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## THE LAWFULNESS OF THE SAME-SEX MARRIAGE DECISIONS: CHARLES BLACK ON *OBERGEFELL*

Toni M. Massaro\*

### INTRODUCTION

In 1960, Professor Charles L. Black, Jr. published a justly famous defense of the United States Supreme Court opinion in *Brown v. Board of Education*,<sup>1</sup> titled *The Lawfulness of the Segregation Decisions*.<sup>2</sup> His essay was an attempt to meet the criticisms of that case on various grounds, including Herbert Wechsler's argument that it suffered from a lack of "neutral principles,"<sup>3</sup> and the argument that the Clark doll studies cited by the Court<sup>4</sup> were inadequate support for the claims about African-American schoolchildren's race-based negative attitudes based on them.<sup>5</sup>

His essay was dazzlingly eloquent and, in his own words, "awkwardly simple."<sup>6</sup> The cases, he said, were supported by the "overwhelming weight of reason."<sup>7</sup>

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> 69 *YALE L.J.* 421 (1960) [hereinafter *Lawfulness*]. The influence of the article continues. See, e.g., Akhil Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 *HARV. L. REV. F.* 109 (2013) (dedicating his essay to Black and citing the *Lawfulness* article); Cass Sunstein, *Black on Brown*, 90 *VA. L. REV.* 1649 (2004) (describing the *Lawfulness* article as one of the most striking and important writings on *Brown v. Board of Education* and the Fourteenth Amendment, but arguing the article also "suffers from the serious vices of formalism and institutional blindness"); Kendall Thomas, *Reading Charles Black Writing: "The Lawfulness of the Segregation Decisions" Revisited*, 1 *COLUM. J. RACE & L.* 1 (2011) (describing the article as "magisterial" and "foundational" with enduring significance).

<sup>3</sup> See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *COLUM. L. REV.* 982 (1978) (discussing the importance of Wechsler's argument for neutral principles in law); Gary Peller, *Neutral Principles in the 1950s*, 21 *U. MICH. J.L. REFORM* 561 (1988) (describing the underlying assumptions that drove the neutral principles approach); Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 *HARV. L. REV.* 1 (1959) (arguing that legal decisions should be result transcendent and offering an associational freedom theory in support of *Brown*).

<sup>4</sup> *Brown*, 347 U.S. at 494.

<sup>5</sup> Wechsler, *supra* note 3, at 32–33 (stating he believed the studies and facts were not actually the reasons the Court ruled against segregation in *Brown v. Board of Education*).

<sup>6</sup> *Lawfulness*, *supra* note 2, at 421.

<sup>7</sup> *Id.*

As he did in a later paper praising the Court for its outcome in *Reitman v. Mulkey*,<sup>8</sup> Black relied heavily on what he termed the “reality principle.”<sup>9</sup> In so doing, he echoed the dissent of Justice Harlan in *Plessy v. Ferguson*,<sup>10</sup> which likewise took others to task for reaching a conclusion about the meaning of segregated railway cars that could not be squared with common knowledge and candor.<sup>11</sup>

The trope of blinking in the face of racial reality continues to this day, as reflected in the powerful dissent by Justice Sotomayor in *Schuette v. BAMN*,<sup>12</sup> where she accused the plurality of being “out of touch with reality.”<sup>13</sup> She meant ethnic and racial reality, and how these aspects of identity powerfully define and distort human experience in ways that minorities understand but nonminorities miss—repeatedly.<sup>14</sup>

Black’s later paper, *The Unfinished Business of the Warren Court*,<sup>15</sup> received less attention but was cut out of the same simply majestic cloth.<sup>16</sup> Black here again defended *Brown* and its methodology,<sup>17</sup> and then supported the Court’s opinion in *Griswold v. Connecticut*<sup>18</sup> on similar grounds.<sup>19</sup>

In his defense of the Court’s opening up of liberty to embrace unenumerated rights, and of expanding equality to embrace desegregation, he also offered a rebuttal to those who feared that the new rights might intrude unduly into religious freedom.<sup>20</sup> The “analogy works both ways,”<sup>21</sup> Black mused. He continued: “If it were true that untoward consequences must follow in, say, the field of religion, if law were to track racism down to its last lair and kill it, then the game can be played both ways . . . .”<sup>22</sup> We must ask “whether we can afford the result we want *as to religion*, if that result leads analogically to the repudiation in practice of our principled commitment against racism.”<sup>23</sup>

<sup>8</sup> 387 U.S. 369 (1967).

<sup>9</sup> See Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 90 (1967) [hereinafter “*State Action*”] (coining the phrase and indicating that creating hard lines of limitations for court action ignores the necessity of reality).

<sup>10</sup> 163 U.S. 537 (1896).

<sup>11</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>12</sup> 134 S. Ct. 1623 (2014).

<sup>13</sup> *Id.* at 1675 (Sotomayor, J., dissenting).

<sup>14</sup> *Id.*

<sup>15</sup> 46 WASH. L. REV. 3 (1970) [hereinafter *Unfinished Business*].

<sup>16</sup> A simple internet search of “Charles L. Black Jr.” will show his paper *The Lawfulness of the Segregation Decisions* as one of the first results, with none of his other papers mentioned.

<sup>17</sup> *Unfinished Business*, *supra* note 15, at 31.

<sup>18</sup> 381 U.S. 479 (1965).

<sup>19</sup> *Unfinished Business*, *supra* note 15, at 32.

<sup>20</sup> See *id.* at 15 (indicating racial and religious differences are not the same, and as such, should not be treated the same by the Court).

<sup>21</sup> *Id.* at 25.

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* (emphasis added).

Black recognized that government eradication of inequality in its last, private lair implicated the state action doctrine.<sup>24</sup> The doctrine restricts all but Thirteenth Amendment violations to acts of government, not private parties.<sup>25</sup> Private suppression of speech or private denials of due process do not violate the Constitution, according to this doctrine. Indeed, to insist on constitutional purity in private domains is to invade liberty rather than protect it.

Black thus did not think all private activity should be vulnerable to constitutional treatment.<sup>26</sup> But he also believed that the collisions of liberty occasioned by protecting private power were not all unavoidable, and often overstated in some contexts.<sup>27</sup> More importantly, he thought that when one liberty did have to trump the other, we should keep our reality wits about us.<sup>28</sup> For example,

If fraudulent racist “private school” schemes are to be condemned—and they certainly are if our legal system is not too imbecile to live—and if a situation presents itself of a non-racist private school scheme, as to which none of the *Brown* considerations apply, then it seems to me the very life of sound legal method hangs on its capacity to conceptualize and to give effect to this distinction.<sup>29</sup>

In short, Black saw the thicket. He did not blink in the face of two powerful arguments that often dog efforts to expand constitutional liberties: that expansion can invade religious freedom, and may threaten other forms of private dissent from constitutional principles that government must respect.<sup>30</sup> He cut a straight line through the thicket. And history, most would likely agree, has proven him right. Moreover, Black did so in a manner devoid of excessive theorizing, toe-in-the-ground equivocation, or footnote-laden caveats.<sup>31</sup> He wrote like a dream.

Black also did not distance himself from the moral imperatives.<sup>32</sup> Where he accused others of imbecility or callowness, he held himself accountable for these

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<sup>24</sup> *Id.* at 17.

<sup>25</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (stating the actions inhibited by the Fourteenth Amendment inhibit states and not private parties).

<sup>26</sup> *Unfinished Business*, *supra* note 15, at 9.

<sup>27</sup> See “*State Action*,” *supra* note 9, at 91 (calling for an end to bright line rules of state action doctrine and instead to have a “shift in approach, attitude, and expectation”).

<sup>28</sup> See *Unfinished Business*, *supra* note 15, at 26 (calling for people to be aware that the “dangers” of racial equality expanding are not as terrible as they presume).

<sup>29</sup> *Id.* at 27.

<sup>30</sup> See *id.* at 25–26 (referring to the fact that many argue that before racial equality can be expanded upon, the collateral consequences on other fields, like religion, must be analyzed).

<sup>31</sup> See *Lawfulness*, *supra* note 2; *Unfinished Business*, *supra* note 15.

<sup>32</sup> *Unfinished Business*, *supra* note 15, at 12–13.

shortcomings too.<sup>33</sup> He reserved his anger for injustice worthy of it, but expressed it in a manner that called up the better angels of others even when they stumbled.<sup>34</sup> In this respect and so many others, Black's rhetorical style was the antithesis of the pugilistic, derisive style of modern legal scolds, including some Supreme Court Justices.<sup>35</sup>

Finally, Black marched in the trenches, as a lawyer for civil rights causes, rather than merely imploring from the podium or the bench.<sup>36</sup> Liberty and equality were not lofty abstractions to Black, but personal and practical imperatives.<sup>37</sup> He worked to erase the stains he came to see in his own life, in his own privileges, and his own private lairs of liberty.<sup>38</sup>

This Essay is dedicated to Charles Black, and to his clear-eyed vision of what matters most in constitutional liberty and equality. It harkens back to his insights, and argues his approach remains stunningly relevant to modern problems, especially the modern constitutional issue of whether the Constitution protects a right to same-sex marriage.<sup>39</sup>

Black's pragmatism, his mastery of constitutional methods and keen sense of their limitations, his preference for simplicity over jargon, and his poetic<sup>40</sup> dominion over words summon up the exactly right way to write, think, and feel about this issue, and how best to answer some of the stormy indictments of thinking otherwise about it. He cuts a path through *this* thicket, too.

Scholars and judges should read the recent same-sex marriage cases with Black's candle hovering above the pages. They should review the Court's work with his voice in their heads, reminding them not to be imbeciles, or failures in matters of will and honesty.<sup>41</sup> They should consider Black's admonition, borrowed from Anthony Powell, that "any healthy human being carries with him always the means of bringing about

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<sup>33</sup> See *Lawfulness*, *supra* note 2; *Unfinished Business*, *supra* note 15.

<sup>34</sup> See *Lawfulness*, *supra* note 2; *Unfinished Business*, *supra* note 15.

<sup>35</sup> The top of this list has to be Justice Scalia, whose acid pen dripped over recent dissents. See *King v. Burwell*, 135 S. Ct. 2480, 2500–01 (2015) (Scalia, J., dissenting) (describing the majority opinion as "[p]ure applesauce" and "jiggery-pokery"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) (saying he would rather "hide [his] head in a bag" than join the majority opinion, and describing the opinion as a descent "to the mystical aphorisms of the fortune cookie").

<sup>36</sup> Robert D. McFadden, *Charles L. Black Jr., 85, Constitutional Law Expert Who Wrote on Impeachment, Dies*, N.Y. TIMES (May 8, 2001), <http://www.nytimes.com/2001/05/08/nyregion/charles-l-black-jr-85-constitutional-law-expert-who-wrote-on-impeachment-dies.html?pagewanted=all>.

<sup>37</sup> See "State Action," *supra* note 9, at 69–70 (calling for a fight against racism using the "business of law" in order to bring justice).

<sup>38</sup> See *Lawfulness*, *supra* note 2, at 424.

<sup>39</sup> Aviam Soifer, *Charles L. Black, Jr.: Commitment, Connection, and the Ceaseless Quest for Justice*, 7 ASIAN-PAC. L. & POL'Y J. 7, 9 (2006).

<sup>40</sup> Black wrote several volumes of poetry. See CHARLES BLACK, *OWLS BAY IN BABYLON* (1980); CHARLES BLACK, *TELESCOPES AND ISLANDS* (1963).

<sup>41</sup> See *Unfinished Business*, *supra* note 15, at 28.

his own disgrace or death.”<sup>42</sup> They should try to live, as Black did, on the right side of history as it unfolds before them, unafraid to take that task seriously—as seriously as life or death—and to be measured accordingly in time. As he asked his contemporaries, over forty-five years ago, to do, modern lawyers and jurists too should ask themselves: “May not our living generation take the words [of the Declaration of Independence] not as a statement of creation already performed, but as an invitation to participate in that ongoing work of a creation whose goal they define?”<sup>43</sup>

And as modern scholars assess the Court’s handiwork in this area, may they avoid past errors—the sterile search for “neutral principles”<sup>44</sup> that run like water through cold fingers—and seek instead to emulate the sturdy, warm, and enduring wisdom of Black. May they dare to defend the Court for doing what history surely will reveal to be the right answer, however imperfectly defended or expressed, rather than rush to rewrite it<sup>45</sup> or critique it by their lights.

To show how this might occur, this Essay borrows Black’s own words about *Brown*, and layers them directly onto the same-sex marriage controversy. Only the italicized words are new. The rest is pure Black light, shining through the decades. It ends with Black’s imagined rebuttal to Chief Justice Roberts’s dissent in *Obergefell v. Hodges*.<sup>46</sup>

#### I. THE LAWFULNESS OF THE MARRIAGE CASES<sup>47</sup>

If the cases outlawing *prohibitions on same-sex marriage*<sup>48</sup> were wrongly decided, then they ought to be overruled. One can go further: if dominant professional opinion ever forms and settles on the belief that they were wrongly decided, then they will be overruled, slowly or all at once, openly or silently. The insignificant error, however palpable, can stand, because the convenience of settlement outweighs the discomfort of error. But the hugely consequential error cannot stand and does not stand.

There is pragmatic meaning then, there is call for action, in the suggestion that the *marriage* cases cannot be justified. In the long run, as a corollary, there is practical

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 31.

<sup>44</sup> *Contra* Wechsler, *supra* note 3.

<sup>45</sup> I foresee the next volume, “What *Obergefell v. Hodges* Should Have Said.” *Cf.* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID (Jack M. Balkin ed., 2001); WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005).

<sup>46</sup> 135 S. Ct. 2584, 2611–26 (2015) (Roberts, C.J., dissenting).

<sup>47</sup> In the following section, I have added my own words to Charles Black’s *The Lawfulness of the Segregation Decisions. Lawfulness*, *supra* note 2. All italicized writing is my own, and in one instance, Justice Kennedy’s, while the plain text is that of Charles Black. *Id.*

<sup>48</sup> *Obergefell*, 135 S. Ct. at 2594 (consolidating cases that challenge prohibitions on, or recognition of, same-sex marriage by states, and holding denials violated the Fourteenth Amendment); *see* Windsor v. United States, 133 S. Ct. 2675 (2013) (holding section 3 of Defense of Marriage Act violated the Fifth Amendment).

and not merely intellectual significance in the question whether these cases were rightly decided. I think they were rightly decided, by overwhelming weight of reason, and I intend here to say why I hold this belief.

My liminal difficulty is rhetorical—or, perhaps more accurately, one of fashion. Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection *and due process clauses* of the *Fourteenth Amendment* should be read as saying that *persons are* not to be significantly *and irrationally* disadvantaged by the laws of the states *with respect to the most basic liberties*.<sup>49</sup> Secondly, *denying access to marriage—a basic liberty*—is a massive *and irrational* intentional disadvantaging of *persons on the basis of sexual orientation*, as such, by state law.<sup>50</sup> No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the *marriage cases: irrational and intentional discrimination with respect to a basic liberty, based on sexual orientation differences from the majority*. [I]f both these propositions can be supported by the preponderance of argument, the cases were rightly decided. If they cannot be so supported, the cases are in perilous condition.

As a general thing, the first of these propositions *now finds uncontested support* in [ ] holding[s] of the Supreme Court. I rest here on the solid sense of *Romer v. Evans*,<sup>51</sup> *Lawrence v. Texas*,<sup>52</sup> *Windsor v. United States*,<sup>53</sup> and *Obergefell v. Hodges*.<sup>54</sup> I draw in particular on *Obergefell*, where *Justice Kennedy* said of the [F]ourteenth [A]mendment:

*The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.*

*The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . [I]t requires courts to exercise reasoned judgment in identifying*

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<sup>49</sup> U.S. CONST. amend. XIV, § 1.

<sup>50</sup> *Marriage Equality*, REVEL & RIOT, <http://www.revelandriot.com/resources/marriage-equality/> [<https://perma.cc/YJ3L-PXSG>].

<sup>51</sup> 517 U.S. 620 (1996) (invalidating amendment to Colorado Constitution that sought to foreclose any political subdivision of the state from protecting persons against discrimination based on sexual orientation).

<sup>52</sup> 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that laws making homosexual sodomy a crime were unconstitutional).

<sup>53</sup> *Windsor*, 133 S. Ct. 2675 (invalidating section 3 of the Defense of Marriage Act to the extent that it barred the federal government from treating same-sex marriages as lawful even when acknowledged as valid in the state where the couples resided).

<sup>54</sup> 135 S. Ct. 2584 (2015).

*interests of the person so fundamental that the State must accord them its respect. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries.*

*The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>55</sup>*

If *Bowers v. Hardwick*<sup>56</sup> be thought a faltering from this principle of government decency, I step back to the principle itself. But the *Bowers* Court clearly conceived it to be its task to show that *discrimination on the basis of sexual orientation* did not really disadvantage gays, except through *their own immoral and unnatural sexual conduct choices in defiance of conventional morality*.<sup>57</sup> There is in this no denial of the *Lawrence, Windsor, and Obergefell* principle; the fault of *Bowers* is in the psychology, *philosophy*, and sociology of its minor premise.<sup>58</sup>

The lurking difficulty lies not in “*gay rights*” cases but in the total philosophy of “*equal protection and due process*” in the wide sense. “*Equal protection*” and “*due process*,” as *they apply* to the whole of state law, must be consistent with the imposition of disadvantage on some, for all law imposes disadvantage on some; to give driver’s licenses only to good drivers is to disadvantage bad drivers. *And of course the states must be left relatively unmolested by federal constitutional law with respect to its countless day to day policy choices*. Thus the word “*rational*” necessarily finds its way into “*equal protection*” and “*due process*,” in the application of *these latter concepts* to law in general. And it is inevitable, and right, that “*rational*,” in this broader context, should be given its older sense of “*supportable by reasoned considerations*.” “*Equal*” thereby comes to mean not really “*equal*,” but “*equal unless a fairly tenable reason exists for inequality*.” “*Due process*” *thereby comes to mean an exceedingly modest baseline expectation of nonarbitrary promotion of plausible public ends*.<sup>59</sup> *As the gravity of the deprivation in question grows*

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<sup>55</sup> *Id.* at 2597–98 (internal citations omitted).

<sup>56</sup> *Bowers*, 478 U.S. 186.

<sup>57</sup> *Id.* at 190–94, 196.

<sup>58</sup> “‘The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .’ That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake.” *Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003) (quoting *Bowers*, 478 U.S. at 190).

<sup>59</sup> *Due Process Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014).

and the irrationality—in a constitutional sense—of the line-drawing becomes more pronounced, however, things shift.<sup>60</sup> At some unbearable point, the judiciary must step in to reset the constitutional calculus. When it does, the court typically—though not always—expects the party objecting to the particular lines and burdens to do the work of showing that this is what irrationality looks like, in our constitutional order.<sup>61</sup> Imposing on the objecting party this quite large burden is how due process and equal protection operate in most cases.<sup>62</sup>

But the whole tragic background of the [F]ourteenth [A]mendment forbids the feedback infection of its central purpose with the necessary qualifications that have attached themselves to its broader and so largely accidental radiations. It may have been intended that “equal protection” and “due process” go forth into wider fields than the racial, and to protect other groups where subordination-driven irrationalities and caste concerns loom. But history puts it entirely out of doubt that the chief and all-dominating purpose was to ensure equal protection for *African Americans*. And this intent can hardly be given the self-defeating qualification that necessity has written on equal protection and due process as applied to carbonic gas. “Reasonableness” in this context surely demands more.

If it is so, then “equal protection” for *African Americans* means “equality until a tenable reason for inequality is proffered by the government.” *The burden of proof has shifted.*<sup>63</sup>

*The test cannot be the shabby rationality required of states in crafting mineral and gas laws,*<sup>64</sup> or that the inequality may persist unless no reason at all can be assigned by a state legislature for *African Americans* not being permitted to hold property, sign wills, marry, testify in court, walk the streets, go to (even segregated) school, ride public transportation, and so on . . . . That cannot have been what the noise was all about in 1866.

*But does it also mean, when equal protection is joined with its due process companion, that other state acts that subordinate entire classes of persons with respect to fundamental liberties such as marriage too must be explained in terms*

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<sup>60</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

<sup>61</sup> *See Lawrence*, 539 U.S. at 575–76, 578.

<sup>62</sup> This is referred to as “rational basis review,” where a heavy burden is placed on the objecting party where a suspect class or fundamental right is not involved. This burden placement began with Justice Harlan’s dissent in *Lochner v. New York*. 198 U.S. 45, 68 (1904) (Harlan, J., dissenting).

<sup>63</sup> Here, it is the government that must provide evidence of reasonableness in order to meet the burden for creating inequality, as opposed to the burden originally born by the objecting party. *Id.*

<sup>64</sup> *See generally Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61 (1911) (involving state statutes registering water, gas, and oil pumping on an owner’s land, where the court held the burden was on the objecting party to prove a lack of reasonable basis for the law, and that the state may claim a *prima facie* defense where there is not arbitrary discrimination and there is some rational basis to the statute).

*that are more rigorous than terms applied to carbonic gas regulations? I conclude it does, though the analysis begins in a remarkably similar fashion as it does in the carbonic gas cases, and ends short of shifting the burden of proof as occurs in the race cases.*<sup>65</sup>

*As applied to so-called gay rights, equal protection and due process mean gay persons may hold property, sign wills, marry, testify in court, walk the streets safely, be employed, go to (even religious) school, ride public transportation, run for office, hold government positions, serve in the military, walk hand in hand in public places, engage in intimate sexual conduct in the privacy of their homes, have and raise children, inherit their spouse's property, share in their medical, tax and other benefits, and so on, only in the event that no decent reason can be assigned by a state legislature for their not being permitted to do these things. That is, as applied to other classifications that operate in similar, though not historically or currently identical, fashion as did racial segregation laws pre-1954, the rational basis expectation is not always the "carbonic gas" level expectation.<sup>66</sup> Judicial space is opened for a discussion of how, in a particular context, the state law is irrationally burdening significant (note that I did not say "fundamental") liberties—such as private consensual intimate conduct, employment, housing, travel, or family rights, including marriage—as to persons who may not be entitled to suspect classification across the board, but whose treatment in this case looks mighty suspicious, caste-like, or even downright cruel.<sup>67</sup> That is what all the noise was about in 1866.*

What the [F]ourteenth [A]mendment, in its historical setting, must be read to say *first and foremost* is that *African Americans* are to enjoy equal protection and due process of law, and that the fact of his or her being an *African American* is not to be taken to be a good enough reason for denying him or her this equality, however "reasonable" that might seem to some people. All possible arguments, however convincing, for discriminating against the *African American* were finally rejected by the [F]ourteenth [A]mendment, and so it is the law today.

*The question in the marriage cases is different, of course, but closely related: does the history of that amendment and its evolution likewise warrant any shift in the carbonic gas assumptions about rationality for matters that touch on one's sexual orientation? Here we raise a more modest inquiry: can constitutional reasonableness, even absent a shift in legal presumptions, be satisfied when state laws operate in ways that deny access to basic liberties and publicly controlled rights and statuses,*

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<sup>65</sup> This would bring the level of scrutiny and burden on the objecting party to intermediate scrutiny. Strict scrutiny, the level required in race cases, is limited to cases involving race, national origin, or religion. See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (first instance of strict scrutiny used by the Court).

<sup>66</sup> See *id.*

<sup>67</sup> Many businesses have taken a stance against this legislation by withdrawing from states imposing the discriminatory laws. Tony Pugh, *Businesses Take Lead Role in Opposing Laws Targeting LGBT People*, KAN. CITY STAR (Apr. 6, 2016), <http://www.kansascity.com/latest-news/article70384677.html> [<https://perma.cc/J4DQ-BSA2>].

to a class of individuals whose identity is known, and whose burdens are demonstrably significant, with no more justification than is required of carbonic gas regulation?

What guidance do we gain from history? It once was urged that a special qualification was written on the concept of “equality” by the history of the adoption of the amendment—that an intent can be made out to exclude segregation of the races from those legal discriminations invalidated by the requirement of equality, whether or not it actually works inequality.<sup>68</sup> A similar argument was made 80 years later in defense of antimiscegenation laws.<sup>69</sup> This historical point, as it related to segregation, was discussed and documented by Professor Alexander Bickel,<sup>70</sup> who, though he found convincing arguments for the conclusion that school segregation was not among the evils the framers of the amendment intended for immediate correction, suggested that they intended at the same time to set up a general concept for later concrete application. Other writers of that era took somewhat similar views.<sup>71</sup> And writers since the 1950s have spilled gallons of ink on questions of framers’ notions about the amendment’s specific and immediate goals.<sup>72</sup>

The data brought forward by Professor Bickel do not seem to me as persuasive, on his first point—the one about specific intent of the Reconstruction Framers on segregation—as they did to him.

But in supporting his second point Bickel developed a line of thought tending to establish that the legislative history did not render the segregation decisions improper, and I am glad the Court ultimately joined him in that practical conclusion in *Brown v. Board of Education*. I would add only one point: The question of the “intent” of the men of 1866 on segregation as we know it calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it developed thereafter.

From this point follows another: To guess their verdict upon other institutions, including marriage, as they function in the early twenty-first century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid. They can in the nature of the case have bequeathed us only their generalities; the specifics lay unborn as they disbanded. I do not understand Professor Bickel to have held a crucially different view. *With this much I agree, whole-heartedly.*

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<sup>68</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (creating the idea of “separate but equal” and allowing segregation).

<sup>69</sup> *Loving v. Virginia*, 388 U.S. 1, 6–7 (1967).

<sup>70</sup> See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

<sup>71</sup> Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 25 (1959); Wechsler, *supra* note 3, at 31–32.

<sup>72</sup> See generally Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019 (2014) (exploring William E. Nelson’s study of the Fourteenth Amendment and commenting on the difficulties of determining an “original intent”).

Then does *a modern prohibition on same-sex marriage* offend against *the equal protection and due process generalities*?

Equality and due process, like all general concepts, *have* marginal areas where philosophic difficulties are encountered. But if a whole *class of persons* find *themselves* confined within a system which is set up and continued for the very purpose, or with the actual effect, of keeping *them* in an inferior position unrelated to their abilities or contributions to the general welfare, and if the question is *whether they* are being treated “reasonably” and “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether *the same-sex marriage prohibitions* answer to this description.

Here I must confess a tendency to start laughing all over again. I was raised in a Texas town where the pattern of *discrimination against gays and lesbians* was firmly fixed. I am sure it never occurred to anyone, *gay or straight*, to question its meaning. The fiction of “reasonableness” or “equality” was just about on a level with the fiction of “finding” in an action of trover. I think few candid Texans would deny this. Modern Americans may be misled by the entirely sincere protestations of many people that *traditional marriage laws are better for all people, including gays and lesbians, and not intended to hurt them.*<sup>73</sup> But I think a little probing would demonstrate that what is meant is that it is better for *gays and lesbians* to accept a position of inferiority, at least for the indefinite future.

But the subjectively obvious, if queried, must be backed up by more public materials. What public materials assure me that my reading of the social meaning of *prohibitions on same-sex marriage* is not a mere idiosyncrasy?

First, of course, is history. *Same-sex marriage bans come down in apostolic succession from criminalization of same-sex sexual conduct, banning gay men and lesbians from the military, denying them employment, denying them other family rights, passage of propositions and referenda aimed at denying them protection of local laws, and cases like Bowers v. Hardwick. Opponents of gay rights fought to keep the criminal prohibitions in place, and lost.*<sup>74</sup> *Then they tried maintaining room for denial of local law rights protections, and lost.*<sup>75</sup> *Then they looked around for something else and drew the line at marriage.*<sup>76</sup> *They also appealed to freedom of*

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<sup>73</sup> See Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. (Mar. 11, 2013), <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it> [<https://perma.cc/TQP4-WNJU>].

<sup>74</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>75</sup> See *Romer v. Evans*, 517 U.S. 620 (1996) (striking down attempt by Colorado to ban local laws that protected against discrimination on the basis of sexual orientation).

<sup>76</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act’s definition of marriage as exclusively between a man and a woman due to its effect of unconstitutionally depriving same-sex couples of their Fifth Amendment right to liberty of the person).

association, expression, and religion principles to maintain safe refuges from earlier losses and to preserve enclaves into which the movement for gay rights could not proceed.<sup>77</sup> (Here they are likely to fight the remaining battles.) But their resistance at the marriage line was an integral part of the effort to maintain and further “heterosexual supremacy”;<sup>78</sup> its triumph represented a triumph of hostile views over moderate sentiment about gay people. It is still today defended very largely on the ground that same-sex couples as such are not fit to occupy the same legal and social space as opposite-sex couples.<sup>79</sup> And worse, it is defended on religious grounds that attempt to turn the equality table and claim the true victims are heterosexual people of faith.<sup>80</sup>

History, too, tells us that *same-sex marriage prohibitions* were imposed on one group by another;<sup>81</sup> consent was not invited or required (indeed it was not imagined to be necessary). *Same-sex marriage prohibitions* grew up and kept going because those making the laws enjoyed it that way and believed it to be morally correct<sup>82</sup>—an incontrovertible fact which in itself hardly consorts with constitutional notions of reasonableness or equality (not to mention a healthy dose of religious neutrality in matters of personal autonomy).<sup>83</sup> This fact perhaps more than any other confirms the picture which a casual or deep observer is likely to form of the life of that Texas community—a picture not of mutual separation of *gays and straights*, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior, *even furtive*, life of its own.

When a writer refers to *the benefits and the vicissitudes of marriage, of the deepest commitments between humans who love each other*, do you not know, does not context commonly make it clear, that *she means marriages between opposite sex*

<sup>77</sup> See, e.g., *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

<sup>78</sup> Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and (A Lack of) Imagination*, 114 PENN ST. L. REV. 1419, 1441 (2010) (“[L]aws criminalizing same-sex acts arguably promote ‘heterosexual supremacy,’ both words code for unearned and unexamined privilege.”).

<sup>79</sup> *Id.*

<sup>80</sup> *Marriage and Religious Freedom Act Backgrounder*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/marriage-and-religious-freedom-act-backgrounder.cfm> [https://perma.cc/AN89-CRX7].

<sup>81</sup> See, e.g., AMARA DAS WILHELM, TRITIYA-PRAKRITI: PEOPLE OF THE THIRD SEX: UNDERSTANDING HOMOSEXUALITY, TRANSGENDER IDENTITY, AND INTERSEX CONDITIONS THROUGH HINDUISM 68–75 (2010) (establishing a timeline of gay world history which includes numerous laws prohibiting homosexual conduct and same-sex marriage).

<sup>82</sup> See Press Release, U.S. Congressman Louie Gohmert, Gohmert on Supreme Court Ruling of Same-Sex Marriage (June 26, 2015), [http://gohmert.house.gov/news/document\\_single.aspx?DocumentID=398234](http://gohmert.house.gov/news/document_single.aspx?DocumentID=398234) [https://perma.cc/E8V4-EP7D].

<sup>83</sup> *Id.*

*couples, and their love? When you hear the phrase, “my spouse” do you not assume this reference is to a different sex partner? That is what you would expect when you define an institution—one intimately tied to human personal, social, and legal identity—in a manner that is segregated and includes only one group of committed adults and not others, and that is what you get.*

*Traditional marriage laws are historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory. I have in mind especially the long-continued and still largely effective exclusion of sexual minorities from prominent political office.<sup>84</sup> Here we have two things. First, a certain group of people is “segregated”—indeed they are afraid to publicly admit their membership in the group. Secondly, at about the same time, the very same group of people is effectively barred from the common political life of the community—from all open presence in political power. Then we are solemnly told that their exclusion from marriage and other rights is not intended to harm them, or to stamp them with the mark of inferiority. How long must we keep a straight (literally and figuratively, with pun wholly intended) face?*

Here it may be added that, generally speaking, *marriage prohibitions are the pattern in communities where the extralegal patterns of discrimination against LGBT people are the tightest, where they are subjected to the strictest codes of “unwritten law” as to job opportunities, social intercourse, patterns of housing, going to the back door, being called names like “sissy,” “faggot,” or “dyke,” and all the rest of the whole sorry business. Of course these things, in themselves, need not and usually do not involve “state action,” and hence the [F]ourteenth [A]mendment cannot apply to them. But they can assist us in understanding the meaning and assessing the impact of state action.*

*“Separate but equal” forms of marriage—cohabitation, or even domestic partnerships with some benefits—are almost never really equal.<sup>85</sup> Sometimes this concerns small things—how names appear in a family genealogy record, or whose name appears on a child’s note from her teacher to the parents, how names appear on a work telephone roster that includes spouses, or how a maître d’ responds to a couple celebrating an anniversary. Sometimes it concerns the most vital matters—most obviously, whom one can marry, but also whether one can gain custody of his or her children, whether one can immigrate together, where one can safely and comfortably live, or whether one will be welcome in the family church, mosque, or temple. The separate world can be so disgracefully inferior that only ignorance can*

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<sup>84</sup> See Ayobami Olugbemiga, *Capitol Hill: The 7 Openly Gay and Lesbian Members of Congress*, DCINNO (Feb. 4, 2014, 4:30 PM), <http://dcinno.streetwise.co/2014/02/04/capitol-hill-the-7-openly-gay-and-lesbian-members-of-congress/> [<https://perma.cc/BLP3-H57H>].

<sup>85</sup> *Marriage, Civil Unions and Domestic Partnerships: A Comparison*, EQUALITY ME., <http://equalitymaine.org/marriage-civil-unions-and-domestic-partnerships-comparison> [<https://perma.cc/PP2M-SDSX>] (explaining the differences between marriage, civil unions, and domestic partnerships and how marriage confers the best benefits).

excuse those who have remained acquiescent members of a community that lived the Molochian child-destroying lie that put them forward as “equal,” or “rational.”

Attention is usually focused on these inequalities as things in themselves, correctable by detailed decrees. I am more interested in their very clear character as *evidence* of what *same-sex marriage prohibitions* mean to the people who impose *them* and to the people who are subjected to *them*. This evidentiary character cannot be erased by one-step-ahead-of-the-marshall correction, *though this is precisely how gay rights have proceeded—incrementally and not in the sudden rush some have wrongly claimed brings us now to the marriage cases.*<sup>86</sup>

Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been “equal” or “rational” in intent, in total social meaning and impact? “Thy speech maketh thee manifest . . .”; *Same-sex marriage prohibitions*, in all visible things, speak only haltingly any dialect but that of inequality *and irrationality*.

Further arguments could be piled on top of one another, for we have here to do with the most conspicuous characteristic of a whole *national* culture. It is actionable defamation to call a *straight man gay*.<sup>87</sup> *Even effeminate or masculine affect, in the “wrong” body, puts one in the inferior “gay” category for many social purposes.*<sup>88</sup> *And even many of those who would defend gay people’s rights would feel great offense, or worse, if misread or labeled as “gay.”*<sup>89</sup> [T]his is the way in which one deals with a taint, such as a carcinogen in cranberries.

The various items I have mentioned differ in weight; not every one would suffice in itself to establish the character of *same-sex marriage prohibitions*. Taken together they are of irrefragable strength. The society that has just lost the *gay man or lesbian as a criminal*, that has just lost out in an attempt to *deny him or her local law protection and more*, the society that views his *or her sexuality* as a contamination and his *or her name* as an insult, the society that extralegally imposes on him *or her humiliating marks of low caste* and that until yesterday kept him *or her* in line by *criminal laws and even violence*—this society, careless of his *or her* consent, moves to cut off *access to marriage*. The Court that refused to see *the inequality and irrationality of this as a matter of constitutional law, or that insisted instead that the*

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<sup>86</sup> See Jonathan Mann, *Slow But Sure Progress on Gay Rights in the U.S.*, CNN (Dec. 4, 2010, 8:14 AM), <http://www.cnn.com/2010/US/12/03/mann.gay.lesbian.military/> [<https://perma.cc/5GAD-WKC3>].

<sup>87</sup> See *Manale v. City of New Orleans*, 673 F.2d 122 (5th Cir. 1982) (holding that a police officer’s remarks of a fellow officer being a “little fruit” constituted unlawful and inflammatory defamation).

<sup>88</sup> See Despina Ladi, *My Mother Insisted I Was Gay—but I’m Not*, GUARDIAN (Dec. 13, 2014, 1:45 AM), <https://www.theguardian.com/lifeandstyle/2014/dec/13/my-mother-insisted-i-was-gay-but-im-not> [<https://perma.cc/STE7-6RQ3>] (explaining how a man was labeled gay for his “feminine” traits and desires).

<sup>89</sup> See Demitri Levantis, *Why I Am a Straight Man for Gay Rights*, GAY STAR NEWS (Apr. 25, 2013), <http://www.gaystarnews.com/article/why-i-am-straight-man-gay-rights250413/#gs.null> [<https://perma.cc/EXM5-52G7>] (explaining how the author was labeled gay for his support of the LGBT movement through his employment at Gay Star News).

*matter should be relegated to the political process and majoritarian lawmaking*,<sup>90</sup> would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact.

I have stated all these points shortly because they are matters of common notoriety, matters not so much for judicial notice as for the background of educated *people* who live in the world. A court may advise itself of them as it advises itself of the facts that we are “a religious people,” that the country is more industrialized than in Jefferson’s day, that children are the natural objects of fathers’ bounty, that criminal sanctions are commonly thought to deter, that steel is a basic commodity in our economy, that the imputation of unchastity is harmful to a woman. Such judgments, made on such a basis, are in the foundations of all law, decisional as well as statutory; it would be the most unneutral of principles, improvised *ad hoc*, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of *same-sex marriage prohibitions is to put gay men and lesbians* in a position of walled-off inferiority *with respect to the most intimate and profound of relationships*—or the other equally plain fact that such treatment is hurtful to human beings. Southern courts, on the basis of just such a judgment, have held that the placing of a white person in [*an African-American*] railroad car is an actionable humiliation; must a court pretend not to know that the [*African-American*] situation there is humiliating? *So it is with the prohibition on same-sex marriage. Placing same-sex couples within the institution may offend some heterosexual or religious people.*<sup>91</sup> *But courts cannot pretend to know the deeper humiliation suffered by the couple whose separate but not equal options are a domestic partnership, or low profile cohabitation.*

I think that some of the artificial mist of puzzlement called into being around *the marriage* question originates in a single fundamental mistake. The issue is seen in terms of what might be called the metaphysics of sociology: “Must *Same-Sex Marriage Prohibitions* Amount to Discrimination?” That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether *inequality and irrationality inhere in these prohibitions where imposed by law in the twenty-first century* in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.

Now I need not and do not maintain that the evidence is all one way; it never is on issues of burning, fighting concern. Let us not question here the good faith of

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<sup>90</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26 (2015) (Roberts, C.J., dissenting) (arguing against the majority’s decision by claiming that the five members of the majority overstepped their constitutional bounds by stating what the law *should be* instead of what the law *is*); *id.* at 2626–31 (Scalia, J., dissenting) (explaining that the majority’s decision takes the issue out of the political process and therefore out of the hands of the citizenry).

<sup>91</sup> See *Marriage and Religious Freedom Act Backgrounder*, *supra* note 80.

those who assert that *same-sex marriage prohibitions represent* no more than an attempt to furnish a wholesome opportunity for parallel development of *traditional marriages and families*;<sup>92</sup> let us rejoice at the few scattered instances they can bring forward to support their view of the matter. But let us then ask which balance-pan flies upward.

The case seems so one sided that it is hard to make out what is being protested against when it is asked, rhetorically, how the Court can possibly advise itself of the real character of *the same-sex marriage prohibition*. It seems that what is being said is that, while no actual doubt exists as to what *the same-sex marriage prohibition* is for and what kind of societal pattern it supports and implements, there is no ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals. But surely, confronted with such a problem, legal acumen has only one proper task—that of developing ways to make it permissible for the Court to use what it knows; any other counsel is of despair. And, equally surely, the fact that the Court has assumed as true a matter of common knowledge in regard to broad societal patterns, is (to say the very least) pretty far down the list of things to protest against.

I conclude, then, that the Court had the soundest reasons for judging that *same-sex marriage prohibitions violate* the [F]ourteenth [A]mendment. These reasons make up the simple syllogism with which I began: The [F]ourteenth [A]mendment commands equality and rationality, and these prohibitions as to such a basic liberty constitute irrational inequality.

Let me take up a few peripheral points. It is true that the specifically hurtful character of *same-sex marriage prohibitions*, as a net matter in the life of each *gay person*, may be hard to establish. *Not all want marriage, care about exclusion from it, or think it is a wise end for the movement to pursue*. It seems enough to say of this that no such demand is made of other constitutional rights. To have a confession beaten out of one might in some particular case be the beginning of a new and better life. To be subjected to a racially differentiated curfew might be the best thing in the world for some individual boy. A man might ten years later go back to thank the policeman who made him get off the platform and stop making a fool of himself. Religious persecution proverbially strengthens faith. *Not all heterosexual people believe in marriage or want any part of it*.<sup>93</sup> We do not ordinarily go that far, or look so narrowly into the matter. That a practice, on massive historical evidence and in

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<sup>92</sup> See *Ten Arguments From Social Science Against Same-Sex Marriage*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=if04g01> [<https://perma.cc/B3R4-QQQG>] (arguing against same-sex marriage by asserting that children need both a mother and a father, that same-sex marriage would isolate marriage from its procreative purpose, and that same-sex marriage would further diminish the expectation of paternal commitment).

<sup>93</sup> See Helen Smith, *8 Reasons Straight Men Don't Want to Get Married*, HUFFINGTON POST (June 20, 2013, 8:29 AM), [http://www.huffingtonpost.com/helen-smith/8-reasons-men-don't-want-t\\_b\\_3467778.html](http://www.huffingtonpost.com/helen-smith/8-reasons-men-don't-want-t_b_3467778.html) [<https://perma.cc/JVY7-NHHN>].

common sense, has the designed and generally apprehended effect of putting its victims at a disadvantage, is enough for law. At least it always has been enough.

I also can heartily concur in the judgment that *the marriage prohibition* harms *straights* as much as it does *gay people*. Sadism rots the policeman; the suppressor of thought loses light; the community that forms into a mob, and goes down and dominates a trial, may wound itself beyond healing. Can this reciprocity of hurt, this fated mutuality that inheres in all inflicted wrong, serve to validate the wrong itself?

Finally it is doubtless true that *the same-sex marriage cases* represented a choice between two kinds of freedom of association, *two versions of marriage*.<sup>94</sup> Freedom from the massive wrong of *prohibitions on same-sex marriage* entails a corresponding loss of freedom on the part of *those who want the public meaning of marriage to include only their unions, and who must now associate with the concept of marriage so altered*.<sup>95</sup> It is possible to state the competing claims in symmetry, and to ask whether there are constitutional reasons for preferring the *same-sex couples'* desire for merged participation in *the institution of marriage to the dissenting persons'* desire for an institution without these same-sex marriages in proximity.

The question must be answered, but I would approach it in a way which seems to me more normal—the way in which we usually approach comparable symmetries that might be stated as to all other asserted rights. The [F]ourteenth [A]mendment forbids inequality and irrational denial of liberty by law.<sup>96</sup> It was surely anticipated that the following of *these directives* would entail some disagreeableness. The disagreeableness might take many forms; the *straight* white man, for example, might dislike having an *African-American gay* neighbor, or dislike having *lesbians with school children in his PTA community*. When the *directives* of equality and liberty cannot be followed without displeasing the *dissenters*, then something that can be called a “freedom” of the *dissenters* must be impaired. If the [F]ourteenth [A]mendment commands equality and liberty,<sup>97</sup> then the status of the reciprocal “freedom” is automatically settled.

I find reinforcement here, at least as a matter of spirit, in the [F]ourteenth [A]mendment command that *gay men and lesbians* shall be “citizens” of their States. It is hard for me to imagine in what operative sense a man could be a “citizen” without his fellow citizens once in a while having to associate with him. If, for example, his “citizenship” results in his *or her* election to the School Board, the *straight parents* may put him *or her* off to one side of the room, but there is still

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<sup>94</sup> See Scott Shackford, *Libertarians, Gay Marriage, and Freedom of Association: A Primer*, REASON.COM (Aug. 19, 2014), <http://reason.com/archives/2014/08/19/libertarians-gay-marriage-and-freedom> [<https://perma.cc/FMG9-WMNE>] (explaining that the freedom of association allows for gays to get married but for objectors to refuse gay couples service, such as refusing to supply a wedding cake to a gay couple).

<sup>95</sup> *Id.*

<sup>96</sup> U.S. CONST. amend. XIV, § 1.

<sup>97</sup> *Id.*

some impairment of their freedom “not to associate.” That freedom, in fact, exists only at home; in public, we have to associate with anybody who has a right to be there. *Our public institutions—like marriage—need to include them.* The question of our right *to be free of any taint of association with them* is concluded *by their* right to be there.

I am not really apologetic for the simplicity of my ideas *on the same-sex marriage* cases. The decisions call for mighty diastrophic change *in traditional notions of marriage.* We ought to call for such change only in the name of a solid reasoned simplicity that takes law out of artfulness into art. Only such grounds can support the nation in its resolve to uphold the law declared by its Court; only such grounds can reconcile the *dissenting states* to what must be. *Elegantia juris*<sup>98</sup> and conceptual algebra have here no place. Without pretending either to completeness or to definitiveness of statement, I have tried here to show reasons for believing that we as lawyers can without fake or apology present to the lay community, and to ourselves, a rationale of *the marriage cases* that rises to the height of the great argument.

These judgments, like all judgments, must rest on the rightness of their law and the truth of their fact. Their law is right if the equal protection *and due process clauses* in the [F]ourteenth [A]mendment are to be taken as stating, without arbitrary exceptions, a broad principle of practical equality *and liberty for gay men and lesbians*, inconsistent with any device that in fact relegates *them* to a position of inferiority. Their facts are true if it is true that *same-sex marriage prohibitions* are actually conceived and *do* actually function as a means of keeping *same-sex couples* in a status of inferiority *as to a basic liberty.* I dare say at this time that in the end the decisions will be accepted by the profession on just that basis. Opinions composed under painful stresses may leave much to be desired. But the judgments, in law and fact, are as right and true as any that ever was uttered.

## II. BLACK’S IMAGINED RESPONSE TO CHIEF JUSTICE ROBERTS<sup>99</sup>

*Obergefell* is sure to elicit a sea of writing critical of the outcome and reasoning. Many of the objections are likely to track the dissent of Chief Justice Roberts. Roberts asked whether we might better heed a view of judicial power and constitutional meaning that is “less pretentious” because it does not “suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst

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<sup>98</sup> Elegant form in law; “logical coherence of part with part.” *Overview elegantia juris*, OXFORD REFERENCE (quoting Oliver Wendell Holmes, Jr.), <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095746684> [<https://perma.cc/7WXK-UUU6>].

<sup>99</sup> In this section of the Essay, the Author continues to discuss the work of Charles Black and uses it as a foundation. Words that appear in plain text are those of the Author. Words that are bolded are statements of Charles Black, while italicized and bolded statements are edits to Charles Black’s work done by the Author.

the bonds of that history and tradition.”<sup>100</sup> He asked, bristling with indignation, “[J]ust who do we think we are?”<sup>101</sup> and cautioned as he did in *Schuette v. BAMN* against demeaning the democratic process by “presum[ing] that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”<sup>102</sup> The same-sex marriage cases called to his mind two of the Court’s most notorious substantive due process cases—*Dred Scott v. Sandford*<sup>103</sup> and *Lochner v. New York*.<sup>104</sup> The Chief Justice condemned the Court for its “extravagant conception of judicial supremacy”<sup>105</sup> in concluding that constitutional rights had been violated and warned of a future in which such unbridled judicial power might lead to other invasions of democratic processes.<sup>106</sup>

If this were not enough to damn the majority opinion, the Chief Justice accused the majority of defamatory impulses.<sup>107</sup> He claimed the Court sullied “the other side of the debate” by characterizing the traditional definition of marriage as demeaning to the dignity of same-sex couples.<sup>108</sup> Doing so was equivalent, the Chief Justice burned, to calling defenders of traditional marriage laws *bigots*.<sup>109</sup>

Roberts ended his dissent by saying—in what could only be read as clenched-teeth sarcasm—that those who favor same-sex marriage should “by all means celebrate today’s decision. . . . But do not celebrate the Constitution. It had nothing to do with it.”<sup>110</sup>

What might Black have said to these dire charges?

To begin, Black likely would remonstrate that it was no more *extravagant* a conception of judicial power for the Court to hold in favor of liberty and equality in the same-sex marriage cases, than it was for the Court in *Brown* to do so in the school segregation cases. Undoing the entrenched social and legal practices of the segregated South was no timid or sparing judicial act. As for the charge of judicial arrogance, we should be grateful that the Warren Court had the temerity to “burst the bonds of *that* history and tradition.”<sup>111</sup> Why is the judicial decision to defy tradition here categorically different, or worse?

If doing so makes those who oppose the decision feel they have been painted as bigots, well, this may be an unavoidable cost of taking sides in disputes about liberty

<sup>100</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

<sup>101</sup> *Id.* at 2612.

<sup>102</sup> *Id.* at 2624 (quoting *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014)).

<sup>103</sup> 60 U.S. 393 (1856).

<sup>104</sup> 198 U.S. 45 (1905).

<sup>105</sup> *Obergefell*, 135 S. Ct. at 2624.

<sup>106</sup> *See id.* at 2611–26.

<sup>107</sup> *Id.* at 2626.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (emphasis added).

and equality. **When the directives of equality and liberty cannot be followed without displeasing the dissenters, then something that can be called a “freedom” of the dissenters must be impaired. If the [F]ourteenth [A]mendment commands equality and liberty, then the status of the reciprocal “freedom” is automatically settled.**

And if some insist that the prohibition on same-sex marriage was never meant to do harm to same-sex couples and conveyed no dignity harm worthy of constitutional attention, we should again respond *with one of the sovereign prerogatives of philosophers—that of laughter.*

Here again, Black might say, **“Thy speech maketh thee manifest . . .” *Same-sex marriage prohibitions, in all visible things, speak only haltingly any dialect but that of inequality and irrationality.***

In short, the Constitution has *everything* to do with it. To insist otherwise is to blink in the face of Fourteenth Amendment reality, not merely stark social reality. Doing so was wrong in 1954, and was still wrong in 2015.

**May not our living generation take the words [of the Declaration of Independence] not as a statement of creation already performed, but as an invitation to participate in that ongoing work of creation whose goal they define?**

It may indeed, Black would argue. Then, and likely now.

Black has the better of this argument, for reasons that make enduring, humane, and constitutional sense.

The holding in *Obergefell*, like the holding in *Brown*, will echo through the ages. Both of these terrain-altering, controversial, and audacious Fourteenth Amendment decisions were lawful, in the sense that Black defined constitutional lawfulness decades ago. Both decisions better perfected constitutional liberty and equality, and both rested on the “overwhelming weight of reason.”<sup>112</sup>

The Roberts dissent, in contrast, may echo through the ages as well, but not in a good way. I predict it will become the opinion in *Obergefell* deemed the most extravagant, the most rhetorically excessive, and the most terribly and utterly wrong. This is all the more lamentable given that the opinion was written long after *Brown*, and long after Black showed us in such moving and clear ways why *Brown* was lawful.<sup>113</sup> Black’s insights were original. We may not be able to match him, but we can honor and emulate him.

#### CONCLUSION

Black’s scholarship was poetic and athletic, discerning and sensitive, intellectually sharp and morally compelling. He painted with all of the colors, not just black and white, vitriolic red or conservative pastels. His was the voice of constitutional and full-spectrum justice in a pure and rare sense.

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<sup>112</sup> *Lawfulness*, *supra* note 2, at 421.

<sup>113</sup> *See id.*

Indeed, his voice was Lincolnesque—that is to say, informed by the best visions of the Framers, Biblical and Shakespearean in tone and allusions, but also chastened by the tragic consequences of past constitutional sins and dedicated to forging a new path to redemption and reconstruction. Our current preoccupation with eighteenth-century Framers and their revolutionary enthusiasms misses this profoundly important, post-revolutionary, Reconstruction insight. Black did not. Black urged constitutional change to move us away from tragedy and our original constitutional sins.<sup>114</sup> Black saw the caste in common practices and traditional institutions, and he found the courage to defy it.<sup>115</sup>

So should we, for “any other counsel is of despair.”<sup>116</sup>

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<sup>114</sup> *See id.* at 426–28.

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* at 428.