Engendered Equality: Probing the Right to Marry in Light of *Obergefell v. Hodges* and Constitutional Freedoms and Limitations

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> *[A]ll the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people[.]*
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> *Whilst all authority* in [the federal republic of the United States] *will be derived from and dependent on the society*, *the society itself will be broken into so many parts*, *interests*, *and classes of citizens*, *that the rights of individuals*, *or of the minority*, *will be in little danger from interested combinations of the majority*. In a free government[,] the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.
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> ...
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> In the extended republic of the United States, and *among the great variety of interests*, *parties*, *and sects which it embraces*, *a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good*; *whilst there being thus less danger to a minor from the will of a major party*, *there must be less pretext*, *also*, *to provide for the security of the former, by introducing into the government* a will not dependent on the latter, or, in other words, *a will independent of the society itself.*
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> — James Madison[1]

I. INTRODUCTION

We unceasingly learn that under the 1987 Philippine Constitution, "[s]overeignty resides in the people and all government authority emanates from them."[2] In simple terms, sovereignty means supreme power or supreme political authority.[3] While this ideal does not expressly appear in the Constitution of the United States of America (U.S.), which is the source of our own Constitution,[4] the U.S. Constitution was ultimately written and ratified to create a republican form as well as a new constitutional form of government that "would receive its power from the people rather than from the [S]tates."[5]

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1. The Federalist No. 51 (James Madison, Jr.) (emphases supplied).
2. PHIL. CONST. art. II, § 1.
3. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2179 (2002) & BLACK'S LAW DICTIONARY 1611 (10th ed. 2009).
4. JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT: NOTES AND CASES, PART I 2 (2010).
5. Madison, Jr., *supra* note 1; A History of the Constitution, *available at* http://supreme.findlaw.com/documents/consthist.html (last accessed Aug. 31, 2016) & Constitution of the United States: A History, *available at*

On 26 June 2015, four justices of the U.S. Supreme Court declared that the constitutional dogma upholding the supremacy of the people was defeated[6] in *Obergefell v. Hodges*.[7] A lawyer himself and someone who believes in the power of the People to effectuate change, the U.S.'s Head of State did not share the view of the dissenters in *Obergefell*.[8] When the U.S. Supreme Court decided, five against four, that the U.S. Constitution guarantees the right of American people, including same-sex couples,[9] to marry, President Barack Hussein Obama II stepped out of the White House and gave a speech that emphasized the equally important concepts of

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http://www.archives.gov/exhibits/charters/constitution_history.html (last accessed Aug. 31, 2016).

6. *See* Obergefell v. Hodges, 14-556, June 26, 2015, *available at* https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (last accessed Aug. 31, 2016) (C.J. Roberts, dissenting; J. Scalia, dissenting; J. Thomas, dissenting; & J. Alito, dissenting) (U.S.).

7. *Obergefell*, 14-556.

8. President Barack Hussein Obama II (POTUS), in an interview on The Ellen DeGeneres Show last 12 February 2016, said —

> [M]y whole political career has been based on the idea that we constantly want to include people and not exclude them. How do we bring more and more people into opportunity and success and feeling hopeful about their lives? ... But I will say, ... as much as we [have] done with laws and ... changing hearts and minds — I do [not] think anybody has been more influential than you on that. ... You being willing to claim who you were, that suddenly empowers other people, and then suddenly, it [is] your brother, it [is] your uncle, it [is] your best friend, it [is] your co-workers. And then attitudes shift. And the law is followed, but it started with folks like you.

Lucas Grindley, Advocate, WATCH: Ellen DeGeneres Thanks President Obama for Helping LGBT People, *available at* http://www.advocate.com/television/2016/2/12/watch-ellen-degeneres-thanks-president-obama-helping-gay-people (last accessed Aug. 31, 2016).

9. The Author is aware of the concepts of sexual orientation and gender identity, and how these factor in when labelling a person as, inter alia, lesbian, gay, bisexual, transgender, or homosexual. For the sake of brevity and unless otherwise stated, these persons will be called "same-sex couples" in this Article. *See* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) & UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), BEING LGBT IN ASIA: THE PHILIPPINES COUNTRY REPORT 24 (2014) (citing American Psychological Association, Answers to Your Questions About Transgender Individuals and Gender Identity, *available at* http://www.lgbt.ucla.edu/documents/APAGenderIdentity.pdf (last accessed Aug. 31, 2016)).

"equality"[10] and "justice"[11] in the U.S. Constitution, but neither addressed nor mentioned the foundational tenets of the said Constitution.

Following the promulgation of the said landmark decision, there was an outpour of support inside and outside the U.S.[12] After all, same-sex marriage was already legal in 36 states and the District of Columbia in the U.S. and in 20 countries around the world before *Obergefell*.[13] With the active online and offline discussion on the propriety, morality, and legality of same-sex marriage, these numbers continue to grow.[14] These developments, however, beg the question — to whom does this discussion belong, to the courts or to the sovereign People? Despite several dissents, *Obergefell* implies that the repository of judicial power, the Supreme Court, may grant to same-sex couples the right to marry and, consequently, re-define marriage.[15] In the Republic of the Philippines (the Philippines), the question includes, but goes

10. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES, June 26, 2015, *available at* http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html (last accessed Aug. 31, 2016).

11. *Id*.

12. *See* N.Y. Times Editorial Board, *A Profound Ruling Delivers Justice on Gay Marriage*, N.Y. TIMES, June 26, 2015, *available at* http://www.nytimes.com/2015/06/27/opinion/a-profound-ruling-delivers-justice-on-gay-marriage.html?smid=fb-nytimes&smtyp=cur (last accessed Aug. 31, 2016) & Rory Carroll & Amanda Holpuch, *Hold the applause for Facebook's rainbow-colored profiles, activists say*, GUARDIAN, June 28, 2015, *available at* http://www.theguardian.com/world/2015/jun/28/facebook-rainbow-colored-profiles-san-francisco-pride (last accessed Aug. 31, 2016).

13. N.Y. Times Editorial Board, *supra* note 12; Pew Research Center, Gay Marriage Around the World, *available at* http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013 (last accessed Aug. 31, 2016); BBC News, How legal tide turned on same-sex marriage in the US, *available at* http://www.bbc.com/news/world-us-canada-21943292 (last accessed Aug. 31, 2016); & Julia Zorthian, These are the States Where SCOTUS Just Legalized Same-Sex Marriage, *available at* http://time.com/3937662/gay-marriage-supreme-court-states-legal (last accessed Aug. 31, 2016). *Compare with Obergefell*, 14-556, at 9 (C.J. Roberts, dissenting opinion) & *Obergefell*, 14-556, at 14 (J. Thomas, dissenting opinion), which state that most States in the U.S. retained their traditional definition of marriage in their Constitution and/or laws before *Obergefell*.

14. *Id*.

15. *See generally Obergefell*, 14-556.

beyond, whether courts have jurisdiction over it. It remains to be seen whether there is a constitutional right to marry in this jurisdiction[16] and whether this right, if it exists, includes same-sex couples. In unwrapping *Obergefell*, its disputed declarations, and contentious cases in the U.S. and Philippine settings, this Article ultimately seeks to answer the foregoing controversies.

II. UNDERSTANDING THE RIGHT TO MARRY IN *OBERGEFELL V. HODGES*

A. Factual Background

A few pages into the U.S. Supreme Court's decision in *Obergefell*, Justice Anthony Kennedy (Justice Kennedy) opined —

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.[17]

Obergefell treated the right in question as a fundamental right that includes same-sex couples under the U.S. Constitution, which the U.S. Supreme Court may review and interpret.[18] It is a landmark decision where the U.S. Supreme Court held that "there is no lawful basis for a [S]tate to refuse to recognize a lawful same-sex marriage performed in another [S]tate on the ground of its same-sex character."[19]

Obergefell began with the stories of 14 same-sex couples and two men whose same-sex partners are deceased (collectively, the *Obergefell* petitioners) who come from the States of Michigan, Kentucky, Ohio, and Tennessee in the U.S.[20] They filed suits in their respective home States where each District Court ruled that they have "the right to marry or to have their marriages, lawfully performed in another state, given full recognition."[21] On

16. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209, arts. 1 & 2 (1987).

17. *Obergefell*, 14-556, at 18-19.

18. *Id.* at 10-11.

19. *Id.* at 28.

20. *Id.* at 2.

21. *Id.*

appeal by their States to the U.S. Court of Appeals for the Sixth Circuit, the said court consolidated the cases of the *Obergefell* petitioners and reversed the earlier rulings of the States' District Courts.[22] The U.S. Court of Appeals held that "a State has *no constitutional obligation* to license same-sex marriages or to recognize same-sex marriages performed outside of State."[23] Consequently, the *Obergefell* petitioners sought *certiorari* from the U.S. Supreme Court,[24] and the rest is history.

B. How Obergefell Defined "Marriage"

1. Marriage in the Eyes of Five U.S. Supreme Court Justices

The Majority Opinion in *Obergefell* defined marriage with an assurance that this institution has never been static and its definition not in a vacuum.[25] Historically, the majority opined, marriage was viewed as a social arrangement that depended on political, religious, and financial considerations.[26] To emphasize how much this notion of marriage has evolved over time, Justice Kennedy and the rest of the U.S. Supreme Court's majority in *Obergefell* proceeded to state that "by the time of the Nation's founding[, marriage] was understood to be *a voluntary contract between a man and a woman*."[27] They continued that despite this definition of marriage, it used to be a "male-dominated legal entity."[28] Indeed, this is not true for many races and ethnicities today. As the role and status of women changed, "the law of coverture was abandoned."[29] The U.S. Supreme Court

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22. *Id*.

23. *Obergefell*, 14-556, at 2 (emphasis supplied).

24. *Id*.

25. *Id*. at 6.

26. *Id*. (citing NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9-17 (2000) & STEPHANIE COONTZ, MARRIAGE, A HISTORY 15-16 (2005)).

27. *Id*. (emphasis supplied).

28. *Id*. (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765)).

29. *Obergefell*, 14-556, at 6 (citing Brief for Historians of Marriage et al. as Amici Curiae, at 16-19, *Obergefell*, 14-556). English jurist William Blackstone defines the doctrine of coverture as follows —

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every

cited these developments on marriage as "deep transformations" that strengthened, not weakened, the said institution.[30] The Court, at the outset, declared that the changed understandings of marriage were a product of democracy that was evident in public discourse often done through pleas and protests, which ended up being considered in the political and judicial processes.[31]

After it briefly discussed the history of marriage as an institution, the majority in *Obergefell* raised different characteristics and definitions of marriage throughout the opinion. It cited *Loving v. Virginia*[32] to state that "marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'"[33] It discussed how historically, marriage has been a personal, intimate choice as a result of individual autonomy,[34] where, "through its enduring bond, two persons can find other freedoms, such as expression, intimacy, and spirituality."[35]

It further defined marriage citing *Griswold v. Connecticut*[36] as

> a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[37]

Necessarily, the U.S. Supreme Court also included the beneficial structure of marriage favoring a child's best interests as one of its defining characteristics; that "marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their

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> thing; and is therefore called in our law-french a *feme-covert* ... under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

1 BLACKSTONE, *supra* note 28, at 430.

30. *Obergefell*, 14-556, at 6-7 (citing COTT, *supra* note 26; COONTZ, *supra* note 26; & HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY (2000)).

31. *See Obergefell*, 14-556, at 7-8.

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

33. *Obergefell*, 14-556, at 11 (citing *Loving*, 388 U.S. at 12).

34. *Obergefell*, 14-556, at 12.

35. *Id*. at 13.

36. Griswold v. Connecticut, 381 U.S. 479 (1965).

37. *Obergefell*, 14-556, at 13-14 (citing *Griswold*, 381 U.S. at 486).

community and in their daily lives.'"[38] Consistent with this is the majority's view that "marriage is a keystone of our social order,"[39] which is supported by the U.S. Supreme Court's explanation in *Maynard v. Hill*[40] that "marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress'"[41] and that "[it] has long been 'a great public institution, giving character to our whole civil polity.'"[42] In closing, Justice Kennedy opined that

> [n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the [*Obergefell* petitioners] demonstrate, marriage embodies a love that may endure even past death."[43]

The rest of the majority opinion discussed the historical, legal, and practical bases for the right to marry, which is the issue in *Obergefell*. The Author will elaborate on these aspects of the Opinion in the succeeding Part I (C) of this Article.

2. Marriage for the *Obergefell* Dissenters

In his dissenting opinion, Chief Justice John G. Roberts, Jr. began his dissent by stating that the U.S. Constitution does not adhere to one theory of marriage and says nothing about it because people of States are free to expand or limit the definition of the said institution.[44] Hence, the framers of the U.S. Constitution deemed it fit to entrust the states with the subject of domestic relations between husband and wife.[45]

Agreeing with the majority opinion, Chief Justice Roberts stated that historically, across civilizations, marriage has always referred to the

38. *Obergefell*, 14-556, at 15 (citing United States v. Windsor, No. 12-307, June 26, 2013, *available at* https://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf (last accessed Aug. 31, 2016)).

39. *Obergefell*, 14-556, at 16.

40. Maynard v. Hill, 125 U.S. 190 (1888).

41. *Obergefell*, 14-556, at 16 (citing *Maynard*, 125 U.S. at 211).

42. *Obergefell*, 14-556, at 16 (citing *Maynard*, 125 U.S. at 213).

43. *Obergefell*, 14-556, at 28.

44. *Id*. at 2 (C.J. Roberts, dissenting opinion).

45. *Id*. at 6 (citing *Windsor*, 12-307 & In Re: Burrus, 136 U.S. 586, 593-94 (1890)).

relationship and union of a man and a woman.[46] According to him, this centuries-long definition of marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history, but from a natural necessity to procreate.[47] The Chief Justice of the U.S. Supreme Court in *Obergefell* continued his dissent by citing the following to explain how the definition of marriage has remained faithful to its traditional meaning, emphasizing that despite the history of marriage being one of both continuity and change,[48] its *core* meaning has endured throughout time:

> (a) Noah Webster — "marriage as 'the legal union of a man and woman for life,' which served the purposes of 'preventing the promiscuous intercourse of the sexes, ... promoting domestic felicity, and ... securing the maintenance and education of children.'"[49]
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> (b) Joel Prentiss Bishop — "marriage as 'a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.'"[50]
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> (c) Black's Law Dictionary — "marriage as 'the civil status of one man and one woman united in law for life.'"[51]
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> (d) *Murphy v. Ramsey*[52] — "marriage as 'the union for life of one man and one woman[.]'"[53]

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46. *Obergefell*, 14-556, at 4 (C.J. Roberts, dissenting opinion) (citing Transcript of the Oral Arguments on Question 1, at 12, *Obergefell*, 14-556).

47. *Obergefell*, 14-556, at 5 (C.J. Roberts, dissenting opinion) (citing GLADYS ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) & MARCUS TULLIUS CICERO, DE OFFICIIS 57 (W. Miller trans., 1913)). *See also Obergefell*, 14-556, at 4 (J. Alito, dissenting opinion).

48. *Obergefell*, 14-556, at 5 (C.J. Roberts, dissenting opinion).

49. *Id*. at 6-7 (citing II AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

50. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 25 (1852)).

51. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing BLACK'S LAW DICTIONARY 756 (1891)). According to Chief Justice Roberts, the essence of this definition has been retained by Black's Law Dictionary over the next century.

52. Murphy v. Ramsey, 114 U.S. 15 (1885).

(e) *Maynard*[54] — marriage as that which forms "'the foundation of the family and of society, without which there would be neither civilization nor progress[.]'"[55]

(f) *Loving*[56] — "marriage as 'fundamental to our very existence and survival,' an understanding that necessarily implies a procreative component."[57]

He continued by citing the influential dissenting opinion of former Associate Justice of the U.S. Supreme Court, John Marshall Harlan II, in *Poe v. Ulman*,[58] which the majority of the U.S. Supreme Court in *Obergefell* also referred to, stating that

> laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up ... form a pattern so deeply pressed into the substance of our social life that any [c]onstitutional doctrine in this area must build upon that basis.[59]

The other members of the minority in *Obergefell* echoed these definitions of marriage with the belief that the U.S. Supreme Court in *Obergefell* did not exercise judicial self-restraint and humility when — instead of adhering to the centuries-old and traditional definition of marriage that was shaped and followed by generations of Americans throughout history — five justices of the said Court chose to defy the long history of marital institution that has long embodied different societies.[60]

C. Why the U.S. Supreme Court Ruled in Favor of the Obergefell Petitioners

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53. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing *Murphy*, 114 U.S. at 45).

54. *Maynard*, 125 U.S.

55. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing *Maynard*, 125 U.S. at 211).

56. *Loving*, 388 U.S.

57. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing *Loving*, 388 U.S. at 12 & Skinner v. Oklahoma Ex Rel. Williamson, 316 U.S. 535, 541 (1942)).

58. Poe v. Ullman, 367 U.S. 497 (1961).

59. *Obergefell*, 14-556, at 18 (C.J. Roberts, dissenting opinion) (citing *Poe*, 367 U.S. at 546).

60. *Obergefell*, 14-556, at 13-14 & 28-29 (C.J. Roberts, dissenting opinion) & *Obergefell*, 14-556, at 3 & 8 (J. Alito, dissenting opinion).

Before delving into the merits of the case, the U.S. Supreme Court in *Obergefell* discussed that in the late 20th century, same-sex couples began to lead more open and public lives and to establish families following substantial cultural and political developments.[61] Consequently, the public attitude shifted towards greater tolerance for homosexual couples,[62] although its tangible effects only occurred much later in recent history, as it did in *Obergefell*. The broad discourse on the issue eventually reached the courts until finally, in the 1986 case of *Bowers v. Hardwick*,[63] the U.S. Supreme Court had occasion to examine the legal status of homosexuals for the first time.[64] The Court therein ruled that a Georgia law criminalizing certain homosexual acts was constitutional.[65]

In 1996, or 10 years after *Bowers*, the U.S. Supreme Court was asked to decide whether or not Amendment 2 of the Colorado Constitution, which forbade the extension of official or governmental protections to individuals suffering discrimination due to their sexual orientation, violated the equal protection clause of the U.S. Constitution.[66] Most of the justices who ruled in favor of the *Obergefell* petitioners (Justice Kennedy, Justice Stephen G. Breyer, and Justice Ruth Bader-Ginsburg) were also among the six justices who ruled that the said Amendment 2 of the Colorado Constitution in *Romer v. Evans*[67] violated the equal protection clause of the U.S. Constitution.[68] In 2003, the U.S. Supreme Court overruled its ruling in *Bowers*, holding that laws making same-sex intimacy a crime are demeaning to the lives of homosexual persons.[69]

In 2013, the U.S. Supreme Court in *United States v. Windsor*[70] invalidated a provision in a U.S. federal law entitled, "Defense of Marriage

61. *Obergefell*, 14-556, at 8.

62. *Id*.

63. Bowers v. Hardwick, 478 U.S. 186 (1986).

64. *Obergefell*, 14-556, at 8 (citing *Bowers*, 478 U.S.).

65. *Id*.

66. *Obergefell*, 14-556, at 8 (citing Romer v. Evans, 517 U.S. 620 (1996)).

67. *Id*.

68. *See Romer*, 517 U.S.

69. *Obergefell*, 14-556, at 8 (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

70. *Windsor*, 12-307.

Act (DOMA)"[71] that limited the definition of marriage for all federal law purposes to "only a legal union between one man and one woman as husband and wife."[72] The said DOMA provision barred the U.S. federal government from treating same-sex marriages as valid regardless of their lawful status in the State where they were licensed.[73] *Windsor* contained an exhaustive discussion on how the U.S. Congress, in enacting the said DOMA provision, violated a principle deeply embedded by history and tradition in the U.S. Constitution, i.e., *that the definition of marriage and laws on domestic relations are reserved to the States*, and for good reason.[74] However, the justices of the U.S. Supreme Court who opined the aforequoted ratiocination in *Windsor* were the same justices who ruled in favor of the *Obergefell* petitioners and, incidentally, changed the traditional definition of marriage in all U.S. states to include same-sex partnerships based on the due process and equal protection clauses of the U.S. Constitution.

1. The Right of the *Obergefell* Petitioners to Marry is Guaranteed by the Due Process Clause

The U.S. Supreme Court in *Obergefell* began its due process discussion by stating that one of the fundamental liberties protected by the due process clause in the U.S. Constitution, where no state shall "deprive any person of life, *liberty,* or property without due process of law,"[75] is the right to marry.[76] *Obergefell* included same-sex couples among those who are allowed to exercise the said right based on four principles:

(a) "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy" (*first principle*);[77]

71. Defense of Marriage Act, 110 Stat. 2419 (1996) (invalidated by *Windsor*, 12-307).

72. *Obergefell*, 14-556, at 9 (citing *Windsor*, 12-307).

73. *Id*.

74. *Windsor*, 12-307, at 13-20.

75. U.S. CONST. amend. XIV, § 1 (emphasis supplied).

76. *Obergefell*, 14-556, at 10 & 11 (citing *Loving*, 388, U.S.; Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Turner v. Safley, 482 U.S. 78, 95 (1987); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632, 639-40 (1974); *Griswold*, 381 U.S., at 486; *Skinner*, 316 U.S.; & Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

77. *Obergefell*, 14-556, at 12-13.

(b) "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals (*second principle*);[78]

(c) "[T]he right to marry ... safeguards children and families and thus draws meaning from related rights of child[-]rearing, procreation, and education"(*third principle*);[79] and

(d) "[M]arriage is a keystone of social order" (*fourth principle*).[80]

The Majority Opinion in *Obergefell* cited the *first principle* as the basis of the U.S. Supreme Court when it invalidated the ban on interracial marriages in *Loving*.[81] It also referred to *Zablocki v. Redhail*,[82] where the Court invalidated a law that barred fathers who were behind child-support payments from marrying without judicial approval and observed that "the right to marry is of fundamental importance for all individuals."[83] According to *Obergefell*, "decisions concerning marriage are among the most intimate that an individual can make[,]" as seen in *Lawrence v. Texas*.[84] The principle of individual autonomy, implied the majority opinion, should allow a person to make profound choices such as who he or she wants to marry regardless of sexual preference because the freedom to marry resides with the individual and cannot be infringed by the State.[85]

As to the *second principle*, the Majority Opinion in *Obergefell* explained that because of the U.S. Supreme Court's decisions in *Griswold*, *Turner v. Safley*,[86] and *Lawrence*, the right to marry cannot also be denied to same-sex couples. In *Griswold*, the U.S. Supreme Court held that the U.S. Constitution protects the right of married couples to use contraception.[87] In *Turner*, the U.S. Supreme Court held that prisoners cannot be denied their right to marry because their committed relationships satisfy the basic reasons of why marriage is a fundamental right.[88] In *Lawrence*, the U.S. Supreme

78. *Id*. at 13-14.

79. *Id*. at 14-15.

80. *Id*. at 16-18.

81. *Id*. at 12 (citing *Loving*, 388 U.S.).

82. *Zablocki*, 434 U.S.

83. *Obergefell*, 14-556, at 12 (citing *Zablocki*, 434 U.S. at 384).

84. *Obergefell*, 14-556, at 12 (citing *Lawrence*, 539 U.S. at 574).

85. *Obergefell*, 14-556, at 13 (citing *Loving*, 388 U.S. at 12).

86. *Turner*, 482 U.S.

87. *Obergefell,* 14-556, at 13 (citing *Griswold*, 381 U.S.).

88. *Obergefell*, 14-556, at 14 (citing *Turner*, 482 U.S. at 95-96).

Court decriminalized acts of same-sex intimacy, holding that same-sex couples have the same right as opposite-sex couples to enjoy intimate association.[89] The Majority Opinion in *Obergefell* rationalized that it is not enough to give same-sex couples the liberty to associate intimately because the full promise of liberty to people who commit themselves to same-sex relationships may only be achieved if they, too, will have the right to marry.[90]

The *third principle* used the same rationale for the traditional definition of marriage, which ties the said institution to the foundational role of the family.[91] Ascribing to *Zablocki* that the right to marry, establish a home, and bring up children are a central part of the liberty accorded by the due process clause, the Majority Opinion in *Obergefell* justified that hundreds of thousands of children are presently being raised by same-sex couples.[92] This line of reasoning connotes that the right to marry should be expanded to include same-sex couples because they, too, have proven their ability to rear and nurture a family.[93] As a result, States have expanded their laws on adoption and foster care to add people belonging to same-sex relationships.[94]

The *fourth principle* had a broader consideration, which is the society.[95] This, too, is similar to one of the bases for the traditional definition of marriage. Echoing *Maynard*, the Court in *Obergefell* advocated for the right of same-sex couples to marry because marriage is a public institution that gives character to the whole civil polity; thus, without it, there would neither be civilization nor progress.[96] For this reason, the States have placed the institution of marriage at the center of the legal and social order, i.e., giving material benefits, granting governmental rights, and expanding responsibilities of married couples.[97]

There is, indeed, no shortage of cases where the U.S. Supreme Court ruled that the right to marry is part of the liberty guaranteed by the due process clause. Even without the foregoing four principles in *Obergefell,* the

89. *Obergefell*, 14-556, at 14 (citing *Lawrence*, 539 U.S. at 567).

90. *Id*.

91. *Obergefell*, 14-556, at 14.

92. *Id*. at 14-15 (citing *Zablocki*, 434 U.S. at 384 & Brief for Gary J. Gates as *Amicus Curiae*, at 4, *Obergefell*, 14-556).

93. *See Obergefell*, 14-556, at 15.

94. *Id*.

95. *Id*. at 16.

96. *Obergefell*, 14-556, at 16 (citing *Maynard*, 125 U.S at 211-13).

97. *Obergefell*, 14-556, at 16-17.

court therein would not have found it difficult to establish the existence of a "right to marry" based on the Fourteenth Amendment of the U.S. Constitution.[98] Since the latter period of the 19th century, the U.S. Supreme Court has been consistent that the liberty granted by the due process clause has no exact definition[99] and "denotes not merely freedom from bodily restraint."[100]

Among the cases that the *Obergefell* majority cited in its due process examination, the cases of *Maynard*, *Meyer*, *Griswold*, *Lawrence* vis-à-vis *Bowers*, and *Windsor* are most illustrative. These cases manifested how marriage evolved into a right that is included in the variety of freedoms encompassed by *liberty* in the due process clause. Each of these cases also undertook their own due process analysis, employing tests to answer the due process inquiry. The subsequent facts and legal reasoning in these cases, which the *Obergefell* Court did not elaborate on, are relevant for this Author's critique in Part IV of this Article.

In *Maynard*, the children of Spouses David and Lydia Maynard filed a complaint challenging, inter alia, legislative divorce.[101] Although there was already a Fourteenth Amendment at the time, the U.S. Supreme Court in *Maynard* did not declare the existence of a right to marry. One of the issues therein was the validity of Oregon's legislative divorce, considering that the Organic Act of Oregon, under which David Maynard filed for divorce,

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98. The Fourteenth Amendement provides —

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the [U.S.]; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. CONST. amend. XIV., § 1.

99. *Meyer*, 262 U.S. at 399 (citing Slaughter-House Cases, 16 Wall. 36 (1873) (U.S.); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Minnesota v. Barber, 136 U.S. 313 (1890); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Twining v. New Jersey, 211 U.S. 78 (1908); Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1911); Truax v. Raich, 239 U.S. 33 (1915); Adams v. Tanner, 244 U.S. 590 (1917); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Truax v. Corrigan, 257 U.S. 312 (1921); Adkins v. Children's Hospital, 261 U.S. 525 (1923); & Wyeth v. Cambridge Board of Health, 200 Mass. 474 (1909) (U.S.)).

100. *Id. Contra Obergefell*, 14-556 (J. Thomas, dissenting opinion).

101. Note that at the time, the power to grant divorces was with legislative bodies. *See Maynard*, 125 U.S at 209.

extended the legislative power of the territory "to all rightful subjects of legislation *'not inconsistent with the Constitution* and laws of the [U.S.]'"[102] Succinctly, the *Maynard* Court was asked whether or not legislative divorce was a legislative impairment of a contract, which violates Section 10, Article I of the U.S. Constitution.[103] The U.S. Supreme Court in *Maynard* held that marriage was not a "mere contract"[104] that legislature was prohibited from impairing.[105] Its reasoning was then cited and quoted by the *Obergefell* majority[106] and Chief Justice Robert's dissenting opinion,[107] with the former using *Maynard*'s marriage discussion to justify the existence of a right to marry and the latter using it only to define marriage. Citing a line of cases decided by Supreme Courts of different U.S. states, the Court in *Maynard* defined marriage as a social or domestic relation and institution that the sovereign will or power, through the government, may regulate.[108]

Several decades after *Maynard*, the U.S. Supreme Court decided the case of *Meyer*. In that case, the State of Nebraska prohibited "the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and successfully passed the eighth grade."[109] The purpose of this law "was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."[110] The Court in *Meyer* ruled that the said law violated the due process clause in the Fourteenth Amendment of the U.S. Constitution.[111] According to the Court, *liberty* in the due process clause of the Fourteenth

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102. *Maynard*, 125 U.S at 203 (emphasis supplied).

103. *See Maynard*, 125 U.S at 209.

104. *Maynard*, 125 U.S at 212 (citing Maguire v. Maguire, 7 Dana, 181, 183 (1838) (U.S.)).

105. *Id*.

106. *Obergefell*, 14-556, at 16 (citing *Maynard*, 125 U.S at 211-13).

107. *Obergefell*, 14-556, at 7 (C.J. Roberts, dissenting opinion) (citing *Maynard*, 125 U.S. at 211).

108. *Maynard*, 125 U.S at 211-12 (citing Adams v. Palmer, 51 Me. 481, 483 (1863) (U.S.); Maguire, 7 Dana; Ditson v. Ditson, 4 R.I. 87, 101 (1856) (U.S.); & Noel v. Ewing, 9 Ind. 37 (1857) (U.S.)).

109. *Meyer*, 262 U.S. at 390-91.

110. *Id*. at 401.

111. *See Meyer*, 262 U.S. at 403.

Amendment included the right "to acquire useful knowledge."[112] It also mentioned, inter alia, the *right to marry* as one of the rights protected by the due process clause.[113] The *Meyer* court examined the due process issue therein by asking whether the challenged statute had a "reasonable relation to some purpose within the competency of the State to effect."[114]

On the one hand, the U.S. Supreme Court noted that the State may legislate to improve the quality of its citizens,[115] such as regulate schools[116] "to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters,"[117] especially because of the "[u]nfortunate experiences during the late war."[118] But on the other hand, the Court found that the law infringed on liberties guaranteed by the due process clause, such as the right of the plaintiff in error to teach and the right of the parents to engage the said plaintiff in error to instruct their children.[119] According to the Court, while the end sought by the legislature in enacting the contested law was desirable, the means it promoted were prohibited by the U.S. Constitution.[120] Weighing these rationales, the *Meyer* Court ruled that the challenged law therein "as applied [was] arbitrary and without reasonable relation to any end within the competency of the State."[121]

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112. *Meyer*, 262 U.S. at 399 (citing *Slaughter-House Cases*, 16 Wall.; *Butchers' Union Co.*, 111 U.S.; *Yick Wo*, 118 U.S.; *Minnesota*, 136 U.S.; *Allgeyer*, 165 U.S.; *Lochner*, 198 U.S.; *Twining*, 211 U.S Chicago, Burlington & Quincy R.R. Co., 219 U.S.; Raich, 239 U.S.; *Tanner*, 244 U.S.; *New York Life Ins. Co.*, 246 U.S.; *Corrigan*, 257 U.S.; *Adkins*, 261 U.S.; & *Wyeth*, 200 Mass.).

113. *Meyer*, 262 U.S. at 399.

114. *Id.* at 400. In a substantive due process analysis, we presently know this as the *rational basis test*. *See* Legaspi v. City of Cebu, 711 SCRA 771, 789-90 (2013) (citing City of Manila v. Laguio, Jr., 455 SCRA 308 (2005)).

115. *Meyer*, 262 U.S. at 401.

116. *Id.* at 402.

117. *Id.*

118. *Id.* World War I ended in 1918, merely one year before the challenged law in *Meyer* was passed. History, World War I Ends, *available at* http://www.history.com/this-day-in-history/world-war-i-ends (last accessed Aug. 31, 2016).

119. *Meyer*, 262 U.S. at 400.

120. *Id.* at 401.

121. *Id.* at 403.

The appellants in *Griswold* gave "information and medical advice to married couples on how to prevent conception."[122] They were convicted under a statute of the State of Connecticut, which prohibited persons from counseling or assisting another in using any drug, medicinal article, or instrument for the purpose of preventing conception.[123] The appellants challenged the said law contending that it violated the due process clause in the Fourteenth Amendment of the U.S. Constitution,[124] offending rights "within the zone of privacy created by several fundamental constitutional guarantees."[125] At the onset, the Court in *Griswold* explicitly declined to base its due process analysis on the case of *Lochner v. New York*,[126] stating that it did "not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[127] Instead, it assessed the challenged law based on the "principle ... that a '*governmental purpose to control or prevent activities constitutionally subject to [S]tate regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms*.'"[128] Specifically, the *Griswold* Court asked, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[129] Unlike in the previously discussed cases, the U.S. Supreme Court in *Griswold* did not go into the details of the State of Connecticut's justification for the challenged law. Based on the aforequoted due process criterion,[130] the Court held that the statute was "repulsive to the notions of privacy surrounding the marriage relationship."[131]

Fast forward to 38 years later — when there was no more doubt that marriage and the right to marry are among the constitutionally protected freedoms in the U.S. — the U.S. Supreme Court decided on *Lawrence*.[132] In

122. *Griswold*, 381 U.S. at 479.

123. *Id.* at 480.

124. *Id.*

125. *Id.* at 485.

126. *Lochner*, 198 U.S.

127. *Griswold*, 381 U.S. at 482. *See also Obergefell*, 14-556, at 13 & 19 (C.J. Roberts, dissenting opinion) & *Obergefell*, 14-556, at 5 (J. Scalia, dissenting opinion).

128. *Griswold*, 381 U.S. at 485 (citing NAACP v. Alabama, 377 U.S. 288, 307 (1964)) (emphasis supplied).

129. *Griswold*, 381 U.S. at 485.

130. *Id.* (citing *NAACP*, 377 U.S.).

131. *Id.* at 486.

132. *Lawrence*, 539 U.S.

that case, the petitioners, who were both male, were caught in their private residence engaging in sexual conduct.[133] They were arrested, charged, and convicted under Section 21.06 (a) of the Texas Penal Code, which punished a person who engaged in any deviate sexual intercourse with another individual of the same sex.[134] The main issue before the U.S. Supreme Court was "[w]hether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate[d] their vital interests in liberty and privacy protected by the [d]ue [p]rocess [c]lause of the Fourteenth Amendment"[135] or, stated otherwise, "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the [d]ue [p]rocess [c]lause of the Fourteenth Amendment to the Constitution."[136]

The U.S. Supreme Court's discussion of the meaning of liberty in the due process clause and its interpretation in *Lawrence* began with a line of cases explaining how the Court declared a breadth of fundamental rights guaranteed by an individual's liberty in the due process clause.[137] These cases were put in contrast with *Bowers*,[138] which was the case most similar to *Lawrence* at the time.[139] In *Bowers*, a Georgia statute prohibited sodomy[140] whether or not the participants were of the same sex.[141] The respondent therein, Michael Hardwick, brought an action in federal court to declare the said statute unconstitutional for violating his fundamental rights guaranteed by the U.S. Constitution, however, the statute was sustained by the U.S. Supreme Court.[142] According to the Court in *Lawrence*, the Texas statute therein and the Georgia statute in *Bowers* purported to do no more than prohibit a particular sexual act but, in doing so, sought "to control a personal

133. *Id.* at 562-63.

134. *Id.* at 563.

135. *Id.* at 564.

136. *Id.*

137. *Id.* at 564-66 (citing *Griswold*, 381 U.S.; Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); & Carey v. Population Services Int'l., 431 U.S. 678 (1977)).

138. *Bowers*, 478 U.S.

139. *Lawrence*, 539 U.S. at 566.

140. According to the said Georgia statute, "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *Bowers*, 478 U.S. at 188.

141. *Lawrence*, 539 U.S. at 566.

142. *Id.* (citing *Bowers*, 478 U.S. at 190).

relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals."[143] After it exhaustively discussed the history of sodomy laws inside and outside of the U.S., *Lawrence* established that the liberty of an individual under the due process clause substantially protects adult persons in deciding how to conduct their private lives in matters pertaining to sex;[144] but the Court therein did not stop there.

The U.S. Supreme Court in *Lawrence* proceeded to answer this issue — whether the governmental interest in circumscribing personal choice by criminalizing private sexual conduct between two consenting adults of the same sex was somehow more legitimate or urgent.[145] To answer this, the U.S. Supreme Court opined that the facts in Lawrence did "not involve[,] [inter alia], whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[146] Thus, citing the dissenting opinion of former Associate Justice of the U.S. Supreme Court, John Paul Stevens, in *Bowers*, the *Lawrence* Court reiterated two propositions made clear by precedents: "[f]irst, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[;]"[147] and "[s]econd, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the due process clause of the Fourteenth Amendment ... [and] this protection extends to intimate choices by unmarried as well as married persons."[148] Following the foregoing discussion, the U.S. Supreme Court in *Lawrence* ruled that the challenged Texas law furthered no legitimate state interest that justified its intrusion into the personal and private life of the individual.[149]

Three years ago, the U.S. Supreme Court settled, among other things, a due process issue in the landmark case of *Windsor*.[150] This case involved Section 3 of the DOMA, a federal law that amended the Dictionary Act of the U.S. Code and provided for a *federal* definition of "marriage" (i.e., a

143. *Lawrence*, 539 U.S. at 567 (emphasis supplied).

144. *Id*. at 572.

145. *See Lawrence*, 539 U.S. at 564 & 571.

146. *Lawrence*, 539 U.S. at 578.

147. *Id*. (citing *Bowers*, 478 U.S. at 216 (J. Stevens, dissenting opinion)).

148. *Lawrence*, 539 U.S. at 578 (citing *Bowers*, 478 U.S. at 216 (J. Stevens, dissenting opinion)).

149. *Lawrence*, 539 U.S. at 578.

150. *Windsor*, 12-307.

"legal union between one man and one woman as husband and wife") and "spouse" (i.e., "a person of the opposite sex who is a husband or a wife").[151] This meant that regardless of States' laws on same-sex marriage, DOMA excluded same-sex couples who had State-sanctioned marriages from the benefits that the said law encompassed.[152]

In the said case, respondent and her same-sex partner of almost five decades got married in Ontario, Canada.[153] This marriage was deemed valid by the State of New York where they were both residents at the time.[154] When respondent's wife died in 2009, she left her entire estate to respondent.[155] Under federal law, the spouse of a deceased person is qualified to avail of "the marital exemption from federal estate tax, which excludes from taxation 'any interest in property which passes or has passed from the decedent to his surviving spouse.'"[156] After paying the estate taxes, respondent sought for a refund based on the said federal law exempting a spouse from federal estate tax.[157] However, the Internal Revenue Service denied her claim on the ground that she was not a "surviving spouse" based on Section 3 of the DOMA.[158] Respondent sued for refund before the U.S. District Court for the Southern District of New York where she claimed that the said DOMA Provision violated the equal protection clause of the U.S. Constitution.[159] The said District Court and the Court of Appeals ruled that Section 3 of DOMA was unconstitutional and ordered the Treasury to refund the tax with interest,[160] hence the case of *Windsor* before the U.S. Supreme Court.

While the case against the U.S. was initially based on the equal protection clause, the U.S. Supreme Court in *Windsor* mainly discussed the due process clause in its ratiocination against the challenged DOMA provision. Subsequent to its discussion on the historical background of same-

151. *Id.* at 2 (citing 1 U.S.C. § 7).

152. *Windsor*, 12-307, at 2 (citing U.S. General Accountability Office, Defense of Marriage Act: Update to Prior Report [GAO-04-353R] 1 (2004)).

153. *Windsor*, 12-307, at 2.

154. *Id.* at 3.

155. *Id.*

156. *Id.* (citing 26 U.S.C. § 2056 (a)).

157. *Windsor*, 12-307, at 3.

158. *Id.*

159. *Id.*

160. *Id.* at 4.

sex marriage legislation in the U.S., the U.S. Supreme Court in *Windsor* considered the design, purpose, and effect of the DOMA provision in deciding on the latter's constitutionality.[161]

The U.S. Supreme Court in *Windsor* found that the due process violation of the DOMA provision hinged on its purpose and practical effects, which imposed disadvantages, a separate status, and a stigma upon all who entered into lawful same-sex marriages by the authority of the States that allowed them.[162] It demonstrated how the effects of the challenged Law were largely discriminatory and prejudicial *without any legitimate governmental benefit*, such as efficiency or whatnot.[163] In fact, this was the central theme of *Windsor*'s analysis on the DOMA Provision's due process violation. *Did DOMA's end justify its means*; or *was DOMA's purpose, if any, more justifiable than the right of same-sex couples to enjoy the benefits that flowed from their State-sanctioned marriages*? After perusing the span of federal laws[164] that would have prejudiced same-sex couples whose marriages were recognized, protected, and enhanced by their own States, with neither concrete nor apparent advantages for the U.S. government, the U.S. Supreme Court in *Windsor* decided that the DOMA Provision was "invalid, for *no 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*."[165]

With the foregoing state of the law as regards due process analyses in cases involving marriage, sex-based inequalities, and/or rights of lesbians, gays, bisexuals, and transgender (LGBTs), and homosexuals, the U.S. Supreme Court in *Obergefell* ruled that the right to marry is "part of the *liberty* promised by the Fourteenth Amendment"[166] even to same-sex couples. We should, however, take note that the *Obergefell* majority decided the due process issue predominantly based on the four principles previously discussed in this Article, citing incidentally the aforementioned cases. Tallying together the said four principles, the U.S. Supreme Court concluded that the public policies in the States of the *Obergefell* petitioners, which excluded same-sex couples from the definition of marriage, violated[167] the latter's liberty — their right to marry — without due process of law.

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161. *Id.* at 14.

162. *See Windsor*, 12-307, at 20-24.

163. *Id.* at 22.

164. *Id.* at 20-24.

165. *Id.* at 25-26 (emphasis supplied).

166. *Obergefell*, 14-556, at 19 (emphasis supplied).

167. According to the Court,

2. The Equal Protection Clause Protects the Right to Marry of Same-Sex Couples

In ruling that the right to marry under the Fourteenth Amendment included same-sex couples, the U.S. Supreme Court in *Obergefell* also used the equal protection clause as basis, holding that the due process clause and equal protection clause are connected in a profound way despite differences in the principles they establish.[168] It cited, in passing, six cases[169] to illustrate that "the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage"[170] several times since the 1970s. But to clarify its equal protection rationale, the U.S. Supreme Court did not delve on those cases; rather, it emphasized *Loving* and *Zablocki* to demonstrate how the U.S. Supreme Court has invoked the equal protection clause alongside the due process clause to vindicate the burdened right of fundamental importance hereof, which the U.S. Supreme Court has declared as a liberty in a slew of cases.[171] To confirm the relation between the concept of liberty under the due process clause and the concept of equality under the equal protection clause, the U.S. Supreme Court in *Obergefell* also sparingly cited *Skinner v. Oklahoma ex rel. Williamson*,[172] *Eisenstadt v. Baird*,[173] *M.L.B. v. S.L.J.*,[174] and *Lawrence*.[175]

For the benefit of the reader and the ensuing critique hereof, this Author has provided the succeeding paragraphs to concisely state the factual and

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> [m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises ... . But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.

Id.

168. *Id*.

169. *Id*. at 21 (citing Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); & Frontiero v. Richardson, 411 U.S. 677 (1973)).

170. *Id*.

171. *Obergefell*, 14-556, at 20-21.

172. *Skinner*, 316 U.S.

173. *Eisenstadt*, 405 U.S.

174. *M.L.B.*, 519 U.S.

175. *Lawrence*, 539 U.S.

legal background of the foregoing cases, which were neither written nor were their equal protection tests employed in *Obergefell*.

To recall, the U.S. Supreme Court in *Loving* examined a Virginia law that prevented "marriages between persons solely on the basis of racial classifications."[176] This was the first case where the U.S. Supreme Court addressed an equal protection challenge involving racial classification with regard to marriage.[177] Because of the racial issue involved, the U.S. Supreme Court deviated from the more common (at that time) *rational basis analysis*, where it "merely asked whether there [was] any rational foundation for the discriminations, and [ ] deferred to the wisdom of the [S]tate legislatures."[178] Instead, it applied the *strict scrutiny test*, which required "that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' ... and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible State objective, independent of the racial discrimination[.]"[179] Under these standards, the criminal statute against interracial marriages in Virginia could not stand. To the *Loving* Court, there existed no justification for the restriction of marriage solely based on race other than to maintain white supremacy, which ran against the central meaning of the equal protection clause.[180]

The subject of the dispute in *Zablocki* was a law in the State of Wisconsin that prohibited its residents, who had minor children not in their custody and who were legally obliged to support the said children due to a court order or judgment, from marrying.[181] Marriages that violated the said law were "void and punishable as criminal offenses."[182] The U.S. Supreme Court in this case treated the said residents as members of a certain class.[183] Since the Wisconsin law interfered with the right to marry, which the *Zablocki* Court referred to as a fundamental liberty based on *Loving*,[184] it again applied the formula of the *strict scrutiny test* to examine whether the statutory classification that interfered with the exercise of the right to marry

176. *Loving*, 388 U.S. at 1.

177. *Id.* at 2.

178. *Id.* at 9.

179. *Id.* at 11 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

180. *Id.* at 11–12.

181. *Zablocki*, 434 U.S. at 375.

182. *Id.* at 387.

183. *Id.*

184. *Id.* at 383 (citing *Loving*, 388 U.S. at 11–12).

was "supported by sufficiently important [S]tate interests and [was] closely tailored to effectuate only those interests."[185] After examining the pleadings of the parties and the legislative history of the Wisconsin law,[186] the *Zablocki* Court held that the classification therein violated the equal protection clause.[187]

In *Skinner*, the State of Oklahoma enacted a statute that sanctioned the sterilization of any person who, having been convicted two or more times in Oklahoma or in any other State of "felonies" involving moral turpitude — "felony" being a crime like larceny (i.e., theft by someone who did not have prior physical or juridical possession), but not embezzlement (i.e., theft by a person who had prior lawful possession) — is thereafter convicted and sentenced to imprisonment in Oklahoma for such a crime.[188] This meant that habitual felons were not allowed to procreate. When the Supreme Court of Oklahoma decreed to enforce the said Law against the petitioner in *Skinner*, the latter filed a petition for *certiorari* before the U.S. Supreme Court.[189] While the law was also attacked based on due process grounds, the U.S. Supreme Court deemed that the feature which clearly condemned the law was its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment. The U.S. Supreme Court in *Skinner* ruled that while a State is allowed to, for example, classify crimes, recognizing "degrees of evil,"[190] classification in a law that involves the basic civil rights of man — i.e., marriage and procreation — should be scrutinized strictly,[191] which the Court therein did. Employing *strict scrutiny*, the law was invalidated because the State of Oklahoma failed to justify why a person's ability to procreate may be taken away if he committed larceny habitually, but not if the habitual crime is embezzlement or other crimes with the same quality of fraud.[192] The said Court held that the Oklahoma Statute violated the equal protection clause.[193] The law resulted to the discrimination and oppressive treatment of a particular class when it laid an unequal hand on those who

185. *Zablocki*, 434 U.S. at 388.

186. *Id.* at 388-90.

187. *Id.* at 390-91.

188. *Skinner*, 316 U.S.

189. *Id.* at 538.

190. *Id.* at 541.

191. *Id.*

192. *Id.* at 538-39.

193. *Id.* at 541.

committed intrinsically the same quality of offense[194] but sterilized one and not the other.[195]

In *Eisenstadt*, a Massachusetts penal law prohibited, inter alia: (a) any person who is neither a registered physician (for prescription) nor a registered pharmacist (for distribution upon prescription) from giving away any drug, medicine, instrument, or article for the prevention of conception; and (b) the giving away of the said contraceptives by any persons to anyone who is not married.[196] Contrary to this law, a lecturer at the Boston University gave a young woman a package of Emko vaginal foam at the close of his lecture and was consequently convicted.[197] The U.S. Supreme Court's equal protection analysis therein was based on the inquiry on the *classification's reasonableness* and its *fair and substantial relation to the object of the legislation*.[198] The U.S. Supreme Court in *Eisenstadt* reasoned that the justification for the classification between married and unmarried persons made by the Massachusetts law as to the distribution of contraceptives is questionable, even if the said justification may have pertained to: (a) morality;[199] or (b) health.[200] In its third reasoning, the U.S. Supreme Court briefly talked about "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[201] This right to privacy is more relevant in a due process-liberty analysis which the Court in *Eisenstadt* recognized, stating that whether or not an individual has a right to access contraceptives, the same should be granted to married and unmarried persons alike.[202] The U.S. Supreme Court therein held that the said penal law violated the equal protection clause "by providing dissimilar treatment for married and unmarried persons who are similarly situated[.]"[203]

A Mississippi law conditioned a parent's right to appeal the termination of her parental rights over her children upon the pre-payment of record

194. For example, larceny and embezzlement.

195. *Skinner*, 316 U.S. at 541.

196. *Eisenstadt,* 405 U.S. at 438.

197. *Id.* at 457.

198. *Id.* at 447.

199. *Id.* at 452-53.

200. *Id.* at 450-51.

201. *Id.* at 453 (citing Stanley v. Georgia, 394 U.S. 557 (1969); *Skinner*, 316 U.S.; & Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

202. *Eisenstadt,* 405 U.S. at 453.

203. *Id.* at 454.

preparation fees in *M.L.B.*[204] When she sought leave of court to appeal *in forma pauperis*, the Supreme Court of Mississippi denied her application because the right to appeal *in forma pauperis* was not allowed at the appellate level, but only at the trial level.[205] The classification in this case "[fenced] out would-be appellants based *solely* on their inability to pay core costs;"[206] a classification that was "wholly contingent on one's ability to pay and ... [had] different consequences on two categories of persons[.]"[207] While there was a due process facet in the Court's analysis in *M.L.B.*, it based its decision on the equal protection framework.[208] The analysis was made through a *strict scrutiny* of state policy and jurisprudential precedents, "*inspect*[*ing*] *the character and intensity of the individual interest at stake*, *on the one hand*, *and the State's justification for its exaction*, *on the other.*"[209] The Court therein declared that the said Mississippi law was unconstitutional based on the due process clause — "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment"[210] — and equal protection clause — "a law non-discriminatory on its face may be grossly discriminatory in its operation"[211] — of the U.S. Constitution. The U.S. Supreme Court in *M.L.B.* held that the State of Mississippi cannot deny appellate review to a parent, whose parental right was terminated, on the grounds of poverty.[212]

Finally, one of the issues in *Lawrence*, was whether the challenged Texas statute therein violated the equal protection clause of the Fourteenth Amendment for criminalizing sexual intimacy by same-sex couples, but not identical behavior by opposite-sex couples.[213] The facts of the case were stated earlier in this Article.[214] The Court's decision in *Lawrence* was largely

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204. *M.L.B.*, 519 U.S. at 108.

205. *Id.* at 109.

206. *Id.* at 120 (emphasis supplied).

207. *Id.* at 127.

208. *Id.* at 120.

209. *Id.* (emphasis supplied).

210. *M.L.B.*, 519 U.S. at 119 (citing Santosky v. Kramer, 455 U.S. 745, 774 (1982) (J. Rehnquist, dissenting opinion)).

211. *M.L.B.*, 519 U.S. at 127 (citing Griffin v. Illinois, 351 U.S. 12 (1956)).

212. *M.L.B.*, 519 U.S. at 107.

213. *Lawrence*, 539 U.S. at 564.

214. Refer to Part I (C) (1) of this Article.

based on a due process scrutiny.[215] It examined the history of sodomy laws, and pre-*Bowers* and post-*Bowers* case law, stating that "[e]quality 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."[216] This *liberty* referred to the *right of homosexual persons to engage in private intimate sexual conduct without government intrusion*.[217] The U.S. Supreme Court did not base its decision on an equal protection analysis in the said case because to do so would have led to an absurd inquiry, such as, whether the law would be valid if it prohibited the penalized conduct both between same-sex and opposite-sex participants.[218] Thus, it deemed it more fit to examine the law on its substantive validity.[219]

In holding that the equal protection clause also guaranteed same-sex couples the right to marry, *Obergefell* particularly cited *Lawrence* as the case that drew upon principles of liberty and equality to define and protect the rights of LGBTs.[220] Without resorting to the jurisprudential tests that confined equal protection challenges in the foregoing cases, *Obergefell* declared that in "interpreting the [e]qual [p]rotection [c]lause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[221] According to *Obergefell*, unjust sex-based classifications in marriage remained common during the mid-20th century despite the gradual erosion of the doctrine of coverture.[222] Considering this "new awareness"[223] and the doctrines in the aforesaid cases, the U.S. Supreme Court in *Obergefell* held, to wit —

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal [—] same-sex couples are denied all the benefits

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215. *See generally Lawrence*, 539 U.S.

216. *Id.* at 575.

217. *Id.* at 578.

218. *Id.* at 575.

219. *Id.*

220. *Obergefell*, 14-556, at 22 (citing *Lawrence*, 539 U.S. at 578).

221. *Obergefell*, 14-556, at 20.

222. *Id.* at 21 (citing Appendix to Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971)).

223. *Obergefell*, 14-556, at 21.

> afforded to opposite-sex couples and are barred from exercising a fundamental right. ... The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the [e]qual [p]rotection [c]lause, like the [d]ue [p]rocess [c]lause, prohibits this unjustified infringement of the fundamental right to marry.[224]

III. THE GROUNDS FOR DISCORD IN *OBERGEFELL*

A. Flawed Due Process and Equal Protection Analyses by the Majority

> The majority states that the right it believes is 'part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.' Despite the 'synergy' it finds 'between th[ese] two protections,' the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.[225]

Four of the nine U.S. Supreme Court Justices in *Obergefell* disagreed with the majority that the right to same-sex marriage is guaranteed by the due process and equal protection clauses of the U.S. Constitution. Statistically speaking, the said four justices comprise the conservative wing of the U.S. Supreme Court.[226] This Author agrees that the dissenting opinions of Chief Justice Roberts, Justice Clarence Thomas, Justice Antonin Scalia, and Justice Samuel A. Alito, Jr. may have been influenced by their conservative leanings;[227] but upon careful scrutiny of *Obergefell*, its jurisprudential bases, and its dissenting opinions, it is without a doubt that there are apparent and valid reasons in U.S. Constitutional Law for the sharp division of the U.S. Supreme Court therein. One of these is *Obergefell*'s inaccurate, if not erroneous, discussion of the due process clause as its basis for the right to marry of same-sex couples.

1. Dissenting Opinions on Liberty and the Due Process Clause in the U.S. Constitution

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224. *Id*. at 22.

225. *Obergefell*, 14-556, at 3 (J. Thomas, dissenting opinion).

226. Hannah Fairfield & Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES, June 26, 2014, *available at* http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html (last accessed Aug. 31, 2016). *See* Washington University Law, Analysis Specifications — Modern Data (1946-2015), *available at* http://scdb.wustl.edu/analysis.php (last accessed Aug. 31, 2016).

227. *See* Fairfield & Liptak, *supra* note 226.

Joined by Justice Scalia, Justice Thomas's dissenting opinion offers an exhaustive discussion on the meaning of liberty under the due process clause. Citing *Davidson v. New Orleans*,[228] A. E. Dick Howard, and Sir Edward Coke, Justice Thomas explained that the due process clause reaches back to Chapter 39 of the original Magna Carta in the years 1215 and 1225, which states that

> [n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or *by the law of the land*.[229]

Sir Coke interpreted "by the law of the land" to mean "by due process of the common law."[230] Come the 17th century, the English jurist William Blackstone referred to the said Magna Carta Provision as "protecting the 'absolute rights of every Englishman,'" such as the right of personal liberty, which he defined as the "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[231] Justice Thomas rationalized that the framers of the U.S. Constitution based its Fourteenth Amendment on the aforequoted language of the Magna Carta.[232]

Further, according to renowned lawyer, legal scholar, and Pulitzer prize winner, Charles Warren, decisions of State courts that interpreted early State Constitutions replicating the Magna Carta provision between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" as freedom from physical restraint.[233] Justice Thomas claimed that "[i]n the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to

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228. Davidson v. New Orleans, 96 U.S. 97, 101-02 (1878).

229. *Obergefell*, 14-556, at 4 (J. Thomas, dissenting opinion) (citing A. E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964) & EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (1797)) (emphasis supplied).

230. *Id*.

231. *Obergefell*, 14-556, at 4 (J. Thomas, dissenting opinion) (citing 1 BLACKSTONE, *supra* note 28, at 123, 125, & 130).

232. *Obergefell*, 14-556, at 5-6 (J. Thomas, dissenting opinion) (citing Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 441–45 (1926)).

233. *Id*.

a particular governmental entitlement;"[234] that "[a]s a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits [a]nd as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment."[235]

While none of the other dissenting opinions directly echoed the historical discussion of Justice Thomas on "liberty" under the due process clause, Chief Justice Roberts also disagreed with the majority's interpretation of the said constitutional clause. He cited Justice Harlan, whose dissenting opinion in *Poe* was heavily relied on by the majority in *Obergefell*, and reiterated that "courts implying fundamental rights are not 'free to roam where unguided speculation might take them. ... They must instead have 'regard to what history teaches' and exercise not only 'judgment' but 'restraint.'"[236] He also added, citing jurisprudence and Justice Thomas's dissenting opinion in *Obergefell*, that U.S. Supreme Court cases "have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[237]

To recall, *Obergefell* upheld same-sex couples' right to marry based on the theory, inter alia, that it is a fundamental liberty of homosexuals and is protected by the due process clause of the U.S. Constitution. In rationalizing this theory, however, the majority opinion cited four principles that are not legal in nature, but based on policy considerations. As pointed out by Chief Justice Roberts, for example "[t]his freewheeling notion of individual autonomy echoes nothing so much as 'the general right of an individual to be free in his person'"[238] and, to this Author, does not contradict the reasons for the traditional definition of marriage that are extensively discussed in the

234. *Obergefell*, 14-556, at 7-9 (J. Thomas, dissenting opinion) (citing JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, § 4, at 4 (J. Gough ed. 1947); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907, 918–19 (1993); & JOHN PHILIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 56 (1988)).

235. *Obergefell*, 14-556, at 13 (J. Thomas, dissenting opinion).

236. *Obergefell*, 14-556, at 18 (C.J. Roberts, dissenting opinion) (citing *Poe*, 367 U.S. at 542).

237. *Obergefell*, 14-556, at 18 (C.J. Roberts, dissenting opinion) (citing DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196 (1989); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973); & *Obergefell*, 14-556, at 9-13 (J. Thomas, dissenting opinion)).

238. *Obergefell*, 14-556, at 19 (C.J. Roberts, dissenting opinion) (citing *Lochner*, 198 U.S.).

dissenting opinions of *Obergefell*. The other principles raised therein to support the due process clause's analysis are equally supportive of the traditional definition of marriage.

2. Dissenting Opinions on Equality and the Equal Protection Clause in the U.S. Constitution

Among the dissenting opinions, Chief Justice Roberts captured an accurate description of how the U.S. Supreme Court in *Obergefell* used the equal protection clause to justify its ruling.[239] Similar to what this Author observed in *Obergefell*, Chief Justice Roberts criticized that the discussion of the majority therein on how the equal protection clause supposedly upholds the right to marry of same-sex couples is "difficult to follow"[240] and lacking the "usual framework for deciding equal protection cases"[241] — a "means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing."[242]

Citing former U.S. Supreme Court Justice Sandra Day O'Connor's concurring opinion in *Lawrence*, Chief Justice Roberts further noted that "the marriage laws at issue here do not violate the [e]qual [p]rotection [c]lause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'"[243] Chief Justice Roberts also pointed out that the cases which the *Obergefell* petitioners filed did not challenge any law specifically, but generally targeted laws defining marriage and its ancillary benefits,[244] which made it difficult or illogical for the Court to approach the issue from a means-ends perspective in the first place.

As this Author discussed earlier, the U.S. Supreme Court in *Obergefell* tried to establish the due process-equal protection synergy by citing instances[245] where the U.S. Supreme Court supposedly used this approach to uphold rights of homosexuals. Chief Justice Roberts correctly stated that the "majority [failed] to provide even a single sentence explaining how the

239. *See Obergefell*, 14-556, at 23-24 (C.J. Roberts, dissenting opinion).

240. *Id*.

241. *Id*.

242. *Id*.

243. *Id*. at 24 (citing *Lawrence*, 539 U.S. at 585 (J. O'Connor, concurring opinion)).

244. *Obergefell*, 14-556, at 24 (C.J. Roberts, dissenting opinion).

245. *See Loving*, 388 U.S.; *Zablocki*, 434 U.S.; *Skinner*, 316 U.S.; *Eisenstadt,* 405 U.S.; *M.L.B.*, 519 U.S.; & *Lawrence*, 539 U.S.

[e]qual [p]rotection [c]lause supplies independent weight for its position[.]"[246]

In examining the equal protection analysis in *Obergefell*, this Author speculated whether the methodology of the U.S. Supreme Court therein was a shortcut or was altogether different. To answer this question, this Author delved into the jurisprudential bases of *Obergefell*'s equal protection analysis, which were *Loving*, *Zablocki*, *Skinner*, *Eisenstadt*, *M.L.B.*, and *Lawrence*. Since *Obergefell* did not discuss them comprehensively, this Author summarized them in Part II (C) (2) hereof earlier and highlighted the equal protection analysis in each case, which will later be considered in analyzing the accuracy of the constitutional precepts explained and applied by the U.S. Supreme Court in *Obergefell*.

B. Obergefell Thwarted the Democratic Process

> When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are — in the tradition of our political culture — reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. 'That is exactly how our system of government is supposed to work.'[247]

The dissenters in *Obergefell* heavily criticized the U.S. Supreme Court's decision therein as a product of an evident lack of judicial restraint,[248] repeating the mistake of the U.S. Supreme Court in *Lochner*[249] where it acted like a super-legislature.[250]

Dwelling on the dissenting opinions of the U.S. Supreme Court in *Lochner*, Chief Justice Roberts aptly observed that the said case is the "only one precedent [that] offers any support for the majority's methodology"[251] in *Obergefell*; a methodology that "has no basis in principle or tradition, except

246. *Obergefell*, 14-556, at 23-24 (C.J. Roberts, dissenting opinion).

247. *Id*.

248. *See Obergefell*, 14-556, at 25 (C.J. Roberts, dissenting opinion); *Obergefell*, 14-556, at 13-14 (J. Thomas, dissenting opinion); *Obergefell*, 14-556, at 7 (J. Alito, dissenting opinion); & *Obergefell*, 14-556, at 3 (J. Scalia, dissenting opinion).

249. *Lochner*, 198 U.S.

250. *Obergefell*, 14-556, at 13 & 19 (C.J. Roberts, dissenting opinion). *See Obergefell*, 14-556, at 5 (J. Scalia, dissenting opinion).

251. *Obergefell*, 14-556, at 19.

for the unprincipled tradition of judicial policy[-]making that characterized discredited decisions such as *Lochner*[.]"[252]

Lochner is a highly chastised U.S. Supreme Court case decided in 1905, with a doctrine that spanned decades before it was overturned.[253] The challenged statute in that case was the Labor Law of the State of New York, which prohibited an employer from requiring and permitting an employee to work for more than 60 hours a week.[254] Generally, the U.S. Supreme Court therein weighed whether the exercise of police power in the interest of public health was a valid interference on the liberty of a person and the freedom of contract;[255] or, more particularly, whether the legislature reasonably infringed on the right of employers and employees to make contracts regarding labor and to earn a living based on terms they deemed best.[256] For the most part, the justices of the Court therein relied on their own policy biases in discussing why the contested labor law violated the due process clause.[257] To the *Lochner* Court, a labor law that limited the number of working hours should have covered occupations that were clearly health hazards only;[258] otherwise, the legislature may infringe on an individual's right to contract with his or her employer no matter how "safe" the job is.[259] In holding that the contested law was unreasonable and arbitrary, the *Lochner* Court is said to have "treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right,"[260] and "imposed *laissez faire* conservative values

252. *Id.* at 10.

253. *See generally* Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U.L. REV. 859 (2005); David A. Strauss, *Why was Lochner Wrong*, 70 U. CHI. L. REV. 373 (2003); & David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003-2004).

254. *Lochner*, 198 U.S. at 52.

255. *Id.* at 60.

256. *Id.* at 61.

257. *Id.* The Court stated, inter alia, that it did not "believe in the soundness of the views which [upheld] this law." *Id.*

258. *Id.* at 56.

259. *Lochner*, 198 U.S. at 56-61.

260. Strauss, *supra* note 253, at 375.

through its interpretations of national power and the [d]ue [p]rocess [c]lause."[261]

According to the chief dissenter in *Obergefell*, the U.S. Supreme Court ably recognized its error in *Lochner* and vowed in a line of cases not to repeat it again.[262] But contrary to this, the majority in *Obergefell* decided the case as if there was a checklist that was completely checked off — allowing five unelected and unaccountable justices of the U.S. Supreme Court to decide what the law should be rather than merely interpret what the law is — because of, inter alia, extensive litigation, more than a hundred *amicus* briefs, studies, and scholarly writings.[263]

Joined by Justice Scalia and Justice Alito, Justice Thomas criticized how *Obergefell* will indirectly affect the institutions and processes that ought to safeguard the liberty that the majority inordinately sought to protect in the case.[264] According to him, while the democratic process is imperfect — as one cannot expect all States to agree on one definition of marriage, for example — allowing the People to engage in the process is what legitimizes their civil liberties.[265]

In his more candid dissenting opinion, Justice Scalia opined that the majority lost focus on what the People's understanding of liberty is.[266] Rather, it considered its *own* views and four non-legal principles to re-define marriage.[267] He reasoned that by *Obergefell*, it is as if the Court made the People subordinate to the former, thereby offending the very tenets of democracy enshrined in the U.S. Constitution.[268]

IV. SYNTHESIS AND AUTHOR'S CRITIQUE

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261. Jack M. Balkin, *"Wrong the Day it was Decided": Lochner and Constitutional Historicism*, 85 B.U.L. REV. 677, 686 (2005).

262. *Obergefell*, 14-556, at 13 (C.J. Roberts, dissenting opinion) (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955); & Day- Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)).

263. *See Obergefell*, 14-556, at 2, 25, & 29 (C.J. Roberts, dissenting opinion).

264. *See Obergefell*, 14-556, at 13 (J. Thomas, dissenting opinion)

265. *Id*. at 14. *See also Obergefell*, 14-556, at 7 (J. Alito, dissenting opinion).

266. *Obergefell*, 14-556, at 5 (J. Scalia, dissenting opinion)

267. *Id*.

268. *See Obergefell*, 14-556, at 5 (J. Scalia, dissenting opinion)

Obergefell justified that same-sex couples' right to marry is guaranteed by the Fourteenth Amendment, holding in the main that the said right is part of the liberty that cannot be violated without due process. Its rationale involved an analysis that is admittedly a big move for substantive due process U.S. jurisprudence.[269] But legal scholars from the U.S., regardless of their biases for or against same-sex marriage, criticized the U.S. Supreme Court's methodology in *Obergefell*.[270]

One of these legal scholars is same-sex marriage, gender rights advocate, and John A. Garver Professor of Jurisprudence at the Yale Law School, William Eskridge, Jr.[271] Professor Eskridge analyzed the opinions and the debate within the *Obergefell* Court in light of theories of constitutional decision-making, which are: original-meaning constitutionalism, common-law constitutionalism, and pluralism-respecting judicial review.[272] According to him, "original-meaning theories ask what meaning constitutional text and structure would have had to a neutral reader of the English language at the time of the framing ... [and] addresses [ ] the general meaning constitutional text and structure would have had to neutral readers of the era."[273]

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269. *See* William Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, CATO SUP. CT. REV. 111, at 113 (2015) & Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015) [hereinafter Yoshino, *Freedom*].

270. *See*, *e.g.*, Eskridge, Jr., *supra* note 269; Yoshino, *Freedom*, *supra* note 269; Stephen Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on Obergefell v. Hodges)*, 24 WM. & MARY BILL RTS. J. 341 (2015); Adam Lamparello, *Justice Kennedy's Decision in Obergefell: A Sad Day for the Judiciary*, 6 HOUSTON L. REV. OFF THE RECORD 45 (2015); & Leonore Carpenter & David Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124 (2015).

271. Yale Law School, Faculty, *available at* https://www.law.yale.edu/william-eskridge-jr (last accessed Aug. 31, 2016).

272. Eskridge, Jr., *supra* note 269, at 112-13.

273. *Id.* at 114 (citing Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875 (2008); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-148 (2003); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75-77, 143-45, 154-55 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); & Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989)).

Common-law constitutionalism "requires [justices] to follow precedent, take its reasoning as well as results seriously, and advance the law case by case through analogy of new problems to older decisions,"[274] while the pluralism-respecting approach "urges the Court to apply the Fourteenth Amendment to invite new social groups into the political process, on terms of equality, but without marginalizing older groups that have been resistant."[275]

Professor Kenji Yoshino, the Chief Justice Earl Warren Professor of Constitutional Law at the New York University School of Law and one who is married to another homosexual,[276] and Professor Eskridge concur that the methodology of the U.S. Supreme Court in *Obergefell* is one of common-law constitutionalism.[277] The majority in *Obergefell*, as Professor Eskridge and this Author observed, also attempted to answer the issue therein from a pluralism-respecting approach which is shown by the Court's reliance on the public's (i.e., state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities) "enhanced understanding" of the right to same-sex marriage.[278] These substantive due process theories are similar with those forwarded by Professor Daniel O. Conkle, especially in examining the U.S. Supreme Court's approach in *Lawrence*;[279] i.e., the theories of historical tradition, reasoned judgment, and evolving national values.[280]

Nevertheless, one of the main criticisms against *Obergefell* is that regardless of U.S. constitutional law theories, it sought to address the same-sex marriage issue by using the precept of liberty in the due process clause rather than the principle of equality in the equal protection clause.[281] This

274. Eskridge, Jr., *supra* note 269, at 123.

275. *Id*. at 113.

276. New York University School of Law, Faculty Profiles, *available at* https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=22547 (last accessed Aug. 31, 2016).

277. *See* Eskridge, Jr., *supra* note 269, at 123 & Yoshino, *Freedom*, *supra* note 269, at 169 (citing *Poe*, 367 U.S. at 542 (J. Harlan, dissenting opinion); McDonald v. City of Chicago, 561 U.S. 742, 881 (2010) (J. Stevens, dissenting opinion); & DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)).

278. *Obergefell*, 14-556 at 23.

279. Danilo O. Conkle, *Three Theories of Substantive Due Process*, 85 N. C. L. REV. 63 (2006).

280. *Id*. at 66-67.

281. *See* Eskridge, Jr., *supra* note 269, 118-21 & Yoshino, *supra* note 269, at 148.

discussion was only made more difficult because historically, it can be said that equality — not liberty — has been the basis for promoting and upholding rights of LGBTs and homosexuals.[282] Worse, although common-law methodology and pluralist-respecting constitutionalism are acceptable substantive due process analyses, if not correct, the precedents cited by the *Obergefell* Court never referred to a right to same-sex marriage but a right to marry, *without changing the core meaning of marriage*.[283] Neither of the two methods, as used by the Court in *Obergefell,* brought to fore a substantive due process consideration that resulted to the creation of another unlisted right in the U.S. Constitution. Moreover, all of the dissenters in *Obergefell* had strong opinions against how the majority therein undermined the democratic process.[284]

Since the U.S. Supreme Court in *Obergefell* impliedly disregarded the aforesaid canvass of the right to marry juxtaposed with the Fourteenth Amendment and the separation of powers enshrined in the U.S. Constitution, this Author will evaluate *Obergefell* from a common-law and pluralist perspective based on: (a) its due process inquiry; (b) marriage equality in the context of the equal protection clause; and (c) the precepts of federalism and democracy.

A. Due Process Inquiry

The Author noted earlier that a survey of all the marriage cases cited by the U.S. Supreme Court in *Obergefell* reveals that the right to marry has, since the 1920s, been held as part of the *liberty* guaranteed by the due process clause in the U.S. Constitution.[285] The *Obergefell* Court, in acknowledging this, declared that its "cases describing the right to marry presumed a relationship involving opposite-sex partners"[286] and "identified essential

282. *See* Eskridge, Jr., *supra* note 269, 118; Peter Nicolas, *Obergefell's Squandered Potential*, 6 CAL. L. REV. 137 (2015); Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L. J. 124, 125 (2015); & Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity*, 76 OHIO ST. L.J. 1007 (2015).

283. *Obergefell*, 14-556, at 8 (C.J. Roberts, dissenting opinion).

284. Feldman, *supra* note 270, at 351.

285. *See also Obergefell*, 14-556, at 11.

286. *Id.*

attributes of that right based on history, tradition, and other constitutional liberties."[287]

By the time *Windsor* was decided in 2013, it became apparent that the U.S. Supreme Court has accepted the notion of including same-sex couples in the definition of *marriage*. One may say that as early as in *Windsor*, the U.S. Supreme Court had an opportunity to change the traditional definition of marriage in all U.S. states. In fact, to this Author, it would have been more legally plausible for the Court therein to change the traditional marriage definition than in *Obergefell* because in the former, the challenged law was at least applicable to all States, unlike in the latter where the challenged laws were merely from the States of the *Obergefell* petitioners. Although this simplistic notion would not have been necessarily correct considering that the DOMA covered federal laws (that spanned all States) only and not State laws, at least the due process analysis in *Windsor* made sense in the context of right to marry cases. In *Obergefell*, an average student of U.S. Constitutional Law in this generation would find it laborious to understand how the U.S. Supreme Court arrived at its conclusion based on a jurisprudential substantive due process approach or from a purely common-law constitutionalism perspective.

Of the U.S. Supreme Court right to marry cases that the *Obergefell* Court cited,[288] three things are clear: (a) the right to marry is a fundamental constitutional right under the due process clause of the U.S. Constitution; (b) the States are the ones authorized to regulate domestic relations, such as the institution of marriage; and (c) a law interfering with or infringing on the right to marry should be scrutinized strictly.

Within these parameters, there were no court-designed "principles" in answering a due process inquiry. One would observe, however, that the justices of the U.S. Supreme Court who comprised the deciding vote in the most recent federal LGBT rights cases (majority of the deciding vote in *Lawrence* and everyone in the winning faction in *Windsor*) were also the ones who ruled in favor of the *Obergefell* petitioners. To some, this observation boosts the non-neutrality of substantive due process analyses;[289] that the said inquiry is ultimately about "whose voice will matter."[290] To the Author, this notion is purely academic. Its accuracy or inaccuracy does not contradict the common peripheries of cases that preceded *Obergefell*.

Maynard, *Meyer*, *Griswold*, *Lawrence*, and *Windsor* all either mentioned or discussed in detail the right to marry in the context of substantive due

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287. *Id.* at 12.

288. Refer to Part I (C) (1) of this Article.

289. Feldman, *supra* note 270, at 344.

290. *Id.* at 349-50.

process. In all cases, the U.S. Supreme Court confirmed the essential role of marriage in society and, later, upheld it as a liberty protected by the U.S. Constitution. Although *Maynard*, decided in 1888, merely two decades after the ratification of the Fourteenth Amendment, only defined marriage as an incident to the *lis mota* of the case therein, the status that marriage occupied in law at that time has consistently been upheld by the Court until *Obergefell*. This is true in *Meyer*, where the U.S. Supreme Court explicitly gave marriage the status of a constitutional right. It was also not the *lis mota* of the case therein, but it was clear that by that time, *liberty* in the Fourteenth Amendment encompassed freedoms beyond physical movement, including those necessary for social and domestic relations.

As discussed earlier, the due process inquiry in the 1923 case of *Meyer* pertained to the right of a person to teach and the right of parents to engage a person to teach their children. These rights, likened with the right to marry, were weighed against the challenged law therein through a criterion that inquired into the latter's reasonable relation with the government's purpose. This is what we know now as the *rational basis review*; a substantive due process test that Professor Bradley Thayer first coined[291] and one that his former student, then Associate Justice of the U.S. Supreme Court, Oliver Wendell Holmes Jr., memorialized in his dissenting opinion in the 1905 case of *Lochner*.[292] According to Professor Thayer, "a statute should be invalidated only if its unconstitutionality is 'so clear that it is not open to rational question.'"[293] Supplementing this, Justice Holmes stated that a law may be held invalid on due process grounds if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[294] At the time *Meyer* was decided, the U.S. Supreme Court did not have a clear delineation of rights — fundamental or non-fundamental — that may trigger different levels of scrutiny.[295] Thus, at the time, the right to marry did not have the elevated status that it has had since *Griswold* and did not require a stricter due process scrutiny.

The right to marry was not the main issue in *Griswold*, but it was in that case where the U.S. Supreme Court included marriage in the then growing

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291. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012) (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)).

292. E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 49 (2013).

293. Posner, *supra* note 291, at 522 (citing Thayer, *supra* note 291, at 144).

294. *Lochner*, 198 U.S. at 76 (J. Holmes, dissenting opinion).

295. *See* SULLIVAN & MASSARO, *supra* note 292, at 50.

list of privacy rights. The Court therein opined that the due process clause allowed married couples to seek counsel on contraception. It undertook a test that was apparently different from the rational basis test. The Court did not even discuss the justifications of the challenged law. Disregarding the legislature's purpose without full review of its justification, *Griswold* declared the challenged statute unconstitutional for being too invasive, as it swept unnecessarily broadly and invaded an area of a protected freedom, having a "maximum destructive impact"[296] on marriage. This was not the first time when a court subjected privacy rights to more judicial protection.[297] In fact, according to a legal practitioner, Irwin R. Kramer, the concept of "privacy rights" may be traced back to an article[298] that former Associate Justice of the U.S. Supreme Court, Louis D. Brandeis, and his friend, Samuel D. Warren, wrote a little over a decade after they graduated from law school.[299] They referred to former Chief Justice of the Michigan Supreme Court, Thomas M. Cooley's "right 'to be let alone[,]'"[300] specifically in "the sacred precincts of private and domestic life[.]"[301]

The U.S. Supreme Court affirmed and highlighted privacy rights, associated with the right of same-sex couples to engage in sexual conduct, in *Lawrence*. It invalidated the remaining sodomy laws in the U.S. at that time based on a combination of historical tradition[302] and what seemed to be a rational basis review.[303] We recall that, similar in *Obergefell*, Justice Kennedy penned the Court's opinion in *Lawrence*, while one of the dissenting opinions therein was written by Justice Scalia. Unlike the latter's forthright dissent in *Obergefell*, Justice Scalia's evaluation of *Lawrence* was more grounded in logic and in law. Among his observations was the U.S. Supreme Court's application of a rational basis review despite its assertion that the right involved in *Lawrence* was a fundamental right, and that in considering the

296. *Griswold*, 381 U.S. at 485.

297. *See* SULLIVAN & MASSARO, *supra* note 292, at 50 (citing *Meyer*, 262 U.S.).

298. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

299. Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 703 (1990).

300. Brandeis & Warren, *supra* note 298, at 195 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed., 1888)).

301. *Id.*

302. *See* Conkle, *supra* note 279, at 66.

303. *Lawrence*, 539 U.S. at 599 (J. Scalia, dissenting opinion).

said approach, the *Lawrence* Court concluded that the moral beliefs of citizens in States with sodomy laws were not legitimate state interests.[304]

If the due process precedents discussed in this Article before *Griswold* are followed, Justice Scalia's observation in *Lawrence* would have been accurate.[305] In plain rational basis review of laws infringing on non-fundamental liberties, the mere weighing between the government's and individual's interests sufficed.[306] *However, it has also been seen that since the era of Griswold, questions relating to listed or unlisted constitutional liberties that affected the right to privacy and/or individual autonomy were not merely answered by inquiring into the legitimacy of state interests.*[307] *At the onset, the scales are tilted in favor of the individual when the issue concerns fundamental rights, and this makes it more difficult for a State to justify an infringing statute.*[308] The issues were even more delicate in *Lawrence* because what was involved therein was a criminal statute with effects highly detrimental to a certain class of individuals, but not necessarily disgraceful to societal morals because the criminalized acts were presumably done privately.[309] It is then more accurate to say that the *Lawrence* Court did not solely use the rational basis review, but also decided the case within the framework of history, tradition, common-law, and evolving societal norms, now more commonly known as the "rational basis plus" or "rational basis with bite" test,[310] vis-à-vis privacy and individual autonomy.[311] Predictably, this approach weighed heavily against the challenged penal law in *Lawrence*, especially because the case involved not only privacy and individual autonomy rights, but also what original meaning constitutionalists would refer to as the definition of *liberty* in the Fourteenth Amendment, i.e., freedom from physical restraint.

The aforementioned chronology of doctrinal declarations shows why the challenged DOMA provision in *Windsor* was struck down. In fact, it was aptly observed that the approach of the U.S. Supreme Court in *Windsor* was

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304. *Id.* at 586.

305. *See* SULLIVAN & MASSARO, *supra* note 292, at 32.

306. See, for example, U.S. cases involving economic liberties. *Contra Lochner*, 198 U.S.

307. *See, e.g.*, *Griswold*, 381 U.S. & *Lawrence*, 539 U.S.

308. *See* SULLIVAN & MASSARO, *supra* note 292, at 32.

309. *See Lawrence*, 539 U.S. at 578.

310. Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2774 (2005).

311. According to Justice Kennedy, autonomy includes "freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 558.

similar to that of *Romer* and *Lawrence*, which were incidentally also written by Justice Kennedy.[312] Similar to the two cases, the U.S. Supreme Court in *Windsor* applied neither a rational basis test nor a strict scrutiny test; but the rational basis plus test. This is not remarkable considering the foregoing jurisprudential background prior to *Windsor*.

The more noteworthy ratiocination of the *Windsor* Court, comprising the same majority in *Obergefell*, was about its reiteration of the "the extent of the [S]tate power and authority over marriage as a matter of history and tradition."[313] According to the Court therein,

> [b]y history and tradition[,] the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.
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> ...
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> Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.
>
> ...
>
> In order to assess the validity of that intervention it is necessary to discuss the extent of the [S]tate power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons ... but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'
>
> The recognition of civil marriages is central to [S]tate domestic relations law applicable to its residents and citizens. ... The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' ... '[T]he [S]tates, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the [U.S.] on the subject of marriage[.]'
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> ...

312. *See* Linda C. Mcclain, *From Romer v. Evans to United States v. Windsor: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 356 (2013).

313. *Windsor*, 12-307, at 16-20.

> Consistent with this allocation of authority, the Federal Government, through our history, has deferred to [S]tate law policy decisions with respect to domestic relations.
>
> ...
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> The significance of [S]tate responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the [S]tates.' ... Marriage laws vary in some respects from State to State[,] ... [b]ut these rules are in every event consistent within each State.
>
> Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one [S]tate to the next. ... When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on [S]tate law to define marriage.[314]

A further analysis is unnecessary to fathom what the U.S. Supreme Court meant with the aforequoted rationale. Instead, what is germane to the subject of this Article is a deeper inquiry as to why the *Obergefell* Court disregarded its foregoing *Windsor* reasoning. One may inevitably turn to the due-process-equal protection synergy justification of the *Obergefell* Court to

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314. *Windsor*, 12-307, at 14-19 (citing Goodridge v. Department of Public Health, 440 Mass. 309 (2003) (U.S.); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Acts No. 09–13; Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (U.S.); VT. STAT. ANN., tit. 15, § 8 (2010); N.H. REV. STAT. ANN. § 457:1–a (2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Dec. 18, 2009); N.Y. DOM. REL. LAW ANN. § 10–a (West Supp. 2013); WASH. REV. CODE § 26.04.010 (2012); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012); MD. FAM. LAW CODE ANN. § 2–201 (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations — Persons Eligible to Marry, 2013 R.I. Laws ch. 4.; *Loving*, 388 U.S.; Sosna v. Iowa, 419 U.S. 393, 404 (1975); Williams v. North Carolina, 317 U.S. 287, 298 (1942); Haddock v. Haddock, 201 U.S. 562, 575 (1906); *In Re: Burrus*, 136 U.S. at 593–94; & Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383–84 (1930)) (emphases supplied).

answer this question; but with the understanding that, at the onset, the U.S. Supreme Court in *Obergefell* did not have a painstaking consideration of the equal protection clause.

B. Marriage Equality Between Heterosexual and Homosexual Couples

According to the *Obergefell* majority, "[t]here is no difference between same- and opposite-sex couples with respect to [marriage];"[315] yet it did not elaborate on its discussion of the equal protection clause with regard to the right to marry.[316] Instead, it cited cases like, inter alia, *M.L.B.*, *Eisenstadt*, *Skinner*, and *Lawrence* to illustrate how "[t]he due process clause and equal protection clause are connected in a profound way[.]"[317]

To shore up its equal protection justification, it did not use the equal protection methodologies of the Court in those cases; but it is clear from the preceding due process inquiry why the *Obergefell* Court did not exactly use one of the tiered scrutiny tests. To the student of Philippine law, these are: (a) strict scrutiny;[318] (b) intermediate scrutiny;[319] and (c) rational basis scrutiny.[320] The wealth of U.S.' Constitutional Law jurisprudence, however, points us to various equal protection tests that overlap with due process tests, such as the more common rational basis with bite test. There is also what legal scholars call a "heightened scrutiny" in equal protection cases, which supposedly encompasses both the intermediate and strict scrutiny tests.[321]

Prescinding from the foregoing, a certain school of thought on equal protection supports the U.S. Supreme Court's decision in *Obergefell*. According to Professor Yoshino, there has been a growing "pluralism anxiety" — the proliferation of social and political factions that do not necessarily agree[322] — that is transforming the civil rights discourse at the

315. *Obergefell*, 14-556, at 17.

316. *See*, *e.g.*, Nicolas, *supra* note 282 & Cooley, *supra* note 282.

317. *Obergefell*, 14-556, at 19.

318. Garcia v. Drilon, 699 SCRA 352, 448 (2012) (J. Leonardo-de Castro, concurring opinion) (citing Central Bank (now Bangko Sentral ng Pilipinas) Employees Association, Inc. v. Bangko Sentral ng Pilipinas, 446 SCRA 299 (2004)).

319. *Id.* at 447.

320. *Id.*

321. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011) [hereinafter Yoshino, *Equality*].

322. *See* Yoshino, *Equality*, *supra* note 321, at 747.

U.S. Supreme Court level.[323] Because of this notion, the U.S. Supreme Court has been moving from group-based equality claims towards upholding individual liberty claims long before *Obergefell*.[324] This development does not denote the mutual exclusivity of the two constitutional principles. In fact, following academic commentaries, this justifies the "legal double helix,"[325] wherein "due process and equal protection ... are profoundly interlocked."[326] In terms of Fifth Amendment and Fourteenth Amendment analyses, this is just the tip of the iceberg.[327] Worth mentioning is the emerging idea that the pluralism anxiety perception, which supposedly led to the legal double helix, produced a new U.S. constitutional law hybrid of "dignity claims."[328]

These so-called dignity claims are said to be common in recent U.S. jurisprudence.[329] Hence, academicians like Professor Yoshino deem it proper to put less emphasis on "the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees."[330] But aside from using *only* dignity as one of its non-legal bases for its equal protection ratiocination, the U.S. Supreme Court in *Obergefell* or in any of the equal protection cases it cited in support thereof neither claimed nor mentioned that such a new hybrid of right exists. To the contrary, apparent from *Obergefell* is the U.S. Supreme Court's insistence therein that, at least in recent history, it has

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323. *Id.* at 747-48.

324. *Id.* at 748.

325. *Id.* at 749 (citing Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004)).

326. *Id.* (citing Tribe, *supra* note 325, at 1902).

327. For example, Professor Yoshino's equality discussion, where he focused on traditional equality jurisprudence and liberty-based dignity (i.e., legal double helix) jurisprudence, is a comparative analysis of Professor Laurence Tribe's essay on the difference between a narrow vision of due process and a broader liberty-based dignity jurisprudence. Yoshino, *Equality*, *supra* note 321, n. 17.

328. Yoshino, *Equality*, *supra* note 321, n. 17.

329. *Id.* at 749-50 & nn. 18-26. *See*, *e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382 (1971); *Meyer*, 262 U.S. at 403; *Loving*, 388 U.S. at 12; Buchanan v. Warley, 245 U.S. 60, 82 (1917); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); *Lawrence*, 539 U.S. at 578; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847–48 (1992); *Roe*, 410 U.S. at 152–53 (1973); *Griswold*, 381 U.S. at 484–86; Shapiro v. Thompson, 394 U.S. 618, 641 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); & *Griffin*, 351 U.S., at 18–20. *Id.* nn. 18-26.

330. Yoshino, *Equality*, *supra* note 321, at 749.

always interpreted the U.S. Constitution to reflect the "synergy" between liberty and equal protection using, impliedly, common-law constitutionalism and pluralism-respecting judicial review.

Notably, although both the due process and equal protection analyses were used to arrive at the U.S. Supreme Court's conclusions in *Loving, Zablocki, Skinner, Eisenstadt,* and *M.L.B.*, the U.S. Supreme Court in the said cases did not use a due process analysis to vindicate a claim for an equal protection violation; in each instance, the traditional equal protection analysis was separate from, although not exclusive of, the due process analysis.

In *Zablocki*, decided in 1978, the U.S. Supreme Court decided the case by employing a strict scrutiny test on the contested law based on an equal protection challenge. Then Justice Potter Stewart concurred in the judgment stating that at that time, the U.S. Supreme Court was reluctant to rely on a substantive due process analysis, presumably because courts were prone to substituting the judgment of legislative bodies with their own social and economic beliefs through the said constitutional principle.[331] Hence, as of the time *Zablocki* was decided, the "equal protection doctrine [had] become the Court's chief instrument for invalidating state laws."[332] This did not mean that the due process analysis in *Griswold*, decided a little over a decade before *Zablocki*, was overturned.

On the contrary, *Zablocki's* strict scrutiny was an addition, if not an alternative, to the holding in *Griswold* where the U.S. Supreme Court declared, or more accurately reiterated,[333] that liberty in the due process clause was broad enough to include unlisted rights, such that when one of these unlisted rights was violated, the U.S. Supreme Court may strike down a statute based on the due process clause. This is consistent with how the U.S. Supreme Court analyzed laws challenged under the Fifth and Fourteenth Amendments of the U.S. Constitution, particularly in the landmark due process and equal protection cases that the *Obergefell* Court

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331. *Zablocki*, 434 U.S. at 395 (J. Stewart, concurring opinion) (citing *Roe*, 410 U.S. 167-168 (J. Stewart, concurring).

332. *Zablocki*, 434 U.S. at 395 (J. Stewart, concurring opinion).

333. *See Roe*, 410 U.S. at 168 (J. Stewart, concurring opinion) (citing Board of Regents v. Roth, 408 U.S. 564, 572 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); *Pierce*, 268 U.S. at 534-35; & *Meyer*, 262 U.S. at 399-400. *Cf. Shapiro*, 394 U.S. at 629-30; United States v. Guest, 383 U.S. 745, 757-58 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964); Kent v. Dulles, 357 U.S. 116, 127 (1958); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); *Raich*, 239 U.S. at 41; & *Poe*, 367 U.S.).

cited. Because of these developments, the U.S. Supreme Court's reluctance to examine challenged laws based solely on the due process clause waned, and in *Lawrence*, the U.S. Supreme Court proclaimed that "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[334] The reasons to struggle against the due process-equal protection application of the U.S. Supreme Court in *Obergefell* are, therefore, trivial. In fact, a legal scholar observed that "*Romer*, *Lawrence*, and *Windsor* now make a trio of significant Supreme Court decisions ... that forge important contours of liberty and equality for gay men and lesbians in the federal constitutional order."[335]

The Author has observed, however, that of the three, only *Windsor* pertained to marriage rights of same-sex couples, and the U.S. Supreme Court therein allotted a significant portion of its decision to discuss the authority of States over domestic relations, such as marriage. Necessarily, this has weighed heavily in favor of the nagging impression that the U.S. Supreme Court lacked judicial restraint in *Obergefell*.[336]

C. Erroneous Means with the Right End

Opinions on the matter of judicial restraint in *Obergefell* differ because, among other reasons, the due process and equal protection methodologies of the U.S. Supreme Court therein are relatively, albeit confusingly, sound and consistent with U.S.' legal history. How the U.S. Supreme Court will decide a case has also largely depended on a number of factors, such as legal precedents, the Court's composition, prevailing States' norms, dominant public opinion, the governmental structure, and the overall political dynamics surrounding the legal issue.[337] While one may say that *Obergefell*

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334. *Lawrence*, 539 U.S. at 575.

335. Mcclain, *supra* note 312, at 356.

336. *Obergefell*, 14-556, at 25 (C. J. Roberts, dissenting opinion); *Obergefell,* 14-556, at 13-14 (J. Thomas, dissenting opinion); *Obergefell*, 14-556, at 7 (J. Alito, dissenting opinion); *Obergefell*, 14-556, at 3 (J. Scalia, dissenting opinion); Augusto Zimmermann, *Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v. Hodges 556 US (2015) — The US Supreme Court Same-Sex Marriage Case*, 16 U. NOTRE DAME AUSTL. L. REV. 77, 77 (2015); & Kyle Duncan, Symposium: Overruling Windsor, *available at* http://www.scotusblog.com/2015/06/symposium-overruling-windsor (last accessed Aug. 31, 2016).

337. *See generally* Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. 52 (2015).

was a *Lochner*-like decision,[338] another may say that *Lochner* was only wrong because of the era when it was decided.[339] There is, of course, also a view that the judicial restraint of the *Obergefell* dissenters has been selective.[340] On these grounds, it would be easy to conclude that the U.S. Supreme Court's decision in *Obergefell* was proper, and it was.

Premised on the principles of federalism[341] and democracy, however, the discussion of the issue on the re-definition of a term consistently held to be within States' sovereignty is felicitous.

While *Windsor* served as a good precedent for same-sex couples' right to marry, it was also hailed as a case that aptly upheld the "decentralizing principle"[342] of the U.S.' federal constitution.[343] Following this dichotomy, it may have been justified — based on its interpretation of the laws and its methods of Constitutional analysis — to decide on the legality of the ban on same-sex marriage in the States of the *Obergefell* petitioners. Nevertheless, although doctrinal trends in U.S. State courts have stirred their course towards legalizing same-sex marriage after *Windsor*,[344] these and their preceding LGBT rights cases did not bind or allow the U.S. Supreme Court to require *all* States "to license a marriage between [same-sex couples] and to recognize [their] marriage ... [if it] was lawfully licensed and performed out-of-State,"[345] considering the other aspect of *Windsor*'s doctrine. It bears stressing that *Windsor* was the only same-sex marriage case that preceded *Obergefell*, and the U.S. Supreme Court arrived at its decision therein mainly because of the "significance of [S]tate responsibilities for the definition and regulation of marriage [that] dates to the Nation's beginning."[346]

Here lies the dilemma — on one hand, the U.S. Supreme Court in *Obergefell* had a due process-equal protection analysis, accompanied by overwhelming context and in line with right to marry and homosexual rights

338. *Obergefell*, 14-556, at 10 (C.J. Roberts, dissenting opinion).

339. *See generally* Balkin, *supra* note 261.

340. *See generally* Ronald Turner, *On the Obergefell Dissenters' Selective Judicial Self-Restraint*, 9 VIENNA J. INT'L CONST. L. 572 (2015).

341. *See generally Windsor*, 12-307.

342. Zimmermann, *supra* note 336, at 83.

343. *See, e.g.*, Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, CATO SUP. CT. REV. (2013).

344. Watts, *supra* note 337, at 71-77.

345. *Obergefell*, 14-556, at 1. *See* Young & Blondel, *supra* note 343, at 118.

346. *Windsor*, 12-307, at 18 (citing Ohio ex rel. Popovici v. Agler, 280 U. S. 379, 383–384 (1930) (U.S.)).

cases, which inevitably resulted in its conclusion that same-sex couples also have the right to marry. On the other hand, it ratiocinated in *Windsor* the age-old doctrine requiring the Federal Government to leave it to States to define marriage. There was an apparent clash of two highly important constitutional principles — one a right, or set of rights, guaranteed by the U.S. Constitution, and the other an oft-repeated doctrine since the Nation's beginnings owing to the federal structure of government — which was unfortunately blurred out in *Obergefell*.

It is reasonable to believe that granting same-sex couples the right to marry, as intertwined with their rights to privacy and autonomy, would have been rendered naught had the U.S. Supreme Court also followed its ratiocination in *Windsor*. After all, to declare that same-sex couples have the right to marry, but at the same time only limit the enforcement of the said right to *Obergefell* petitioners' States or to States that allow same-sex marriage, would render the exercise almost futile. This is, however, speculative. Whether the decision in *Obergefell* would have been the same had the U.S. Supreme Court discussed the focal point in *Windsor* is, then, a valid question.

This Author deems that the Decision would rightly have been the same had the U.S. Supreme Court discussed *Windsor* in *Obergefell*. But this does not justify leaving out an equally relevant ratiocination on why its "rhapsodized"[347] discussion in *Windsor* was either incompatible with or inapplicable to the resolution in *Obergefell*. This is a logical inquiry that should not have been left out in a landmark case as encompassing as *Obergefell*, especially when its doctrine is in complete contrast with the only precedent, decided a mere two years earlier, that initially laid the foundation for same-sex marriage cases before the U.S. Supreme Court. While the selectivity in *Obergefell* turned a page in the rights of same-sex couples, it removed such development from what was supposed to be a holistic constitutional analysis. At best, the doctrine in *Obergefell* was incomplete and, at worst, it was apathetic of established federalism principles. Succinctly, the predicament here is not that a violation of one's liberty or right to marry should trump the sovereignty of States. They are not mutually exclusive. It is that a historically significant decision like *Obergefell* should have been written exhaustively, enough that it can answer *not only* why same-sex couples have the right to marry, but also why in this particular case that right to marry is superior over a settled doctrine that States, in their exercise of sovereign power, may or may not choose to allow same-sex marriage.

347. Duncan, *supra* note 336.

V. THE RIGHT TO MARRY IN THE PHILIPPINES

> I have been teaching constitutional law long enough to realize that there often are two or more possible sides to a constitutional argument. And *the outcome of a constitutional debate often depends upon the modality of constitutional interpretation a justice might use*. As one political writer has put it, describing the Supreme Court is like discussing the theories of Karl Marx — one has to indulge in half-truths correcting each other and exaggerations of important truths. *This is because the Supreme Court is not just a court. It is also a political institution. Because the key provisions of the Constitution are couched in grand ambiguities and because the key provisions concern the larger issues of our life, of our liberties, and of our happiness, the Supreme Court, by the exercise of judicial review, wields tremendous political power.*
>
> — Fr. Joaquin Bernas[348]

A. State of the Law

If there is a right to marry in the Philippines — as this is still unclear in Philippine jurisprudence — it would be similar to how the U.S. Supreme Court interpreted it prior to *Windsor* and *Obergefell*; one which pertains to marriage between a man and a woman. Verily, Philippine jurisprudence is not abundant in terms of right to marry cases compared to U.S. jurisprudence, where the right to marry has stirred revolutionary developments in the institution of marriage.[349]

The Philippines as a state-party is, nevertheless, bound by the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), which commonly refer to a man and a woman in their right to marry provisions.[350] Notwithstanding the relative lack of right to marry cases in the Philippines, we can still, therefore, say that our courts should respect and uphold the right to marry.

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348. Fr. Joaquin G. Bernas, S. J., *Sovereignty of the people*, PHIL. DAILY INQ., Dec. 11, 2011, *available at* http://opinion.inquirer.net/18965/sovereignty-of-the-people (last accessed Aug. 31, 2016) (emphases supplied).

349. *See, eg.*, *Obergefell*, 14-556, at 11 (citing Zablocki, 434 U.S.; Turner, 482 U.S.; & Loving, 388 U.S.).

350. MELENCIO S. STA. MARIA, JR., PERSONS AND FAMILY RELATIONS LAW 104 (2010) (citing Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 16, ¶ 1, U.N. Doc. A/810 at 71 (1948), ICESCR art 10, and ICCPR art 23). See Chapin and Charpentier v. France (no. 40183/07), European Court of Human Rights, 9 June 2016.

The 1987 Constitution does not define marriage, but states that it is an "inviolable social institution"[351] that "is the foundation of the family and shall be protected by the State."[352] This policy has been implemented through, inter alia, the Family Code of the Philippines, which was promulgated because of "pervasive changes and development [that] necessitated revision of its provisions on marriage and family relations to bring them closer to Filipino customs, values, and ideals, [ ] reflect contemporary trends and conditions ... and ensure equality between men and women."[353] Hence, to add "safeguards for strengthening marriage and the family as basic social institutions recognized as such by the [1987] Constitution,"[354] the framers of the Family Code amended the old provision on marriage to expressly require that its parties be a male and a female.[355]

It is, then, evident that the state of the law with regard to the definition of marriage vis-à-vis the right to marry presently applies to heterosexual couples. But *Windsor*, *Obergefell,* and various laws and judgments in other parts of the world allowing same-sex couples to marry have shown us that this interpretation may not stay the same. Germane to the possibility of granting to same-sex couples the right to marry, we have to ask: (*a*) whether the current changes in Filipino customs, values, and ideals have rendered the right to marry ripe for a shift in policy; and (*b*) if they have, whether the Supreme Court or Congress should lead this shift.

B. The Clamor for Marriage Equality, Same-Sex Union

The Family Code was promulgated through eight years of work by the Civil Code Revision Committee not merely to enforce Article XV of the 1987 Constitution, but more importantly, "in partial realization of women's long fight for equality with men before the law."[356] Currently, there is once again a movement to revise provisions of the Family Code, specifically the provisions that restrict marriage to one between a male and a female.[357]

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351. PHIL. CONST. art. XV, § 2.

352. PHIL. CONST. art. XV, § 2.

353. FAMILY CODE, 2d & 3d whereas cl.

354. Myrna S. Feliciano, *Law, Gender, and the Family in the Philippines*, 28 L. & SOC'Y REV. 409, 556 (1994) (citing ALICIA V. SEMPIO- DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES ii-iii (1988)).

355. FAMILY CODE, arts. 1 & 2 (1).

356. Feliciano, *supra* note 354, at 555-56.

357. *See, eg.*, Falcis III v. Civil Registrar-General, G.R. No. 217910 (SC, filed May 19, 2015) (pending). *See generally* USAID & UNDP, *supra* note 9, at 41-42. *See*

The political activism of LGBT communities and organizations has been fairly recent but long, dating back to around the 1990s.[358] Although this has stirred some changes in the LGBT political landscape, there is still much that can and should be done to cement the status of LGBTs, including same-sex couples, in public policy and the law.[359] They are currently underrepresented especially in political venues where quicker and more drastic changes could be made in their favor.[360] While there had been several cases involving LGBTs before the courts,[361] the Supreme Court has yet to write a *Romer*-, *Lawrence*-, *Windsor*-, or *Obergefell*-like decision. The U.S. Supreme Court in these cases used both due process and equal protection analyses to uphold the rights of LGBTs under the U.S. Constitution. But in the 2010 victory of LGBTs before the Supreme Court, the latter disagreed with the "[Office of the Solicitor General's (OSG)] position that [LGBTs and] homosexuals are a class in themselves for the purposes of the equal protection clause,"[362] stating that at the time, "[the Supreme Court was] not yet prepared to single out [LGBTs and] homosexuals as a separate class"[363] since it had not yet "received sufficient evidence to that effect."[364] This implies that the Supreme Court may change this view. However, in the

also RG Cruz, Lawmaker to file same-sex marriage bill, *available at* http://news.abs-cbn.com/nation/06/30/15/lawmaker-file-same-sex-marriage-bill (last accessed Aug. 31, 2016) & Jesus Nicardo Falcis III, Inequality? Not in my lifetime, *available at* http://www.rappler.com/thought-leaders/94383-inequality-same-sex-marriage (last accessed Aug. 31, 2016).

358. USAID & UNDP, *supra* note 9, at 8.

359. *See* An Act Prohibiting Discrimination on the Basis of Sexual Orientation or Gener Identity (SOGI) and Providing Penalties Therefor, H.B. No. 51, explan. n., 17th Cong., 1st Reg. Sess. (2016) & Fritzie Rodriguez, The long road to an LGBT anti-discrimination law, *available at* http://www.rappler.com/move-ph/issues/gender-issues/100632-ph-anti-discrimination-law-history (last accessed Aug. 31, 2016).

360. USAID & UNDP, *supra* note 9, at 47. *See generally* Ang Ladlad LGBT Party v. Commission on Elections, 618 SCRA 32 (2010).

361. *See, eg.*, Pablo-Gualberto v. Gualberto V, 461 SCRA 450 (2005); Silverio v. Republic, 537 SCRA 373 (2007); & *Ang Ladlad LGBT Party*, 618 SCRA.

362. *Ang Ladlad LGBT Party*, 618 SCRA at 65.

363. *Id.*

364. *Id.*

struggle of LGBTs and homosexuals for liberty and equality, we may very well say that religion has proven to be its emphatic opposition.[365]

Despite the foregoing "obstacles," the momentum for LGBT rights has never been as strong as it is today. Indeed, *Obergefell*'s doctrine did not only tread a path in judicial analysis where only a few had dared to go; it has, more importantly, transcended to a level of constitutional determination that many same-sex couples all over the world may arm themselves with should they wish to seek redress before the courts. It would have been distinctively enlightening for the Petition for *Certiorari* and Prohibition dated 18 May 2015[366] filed before the Supreme Court a few weeks before *Obergefell* was promulgated.[367] Nevertheless, the era for a same-sex marriage discourse before the Supreme Court has already begun, and the U.S. Supreme Court's analysis in *Obergefell* has, in a way, made this possible. In fact, in the recent case of *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*,[368] Associate Justice Francis H. Jardeleza cited *Obergefell* and its judicial precedents to discuss the extent of the right to marry, albeit in the context of a woman's right to choose or not to choose marriage.[369]

Be that as it may, these are not enough to say that the Supreme Court would declare Articles 1 and 2 of the Family Code unconstitutional *anytime soon*. After all, there has yet to be a case that has similar factual precedents to *Windsor* and *Obergefell* ripe for the Supreme Court's adjudication. Should there be one, it would still be difficult to ascertain how the justices will vote because the membership of the Supreme Court is unlike that of the U.S.,

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365. See GMA News Online, CBCP exec: US should respect PHL law regarding same-sex marriage, *available at* http://www.gmanetwork.com/news/story/338966/news/pinoyabroad/cbcp-exec-us-should-respect-phl-law-regarding-same-sex-marriage (last accessed Aug. 31, 2016) & Asian Journal, CBCP: No same-sex marriage in PH, available at http://asianjournal.com/news/cbcp-no-same-sex-marriage-in-ph (last accessed Aug. 31, 2016). *See also Ang Ladlad LGBT Party*, 618 SCRA at 47-49.

366. *Falcis III*, G.R. No. 217910 (pending).

367. As of writing, the Office of the Solicitor General (OSG) has filed its Comment on the Petition, but did not discuss its stand on the merits of the case. It correctly addressed the jurisdictional flaws of the Petition which, given *Windsor* and *Obergefell*, would render it improper for the Supreme Court to rule on the merits of the Petition. Comment by the Office of the Solicitor General, Mar. 29, 2015, (on file with the Supreme Court) *in Falcis III*, G.R. No. 217910 (pending).

368. Capin-Cadiz v. Brent Hospital and Colleges, Inc., G.R. No. 187417, Feb. 24, 2016 (J. Jardeleza, concurring opinion).

369. *Id.* at 5-7.

which is sharply and consistently divided by their philosophical leanings.[370] Apparent in most cases, the collegial body that constitutes our Supreme Court concerns itself with legal objectivity. Consequently, if faced with a case like *Windsor* or *Obergefell* sooner rather than later, the Supreme Court will refer to both local jurisprudence and U.S. jurisprudence in analyzing the issue before it. It may take note that in examining whether the right to marry includes same-sex couples, the U.S. Supreme Court used the rational basis with bite or rational basis plus test that allowed it to ascertain whether the definition of marriage in States that excluded same-sex couples violated the due process and equal protection clauses of the U.S. Constitution in the context of history, tradition, common-law, and evolving societal norms. Since the U.S. is a federal nation, several States therein had already legalized same-sex marriage when *Windsor* and *Obergefell* were promulgated — a feat that took a long time to achieve, even in a country fundamentally characterized by religious diversity. In this context, the Philippines is presently at the opposite end of the spectrum.

Moreover, while the Supreme Court refused to rule in favor of governmental acts or policies based on religious morality,[371] and made rulings based on public and secular morality[372] and in favor of LGBTs,[373] those cases did not involve marriage between same-sex couples. In *Silverio v. Republic*,[374] the Supreme Court acknowledged same-sex couples and same-sex marriage in its rationale but ultimately stressed that it

> has no authority to fashion a law on that matter, or on anything else. The Court cannot enact a law where no law exists. It can only apply or interpret the written word of its co-equal branch of government, Congress.
>
> ...
>
> The Court recognizes that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal.

370. Fairfield & Liptak, *supra* note 226. *See* Artemio V. Panganiban, *How cases are decided*, PHIL. DAILY INQ., July 19, 2015, *available at* http://opinion.inquirer.net/86836/how-cases-are-decided (last accessed Aug. 31, 2016).

371. *See Ang Ladlad LGBT Party*, 618 SCRA & *Leus v. St. Scholastica's College Westgrove*, 748 SCRA 378 (2015).

372. *Capin-Cadiz*, G.R. No. 187417 & *Leus*, 748 SCRA.

373. *Ang Ladlad LGBT Party*, 618 SCRA.

374. *Silverio*, 537 SCRA.

> However, the remedies petitioner seeks involve questions of public policy to be addressed solely by the legislature, not by the courts.[375]

Jurisprudence is also replete with the gist of the afore-quoted ratiocination, such as in *Kalaw v. Fernandez*[376] and *Antonio v. Reyes*,[377] where the Supreme Court stated that "[i]t remains the province of the legislature to define all legal aspects of marriage and prescribe the strategy and the modalities to protect it, based on whatever socio-political influences it deems proper."[378]

Necessarily, although "[t]he Constitution is an expression of the ideals of the society that enacted and ratified it[,]"[379] as are our laws, and "should be considered as a gauge of what the public deems as moral,"[380] there is no reason why changes in our marriage laws should be boxed solely in legal analysis. To be sure, the legislature primarily considers, but is not limited to, Constitutional provisions when making laws. There is also a considered view, from no less than the Philippines' first transgender legislator, that instead of same-sex marriage, same-sex *unions* should be legalized considering that while its effects are the same, the latter would not offend religion.[381]

This is not to say that the Supreme Court must never rule on the pertinent issue here; it can and, given the right factual milieu, it should. After all, the Bill of Rights in our Constitution exists precisely to protect individuals, especially oppressed minorities, from acts of the other branches of government, and only the Supreme Court has the power to interpret it. Aside from being able to refer to *Obergefell* and its rational basis plus test in the future, it may also be guided by the doctrine of relative constitutionality where

> [t]he constitutionality of a statute cannot, in every instance, be determined by a mere comparison of its provisions with applicable provisions of the Constitution, since the statute may be constitutionally valid as applied to one set of facts and invalid in its application to another.
>
> A statute valid at one time may become void at another time because of altered circumstances. Thus, if a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by a former

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375. *Id.* at 395.

376. Kalaw v. Fernandez, 745 SCRA 512 (2015).

377. Antonio v. Reyes, 484 SCRA 353 (2006).

378. *Kalaw*, 745 SCRA at 553 & *Antonio*, 484 SCRA at 372.

379. *Capin-Cadiz*, G.R. No. 187417, at 3 (J. Jardeleza, concurring opinion).

380. *Id.* at 9.

381. Jansen Musico, Geraldine Roman wants to be more than just 'the transgender congresswoman,' *available at* http://cnnphilippines.com/life/culture/politics/2016/05/20/geraldine-roman-cover-story.html (last accessed Aug. 31, 2016).

> adjudication, is open to inquiry and investigation in the light of changed conditions.[382]

But, as some things, "timing is everything." Considering the available legal doctrines and jurisprudential tests, there is yet no basis for the Supreme Court to resolve whether or not the present definition of marriage in the Philippines violates the liberty and equal protection of same-sex couples. In the future, once the time is ripe and the socio-political paradigms on the matter have leveled, the Supreme Court may legally be obliged to answer this question. Currently, we may engage in this discourse, and those who advocate for same-sex marriage or unions should write about it, lobby for it, and make sure that their voices will continuously thrive amongst the many issues that we face today.

382. *Central Bank Employees Association, Inc.*, 446 SCRA at 347-48.

VI. IN ENGENDERING EQUALITY

The legal order, including the courts and legislature, exists to suppress the tyranny of the many or of the few and to protect and vindicate every person's rights.[383] In this sense, election has little to do with which branch of government should allow same-sex couples to get married. Both the Supreme Court and Congress are political institutions that derive their powers from the People through the Constitution.

Notably, democracy is part and parcel of the discourse, whether it be done before the courts or legislature. As such, the U.S. Supreme Court was right to hear the pleadings of the *Obergefell* petitioners because their rights to privacy and autonomy, embraced by their liberty guaranteed in the U.S. Constitution, were infringed. Although the right to marry in the U.S. had always pertained to marriage in its traditional sense, a careful study of the factual and jurisprudential antecedents of the case revealed that the U.S. Supreme Court's interpretation of the right to marry vis-à-vis the U.S. Constitution and the laws is in accordance with present-day realities — a fitting exemplification that the highest law of the land breathes with the times and does not exist in a vacuum. To this Author, *Obergefell*'s sole flaw was the complete absence of a justification as to why the doctrine that States' sovereignty to define marriage should give way to the right of same-sex couples to marry.

Fortunately for our Supreme Court, it may add as future reference the guiding principles found in the U.S.' LGBT, homosexual, and same-sex marriage cases cited in *Obergefell*. In doing so, it must ensure that if faced with a similar issue in the future, it would not repeat the error of the U.S. Supreme Court therein. The recognition, therefore, of the Supreme Court's judicial power requiring it "to settle actual controversies *involving rights which are legally demandable and enforceable*"[384] vis-à-vis the Bill of Rights should be read with the plenary powers of Congress, which are made apparent in, inter alia, *Silverio*, *Antonio*, and *Kalaw*. If or when later faced with petitioners like those in *Obergefell*, the Supreme Court should be able to decide the case by weighing among constitutional principles that would result in a proper justification as to why one of them takes precedence, such that when the hammer falls, it falls heavily.[385] Aptly, in the words of former Justice of the Supreme Court, Jose P. Laurel —

> When the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and

383. *See* Estrada v. Escritor, 408 SCRA 1, 174-75 (2003) & Madison, Jr., *supra* note 1.

384. PHIL. CONST. art. VIII, § 1.

385. Zandueta v. de la Costa, 66 Phil. 615, 627 (J. Laurel, concurring opinion).

> sacred obligation assigned to it by the Constitution *to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.*[386]

Nevertheless, to this Author, the shift in policy with regard to the definition of marriage in the Philippines should take place in the hallowed halls of legislature. Not only is this in accordance with settled legal principles, it is also more comprehensive. It is where maximum participation from citizens can occur, given that they can write to or speak with their representatives. It is also where a law that will include a span of rights, not only that of marriage, may be enacted. Indeed, this was how the long struggle for women's rights in the Philippines was won[387] — through decades of debates and challenges; through small victories that totaled various legislations now sealed in the legal system. While there is nothing wrong with asking the Supreme Court to rule on the matter in the future, to let Congress decide whether same-sex couples may enter into a civil union or contract marriage would be better, as it is practical and in line with the Constitution, removing from the Supreme Court the burden of defending itself from concerns regarding judicial restraint and judicial legislation.

The road to same-sex marriage or unions in the Philippines is still long and winding. But when the time comes, the victory of same-sex couples should be a victory grounded on democracy and founded on the Constitution. To this Author, who happens to be a devout Catholic, liberty and equality should be applied to all, with a few exceptions that should not be based on religious morality or established through discrimination. This is the spirit of the law that gives it life,[388] and we should adhere to it.

386. Angara v. The Electoral Commission, 63 Phil. 139, 158 (1936).

387. Although, the Author acknowledges that the persistence of rape culture in the Philippines indicates that this vincidcation has not yet resonated with certain segments of society.

388. Madison, Jr., *supra* note 1.