
MARRIAGE EQUALITY AND
ONE ORIGINAL PRINCIPLE OF RELIGIOUS LIBERTY

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I. AN INTRODUCTORY NOTE ON ORIGINALISM.

For decades, the arguments over liberty and equality have focused on the Supreme Court and a sentiment expressed by Byron White in *Bowers v. Hardwick*,¹ a tragic decision that held – cruelly – that gay and lesbian persons did not enjoy the same rights of sexual intimacy as all others. The holding of *Bowers* is gone now,² but the legacy remains. Justice White noted that “the cases are legion in which” the Court interpreted the Due Process Clauses to “have substantive content.”³ He referred to cases “recognizing rights that have little or no textual support in the constitutional language.”⁴ The Court often offered assurances “that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government.”⁵ He urged restraint by means of the rule that judges should enforce only “fundamental liberties that are ‘implicit in the concept of ordered liberty.’”⁶ The judges must inquire into history and tradition. Their task is to decide which liberties are so indispensable that “neither liberty nor justice would exist if [they] were sacrificed.”⁷ The *Bowers* opinion feared: “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law

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¹ 478 U.S. 186 (1986).

² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³ *Bowers*, 478 U.S. at 191.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

⁷ *Id.* at 191-92.

having little or no cognizable roots in the language or design of the Constitution.”⁸

There are many difficulties in the *Bowers* opinion, but Justice White put his finger on why many Americans believe our constitutional discourse to be artificial and befuddling.⁹ Strange jargon like “strict scrutiny,” “overbreadth,” and “rational basis” confound public understanding of the Constitution.¹⁰ There is, of course, a tendency of all to judge cases by results, without regard to legal rationales, but even when an outcome seems compassionate or fair, even “experts” can find a case to be “dissatisfying” as constitutional law.¹¹

One basic step in the search for a more “satisfying” constitutional law is to find an authentic link to the Constitution’s text, history, or tradition. This need not be an inquiry oversimplified into questions like “what would James Madison think?” or “what would Mr. Lincoln or the Fourteenth Amendment’s Framers think?”¹² In the absence of a clear command in text, judges should seek an intelligible, understandable rationale rooted in basic, authentic elements of the public understanding of our constitutional tradition. The key is an authentic “underlying premise . . . fairly discoverable in the Constitution.”¹³

One possible moment for considering a more elemental approach may come soon. On October 18, 2012, the United States Court of Appeals for the Second Circuit pushed a preeminent constitutional question in the direction of the Supreme Court. In the first week of November, just after the reelection of the president, the Court accepted *Windsor v. United States*.¹⁴ The surviving spouse of a same-sex couple married in Canada in 2007 sued the United States Internal Revenue Service for a refund of federal estate taxes of \$363,053, arguing she was denied spousal tax benefits solely because of Section 3 of the Defense of Marriage Act (“DOMA”).¹⁵ The Act defines the words “marriage” and “spouse” in federal law in a way that bars the IRS from rec-

⁸ *Id.* at 194.

⁹ *See id.* at 191-92.

¹⁰ *Id.*

¹¹ JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 184 (2005) (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹² *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 162 (1990) (denying a narrow and rigid interpretive approach).

¹³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-2 (1980).

¹⁴ 699 F.3d 169 (2d Cir. 2012), *cert. granted* (U.S., No. 12-307) (Dec. 7, 2012).

¹⁵ *Id.* at 175.

ognizing Windsor as a spouse or the couple as married. The text of Section 3 is as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁶

So, the case is not unusually complex. Any American can understand a tax bill, and the discriminatory character of the statute is obvious. But if Americans are familiar with “discrimination” in racial or gender contexts, they may have difficulty understanding how – or if – discrimination based upon sexual orientation offends a Constitution adopted in 1788, even if amended in 1868.¹⁷

The opinion for the appellate court displayed a clarity that recent Supreme Court decisions lack. Chief Judge Jacobs ruled that DOMA violated equal protection principles of the Fifth Amendment.¹⁸ The test applied to DOMA was so-called “intermediate scrutiny”¹⁹ that had applied to gender discrimination since *Craig v. Boren*.²⁰ The Second Circuit concluded that governmental classifications based on sexual orientation was, like gender, problematic, and “quasi-suspect.”²¹ The judges found that the characteristics of discrimination against homosexuals were similar to other biases against other groups.²² Homosexuals as a group had suffered persecution and hostility.²³ Sexual orientation has little to do with individual merit or ability to contribute to society.²⁴ As a politically defenseless minority, government prejudice was of the type that deserved judicial protection.²⁵

Perhaps this rationale will do, but even with the requisite judicial balancing of competing interests, many Americans will not understand how courts strike down “traditional” definitions of matrimony. The dominant, authentic argument for DOMA is that the Act respected

¹⁶ 1 U.S.C. § 7 (2013).

¹⁷ See *Windsor*, 699 F.3d at 182.

¹⁸ *Id.* at 188.

¹⁹ *Id.* at 176.

²⁰ 429 U.S. 190 (1976).

²¹ See *Windsor*, 699 F.3d at 182-85.

²² *Id.*

²³ *Id.* at 182.

²⁴ *Id.* at 182-83.

²⁵ *Id.* at 184-85.

and promoted traditional notions of marriage as a national standard.²⁶ Obliquely addressing the religious content of the DOMA objective, the Court said: “[o]ur straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal *or* state) is not concerned with holy matrimony.”²⁷ Judge Straub’s dissenting and concurring opinion urged deference and respect for tradition.²⁸ He concluded the issue was appropriate for resolution by the people and the political process.²⁹

All the judges on the Second Circuit panel were following the pattern of applicable equal protection analysis.³⁰ But intermediate scrutiny was always a compromise and a hedge. Deciding whether a federal law serves “important” objectives seems an odd way to define “rights.” An American of common sense could ask – reasonably: “Okay, I understand. I can’t discriminate, unless it is important for me to discriminate. So what’s important? What does that mean? And who decides?”

II. TOWARD A MORE ELEMENTAL RATIONALE: NO DISCRIMINATION REGARDING “CIVIL RIGHTS” FOR ESSENTIALLY RELIGIOUS REASONS

In 1779, Thomas Jefferson drafted a bill that became the Virginia Statute for Religious Freedom.³¹ It stated an anti-discrimination principle of breadth and idealism.³² In relevant part, the text reads:

We the General Assembly of Virginia do enact that no man . . . shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.³³

Jefferson explained his proposed law in elemental terms: “[O]ur civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry.”³⁴ Put simply, the statute guaranteed equal standing for all in the community, believers and nonbelievers, adherents and non-adherents, regardless of religious opinion or practice.

²⁶ *See id.* at 191.

²⁷ *Id.* at 188.

²⁸ *Id.* at 189 (Straub, J., dissenting in part and concurring in part).

²⁹ *Id.* at 211.

³⁰ *Id.* at 180, 190.

³¹ THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* (1779), reprinted in 2 THE WRITINGS OF THOMAS JEFFERSON 237 (Paul Leicester Ford ed., 1893).

³² *Id.* at 239.

³³ *Id.*

³⁴ *Id.* at 238.

What Jefferson proposed, Madison accomplished. The younger Virginian argued that religious liberty derives from the principle that “[e]quality . . . ought to be the basis of every law” in his *Memorial and Remonstrance against Religious Assessments*.³⁵ Madison also argues:

If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “equal title to the free exercise of Religion according to the dictates of Conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God³⁶

Without being distracted by the endless discussions of the hypocrisies of the founding generation – and what was not contemplated as “equality” – Madison and Jefferson both seem to have concluded that all human beings were born free and equal in their right to worship God – or not – according to their own sense of duty. Government might enact laws that modified the status and opportunities of human beings, but not the “equal rights of conscience.”³⁷

The arguments of Madison and Jefferson are a beginning for understanding an elemental root principle. America’s conception of equality was not – and never has been – an equality of wealth, power, talent, or property. It is equality of rights. What rights? Inalienable rights to “life, liberty and the pursuit of happiness.”³⁸ Years later, an explanation was offered by a careful lawyer committed to the unusual, idealistic view that the Declaration and the Constitution were linked: Abraham Lincoln.

³⁵ James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), reprinted in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 164 (J.B. Lippincott & Co. 1867) [hereinafter *Memorial and Remonstrance*].

³⁶ *Id.* Madison’s emphasis on equality does not seem accidental; he also repeated his view. Later, in 1789, when keeping a campaign promise to introduce a bill of rights in Congress, Madison reminded his colleagues that many states, in their own bills of rights, often did “no more than state the perfect equality of mankind; this to be sure is an absolute truth, yet it is not absolutely necessary to be inserted at the head of a constitution.” James Madison, *Address to U.S. House of Representatives Proposing A Bill of Rights* (June 8, 1789), in 5 THE WRITINGS OF JAMES MADISON 370, 381 (Gallard Hunt ed., 1904) [hereinafter *Address to U.S. House*].

³⁷ *Address to U.S. House*, *supra* note 36, at 377.

³⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[The] authors of [the Declaration of Independence] intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.³⁹

Historians and political theorists have debated what the Declaration and Jefferson meant.⁴⁰ The debate did not end with Lincoln. It has not ended since. It does not seem likely to end. One careful scholar, Pauline Maier, urges an understanding that is Biblical – and sensible:

For Jefferson and his contemporaries, happiness no doubt demanded safety or security, which would have been in keeping with the biblical phrase one colonist after another used to describe the good life – to be at peace under their vine and fig tree with none to make them afraid.⁴¹

She elaborates by quoting another scholar, Ronald Hamowy:

When Jefferson spoke of an inalienable right to the pursuit of happiness, he meant that men may act as they choose in their search for ease, comfort, felicity and grace, either by owning property or not, by accumulating wealth or distributing it, by opting for material success or asceticism, in a

³⁹ Abraham Lincoln, Speech on the Dred Scott Decision (Springfield, Ill., June 26, 1857). As Republican senate candidate, Lincoln reaffirmed his position by quoting his own earlier remarks in the seventh and final debate with Stephen A. Douglas. *Seventh Lincoln-Douglas Debate: Lincoln's Reply* (Alton, Ill., Oct. 15, 1858).

⁴⁰ See, Patrick J. Charles, *Restoring "Life, Liberty and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457 (2011); Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107 (1998); Donald S. Lutz, *The Declaration of Independence as Part of the American National Compact*, 19 PUBLIUS 41 (1989); William Pencak, *The Declaration of Independence: Changing Interpretations and a New Hypothesis*, 57 PA. HIST. 225 (1990); Lee J. Strang, *Originalism, The Declaration of Independence, and the Constitution: A Unique Role In Constitutional Interpretation?*, 111 PENN ST. L. REV. 413 (2006).

⁴¹ PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 134 n.79 (1997) (referencing *Micah* 4:4).

word by determining the path to their own earthly and heavenly salvation as they alone see fit.⁴²

Taken together, these descriptions offer a realistic vision of the public understanding of “the pursuit of happiness” as well as a description of the basic civil rights and civil capacities of all free and independent human beings, the ways and means of the pursuit of happiness.

The phrases and concepts are old. Applied to today’s debates, they may seem archaic and anachronistic. But do they constitute elements of a more appealing, understandable basis for a ruling? To continue, a redefinition of the “legal” issue presented by *Windsor* and similar cases might be appropriate: whether two adults of the same gender with capacity to consent have the equal right to make enforceable mutual promises to share lives, property, family, and fate in “pursuit of happiness.”⁴³

A similar discrimination was addressed by Justice Sandra Day O’Connor in *Lawrence v. Texas*,⁴⁴ a case in which the question was whether Texas could prohibit homosexual sodomy, but not heterosexual sodomy.⁴⁵ She declined to endorse a sweeping libertarian theory and concluded: “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”⁴⁶ Her approach avoided the usual suspects among balancing formulations. Her rationale was narrower and closer to a principle traceable to the founding. Rewritten and applied to marriage equality, the principle derived from O’Connor’s equality argument could be as follows: Religious disapproval of homosexuals, like a bare religious desire to harm any group, is an interest that is illegitimate to satisfy the Equal Protection Clause.

Of course, more particularized arguments are essential. First, a human being’s agreement to share a life, property, family, and fate is a contract – and a civil right.⁴⁷ Second, religious tests and doctrines cannot be the basis of denying a human being the civil right of making

⁴² *Id.* (quoting Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills’s Inventing America: Jefferson’s Declaration of Independence*, 36 WM. & MARY Q. 503, 519 (1979)).

⁴³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁴ 539 U.S. 558, 579-85 (2003) (O’Connor, J., concurring).

⁴⁵ *Id.* at 558.

⁴⁶ *Id.* at 582 (O’Connor, J., concurring).

⁴⁷ RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 103 (2d ed. 1997).

and enforcing a life-sharing contract.⁴⁸ Third, the discrimination against persons who seek to exercise their civil right in a way at odds with “traditional” notions of “holy matrimony” and related traditions is rooted in religious, even sectarian, ideas.⁴⁹

1. *A Civil Right: Marriages and Unions as an Exchange of Promises to Share a Life*

Aside from the term “marriage,” which is closely linked to “holy matrimony,” a marriage is an agreement to share a life, property, family, and fate – it is a contract.⁵⁰ It is not necessary to inquire into the “fundamentalness” of the right, either specifically or generally. It is not necessary to “weigh” competing governmental interests. It is not necessary to reconsider or reaffirm the claim of *Loving v. Virginia*: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵¹ It is only necessary to appreciate the fact that marriage is both a contract and traditionally treated as a “civil right,”⁵² as that term was used prior to litigation and struggles over race relations.⁵³

⁴⁸ See Alec Walen, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 628 (1997).

⁴⁹ See Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 236 (1988).

⁵⁰ BERGER, *supra* note 47, at 194. The extensive debates about interracial marriage and the interpretation of the Court in *Loving v. Virginia*, 388 U.S. 1 (1967), are pertinent. Professor Berger reports that an opponent of the Fourteenth Amendment made the argument “that because a Negro would now be authorized to enter into a contract, he could enter into a ‘contract of marriage’ with a white woman.” *Id.* at 193. Berger noted the widespread hostility to interracial marriage. “Few of the most ardent abolitionists would have wrecked their hope of securing the indispensable ‘fundamental rights’ to blacks.” *Id.* A strict originalist, Professor Berger concludes that specific understandings must prevail over the abstractions of principle: “To attribute to the framers an intention by the word ‘contract’ to authorize interracial marriage runs counter to all intentions.” *Id.* at 193-94. The same point is made, ironically, in *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (“Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State.”).

⁵¹ 388 U.S. 1, 12 (1967).

⁵² *Id.* The *Loving* majority continued to hold, “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁵³ One story may show that specific expectations ought not to distract a court from seeking a consistent and fair reading of basic principles. When defining equal protection, there should be little deference to even well-documented exceptions proposed for bigotry. Berger’s facts show bigotry – or defensiveness in face of race-baiting political tactics. But should they be taken as proof of constitutional meaning? Abraham Lin-

2. Religion: An Insufficient, Unconstitutional Basis for Discriminating

Religion alone cannot be the basis for denying the obligation of a contract.⁵⁴ Public policy is a basis for government rules that some contracts cannot be made and enforced, but government must always have a secular purpose for its law.⁵⁵ The principle is usually used as part of Establishment Clause jurisprudence, but when applied to human beings – rather than monuments and celebrations – is an antidiscrimination principle. Justice O'Connor championed the principle that government may not endorse religious doctrine, as such, in a way that sends a message to believers that they are “insiders” and to nonbelievers that they are strangers in their own community.⁵⁶ Stronger still must be the principle that government shall not draw lines among persons that actually classify, discriminate, and subordinate a disfavored group so that they are, in reality, strangers in their own communities.⁵⁷

It is no proper function of government to assume authority for defining or promoting the sacred. Churches have a right to preach virtue and to condemn sin, to advise individual human beings on the proper way to pursue happiness; and we all should hope never to live in a community that fails to acknowledge and respect such rights. But it is not government's mission, function, purpose, or legitimate power

coln, as candidate for Senate in 1858, famously denied that his argument against slavery's expansion signaled an end to barriers against interracial marriage. Critics of Lincoln through the years have used the remarks to allege Lincoln was dishonest or hypocritical or racist. In October 1859, Lincoln delivered an address in Columbus, Ohio in which he denounced the tendency of Senator Douglas to compare slaves to brutes. A member of the audience, a resident of Ohio asked Lincoln about interracial marriage and an Illinois law against it: “The law means nothing. I shall never marry a negress, but I have no objection to anyone else doing so. If a white man wants to marry a negro woman, let him do it – *if the negro woman can stand it.*” Richard Striner, *Lincoln and Race* (2012) (citing David R. Locke, quoted in Allen Thorndike Rice (ed.), *REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME* 446-47 (1886)).

⁵⁴ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

⁵⁵ *Id.* at 859. Only proof of a sincere, authentic secular purpose will do. *Id.* at 865; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding “it is nonetheless the duty of the courts to ‘distinguis[h] a sham secular purpose from a sincere one’” (citing *Wallace v. Jaffree*, 42 U.S. 38, 75 (1985))); *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (“it is required that the statement of such purpose be sincere and not a sham”).

⁵⁶ *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (“The . . . more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders.”).

⁵⁷ *Id.*

to confound sin with crime, as one of the great religious teachers of early America said – not long after he persuaded James Madison to “flip-flop” and to embrace a bill of rights.⁵⁸ Elder John Leland of the Baptist Church made the point in a famous remark, often quoted, too often forgotten:

What leads legislators into this error, is confounding sins and crimes together – making no difference between moral evil and state rebellion: not considering that a man may be infected with moral evil, a one God, three Gods, twenty Gods, or no God – if he pays adoration one day in a week, seven days or no day – wherein does he injure the life, liberty or property of another? Let any or all these actions be supposed to be religious evils of an enormous size, yet they are not crimes to be punished by laws of state, which extend no further, in justice, than to punish the man who works ill to his neighbor.⁵⁹

3. *Religion as Motive for Discrimination Against Same-Sex Marriage*

There seems to be little doubt that discrimination against same-sex unions is derived from religious teachings. The line between “traditional marriage” and same-sex unions does not reflect a more general non-religious morality, as easily seen in the rhetoric of those who can recognize only “traditional marriage” as part of God’s plan. In an election in May of 2012, “North Carolinians voted in large numbers . . . for an amendment that would ban same-sex marriages, partnerships and civil unions, becoming the 30th state in the country and the last in the South to include a prohibition on gay marriage in the state constitution.”⁶⁰ A leader of the effort that prevailed at the polls offered a typical summary of her argument at a victory celebration: “[T]he whole point is simply that you don’t rewrite the nature of God’s design for marriage based on the demands of a group of adults.”⁶¹ It seems clear that the legal discriminations against same-sex unions are derived from religious teachings – first, about “holy matrimony” between man and woman and, second, about the sinfulness of homosexuality.⁶² Though some opponents speak in more generalized terms about a visceral disgust about homosexual practices, it is unrealistic to

⁵⁸ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787).

⁵⁹ JOHN LELAND [writing under the pen name of “Jack Nipps”], *THE YANKEE SPY*, (Boston, 1794) (reprinted in 2 CHARLES HYNEMAN AND DONALD LUTZ, *POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805* 979 (1983)).

⁶⁰ See Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES, May 8, 2012, http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html?_r=0.

⁶¹ *Id.*

⁶² See *id.*

see such rhetoric as a nonreligious morality independent of religious motives.⁶³

4. *Equality of Right: An Origin of Equal Protection*

President George Washington never addressed the issues of religious liberty in any detail like his fellow Virginians, Jefferson and Madison. His views were his own but paralleled the nation's progress; at least, he thought so. In his first term, he offered an assessment of America's policies, aspirations and opinions:

The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.⁶⁴

When the first president wrote this message, the First Amendment had been proposed, but not ratified.⁶⁵ In his second term, after ratification, Washington again expressed his understanding:

We have abundant reason to rejoice that in this land the light of truth and reason has triumphed over the power of bigotry and superstition and that every person may here worship God according to the dictates of his own heart. In this enlightened Age & in this Land of equal liberty it is our boast, that a man's religious tenets, will not forfeit his protection of the Laws, nor deprive him of the right of attaining & holding the highest offices that are known in the United States.⁶⁶

It is striking that Washington used words that would also be used by advocates for equality under the law before and after the ratification of the Fourteenth Amendment including "immunities of citizenship," "inherent natural rights," no government "sanction" for "bigotry," and the

⁶³ *Id.* See also MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) (arguing that "disgust" has been a motivating emotion in opponents of equal rights for lesbian and gay citizens).

⁶⁴ Letter from George Washington to the Hebrew Congregation of Newport, R.I. (Aug. 18, 1790).

⁶⁵ The letter from George Washington to the Hebrew Congregation of Newport, R.I. was written on August 18, 1790. *Id.* The First Amendment of the United States was ratified on December 15, 1791. See *Bill of Rights Transcript Text*, NAT'L ARCHIVES AND RECORDS ADMIN., http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited Sept. 16, 2013).

⁶⁶ Letter from George Washington to the New Church of Balt. (Jan. 22, 1793).

“protection of the laws.” True, his praise for his country seemed premature and even insensitive to realities, but praise for the concepts from the first President of the United States illustrates aspirations.

Another sign of hope – mixed with a measure of realism – appears in an exchange between two famous friends, rivals, and presidents – John Adams and Thomas Jefferson. The Virginian expressed confidence in a letter to Adams that “a protestant popedom is no longer to disgrace the American history and character.”⁶⁷ The more skeptical and wiser Adams thought the work was not yet complete. He feared passionate true believers remained all too ready to impose their religious will on others – by harsh means:

Oh! Lord! Do you think that Protestant Popedom is annihilated in America? Do you recollect, or have you ever attended to the ecclesiastical strifes in Maryland, Pennsylvania, New York, and every part of New England? What a mercy it is that these people cannot whip, and crop, and pillory, and roast as yet in the United States! If they could, they would.⁶⁸

Adams and Jefferson were discussing state constitutions because basic human rights were then defined by the states, not the federal government.⁶⁹ Importantly, when the states wrote their own fundamental law addressing the individual’s rights of worship, they frequently borrowed from Jefferson or Madison.⁷⁰ For only one example, the Constitution of Arkansas, adopted in 1836, says plainly that “the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged, on account of his religion.”⁷¹

Religiously-inspired exercise of religious freedom is part of the story of America’s struggle with the problem of equality; so are the religiously-influenced concepts of the rights of man, the equality of right secured by the Declaration, and the denunciation of the tyrannical notion that one group of human beings was ineligible for these rights, solely because of the color of their skin.

⁶⁷ Letter from Thomas Jefferson to John Adams (May 5, 1817).

⁶⁸ Letter from John Adams to Thomas Jefferson (May 18, 1817).

⁶⁹ See BERGER, *supra* note 47, at 53 (“[T]he Constitution said remarkably little about rights because the federal government was not to be the primary government . . . governance was left principally to the States.”) (internal quotations omitted).

⁷⁰ See ARK. CONST. of 1836, art. II, § 4; David A. Carrillo & Shane G. Smith, *California Constitutional Law: The Religion Clauses*, 45 U.S.F.L. REV. 599, 690 (2010-11); Allison Hensley, *A Comparison of Religious Expression Doctrine Under the United States and Oregon Constitutions*, 75 OR. L. REV. 1253, 1278 (1996).

⁷¹ ARK. CONST. of 1836, art. II, § 4.

III. A CONCLUDING NOTE ON CONSTITUTIONAL POLITICS: THE INFLUENCE OF AN ELECTION

In 2012, Barack Obama became the first President of the United States to endorse marriage equality.⁷² Even before the President announced his own change of heart, the U.S. Justice Department had decided it could not defend DOMA and left the task to lawyers hired by the U.S. House of Representatives.⁷³ Finally, and most importantly, on Election Day, the people in three states – Maine, Maryland, and Washington – endorsed versions of marriage equality by popular referendum.⁷⁴ It was the first time any such measure passed by popular vote in any state.⁷⁵ Within one month of Election Day, the Supreme Court accepted two cases on to its docket:⁷⁶ first, the *Windsor* case;⁷⁷ second, a case arising from California challenging a popular initiative endorsing a definition of marriage limited to a union between one man and one woman.⁷⁸

Many commentators noticed, but George F. Will, a well-known, influential analyst spoke most plainly. He saw the Court facing a dilemma. On the one hand, the Court might repeat its mistake and resolve basic questions as it attempted to do in 1973 with the abortion issue.⁷⁹ “The country was having a constructive accommodation on abortion, liberalizing abortion laws. The court yanked the subject out of democratic discourse and embittered the argument.”⁸⁰ The Court might avoid a constitutional resolution and “let the democracy take care of this. On the other hand, they could say it’s now safe to look at this because there is something like an emerging consensus. Quite lit-

⁷² Carol E. Lee, *Obama Backs Gay Marriage — Shift Could Energize Conservative Opponents; Timing Seen as Politically Risky*, WALL ST. J., May 10, 2012, at A1.

⁷³ Evan Perez, *Boehner Moves to Defend Law Against Gay Marriage*, WALL ST. J., Mar. 5, 2011, at A4.

⁷⁴ Joel Millman & Geoffrey A. Fowler, *First the Vote, Now the Vows*, WALL ST. J., Dec. 10, 2012, at A6.

⁷⁵ CNN Library, *Same Sex Marriage Fast Facts*, CNN U.S. (Sept. 14, 2013), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html>.

⁷⁶ See *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), cert. granted, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307); see also *Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012), cert. granted, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

⁷⁷ 699 F.3d 169.

⁷⁸ See *Hollingsworth*, 671 F.3d 1052.

⁷⁹ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁰ *This Week with George Stephanopolous* (ABC television broadcast Dec. 9, 2012) available at <http://abcnews.go.com/Politics/week-transcript-powerhouse-roundtables/story?id=17914264>.

erally, the opposition to gay marriage is dying. It's old people."⁸¹ With either choice, of course, something like marriage equality seems inevitable.

There is much to say in favor of a democratic evolution. Most obviously, the process seems to respect the uncertain character of enumerated rights and the need for popular participation in the expansion of human rights. Justice Scalia, dissenting in a substantive due process case involving alleged parental rights, *Troxel v. Granville*,⁸² outlined a case for judicial restraint. The unenumerated right, he conceded, was "among the 'unalienable Rights' with which the Declaration of Independence proclaims."⁸³ Also, it was "among the '[other rights] retained by the people' [according to] the Ninth Amendment."⁸⁴ But the courts, he continued, had no role to play in adding to the textual enumeration of rights enforced by judges.⁸⁵

[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.⁸⁶

Even though Justice Scalia's view of the division of labor between "We, the People" and the unelected federal courts has theoretical plausibility, it does not reflect the actual patterns of precedent. It seems to be a call for a lost vision of judicial review. Since the ratification of the Fourteenth Amendment, the list of cases defining expanded, idealistic, progressive degrees of liberty and equality is too long for enumeration here.⁸⁷

Though 2012 seems to be a year in which popular opposition to marriage equality subsided in intensity and effectiveness, our conceptions of human rights has never been an issue to be left solely to transient majorities or political processes. Much of the popular support

⁸¹ *Id.*

⁸² 530 U.S. 57 (2000) (Scalia, J., dissenting).

⁸³ *Id.* at 91.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that restrictions on the freedom to marry on the basis of racial classification was a violation of the Fourteenth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the criminal convictions of two adults, for committing homosexual sodomy in violation of a state statute, was a violation of the Fourteenth Amendment).

for this process comes from Americans who cannot explain “strict scrutiny” or other aspects of the “legal” rationales.

The durability of the Court’s teachings seem traceable to popular appreciation of the more basic connections of legal doctrine with basic elements of American constitutional faiths. Americans are growing accustomed to the concept of same-sex marriage because they understand that they seek not something strange or different, but something all of us want: the freedom to live in a community with loved ones with something approaching equal dignity and equal respect – and equal means – as well as civil rights and civil capacities – to build a life.

It begins with the idea that Americans do not want governments to instruct, enforce, and regulate based on what someone else’s church teaches. Hopefully, most citizens can understand that this ideal is best achieved by ensuring that law must never be theocratic, no matter whose church provides the instruction.

No doubt the argument outlined in this essay will not displace the usual theories. Arguments premised on equality will press towards heightened scrutiny and a significantly greater burden for government to prove its discrimination. An argument premised on liberty will follow the controversial patterns of substantive due process. But a genuine and authentic comparison between principles and concepts present at the creation of the republic and the claims of human beings who only want an opportunity to organize their own lives can inform the legal arguments of the moment.

In sum, applied to *Windsor* and similar cases, governments may not deny same-sex couples access to courts to enforce life-sharing promises for sectarian, ecclesiastical, or essentially religious reasons. Even before the courts announced their understandings, people seem to be coming to the conclusion that human beings are denied equal protection – as originally understood and, indeed, as understood before the Fourteenth Amendment. The fact that the couples choose – or feel they must – seek happiness outside the forms of religious sanctions or dictates is not a legitimate justification for discrimination. Put another way, neither the federal government nor any state government has legitimate power to hurl a class of human beings not adhering to religious dogma, rites, or forms away from the community. Government may not exile or shun nonadherents. Government may not condemn human beings acting outside the traditions and teachings of a church to a life of loneliness, isolation, or civic indignity.

