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Marriage Mandates: Compelled Disclosures of Race, Sex, and Gender Data in Marriage Licensing Schemes

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MARRIAGE MANDATES: COMPELLED DISCLOSURES OF RACE, SEX, AND GENDER DATA IN MARRIAGE LICENSING SCHEMES

INTRODUCTION

Fifty-two years after the landmark decision *Loving v. Virginia*, which struck down anti-miscegenation laws as unconstitutional under

the Fourteenth Amendment,[1] Virginia's marriage license statute was once again challenged in federal court.[2] In 2019, Virginia still statutorily mandated individuals to disclose their race in order to obtain a marriage license.[3] When Ashley Ramkishun and Samuel Sarfo applied for a marriage license in Arlington, Virginia, a court clerk told them to select "other" if they did not wish to identify their races.[4] Ramkishun, who is of Asian Indian and Guyanese descent, objected and explained:

> When I have to put down my race, most of the time I'm kind of forced to stick myself in a box I don't necessarily fit in. . . . I'm not Asian, I'm not American Indian, I'm not black, I'm not white . . . . We don't want to put "other" because we are not "other." We are human beings.[5]

Three couples, including Ramkishun and Sarfo, who intended to marry in the state but refused to disclose their race to the government, argued that the statute was a vestige of the Jim Crow era and challenged the statute on First, Thirteenth, and Fourteenth Amendment grounds.[6] In October 2019, the United States District Court for the Eastern District of Virginia held that Virginia's marriage license law, which required individuals to state their race on a marriage license application, was unconstitutional under the Fourteenth Amendment, as it burdened citizens' fundamental right to marry.[7] Acknowledging the statute's connection with the Racial Integrity Act of 1924,[8] the

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1. Loving v. Virginia, 388 U.S. 1, 12 (1967).

2. Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 2 (E.D. Va. filed Oct. 11, 2019).

3. VA. CODE ANN. § 32.1-267(A) (2005) (amended 2020).

4. Rachel Weiner, *'Aryan' and 'Octoroon': Couples challenge racial labels to get married in Virginia*, WASH. POST (Sept. 6, 2019), https://www.washingtonpost.com/local/legal-issues/aryan-and-octoroon-couples-challenge-racial-labels-to-get-married-in-virginia/2019/09/06/0c41d6bc-ca73-11e9-a4f3-c081a126de70_story.html?fbclid=IwAR3V07rte7JXpPBppmM-aa_k_K4JEbPyriW5MWcOJbwwX16mPiKcwl1tslc [http://perma.cc/2EZS-7STN].

5. *Id.*

6. Complaint at 1–3, Rogers v. Virginia State Registrar, No. 1:19-cv-01149 (E.D. Va. filed Sept. 5, 2019) [hereinafter Rogers Compl.]; *see* Weiner, *supra* note 4.

7. *Rogers*, slip op. at 18.

8. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 140–42 (2009). The Racial Integrity Act of 1924 was Virginia's miscegenation law which instituted a one-drop rule to preserve white purity. *See id.*; *see also infra* Section I.A notes 28–30 and accompanying text (addressing anti-miscegenation laws and the path to Loving v. Virginia). Walter Plecker, Virginia's first Registrar of Vital Statistics, fiercely advocated for the Act, as he was "obsess[ed] with drawing racial lines around sex and marriage [and linking] the politics of white purity to the rising scientific authority of eugenics." PASCOE, *supra* note 8, at 140. Plecker's office "instructed marriage

court explained, "[t]he Commonwealth of Virginia is naturally rich in its greatest traditions. But like other institutions, the stain of past mistakes, misgivings and discredited legislative mandates must always survive the scrutiny of our nation's most important institution. . . The Constitution of the United States of America."[9]

Virginia was not alone in requiring the collection of racial data on marriage licenses; six other states and territories continue to mandate that applicants provide this information to the state in order to obtain a marriage license.[10] These racial mandates, much like Virginia's law, are vestiges of the Jim Crow era.[11]

But the collection of private, personal information does not stop there.[12] Six years after *Obergefell v. Hodges*, which held that same-sex marriage bans were unconstitutional under the Fourteenth

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license clerks to take full advantage of these powers and to make 'every effort to prevent the marriage of white persons with those of colored origin.'" *Id.* at 145. The Racial Integrity Act of 1924 became the central law at issue in *Loving v. Virginia*, and the Supreme Court struck it down in its 1967 landmark decision. *See id.* at 150.

9. *Rogers*, slip op. at 18. On February 25, 2020, the Virginia General Assembly unanimously passed S.B. 62 to strike the race requirement from the state's marriage license statute. *See* S.B. 62, 2020 Gen. Assemb., Reg. Sess. (Va. 2020). The amended statute went into effect July 1, 2020. VA. CODE ANN. § 32.1-267 (2020).

10. VA. CODE ANN. § 32.1-267(A) (2005) (amended 2020); P.R. LAWS ANN. tit. 24, § 1165(3) (2000); CONN. GEN. STAT. § 46b-25 (2012); DEL. CODE ANN. tit. 13, § 122(a) (2013); N.H. REV. STAT. ANN. § 5-C:41(III) (2015); LA. STAT. ANN. § 9:224(A)(2) (2016); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017). Alabama recently removed this mandate from its statute, effective August 29, 2019. ALA. CODE § 30-1-9.1(a), (b) (2019). State legislators in Delaware and New Hampshire introduced bills in December 2019 and January 2020, respectively, to amend their states' statutes to remove the race requirement. *See* H.B. 1644, 166th Gen. Court, 2020 Sess. (N.H. 2020); S.B. 194, 150th Gen. Assemb., Reg. Sess. (Del. 2019). As of March 2020, the New Hampshire bill has been tabled; however, the Delaware bill unanimously passed on June 29, 2020, and is awaiting the governor's signature. *See New Hampshire House Bill 1644 (Adjourned Sine Die)*, LEGISCAN, https://legiscan.com/NH/bill/HB1644/2020 [https://perma.cc/TS58-6DNU]; *Senate Bill 194*, DEL. GEN. ASSEMBLY, https://legis.delaware.gov/BillDetail?legislationId=47908 [https://perma.cc/8KQH-3CYD]. Minnesota collects this information, but in 1969, the state Attorney General filed an official opinion stating that the state cannot deny a license to an individual who refuses to state their race, as it is not related to the regulatory purpose of the license. *Minnesota Application for Marriage License*, https://www.co.nobles.mn.us/wp-content/uploads/2016/12/Marriage-License-Application_1.pdf [http://perma.cc/5PER-VQBR]; 2 Op. Att'y Gen. 300-m (1969). North Carolina gives applicants the option to fill out their race, and they may select from twenty-four racial options pre-approved by the state, including "other." *See* N.C. GEN. STAT. § 51-16 (2020).

11. *See* PASCOE, *supra* note 8, at 9 ("As miscegenation laws began to take hold, marriage license applicants were required to state (and clerks to record or approve) their 'race or color.' During the twentieth century, marriage licensing was the most common, and surely the most effective, means of preventing interracial marriage and enforcing miscegenation laws. And it was a procedure that survived long after miscegenation laws themselves were repealed.").

12. *See* 750 ILL. COMP. STAT. ANN. 5/202(a) (West 1977); DEL. CODE ANN. tit. 13, § 122(a) (2013); MINN. STAT. § 517.08(1a) (2016); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017); OR. REV. STAT. § 106.041(2)(b) (2018); COLO. REV. STAT. ANN. § 14-2-105(1)(a) (West 2019).

Amendment,[13] five states still mandate parties to disclose their sex on a marriage license application,[14] and one state mandates parties to disclose their gender.[15]

This Note argues that mandatory disclosures of personal information—specifically race, sex, and gender—on a marriage license application constitute compelled speech under the First Amendment and should be subject to heightened scrutiny.[16] Disclosing one's race, sex, or gender on a marriage license application is an affirmative act, and individuals may wish to have their identity remain anonymous. These mandatory disclosures send a message that this information is still relevant to marriage regulation. Neither race nor gender is based in science;[17] rather they are historical and social constructs created to uphold a system of white supremacy and heteronormativity.[18] Thus, such statements are not facts which ought to be compelled by the government, particularly within the sphere of marriage, which falls within the penumbra of privacy under the Bill of Rights.[19] These statutes should be struck down as unconstitutional. At a

13. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

14. *See* 750 ILL. COMP. STAT. ANN. 5/202(a)(1) (West 1977); DEL. CODE ANN. tit. 13, § 122(a) (2013); MINN. STAT. § 517.08(1a)(1) (2016); OR. REV. STAT. § 106.041(2)(b) (2018); COLO. REV. STAT. ANN. § 14-2-105(1)(a) (West 2019).

15. KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017). Several states' statutes are written in gendered terms, referring to applicants as "bride," "wife," "husband," or "groom," when dictating which parties must fill out specific information; therefore, although those statutes do not explicitly dictate that parties must mark their gender in a specific box, the gathering of this information is implicit based on how the applications are designed. *See* GA. CODE ANN. § 19-3-33(a) (2005); N.H. REV. STAT. ANN. § 5-C:41(I)–(IV) (2015); TENN. CODE ANN. § 36-3-104(a)(1) (2019).

16. While the plaintiffs in *Rogers v. Virginia State Registrar* raised a compelled speech claim, the court did not reach the issue when striking down Virginia's marriage license statute as unconstitutional. *See* Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 2, 18 (E.D. Va. filed Oct. 11, 2019). Though this argument may be applied to other government documents, such as driver's licenses or even the Census, this Note focuses on this argument only as it applies to marriage licenses.

17. Courts have routinely rejected a scientific approach for determining one's race. *See* United States v. Cartozian, 6 F.2d 919, 919 (D. Or. 1925); *In re* Singh, 257 F. 209, 212 (S.D. Cal. 1919); *see also* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 35, 37–39, 44–47, 55 (10th anniversary ed. 2006) (discussing the racial prerequisite cases).

18. *See* LÓPEZ, *supra* note 17, at xxi ("Races are not biologically differentiated groupings but rather social constructions. Race exists alongside a multitude of social identities that shape and are themselves shaped by the way in which race is given meaning. We live race through class, religion, nationality, gender, sexual identity, and so on."); Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 126 (1987) ("[T]he 'doing' of gender is undertaken by women and men whose competence as members of society is hostage to its production. Doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine 'natures.'"); *see also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 30 (1999) (examining the cultural construction of sexuality).

19. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015); United States v. Windsor, 570 U.S. 744, 769 (2013).

minimum, states should follow Hawaii's lead to make these disclosures optional.[20] Even better, similar to California, states can eventually explicitly forbid the government from collecting this information on marriage license applications at all.[21]

This Note proceeds in five parts. Part I presents a brief history of the legal movements to achieve marriage equality, charting the paths civil rights lawyers and activists took to get to the landmark Supreme Court precedents *Loving* and *Obergefell*. Part II explains the constitutional nexus between speech, privacy, and marriage. Part III offers an overview of compelled speech doctrine, focusing on compelled ideological messages and identity disclosures. Part IV fuses the lines of case law discussed in Part III to argue that statutes mandating the disclosure of race, sex, or gender on a marriage license application constitute compelled speech under the First Amendment and cannot survive strict scrutiny. Upon discussing the theory of "Rights Dynamism," I posit that courts should interpret First Amendment speech claims in this realm against the historical backdrop of anti-miscegenation laws and same-sex marriage bans, and specifically in light of the Fourteenth Amendment Equal Protection and Due Process jurisprudence in the marriage context. Lastly, Part V proposes legislative alternatives for states to rewrite their marriage license statutes, either to make optional or expressly forbid the disclosure of this data on such applications.

I. A BRIEF HISTORY OF RACE AND SEX IN THE CONTEXT OF MARRIAGE

A. Anti-Miscegenation Laws and the Path to Loving

The first laws regulating interracial sex and marriage passed during the colonial period in Maryland and Virginia, in 1664 and 1691, respectively.[22] On the eve of the enactment of the Civil Rights Act of 1866, thirty-two states had anti-miscegenation laws in effect.[23] Though some states did away with these laws during Reconstruction, interracial marriages did not increase because social

20. *See* HAW. REV. STAT. § 572-6(a) (2013).

21. *See* CAL. HEALTH & SAFETY CODE § 103175(b) (West 2009).

22. PASCOE, *supra* note 8, at 19–20.

23. *See id.* at 42 (map depicting states with miscegenation laws in effect during 1865). Several of the states whose laws today still mandate that individuals disclose their race on a marriage license enacted miscegenation laws around this time: Delaware banned interracial sexual behavior between 1726–1736 and then re-codified its interracial marriage ban in 1807; Kentucky passed its first interracial marriage ban in 1792; and Louisiana's ban originally passed in 1724 and then was re-enacted in 1808. *Id.* at 20–21.

pressure prevented individuals from "cross[ing] the color line."[24] Particularly for Black men, this included a genuine fear of lynching by the Ku Klux Klan for even being rumored to have had sex with white women.[25]

However, post-Reconstruction legislatures in southern states, dominated by white men, sought to promptly re-enact these laws, often implementing a "one-drop rule" for racial classification.[26] Acting under the guise of federalism, as marriage and sex traditionally fell within the control of the states, twenty-six states by 1900 linked the ideas of "illicit sex and illegitimate marriage" to strengthen their anti-miscegenation laws and enforce stricter criminal penalties for interracial marriages.[27] Arguably the most prominent, and toughest, example of such miscegenation statutes was Virginia's Racial Integrity Act of 1924, originally entitled "[A]n [A]ct to [P]reserve the [I]ntegrity of the White Race."[28] The Act instituted a one-drop rule to preserve white purity, making it "unlawful for any white person . . . to marry any save a white person, or a person with no other admixture of blood than white and American Indian."[29] The Racial Integrity Act also granted sweepingly broad powers to court clerks to discern an individual's race in order to prevent the issuance of marriage licenses to interracial couples.[30] By the 1930s, requiring race on a marriage license application became so commonplace that even states that did not have anti-miscegenation laws on the books still required applicants to state their race.[31]

Working in conjunction with their anti-miscegenation laws, some states, including Virginia, codified evasion statutes.[32] These statutes targeted interracial couples who crossed state boundaries to marry in an effort to work around the state's anti-miscegenation laws, and they carried strict criminal penalties.[33] Upon returning to their home state, the couple's marriage would be considered void and subject to the same penalty as though the marriage was performed

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24. RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 26 (2001).

25. *Id.* at 27.

26. *Id.*

27. PASCOE, *supra* note 8, at 62–63.

28. *Id.* at 142–43.

29. *Id.* at 142; Loving v. Virginia, 388 U.S. 1, 13 n.4 (1967). Legislators included the Pocahontas Exception in the law as an ode to the descendants of Pocahontas and John Rolfe who identified as white. PASCOE, *supra* note 8, at 142, 145.

30. PASCOE, *supra* note 8, at 145. For more information about Walter Plecker and The Racial Integrity Act, see *supra* note 8.

31. *Id.* at 139.

32. Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1205–06 (1966).

33. *See id.* at 1205.

within the state's borders.[34] Famously, Richard and Mildred Loving would fall prey to Virginia's evasion and anti-miscegenation statutes when the couple returned to Virginia after traveling to nearby Washington D.C. to marry.[35]

The first serious constitutional test for Virginia's anti-miscegenation framework occurred in 1955 in *Naim v. Naim*, on an appeal from an annulment suit for a white and Chinese couple, who traveled to North Carolina for the sole purpose of marrying and then returned to Virginia to live as a couple.[36] The Virginia Supreme Court of Appeals rejected the due process and equal protection challenges to the Racial Integrity Act.[37] It held that states reserved the right to regulate marriage, and the racial classification scheme served a reasonable purpose in enforcing the anti-miscegenation laws.[38] After two appeals to the United States Supreme Court, the Court ultimately dismissed the case, claiming it lacked a federal question.[39] In effect, the Court's dismissal communicated the notion that bans on interracial marriage were constitutional so long as the racial classification scheme was not arbitrary.[40]

While the *Loving* case, which took another swing at the Racial Integrity Act, worked its way through the Virginia state courts, the United States Supreme Court invalidated a Florida statute which punished interracial cohabitation in *McLaughlin v. Florida*; however, the Court did not reach the ultimate issue of the constitutionality of interracial marriage bans.[41] The judiciary's review of these types of statutes prompted a wave of repeals of anti-miscegenation laws around the country.[42] At the time of the first *Naim* decision in 1955, more than half of the states had anti-miscegenation laws in effect.[43] When *Loving* reached the Supreme Court of Appeals of Virginia in 1966, only seventeen states, predominantly in the South, had anti-miscegenation laws in force.[44]

Finally, in 1967, the United States Supreme Court in *Loving v. Virginia* held that anti-miscegenation laws, which rested solely upon

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34. *Id.* at 1205–06.
35. *See* Loving v. Virginia, 388 U.S. 1, 2–3 (1967).
36. Wadlington, *supra* note 32, at 1208; *see also* Naim v. Naim, 87 S.E.2d 749, 750–51 (Va. 1955), *vacated*, 350 U.S. 891 (1955).
37. Wadlington, *supra* note 32, at 1208–09.
38. *Id.*
39. *Id.* at 1209.
40. *Id.* at 1210.
41. McLaughlin v. Florida, 379 U.S. 184, 184 (1964); Wadlington, *supra* note 32, at 1189–90.
42. Wadlington, *supra* note 32, at 1190.
43. *Id.* at 1190 n.8.
44. *See id.* at 1190, 1190–91 n.8.

racial distinctions, violated the equal protection and due process guarantees of the Fourteenth Amendment and were thus unconstitutional.[45]

B. Same-Sex Marriage Bans, Sodomy Laws, and the Path to Obergefell[46]

While same-sex unions have occurred throughout history within various cultures around the world,[47] the legal fight for marriage equality in the United States began in 1970.[48] After a Minnesota court clerk denied Jack Baker and Mike McConnell a marriage license in May 1970, they challenged the state law which explicitly regulated marriage relations between "husband" and "wife" as unconstitutional.[49] State courts dismissed the suit, and the United States Supreme Court denied Baker and McConnell's appeal, stating that the case lacked a "substantial federal question."[50] Courts revisited the marriage license issue in the early 1990s, after three couples were denied licenses in Hawaii.[51] In May 1993, the Hawaii Supreme Court held that the denial of marriage licenses to same-sex couples violated equal protection under the state's constitution.[52] Though this appeared to be a promising forecast for national LGBTQ civil rights litigation, it turned into a backlash of state legislatures across the country enacting same-sex marriage bans.[53] In addition, the United States Congress passed the federal Defense of Marriage Act

45. Loving v. Virginia, 388 U.S. 1, 11–12 (1967). Despite this victory, states did not immediately remove these statutes from the books. Alabama became the last state, via referendum, to overturn its anti-miscegenation law in 2000. *See* Aaron Blake, *Alabama was a final holdout on desegregation and interracial marriage. It could happen again on gay marriage*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/?arc404=true [https://perma.cc/T5RN-EUYV].

46. For a general history of the legal pursuit for marriage equality, see LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA, at v–vii (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016) [hereinafter LOVE UNITES US].

47. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1437, 1439, 1441, 1453 (1993).

48. *See* William N. Eskridge, Jr., *The First Marriage Cases, 1970–74*, *in* LOVE UNITES US, *supra* note 46, at 21, 22–23.

49. *Id.*

50. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

51. Evan Wolfson, *The Hawai'i Marriage Case Launches the U.S. Freedom to Marry Movement for Equality*, *in* LOVE UNITES US, *supra* note 46, at 40, 40.

52. *Id.* at 40–41; *see* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993), *reconsideration granted by* 875 P.2d 225 (Haw. 1993).

53. Wolfson, *supra* note 51, at 41–42.

(DOMA), which defined marriage as a union between one man and one woman for the purposes of federal regulations.[54]

The movement also attempted to combat sodomy laws, which criminalized sexual activity—often oral or anal sex—and were weaponized as harassment tools and disproportionately enforced against members of the LGBTQ community.[55] Illinois became the first state to decriminalize sodomy, and nineteen states followed suit by the end of the 1960s.[56] Civil rights lawyers seized upon the opportunity to challenge these laws after officers arrested Michael Hardwick in his home for having private, consensual sex in violation of Georgia's sodomy law.[57] However, the United States Supreme Court upheld sodomy laws in *Bowers v. Hardwick*, criticizing Hardwick's argument that the constitution protected a fundamental right to sodomy as "at best, facetious."[58] Lawyers finally succeeded seventeen years later in *Lawrence v. Texas*, which struck down Texas's sodomy law as unconstitutional and overturned *Bowers*.[59] The Court recognized that the constitutional right to privacy extended to the intimate sexual and familial decisions of same-sex couples.[60]

The privacy rationale in *Lawrence* paved the way for future marriage equality cases.[61] In November 2003, the Massachusetts Supreme Judicial Court, relying on its state constitution, reasoned "that there was no permissible reason to exclude same-sex couples from marriage."[62] In the following years, many states and federal courts also relied on *Lawrence* in extending the right to marry to same-sex couples.[63]

The United States Supreme Court struck down DOMA as unconstitutional in 2013 in *United States v. Windsor*.[64] Finally, in 2015, the Court held in *Obergefell v. Hodges* that the Constitution recognizes a fundamental right to same-sex marriage.[65]

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54. *See id.* at 42.

55. *See* Kevin M. Cathcart, *The Sodomy Roundtable*, *in* LOVE UNITES US, *supra* note 46, at 51, 51; Suzanne B. Goldberg, *"Not Tonight Dear—It's a Felony":* Lawrence v. Texas *and the Path to Marriage Equality*, *in* LOVE UNITES US, *supra* note 46, at 56, 56.

56. Cathcart, *supra* note 55, at 51–52.

57. *Id.* at 52.

58. *Id.* at 53; Bowers v. Hardwick, 478 U.S. 186, 194 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

59. Goldberg, *supra* note 55, at 60, 63. For a detailed look at the story behind the *Lawrence* case, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS*, at xiii (2012).

60. Goldberg, *supra* note 55, at 63.

61. *See id.* at 64.

62. *Id.*; *see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

63. Goldberg, *supra* note 55, at 64.

64. United States v. Windsor, 570 U.S. 744, 774 (2013).

65. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

II. SPEECH, PRIVACY, AND MARRIAGE

The Constitution recognizes a fundamental right to privacy within the penumbra of the Bill of Rights.[66] First Amendment protections, including the Free Speech Clause, are also within this scope.[67] The Supreme Court has also extended the fundamental right to privacy to the institution of marriage.[68] The mandatory declaration of one's race, sex, or gender on a marriage license application therefore can be viewed as a nexus between the fundamental right to marriage and free speech; both of which fall within the penumbra of privacy under the Bill of Rights and thus should be analyzed with the utmost care.[69]

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech[.]"[70] It protects both an individual's "right to speak freely and the right to refrain from speaking at all."[71] Philosophers, scholars, and judges have advanced several justifications for the First Amendment.[72] Famously articulated by Justice Holmes and Justice Brandeis, the Free Speech Clause creates a marketplace of ideas by permitting a free-flowing debate of ideas and values in society's search for truth.[73] In addition, the Free Speech Clause aids in promoting individual autonomy; humans necessarily develop in their course of free-thinking through exposure to a variety of competing ideas and cultures.[74] The First Amendment also advances our system of self-government by allowing individuals to engage with public policy and public officials.[75] Lastly, society generally distrusts government to regulate speech because officials will

66. *See* Griswold v. Connecticut, 381 U.S. 479, 483–84, 486 (1965); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847–48 (1992); Roe v. Wade, 410 U.S. 113, 152–53 (1973), *reh'g denied*, 410 U.S. 959 (1973).

67. *See Griswold*, 381 U.S. at 483 ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

68. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also Obergefell*, 135 S. Ct. at 2604–05 (2015) (explicitly grounding the fundamental right to marry within the Fourteenth Amendment); *Windsor*, 570 U.S. at 769 (recognizing marriage as a relationship "worthy of dignity in the community").

69. *See Griswold*, 381 U.S. at 483, 486.

70. U.S. CONST. amend. I.

71. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

72. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130, 141–43 (1989).

73. *See id.* at 130–31; *see also* Whitney v. California, 274 U.S. 357, 372, 377 (1927) (Brandeis, J., concurring) (discussing the importance of an "opportunity for full discussion"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the need for a marketplace of ideas).

74. *See* Greenawalt, *supra* note 72, at 143–45.

75. *See id.* at 142–43, 145–46.

either promote or suppress certain messages as they become entrenched in power.[76]

Necessarily invoking these justifications, the Court has addressed the doctrine of compelled speech in certain contexts, such as political and commercial speech.[77] However, there is currently a gap in the law as to whether the government may compel individuals to communicate private facts to the government itself.[78]

III. OVERVIEW OF COMPELLED SPEECH CASES

The basic factors of a First Amendment compelled speech claim include the dictation of a specific message or belief, the attribution of that message to the speaker, and a lack of opportunity for the speaker to disassociate from the message.[79] This section breaks down the Court's relevant compelled speech jurisprudence into two categories: compelled ideological messages and compelled disclosures of identity.

A. Compelled Ideological Messages: Barnette*,* Wooley*, and* FAIR

The government may not compel "people to speak things they do not want to speak."[80] In other words, the government may not compel individuals to affirmatively act or speak in ways that communicate ideological messages, and such regulations are subject to heightened scrutiny.[81]

Famously, in *West Virginia State Board of Education v. Barnette*, a group of Jehovah's Witnesses challenged a school board resolution mandating students and teachers to salute the flag and recite the Pledge of Allegiance, and it subjected non-participating students to

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76. *See id.* at 145–46.

77. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995); Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 629 (1985); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943). The Court's body of compelled speech case law also addresses issues of compelled access, as well as compelled inclusion of others in expressive activity. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (compelled inclusion of others in expressive organizations); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 557 (1995) (compelled inclusion of others in parades); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77–78 (1980) (compelled access of others in privately owned shopping malls); Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 241–42 (1974) (compelled access to space in newspapers).

78. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 357 (2018).

79. *See, e.g.*, *McIntyre*, 514 U.S. at 334, 341–43; Wooley v. Maynard, 430 U.S. 705, 705 (1977).

80. Volokh*, supra* note 78, at 368.

81. *See Wooley*, 430 U.S. at 715–16; *Barnette*, 319 U.S. at 642.

expulsion.[82] The Supreme Court rejected the state's interest in advancing national unity, and rather advanced the notion of freedom of thought under the First Amendment in striking down the rule[83]: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[84]

In *Wooley v. Maynard*, a Jehovah's Witness repeatedly covered the New Hampshire state motto, "Live Free or Die," on his vehicle's license plate, citing religious and moral objections.[85] After facing criminal sanctions pursuant to a state statute requiring license plates on non-commercial vehicles to display the state motto, Maynard brought suit challenging the statute's constitutionality.[86] Drawing on *Barnette*, the Supreme Court viewed state compulsion of exhibiting an ideological viewpoint—the state's motto—on one's personal property for daily public display as an invasion of freedom of thought under the First Amendment.[87] The message was likely to be attributed to the individual driver, and the law prevented an opportunity for the driver to disassociate from the message.[88] Applying strict scrutiny, the Court rejected the state's interests in identifying passenger vehicles and promoting an "appreciation of history, individualism, and state pride" as not narrowly tailored because the state can identify vehicles through the combination of letters and numbers on the license plate.[89] The Court also rejected the state's argument that the majority of citizens agreed with the motto as a justification for the statute because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the state] commands, an idea they find morally objectionable."[90]

In contrast, when the government merely compels access or conduct that does not equate to a specific message or viewpoint,

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82. *Barnette*, 319 U.S. at 626, 628–29.

83. *Id.* at 640, 642. *Barnette* also suggests that regulations are subject to higher scrutiny when there are combined First Amendment and Fourteenth Amendment due process interests. *Id.* at 639 ("The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.").

84. *Id.* at 642.

85. *Wooley*, 430 U.S. at 707–08.

86. *Id.* at 708–09.

87. *Id.* at 715.

88. *Id.*

89. *Id.* at 716.

90. *Id.* at 715.

compelled speech claims often fail.[91] In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, an association of law schools and their faculties challenged the Solomon Amendment, which compelled equal access to campus facilities for military recruiters.[92] They argued the schools' non-discrimination policies were at odds with the military's "Don't Ask, Don't Tell" policy, so the forced inclusion and access to accommodate the military's message violated their First Amendment rights.[93] The Court rejected this claim because the Solomon Amendment only compelled equal access to facilities, not the endorsement of a particular message.[94] Further, students could distinguish the government's message as distinct from the law schools', and there were still opportunities to disassociate from the military's message by allowing protests or for each school to disseminate its own views.[95]

When taken together, these cases demonstrate that the government cannot compel individuals to participate in affirmative acts that ultimately connote a state-sponsored message that the individuals would not otherwise adopt or promote.[96]

B. Compelled Disclosures of Identity: McIntyre*,* American Constitutional Law Foundation*, and* Watchtower Bible

In the context of political speech, the First Amendment generally affords protection to an individual's identity.[97] The realm of campaign finance, however, is a duly noted exception to this rule.[98] Regulations requiring the disclosure of aspects of one's identity, including name and address, in order to engage in speech are subject to strict

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91. *See* Rumsfeld v. F. for Acad. & Inst. Rts., Inc. (FAIR), 547 U.S. 47, 60–65 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85–88 (1980) (holding a California constitutional provision, which provided individuals with equal access to petition in privately owned shopping centers, did not violate owner's First Amendment rights). *But see* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating a "right of reply" statute that compelled newspapers to run the replies of attacked political candidates against their otherwise editorial judgment).

92. *FAIR*, 547 U.S. at 51–52.

93. *Id.* at 52–53.

94. *Id.* at 60.

95. *Id.* at 64–65.

96. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

97. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995).

98. *See* Buckley v. Valeo, 424 U.S. 1, 64–74 (1976) (upholding compelled disclosures of identity in the campaign finance realm due to government interests in deterring corruption and detecting violations of contribution limits; however, mandatory disclosures requirements can be waived if there is a reasonable probability that such disclosures will affect minority parties).

scrutiny.[99] Courts apply the highest form of judicial scrutiny in this context to protect dissenters and to avoid chilling minority speech.[100]

In *McIntyre v. Ohio Elections Commission*, the Ohio Elections Commission fined the plaintiff one hundred dollars for distributing anonymous handbills in violation of a state statute requiring campaign literature to contain the name and address of the author.[101] The text of the handbills, which urged voters to oppose a school tax, was neither false nor misleading.[102] Treating the statute as a content-based regulation, the Supreme Court rejected the state's interest in providing relevant information to the electorate and preventing fraudulent statements.[103] The statute was not narrowly tailored to serve these interests because the name and address of a private citizen adds little value to the recipient's evaluation of a message, nor was this provision the state's only way to insure against false statements during the political process, as Ohio had separate provisions in its election code to deal with this particular concern.[104] In addition, the Court noted the history of anonymous political speech, reasoning "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[105]

Building on the right to anonymity, the plaintiffs in *Buckley v. American Constitutional Law Foundation, Inc.* challenged a Colorado statute requiring initiative-petitioners to wear a name badge and mandating advocates to report the names and addresses of paid petitioner-circulators.[106] Applying strict scrutiny, the Court rejected the state's interest in the public's ability to identify, and the state's ability to apprehend, people engaged in misconduct.[107] Compelling individuals to reveal their identity while delivering a political message, when one's interest in anonymity may be at its peak, effectively discourages political speech.[108]

Lastly, in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, a congregation of Jehovah's Witnesses, whose teachings require followers to proselytize and distribute religious

99. *See* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165 (2002); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 199 (1999); *McIntyre*, 514 U.S. at 347.

100. *Am. Const. L. Found., Inc.*, 525 U.S. at 199–200.

101. *McIntyre*, 514 U.S. at 337–38, 388 n.3.

102. *Id.* at 337.

103. *Id.* at 348–53.

104. *Id.* at 347–49, 353.

105. *Id.* at 341–42.

106. Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 197–99 (1999).

107. *Id.*

108. *Id.* at 198–200.

literature door-to-door, challenged a village ordinance instructing canvassers and petitioners to obtain a permit from the mayor's office before conducting door-to-door advocacy.[109] Up front, the Supreme Court recognized the need to analyze this case against the historic backdrop in which this particular group has routinely faced First Amendment challenges from a religious and free speech standpoint.[110] The Court rejected the state's interest in preventing fraud and crime, as well as protecting residents' privacy.[111] Although towns may enact ordinances to protect individuals from unwanted solicitation, the Court struck down this particular ordinance as overbroad because it infringed on the rights of religious groups who engaged in proselytization as well as the rights of individuals engaged in political discourse, including spontaneous speech.[112]

Thus, while the right to anonymity is not absolute, regulations compelling the disclosure of personal identity as a prerequisite for engaging in basic political speech are subject to strict scrutiny under the First Amendment.[113]

IV. STATUTORY MANDATES REQUIRING THE DISCLOSURE OF ONE'S RACE, SEX, OR GENDER ON A MARRIAGE LICENSE VIOLATE THE FIRST AMENDMENT

Upon fusing the two lines of compelled speech doctrine discussed in Part III, statutes that mandate individuals to disclose their race, sex, or gender on a marriage license application cannot survive strict scrutiny. This section proceeds in four parts. First, it applies the compelled speech factors derived from the case law to disclosures of race, sex, and gender identity on marriage licenses. Next, it argues for extending anonymity to these aspects of identity, distinguishing marriage licenses from identity documents and the census, while reconciling self-identification and anti-discrimination efforts. Third, it introduces the theory of "Rights Dynamism" to advocate interpreting these statutory mandates in light of Fourteenth Amendment marriage equality jurisprudence. Finally, it demonstrates that these compelled disclosures cannot withstand constitutional muster.

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109. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. Of Stratton, 536 U.S. 150, 153–55, 160 (2002).

110. *Id.* at 160–64.

111. *Id.* at 164–65.

112. *Id.* at 165–68.

113. *See id.* at 150–51; *Am. Const. L. Found., Inc.*, 525 U.S. at 199; McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 334–35 (1995). *But see* Buckley v. Valeo, 424 U.S. 1, 64–74 (1976).

A. Analyzing Compelled Speech Factors in Marriage Licensing Schemes

The government may not compel people to "speak things they do not want to speak," and such compelled ideological affirmations are subject to heightened scrutiny.[114] Here, filling out a box with one of the state's pre-selected racial categories,[115] or often binary gender or sex designations, is an affirmative act within the plain meaning of the phrase. The compulsion of a message in this context is arguably in the gray area between *Barnette* and *FAIR*. Compelling a message through self-identification on a marriage license does not automatically conjure up the image of a compulsory flag salute, but it certainly is more directly attributable to the individual when compared to the military's anti-LGBTQ message vis-à-vis the law schools in *FAIR*.[116]

The statutes at issue here require individuals to convey a fundamental aspect of their identity. Some may contend that is a fairly neutral message, perhaps no state-sponsored message is present at all. But when one confronts the legislative history and ideology behind these laws, which have roots in policing certain relationships to maintain systems of white supremacy and heteronormativity, it contextualizes these seemingly minor compulsions, and their harmful message becomes clear.[117] States deliberately crafted mandatory disclosures of race, sex, and gender data in marriage licensing schemes to suppress certain groups, predominately people of color and LGBTQ individuals.[118] States did not intend these classifications to celebrate diversity across racial lines or the gender spectrum.[119]

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114. Volokh, *supra* note 78, at 368; *see* Wooley v. Maynard, 430 U.S. 705, 715–16 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

115. In 1977, the Office of Management and Budget (OMB) issued Directive No. 15, charging federal agencies to use five racial and ethnic categories for statistical data and civil rights enforcement; OMB revised the guidelines in 1997 to add two new categories and allow for self-selection of multiple categories. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 62 Fed. Reg. 58,782, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY (1997). OMB Directive No. 15 sets the federal floor for minimum racial categories, and while states have leeway to adopt more categories, many follow the guidance of this Directive for state-level government data. *See id.* While the categories have garnered criticism, OMB retained its original charge, explaining "[t]he racial and ethnic categories set forth in the standards should not be interpreted as being primarily biological or genetic in reference. Race and ethnicity may be thought of in terms of social and cultural characteristics as well as ancestry." *Id.*

116. *See* Rumsfeld v. F. for Acad. & Inst. Rts., Inc. (FAIR), 547 U.S. 47, 60–65 (2006); *Barnette*, 319 U.S. at 627–29.

117. *See supra* Part I.

118. *See supra* Part I.

119. *See supra* Part I.

Rather, by forcing individuals to label themselves in this particular context, it sent a message of inferiority and oppression based on the color of one's skin or sexuality.[120] By requiring individuals to continue to label themselves in this manner, the state continues to send a message that this information is somehow still relevant to marriage. When the applicant, the speaker, is forced to label oneself in this context, it sends a message of endorsement and complicity in perpetuating this scheme.

While such compulsions may not be as drastic as the government compelling students to salute the flag or to publicly display the state motto on personal property,[121] the effect is nonetheless the same. These statutory mandates require individuals to effectively adopt a state's unjustified construction of race, sex, and gender categories and hierarchies[122]—to place themselves in a pre-ordained box against their otherwise rational and moral judgment.

Central to a compelled speech claim is the speaker's lack of opportunity to disassociate from the message the government is forcing upon them.[123] In order to obtain a marriage license, individuals must truthfully and accurately fill out each required box with the relevant information.[124] Since this is a government document, individuals face the threat of perjury prosecution if they fail to complete the application truthfully.[125] On the other hand, the license will not issue if one fails to provide the state with all of the required data, thereby inhibiting the exercise of the right to marry.[126]

These statutory mandates thus create a catch-22 for individuals intending to marry: either adopt the state's message by filling out the boxes despite the known problematic legacy of these laws—and potentially perjure oneself by, out of necessity, selecting an category from the options provided even if one does not personally identify with it—or forgo the right to marry.

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120. *See* PASCOE, *supra* note 8, at 9.

121. *See* Wooley v. Maynard, 430 U.S. 705, 707 (1977); *Barnette*, 319 U.S. at 626.

122. Implicit hierarchies form based on the presentation order of categories. Scholars suggest that the government's refusal to alphabetize racial categories on the Census, instead listing "white" first, implicitly creates a hierarchy of race. *See* Manav Bhatnagar, Note, *Identifying the Identified: The Census, Race, and the Myth of Self-Classification*, 13 TEX. J. ON C.L. & C.R. 85, 104 (2007) (citing DAVID THEO GOLDBERG, RACIAL SUBJECTS: WRITING ON RACE IN AMERICA 53 (1997)). This argument can also extend to states only providing binary gender categories on government forms. This effectively erases non-binary or gender non-conforming individuals from the narrative.

123. *See Wooley*, 430 U.S. at 705–06; *Barnette*, 319 U.S. at 633.

124. *See, e.g.*, VA. CODE ANN. § 18.2-434 (2005); VA. CODE ANN. § 32.1-267 (2005) (amended 2020).

125. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1223 (1995); LA. STAT. ANN. § 9:224(A)(7) (2016); 2015 La. Sess. Law Serv. 436 (West).

126. *See, e.g.*, KY. REV. STAT. ANN. § 402.100 (West 2017).

B. Extending the Right to Anonymity to Racial, Sexual, and Gender Identity

Individuals may reasonably wish for their racial or gender identity to remain anonymous. In the political speech context, anonymity is generally protected and regulations requiring the disclosure of aspects of one's identity in order to engage in speech are subject to strict scrutiny.[127] Because anonymity applies to personal details such as one's name or address in the context of political speech,[128] this principle should extend to aspects of racial, sexual, and gender identity.

While some jurisdictions require individuals to apply for a marriage license in person, many states are moving toward online applications.[129] In that respect, court clerks cannot as easily discern these aspects of one's identity. Arguably, even for individuals who live in states requiring in-person applications, one's race or gender, as a matter of pure fact, is not always objectively verifiable to the clerks who approve these applications.[130] Rather, the observable traits include one's skin color or how one performs their racial or gender identity through their clothing or language.[131] Further, the mandated inclusion of this information has no bearing on the court clerk's decision-making process for an individual's eligibility for a

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127. *See* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164–65 (2002); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 198–99 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). *But see* Buckley v. Valeo, 424 U.S. 1, 64–74 (1976).

128. *See Watchtower Bible*, 536 U.S. at 150; *Am. Const. L. Found., Inc.*, 525 U.S. at 199; *McIntyre*, 514 U.S. at 341–43.

129. *See Applications for a Vital Record*, VA. DEP'T OF HEALTH, https://www.vdh.virginia.gov/vital-records/applications-for-a-vital-record [http://perma.cc/T5VK-8GJH]. This may also vary by judicial districts in each state. *See* Weiner, *supra* note 4. In Virginia, for example, procedures and forms vary by county. *Id.*

130. *See* LÓPEZ, *supra* note 17, at 151 ("[P]ersons who, because their physical appearance allows them to, hold themselves out as members of a group to which by social custom they would not be assigned on the basis of their ancestry.").

131. Social psychologists notably argue that the formation of a racial identity is learned through parental and environmental socialization. *See* TANYA KATERÍ HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED RACE STORIES OF DISCRIMINATION 96 (2018). "[T]he formation of [B]lack identity is contested and multidimensional and more accurately viewed as a 'metamorphic process' . . . ." *Id.* at 96. Criticisms of an individual's racial performance often arise in college in the form of statements such as "acting white" or not being "Black enough" based on the shade of one's skin. *Id.* Individuals who identify as mixed race, Latinx, and Asian go through a similar process. *See id.* at 97. Analogous to this is the notion of gender performance. As Jeffrey Kosbie notes, "individual gender performances are constantly evaluated against norms defining how men and women *should* behave. Most of us constantly use our behavior, mannerisms, appearance, speech, and activities to prove that we are male or female." Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 201 (2013). For a discussion of the feminist theory of gender performativity, see BUTLER, *supra* note 18, at 24–25, 33.

marriage license because one cannot be denied on the basis of race, sex, or gender under the Due Process or Equal Protection Clauses.[132]

1. Distinguishing Marriage Licenses from General Identity Documents

A statement of one's race, sex, or gender is wholly irrelevant to the purpose of a marriage license. The purpose of these documents is to confirm the parties' legal eligibility to marry and to create a record of marriages performed in the state.[133] Identity documents, on the other hand, are commonly and routinely used by local, state, and federal officials to identify individuals.[134] Examples of identity documents include birth certificates, driver's licenses, and passports.[135] Thus, marriage licenses are not considered identity documents.

Given this distinction, mandating the disclosure of race, sex, or gender data is even more suspect if states do not require the revelation of this information *until* documents like marriage licenses. While the decentralized birth registration system in the United States can vary at the local level, many states base their vital birth statistical data on guidance from the U.S. Standard Certificate of Live Birth.[136] This document notably does not include a statement of the infant's race, but does include the race of the parents.[137] It also includes a space to indicate the infant's sex at birth, but not its gender.[138] In the same vein, most states do not list an individual's race on their driver's license, but all include sex or gender markers.[139] Similarly, the United States Passport Application does not

132. Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967).

133. *See, e.g.*, N.H. REV. STAT. ANN. § 457:22 (2006). Common criteria for eligibility for marriage include one's age for consent purposes and current marital status. *See, e.g.*, LA. STAT. ANN. § 224(A)(2), (4) (2016).

134. Adam Herpolsheimer, Note, *A Third Option: Identity Documents, Gender Non-Conformity, and the Law*, 39 WOMEN'S RTS. L. REP. 46, 47 n.4 (2017).

135. *Id.*

136. *See Birth Certificates*, AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates [http://perma.cc/L9ZS-AD8U].

137. *U.S. Standard Certificate of Live Birth*, https://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf [http://perma.cc/U776-44W9].

138. *Id. But compare* CONN. GEN. STAT. § 7-52(a) (2001) (requiring the collection of the infant's sex, but not race, on birth certificate), *with* KY. REV. STAT. ANN. § 213.051(1)(b) (West 2005) (amended 2020) (requiring a statement of both the infant's sex and race on a birth certificate).

139. Cassius Adair, *Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies*, 71 AM. Q. 569, 587–88 (2019) (explaining how race markers "quietly disappeared from most US driver's licenses at some point in the mid-twentieth century[,]" but sex markers are universally mandated and bolstered by the 2005 Real ID Act).

require applicants to disclose their race or gender, but it does require applicants to identify themselves as one of the binary sexes.[140] Setting aside sex and gender designations for a moment,[141] it is worth clearly noting that the most common identity documents do not include spaces for racial identity labels, yet by no coincidence, a handful of states still mandate the disclosure of racial information on marriage license applications.[142] Thus, the current statutes that require the disclosure of this identifying information in the marriage context are undoubtedly linked to anti-miscegenation laws that sought to police interracial sex and marriage years ago[143]: if this information is truly so important for statistical purposes, it would be collected before the stage in life when one seeks to wed.

2. Distinguishing Legal Challenges to Census Categories in Morales v. Daley

Litigants have unsuccessfully attempted to bring compelled speech claims regarding the collection of sex and racial identity data on the census.[144] In *Morales v. Daley*, plaintiffs advanced both First Amendment compelled speech and Fourteenth Amendment Equal Protection claims in relation to the 2000 census.[145] The United States District Court for the Southern District of Texas upheld the race and ethnic categories used in this context because the census is mandated by the Constitution to provide an enumeration of the citizenry.[146] Historically, however, it provides more than a mere headcount.[147] The racial data[148] collected from the census is used in drafting and enforcing regulations, such as "assess[ing] racial disparities in health and environmental risks" in addition to informing

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140. *See U.S. Passport Application*, https://eforms.state.gov/Forms/ds11.pdf [http://perma.cc/C74M-5WW2].

141. Sex designations seem to be a common thread on these identity documents. However, the issue of whether race, sex, or gender disclosures on common identity documents meet the strict scrutiny standard is beyond the scope of this Note.

142. *See* P.R. LAWS ANN. tit. 24, § 1165(3) (2000); CONN. GEN. STAT. § 46b-25 (2012); DEL. CODE ANN. tit. 13, § 122(a) (2013); N.H. REV. STAT. ANN. § 5-C:41(III) (2015); LA. STAT. ANN. § 9:224(A)(2) (2016); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017).

143. *See supra* Section I.A and accompanying notes.

144. *See* Morales v. Daley, 116 F. Supp. 2d 801, 809, 820 (S.D. Tex. 2000); *see also* Bhatnagar, *supra* note 122, at 94 (noting that *Morales* is the only federal lawsuit challenging the constitutionality of the census' race categories and racial data collection).

145. *See Morales*, 116 F. Supp. 2d at 803.

146. *Id.* at 814–15.

147. *Id.* at 809.

148. *See* OFF. OF MGMT. & BUDGET, *supra* note 115.

reapportionment, legislative redistricting, and voting rights.[149] In addressing the compelled speech issue, the Court also noted that individuals are not disseminating a public message that they disagree with by filling out the census.[150] In light of this precedent, courts may be skeptical of compelled speech claims relating to the disclosure of similar data on marriage license applications.

However, the rationale in *Morales* is readily distinguishable as applied to compelled speech claims regarding the mandatory labeling of one's race, sex, or gender on a marriage license.[151] First, the census and marriage licenses serve distinct purposes. The Founders intentionally created the census as a mechanism for enumeration and apportionment,[152] whereas states did not create marriage licenses for this purpose. As previously mentioned, the purpose of marriage licenses is to confirm one's legal eligibility to marry and to create a record of marriages within the state.[153] Second, the data collected from the census is used to inform government programming and spending, whereas the data collected from marriage license applications does not serve this function.[154] As the Commonwealth of Virginia conceded in *Rogers*, the state had no legitimate interest in the data collected from marriage licenses, and the court noted that the variability of the racial categories employed by the state likely produced high rates of error, rendering any data collected as practically useless.[155] Third, the census data collection does not infringe on other fundamental rights and is required by the Constitution.[156] In comparison, the collection of race, sex, and gender data in the marriage license context interferes with the fundamental right to marry.[157] State officials cannot deny issuing a marriage license on the basis of one's race, sex, or gender under the Due Process and Equal Protection Clauses.[158]

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149. *Morales*, 116 F. Supp. 2d at 813.

150. *Id.* at 816.

151. *See id.* at 815–16.

152. *See* U.S. CONST. art. I, § 2.

153. *See supra* note 133 and accompanying text.

154. *Why We Conduct the Decennial Census*, U.S. CENSUS BUREAU (Apr. 16, 2020), https://www.census.gov/programs-surveys/decennial-census/about/why.html [http://perma.cc/74ZM-7YGW].

155. Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 17–18 (E.D. Va. filed Oct. 11, 2019); *see also infra* Section IV.D (arguing that race, sex, and gender mandates on marriage licenses fail strict scrutiny).

156. *See* U.S. CONST. art. I, § 2.

157. *See Rogers*, slip op. at 18 ("[R]equiring Plaintiffs to disclose their race in order to receive marriage licenses burdens their fundamental right to marry.").

158. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967).

3. Reconciling Anti-Discrimination Efforts, the Right to Self-Identify, and the Right to Anonymity

Some may argue that mandatory disclosures of personal information—specifically race, sex, and gender—on a marriage license and other government-related documents can actually advance anti-discrimination efforts.[159] Generally, color-blind policies do more harm than good, so having this data can aid in the creation and enforcement of equitable policies to effectively serve communities.[160] While the collection of this data on identification documents and government surveys is critical to addressing systemic racism and sexism in a variety of fields, it is highly suspect to collect this information in the marriage license context due to the historic relationship between anti-miscegenation laws and policing of LGBTQ sexual and marital relationships. State governments have no practical use for such disclosures on this particular document,[161] and if so desired for statistical purposes, they can get this information from proper identity documents or other sources.[162]

Arguably, at the core of many equality movements, groups have fought tirelessly for the right to publicly self-identify.[163] This is exhibited through sit-ins during the Civil Rights Movement, the process of gay men and lesbians coming out in public spaces during the Gay Liberation Movement, and most recently, transgender and nonbinary individuals changing their gender markers on identity documents to project an accurate representation of themselves to the public.[164]

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159. *See* Morales v. Daley, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000).

160. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 199, 224–27 (2010) (arguing that the War on Drugs and mandatory minimum sentencing laws have led to the mass incarceration of black men); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 22–23 (2005) (examining how New Deal and Fair Deal era social policies, including Social Security and the G.I. Bill, created social and economic opportunities that effectively solidified a white middle class, widening the gap between white and Black Americans); Jennifer S. Carrera & Catherine Coleman Flowers, *Sanitation Inequity and the Cumulative Effects of Racism in Colorblind Public Health Policies*, 77 AM. J. ECON. & SOCIO. 941, 949–61 (2018) (discussing the use of land control, housing availability, and public health code enforcement to devalue Black bodies and criminalize poverty); Shannon M. Monnat, *Toward a Critical Understanding of Gendered Color-Blind Racism Within the U.S. Welfare Institution*, 40 J. BLACK STUD. 637, 647–49 (2010) (explaining how the stereotypical characterization of Black women as deviant, undeserving, "welfare queens" leads to greater likelihood that they will be sanctioned within the United States welfare system).

161. *See infra* Section IV.D.

162. *See supra* Section IV.B.1; *infra* Section IV.D.

163. *See* TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 147 (2018).

164. *See id.* at 167; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 93–95, 123–25 (1999); Timothy Zick, *The Dynamic Relationship Between*

Equally important to these equality movements, however, was the right to speak and associate anonymously.[165] From an autonomy perspective, there is no doubt that the right to self-identify is critical for individuals and groups; however, the argument advanced here is predominately about being *compelled* to self-identify as it may infringe on another fundamental right or one's privacy.[166]

C. Rights Dynamism and the Influence of the Fourteenth Amendment Jurisprudence on First Amendment Interpretation

Just as in *Watchtower Bible*, where the Court analyzed the free speech claim in light of the deep history of religious discrimination against that particular group,[167] the statutes that require disclosure of one's race, sex, or gender should be analyzed with the historic backdrop of anti-miscegenation laws and same-sex marriage bans in mind.[168] The Due Process and Equal Protection guarantees of the Fourteenth Amendment can help inform and influence First Amendment speech protections in this realm, based on the notion described by some constitutional scholars as "Rights Dynamism."[169] Rights Dynamism refers to "the dynamic process in which constitutional rights intersect and interact with one another."[170] As Professor Timothy Zick notes, "constitutional rights do not exist in strict isolation from one another. To the contrary, they are connected by thick historical, precedential, and doctrinal tissues."[171] Related to this is Professor Michael Coenen's concept of "combination analysis."[172]

Freedom of Speech and Equality, 12 DUKE J. CONST. L. & PUB. POL'Y 12, 19–22 (2016); Andy Newman, *Male, Female, or "X": The Push for a Third Choice on Official Forms*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/nyregion/gender-neutral-birth-certificate.html [http://perma.cc/3NT9-TZNY].

165. *See* ZICK, *supra* note 163, at 25; McIntyre v. Ohio Elections Comm'n, 515 U.S. 334, 357 (1995); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

166. It is worth noting that certain populations have genuine fears of retaliation by government officials based on compelled self-identification. While beyond the scope of the Note, a recent newsworthy example was the legal battle over adding a citizenship question to the 2020 census, with fears of the Trump Administration particularly targeting undocumented individuals living in the United States. *See* Michael Wines, *2020 Census Won't Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html [http://perma.cc/NZ9E-T63L].

167. *See* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 161 (2002).

168. *See supra* Part I.

169. *See* Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 793–94 (2017); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Informational Society*, 79 N.Y.U. L. REV. 1, 55 (2004).

170. Zick, *supra* note 169, at 793.

171. *Id.* at 797.

172. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1077 (2016).

By engaging in holistic constitutional interpretation and strategically crafting claims containing two or more clauses, litigators and judges can identify big picture constitutional principles, which can in turn influence judicial outcomes "even when the principles themselves cannot be derived from a lone provision of the constitutional text."[173]

Frequently, activists and litigants bring Due Process and Equal Protection claims together, and while these provisions are distinct, judges interpret their meanings in relation to and intersecting with one another.[174] This can be evidenced in defining and expanding the fundamental right to marriage in *Loving*, and perhaps most explicitly in *Obergefell*, where the Court noted the dynamic and evolutionary relationship between the two clauses:

> In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[175]

Just as the Due Process and Equal Protections Clauses share an abstract principle of fundamental fairness, the First Amendment Free Speech Clause and the Fourteenth Amendment Equal Protection Clause are historically and substantively connected to protect minorities and dissenters from discrimination by state actors in the political majority.[176] Similarly, legal advocates in both the race and LGBTQ equality movements have invoked First Amendment rights both in combination with and to facilitate Equal Protection claims.[177] Early cases helped establish a right to expressive equality based on free speech and equal protection principles.[178] This granted Black folks, and later LGBTQ individuals, basic freedoms to speak, associate, and publish materials.[179] Building on these rights and principles, it permitted these groups to express their identities in numerous and creative ways; eventually in *Obergefell*, the Supreme Court noted that the Fourteenth Amendment Due Process and Equal Protection Clauses protect "a liberty that includes certain specific rights that allow persons, within a lawful realm, *to define and express their identity*."[180]

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173. *Id.* at 1098.
174. Zick, *supra* note 169, at 812–14.
175. *Id.* at 812–16 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).
176. *Id.* at 812, 818.
177. *Id.* at 818–19.
178. *Id.* at 827.
179. *See id.* at 827–28; ZICK, *supra* note 163, at 141; ESKRIDGE, *supra* note 164, at 93–96, 111–16.
180. Zick, *supra* note 169, at 828 (quoting *Obergefell*, 135 S. Ct. at 2593 (emphasis added)).

Even within its compelled speech jurisprudence, the Court expressly noted in *Barnette* that the underlying principles of the First and Fourteenth Amendments trigger more heightened scrutiny when read together, rather than in isolation, to advance the notion of freedom of thought.[181] These examples illustrate the bidirectional nature of the First and Fourteenth Amendments and how the principles of free speech, due process, and equal protection can evolve with and build upon each other.

Thus, as Professor Zick explains, "changing notions of constitutional equality can influence judicial interpretations of expressive rights" leading courts to expand or "interpret free speech claims in light of changes in equal protection doctrine."[182] The evolution of the Supreme Court's jurisprudence during the fight for marriage equality from *Loving* to *Obergefell*, striking down anti-miscegenation laws and same-sex marriage bans on equal protection and due process grounds,[183] should influence the examination of First Amendment compelled speech claims as they pertain to marriage licenses. As most recently noted in *Rogers v. Virginia State Registrar*, Virginia's statutory mandate requiring the disclosure of one's race on a marriage license application burdened citizens' fundamental right to marry under the Fourteenth Amendment and was so clearly tied to the law at the heart of *Loving* fifty-two years before.[184] The same logic can easily be extended in light of recognizing the fundamental right to marry for same-sex couples, as mandatory disclosures of sex and gender on marriage licenses can be linked to the legal framework that once policed and prevented intimate relationships among LGBTQ persons.[185] By striking down statutes compelling the disclosure of race, sex, or gender in this realm, courts will not only expand First Amendment freedoms pertaining to self-identification—including the choice not to self-identify—and personal expression, but also simultaneously protect the exercise of the fundamental right to marry.

D. Race, Sex, and Gender Mandates on Marriage Licenses Fail Strict Scrutiny

Content-based speech regulations are subject to strict scrutiny.[186] To survive strict scrutiny, the government must advance a compelling

181. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
182. Zick, *supra* note 169, at 807.
183. *Obergefell*, 135 S. Ct. at 2604–05; Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
184. Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 17–18 (E.D. Va. filed Oct. 11, 2019).
185. *See supra* Section I.B and accompanying notes.
186. Reed v. Town of Gilbert 576 U.S. 155, 163–64 (2015).

interest in regulating speech, and the regulation must be narrowly tailored to the serve that interest.[187] A state's only plausible interests in mandating the disclosure of specific race, sex, or gender information on a marriage license is data collection or identification.

As evidenced in the cases discussed in Part III, state interests in preventing fraud or crime,[188] providing the public with relevant information,[189] and protecting others privacy,[190] or even promoting broader ideological notions of unity[191] or individualism[192] did not pass the constitutional muster of strict scrutiny. When viewed in isolation, those state interests seem more serious and compelling than mere data collection. Yet, the Court's ultimate rejection of those interests is quite telling of the high bar the statutes at hand would have to pass.[193]

When confronted with this issue in *Rogers*, the Commonwealth of Virginia conceded it had *no* state interest in the racial data collected from marriage licenses.[194] Though the State Registrar's Office generates statistical tables based on the information collected on marriage licenses,[195] when the plaintiffs filed suit in September 2019, the Commonwealth had not updated its racial data tables since 2013.[196] In addition, the Virginia Department of Health had not conducted a substantive study based on the racial data collected, nor had any third parties requested the data.[197] The court also noted that the Registrar's data collection efforts likely produced high rates of error given the variability of racial categories offered by the Commonwealth on its marriage license applications; therefore, any data collected in this context is practically useless.[198] These concerns

187. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

188. *See* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164–65 (2002); *McIntyre*, 514 U.S. at 335.

189. *See McIntyre*, 514 U.S. at 335.

190. *See Watchtower Bible*, 536 U.S. at 164–65.

191. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

192. *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977).

193. *See Watchtower Bible*, 536 U.S. at 168–69; *McIntyre*, 514 U.S. at 335; *Barnette*, 319 U.S. at 641; *Wooley*, 430 U.S. at 716–17.

194. Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 17 (E.D. Va. filed Oct. 11, 2019).

195. *See* VA. CODE ANN. § 32.1-268.1 (2020).

196. *See* Rogers Compl., *supra* note 6, at 25. The Virginia Department of Health has since updated its statistics through 2018. *See Statistical Reports and Tables*, VA. DEP'T OF HEALTH, https://www.vdh.virginia.gov/HealthStats/stats.htm [http://perma.cc/FX27-A5ZH]. However, the Department only breaks down the racial data into "white," "black," "other," and "unknown." *See* Rogers Compl., *supra* note 6, at 25.

197. *See* Rogers Compl., *supra* note 6, at 25.

198. *Rogers*, slip op. at 18.

hold true for other states' collection efforts as well.[199] Thus, the lack of regular and meaningful use of the data collected from marriage licenses effectively undermines the compelling nature of this interest.[200]

It is also important not to lose sight that, even if states once had a compelling interest in the collecting race, sex, and gender information in this context, their purpose in doing so was ultimately to prevent interracial and same-sex marriages.[201] By gathering this information, states could effectively enforce anti-miscegenation laws and same-sex marriage bans.[202] That interest can no longer survive in light of *Loving* and *Obergefell*.[203]

While identification may be a compelling interest in certain contexts, these laws are not narrowly tailored to serve that interest. As demonstrated in Section IV.B.1, marriage licenses are not identity documents.[204] Rather, the government can effectively serve this interest by collecting identification information from proper sources, such as birth certificates, driver's licenses, and passports.[205] Further, by only providing binary gender or sex markers on these documents, these laws are underinclusive because they do not gather identifying information about non-binary individuals, thereby erasing or invalidating their existence.

Similarly, even if one were to simply assume the government had a compelling interest in data collection, these statutes are not narrowly tailored to serve that interest. As evidenced above, if there is no practical use for such data from marriage licenses, there is no reason to require its divulgence. Optional, rather than mandatory, disclosure would provide a less intrusive alternative. Furthermore, the United States Census Bureau accumulates race and sex data

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199. For example, Delaware and Connecticut have not updated their marriage statistics since 2015, and Delaware only breaks down its data by "black" and "white." *See Delaware Vital Statistics Annual Report Marriage and Divorce, 2015*, DEL. HEALTH & SOC. SERVS., https://dhss.delaware.gov/dhss/dph/hp/files/m_d15.pdf [http://perma.cc/G9RU-EVUH]; *Connecticut Registration Report: Births, Deaths, and Marriages Calendar Year 2015*, CONN. DEP'T OF PUB. HEALTH, https://portal.ct.gov/-/media/Departments-and-Agencies/DPH/Vital-Statistics/Registration-Reports/Reports/RR2015.pdf?la=en [http://perma.cc/W8QS-6DUZ]. Kentucky, on the other hand, has no data available online.

200. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a 'law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'") (citations omitted).

201. *See supra* Part I.

202. *See supra* Part I

203. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

204. S*ee supra* Section IV.B.1.

205. *See* Herpolsheimer, *supra* note 134, at 47 n.4.

when conducting the American Community Survey, among other surveys like the census.[206] The Census Bureau then publishes this data for local, state, and federal use to inform policies and programs.[207] The identity documents discussed above also serve as data sources.[208] Because the state has access to this information from government surveys and other documents, the duplicative nature of mandatory disclosures in the marriage license context is unnecessary.

Thus, lacking a compelling governmental interest in both data collection and identification, compounded by the narrow tailoring concerns, it is clear that statutes that mandate the disclosure of race, sex, or gender on a marriage license do not pass the constitutional muster of strict scrutiny.

V. PROPOSED LEGISLATIVE ALTERNATIVES

As demonstrated above, the current statutes in force mandating the disclosure of race,[209] sex,[210] or gender[211] on marriage license applications constitute compelled speech under the First Amendment and are thereby unconstitutional. If these statutes do not find their way into federal courts first, state legislatures can preemptively revise their marriage license statutes in light of these constitutional and historical concerns. California, North Carolina, and Hawaii present a spectrum of legislative alternatives.[212]

California's marriage license statute expressly forbids the collection of racial data on a marriage license, nor does it mention the collection of sex or gender data on its face.[213] As written, this statute seemingly does away with the First Amendment concerns because

206. *See American Community Survey: Questions on the Form and Why We Ask*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/about/why-we-ask-each-question/index.php [http://perma.cc/U5MU-UUQ9].

207. *See American Community Survey: Why We Ask Questions About Marital Status / Marital History*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/about/why-we-ask-each-question/marital [http://perma.cc/F58S-UJ56].

208. *See supra* Section IV.B.1.

209. *See* P.R. LAWS ANN. tit. 24, § 1165(3) (2000); CONN. GEN. STAT. § 46b-25 (2012); DEL. CODE ANN. tit. 13, § 122(a) (2013); N.H. REV. STAT. ANN. § 5-C:41(III) (2015); LA. STAT. ANN. § 9:224(A)(2) (2016); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017).

210. *See* 750 ILL. COMP. STAT. ANN. 5/202(a)(1) (West 1977); DEL. CODE ANN. tit. 13, § 122(a) (2013); MINN. STAT. § 517.08(1a)(1) (2016); OR. REV. STAT. § 106.041(2)(b) (2018); COLO. REV. STAT. § 14-2-105(1)(a) (West 2019).

211. *See* KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017).

212. *See* CAL. HEALTH & SAFETY CODE § 103175(b) (West 2009); N.C. GEN. STAT. § 51-16 (2020); HAW. REV. STAT. § 572-6(a) (2013).

213. CAL. HEALTH & SAFETY CODE § 103175(b) (West 2009) ("The marriage license shall not contain any reference to the race or color of parties married.").

there is no compulsion of these aspects of identity.[214] By preventing the collection of this information, this statutory construction attempts to make amends with the historic use of marriage licensing schemes to police and prohibit marriages between certain populations.[215]

Some states, like North Carolina, allow for the optional disclosure of this information.[216] However, the statute lists twenty-four race markers for applicants to choose from, including "other."[217] While optional disclosure is certainly better than mandatory, this alternative does not alleviate the concerns raised by state-sponsored construction of race and the messages associated. The autonomy and negative theories of the First Amendment are implicated here because the state is still choosing, thereby limiting, the possible identities one can express.

Hawaii, on the other hand, currently does not statutorily mandate the disclosure of race, sex, or gender on its marriage license.[218] Rather, if the state opts to collect new information not previously prescribed for health or statistical purposes, the statute requires any new criterion added to the license must be optional for applicants.[219] This option presents the best of both worlds solution; it allows groups who have fought tremendously for the right to self-identify to have the right to do so, while simultaneously not compelling individuals, now or ever, to disclose this information.

If a state collects this information at all, it should be optional to designate. This is the simplest way out of the compelled speech issue, as the state would no longer be *compelling* a message. However, lurking in the backdrop of the First Amendment argument advanced throughout this Note is that race, sex, and gender designations are wholly irrelevant, therefore unnecessary, to granting a marriage license because clerks cannot deny licenses on these grounds under the Fourteenth Amendment.[220] Reading the First and Fourteenth Amendments in tandem to advance broader constitutional notions of equality[221] would suggest the ultimate solution is to outrightly

214. *See id.*
215. *See supra* Part I.
216. *See* N.C. GEN. STAT. § 51-16 (2020).
217. *Id.*
218. *See* HAW. REV. STAT. § 572-6(a) (2013).
219. *See id.* ("Any other information consistent with the standard marriage certificate, as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes . . . provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information.").
220. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
221. *See supra* Section IV.C.

prohibit the collection of race, sex, and gender information on marriage licenses.

CONCLUSION

Thanks to dedicated lawyers and activists, as well as courageous plaintiffs, there have been significant legal and social achievements in the marriage equality movements.[222] Landmark victories in *Loving* and *Obergefell* have affirmed and validated the civil rights of interracial and same-sex couples, despite the historic and systematic efforts to control their bodies and police their relationships.[223] Notwithstanding these achievements, however, there are still barriers to fully exercising the fundamental right to marriage. Fifty-four years after *Loving*, and six years after *Obergefell*, six states and territories still statutorily require individuals to disclose their race on a marriage license application,[224] and six states mandate the disclosure of sex or gender.[225] After *Rogers v. Virginia State Registrar*, which struck down Virginia's racial mandate as unconstitutional under the Fourteenth Amendment,[226] some state legislatures have begun to revisit and revise their marriage license statutes after the case drew attention to the clear connection to Jim Crow laws.[227]

As this Note has demonstrated, statutes requiring individuals to disclose their race, sex, or gender on a marriage license application constitute compelled speech under the First Amendment and these laws cannot survive heightened scrutiny.[228] By mandating the disclosure of this information, individuals must affirmatively act to turn over fundamental aspects of their identity that they may otherwise wish to keep anonymous and that are wholly unrelated to the purpose of a marriage license. Unlike scientific or factual information,

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222. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2594–95; *Loving*, 388 U.S. at 2.

223. *See supra* Part I.

224. *See* P.R. LAWS ANN. tit 24, § 1165(3) (2000); CONN. GEN. STAT. § 46b-25 (2012); DEL. CODE ANN. tit. 13, § 122(a) (2013); N.H. REV. STAT. ANN. § 5-C:41(III) (2015); LA. STAT. ANN. § 9:224(A)(2) (2016); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017). Please note that this total reflects the count at the time of writing in August 2020.

225. *See* 750 ILL. COMP. STAT. ANN. 5/202(a)(1) (West 1977); DEL. CODE ANN. tit. 13, § 122(a) (2013); MINN. STAT. § 517.08(1a)(1) (2016); OR. REV. STAT. § 106.041(2)(b) (2018); COLO. REV. STAT. § 14-2-105(1)(a) (West 2019); KY. REV. STAT. ANN. § 402.100(1)(b) (West 2017).

226. Rogers v. Virginia State Registrar, No. 1:19-cv-01149, slip op. at 18 (E.D. Va. filed Oct. 11, 2019).

227. *See* H.B. 1644, 166th Gen. Court, 2020 Sess. (N.H. 2020); S.B. 194, 150th Gen. Assemb., Reg. Sess. (Del. 2019); *see also* ALA. CODE § 30-1-21(a), (b), (g) (2019) (removing the racial mandate in late August 2019).

228. *See supra* Part IV.

racial and gender identities are social and historical constructions that should not be compelled by the government in the context of marriage documents. Noting the historical ties to anti-miscegenation laws and same-sex marriage bans, courts should engage in holistic constitutional interpretation to analyze these statutes with an even more critical eye to advance not only First Amendment speech rights, but also equal protection and due process principles. By striking down and revising these statutes, courts and legislatures can work to decrease barriers for individuals to exercise their fundamental rights.

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