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## Exploring the Boundaries of Obergefell

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# NOTES

## EXPLORING THE BOUNDARIES OF *OBERGEFELL*

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## INTRODUCTION

Nino Esposito and Drew Bosee have been in a committed same-sex relationship for forty-five years and “married in almost every sense of the word.”<sup>1</sup> Along with millions around the United States, they celebrated when the Supreme Court announced its ruling in *Obergefell v. Hodges*—that same-sex couples have a constitutional right to marry.<sup>2</sup> In a 5-4 decision, the Court held that “the right to marry is a fundamental right inherent in the liberty of the person,” and that individual states cannot discriminate against a couple on the basis of sexual orientation.<sup>3</sup> Focusing on “the transcendent importance of marriage,” the Court identified marriage as a stabilizing force in our social order.<sup>4</sup> The Court concluded that although homosexuality had been considered taboo in the past, changing dynamics in our society, an evolution of our cultural mores, and a robust debate about same-sex marriage reinforced the concept of marriage as a fundamental right that may not be denied to same-sex couples.<sup>5</sup>

However, Nino and Drew still cannot marry.<sup>6</sup> In 2012, in order to gain legal recognition of their relationship, Drew allowed Nino to adopt him.<sup>7</sup> And as adoptive “father and son,” Nino and Drew are now prohibited from marrying under their home state of Pennsylvania’s incest statute, which prohibits marriage between a parent and child, including the “relationship of parent and child by adoption.”<sup>8</sup> Although sympathetic to their situation, a Pennsylvania judge believed that under the current law, including *Obergefell*, he

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1. Yanan Wang, *These Gay Men Became ‘Father & Son.’ Now They Want to Get Married but Can’t.*, WASH. POST (Nov. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/05/these-gay-men-became-father-and-son-now-they-want-to-get-married-but-cant/> [<https://perma.cc/F4DX-5FE7>].

2. See Avianne Tan, *Celebrations Break Out After Same-Sex Marriage Legalized Nationwide*, ABC NEWS (June 26, 2015, 1:01 PM), <http://abcnews.go.com/US/celebrations-break-sex-marriage-legalized-nationwide/story?id=32051778> [<https://perma.cc/7QLC-AKGL>].

3. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

4. *Id.* at 2594.

5. *See id.* at 2605-07.

6. *See* Wang, *supra* note 1.

7. *See id.* Adoption was a common choice for many same-sex couples who were frustrated with the inability to have their relationship legally recognized. *See id.*

8. 18 PA. CONS. STAT. § 4302 (2016).

was unable to annul the adoption to allow the couple to legally marry.<sup>9</sup>

Incest remains one of the most entrenched taboos in American society.<sup>10</sup> Opponents of same-sex marriage have regularly seized on incest when arguing that the legalization of same-sex marriage will lead to a new “parade of horrors.”<sup>11</sup> Perhaps more importantly, dissenters from the Supreme Court’s recent substantive due process cases have also noted that the doctrinal standards developed in the area of “substantive” due process are nowhere to be found in the majority decision.<sup>12</sup> Theirs is a concern for judicial restraint that counsels against courts “creating” new fundamental rights whenever political correctness may call for it.<sup>13</sup> Yet, because incest implicates questions of sexual autonomy, privacy, reproductive rights, and marriage—all contentious areas of due process disputes—it raises substantial questions about our current prohibitions against incest and other similarly condemned relationships in light of the *Obergefell* decision.

This Note posits that the Court’s historical treatment of a “right to marry” combined with the majority’s rationale in *Obergefell* may make broad restrictions on who may marry whom unconstitutional, and that such treatment opens the door to the recognition of other

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9. See Wang, *supra* note 1.

10. JONATHAN H. TURNER & ALEXANDRA MARYANSKI, *INCEST: ORIGINS OF THE TABOO* 1 (2005) (“Humans have been fascinated by incest for all of recorded history.”).

11. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”); *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (“[I]f respondent’s submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.”); see also Y. Carson Zhou, *The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187, 190 (2016) (“Incest, in short, is now treated as a constitutional laugh-out-loud test; if a court decision compels the decriminalization of incest, the decision must not have been constitutionally compelled.”); Wesley Pruden, *Why Gays ‘Can’t Get No Satisfaction,’* WASH. TIMES (June 29, 2015), <http://www.washingtontimes.com/news/2015/jun/29/wesley-pruden-slippery-slope-of-supreme-court-gay/> [<https://perma.cc/GCP9-5U6J>] (noting that the decision in *Obergefell* will likely lead to further litigation in determining the right to marry).

12. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting).

13. See *id.* at 2616; see also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (noting that courts “do not sit as a super-legislature to weigh the wisdom of legislation”).

relationship constructs, including incestuous relationships between consenting adults. Some scholars have argued that the criminalization of incest, as in the sexual act itself, may no longer enjoy any constitutional validity,<sup>14</sup> but very few have considered how the Court's changing jurisprudence may affect civil bans on marriage between close relatives.<sup>15</sup> The intent of this Note is not to advocate for the recognition of incestuous marriage, or for a change in any current laws. Rather, this Note analyzes how the majority's rationale for finding that the right to marry extends to same-sex couples raises significant questions regarding the historical justification for blanket bans on other relationship constructs.<sup>16</sup> In doing so, this Note uses incest as a template for examining the rationale of such prohibitions.

Part I introduces the taboo against incest and the present state of incest laws in the United States. Part II briefly traces the development of the fundamental right to marriage and focuses on how the *Obergefell* majority's rationale alters previous "substantive" due process jurisprudence. Part III argues that the legal justification for complete bans on incestuous marriage between consenting adults fails to meet an exacting scrutiny and that, as a result, such laws are unconstitutional. This Note also proposes that, if incest laws are unconstitutional, then states may still be able to regulate such marriages under the "undue burden" analysis announced by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>17</sup> Finally, Part IV examines some counterarguments to this proposed theory and ultimately concludes that, although the jurisprudential landscape may require states to allow incestuous marriages between consenting adults, the lack of large-scale public support and entrenched attitudes on the Court make it unlikely that any such change will occur in the near future.

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14. See Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 337-38 (2004).

15. See, e.g., Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 259 (1984).

16. Although this Note will focus on adult consensual incest, it may be possible to extrapolate the arguments to other constructs. For an excellent discussion of how *Obergefell* will impact polyamorous marriages, see Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89 (2015).

17. 505 U.S. 833, 876-77 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

## I. THE INCEST TABOO

Before beginning any discussion of the legal implications regarding incestuous marriage, an initial understanding of the taboo is in order. This Part reviews the history of incest, the empirical evidence and statistics related to the incidence of incest, and the current state of incest laws in the United States.

The word incest does not have a single meaning; the word itself can bring different images to mind for different people.<sup>18</sup> It is essential to understand what courts and legislatures mean when they speak of incest in the law. Incest is generally defined as “[s]exual relations between family members or close relatives, including children related by adoption.”<sup>19</sup> Individual legislatures determine what degree of familial relationship is prohibited. This degree is referred to as consanguinity; the closer the relationship between people, the greater the consanguinity.<sup>20</sup> As one scholar put it, in the legal forum “[i]ncest’ describes a relationship the government has chosen to proscribe, drawing the line somewhere on the skin of the consanguineous onion.”<sup>21</sup> A state may also choose to define incest not only by blood but by marriage as well; this is called affinity.<sup>22</sup>

Under these definitions, there are two primary forms of incest that may occur. The first occurs when an adult parent, relative, or older sibling of a minor takes advantage of that child.<sup>23</sup> This type of incest is not the subject of this Note; it is properly criminalized

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18. Brendan J. Hammer, Note, *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 DEPAUL L. REV. 1065, 1065 (2007) (“Perhaps [incest] is the relatively benign image of ‘kissin’ cousins’ in a moonshine-fueled backwoods pairing. Perhaps it is the sickening thought of the violent sexual abuse of a child at the hands of her father or brother.” (footnote omitted)).

19. *Incest*, BLACK’S LAW DICTIONARY (10th ed. 2014).

20. “Consanguinity” is defined as “[t]he relationship of persons of the same blood or origin.” *Consanguinity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

21. Hammer, *supra* note 18, at 1068.

22. *See id.*; *see also* Commonwealth v. Rahim, 805 N.E.2d 13, 15 (Mass. 2004) (analyzing the current status of incest laws based on marriage, rather than blood). For a further discussion of the regulation of incest through affinity, see Christine McNiece Metteer, *Some “Incest” Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL’Y 262 (2000).

23. *See* Note, *Inbred Obscurity: Improving Incest Laws in the Shadows of the “Sexual Family,”* 119 HARV. L. REV. 2464, 2465 (2006).

through rape, sexual assault, and abuse statutes.<sup>24</sup> The second type of incest is when a consensual relationship occurs between competent, consanguineous adults.<sup>25</sup> This Note focuses on this type of incestuous relationship.

### A. *The History of Incest*

The concept of incest knows nearly no geographical or cultural bounds. It has been argued that the incest taboo is so widespread that it “is generally regarded ... [as] the evolutionary Rubicon of human social life.”<sup>26</sup>

Literature and mythology of many cultures are rife with references to incestuous relationships. In Greek mythology, Zeus and Hera were brother and sister as well as husband and wife and the parents of a number of other gods.<sup>27</sup> In the folklore of Mesopotamia, Enil created life by committing incest with his mother, Ki.<sup>28</sup> Perhaps closer to Western culture, the Old Testament of the Christian Bible is replete with examples of consensual incest.<sup>29</sup> One could argue that the first occurrence of sexual relations in history, Adam copulating with Eve, was incestuous.<sup>30</sup>

The occurrence of incest was not only limited to stories. Egyptian law permitted marriage between brothers and sisters, although it was mostly limited to the royal families.<sup>31</sup> To this day, in certain areas of India and southeastern Asia, it is a widely practiced custom for men to marry their biological nieces.<sup>32</sup> In Western culture, notables such as Albert Einstein and Charles Darwin both married

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24. See generally *id.* (discussing the application of criminal laws to instances of consensual and nonconsensual incest).

25. See *id.* at 2465.

26. Seymour Parker, *The Waning of the Incest Taboo*, 11 LEGAL STUD. F. 205, 206 (1987).

27. J.M. Hunt, *The Olympians*, GREEK MYTHOLOGY, [http://www.desy.de/gna/interpedia/greek\\_myth/olympian.html](http://www.desy.de/gna/interpedia/greek_myth/olympian.html) [<https://perma.cc/Q8BY-NM48>]; see also, e.g., P.B. Adamson, *Consanguinous Marriages in the Ancient World*, 93 FOLKLORE 85, 85 (1982).

28. See Adamson, *supra* note 27, at 85.

29. See, e.g., *Genesis* 11:26-29 (uncle marrying his niece); *Genesis* 19:31-38 (father sleeping with his daughters); *Genesis* 20:12-13 (brother marrying his half-sister).

30. Cf. *Genesis* 4:1-2.

31. See Russell Middleton, *Brother-Sister and Father-Daughter Marriage in Ancient Egypt*, 27 AM. SOC. REV. 603, 603 (1962).

32. See 1 ENCYCLOPAEDIA OF HEALTH, NUTRITION AND FAMILY WELFARE 166 (S. Wal & Ruchi Mishra eds., 2000).

their first cousins.<sup>33</sup> Darwin and his wife even had ten children together.<sup>34</sup> Frequent consanguineous unions occurred within the well-respected and well-known Rothschild family, and in numerous royal families, most notably the Hapsburgs and the royal families of Hawaii.<sup>35</sup>

None of this should downplay the seriousness of the taboo against incest. While it may appear that primitive cultures would be more likely to allow incest, an early study of almost 250 different societies found that *all* of them had banned relationships between immediate family members.<sup>36</sup> The study emphasized that the “incest taboos and exogamous restrictions ... are characterized by a peculiar intensity and emotional quality.”<sup>37</sup> Both normative and directive forces within society work to generate proscriptions against incestuous behavior.<sup>38</sup> Although incest was not criminalized at English common law, it was contrary to church law.<sup>39</sup> Bishops had wide discretion in assigning punishment for such an offense.<sup>40</sup> Even within literature, incest was not always considered an acceptable act. One of the most famous

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33. See Nikki Racklin, *We Are Family*, *GUARDIAN OBSERVER* (Dec. 8, 2002), <https://www.theguardian.com/theobserver/2002/dec/08/magazine.features7> [<https://perma.cc/R4TQ-YEGL>].

34. See *id.*

35. See H.E. Malden, *Historic Genealogy*, 4 *TRANSACTIONS ROYAL HIST. SOC'Y* 103, 105-06, 110, 112-13 (1889); Joanne Carando, *Hawaiian Royal Incest: A Study in the Sacrificial Origin of Monarchy*, 1 *TRANSATLANTICA*, no. 1, 2002, at 2-3, 10-11, <https://transatlantica.revues.org/525> [<https://perma.cc/L2RW-7GF5>]; Richard Conniff, *Go Ahead, Kiss Your Cousin: Heck, Marry Her If You Want To*, *DISCOVER* (Aug. 1, 2003), <http://discovermagazine.com/2003/aug/featkiss> [<https://perma.cc/SJ2T-8T7G>].

36. See TURNER & MARYANSKI, *supra* note 10, at 65-66; see also KARIN C. MEISELMAN, *INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS* 4 (1978).

37. TURNER & MARYANSKI, *supra* note 10, at 66 (alteration in original) (quoting GEORGE PETER MURDOCK, *SOCIAL STRUCTURE* 288 (1949)).

38. See *id.* at 67-68, 69 tbl.3.2 (discussing the cultural influences affecting the incest taboo and the level of effect each has on different incestuous relationships).

39. See *People v. Baker*, 442 P.2d 675, 677-78 (Cal. 1968) (“Incest was not a common law *crime* in England; punishment was left solely to the ecclesiastical courts.”). Incest was criminalized in Britain through the Punishment of Incest Act in 1908. Punishment of Incest Act 1908, 8 Edw. 7, c. 45; see also VIKKI BELL, *INTERROGATING INCEST: FEMINISM, FOUCAULT AND THE LAW* app. 1 at 186-88 (1993) (discussing the current state of incest laws in England and Scotland).

40. See 1 R.H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S*, at 50, 628-29 (2004).

depictions of incest, the story of the Greek king Oedipus and his incestuous relationship with his mother, ends in tragedy and death.<sup>41</sup>

### *B. Empirical Evidence of Incest*

Available statistics show that the incidence of consanguineous incest is higher than anecdotal evidence would suggest. For example, in areas of northern Africa, central and western Asia, and some parts of southern Asia, studies have shown that consanguineous relationships account for nearly 20 percent of all unions, and in some areas may even exceed 50 percent.<sup>42</sup> In Japan, the rate of incestuous marriages is estimated to hover around 3.9 percent, but in areas such as Fukushima and Hirando, it may exceed 10 percent.<sup>43</sup> However, given the social views toward incestuous relationships, reliable statistics on the occurrence of such relationships are difficult to come by.<sup>44</sup> Even the global statistics that are released offer a disclaimer that they reflect only an approximation of what is potentially a much larger actual incidence of incest.<sup>45</sup>

### *C. Incest Laws in the United States*

As in England, incest was not a common law crime in the United States.<sup>46</sup> The criminal statutes for incest vary widely by state. Rhode

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41. See SOPHOCLES, *OEDIPUS THE KING* 80, 92-94 (Stephen Berg & Diskin Clay trans., Oxford Univ. Press 1978). *But see* HOMER, *THE ODYSSEY* bk. XI (E.V. Rieu trans., 1946) (discussing the Oedipus story and allowing Oedipus to continue to live on and rule Thebes after his incestuous marriage).

42. See Alan H. Bittles, *The Role and Significance of Consanguinity as a Demographic Variable*, 20 *POPULATION & DEV. REV.* 561, 563 (1994).

43. See *id.* (noting the decline in first cousin unions from approximately 8 to 5 percent in the 1950s to 3.9 percent in the 1980s); see also Alan H. Bittles, *Empirical Estimates of the Global Prevalence of Consanguineous Marriage in Contemporary Societies* 15-17 tbl.1, 24-40 tbl.3 (Morrison Inst. for Population & Res. Studies, Stanford Univ., Working Paper No. 74, 1998).

44. See TURNER & MARYANSKI, *supra* note 10, at 53 ("Because incest is prohibited ... it is difficult to get reliable data on rates of incest in contemporary families.").

45. See Hammer, *supra* note 18, at 1070-71 ("Global statistics on the prevalence of blood-related marriage provide only a rough approximation of what is, potentially, the larger number of instances of consanguineous sexual relations.").

46. See Graham Hughes, *The Crime of Incest*, 55 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 322, 323 (1964).

Island repealed all criminal laws related to incest in 1989.<sup>47</sup> Ohio, which includes incestuous acts under its definition of “sexual battery,” does not prohibit sex between brothers and sisters.<sup>48</sup> In Michigan and New Jersey, incest is “a subcategory of criminal sexual conduct” when either party to the relationship is between thirteen and sixteen years old;<sup>49</sup> however, neither of those states prohibit incest if both individuals are eighteen or older.<sup>50</sup> Florida’s incest law is limited to only sex between a man and a woman who are related by blood,<sup>51</sup> even though homosexual incest—between a mother and daughter or father and son—is likely more common than previously thought.<sup>52</sup> Indeed, fewer states currently prohibit sex between first cousins than those that banned sodomy before the ruling in *Lawrence v. Texas*.<sup>53</sup>

All fifty states do, however, have some form of regulation banning incestuous marriage, but the degree of consanguinity these laws prohibit varies widely.<sup>54</sup> Certain states allow marriages between individuals who are related by affinity—that is, step-parents and step-siblings—rather than by consanguinity.<sup>55</sup> Bans on incestuous marriage between members of the nuclear family are universal, but the United States appears to be unique in Western culture in explicitly banning marriage between first cousins, even though, as noted above, sexual relations between such relatives is generally allowed.<sup>56</sup> Some states specifically tie criminal punishment to their marriage statutes. In these states, parties that are banned from marrying also face criminal charges for engaging in sexual

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47. 11 R.I. GEN. LAWS § 11-6-4 (repealed 1989).

48. OHIO REV. CODE ANN. § 2907.03(A)(5) (West 2016).

49. See Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1564 (1998).

50. See McDonnell, *supra* note 14, at 349 n.74 (citing MICH. COMP. LAWS §§ 750.520b, 750.520c (1984); N.J. STAT. ANN. § 2C:14-2 (West 1979)).

51. FLA. STAT. § 826.04 (2017).

52. See TURNER & MARYANSKI, *supra* note 10, at 53, 59.

53. See McDonnell, *supra* note 14, at 350.

54. See NAT’L DIST. ATTORNEYS ASS’N, STATUTORY COMPILATION REGARDING INCEST STATUTES (2013), <http://www.ndaa.org/pdf/Incest%20Statutes%202013.pdf> [<https://perma.cc/P6Q6-6REJ>].

55. Compare CONN. GEN. STAT. § 46B-21 (2015) (prohibiting marriages of those related by blood or marriage), and VT. STAT. ANN. tit. 15, § 511 (2016) (same), with CAL. FAM. CODE § 2200 (West 2016) (limiting the definition of “incestuous marriages” to those relatives who are of the “half as well as the whole blood”).

56. See McDonnell, *supra* note 14, at 349.

relations.<sup>57</sup> Rhode Island's law contains an exception to allow marriages that would otherwise be void under its incest statutes if those marriages are permitted by the Jewish religion.<sup>58</sup> This wide variety of restrictions may also raise problems for those individuals who may be allowed to marry in one state but have difficulty getting their marriage recognized when they move to a state with broader prohibitions on incestuous marriage.<sup>59</sup>

## II. DEFINING THE RIGHT TO MARRY

The concept of substantive due process and individual rights has developed over time.<sup>60</sup> The right to marriage, and its associated rights of procreation, has raised particularly controversial questions for the Court.<sup>61</sup> This Part traces the development of the right to marry, beginning with the original formulation and doctrine used by the Supreme Court in defining the right. It then examines the *Obergefell* decision in detail and discusses how Justice Kennedy, and particularly the majority opinion he authored, has altered substantive due process jurisprudence regarding the right to marry. Finally, this Part briefly concludes by synthesizing the different doctrinal threads and identifying the current state and understanding of the fundamental right to marriage.

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57. See, e.g., WIS. STAT. § 944.06 (2017) (criminalizing incest when the persons are "related in a degree within which the marriage of the parties is prohibited by the law of this state").

58. 15 R.I. GEN. LAWS § 15-1-4 (2017).

59. Although only briefly addressed in *Obergefell*, the Court held that other states must recognize marriages that are performed and held lawful in another state, thus rendering this issue moot. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

60. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 502 (1997); see also *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 193 (1998) (discussing the development of the Court's substantive due process jurisprudence).

61. See generally *Obergefell*, 135 S. Ct. at 2594; *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

### A. *The Court's History*

Although the extent to which the Constitution protects unenumerated rights has varied over time,<sup>62</sup> the Supreme Court has consistently recognized marriage as one of the most significant rights of an individual.<sup>63</sup> At times, the Court has focused solely on protecting the interests of each individual participating in the marriage.<sup>64</sup> At other times, the focus has been on the family as a whole unit in order to protect the significance of marriage itself and the interests of children born as a result of the marriage.<sup>65</sup> But at the core of this “right to marry” is the right to individualized choice in marriage and family relationships.<sup>66</sup>

In *Loving v. Virginia*, the Court invalidated a Virginia antimiscegenation statute banning interracial marriages.<sup>67</sup> The decision focused on application of the Equal Protection Clause, but the right to marry was characterized as a “vital personal right.”<sup>68</sup> This case alone sheds little light on the constitutional dimensions of the right to marry, but it does reinforce that a state’s power to regulate the choice a person may make regarding who to marry is not unlimited.

Similarly, in *Zablocki v. Redhail*, the Court struck down a Wisconsin statute prohibiting noncustodial parents from remarrying if they lacked the financial resources to meet their support obligations.<sup>69</sup> The Court acknowledged that the recognition of a constitutionally protected right to marry was a fundamental extension of its

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62. See McDonnell, *supra* note 14, at 338 (reviewing the history of the Supreme Court’s recognition of unenumerated rights).

63. See, e.g., *Obergefell*, 135 S. Ct. at 2594; *Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 386; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring).

64. See *Turner*, 482 U.S. at 94-95 (holding that the fundamental right to marry extends to inmates); *Loving*, 388 U.S. at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

65. See *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (“[S]o long as a parent adequately cares for his or her children ... there will normally be no reason for the State to inject itself into the private realm of the family.”); *Zablocki*, 434 U.S. at 386-87 (recognizing the right to marry as a fundamental right and the foundation of family in society).

66. See JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 629 (3d ed. 1987).

67. 388 U.S. at 12.

68. *Id.*

69. 434 U.S. at 384-86.

decisions respecting individual choice in the area of family relationships, childrearing, and childbirth.<sup>70</sup>

In *Turner v. Safley*, the Court invalidated state regulations prohibiting inmates from marrying without the permission of the warden of the prison in which the inmate was housed.<sup>71</sup> The choice of whether to engage in the act of marriage was recognized as a matter of individual choice outside the reach of state regulation.<sup>72</sup> In so holding, the Court focused on three fundamental aspects of marriage: (1) marriage is a public expression of support and commitment; (2) marriage involves a spiritual and personal dynamic; and (3) being married is a necessary condition to receiving many government benefits.<sup>73</sup> It is difficult to see how these characteristics of a marital relationship, especially the desire to publicly commit and express feelings for another, would apply with any less force to a consanguineous couple than to any other monogamous couple seeking civil recognition of their union.

The protections of the right to marry are not limited to the institution itself. In *Griswold v. Connecticut*, the Supreme Court held that marriage was deserving of protection because some liberty interest was inherent in marriage itself.<sup>74</sup> Importantly, though, the Court rejected the argument that this liberty interest was protected solely because marriage served as the basis for procreation and the rearing of children.<sup>75</sup> The Constitution limits the power of states to interfere with a couple's choice of whether to use contraception.<sup>76</sup> As a recent scholar noted: "The right to marry is not necessarily rooted in or ancillary to these constitutional rights; rather, the Court has recognized that constitutionally protected rights to sexual activity, to procreation, or to raising children exist outside the context of

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70. *Id.* at 386 ("[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.").

71. 482 U.S. 78, 100 (1987).

72. *Id.*

73. *Id.* at 95-96.

74. 381 U.S. 479, 485-86 (1965) (finding that marital privacy is a "privacy older than the Bill of Rights").

75. *See id.*

76. *See id.* (invalidating a state statute that banned couples from using contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-43 (1942) (invalidating a state statute which allowed sterilization of convicted criminals).

marriage.”<sup>77</sup> Modern evolution of the “American family” has forced the Court to consider the different ways a person may become a parent.<sup>78</sup> Individuals may become parents through adoption, artificial insemination, or even when a mother and father do not believe in the institution of marriage. All are situations in which the adults have a legitimate interest in the parent-child relationship but do not necessarily implicate the right to marry or even a right to an active sexual relationship between the parents.<sup>79</sup> But these individuals do have a right to privacy and liberty with respect to their family life under the Supreme Court’s prior decisions.<sup>80</sup> Recognition of this parent-child relationship and any subsequent constitutional protection flowing from such a recognized relationship is independent of the concept of marriage, but nonetheless can only be interfered with when a state can demonstrate a compelling interest.<sup>81</sup>

Recognition of a fundamental right to marry has not abrogated the role of the state in the regulation of marriage.<sup>82</sup> The state has been a significant player in the marriage arena throughout American history.<sup>83</sup> Such government regulation, however, is not unlimited. Although marriage, like other areas of domestic relations, is properly within the state police power, such regulations must be supported by “sufficiently important state interests and [be] closely tailored to effectuate only those interests.”<sup>84</sup> If the regulation affects an individual’s choice to marry in only an incidental way, then the Court will subject it to only minimal scrutiny.<sup>85</sup>

Incest statutes are an intentional intrusion into an individual’s right to marry because the current civil bans on incestuous

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77. Harrison, *supra* note 16, at 119-20; *see also* Michael H. v. Gerald D., 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983).

78. *See* Harrison, *supra* note 16, at 120.

79. *See id.*

80. *See* *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

81. *Troxel*, 530 U.S. at 66.

82. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). *But see* Ethan J. Leib, *Hail Marriage and Farewell*, 84 *FORDHAM L. REV.* 41, 42-44 (2015) (arguing that states may be able to and possibly should be removed completely from the marriage “business”).

83. *See generally* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000) (discussing the history of marriage in the United States).

84. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

85. *See Zablocki*, 434 U.S. at 387 n.12.

marriage directly regulate the choice of a marriage partner. If the couple falls within the defined consanguineous degree outlined by the state statute, then the marriage is invalid. Thus, these types of incest statutes should be subjected to the same type of rigorous scrutiny exhibited by the Court's earlier decisions.<sup>86</sup> Certainly the state has an interest in protecting aspects of family life, particularly the well-being of children. The question moving forward is whether such an interest is necessarily furthered or even implicated by prohibiting incestuous marriages.

### *B. The Obergefell Decision*

Even as Justice Kennedy read the result in *Obergefell v. Hodges* from the bench, the decision took on an almost canonical status. The language at the end of the majority opinion rang out as an affirmation of the plaintiffs' rights: "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."<sup>87</sup> Although the long-term effects of the decision have yet to play out, the rationale espoused by the majority may have altered the way in which the Court will analyze fundamental rights challenges. This Section examines how the Court addressed the question raised in *Obergefell*, and how it revised the roles of tradition and dignity in clarifying the fundamental rights protected under the Constitution.

#### *1. Equal Protection or Due Process?*

The question posed in *Obergefell* is deceptively simple: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex."<sup>88</sup> From a jurisprudential perspective, that question shaped how the majority decided the

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86. Cf. *Lawrence v. Texas*, 539 U.S. 558, 558, 574 (2003); *Turner v. Safely*, 482 U.S. 78, 94-95 (1987); *Zablocki*, 434 U.S. at 384-86; *Loving*, 388 U.S. at 12.

87. 135 S. Ct. 2584, 2608 (2015).

88. *Id.* at 2593.

case—the petitioners had invoked both the Due Process Clause and the Equal Protection Clause in support of their position.<sup>89</sup>

Justice Kennedy did not equivocate—the majority opinion grounded the *Obergefell* decision in the protections of the Due Process Clause.<sup>90</sup> Yet, while the majority pointed to the Due Process Clause as the basis for its decision, it tied the Equal Protection Clause to due process under the umbrella of personal dignity to help define the contours of the doctrine.<sup>91</sup> By cementing the right to marry within the protection of the Due Process Clause, the rationale espoused by Justice Kennedy revolutionized substantive due process analysis in a way that will have ramifications for all future fundamental rights challenges.

## 2. *The Role of Tradition*

Perhaps more importantly, *Obergefell* effectively replaced the Supreme Court's older methodology for determining fundamental rights with a more holistic approach. The Court rejected its more rigid test for fundamental rights, best articulated in *Washington v. Glucksberg*,<sup>92</sup> in favor of a more reasoned balancing inquiry that weighs individual liberties against governmental interests.<sup>93</sup> Such an approach was first introduced by Justice Harlan's dissent in *Poe v. Ullman*.<sup>94</sup> Justice Harlan's analysis took past tradition

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89. See Brief for Petitioners at 6-7, *Obergefell*, 135 S. Ct. 2584 (No. 14-556).

90. See *Obergefell*, 135 S. Ct. at 2602-05; see also Ashutosh Bhagwat, Anthony M. Kennedy Lecture at the Lewis & Clark School of Law: Liberty or Equality? (Sept. 23, 2015), <http://ssrn.com/abstract=2673194> [<https://perma.cc/WDK4-QP9L>] (exploring why Justice Kennedy elected to focus on due process rather than equal protection).

91. See *Obergefell*, 135 S. Ct. at 2605. Professor Laurence Tribe has referred to this as the “doctrine of equal dignity” and argues that it lays out a new rubric for examining fundamental rights claims. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19-20 (2015).

92. See 521 U.S. 702, 719-21 (1997) (requiring that a right protected under the Due Process Clause must be both “deeply rooted in this Nation’s history and tradition” and carefully described to be consistent with the “guideposts for responsible decisionmaking” (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

93. See Tribe, *supra* note 91, at 19-20.

94. See 367 U.S. 497, 522-24 (1961) (Harlan, J., dissenting). This dissent gained precedential value when the majority of the Court adopted it in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848-49 (1992).

into account but was not shackled to the past because it considered tradition itself a “living thing.”<sup>95</sup>

In *Glucksberg*, the Court found “that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>96</sup> It is important to note that the formulation in *Glucksberg* required both prongs of this analysis to be satisfied. Before that case, courts had been able to focus on either the “tradition” inquiry or on finding the right necessary for “ordered liberty.”<sup>97</sup> By making the test conjunctive, the Supreme Court forced courts to consider historical precedent to find that a substantive right exists.<sup>98</sup> Scholars have noted that this trend has made the Due Process Clause a “backward-looking” protection, safeguarding against activist judges and temporary majorities.<sup>99</sup> Both Justice Alito and Chief Justice Roberts pointed out the apparent abandonment of this principle by the *Obergefell* majority.<sup>100</sup>

Justice Kennedy could have avoided pressing this issue. As Professor Kenji Yoshino has pointed out, although “the ‘right to same-sex marriage’ was not ‘deeply rooted in this Nation’s history and tradition,’ the ‘right to marry’ certainly was.”<sup>101</sup> By focusing on the definition of the right being claimed, the majority could have side-stepped questions about the role of tradition and left that portion of the *Glucksberg* test intact.<sup>102</sup> Some have argued that this is what the

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95. *Poe*, 367 U.S. at 542.

96. *Glucksberg*, 521 U.S. at 720-21 (citations omitted) (first quoting *Moore*, 431 U.S. at 503; and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

97. See Kenji Yoshino, *The Supreme Court, 2014 Term—Comment: A New Birth of Freedom?*; *Obergefell v. Hodges*, 129 HARV. L. REV. 147, 152 (2015).

98. See *id.* (“Even when the Court has been at its most aggressive in discerning ‘new’ rights in its substantive due process jurisprudence, it has thrown sops to tradition.”).

99. See, e.g., *id.* at 152-53.

100. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting) (“[T]he Court has held that ‘liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘deeply rooted in this Nation’s history and tradition.’” (citations omitted) (quoting *Glucksberg*, 521 U.S. at 720-21)); *id.* at 2618 (Roberts, C.J., dissenting) (pointing out that the “importance of history and tradition to the fundamental rights inquiry” has been consistently adopted by courts both before and after *Glucksberg*).

101. Yoshino, *supra* note 97, at 163 (footnotes omitted).

102. See *id.* A second prong of *Glucksberg* requires a “‘careful description’ of the asserted fundamental liberty interest.” *Glucksberg*, 521 U.S. at 721. Justice Kennedy, however, has never appeared to buy into such a formulation. In subsequent cases, he has always favored

majority did, and, therefore, the *Obergefell* decision is consistent with *Glucksberg* because it defined the right in question in broad strokes.<sup>103</sup> For example, the majority opinion explicitly points out that “*Loving* did not ask about a ‘right to interracial marriage’; *Turner* did not ask about a ‘right of inmates to marry’; and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’”<sup>104</sup> By taking advantage of the latitude offered by a higher level of abstraction, Justice Kennedy could have avoided the issue of tradition.<sup>105</sup>

Instead, Justice Kennedy chose to address what role tradition should play in determining fundamental rights. There were unmistakable traces of *Lawrence* in the opinion. For example, the opinion noted the inability of past generations to recognize deficiencies in liberty “in [their] own time[.]” and the wisdom of the Framers in entrusting the protection of liberty to future generations.<sup>106</sup> Yet, *Obergefell* went further by renouncing any formula or straightforward test for the protection of fundamental rights.<sup>107</sup> Rather, this new methodology “requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>108</sup> By explicitly invoking Justice Harlan’s dissent in *Poe*, the majority signaled that it was departing from the prior *Glucksberg* formulation and that a new method was forthcoming.<sup>109</sup>

Critics of the opinion claim that this doctrinal rationale revives the often criticized analysis employed by the Court in *Lochner v.*

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a more broad-stroke approach to defining the right in question. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (defining the right as private sexual behavior, rather than homosexual sodomy); see also Daniel J. Crooks III, *Toward “Liberty”: How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 273-74 (2013-2014).

103. See, e.g., Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 343 (2016).

104. *Obergefell*, 135 S. Ct. at 2602.

105. See Yoshino, *supra* note 97, at 163.

106. *Obergefell*, 135 S. Ct. at 2598.

107. See *id.*

108. *Id.*

109. See *id.* at 2602; see also Yoshino, *supra* note 97, at 163-64 (discussing how *Obergefell* departs from *Glucksberg*).

*New York*.<sup>110</sup> *Lochner* remains one of the most reviled cases in constitutional law, and Chief Justice Roberts's dissent cites *Lochner* no fewer than sixteen times.<sup>111</sup> The dissenters' claim is that without the strict guidelines of a method like *Glucksberg*, activist jurists will invent new substantive rights based on potentially temporary populist views.<sup>112</sup> In his recent comment on *Obergefell*, Professor Yoshino persuasively dismisses this comparison by pointing out an "antisubordination" principle relied on by the majority in reaching its decision.<sup>113</sup> He argues that the "freedom of contract" *Lochner* espoused was never understood as redressing the subordination of master bakers by their employers.<sup>114</sup> In contrast, *Obergefell* is easily understood to redress the subordination of same-sex couples and LGBT individuals.<sup>115</sup> Yoshino's point is that by tying the decision to both due process and equal protection, "one of the major inputs into any such [fundamental rights] analysis will be the impact of granting or denying such liberties to historically subordinated groups."<sup>116</sup> Rather than engaging in mechanical "careful description[s]" of rights and identifying historical "tradition[s]," as under *Glucksberg*,<sup>117</sup> the more holistic analysis introduced in *Poe* and accepted in *Obergefell* will help the courts realize "what freedom ... must become."<sup>118</sup>

The result, then, is that substantive due process analysis will serve to validate equality concerns of vulnerable, and likely minority, groups. If denying a group access to a claimed right continues a period of exclusion and subordination for that group, then the twin

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110. See, e.g., Symposium, *The Supreme Court Has Legalized Same-Sex Marriage: Now What?*, NAT'L REV. (June 27, 2015), <http://www.nationalreview.com/article/420420/same-sex-marriage-obergefell-supreme-court> [<https://perma.cc/AP7L-EJP5>]; Gil Troy, *Who Let the Supreme Court Make Laws?*, DAILY BEAST (July 11, 2015, 12:00 AM), <http://www.thedailybeast.com/articles/2015/07/11/how-to-restrict-the-lawmaking-power-of-the-supreme-court.html> [<https://perma.cc/Q5SQ-AWBH>].

111. See Michael C. Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), <http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language> [<https://perma.cc/K442-RNTX>].

112. See Tribe, *supra* note 91, at 17-18.

113. See Yoshino, *supra* note 97, at 174-75.

114. *Id.* at 175.

115. See *id.* at 174-75; see also Tribe, *supra* note 91, at 18.

116. Yoshino, *supra* note 97, at 174.

117. *Id.* at 150 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

118. *Id.* at 179 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

protections of due process and equal protection will intervene to correct that balance.<sup>119</sup>

### 3. *A Focus on Dignity*

Such a development should not be surprising given the Court's and, more specifically, Justice Kennedy's recent history. The notion that all individuals are entitled to "define [their] own concept of existence"<sup>120</sup> instead of allowing the state to define their identity and social role has been prevalent in Justice Kennedy's most memorable fundamental rights decisions.<sup>121</sup> It most clearly developed through his gay-rights opinions: *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*.<sup>122</sup> In each successive opinion, Justice Kennedy became more explicit about ensuring that no individual is a "stranger to [the] laws."<sup>123</sup> This decades-long journey reached its culmination in *Obergefell v. Hodges* where "Justice Kennedy has wound the Equal Protection and Due Process Clauses more tightly, finally fusing them together ... with the notion of 'equal dignity in the eyes of the law.'"<sup>124</sup> This ongoing trend toward individual dignity suggests that, for the moment, the Court will examine fundamental rights challenges in the light of present cultural understandings and knowledge rather than feel bound by past mores or antiquated custom.<sup>125</sup>

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119. *See id.* at 174.

120. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

121. *See* Tribe, *supra* note 91, at 22-23.

122. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) ("[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

123. *Romer*, 517 U.S. at 635.

124. Tribe, *supra* note 91, at 22-23 (quoting *Obergefell*, 135 S. Ct. at 2608); *see also id.* at 20-21 (exploring the importance of the term "dignity" in constitutions and treaties around the world).

125. Such progressive thinking within the Court is not limited to constitutional issues. Federal antitrust law is founded on the idea that challenged restraints on trade must be examined "in the light of reason" understanding modern economic thinking. *See* *Cont'l T.V.*,

This concept of “equal dignity”<sup>126</sup> further broadens the scope of constitutional protections. It has been argued that the Constitution traditionally protects *negative* liberties—that is, the right of people to be protected “against government interference with certain fundamental rights and liberty interests”<sup>127</sup>—rather than positive ones.<sup>128</sup> Ratifying the dignity of an individual, however, necessarily requires the granting of a positive right. After *Obergefell*, states not only are restricted from banning same-sex marriages (a negative protection), but are also required to grant the appropriate recognition and benefits (a positive right).<sup>129</sup> Although he is never explicit about which right is being vindicated in the opinion, Justice Kennedy is hinting that the deeper purpose of constitutional protection is on *both* sides of the line.

None of this is to say that *Obergefell* completely rejects tradition as part of the due process analysis. Tradition remains an important factor in the analysis of a fundamental right.<sup>130</sup> Indeed, Justice Kennedy identifies four “principles and traditions” of marriage that suggest why it is so fundamental to society and should be expanded.<sup>131</sup> First, he reminds us that the choice of whom to marry is an essential part of personal autonomy and creates a dignified bond between two separate people.<sup>132</sup> Second, to the majority, marriage is a “union unlike any other in its importance” to the individuals in the relationship.<sup>133</sup> Third, marriage provides a stable and

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Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 286-87 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The Court has regularly ignored *stare decisis* and out-dated economic rationales in overruling past precedent in order to ensure antitrust jurisprudence remains consistent with current economic thinking.

126. *Obergefell*, 135 S. Ct. at 2608.

127. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

128. See, e.g., Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 *FORDHAM L. REV.* 675, 706 (2006) (“The Constitution, most judges and scholars believe, ‘is a charter of negative rather than positive liberties.’” (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983))).

129. See *Obergefell*, 135 S. Ct. at 2604-05; see also *United States v. Windsor*, 133 S. Ct. 2675, 2691-92 (2013) (defining marriage as a positive right); Gregg Strauss, *The Positive Right to Marry*, 102 *VA. L. REV.* 1691, 1713 (2016) (“*Obergefell* improves on prior doctrine by not describing the right to marry as a negative liberty and by suggesting a normative analytical framework for the right to marry.”).

130. See *Obergefell*, 135 S. Ct. at 2598.

131. *Id.* at 2599.

132. *Id.*

133. *Id.*

predictable unit for a family to thrive.<sup>134</sup> Finally, he recognizes that the institution of marriage is “a keystone of our social order.”<sup>135</sup> The articulation of these “traditions” suggests that the role of tradition is now much more flexible, looking to the purpose and effect of the right sought, instead of simply asking who was able to exercise it. Under this formulation, fundamental rights cannot be decided solely on the idea of who was able to exercise such a right in the past.<sup>136</sup>

This is another limitation the majority opinion places on the freedom of courts to find new rights; not only must the claimed right redress previous subordination or discrimination, but access to the right must also still vindicate the interests of society. While the dissenters claim the rationale of *Obergefell* could lead to a right to polygamous marriages, it is difficult, if not impossible, to fit the idea of multiple marriages within the special “bilateral loyalty” created by two-person marriage.<sup>137</sup> In this way, the focus on dignity is not limited only to that of an individual, but incorporates the dignity of society as a whole. The place of marriage as a stabilizing force for families and the role the institution plays within wider communities reflect how tradition can be coupled with dignity to ratify the promise of the Constitution. Justice Kennedy’s new approach reflects a flexible common law analysis instead of the strict lines of a historian’s straight-forward recounting.

Finally, the fact that the opinion was authored by Justice Kennedy should not be underestimated. As the current “swing” Justice, Justice Kennedy’s opinions hold significant influence that may reflect the direction in which the Court is moving.<sup>138</sup> Particularly with the level of partisan divide on the current Supreme Court, Justice Kennedy nearly always holds the decisive vote on important issues.<sup>139</sup> Perhaps this decision should not be surprising given that the swing Justices have historically worked to keep the Court

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134. *Id.* at 2600-01.

135. *Id.* at 2601.

136. *Id.* at 2602.

137. See Yoshino, *supra* note 97, at 177 (quoting *Obergefell*, 135 S. Ct. at 2599). *But see* Harrison, *supra* note 16, at 146, 150-51, 154 (arguing that the history of polygamy fits it well within the boundaries outlined by the majority opinion in *Obergefell*).

138. See generally JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 401-05 (2008) (discussing Justice Kennedy’s emergence as the swing Justice after 2005).

139. Bhagwat, *supra* note 90, at 2.

current, reflecting “the mainstream of American public opinion.”<sup>140</sup> Allowing such an influential Justice to author the opinion may indicate that the Court intends for this opinion to be read and applied broadly.

### *C. The Fundamental Right Today*

Having explored what the Court previously said about the right to marry, and now Justice Kennedy’s modernization of due process analysis and jurisprudence in *Obergefell*, some preliminary conclusions about the fundamental right to marriage can be drawn:

First, the right to marry is, at its core, concerned about the autonomy of choice of each individual.<sup>141</sup>

Second, our society’s understanding of marriage and who is allowed to marry is not a static definition, but rather one that evolves over time.<sup>142</sup> The same is true of the concept of family; no single model may be preferred by the state over any other.<sup>143</sup>

Third, the role of tradition in determining who can marry is not going to be bound up in historical decisions or mores, but rather will be analyzed under the more robust and well-rounded approach as articulated in *Poe*, with a goal of validating the *dignity* of the individual plaintiffs.<sup>144</sup>

Finally, because the *Obergefell* opinion cements the “right to marry” as a fundamental liberty interest of individuals, it also compels any future challenges to exclusions from that right to be analyzed under some form of heightened scrutiny.<sup>145</sup> Whatever one calls the standard of review applied (strict scrutiny, heightened scrutiny, et cetera), the Court has consistently and firmly stated that there must

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140. *Id.* at 3.

141. *See Obergefell*, 135 S. Ct. at 2599.

142. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (protecting inmates’ right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (allowing unwed parents to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (extending constitutional protection to interracial marriages).

143. *See Cary Franklin, Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 884-85 (2014) (“[A]ll happy families are not alike. Traditional heterosexual marriage is not the only successful way to arrange intimate and family life.” (footnote omitted)).

144. *See supra* Part II.B.

145. *See Obergefell*, 135 S. Ct. at 2597-605.

be an important or compelling state interest implicated, and the regulation must be narrowly drawn to effectuate that interest.<sup>146</sup>

### III. APPLYING THE RIGHT TO MARRY TO CONSENTING ADULTS IN AN INCESTUOUS RELATIONSHIP

Understanding the definition of the right to marry and the fundamentality and flexibility the right must exhibit under the Court's decisions, this Part turns to applying those standards to consenting and consanguineous adults. For purposes of clarity, this Part uses a hypothetical relationship between a full-blooded brother and sister as an example.

#### A. *A Tradition of Incest?*

Opponents of incestuous marriage will assert that the right to marry a sibling or parent is certainly not implicit in the concept of ordered liberty or deeply rooted in our nation's history.<sup>147</sup> However, the rationale of *Obergefell* focused on the traditions of the institution generally and whether granting the right to the plaintiffs would vindicate those traditions.<sup>148</sup> Taking each of the four "principles" of marriage outlined by the majority opinion, a consenting relationship between consanguineous adults satisfies each.

First, absent any evidence of coercion or psychological abuse, the choice between a brother and sister to form a romantic bond is a product of their own autonomous choice. It is likely one of the most difficult choices each has made. Especially after *Obergefell*, the state cannot close the doors of marriage simply because it does not approve of the choice two individuals have made.<sup>149</sup> Moreover, this concept implicates the very dignity that *Obergefell* seeks to protect—the right of two individuals to make a choice of their existence without undue interference by the state.<sup>150</sup>

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146. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

147. See *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see also Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What Is Protected and Why?*, 38 *NEW ENG. L. REV.* 667, 676 (2004).

148. See *Obergefell*, 135 S. Ct. at 2599-602.

149. See *id.* at 2579-605.

150. See *id.* at 2589.

Second, given the stigma likely to be encountered by a brother and sister attempting to get married, the choice to go through with a marriage demonstrates the immense importance of the union itself to each of them. Siblings separated at birth may find themselves attracted to each other despite the social taboo or willingness of society to accept their “unnatural” desires.<sup>151</sup> As Justice Kennedy points out, “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”<sup>152</sup> The world is full of marriages that society, in general, did not understand or approve of at one time, but the Court’s history protects the right of those individuals to enter into such marriages.<sup>153</sup>

Third, the couple would need to show that this marriage would help “safeguard[ ] children and families.”<sup>154</sup> Opponents would gain some ammunition here; one of the most common arguments against incest is the potential for genetic harm to future offspring.<sup>155</sup> But that argument misinterprets Justice Kennedy’s point. The concern raised in *Obergefell* is not that a family may be harmed or that children will be hurt by the couple entering into marriage; such abuse unfortunately occurs under our current marriage laws and in a myriad of family constructs.<sup>156</sup> Any neglect or abuse perpetrated on a child of an incestuous marriage should be addressed through existing child abuse statutes.<sup>157</sup> Rather, Justice Kennedy’s principle ratifies the understanding that children thrive within two-parent,

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151. See Zhou, *supra* note 11, at 204 (noting that the current scientific consensus is that “genetic sexual attraction,” the attraction between blood relatives reunited after being separated as children, may occur in approximately 50 percent of all cases); see also Alix Kirsta, *Genetic Sexual Attraction*, GUARDIAN (May 16, 2003, 8:16 PM), <https://www.theguardian.com/theguardian/2003/may/17/weekend7.weekend2> [<https://perma.cc/VQ34-HA6K>] (discussing the impact and occurrence of genetic sexual attraction).

152. *Obergefell*, 135 S. Ct. at 2600.

153. See *supra* note 142.

154. *Obergefell*, 135 S. Ct. at 2600.

155. See *infra* Part III.B.

156. See MARY PARKE, CTR. FOR LAW & SOC. POLICY, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN?: WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING 5-7 (2003).

157. Cf. *In re Tiffany Nicole M.*, 571 N.W.2d 872, 876 (Wis. Ct. App. 1997). Although the trial court in that case found that incestuous parents were unsuitable due to their neglect, see *id.* at 873-76, eliminating the incest would have very likely resulted in the same finding.

married families.<sup>158</sup> The effect of bans on incest, therefore, is to harm an innocent child by excluding her family from the recognition and rights of other families.<sup>159</sup>

Finally, allowing an incestuous marriage between brothers and sisters is unlikely to destroy the respect in which the institution of marriage is held as a “keystone of our social order.”<sup>160</sup> Opponents previously claimed that same-sex marriages, interracial marriages, marriages involving indigents, or marriages to inmates would destroy our social order.<sup>161</sup> The Court, facing those situations in *Obergefell*, *Loving*, *Zablocki*, and *Turner*, found that constitutional protection for fundamental rights evolves along with culture and society.<sup>162</sup> The constitutional standard for discerning protected constitutional interests was not static, in that as “the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>163</sup> Moreover, there has been considerable evolution on just this issue. States have begun to repeal criminal bans on incestuous activity.<sup>164</sup> Similarly, a Danish professor of criminal justice, Thomas Peterson, has advocated that modern practices of sperm donation and fertilization mandate a rethinking of “old taboos” against incest.<sup>165</sup> Germany’s ethics counsel has argued that incest between siblings should no longer be criminalized, hoping to rely on the social taboo alone to limit its occurrence.<sup>166</sup> Concern for the protection of marriage should focus on

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158. See PARKE, *supra* note 156, at 8.

159. See *Obergefell*, 135 S. Ct. at 2600 (“Without the recognition, stability, and predictability marriage offers, ... children suffer the stigma of knowing their families are somehow lesser.”).

160. *Id.* at 2601.

161. See *supra* Part II.A.

162. See *Obergefell*, 135 S. Ct. at 2604-05 (protecting same sex marriages); *Turner v. Safley*, 482 U.S. 78, 96 (1987) (protecting inmates’ right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (allowing unwed parents to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (extending constitutional protection to interracial marriages).

163. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

164. See 11 R.I. GEN. LAWS § 11-6-3 (repealed 1989).

165. See Thaddeus Baklinksi, ‘Sibling Incest Should Be Legal,’ Says Danish Professor of Criminal Justice Ethics, LIFESITE (Oct. 17, 2014, 5:57 PM), <https://www.lifesitenews.com/news/sibling-incest-should-be-legal-says-danish-professor-of-criminal-justice-et> [https://perma.cc/462V-227W].

166. See Lizzie Dearden, *German Ethics Council Calls for Incest between Siblings to Be Legalised by Government*, INDEP. (Sept. 24, 2014, 2:30 PM), <http://www.independent.co.uk/news/world/europe/german-ethics-council-calls-for-incest-between-siblings-to-be-legalised-by->

actions that harm the institution—such as domestic violence and psychological abuse—rather than the nature of the individuals who enter into it.

Having shown that an incestuous couple has a legitimate claim to be granted access to marriage, the analysis then turns on whether the current restrictions are a result of a state's compelling interest and, if so, whether the ban is narrowly tailored to effectuate that interest.

### *B. The State's Interest*

One leading justification favoring the state is the social and moral taboo against incest. Since *Lawrence*, however, such moral interests are insufficient on their own to justify interference with a person's fundamental right.<sup>167</sup> One scholar has argued that, given the near-universal understanding of the taboo of incest, such moral laws will remain unchallenged and thus *Lawrence* is inapplicable.<sup>168</sup> The argument certainly has been upheld in courts that have faced the issue, which have managed to distinguish *Lawrence's* holding to maintain the prohibition against incest.<sup>169</sup>

Such an argument, however, is more realist than legal. As the advancement of gay rights demonstrates, taboos clearly evolve over time.<sup>170</sup> What is true about society today may not be true tomorrow, or five or ten years down the road; basing laws in feelings of disgust could result in unequal treatment. For example, it is difficult to justify complete bans on sibling or parent-child incest with feelings of disgust while those same laws allow first-cousin incest and, sometimes, step-parent/step-child relationships.<sup>171</sup> It is even pos-

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government-9753506.html [https://perma.cc/CJR6-EC2L].

167. See *Lawrence*, 539 U.S. at 577-78.

168. See McDonnell, *supra* note 14, at 354.

169. See, e.g., *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005). But see *Hammer*, *supra* note 18, at 1079-83 (explaining why the Seventh Circuit was incorrect in distinguishing *Lawrence*); Zhou, *supra* note 11, at 227-30 (arguing that morality and tradition do not constitute a valid state interest for upholding bans on incest).

170. See *supra* Part I.A.

171. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 81 (2004). To be frank, the additional common DNA between parents and children that is not present between cousins may be sufficient for some to draw this line. But it should be recognized that it is an arbitrary line, based on subjective feelings.

sible, given the progression of the Court from *Romer*, to *Lawrence*, to *Obergefell*, that a court facing the issue would deem this moral justification irrational on its face.<sup>172</sup>

There are, however, more legitimate state interests regarding incest, including the commonly cited concern that children of incestuous parents will be born with genetic defects.<sup>173</sup> However, such a concern has problems. Most importantly for purposes of this Note, *Obergefell* explicitly distanced the right to marry from an interest in having children.<sup>174</sup> The majority rejected the argument that same-sex couples should not be allowed to marry because continuing the human race was a fundamental objective of marriage.<sup>175</sup> Even Justice Scalia recognized that a concern about procreation is insufficient when “the sterile and the elderly are allowed to marry.”<sup>176</sup>

Further, some modern scientific studies show that incest itself does not cause birth defects but merely increases the chance of defects occurring.<sup>177</sup> There is an equal possibility that positive traits will get passed on through incest.<sup>178</sup> There has also been an argument that, because children of closely related individuals are more likely to result in expression of recessive genes, there are societal benefits to the offspring of incest.<sup>179</sup> While it is unlucky for the individual child suffering from the bad gene, it may in fact be good for society (and thus the state) as a whole because the undesired genes can be purged from the pool, rather than lurking in the background and popping up occasionally.<sup>180</sup> Exposing such damaging

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172. See Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 140 (2012) (pointing out that there is still “a deep and lingering uncertainty as to whether state action based on morality is permissible”).

173. See MODEL PENAL CODE § 230.2 (AM. LAW INST., Proposed Official Draft 1962); Katharine B. Silbaugh, *Sex Offenses: Consensual*, in ENCYCLOPEDIA OF CRIME & JUSTICE 1465, 1469 (Joshua Dressler ed., 2d ed. 2002).

174. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (“[T]he right to marry [cannot be conditioned] on the capacity or commitment to procreate.”).

175. See *id.*

176. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

177. See Alex S. Prayson, *Autism, Genetics, and Inbreeding: An Evolutionary View* 5 (June 24, 2015) (unpublished manuscript), <http://papers.ssrn.com/abstract=2736171> [<https://perma.cc/HPK4-P4CB>]; see also Zhou, *supra* note 11, at 234-36 (discussing the science of genetic health and eugenics).

178. See Silbaugh, *supra* note 173, at 1469.

179. See McDonnell, *supra* note 14, at 352-53.

180. See Bratt, *supra* note 15, at 267-76 (exploring the genetic implications of incest). Focus on the genetic argument in favor of bans on incest also raises dangerous implications of

genes is more likely to remove it from society, resulting in a net benefit.<sup>181</sup>

Moreover, the fact that homosexual incest is common,<sup>182</sup> but does not include any risk of genetic mutation, further invalidates the argument. There must be some separate justification in order to stop a same-sex, related couple from marrying.

The argument above ties in with the final major argument, and potentially the most compelling, in favor of bans on consanguineous relationships—that such relationships have special potential to be abusive or coercive.<sup>183</sup> Such an argument claims that if adults knew that children within their families could be legal sexual partners once older, the adults may be more likely to view younger children as sexual objects and groom them accordingly.<sup>184</sup> There is certainly no right to keep a person subordinated, and empowering the states to prevent the manipulation of dependents is a compelling justification to prohibit subsequent marriages between adults.<sup>185</sup>

This argument, however, does not address the core of the problem. If the interest is really in preventing abuse of minors, such harm is already addressed through statutes explicitly dealing with child abuse.<sup>186</sup> Further, the speculative nature of this argument is troubling; prescriptive legislation that bans a union *ex ante* intending to reduce the number or potential number of at-risk children is inherently crudely fit.<sup>187</sup> Blanket bans, such as the one against incestuous marriage, are always over-inclusive in that some amount

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eugenics. *See id.* at 276-77.

181. *See* Patrick Bateson, *Inbreeding Avoidance and Incest Taboos*, in *INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY* 24, 25 (Arthur P. Wolf & William H. Durham eds., 2004).

182. TURNER & MARYANSKI, *supra* note 10, at 53, 59.

183. *See* Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *NW. U. L. REV.* 1543, 1569-70 (2005); *see also* McDonnell, *supra* note 14, at 353 (pointing out a related concern of preventing the “over-sexualiz[ation]” of family relationships).

184. *See* Cahill, *supra* note 183, at 1571.

185. *See* Strauss, *supra* note 129, at 1761.

186. *See* Joëlle Anne Moreno, Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 *U. PA. L. REV.* 1281, 1302 n.150 (1989).

187. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-96-178, *CYCLE OF SEXUAL ABUSE: RESEARCH INCONCLUSIVE ABOUT WHETHER CHILD VICTIMS BECOME ADULT ABUSERS 2* (1996) (finding that the “widespread belief that there is a ‘cycle of sexual abuse’” lacks scientific support).

of truly consensual activity will be caught up and prohibited.<sup>188</sup> As Y. Carson Zhou points out in his article addressing criminal incest statutes, “If the state has the power to punish incest because parent-child relationships are inherently coercive, then we must contemplate whether the state also has the authority to ban consensual office romances.”<sup>189</sup>

A more uncomfortable argument against this rationale is that keeping incest illegal may mean that there is no reason for an abuser to wait. If a parent is going to be punished for engaging in a sexual relationship with his daughter whether she is above the age of consent or not, what, other than his own questionable morals, incentivizes him to refrain from such contact when she is underage?<sup>190</sup> Even with the law gone, the social taboo remains—it is unwise to disregard the power the “disgust” factor has in chilling behavior.<sup>191</sup> Indeed, one could argue that keeping incestuous relationships illegal entices certain individuals as viewing such relationships as *more* attractive, precisely because they are forbidden.<sup>192</sup> In such situations, there is no reason to distinguish between a family member or a stranger, and the abuser should be punished under generally applicable law for child sexual abuse.<sup>193</sup>

Even given the arguments on both sides, the deeply entrenched attitudes toward incest weigh in favor of a court to, at least, hesitate before striking down the state statutes. It is likely that at least one, if not more, of the interests above will be found sufficiently compelling for the state to try and show that its laws are narrowly tailored.

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188. See Zhou, *supra* note 11, at 240-41.

189. *Id.* at 240.

190. See *id.* (arguing that a “presumption of coercion” is problematic to survive any scrutiny in circumstances arising from “natural biosocial impulses” such as genetic sexual attraction, or when applied to a “sibling pair in their 30s”).

191. See Cahill, *supra* note 183, at 1578-87 (discussing the role of disgust and revulsion in creating the incest taboo and subsequent regulations). As an example, in the context of gay relationships, the strong social taboos against homosexual behavior essentially mandated that gay individuals hide their sexual orientation. See Lawrence M. Friedman & Joanna L. Grossman, *Double Take: The Law of Embezzled Lives*, 83 U. CIN. L. REV. 117, 150-51 (2014). See generally Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (discussing ways in which the law forced gay people to lead a kind of double life).

192. See 3 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE CARE OF THE SELF* 45 (Robert Hurley trans., 1986).

193. See Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1392 (2008).

*C. Narrow Tailoring*

Conceding that there may be a state interest sufficiently compelling to justify some regulation of incestuous marriage, a complete ban on an activity is almost never upheld as being narrowly tailored.<sup>194</sup> To satisfy this scrutiny, the ban must be able to show that every activity that occurs within its reach implicates the asserted state interest.<sup>195</sup> Although the idea of incest brings up distasteful consequences, in practice not every relationship will satisfy this standard. For example, a complete ban on incestuous relationships with the goal of protecting minors would be over-inclusive by encompassing relationships between consenting adult siblings who were adopted and separated at birth, thus never raising the concern of coercion. Similarly, it may be under-inclusive by failing to prevent the marriage of second cousins who were abused into marrying each other. Moreover, premising a blanket ban on incestuous marriage to prevent genetic defects in children does not make sense when that rationale is applied to individuals who are sterile, relationships between gay cousins, or elderly siblings who happen to fall in love but are past the childbearing age.

These broad bans lead to absurd results that in no way implicate the interests of the state. As noted in the Introduction, Nino Esposito and Drew Bosee discovered that they are unable to get married, despite the decision in *Obergefell*, because they officially adopted each other two years earlier.<sup>196</sup> This couple is excluded from marriage because adoption falls within Pennsylvania's definition of incest.<sup>197</sup> This relationship raises none of the concerns of the state and likely would not raise the specter of incest in the average person hearing about it. But the over-inclusive nature of the statute

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194. See *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (“A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.”).

195. See *id.*

196. See Wang, *supra* note 1.

197. See 18 PA. CONS. STAT. § 4302(c) (2016) (including the “relationship of parent and child by adoption” within Pennsylvania’s incest statute). A judge also informed the couple that the court does not have the authority to annul their parental relationship in order to allow them to get married. See Wang, *supra* note 1.

encompasses this relationship and thus any marriage of this form is banned as incestuous.

One solution could be to follow the path of some states and simply get out of regulating incest as a separate offense altogether. As noted above, Rhode Island and Ohio have elected to rely on their sexual abuse and battery laws to protect the state interest, rather than specific incest statutes.<sup>198</sup> As Professor Brett McDonnell points out, a more narrowly drawn law, such as Michigan's criminal sexual misconduct law, is better suited to combat real harms of incest because it specifically references the fact that a position of authority was used to coerce a victim to submit.<sup>199</sup> Laws that make no reference to the relationship, but point to the specific conduct—abuse or coercion—that gives rise to the state concern, should not run into constitutional problems.<sup>200</sup> Coercive or abusive relationships are appropriately handled under traditional lack-of-consent crimes regulating sexual assault in all cases.<sup>201</sup>

Another alternative is for states to closely examine what harm they aim to prevent. For example, a state may, with good reason, be concerned with preventing coercion or abuse of minors because of the difficulty in getting minors to report such abuse.<sup>202</sup> But an outright ban on such relationships does not address the identified concern; children still may not come forward to report abuse that does occur. Instead, a more narrow remedy, such as imposing increased penalties in situations in which the abuser is a family member or, more broadly, in a supervisory position over the child, could deter

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198. See *supra* notes 47-48 and accompanying text.

199. See McDonnell, *supra* note 14, at 354 n.109 (citing MICH. COMP. LAWS § 750.520b(1)(b)(iii) (1984)).

200. See *id.*

201. Cf. Note, *supra* note 23, at 2467-68. It is important to recognize that the laws may be insufficient to protect against the psychological harm such relationships may cause. Psychological coercion may not satisfy the elements of a particular state's rape or assault laws. See, e.g., *State v. Thompson*, 792 P.2d 1103, 1106 (Mont. 1990) (concluding that a principal who threatened to block a student's graduation unless she consented to sexual intercourse could not be convicted of the crime of "sexual intercourse without consent"). The answer in such cases should be to reform the current laws, rather than have a blanket prohibition that chills consensual activities between mature individuals. See Collins et al., *supra* note 193, at 1392.

202. See DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 122-23 (2009); see also TURNER & MARYANSKI, *supra* note 10, at 181 (discussing how the evolution of the modern nuclear family makes incest "much easier to conceal").

such activity.<sup>203</sup> In other words, if the abuser has coercive power over the minor, then the criminal penalties would be proportionally increased.<sup>204</sup> Admittedly, this may not directly increase the number of children reporting improper conduct, but it does avoid the over-inclusiveness of a blanket ban.

#### *D. A Recommendation for States*

Suggestions for specific rules regulating relationships and sexual contact between family members could be as high as the number of scholars writing about it. The solution would depend on the corresponding asserted state interest. Instead of attempting to define what these rules should be, this Note proposes a constitutional test that allows states to maintain incest within their respective codes and may be found outside the Court's marriage jurisprudence.

The Supreme Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was arguably grounded in the similar type of liberty interest that is implicated in the marriage context in *Obergefell*.<sup>205</sup> In *Casey*, the Court ratified the core holding of the landmark case *Roe v. Wade*, which protected a woman's right to have an abortion.<sup>206</sup> The joint opinion, authored in part by Justice Kennedy, clearly focused on the dignity and liberty of women that must be protected.<sup>207</sup> Moreover, the Court noted that their "obligation is to define the liberty of all, not to mandate our own moral code."<sup>208</sup> In that case, the Court held that an "undue burden" standard was the appropriate means of reconciling a state's interest with an individual's protected liberty.<sup>209</sup> Although the undue burden standard is an amorphous test, if a state restriction "has the purpose or effect of placing a substantial obstacle in the path of a

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203. See MARKEL ET AL., *supra* note 202, at 122.

204. This need not be limited only to family members.

205. See generally Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21.

206. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852-53 (1992).

207. See *id.* at 848-50.

208. *Id.*

209. See *id.* at 876; see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (discussing the undue burden standard).

woman” choosing to exercise her right to terminate a pregnancy, then the restriction constitutes an unlawful “undue burden.”<sup>210</sup> Regulations that allow a state to “express profound respect for the life of the unborn,” however, are permissible so long as they properly acknowledge the woman’s protected dignity and liberty.<sup>211</sup> Thus, while *Casey* did not overturn *Roe v. Wade*, the decision does soften the Court’s stance toward regulation by indicating that a state could discourage abortion (or other constitutionally protected activities) with a valid purpose.<sup>212</sup> However, lower courts have struggled with defining what portion of the population must be affected or what impact the restriction must have for an obstacle to be considered an “undue burden.”<sup>213</sup>

This inherent ambiguity, coupled with the similarities between the liberty interest described in *Casey*, and the dignity interest of the plaintiffs upheld in *Obergefell*, may provide states with an avenue to continue regulating marriage. The Court has held that an informed consent requirement and a 24-hour waiting period are permissible under the standard articulated in *Casey*.<sup>214</sup> Conversely, the Supreme Court most recently decided that both requiring doctors to have admitting privileges at hospitals within thirty miles of an abortion facility and requiring that abortion facilities meet surgical-center standards constituted an undue burden on a woman’s right to choose.<sup>215</sup> Applying this rationale to incestuous marriage,

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210. *Casey*, 505 U.S. at 877 (joint opinion of O’Connor, Kennedy & Souter, JJ.); see also Bebe J. Anderson, *Litigating Abortion Access Cases in the Post-Windsor World*, 29 COLUM. J. GENDER & L. 143, 145-46 (2015).

211. See *Casey*, 505 U.S. at 877.

212. See Mark H. Woltz, Note, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1788 (1993).

213. See *Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999) (“The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the ‘purpose’ of imposing an undue burden.”), *rev’d on other grounds*, 244 F.3d 405 (5th Cir. 2001); see also *Cincinnati Women’s Servs., Inc. v. Taft*, 468 F.3d 361, 370-74 (6th Cir. 2006) (striking down a single-petition restriction as a substantial obstacle for “practically all” of an impacted population, but upholding an in-person rule because it would only affect about 12 percent of the group).

214. See *Casey*, 505 U.S. at 884-87 (joint opinion of O’Connor, Kennedy & Souter, JJ.).

215. *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2312-16 (2016); see also *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015) (considering the health benefits of admitting-privilege laws), *aff’d sub nom.* *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

perhaps states could impose a waiting period on incestuous marriage to provide both parties with information about the known risks and rationales against consanguineous marriage.<sup>216</sup> But mandating sterilization or an agreement that the incestuous couple would not procreate would almost certainly violate that couple's constitutional rights.<sup>217</sup>

A middle ground may be for a state to require counseling or a hearing before a judge to explore the possibility of abuse or coercion between the parties.<sup>218</sup> For example, Virginia recently enacted a law setting the minimum age of marriage at eighteen.<sup>219</sup> The law is "aimed at curbing forced marriage, human trafficking and statutory rape disguised as marriage."<sup>220</sup> However, the law also allows procedures for minors to petition a juvenile judge to "emancipate" them if the "judge finds the minor is not being compelled to marry, the parties are mature enough, the marriage will not endanger the minor and the marriage is in the best interest of the minor."<sup>221</sup> In the incestuous marriage context, a judge could find that there is no danger of coercion and that this marriage does not implicate any of the purported harms of incest, and grant an order allowing the couple to marry. In our exemplar case of Drew Bosee and Nino Esposito, this would allow the judge to determine that their adopted relationship does not implicate any state concern and that their

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216. *Cf. Casey*, 505 U.S. at 881-87 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (upholding the constitutionality of a waiting period for women seeking abortions). The *Casey* Court focused on the necessity of a doctor obtaining informed consent from a patient as part of its rationale. *Id.* It is doubtful that a mere state or municipal employee, authorized to grant marriage licenses, would be similarly justified in delaying marriages without a medical component to their duties.

217. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-43 (1942) (holding that compulsory sterilization is unconstitutional); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (striking down a state law prohibiting the second most common abortion procedure as violating the undue burden standard).

218. *See* Elsa M. Shartsis, *Casey and Abortion Rights in Michigan*, 10 T.M. COOLEY L. REV. 313, 345 (1993) ("[U]nder the *Casey* undue burden standard, one cannot say that the State could not mandate a second (or third) medical opinion; a hospital review board; or other third-party involvement beyond the doctor-patient relationship.").

219. VA. CODE ANN. § 20-48 (2017).

220. Jenna Portnoy, *Why 13-Year-Olds Can No Longer Marry in Virginia*, WASH. POST (July 3, 2016), [https://www.washingtonpost.com/local/virginia-politics/why-13-year-olds-can-no-longer-marry-in-virginia/2016/07/03/03849e46-3ef9-11e6-a66f-aa6c1883b6b1\\_story.html](https://www.washingtonpost.com/local/virginia-politics/why-13-year-olds-can-no-longer-marry-in-virginia/2016/07/03/03849e46-3ef9-11e6-a66f-aa6c1883b6b1_story.html) [<https://perma.cc/KA8Y-B2WZ>].

221. *See id.*

marriage should be allowed to proceed.<sup>222</sup> Because the law does not impose a complete ban, it may survive heightened scrutiny under the Court's marriage jurisprudence.<sup>223</sup>

In sum, there may be avenues a state could pursue to continue regulating incest and incestuous marriage. Such measures may not even be likely, because regardless of the legal prohibitions, incestuous relationships remain on the fringe of society and will be deterred simply by the social stigma.<sup>224</sup>

#### IV. COUNTERARGUMENTS

Any state attempting to allow consanguineous marriages in the face of the entrenched incest taboo will no doubt face harsh criticism and an uphill battle. The following counterarguments raise concerns in opposition to the above analysis.

##### *A. Incest Is Conduct*

Opponents could argue that incestuous behavior is merely the conduct of the participating individuals, rather than any inherent status, and as such should be well within the police power of the state.<sup>225</sup> Because the couple could choose to be with someone else—either man or woman—there is no threat that they are being subordinated or excluded from the law.

This argument improperly broadens the concept of conduct in the marriage arena. All marriages, by their nature, are a product of the choice of two individuals. Allowing the state to prohibit marriages based on conduct that does not fall within a separate protection potentially allows a state to identify any mere conduct and disallow such marriages. Certainly, a state could not ban marriages on the basis of race, age, disability, or sexual orientation, but states may

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222. Whether the adoption should, and could, be annulled under Pennsylvania law is a question outside the scope of this Note.

223. See *supra* Part II.C.

224. Cahill, *supra* note 183, at 1578-83.

225. For this type of argument in the polygamy context, see Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 873-74 (2016).

be able to proscribe a rich man from marrying a poor woman.<sup>226</sup> Similarly, if a state decided it disapproved of individuals with an age disparity greater than five years from marrying, then that would be conduct they could proscribe as well.<sup>227</sup> A state may still need to articulate an important or compelling interest to justify its law, but the point is that the choice to marry someone of a lower economic class or a different age is *conduct* outside of any protected class. Allowing such expansion of the state's power regarding marriage would conflict with the Supreme Court's trend of encouraging autonomy of choice in whom to marry.

Further, there is a type of status associated with being a member of a family. Particularly in the immigration context, being a family member has been found to be an immutable trait that is worthy of protection.<sup>228</sup> Although Justice Kennedy was never explicit about declaring homosexuality an immutable trait, his conclusion that gay individuals would be consigned to a lonely life without legalizing same-sex marriage suggests that he would consider such unchangeable characteristics in future analyses.<sup>229</sup> And consider again the hypothetical brother and sister. If the sister wants to marry a person who is not her family member—black, white, man, woman, or federal inmate—under controlling Supreme Court precedent, she may do so and the state cannot interfere. But if she wants to marry her brother, she may not—not because her act is fundamentally different in this circumstance, but because of *who she and her brother are*, namely a consanguineous pair. That is, in both scenarios, the sister is making a choice and the limitation in the latter scenario is

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226. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 42 (2006) (“[S]ocio-economic status is not a protected class under federal equal protection analysis.”).

227. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (finding that age is not a suspect class for purposes of equal protection analysis).

228. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 124 (4th Cir. 2011) (finding kinship ties are a “paradigmatically immutable” characteristic); see also *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (holding that family ties can provide a basis for a protected social group); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009) (same); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004) (same); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (same).

229. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). It is interesting to note that polygamy as a marriage construct is more vulnerable to this argument. That is, restrictions on polygamy prohibit the *conduct* of marrying more than one partner regardless of the *status* of the parties to the marriage. See Yoshino, *supra* note 97, at 177.

only imposed because of their status as brother and sister, over which they have no control. There is even an argument that this type of attraction is not a choice at all but part of an inherent genetic attraction.<sup>230</sup> Allowing the marriage to occur removes these difficult questions and, as discussed above, grants the states room to still prohibit the conduct they are most concerned about, namely coercion and abuse.

### *B. No One Wants to Legalize Incest*

Even if there may be an opening for incestuous relationships, from a realist perspective it may be unlikely that society or, in a more limited fashion, the courts will ever be able to respond accordingly. Both social and political factors may influence future reviews of incest statutes. Further, the individual policy preferences of the Justices, coupled with the Court's discretion in which cases it grants certiorari, dramatically limit the chances of such a case ever actually reaching the Court for review.

First, there is no current grass roots or political support for incest in the same way as there was for same-sex marriage. The importance of public input and support for a change in our constitutional understanding should not be underestimated.<sup>231</sup> Social movements can shape the legal landscape both directly, through litigation and lobbying, or indirectly, by imparting political support to a particular cause.<sup>232</sup> Studies have recognized that the Supreme Court responds to changes in the dominant public opinion, even if the makeup or ideology of the Court has not changed.<sup>233</sup> This may reflect a belief

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230. See Kirsta, *supra* note 151.

231. For a detailed discussion of the role that social movements and public opinion play in influencing the Supreme Court, see Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1654-61 (2017).

232. See Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 657 (2010).

233. See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion of Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993) ("[T]he evidence suggests that public opinion exercises important influence on the decisions of the Court even in the absence of changes in the composition of the Court or in the partisan and ideological makeup of Congress and the presidency."). This concept is not new to the Court; numerous Justices have recognized the impact public support for a particular constitutional decision has had on the Court's decision-making. See, e.g., Lain, *supra* note 231, at 1639 n.105 (collecting quotes from various Supreme

that majority rule dictates the correct answer to constitutional questions, or merely that the Supreme Court Justices are susceptible to the same influences and viewpoints that the majority of society face. Whatever the reasoning behind this phenomenon, it appears clear that public advocacy makes it easier for the Court to rule in a way that matches the public's position. For example, each step on the path from *Romer* to *Obergefell* coincided with the growth of support for same-sex marriage, but it is difficult to find that same progression in the area of incest.<sup>234</sup>

Importantly, such a change is generally only seen when social movements do not coincide with the legal status quo. When the current social mores are in agreement with a legal consensus, the two "are mutually reinforcing" and may prevent change from happening.<sup>235</sup> Currently, there is a consensus among the circuit courts that have considered challenges to incest that such laws should be upheld.<sup>236</sup>

Such lack of support may be due to the secrecy required of those who would otherwise advocate for incest. The need to keep these relationships secret for fear of being ostracized gives supporters much less ability to organize. Groups that might be potential advocates for such general equality, such as the feminist movement, typically argue in favor of further enforcement of these laws under the banner of protecting children.<sup>237</sup> One group that may be able to voice support is immigrants, particularly those coming from countries where incest is more acceptable.<sup>238</sup> However, even these groups are limited in their ability to turn most of the populace to such an unpopular belief. Public opinion is much more likely to condemn marriage between siblings than same-sex marriage. The current trend in

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Court Justices).

234. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1118-20 (2003) (describing the "typology" of slippery slopes).

235. Edelman et al., *supra* note 232, at 658.

236. See *generally* Nguyen v. Holder, 743 F.3d 311 (2d Cir. 2014); *Lowe v. Swanson*, 663 F.3d 258 (6th Cir. 2011); *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005); see also Nicolas, *supra* note 103, at 343 & n.69.

237. See BELL, *supra* note 39, at 134-36.

238. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2274-79 (2002) (discussing the effect social movements, such as immigration, have on inspiring major constitutional changes).

liberalization of incest is only beginning and has a substantial path ahead before it reaches the same level of support as same-sex marriage.

The second realist obstacle to changing incest laws is the views of the Supreme Court itself. Professor McDonnell offers a compelling analysis of how the Justices' worldview and policy preferences limit the opportunity for changes to incest law.<sup>239</sup> He points out that Supreme Court Justices tend to be pulled from a well-educated group, and thus more liberal in their views on policy matters.<sup>240</sup> However, even the liberal Justices are not young, and as past cases involving sexual matters show, they tend to be uncomfortable with such issues.<sup>241</sup> Further, complete legalization of incestuous marriage may be too far of a leap for some Justices to accept, and, therefore, they will look for a nonarbitrary way to distinguish between incest and other marriage relationships.<sup>242</sup> The overtly expressive quality of the dissenters in cases such as *Lawrence* and *Obergefell* highlights this difficulty. Justice Scalia believed the Court had already "largely signed on to the so-called homosexual agenda,"<sup>243</sup> while he himself appeared to have signed on to a conservative agenda that would not even entertain a challenge to an incest law.

More basically, the Supreme Court may just decide it does not want to hear such a case. The power of the Court to grant certiorari is one of complete judicial discretion.<sup>244</sup> Factors that may influence the Court are circuit splits and unsettled important points of federal law.<sup>245</sup> For example, the Court waited to take another same-sex marriage case (*Obergefell*) until the Sixth Circuit split from other circuit decisions to uphold a ban on same-sex marriage.<sup>246</sup> The resulting circuit split necessitated an answer from the Supreme Court. Given the consensus currently existing at the circuit level, there

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239. See McDonnell, *supra* note 14, at 354-56.

240. See *id.* at 355.

241. See *id.*

242. See *id.*

243. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

244. SUP. CT. R. 10.

245. *Id.*

246. Compare *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (upholding a ban on same-sex marriage), *cert. granted*, 135 S. Ct. 1040 (2015), with *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (striking down a same-sex marriage ban), *cert. denied*, 135 S. Ct. 316 (2014), and *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (same), *cert. denied*, 135 S. Ct. 308 (2014).

may not be the opportunity for advocates of incest to even argue their case.

This is a most likely situation and a valid criticism of the theory. Constitutional doctrine is too muddy and, apparently, subject to change depending on which Justice picks up his or her pen. However, this does not provide much support or confidence to states when considering their own laws. It is also still very early after the *Obergefell* decision, and lower courts may be inspired to re-examine their decisions regarding limitations on marriage, given this new rationale. More importantly, the views of the international community toward incest, combined with the repeal of criminal penalties for incest in certain U.S. states, demonstrate that the social antipathy toward incest may be crumbling. Although it is unlikely that support will rise at the same pace as the support for same-sex marriage, social evolution may force the Supreme Court to fit incest into its new jurisprudence.

#### CONCLUSION

Substantive due process has always been a murky area of constitutional law; balancing the interests of an individual against purported state concerns will never be an exact science. By rejecting wooden doctrines that bind fundamental rights to concepts of history and tradition, the majority opinion in *Obergefell* acknowledged these difficulties and laid out a much broader and more holistic test.<sup>247</sup> More importantly, the decision firmly rooted the fundamental right to marry in the protections of the Due Process Clause and the concept of individual dignity.<sup>248</sup>

While not advocating for incestuous marriage, this Note argues that these changes have opened the door for challenges to state bans against consenting adult incestuous marriage and other relationship constructs. States that wish to continue prohibiting incest for this narrow group must now articulate both a compelling interest to justify their law and craft the restriction narrowly to effectuate that interest.<sup>249</sup> States may still have the opportunity to narrow their

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247. See *supra* notes 92-95 and accompanying text.

248. See *supra* note 91 and accompanying text.

249. See *supra* Part II.C.

laws to proscribe only the conduct society is truly concerned about—abuse and coercion of children within the family environment.<sup>250</sup> Or, a court may decide that the similarities between the dignity of an incestuous couple and the liberty interest of a pregnant woman mandate that the “undue burden” test should be expanded into this area. Whatever the approach, it should be clear that current absolute prohibitions extending beyond consanguinity to individuals related by marriage or adoption are far too over-inclusive and cannot satisfy this type of heightened scrutiny.

However, the legal argument cannot be the end of the inquiry. Changes to civil rights, abortion, and same-sex marriage all came about, in large part, because of popular support from a majority of the community. Without a similar swell of public support and acceptance of incestuous relationships, the chances of a successful challenge to these types of laws even reaching the Supreme Court remain small. Perhaps the more important question is how this new approach to fundamental rights, if it can be called that, will be applied in other areas of entrenched attitudes to help move our society closer to a broader view of freedom and equality.

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250. *See supra* Part III.B.

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