

Obergefell’s Dreams

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“[A]nalyzes such as this are not published in order to produce conviction in the minds of those whose attitude has hitherto been recusant and sceptical.”
-Sigmund Freud¹

“To no longer insist on being someone is to be free to be no one.”
-Christina Feldman²

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¹ Sigmund Freud, *From the History of an Infantile Neuroses* (1918) [hereinafter, Freud, *Wolf Man*], reprinted in 17 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3, 13 (James Strachey ed. & trans., 1955).

² Christina Feldman, *The Wisdom of Disappointment*, DHARMA SEED 37:23 (Mar. 7, 2007), http://media.dharmaseed.org/recordings/2007/03/20070307-Christina_Feldman-IM_SRC-wisdom_of_disappointment.mp3 [https://perma.cc/X2ZW-YUMS]. Feldman’s is an elegant paraphrase of an idea in Nagarjuna, *Contingency, as translated in VERSES FROM THE CENTER: A BUDDHIST VISION OF THE SUBLIME* 131, 131 (Stephen Batchelor ed., 2000): “Clinging is to insist on being someone— / Not to cling is to be free to be no one.” *Id.*

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I. INTRODUCTION

The U.S. Supreme Court’s announcement in *Obergefell v. Hodges*—that the U.S. Constitution promises marriage equality for same-sex couples—has quickly and broadly swept the nation as a powerful symbol of social progress: of justice, of liberty and equality, of dignity, of freedom, delivered.³

It is easy to see why. Three decades ago in *Bowers v. Hardwick*, the Supreme Court ridiculed the suggestion that homosexuality bore any relationship to the sacred precincts of marriage, family, and procreative life.⁴ Approving homosexuality’s outlawry, *Hardwick* repudiated constitutional same-sex intimacy claims as “facetious” “at best.”⁵ After *Hardwick*’s own repudiation by *Lawrence v. Texas*,⁶ whose protections for same-sex intimacies were extended to the marriage setting in *United States v. Windsor*,⁷ whatever of *Hardwick*’s homophobic sensibilities persisted in constitutional law, *Obergefell* extirpates them. According to this new ruling, same-sex intimacies are not simply *like* marital intimacies, as *Lawrence* regarded them, but, as with *Windsor*, they *are* marital intimacies inside of the constitutionally protected, normative, American, multi-generational marital and family form. From “[o]utlaw to outcast,” after *Obergefell*, homosexuality and same-sex intimacies

³ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99, 2604–05, 2608 (2015). On *Obergefell*’s positive symbolism, see, for example, Elizabeth B. Cooper, *The Power of Dignity*, 84 *FORDHAM L. REV.* 3, 5 (2015); Jeremiah A. Ho, *Once We’re Done Honeymooning: Obergefell v. Hodges, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 *KY. L.J.* 207, 207 (2016); Joseph Landau, *Roberts, Kennedy, and the Subtle Differences that Matter in Obergefell*, 84 *FORDHAM L. REV.* 33, 33 (2015); Toni M. Massaro, *The Lawfulness of the Same-Sex Marriage Decisions: Charles Black on Obergefell*, 25 *WM. & MARY BILL RTS. J.* 321, 340–41 (2016); and Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 *HARV. L. REV.* 147, 147 (2015).

⁴ *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵ *Id.* at 194.

⁶ *Lawrence*, 539 U.S. at 578.

⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

are constitutionally insiders of the first, indeed noble, rank.⁸ Thus is *Obergefell* seen as movement, worlds of distance from *Hardwick* and its rule of law's reign.⁹

Revolutionary in these ways, *Obergefell* is also revolutionary in a wholly different and far less salutary sense.¹⁰ *Hardwick*'s pro-homophobic sensibilities no longer normatively persist in law, but *Obergefell* is no singular triumph. The decision, rather, marks a return—a revolution—to a mode of thinking about lesbian and gay rights and same-sex intimacies on inglorious display in *Hardwick*. Troublingly, *Hardwick* refused to align its negation of

⁸The quoted language comes from *Obergefell*, 135 S. Ct. at 2600. The notion of “nobility” appears in *id.* at 2594, 2599–600; cf. Mary Anne Case, Address at the Florida State University College of Law Symposium: After Marriage (Jan. 31, 2014) (transcript on file with author) (“[T]his notion that marriage is a dignity brings the No Titles of Nobility Clause into perspective in a way that . . . hasn’t yet been recognized. . . . I think that marriage has now been elevated to a title of nobility; and I would actually like to see no titles of nobility . . .”).

⁹Some thoughts on the larger transformation are in GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY (2005); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015); and Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIR. 157 (2015), <https://californialawreview.org/obergefell-intersection-civil-rights-social-movements/> [<https://perma.cc/T8MP-GZ5E>].

¹⁰Other accounts of *Obergefell*, without missing the advances it makes, have explored its limitations. See, e.g., Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. REV. 617, 637–38 (2016); Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. (forthcoming 2017) (manuscript at 19–20), <https://ssrn.com/abstract=2766577> [<https://perma.cc/GMM2-DP9Z>]; Mary Anne Case, *Missing Sex Talk in the Supreme Court’s Same-Sex Marriage Cases*, 84 UMKC L. REV. 675, 683, 684–91 (2016); Ruth Colker, *The Freedom to Choose to Marry*, 30 COLUM. J. GENDER & L. 383, 385–86 (2015); Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23–27 (2015); Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. FURTHERMORE 79 (2015), <http://moritzlaw.osu.edu/students/groups/oslj/files/2015/10/Vol.-76-79-85-Infanti-Essay.pdf> [<https://perma.cc/26YT-M47X>]; Zachary A. Kramer, *Before and After Obergefell*, 84 UMKC L. REV. 797, 801 (2016); Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 41–42 (2015); R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 66 (2015); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209–10, 1239–57 (2016); Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIR. 137, 138 (2015), https://www.californialawreview.org/squandered_potential/ [<https://perma.cc/KG5Z-4WNM>]; Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 69–70 (2015); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 156–57 (2016); Ruthann Robson, *Justice Ginsburg’s Obergefell v. Hodges*, 84 UMKC L. REV. 837, 848–50 (2016); Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HLRE 157, 157–58 (2015), http://www.houstonlawreview.org/wp-content/uploads/2015/11/Velte_Final.pdf [<https://perma.cc/3KQX-UPDN>].

lesbian-and-gay rights with rule-of-law conditions like logic and reason. As its critics have long maintained, it manifested their eclipse.¹¹ As doctrine, *Hardwick* has been defanged, but as method—defined by illogic and unreason—*Hardwick*'s law remains. In *Obergefell*, this method and its law carry the day.

To say this is to face facts that *Obergefell*'s readers either already know or should. The opinions in the case, both in majority and in dissent, turn with emotion and twist with passion's fevers. They trade accusations that, across marriage equality's bottom line, are modes of thinking that have come unhinged from reason.¹² This is no dispute in which only one side is right. As the *Obergefell* majority opinion seals the coffin on *Hardwick*'s distinctively homophobic, hence irrational, sensibilities, it joins with the dissenting opinions in the case to dredge up *Hardwick*'s dormant irrationality as an approach to decision, giving that approach a renewed lease on constitutional, hence legal, hence social, life. What follows in these pages is one part—the first part—of that account. It begins with a close reading focused on the lead *Obergefell* dissent written by Chief Justice John Roberts and joined by Justices Antonin Scalia and Clarence Thomas.¹³ The second part, to be published as a separate article, will focus its attentions on the *Obergefell* majority opinion written by Justice Anthony M. Kennedy.

The discussion here proceeds as follows. First is background that situates the work in its intellectual context. Next is an engagement with Chief Justice John Roberts's *Obergefell* dissent. Through a close reading of this opinion, one part of a larger case is made out: On *Obergefell*'s dissenting side at least is doctrinal machinery that rests atop, and may even be defined by, the complex and shifting soil of reason's eclipse.

¹¹ The literature is legion. See, e.g., CHARLES FRIED, ORDER AND LAW 81–84 (1991); Thomas B. Stoddard, *Bowers v. Hardwick*, *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 648 (1987); Kendall Thomas, Commentary, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1805 (1993). Additional relevant sources are cited in Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 367–70, 367–70 nn.11–23 (2001).

¹² For relevant perspectives from the majority opinion, see, for example, *Obergefell*, 135 S. Ct. at 2596–602, 2604, 2607. For relevant perspectives from the Chief Justice's dissent, see *infra* notes 41–53 and accompanying text. For relevant perspectives from Justice Scalia's dissent, see, for example, *Obergefell*, 135 S. Ct. at 2626–31 (Scalia, J., dissenting). For relevant perspectives from Justice Thomas's dissent, see, for example, *id.* at 2631–32, 2632 n.1, 2636 n.5, 2637, 2639–40 (Thomas, J., dissenting). For relevant perspectives from Justice Alito's dissent, see, for example, *id.* at 2642–43 (Alito, J., dissenting). Speaking generally, Louis Michael Seidman has noted “the vitriol and abuse dished out” in the *Obergefell* dissents. Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117.

¹³ The other dissents are engaged in different ways *infra*. For Justice Scalia's dissent, see *infra* note 107, and notes 138–46, 230 and accompanying text. For Justice Thomas's dissent, see *infra* note 142, and note 213 and accompanying text. For Justice Alito's dissent, see note 129 and accompanying text, and note 282.

II. BACKGROUND

This work—and the close readings of the opinions from *Obergefell* that it offers—sits at the intersection of two traditions of legal academic thought and practice. From one—the law and literature movement—it draws an interest in the discursive operations of legal, including judicial, texts.¹⁴ It proceeds having accepted the law and literature insight that attending to the rhetoric of legal texts, including “what might loosely be termed [their] ‘figural’ or ‘metaphorical’ elements,” is a means by which to register, if not strictly to produce, their complexly constituted meanings.¹⁵

From the other tradition, which traces a genealogy to Jerome Frank’s efforts in psychoanalytic jurisprudence, the work draws an interest in the psychological dimensions of legal texts, including the irrationalities that, consciously or not, shape and define them, along with the imaginary worlds—the dreams, fantasies, and nightmares—to and from which those irrationalities at times give rise.¹⁶ Interesting in its own right, exploring these legal vistas offers a way to ventilate elements of legal texts that are beyond the purview of standard rule-of-law protocols for interpreting them, which posit that the meanings of legal texts are to be discovered, if at all, on the terrain of

¹⁴Some prominent works in this tradition include STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990); RICHARD A. POSNER, *LAW AND LITERATURE* (1988); JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 *YALE J.L. & HUMAN.* 129 (1988); and James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 *HARV. L. REV.* 2014 (1989) (book review). Different offerings in and perspectives on the related law and narrative project are in DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG* (1995); Kathryn Abrams, *Hearing the Call of Stories*, 79 *CALIF. L. REV.* 971 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989); and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990). For a collection of additional sources, see WEST, *supra*, at 345 n.1.

¹⁵Thomas, *supra* note 11, at 1812.

¹⁶Jerome Frank’s classic effort in psychoanalytic jurisprudence is JEROME FRANK, *LAW AND THE MODERN MIND* (1930). For genealogies of this tradition, see David S. Caudill, *The Future of Freud in Law*, in *FREUD 2000*, at 262, 264–69 (Anthony Elliot ed., Routledge 1999) (1998), and Anne C. Dailey, *Striving for Rationality*, 86 *VA. L. REV.* 349, 350 n.8 (2000) (book review). Various lines of research make clear that this tradition has roots that precede Frank’s work. See, e.g., ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW* 52–53 (1985); Mortimer J. Adler, *Legal Certainty*, 31 *COLUM. L. REV.* 91, 91 (1931); K.N. Llewellyn, *Legal Illusion*, 31 *COLUM. L. REV.* 82, 82–84 (1931).

objectivity, dispassion, logic, and reason.¹⁷ If, in some precincts, psychoanalysis is a dead letter, it nevertheless continues to supply resources for delivering fresh insights into how legal texts, however they may be described in theory, can, in practice, deviate from and call into question rule-of-law ideals.¹⁸

Of the numerous efforts in these two traditions, and the smaller number of works at their intersection, Kendall Thomas's 1993 commentary *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick* deserves special mention as work that undertakes a rhetorical and psychoanalytically inflected interpretation of the Supreme Court's *Bowers v. Hardwick* decision.¹⁹ The

¹⁷ Pierre Schlag puts it this way, neatly:

While American legal thinkers have for the most part been very critical of specific cases, statutes, constitutional provisions, and the like, they have nonetheless been very critical in a very narrow way—a way that presumes and systematically reaffirms the essential rationality and essential value of American law. The discipline of American law, from its very beginnings (and without much critical reflection), has been committed to the rationalization of official government actions that are themselves not obviously the product of reason or rationality, but also an admixture of all sorts of forces, to wit: tradition, experience, power politics, rent seeking, utopian hopes, dystopian fears, expediency, practicality.

PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 12 (1998); see also Thomas, *supra* note 11, at 1811–12.

¹⁸ On some of the reasons for burying psychoanalysis and psychoanalytic approaches to social, including legal, questions, see MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* 373–87 (1970); JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 7–20, 30 (1992); JULIET MITCHELL, *PSYCHOANALYSIS AND FEMINISM*, at xv (Vintage Books ed. 1975) (1974); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1130–31 & nn.104–06 (2005); Jeremiah P. Conway, *The Retreat from History: A Marxist Analysis of Freud*, 25 *STUD. SOVIET THOUGHT* 101, 104–11 (1983); Hubert Dreyfus, *Foreword to the California Edition of MICHEL FOUCAULT, MENTAL ILLNESS AND PSYCHOLOGY*, at xiii–xviii (Alan Sheridan trans., Univ. of Cal. Press, 2d paperback prt. 2008) (1954); and Michel Foucault, *Confinement, Psychiatry, Prison, translated in POLITICS, PHILOSOPHY, CULTURE* 178 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988). See also generally MICHEL FOUCAULT, *HISTORY OF MADNESS* (Jean Khalifa ed., Jonathan Murphy & Jean Khalifa trans., Routledge 2006) (1961); CATHARINE A. MACKINNON, *Sex, Lies, and Psychotherapy*, in *WOMEN'S LIVES, MEN'S LAWS* 251 (Harvard Univ. Press paperback ed. 2007). Critiques notwithstanding, these approaches retain tremendous generative powers as tools of critical analysis. See generally, e.g., LEO BERSANI, *HOMOS* (1995) [hereinafter BERSANI, *HOMOS*]; LEO BERSANI & ADAM PHILLIPS, *INTIMACIES* (2008); LEO BERSANI, *IS THE RECTUM A GRAVE?* (2010); TIM DEAN, *BEYOND SEXUALITY* (2000); TIM DEAN, *UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING* (2009) [hereinafter DEAN, *UNLIMITED INTIMACY*]; HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (prt. 1966); Christopher Lane, *Freud on Group Psychology: Shattering the Dream of a Common Culture*, in *HOMOSEXUALITY & PSYCHOANALYSIS* 147 (Tim Dean & Christopher Lane eds., 2001). For additional sources, see *infra* note 36.

¹⁹ See generally Thomas, *supra* note 11. Other works at this intersection include Adler, *supra* note 18; Amy Adler, *Performance Anxiety: Medusa, Sex, and the First*

essay's stance—that *Hardwick* fails to satisfy ordinary rule-of-law conditions, its defining features being, as the essay details them, illogic and unreason, emotion and passion, fantasy and not fact—cannot now be gainsaid.²⁰

Part of the brilliance of Thomas's commentary is in how it frames its analysis of *Hardwick* with reference to the writings of Dr. jur. Daniel Paul Schreber, "a German lawyer, judge, and *Senatspräsident* of the Dresden Appeal Court."²¹ The writings by Judge Schreber that Thomas's essay has in mind are not from a law case he decided but his autobiography, *Memoirs of My Nervous Illness*,²² which Sigmund Freud famously glossed in order "to develop a theory of the catalytic role played by repressed homosexual wish fantasies in the mechanism of paranoid psychosis."²³

Thomas's commentary prepares the ground for its reading of *Hardwick* by rehearsing important aspects of Schreber's *Memoirs* as Freud's study characterized them. Both for flavor and for content, this is a vital aspect of the picture that Thomas's essay paints of Schreber's case. Quotes in the passage are stacked because Thomas's essay at this point is looking at Schreber's *Memoirs* through the lens that Freud's work trains on them:

For Freud, the "salient feature" of the *Memoirs* is a "delusion of emasculation" or Judge Schreber's belief that he was "being transformed into a woman." Freud explains that Schreber's psychotic fantasy is triggered one morning "between sleeping and waking" by the thought " 'that after all it really must be very nice to be a woman submitting to the act of copulation.' " "This idea," writes Freud, "was one which [Schreber] would have rejected with the greatest indignation if he had been fully conscious." Indeed, Schreber recounts in the *Memoirs* that he initially construed his transformative "unmanning" (*Entmannung*) as a conspiracy in which " 'God Himself had played the part of accomplice, if not of instigator.' " This divinely ordained scheme, Schreber notes paradoxically, was driven by purposes " 'contrary to the Order of Things' ": Schreber's " 'soul was to be murdered' " and his transformed " 'body used like a strumpet.' " Over time, however, the judge decides that his "emasculation" is in fact part of a "divine miracle," and is thus very much " 'in consonance with the Order of Things.' " Schreber is forced to realize that " 'the Order of Things imperatively

Amendment, 21 YALE J.L. & HUMAN. 227 (2009); and Allyson M. Lunny, 'Look, a Faggot!': The Scopio Economies of Cruising, *Queer Bashing and Law*, 22 SOC. & LEGAL STUD. 231 (2012).

²⁰ See generally Thomas, *supra* note 11.

²¹ *Id.* at 1807.

²² DANIEL PAUL SCHREBER, MEMOIRS OF MY NERVOUS ILLNESS (Ida Macalpine & Richard A. Hunter eds. & trans., 1955).

²³ Freud's study of Schreber's case appears in Sigmund Freud, *Psycho-Analytic Notes on an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)* (1911) [hereinafter Freud, *Psycho-Analytic Notes*], reprinted in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3 (James Strachey ed. & trans., 1958). The quoted language describing Freud's work comes from Thomas, *supra* note 11, at 1807–08.

demanded [his] emasculation, whether [he] personally liked it or no,' ” because he had been chosen for “ ‘[s]omething . . . similar to the conception of Jesus Christ by the Immaculate Virgin.’ ” The judge comes to interpret his “unmanning” as a sign that God has called him to redeem the world: “ ‘The further consequence of my emasculation could, of course, only be my impregnation by divine rays to the end that a new race of men might be created.’ ” Schreber is eventually able to “ ‘reconcile [himself] to the thought of being transformed into a woman’ ” and reports in lavish detail the hours he spends before the mirror “ ‘with the upper portion of [his] body bared, and wearing sundry feminine adornments, such as ribbons, false necklaces, and the like.’ ” Having transposed his dissonant sexual fantasy into a more harmonious spiritual key, Schreber finally accepts his calling. Schreber confesses that he finds that “ ‘a little sensual pleasure falls to [his] share’ ” when he “ ‘[i]nscribe[s] upon [his] banner the cultivation of femaleness’ ” and evokes that “ ‘sensation of voluptuousness such as women experience,’ ” without which he cannot discharge his new maternal duty to keep God in a “ ‘constant state of enjoyment.’ ” It is thus that the “ ‘unequal struggle between this one weak man and God himself’ ” is brought to a happy end. In Freud’s formulation, what begins as a “sexual delusion of persecution” is “converted in [Schreber’s] mind into a religious delusion of grandeur.”²⁴

Thus does Thomas’s portrayal of Schreber’s paranoid delusions highlight two of the themes that prominently define them: Schreber’s “sexual delusion[s] of persecution,” or, slightly differently, his delusions of sexual persecution, on the one hand, and the “delusion[s] of emasculation,” or “unmanning,” that are, at times, complexly and tightly bound up with them, on the other.²⁵ These paired themes—of sexual persecution and unmanning—are indispensable reference points for the interpretation of *Hardwick* that Thomas’s commentary offers, which stakes out the position that the “bizarre

²⁴Thomas, *supra* note 11, at 1808–09 (alterations in original, with the exception of “[’]”) (footnotes omitted) (quoting Freud, *Psycho-Analytic Notes*, *supra* note 23, at 13–34, with the word “unmanning” derived from SCHREBER, *supra* note 22, at 361).

²⁵*Id.* (first quoting Freud, *Psycho-Analytic Notes*, *supra* note 23, at 18; then quoting *id.* at 20; and then quoting SCHREBER, *supra* note 22, at 361). See generally SCHREBER, *supra* note 22; Freud, *Psycho-Analytic Notes*, *supra* note 23. This way of articulating the point is a slight but intentional departure from Thomas’s reading of Freud’s reading of Schreber’s *Memoirs*. Within Thomas’s analysis, there is, at times, an operative identity between Schreber’s “delusion of persecution” and his “delusion of emasculation.” See, e.g., Thomas, *supra* note 11, at 1808–09. This approach is understandable, even warranted, in this setting, both as an account of Freud’s study of Schreber’s case and as a reading of Schreber’s *Memoirs*. For present purposes, however, Schreber’s delusions are approached with a more marked, if provisional, distinction between his delusions of persecution and his delusions of unmanning. The basis for this approach returns to Schreber’s *Memoirs* themselves, in which delusions of persecution do not invariably reduce to delusions of unmanning. See, e.g., SCHREBER, *supra* note 22, at 55, 69–72, 75–79, 79 n.35, 83–84, 86–88, 87 n.39, 99–100, 121, 124, 130, 132–39, 171, 211–12.

figural logic[s]" found in *Hardwick* bear "uncanny continuities" with "the psychotic discourse of Judge Schreber's *Memoirs*."²⁶

²⁶Thomas, *supra* note 11, at 1809. Detailing the "uncanny continuities," Thomas's commentary ventures that, as a textual matter, the Court's *Hardwick* opinion shows signs of Schreber-like psychosexual fantasies in which a heterosexually male-identified figure, apparently associated with the Supreme Court, is erotically persecuted and unmanned. Key evidence for the existence of these fantasies emerges through a Freudian reading of an important passage in *Hardwick* that dredges up *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and the "painful[]" "face-off" that it precipitated "between the Executive and the Court in the 1930s." *Id.* at 1814 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986)). If, doctrinally, the Court invokes *Lochner* to explain its felt imperative to reject what it takes to be a claimed right to homosexual sodomy, on a rhetorical level, summoning *Lochner* and its traumatic effects is a powerful clue that *Hardwick* is inflicting a trauma on the Court. Like *Lochner*, *Hardwick* involves a "painful[]" "face-off," *id.* (quoting *Hardwick*, 478 U.S. at 194)—not with the Executive, but with homosexuality itself, claims for which are being "pressed" upon the Court, *id.* at 1816 (quoting *Hardwick*, 478 U.S. at 195), and which must be met with "great resistance," *id.* at 1814, 1816, 1821 (quoting *Hardwick*, 478 U.S. at 195). No mere reference to arguments the Court is being urged to adopt, this is a sexual "press" which, in *Hardwick*'s imagination, "represents an assault on the normative order of male heterosexuality," *id.* at 1822, and thereby "provokes [within the Court's opinion] nothing less than a crisis of institutional representation," *id.* at 1823.

This "crisis of institutional representation" surfaces in *Hardwick* in ways that are similar to Schreber's own crisis of self-representation. *Id.* Sensing that *Hardwick*'s homosexual advances are "somehow not only" a threat that would "undermine the authority of the Court, but [a threat that would also] unman (to use Judge Schreber's word) the patriarchal (hetero)sexual ideologies and identities on which that authority ultimately rests," *id.* at 1818, *Hardwick* seeks to preserve the Court's authority, rebuffing the would-be unmaning in the case through an opinion that stages a deep and "radical . . . disidentification with the very figure of the male homosexual," *id.* at 1824. This staged disidentification with the figure of the male homosexual is so radical and so insistent that it readily reads as an indication that something is hiding beneath it. Recalling Freud's claim that "all human beings are capable of making a homosexual object-choice and have in fact made one in their unconscious," *id.* at 1826 (quoting SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905) [hereinafter, FREUD, THREE ESSAYS], reprinted in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 125, 144 n.1 (James Strachey ed. & trans., 1953)), *Hardwick*, considering the claims to homosexual sodomy at hand, has apparently faced its own capacity for making a homosexual object-choice and made that choice, if solely on an unconscious level, only to find itself feeling a surging need to insist emphatically that it never had, never did, and never would, by not merely rejecting but violently smashing Michael *Hardwick*'s claims in an opinion that "rages irrationally against [them]," *id.* at 1828. No sober second look at the constitutionality of Georgia's sodomy statute, *Hardwick* is, if anything, a case of an anti-gay homosexual panic.

Something curious happens as part of this anti-gay homosexual panic that is also like what happens in Schreber's case. Formally, *Hardwick* repudiates the pro-lesbian-and-gay constitutional arguments in the case in a turn that ridicules them, *see supra* note 5 and accompanying text, but this repudiation comes through a decision that displaces its own homophobic aggressions by projecting them onto the figure of the male homosexual who is thereby reconfigured as an aggressor who would take a heterosexualized and male-

identified *Hardwick* Court and reduce it to the status of a sexual victim. In doing so, *Hardwick* would place the heterosexual male-identified Court in a “‘vulnerable,’ unmanly, and perforce, enfeminized position,” Thomas, *supra* note 11, at 1824 (quoting *Hardwick*, 478 U.S. at 194), not only as a matter of doctrine, but also, importantly, as a matter of sex.

In its sexual dimensions, the Court’s homophobic imagination tracks “the regnant representation of the gay male homosexual” in the “homophobic American mind . . . of ‘a grown man, legs high in the air, unable to refuse the suicidal ecstasy of being a woman.’” *Id.* at 1822 (quoting Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 212 (1987)). If, despite itself, *Hardwick* practically “confesse[s] with equal insistence the very interest in homosexuality that [it] has so insistently disavowed,” *id.* at 1828, the ultimate logic of the Court’s fantasy about *Hardwick* bespeaks an act the desires for which are not properly “fit to be named,” *id.* at 1823 (quoting *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215)). Nameless, they are not without comparison, as found in Chief Justice Warren Burger’s concurring opinion in the case. Following Blackstone, that opinion explains that *Hardwick* involves an act of “‘deeper malignity’ than rape.” *Id.* at 1822 (quoting *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 BLACKSTONE, *supra*, at *215)). These being the dark acts that *Hardwick* fantasizes about—and repudiates—it is no wonder that forces erupting from the depths like this have a traumatizing grip on the Court’s opinion.

But, Thomas’s commentary carefully observes, *Hardwick* does not allow itself to succumb to these imaginary forces without a fight. Its text bears witness to an attempt by *Hardwick* to save itself from its own phantasmatic, worse-than-rape horrors. Paradoxically, *Hardwick* tries to preserve its heterosexual male identifications intact by abandoning them through what Thomas’s essay describes as a staged “reversal into [their] opposite.” *Id.* at 1821 (quoting Sigmund Freud, *Instincts and Their Vicissitudes* (1915) [hereinafter, Freud, *Instincts and Their Vicissitudes*], reprinted in 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 109, 126–27 (James Strachey ed. & trans., 1957)). This reversal entails a “discursive transformation of the institutional image of the Supreme Court . . . from a subject-position of ‘masculine’ activity to ‘feminine’ (aggressive) passivity.” *Id.* at 1821–22. This move is salvific because whatever the very figure of the male homosexual would presumably like to do sexually to heterosexual men as men, it would not like to do to them as women.

Thus does *Hardwick* express itself in feminine registers, demonstrating an upright and ladylike stance of opposition to the homosexual sodomy claims being pressed upon the Court. This “discursive ‘sex-change,’” *id.* at 1825, in addition to exempting the Court from its erstwhile status as an object of homosexual sexual interest, also enables it to mount that great resistance to the homosexual sodomy claims, rebuffing them in a way that preserves the Court as a chaste and otherwise virtuous vessel for the Founding Fathers’ aims. “Fidelity to the ‘language [and] design’ of the ‘Law-of-the-(Founding)-Father(s)’ demands ‘great resistance’ to *Hardwick*’s attempted seduction of the Court, and the ‘illegitimacy’ to which a betrayal of that law would lead.” *Id.* at 1821 (alteration in original) (quoting *Hardwick*, 478 U.S. at 194–95). Judicial recognition of *Hardwick*’s claims, claims that lack any “readily identifiable” grounding in the Constitution’s text, *id.* (quoting *Hardwick*, 478 U.S. at 191), “would represent an act of interpretive adultery, whose shameful outcome [could] only be the birth of a ‘bastard’ right with no legitimate textual ‘roots’ or claim to the ‘Name-of-the-(Founding)-Father(s).’” *Id.* Avoiding these forms of illegitimacy preserves the Court’s chastity and virtuousness, but at the price of its heterosexual male identification. In this sense, the figure of the homosexual who sexually persecutes the heterosexual male-identified *Hardwick* Court leads it through homosexual sexual advances to relinquish that identity. “[N]ot even the ‘Father-Judges’ of the Supreme Court can break [the] linguistic taboo” associated with “homosexual sodomy,” that “crime not fit to be

From that bid, there is another: In different ways than *Hardwick*, the “figural logic[s]” of the *Obergefell* opinions, both in majority and in dissent, bear affinities to the irrational “discourse of Judge Schreber’s *Memoirs*” as well.²⁷

A. A Note on Method—Depersonalization, Aesthetics

Before turning to the first part of an elaboration of that point, which focuses on the text of Chief Justice Roberts’s *Obergefell* dissent, an important note on method is in order.

It is no small matter to engage in a rhetorical reading of a Supreme Court opinion, particularly when it takes a psychologized, much less a psychoanalytic, turn.²⁸ To be steeped in rule-of-law thinking and the conventional, “rationalist doctrinal analysis” to which it gives rise is to be imbued with a “situation sense” that finds something troubling, objectionable, disconcerting, even illegitimate, about this mode of interpretive pursuit.²⁹ There are many reasons for thinking this way, but significantly among them is a sense that rhetorical readings of judicial texts, particularly when psychologically inflected, participate in extra-legal and speculative engagements that have naught to do with doctrine, hence law, leading them readily to seem to reduce to *ad hominem* challenges against judicial authors whose works are the objects of scrutiny, read: interpretive attack.³⁰

named,” “without first submitting to a discursive . . . ‘unmanning’ which removes them, like Judge Schreber, from ‘the category of men’ on whom the male homosexual preys.” *Id.* at 1825.

And so it is that *Hardwick*, a case involving the claimed constitutional right to homosexual sodomy, triggers a fantasy of homosexual sodomitical attack, which the text desires, but is traumatized by, and so repudiates, while “transform[ing],” *id.* at 1821 (quoting Freud, *Psycho-Analytic Notes*, *supra* note 23, at 20), or “transsexualiz[ing] [itself] into a woman,” *id.* at 1825. Fantasies of persecution and unmanning being part of the *Hardwick* Court’s rhetoric, *Hardwick* does, as Thomas’s commentary says, bear a “startling resemblance” to the delusions of sexual persecution and unmanning that importantly defined Daniel Schreber’s case. *Id.* at 1820–21.

²⁷ See *id.* at 1809.

²⁸ As Anne Dailey observes: “The study of irrationality is not a familiar topic in the law. Despite scattered references to psychoanalysis and the unconscious, the law has remained remarkably resistant to the methods and insights of psychoanalysis generally and the study of irrationality in particular.” Dailey, *supra* note 16, at 350.

²⁹ The expression “rationalist doctrinal analysis” comes from Thomas, *supra* note 11, at 1812. The idea of “situation sense” is drawn from KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 121 (1960). It itself has not gone uncritiqued. See generally, e.g., Charles E. Clark & David M. Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961); Patrick J. Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or “Just-Result Jurisprudence”?*, 32 *FORDHAM L. REV.* 51 (1963).

³⁰ The fuller set of reasons for this skepticism deserves study in its own right. That effort would be aided by engaging the critiques of FRANK, *supra* note 16. For some

That being so, it bears noting that the rhetorical readings of the *Obergefell* opinions offered in this work explore these texts for their rational content, including their declarations of constitutional doctrine, as well as for their irrational dimensions, including their fevers and their conscious or unconscious dreams, their fantasies and nightmares both. The approach to the *Obergefell* opinions at work here regards them not as transparencies onto individual authorial psychology, but as complexly situated cultural artifacts that hold distinctive places “in the broader archive of cultural texts.”³¹ Within that archive, the *Obergefell* opinions are actively participating in the processes by which the cultural meanings of the topics that they treat—among them, prominently, marriage, family, sexuality (including sexual violence), and gender—are being negotiated. These processes of negotiation are not straightforward or always logical by standard measures, but being deep in the midst of them as they are, the *Obergefell* opinions cannot be pinned down as anything so simple as reflections of individualized judicial psychologies.³² To state the point somewhat differently, the psychologies that are in play in the texts are themselves, in excess of the psychologies of their nominal judicial

relevant discussion, see, for example, GLENNON, *supra* note 16, at 53–60, and JULIUS PAUL, THE LEGAL REALISM OF JEROME FRANK 66–67, 67 nn.1–3 (1959).

³¹Thomas, *supra* note 11, at 1811. Some grounding for this approach may make its way back to Freud. See generally, e.g., SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930), reprinted in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 59 (James Strachey ed. & trans., 1961); SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (1921), reprinted in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 67 (James Strachey ed. & trans., 1955); SIGMUND FREUD, MOSES AND MONOTHEISM (1939), reprinted in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3 (James Strachey ed. & trans., 1964); SIGMUND FREUD, TOTEM AND TABOO (1913), reprinted in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, at ix (James Strachey ed. & trans., 1955).

³²If, it should be added, individualized judicial psychologies discovered via judicial opinions may even be thought to exist as proper objects of psychological investigation. Aside from recognizing that judicial opinions, like other outputs of legal institutions, are invariably the products of complexly situated, multi-party, institutional dynamics—dynamics that are themselves complexly situated in complex cultural milieux—there are other reasons not to think of judicial opinions as glass windows onto individual judicial psychologies. These include how individuality may be thought to work in psychoanalysis, on which see, for example, JONATHAN LEAR, OPEN MINDED 134 (1998), and Dailey, *supra* note 16, at 371 n.80, along with the reasons offered elsewhere for rethinking conventional notions of authors and authorship, see, e.g., MICHEL FOUCAULT, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 113 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977), which have yet to be spelled out in terms of judicial work product. All that having been said, viewed pragmatically, judicial opinions will obviously not always be wholly bereft of any serviceable clues about judicial psychologies, even as they cannot invariably be treated as transparent windows onto the psychic lives and worlds of their “authors.” Important aside: None of this focus on “authors” is to overlook the role or the problematics of the figure of “the reader.”

authors, manifestations of complex and large-scale cultural dynamics.³³ These dynamics and the psychologies that they manifest in the opinions influence, as they are reworked by, the engagement with the marriage equality claims that *Obergefell* involves. In this sense and to this extent, the rhetorical and psychologically interested readings of the *Obergefell* opinions presented in this work understand these opinions to instantiate patterns of thought—rational and irrational alike—that are beyond anything that conventional notions of authorship, and judicial authorship in particular, allow. The meanings and ideas found in the rhetoric of these opinions thus surpass anything their “formal” authors could possibly consciously and specifically intend. This is why the readings offered in these pages make no claims about the psychologies of the individual judicial authors whose opinions are engaged. Indeed, for purposes of the present effort, what may have been in a judicial author’s mind when “writing” an opinion does not define, and so cannot circumscribe, its meanings. What matters is what a reading of the resulting text that has been produced will allow.³⁴

Departing from the idea that authorial intentions—or even authorial psychologies—govern the meanings of judicial texts, the readings of the *Obergefell* opinions that follow do not rest in the normative sweet spot of legal academic interpretive practice.³⁵ But then neither are these ways of reading judicial opinions utterly foreign to this universe. If nothing else, the genealogies that these readings trace—to the law and literature movement and to the psychoanalytic jurisprudence that Jerome Frank inspired—assure as much.³⁶

³³Some of the complexities of this process are discussed in DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (N.Y. Univ. Press Critical ed. 2004) (1983).

³⁴To say this is not to insist that a text exists before it is read, only to posit, however provisionally, some “work” (or work-like gesture or mark) that may be thought to be “there”—in the sense of marking the occasion for the production of a text and its meaning. *See generally* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

³⁵Then again, considerable amounts of legal academic scholarship about Supreme Court decisions do, in a Realist vein, with nods to Holmes’s vision of law as “what the courts will do in fact,” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), imagine that the meaning of cases is what is in a judicial author’s mind, which leads, if in what are deemed doctrinally appropriate ways, to judicial opinions being treated as portals onto judicial psychology. But, as Michael Dorf observes, “[w]hatever expertise we law professors have in psychoanalyzing the justices we study at length (and I think we have quite a bit), that is hardly what we like to think we are doing.” Michael Dorf, *Reading Justice X’s Mind*, DORF ON L. (Aug. 10, 2016), <https://www.dorfonlaw.org/2016/08/reading-justice-xs-mind.html> [<https://perma.cc/D6M4-6RPJ>].

³⁶*See supra* notes 14, 16. Recent (or recentish) work in the Frankian tradition includes MARIA ARISTODEMOU, *LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY* (2014); Adler, *supra* note 18; Adler, *supra* note 19; Paula Baron, *The Web of Desire and the Narcissistic Trap: A Psychoanalytic Reading of Re Alex*, 14 GRIFFITH L. REV. 17 (2005); Matthew H. Birkhold, *Freud on the Court: Re-Interpreting*

Affirming and extending these traditions, this work constitutes a return to some hard and pressing questions that earlier efforts in psychoanalytic jurisprudence practically raised, but which have not to date been adequately addressed at the level of critical jurisprudence, much less its mainstream forms.³⁷ Is irrationality constitutive of, rather than episodic within and excludable from, the rule-of-law regime?³⁸ If the rule of law is continuous with—not autonomous from—culture and cultural processes, processes that are incredibly messy and at times highly irrational, could the rule of law ever reflect pure and neat forms of rationality and reason? What is to be made of how culture's dark sides—including its deep, abiding, and roiling irrationalities—inevitably leech into legal decision-making, hence rule-of-law rules?³⁹ If and when that happens, could normative opposition ever constitute an adequate corrective? If that opposition did the work that it might like to do, what rules would be left within the rule of law? How circumscribed would its operative forms be?

For now, something in the direction of an aesthetic response to these questions—toward an aesthetic jurisprudence—is imagined.⁴⁰ Without

Sexting & Child Pornography Laws, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 897 (2013); Anthony Paul Farley, *Lacan & Voting Rights*, 13 YALE J.L. & HUMAN. 283 (2001) [hereinafter Farley, *Lacan & Voting Rights*]; Anthony Paul Farley, *Law as Trauma & Repetition*, 31 N.Y.U. REV. L. & SOC. CHANGE 613 (2007); Michael H. Hoffheimer, *Justice Holmes: Law and the Search for Control*, 1989 SUP. CT. HIST. SOC'Y Y.B. 98; Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL'Y & L. 385 (2009); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008); Symposium, *Law and the Postmodern Mind*, 16 CARDOZO L. REV. 699 (1995); Lunny, *supra* note 19; Sahand Shaibani, *Psychodynamics of the Judicial Process*, 1 STAN. J. LEGAL STUD. 1 (1999), <https://agora.stanford.edu/sjls/images/pdf/shaibani.pdf> [<https://perma.cc/D3B6-CXPZ>]; Shiva Kumar Srinivasan, *What is the Psychoanalysis of Law?*, 20 IOSR J. HUMAN. & SOC. SCI. 15 (2015); Gretchen S. Sween, *Who's Your Daddy? A Psychoanalytic Exegesis of the Supreme Court's Recent Patent Jurisprudence*, 7 NW. J. TECH. & INTELL. PROP. 204 (2009); Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731 (2000); and Richard Cornes, *Making Up the Judge's Mind—A Psychoanalytic Perspective on Legal Reasoning and the Role of the Judge* (June 6, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2446452> [<https://perma.cc/KK65-56XK>]. See *infra* note 37 for additional sources.

³⁷Not that there is nothing to be found. Engaging examples include Jeanne L. Schroeder, *His Master's Voice: H.L.A. Hart and Lacanian Discourse Theory*, 18 LAW & CRITIQUE 117 (2007), and Jeanne L. Schroeder & David Gray Carlson, *Psychoanalysis as the Jurisprudence of Freedom*, in ON PHILOSOPHY IN AMERICAN LAW 139 (Francis J. Mootz III ed., 2009).

³⁸Pierre Schlag's work, which comes at these questions from a different angle, is an indispensable passage point. See generally, e.g., SCHLAG, *supra* note 17.

³⁹The tradition of legal academic study of the irrationalities of law as an endemic feature of it is underdeveloped even in the critical literature that sees law as pervaded with and by it.

⁴⁰With Adam Gearey, "aesthetic jurisprudence . . . must have some concern with revealing the beauty of law," though that is also "a narrow interpretation of the possibilities offered by a thinking through of aesthetics. Aesthetics is much more than a theory of the

sketching all its details, in this approach, the irrationalities of judicial opinions are not obviously and imperatively only objects of judgment, critique, or condemnation but also objects of, well, beauty and wonder to catch sight of and to behold. Law itself being an impossibly human endeavor, why on this level condemn it for the fullness, the richness, the beauty, even in the ugliness, of its humanity? There are undoubtedly highly practical, non-aesthetic reasons to discover, but for now, what would happen if the search for them were to be deferred for a spell, maybe just so long as is required to see what the rhetoric of the opinions filed in *Obergefell* can be read to tell? What might yet be learned about the grounds of these decisions, and the grounds of their law and the rule-of-law system of which they are a part?

beautiful.” Adam Gearey, *Love and Death in American Jurisprudence*, in 33 STUDIES IN LAW, POLITICS, AND SOCIETY 3, 5 (Austin Sarat & Patricia Ewick eds., 2004); see also COSTAS DOUZINAS & ADAM GEAREY, *Aesthetic Jurisprudence*, in CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE 303 (2005); Adam Gearey, “Where the Law Touches Us, We May Affirm It”: *Deconstruction as a Poetic Thinking of Law*, 27 CARDOZO L. REV. 767, 788–89 (2005). See generally ADAM GEAREY, LAW AND AESTHETICS (John Gardner ed., 2001). Very roughly, the idea of aesthetic jurisprudence as used here means to refer to a mode of reading law that sees it in fully aesthetic and nonprogrammatic terms, a way of viewing and reading law that is not simply about its beauty, nor its improvement, as by some moral metric, nor its reader’s improvement, as in political or moral terms, nor, for that matter, in terms of other human excellences, so much as how law may cause its readers to think about it, about themselves and about their worlds, without any programmatic normative overlay driving individual and collective senses of the thing. This vision does not mean to reduce to an analysis of law as (mere) object, nor (mere) power politics, although power and struggles involving power—including dominance and subordination—may be (though they need not necessarily be) among its themes. For work to which this conception of aesthetic jurisprudence is related, and against which it would have to be elaborated and refined, see, *inter alia*, LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS (1985); PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992); LAW AND ART: JUSTICE, ETHICS AND AESTHETICS (Oren Ben-Dor ed., 2011); ROBIN WEST, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, in NARRATIVE, AUTHORITY, AND LAW 345 (1993); WHITE, *supra* note 14; Susan Chaplin, *Textual Properties: The Limit of Law and Literature—Towards a Gothic Jurisprudence*, in 43 STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE: LAW AND LITERATURE RECONSIDERED 113 (Austin Sarat ed., 2008); Roberta Kevelson, *Introduction: Dialectic, Conflicts in Cultural Norms, Laws and Legal Aesthetics* to LAW AND AESTHETICS 1 (Roberta Kevelson ed., 1992); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002); and Olaf Tans, *The Imaginary Foundation of Legal Systems: A Mimetic Perspective*, 26 LAW & LITERATURE 127 (2014).

III. *OBERGEFELL V. HODGES*: THE RETURN OF THE REPRESSEDA. *Obergefell's Visions of Persecution and Unmanning: Chief Justice Roberts's Dissent*

There is no more authoritative dissent in *Obergefell*, and no more comprehensive reflection of the tendencies in the *Obergefell* dissents for Schreber-like visions of persecution and unmanning, than the opinion that Chief Justice John G. Roberts files in the case, joined by Justice Antonin Scalia and Justice Clarence Thomas.⁴¹ The dissent's elegantly simple doctrinal conclusion—that the U.S. Constitution offers same-sex marriages no protections—arrives in an opinion whose rhetoric far exceeds it.⁴² This is an opinion bursting its seams with ideas and images involving fantastical forces that sexually target and ruin the heterosexuality and the manhood of heterosexual men.

Well before any sexual elements of the opinion become apparent, the Chief Justice's dissent departs from cool and calm legal reason.⁴³ Only a page in, the dissent, in a cold, controlled rage, seething, is not so much disagreeing as attacking the majority opinion. *Obergefell* is not simply mistaken to recognize marriage equality as a constitutional guarantee. It is lawless to do so.⁴⁴ Hinting that *Obergefell* may somehow be an act of "force," it is plainly decried as an "act of will."⁴⁵ Through it, the Court has installed itself anti-democratically over the nation's governments, no longer governments of law, but ruled by the Court's individual women and men.⁴⁶ Without declaring this

⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting). The Chief Justice's dissent has elsewhere been described as "the most extensive and carefully reasoned of the four dissents," though not without noting that "[t]he opinion . . . overflows with ironies and contradictions." Seidman, *supra* note 12, at 122.

⁴² *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting); *see also id.* at 2611–12. The reasoning of the *Obergefell* majority opinion has elsewhere been accounted for in terms of its own elegant simplicity. *See* Massaro, *supra* note 3, at 325–26.

⁴³ For a description of Chief Justice Roberts's delivery of his *Obergefell* dissent from the Bench, a "first . . . in his decade-long tenure," Robin Fretwell Wilson, "Getting the Government Out of Marriage" *Post Obergefell: The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. 1445, 1447, and the effect of this reading as a live performance, different than "on paper," *see* Dahlia Lithwick, *Amicus: The Term in Review*, SLATE (July 4, 2015), https://www.slate.com/article/s/podcasts/amicus/2015/07/same_sex_marriage_obamacare_and_the_rest_of_the_2014_15_supreme_court_term.html [<https://perma.cc/BR47-2F43>]. An alternative view of sexuality's role in the *Obergefell* opinions is presented by Case, *supra* note 10.

⁴⁴ *Obergefell*, 135 S. Ct. at 2611–12 (Roberts, C.J., dissenting) (citing *id.* at 2598, 2605 (majority opinion)).

⁴⁵ *Id.*

⁴⁶ *Id.* The dissent returns to these themes elsewhere. *See, e.g., id.* at 2612, 2615–19, 2622–24, 2626. Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. (forthcoming 2017) (manuscript at 3), <https://ssrn.com/abstract=2763258> [<https://perma.cc/ZT7S-TJ8K>], sets out to "rebut[] the charge that *Obergefell* was undemocratic." *See also infra* note 102.

usurpation an impeachable offense, *Obergefell*, not any kind of “good [judicial] [b]ehaviour” as the Constitution requires, is a criminal event.⁴⁷ The Supreme Court has “stolen” the political decision on same-sex marriage “from the people” to whom it constitutionally belongs, a theft that results from nothing more than the Court’s arrogant and incautious “desire to remake society according to its own ‘new insight’ into the ‘nature of injustice,’” which serves to “transform[] . . . a social institution that has formed the basis of human society for millennia.”⁴⁸ This turn of events is so disturbing to the dissent that, despite its air of self-possession, it gives itself over to a repetition compulsion. In the introduction alone, after multiple indications of *Obergefell*’s lawlessness, the dissent didactically states it this way again: “The majority’s decision is an act of will, not legal judgment” that has “no basis in the Constitution or this Court’s precedent.”⁴⁹

When the dissent’s angry, opening wave does finally break, its energies do not dissipate. Past the details of the dissent’s subsequent doctrinal maneuvering, its rhetoric, like its opening, is a sight to behold. Start to finish, the dissent fires on high heat, demonstrating a scorched-earth aim to set ablaze all the major (and a few minor) turns of the Court’s opinion. Practically, this strategy, which repeatedly condemns *Obergefell* for abandoning the Constitution and the Court’s precedents, points to the remarkable dangers that *Obergefell* courts. Some of these dangers, like the theft of the issue of same-sex marriage from the people, manifest in *Obergefell* itself, while others, some already visible and others not yet clearly seen, remain in the offing—for now.⁵⁰ The dissent does not pretend to know exactly where *Obergefell* will lead the Court, but it is certain this is not the end of the road.⁵¹ If a millennia-old basic institution like marriage with its ages-old definition is not enough to stop the Court, what can or will?⁵² Unmoored from the Constitution and the

⁴⁷ U.S. CONST. art. III, § 1.

⁴⁸ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (citing *id.* at 2598, 2605 (majority opinion)). The dissent’s precise language describing the theft is “[s]tealing.” *Id.*

⁴⁹ *Id.* For repetition of these themes elsewhere in the dissent, see, for example, *id.* at 2619–26.

⁵⁰ As for the dangers of *Obergefell* that are plainly visible to the dissent, see, for example, *id.* at 2611 (“[F]or those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.”); *id.* at 2612 (“Stealing this issue from the people will . . . mak[e] a dramatic social change that much more difficult to accept.”); *id.* at 2621 (“It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”); and *id.* at 2626 (indicating that “[t]here is little doubt” that cases involving *Obergefell*’s conflict with religious freedoms “will soon be before this Court”). As for what is not yet clearly seen, but presently remains in the offing, see *infra* note 52 and accompanying text.

⁵¹ *Obergefell* in this sense is no *Bush v. Gore*. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances . . .”).

⁵² In the dissent’s own formulation: “If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?” *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

Court's precedents, *Obergefell* sets the Court free to roam at large, inventing new constitutional rules unconstrained by traditional methods of constitutional interpretation—text, history, tradition, structure, precedent—with nothing more than its “new insight” into justice’s nature, at times dressed up as “reasoned judgment,” as the basis for imposing itself on the nation as it will.⁵³

Surveyed this way, the Chief Justice’s dissent reads at times like a morality play in which an obviously ordinarily heroic Supreme Court has lost its way, allowing itself to be captured by desires that, when indulged, constitute the judicial equivalent of cardinal sins, including pride, lust, and greed. At the same time, the dissent presents itself for an even more engaging read as a psychological thriller, in which the *Obergefell* Court yields to forces of desire, long held in check, that bear impressive affinities to what Freud dubbed the id. Contrasted with the ego, which “represents what may be called reason and common sense,”⁵⁴ and with the super-ego, which represents “that part of a person’s mind that acts as a self-critical conscience or censor, reflecting standards and behaviour learned from parents and society; the agent of self-criticism or self-observation that acts as a check on the id and the ego,”⁵⁵ “the id falls to instinct”⁵⁶ and “contains the passions.”⁵⁷ It is “a chaos, a cauldron full of seething excitations,” “filled with energy reaching it from the instincts,” “a striving to bring about the satisfaction of the instinctual needs subject to the observance of the pleasure principle.”⁵⁸

By the Chief Justice’s dissent’s lights, *Obergefell* is notably id-like: willful, lawless, unprincipled, hubristic, disrespectful of the Constitution, the American people, and the history and tradition of their institutions, including democracy and marriage, drunk on its own stolen power to the degree of not caring about either the Court’s precedents or the effects this ruling will have, interested, finally, only in its visceral wants and their satisfactions, the Court’s

⁵³ The dissent draws the language of “new insight” and the “nature of injustice” from the majority opinion. *See id.* at 2612 (quoting *id.* at 2598, 2605 (majority opinion)); *see also id.* at 2621 (quoting *id.* at 2598 (majority opinion)). The same holds with the dissent’s invocation of “reasoned judgment.” *Id.* at 2621 (quoting *id.* at 2598 (majority opinion)). This perspective on the *Obergefell* majority opinion is reminiscent of Robert Bork’s observation that “[w]e would hardly revere a document that we knew to be no more than an open warrant for judges to do with us as they please.” ROBERT H. BORK, *THE TEMPTING OF AMERICA* 16 (1990).

⁵⁴ SIGMUND FREUD, *THE EGO AND THE ID* (1923) [hereinafter FREUD, *EGO AND THE ID*], reprinted in 19 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 3, 25 (James Strachey ed. & trans., 1961).

⁵⁵ *Superego*, n., OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/194265?redirectedFrom=super+ego#eid> [<https://perma.cc/D9VY-FVYZ>]. Some additional notes on the topic of the super-ego and developments in its conceptualization are in ANTHONY STORR, *FREUD: A VERY SHORT INTRODUCTION* 60–64 (2001).

⁵⁶ FREUD, *EGO AND THE ID*, *supra* note 54, at 25.

⁵⁷ *Id.*

⁵⁸ SIGMUND FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* (1933), reprinted in 22 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 3, 73 (James Strachey ed. & trans., 1964).

own pleasure principle.⁵⁹ Possessed of the Court's impressive institutional powers, including the powers to break from, hence make, world history, the Court's id—eventually represented by the dissent as an unprecedented dark force, a heretofore unknown constitutional monster even—gives *Obergefell* its unwholesome energies of decision.⁶⁰ The id-like force in play in the majority opinion stalks the Chief Justice's dissent, which calls it out in order to rail against and annihilate it. Unfortunately, at some point in the struggle, the dissent loses its bearings only to find itself textually embroiled in a psychodrama entirely of its own creation. The opinion's language and its rhetoric give public witness.

B. *Obergefell as Lochner*, *Obergefell as Dred Scott*

A “decisive moment” in the Chief Justice's dissent's psychodrama arrives as it is capturing important doctrinal ground.⁶¹ By this point in its argument, the dissent has proposed that *Obergefell* is unsupported by the Court's right-to-marry and its right-to-privacy decisions, leaving a discredited substantive due process ruling as the lone precedent it can muster as authority.⁶² Temporarily abandoning its early stance, repeated later on, that nary one Supreme Court precedent authorizes *Obergefell*,⁶³ the dissent defiantly declares: “Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*,” the anti-canonical decision that discovered an unwritten liberty to contract in the Fourteenth Amendment's Due Process Clause.⁶⁴

⁵⁹ There is, in addition to the dissent's view of the majority opinion as an act of will, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612, 2624 (Roberts, C.J., dissenting), its invocations of notions of the majority's opinion as bound up with desire and preference. See, e.g., *id.* at 2612 (“The majority . . . openly rel[ies] on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’” (quoting *id.* at 2598, 2605 (majority opinion))); *id.* (“It can be tempting for judges to confuse our own preferences with the requirements of the law.”); *id.* at 2616 (noting the importance of judges not “subtly transform[ing]” due process liberty “into the policy preferences of the Members of this Court” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))); *id.* at 2618 (discussing the need not to indulge “personal preferences”); *id.* at 2619 (“The majority's driving themes are that marriage is desirable and petitioners desire it.”); *id.* at 2621 (“[T]oday's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to”); *id.* (suggesting that *Obergefell* “has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*”); *id.* at 2626 (referring to “the achievement of a desired goal” that has “nothing to do with” the Constitution).

⁶⁰ See *infra* Part III.H.

⁶¹ Thomas, *supra* note 11, at 1814.

⁶² *Obergefell*, 135 S. Ct. at 2619–21 (Roberts, C.J., dissenting).

⁶³ See *supra* note 49 and accompanying text.

⁶⁴ *Id.* at 2621; accord *Lochner v. New York*, 198 U.S. 45, 58 (1905), *overruled in part* by *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

While the dissent maintains that *Lochner* is the “only one precedent” supporting *Obergefell*’s methodology, the idea is unsustainable in this form.⁶⁵ The dissent does not really believe it. Its own earlier discussion of substantive due process’s doctrinal history places *Lochner* in a long, sordid line of contract liberty decisions, the existence of which means *Lochner* cannot be a unique precedential warrant for what *Obergefell* does.⁶⁶ Far more significant is the dissent’s observation in the same larger historical tour that *Lochner* harkens back to the great illegitimate decision of illegitimate decisions, the opinion that launched the Supreme Court’s substantive due process line: *Dred Scott v. Sandford*.⁶⁷ If so, it follows: As *Obergefell* is swelled and diminished by *Lochner*, it is simultaneously underwritten and delegitimated by *Dred Scott*.⁶⁸

The Chief Justice’s dissent makes it easy to make light of the analogy that it configures between *Obergefell* and *Dred Scott*. The opinion’s declaration that *Lochner* is the “only” case supporting *Obergefell*’s methodology practically recommends that the analogy be made light of, even that it be overlooked.⁶⁹ Still, the dissent’s brief, direct engagement with *Dred Scott*—or its substantive due process analysis, anyway—indicates that what might seem like no more than a tacitly configured, not-very-significant likening actually

⁶⁵ *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

⁶⁶ *Id.* at 2617. As the dissent explains it, in part: “In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty . . .” *Id.*

⁶⁷ *Id.* at 2616–17; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁶⁸ There are certain resemblances between how the Chief Justice’s dissent aligns *Obergefell* with *Dred Scott* and how others have situated *Roe v. Wade* and its progeny in relation to *Dred Scott*. See, e.g., Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998, 1002 (1992) (Scalia, J., dissenting); BORK, *supra* note 53, at 32; Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 936–39 (1999). See generally Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003); Charles E. Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973). Further perspective on the topic is in JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 3–13 (2013).

⁶⁹ Unremarkably, then, many have not commented upon it. For counter-examples, see, for example, Adam Lamparello, *Justice Kennedy’s Decision in Obergefell: A Sad Day for the Judiciary*, 6 HLRE 45, 53 & nn.62–63 (2015), https://www.houstonlawreview.org/wp-content/uploads/2015/08/Lamparello-Justice-Kennedys-Decision_Final1.pdf [<https://perma.cc/B595-CNFR>]; Adam J. MacLeod, *Rights, Privileges, and the Future of Marriage Law*, 28 REGENT U. L. REV. 71, 107 & n.328 (2015); Massaro, *supra* note 3, at 338–39; Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 333 & n.8 (2016); Jane S. Schacter, *Obergefell’s Audiences*, 77 OHIO ST. L.J. 1011, 1019 (2016); Seidman, *supra* note 12, at 122–24; and Yoshino, *supra* note 3, at 170–71. A sensitive treatment of the relationship between *Obergefell* and *Dred Scott* outside the law review literature is in Amy Davidson, *What Does Marriage Equality Have to Do with Dred Scott?*, NEW YORKER (July 8, 2015), <https://www.newyorker.com/news/amy-davidson/what-does-marriage-equality-have-to-do-with-dred-scott> [<https://www.perma.cc/2SSC-44A5>].

reflects a very different belief: *Obergefell*, as the dissent sees it, bears striking, deep, and alarming affinities to the Supreme Court's opinion in *Dred Scott*.⁷⁰

Initially, the Chief Justice's dissent characterizes *Dred Scott* abstractly as a case that taught the Supreme Court important lessons about "the strong medicine of substantive due process . . . the hard way."⁷¹ *Dred Scott* is then summed up as the ruling that "invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders."⁷² Elaborating, the dissent explains that *Dred Scott* proceeded from an extra-constitutional sense that Fifth Amendment Due Process protections of "liberty and property" embraced the institution of slavery through the protection of slaveholders' implied constitutional rights: Slaveholders' constitutional liberty and property rights guaranteed them the right to own enslaved persons, a right that the Missouri Compromise could not deny.⁷³ In saying this, the Chief Justice's dissent illuminates *Dred Scott*'s substantive due process reasoning by plucking, and reproducing, a sentence from the decision that underscores ideas of "liberty" and "property," while adding a third concept—"digni[ty]," related to due process of law—into the mix.⁷⁴ Hence (the emphasis is added): *Dred Scott* "asserted that 'an act of Congress which deprives a citizen of the United States of his *liberty* or *property*, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be *dignified* with the name of *due process of law*.'"⁷⁵

Quoting this sentence from *Dred Scott* this way in an opinion dissenting from *Obergefell* is highly revealing. Like *Dred Scott*, *Obergefell* relies on due process "liberty" as a centerpiece of its decision.⁷⁶ Moreover, *Obergefell*'s notion of "liberty" practically builds on the version of it advanced in *United*

⁷⁰ Chief Justice Roberts's *Obergefell* dissent does not engage vital aspects of Chief Justice Taney's *Dred Scott* opinion, including—significantly—what it says about *Dred Scott* and constitutional personhood as a function of race. *See, e.g., Dred Scott*, 60 U.S. (19 How.) at 403–27. These are not the interests of the Chief Justice's *Obergefell* dissent. Thanks to Tucker Culbertson for conversation on the point.

⁷¹ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting). This is not the only opinion authored by Chief Justice Roberts to speak of "strong medicine." *See* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013); *see also* *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (quoting *Steffel v. Thompson*, 415 U.S. 452, 466 (1974)); *supra* notes 32–34 and accompanying text.

⁷² *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* (quoting *Dred Scott*, 60 U.S. (19 How.) at 450).

⁷⁵ *Id.* (alteration in original) (emphasis added) (quoting *Dred Scott*, 60 U.S. (19 How.) at 450). The Chief Justice's dissent's use of ellipses to modify the original quotation from *Dred Scott* is a reminder that the language is being crafted to serve the dissent's own ends.

⁷⁶ *Id.* at 2593, 2597–605, 2607–08 (majority opinion). Indeed, it has been suggested that due process "liberty" may properly be thought of as *the* centerpiece of the Court's *Obergefell* decision. *See, e.g.,* Susan Frelich Appleton, *Obergefell's Liberties*, 77 OHIO ST. L.J. 919, 925 (2016). To put this point this way is to raise, but not to settle, important questions about the role of equality in the Court's decision in the case.

States v. Windsor, which protected liberty while safeguarding a property inheritance from the taxman, hence protected both liberty and property as a matter of due process.⁷⁷ Additionally, *Windsor* and *Obergefell* extend the Court's earlier decision in *Lawrence v. Texas*,⁷⁸ which, like them, emphasized notions of dignity associated with "the name of due process of law."⁷⁹ Aware of all these aspects of the doctrinal ground that *Obergefell* occupies, the dissent's decision to selectively quote this substantive due process language from *Dred Scott* forges a textual bond between *Dred Scott* and the new marriage equality ruling.

Strengthening and sealing that inter-textual bond is the critique that the Chief Justice's *Obergefell* dissent draws from the dissenting opinion filed by Justice Benjamin R. Curtis in *Dred Scott*. According to the Chief Justice's *Obergefell* opinion, Justice Curtis's dissent took exception to the Court's ruling in *Dred Scott* because of how it "abandoned" the "fixed rules which govern the interpretation of laws"⁸⁰ in favor of "the theoretical opinions of individuals"⁸¹ that were thus "allowed to control" the Constitution's meaning.⁸² Through their operation, these unfixed, theoretical opinions of

⁷⁷ United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013). Of course, *Windsor*'s Fifth Amendment Due Process Clause holding was by its own terms animated by constitutional equality guarantees. *Id.*

⁷⁸ Lawrence v. Texas, 539 U.S. 558, 578 (2003).

⁷⁹ For relevant textual moments from *Lawrence*, see, for example, *id.* at 560, 567, 575. The quoted language is from *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (quoting *Dred Scott*, 60 U.S. (19 How.) at 450).

⁸⁰ *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting)). Compare *id.*, with, e.g., *id.* at 2612 ("The majority today neglects [the] restrained conception of the judicial role. . . . And it answers that question based not on neutral principles of constitutional law, but on its own 'understanding of what freedom is and must become.'" (quoting *id.* at 2603 (majority opinion))), and *id.* at 2618 (discussing an approach to substantive due process interpretation that focuses on recognizing only those "implied fundamental rights [that are] 'objectively, deeply rooted in this Nation's history and tradition,'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997))), and then observing that "[t]he majority acknowledges none of this doctrinal background").

⁸¹ *Id.* at 2617 (quoting *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting)). Compare *id.*, with, e.g., *id.* at 2612 ("The majority . . . openly rel[ies] on its desire to remake society according to its own 'new insight' into the 'nature of injustice.'" (quoting *id.* at 2598, 2605 (majority opinion))), and *id.* (implying that the majority has "confuse[d] [its] own preferences with the requirements of the law"), and *id.* at 2616 ("Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society."), and *id.* at 2618 (referring to the importance of not repeating *Lochner*'s "error of converting personal preferences into constitutional mandates"), and *id.* at 2619 ("The majority's driving themes are that marriage is desirable and petitioners desire it").

⁸² *Id.* at 2617 (quoting *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting)). Compare *id.*, with, e.g., *id.* at 2612 ("The right [the majority's decision] announces has no basis in the Constitution or this Court's precedent."), and *id.* at 2621 (describing *Obergefell* as having "no more basis in the Constitution than did the naked policy preferences adopted

individuals transformed the Constitution's meaning into what a majority of the Court would, and did, hold. This maneuver constituted an illicit suspension, if not a wholesale negation, of the Constitution itself. Hence, as the Chief Justice quotes Justice Curtis to report: With *Dred Scott*, "we have no longer a Constitution."⁸³ What obtained instead in Justice Curtis's view was a country "under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."⁸⁴

To read this description of Justice Curtis's critique of *Dred Scott* in Chief Justice Roberts's dissent is inevitably to think about the Chief Justice's dissent's own critique of *Obergefell*.⁸⁵ Like Justice Curtis's opinion, the Chief Justice's dissent repeatedly complains that the *Obergefell* majority erroneously abandons the fixed security of an historical and traditional approach to substantive due process decision-making.⁸⁶ Instead, according to the Chief Justice's dissent, the Court has put in its place an approach to interpretation that "convert[s] personal preferences into constitutional mandates,"⁸⁷ resulting in the Constitution and nation being placed under a government not of laws but of men.⁸⁸ In view of knocks like these, the Chief Justice's dissent's decision to ventriloquize yet another round of them by putting them in Justice Curtis's mouth is an indication not only that the Chief Justice's dissent sees itself following in Justice Curtis's footsteps but also that it sees *Obergefell* following in *Dred Scott*'s.⁸⁹ If Faulkner was right, as the Chief Justice's dissent quotes him to say, that "[t]he past is never dead[;] [i]t's not even past,"⁹⁰ from the dissent emerges the thought that *Dred Scott* and its infamy

in *Lochner*"), and *id.* at 2626 ("If you . . . favor expanding same-sex marriage, by all means celebrate today's decision. . . . But do not celebrate the Constitution. It had nothing to do with it."). For further discussion, see *infra* text accompanying notes 183–84.

⁸³ *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting)). For the relevant comparisons, see *supra* note 82.

⁸⁴ *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting)). For the relevant comparisons, see *supra* notes 81–82.

⁸⁵ See *supra* notes 80–84.

⁸⁶ *Obergefell*, 135 S. Ct. at 2615–23 (Roberts, C.J., dissenting).

⁸⁷ *Id.* at 2618.

⁸⁸ See *id.* at 2611–12.

⁸⁹ Critical perspective on Justice Curtis's *Dred Scott* dissent is provided by MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 56, 77–78 (2006).

⁹⁰ *Obergefell*, 135 S. Ct. at 2623 (quoting WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951)). Or, as James Baldwin put it in the context of race inequality: "It is a sentimental error, therefore, to believe that the past is dead; it means nothing to say that it is all forgotten, that the Negro himself has forgotten it. It is not a question of memory." JAMES BALDWIN, *Many Thousands Gone, in NOTES OF A NATIVE SON* 24, 29 (1955). For thoughts on memory and time in Freud, see Richard Terdiman, *Memory in Freud, in MEMORY: HISTORIES, THEORIES, DEBATES* 93, 94–97 (Susannah Radstone & Bill Schwarz eds., 2010).

live on in *Obergefell*, which is not so much merely analogically like *Dred Scott* as it itself is the “new” *Dred Scott*.⁹¹

C. *Dred Scott’s Lessons for and in Obergefell*

Obergefell being figured by the Chief Justice’s dissent as the “new” *Dred Scott*, a closer look at what the dissent makes of the “old” *Dred Scott*’s teachings is in order. Returning to them, the dissent’s language introducing *Dred Scott* is metaphorically rich: “The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way” from *Dred Scott*.⁹²

The dissent’s key expressions about *Dred Scott*’s pedagogy—that it taught the Supreme Court about “the strong medicine of substantive due process” and that it did so “the hard way”—are overdetermined.⁹³ High among their meanings is one that recognizes in the dissent’s description of *Dred Scott* two images regularly associated with punitive chastening. This is not the chastening that a naughty child (or adult) might suffer, with the “strong medicine” of, say, castor oil, rounded out with a spanking to impress upon its object the proper “lesson” being “hard” taught. *Dred Scott*’s teaching is dead serious, both larger and more severe. Indeed, judging from the dissent, *Dred Scott*’s teaching has been painfully seared into the Court’s institutional conscience and memory by the case’s aftermath.⁹⁴ Condensing volumes of history, the dissent remarks: *Dred Scott*’s holding was ultimately “overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox.”⁹⁵

The indirection and parsimony of this quickly turned phrase, with its affectless invocation of “the battlefields of the Civil War” and the processes of “constitutional amendment after Appomattox,” paper over a powerful underlying gesture.⁹⁶ With great efficiency, the dissent evokes hard, bleak histories once lived and died in gruesome color and tragic dimension. To state the obvious, the color of *Dred Scott*’s pedagogy prominently includes the deep crimson of spilled human blood. Its tragedy includes the agonies of slavery-

⁹¹ See, e.g., *Santorum Compares Supreme Court Ruling on Gay Marriage to Dred Scott*, FOX NEWS (Aug. 6, 2015), <https://www.foxnews.com/politics/2015/08/06/santorum-compares-same-sex-marriage-decision-to-dred-scott-blasts-rogue-supreme.html> [<https://perma.cc/N77K-AGAT>]; Bradley C.S. Watson, *Reclaiming the Rule of Law After Obergefell*, NAT’L REV. (July 9, 2015), <https://www.nationalreview.com/article/420934/same-sex-marriage-and-rule-law> [<https://perma.cc/2KP8-GQR5>]; see also *infra* note 107. For further discussion of the Chief Justice’s dissent’s comparison of *Obergefell* to *Dred Scott*, see *supra* note 69.

⁹² *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

⁹³ *Id.*

⁹⁴ The parallels here to the discussion of *Lochner v. New York* in *Bowers v. Hardwick*, as revealed in Thomas, *supra* note 11, at 1815, are apparent.

⁹⁵ *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting).

⁹⁶ *Id.*

wounded and war-wounded human bodies and the human lives lost on slaveholding plantations and elsewhere, as well as “on the battlefields of the Civil War.”⁹⁷ The war’s end—with Union success over Confederate forces—is represented by the dissent through an understatement that conjures a quiet scene of military surrender that, no matter how dignified and austere it may have been, could not hide or salve Southern humiliation. Defeat and shame, to say nothing of the material and political violence involved in enacting the Fourteenth Amendment, are also part of the lessons of *Dred Scott*.

Something unusual to the point of extraordinary is thus revealed by the Chief Justice’s dissent’s brief formal engagement with *Dred Scott*. Beyond laying a degree of real institutional blame at the Court’s own doorstep for great American tragedies involving slavery and the Civil War, as well as more than a faint whiff of self-congratulation for the modes of national recuperation marked by constitutional amendment after the South’s defeat, the Chief Justice’s dissent, with its invocation of historical events that resulted in *Dred Scott*’s demise, presents a preparatory sketch for a larger and more expansive study filled with the full intensity and the range of trauma that the dissent actively associates with *Dred Scott*.⁹⁸ In that larger picture are figures of turmoil, violence, disorder, pain, bloodshed, injury, humiliation, surrender, defeat, and death associated with the institution of slavery that *Dred Scott* sanctioned and what it took to overcome all that after Appomattox in order to repair the Constitution and to reunify the nation.

As depersonalized and gestural as the dissent’s presentation of the range of traumas it associates with *Dred Scott* is, the qualities of the traumas it evokes are not. Articulated as elements of the dissent’s active resistance to *Obergefell*, the traumatic lessons that *Dred Scott* taught the Court “the hard way” are once again speaking an important truth that is unfolding in the dissent’s imagination in the present tense. While seemingly only recounting a memory of wounds of yore, the dissent’s text is giving evidence that *Obergefell*, the occasion for summoning *Dred Scott*’s traumas, is causing the dissent to experience those wounds—“never dead,” “not even past”—in a fully active sense.⁹⁹ If so, the dissent is not only dreaming about the pains of the lessons that *Obergefell* teaches, but it is also imagining what must soon, again, unfold, at least on an imaginary—maybe on a political, hence material, level—in order to bring about the result that a decision like this calls for: *Obergefell*, like *Dred Scott*, being overturned.¹⁰⁰ Ominously, prophetically, as with *Dred Scott*, so with *Obergefell*: visions of Civil War, its violence, its destruction, its death, and its

⁹⁷ *Id.*

⁹⁸ A related view is in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883, 1002 (1992) (Scalia, J., dissenting), which refers to *Dred Scott* and “its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation.”

⁹⁹ *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

¹⁰⁰ This is, from a certain point of view of dissent to *Obergefell*, part of a *Kulturkampf*, after all. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

profoundly negative effects on the nation, initially ripping the country apart before the process of constitutional restoration can begin. This is the bell *Obergefell* tolls.

D. *Obergefell* as *Dred Scott*: *Political Mastery of the Nation*

It is, by now, well established, if not universally accepted, that the experiences and inner worlds of trauma are not the standard precincts of rationality and proportion.¹⁰¹ Even recognizing this, the Chief Justice's dissent's reactions to *Obergefell* are striking. How does the dissent, understanding that *Obergefell* sees itself as a decision about the loving world of same-sex intimacy and love and a life-right to it under the Constitution, respond to the majority opinion with thoughts that run to *Dred Scott* and a nightmarish dreamscape in which *Obergefell* is the rebirth of a decision involving the detestable approval of master-slave relations that helped precipitate a Civil War that, in turn, violently ripped the nation apart, requiring monumental, concerted efforts to restore it?

An anodyne account of the rhetorical stakes of the dissent's representation of *Obergefell* as the new *Dred Scott* contains the seeds of a more comprehensive answer.

Uncommonly among the Court's precedents and uniquely among its substantive due process rulings, *Dred Scott* offers distinctive rhetorical resources useful for an opinion, like the Chief Justice's, set on insisting that *Obergefell* is an attack on American democracy and freedom. Not unproblematic by any number of metrics, the equation of *Obergefell* to *Dred Scott* gives the dissent symbolic resources that it can draw on to capture, dramatize, and even melodramatize, the gravity of *Obergefell*'s anti-democratic *mala fides*.¹⁰²

Implicitly at least, *Obergefell*'s anti-democratic un-credentials are situated by the Chief Justice's dissent somewhere on a spectrum between two of *Dred Scott*'s anti-democratic extremes. At its furthest reaches, *Dred Scott*'s formal

¹⁰¹ For relevant discussion, see generally HERMAN, *supra* note 18, and Siegfried Zepf & Florian D. Zepf, *Trauma and Traumatic Neurosis: Freud's Concepts Revisited*, 89 INT'L J. PSYCHOANALYSIS 331 (2008). On trauma, more generally, see CATHY CARUTH, UNCLAIMED EXPERIENCE: TRAUMA, NARRATIVE, AND HISTORY (1996); SHOSHANA FELMAN, THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY (2002); and TRAUMA: EXPLORATIONS IN MEMORY (Cathy Caruth ed., 1995). *But see* RUTH LEYS, TRAUMA (2000). Thanks to Brookes Hammock for engagement on this point.

¹⁰² The standard riposte is in *Obergefell*. *Obergefell*, 135 S. Ct. at 2605–06 (“[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.”); *accord* Transcript of Oral Argument at 74, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (statement by Kagan, J.); Laurence H. Tribe, Response, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 25–26 (2015), <https://harvardlawreview.org/2015/11/equal-dignity-speaking-its-name> [<https://perma.cc/JCQ7-42H3>].

approval of institutionalized master-slave relations is the antithesis of democratic, indeed any kind of, political freedom.¹⁰³ At less radical extremes are the master-slave-like constraints that *Dred Scott* practically imposed on the democratic right of political self-government, a right of individual and shared self-mastery, that was violated when *Dred Scott* invalidated the Missouri Compromise, one collective expression of that right. Situated on this spectrum, *Dred Scott* covers it entirely, both formally approving of institutionalized slavery for some who ought to have been free citizens, while simultaneously reducing the American people as a whole to slave-like conditions of servitude to the “theoretical opinions” of a majority of the Supreme Court.¹⁰⁴ Subjugated to these unlawful judicial powers, the American people lost the political liberty to shape their destinies and the destinies of those who were to be delivered freedom through the Missouri Compromise.

In no way does the equation of *Obergefell* to *Dred Scott* in the Chief Justice’s dissent expressly indicate that *Obergefell* literally reprises *Dred Scott*’s formal approval of institutionalized master-slave relations. And how could it? Still, the dissent’s equation does neatly conduce to an understanding of *Obergefell* in which it recapitulates the general master-slave-like conditions that *Dred Scott* approved in the broad and still highly significant political sense. Equating *Obergefell* to *Dred Scott* allows the dissent to say, without ever actually saying, and to argue, without ever actually arguing, that *Obergefell* is *Dred Scott* redux—both in its exercise of “judicial supremacy” over American democratic political relations and in making the American people symbolically and practically slave-like in their subjugation to the Court’s, their new master’s, powers.¹⁰⁵ This being the arc on which the Chief Justice’s dissent’s understanding of *Obergefell* as the new *Dred Scott* bends—not toward justice, but toward unfreedom—*Obergefell*’s threat to American democracy and democratic self-mastery is every bit as urgent and high-stakes as the dissent maintains. At bottom, *Obergefell* is a case about what the political conditions of American freedom and unfreedom are and will be, and what basis the Court must have beyond its own shifting whims for lawfully displacing the metes and bounds the American people set for themselves through constitutional politics.

Perhaps it goes without saying, but American political culture and public discourse, to say nothing of historical facts, have long been such that the Chief

¹⁰³The agency of some “happy slaves” notwithstanding, on the topic of which, from different perspectives, see, for example, DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989), and Janet Halley, *My Isaac Royall Legacy*, 24 HARV. BLACKLETTER L.J. 117 (2008). On the inherent dignity of enslaved persons as unaffected by their political and institutional unfreedom, see *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

¹⁰⁴See *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

¹⁰⁵The dissent actually speaks of the *Obergefell* Court’s “extravagant conception of judicial supremacy.” *Id.* at 2624.

Justice's dissent would not dare to say directly and aloud that *Obergefell* smacks of the production of master-slave-like political relations that *Dred Scott* once so dramatically performed.¹⁰⁶ Then again (this is part of the opinion's genius) it does not have to. The structure of the Chief Justice's dissent and its account of *Obergefell* as the new *Dred Scott* brilliantly navigates the pitfalls of political culture, public discourse, and history. By making the point the way it does, the dissent avoids speaking the unspeakable that *Obergefell* is not only anti-democratic, but also pro-slavery in a metaphorical sense. It thus leverages the tremendous felt human and political significance of what must not be overtly said by invoking *Dred Scott* in a way that makes clear that *Obergefell* is at one with it. In that oneness, *Obergefell* is one of those hopefully-always-rare constitutional mistakes that must be reversed *post haste*. The question the Chief Justice's dissent powerfully raises about *Obergefell* is, What lover of freedom could possibly applaud a decision that so readily sacrifices political freedom in the name of a right to choose to marry . . . except maybe those content to live political life as "happy slaves" whose existence in the political and the personal realms will always be basically conditioned, dictated even, by overlords on the Supreme Court?¹⁰⁷

¹⁰⁶ An approximation of this thought is in Yoshino, *supra* note 3, at 170.

¹⁰⁷ See *supra* note 103. Justice Scalia's *Obergefell* dissent tracks these moves into the conceptual space that Chief Justice Roberts's opinion clears, but without expressly invoking *Dred Scott* or talking about masters and slaves, in a move that achieves something of the same effect. Telling its readers why *Obergefell* constitutes a very real threat to American democracy, Justice Scalia's opinion insists that it is not "of immense personal importance," or "special importance," what *Obergefell* concludes on the bottom line, marriage being subject to any sort of relational definition the people themselves might decide that they want. *Obergefell*, 135 S. Ct. at 2626–27 (Scalia, J., dissenting). What is of "immense," indeed "of overwhelming importance," Justice Scalia's dissent says, is who decides the question of marriage's meaning: "It is of overwhelming importance . . . who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." *Id.* To speak of being ruled this way, or, as the dissent later puts it, to be "subordinate[d]," *id.* at 2629, by *Obergefell* through an act of political domination, is not quite to speak of the Court as having announced that it is the American people's master, though it may be taken as moving in that direction. Perspective on why is found in the dissent's remark that what *Obergefell* achieves is not simply "the furthest extension in fact," but "the furthest extension one can even imagine . . . of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention." *Id.* at 2627. Whatever exactly this means, it functions as a way by which the dissent can refer to the negation of political freedom—what is elsewhere referred to as a freedom of self-government, *id.* ("the freedom to govern themselves")—with the Court-ruler deciding for the American people what their government, hence their lives, will be like. This is not master-slave relations, since the people, after all, retain the power of constitutional revision, but the relations do partake of some of slavery's attributes, including hierarchy, and unequal and nonconsensual relations. If these relations are not without any limit, they are certainly deeply anti-democratic, *id.* at 2629 ("A system of government that makes the [American] People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."), hence in important respects politically constrained to the point of being no longer properly

E. *Beyond Political Master-Slave Relations: Obergefell's Mastery of Marriage's Masters*

To understand Chief Justice Roberts's *Obergefell* dissent to be speaking through its equation of *Obergefell* to *Dred Scott* about conditions of political mastery and servitude is to be poised to watch this insight blossom into a set of concerns about a different, but hardly wholly unrelated, set of master-slave relations. To see what the concerns are and what those other master-slave relations look like, it is helpful to recall *Obergefell*'s central challenge, as seen from the historical and traditional perspective that the Chief Justice's dissent wants.

Following *Lawrence v. Texas* and *United States v. Windsor*, cases in which the Supreme Court declared same-sex intimacies and relationships to be just like their cross-sex counterparts for constitutional purposes, marriage equality advocates in *Obergefell* set out to eliminate—in the context of State bans on same-sex marriage—the residual legal normativity of heterosexual difference (meaning: the difference between heterosexuality and homosexuality) as it is grounded in sexual difference (meaning: the difference between men and women) and operates in the form of cross-sex sexual union and its procreative consequences.¹⁰⁸ Hence did the pro-marriage equality stance in *Obergefell* seek to displace “natural” male-female heterosexuality and its procreative consequences as *the* distinctive element constitutionally justifying the continued definition of marriage as an exclusively cross-sex institution.¹⁰⁹

democratically free. Interestingly, Justice Scalia's dissent does not affirmatively say what the system of government that *Obergefell* propounds should be called, other than to say it “does not deserve to be called a democracy.” *Id.* This could be because it is too soon to tell what *Obergefell* and its rule may become. Then again, if, as the dissent maintains, *Obergefell* has already reached the constitutional limits that achieve the boundaries of what is imaginable, it could be that the dissent understands what the surpassing of those limits implies about the system of sovereign relations of ruler to ruled that *Obergefell* brings about, but simply declines to say just what they are. Perhaps it is significant in this regard—or perhaps not—that, after *Obergefell* was handed down, it was reported that Justice Scalia discussed *Obergefell* in ways that likened its conditions to *Dred Scott*'s. See Ramesh Ponnuru, *Scalia on the Role of the Courts*, NAT'L REV. (Nov. 16, 2015), <https://www.nationalreview.com/corner/427131/scalia-role-courts-ramesh-ponnuru> [<https://perma.cc/DCG8-VMEP>]; Richard A. Posner & Eric J. Segall, Opinion, *Justice Scalia's Majoritarian Theocracy*, N.Y. TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?_r=0 [<https://perma.cc/9PVV-NSET>].

¹⁰⁸ For an earlier iteration of at least part of this move, see *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting), which ventures: “Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”

¹⁰⁹ See, e.g., Brief for Petitioners at 49, 55–58, *Obergefell*, 135 S. Ct. 2584 (No. 14-556); Brief for Petitioners at 16, 46–50, *Bourke v. Beshear*, 135 S. Ct. 2584 (2015) (No. 14-574); Brief for Petitioners at 35–38, *DeBoer v. Snyder*, 135 S. Ct. 2584 (2015) (No. 14-

For its part, the Chief Justice's *Obergefell* dissent rejects this pro-marriage equality bid to (in the *Obergefell* majority opinion's words) "sever[] the connection between natural procreation and marriage."¹¹⁰ The dissent's rejection of this stance arrives in significant part through a survey of marriage's history and tradition, which leads the opinion to point out that the institution of marriage is (or before *Obergefell*, was) a response to the trans-historical and trans-traditional felt need to organize heterosexual sexuality and its reproductive consequences in ways that ensure the interests of the biological offspring of heterosexual sexual unions both for their own "good" and "for the good of . . . society."¹¹¹ Filling out the point, the dissent observes that children of heterosexual unions "generally [having] better" prospects "if the mother and father stay together rather than going their separate ways," the institution of marriage has been constructed to give kids the chance to grow up with both "mother and father" together in stable circumstances.¹¹² Heterosexual difference grounded in sexual difference as reflected in the biological distinctiveness of cross-sex procreation and its consequences—children—thus continues to provide an adequate constitutional basis for limiting marriage to the union of one man and one woman as husband and wife.¹¹³

Without arguing whether heterosexuality, sexual difference, and their procreative consequences operating inside of marriage have been designed to serve and, as the dissent intimates, have actually served the interests of children and of society at large, they have unquestionably served other ends as an historical and traditional matter.¹¹⁴ Among other things, heterosexuality, sexual difference, and their procreative consequences have been essential materials for the operation of various ideologies of male dominance that have

571); Brief for the United States as Amicus Curiae Supporting Petitioners at 12, 25–28, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574). In a related vein, Douglas NeJaime describes challenges to the marital presumption (which, traditionally, presumed the husband "to be the biological, and thus legal, father of a child born to his wife") as applied to same-sex couples, "which have proliferated in *Obergefell's* wake," as "implicat[ing] not only sexual-orientation equality, but also the displacement of biological and gendered parentage principles." Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190 (2016).

¹¹⁰ *Obergefell*, 135 S. Ct. at 2606–07.

¹¹¹ *Id.* at 2613 (Roberts, C.J., dissenting).

¹¹² *Id.*

¹¹³ *Id.* at 2613–15; accord *DeBoer v. Snyder*, 772 F.3d 388, 404–06 (6th Cir. 2014) (explaining that limiting marriage to cross-sexed unions is not "irrational," but rather reflects an "awareness of the biological reality" that same-sex couples do not procreate as cross-sex couples do and "do not run the risk of unintended offspring"), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584.

¹¹⁴ Were the unmade argument to be made, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), might be invoked.

long governed marriage and family law and life, along with politics and society in a wider sense.¹¹⁵

Perhaps predictably given the normative force that marriage and its history and tradition possess in the Chief Justice's dissent, the opinion does not very critically engage marriage's record as an institution of male dominance involving male control of heterosexual sexuality, sexual difference, and procreation. To its credit, the dissent does not ignore the underlying facts in their entirety. The Chief Justice's dissent briefly invokes and remarks on the English and American law of coverture, a legal institution characterized by the *Obergefell* majority opinion as an exercise in "male[]domina[nce]," a description that, if not openly embraced by the Chief Justice's dissent, is not openly disavowed by it either.¹¹⁶ For its part, the majority opinion's account of coverture sits atop William Blackstone's description of it in his *Commentaries on the Laws of England*,¹¹⁷ a source that the Chief Justice's dissent affirmatively embraces as authority for what America's Founding Fathers, as "[e]arly Americans," thought about the institution of marriage.¹¹⁸ From a thoroughly modern point of view, Blackstone's *Commentaries* are strikingly unselfconscious in their embrace of coverture as a practice of male dominance. This is Blackstone:

¹¹⁵ See generally, e.g., ANDREA DWORKIN, WOMAN HATING (1974); ELEANOR BURKE LEACOCK, MYTHS OF MALE DOMINANCE pt. 3 (1981); GERDA LERNER, THE CREATION OF PATRIARCHY (1986); CATHARINE A. MACKINNON, *Does Sexuality Have a History?*, in WOMEN'S LIVES, MEN'S LAWS, *supra* note 18, at 269; JOHN STUART MILL, THE SUBJECTION OF WOMEN (New York, D. Appleton & Co. 1869); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). For normatively and methodologically different accounts that land on some of the same perspectives, see, for example, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141–42 (1873) (Bradley, J., concurring); *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908); and STEVEN GOLDBERG, WHY MEN RULE: A THEORY OF MALE DOMINANCE (1993).

¹¹⁶ On the dissent's references to coverture, see *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting). On coverture, described by the *Obergefell* majority as "male[]domina[nce]," see *id.* at 2595 (majority opinion), and also Serena Mayeri, *Marriage (In)Equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 129 (2015), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1079&context=clr_circuit [<https://perma.cc/K3YA-SLVD>]. It has been suggested that the constitutional status of coverture (as opposed to its formal legal status, see *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting)), is a question that the Chief Justice's dissent raises. Case, *supra* note 10, at 690.

¹¹⁷ *Obergefell*, 135 S. Ct. at 2595 (citing 1 BLACKSTONE, *supra* note 26, at *430).

¹¹⁸ *Id.* at 2613 (Roberts, C.J., dissenting) (citing 1 BLACKSTONE, *supra* note 26, at *410). Mary Anne Case has criticized the Chief Justice's dissent's invocation of "Blackstone's 'conception of marriage and family,'" on the grounds that, while "'a given' for the Framers, 'its structure, its stability, roles, and values accepted by all;' it is . . . the antithesis of a given under our current constitutional order; it is now unconstitutional." Case, *supra* note 10, at 688 (footnotes omitted) (quoting *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting)).

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 thing; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.¹¹⁹

Here is an associated truth: The lords and masters of women in marriage have also historically and traditionally been the lords and masters of the children born to it.¹²⁰ All were under the husband-father's protection, influence, control, and wing.¹²¹

It is at precisely this point—armed with this Blackstonian perspective—that the Chief Justice's dissent's thinking about *Obergefell* as an exercise of political mastery and its thinking about marriage as an institution whose constitutional meaning is historically and traditionally defined, converge in an illuminating respect. If *Obergefell* problematically involves political mastery in a diffuse and generalized way, it achieves that mastery through the dominion that is claimed then exercised over the institution of marriage, which, the dissent maintains, is properly constitutionally defined with reference to its history and tradition. Tracing out the sightline of this thought: As *Obergefell* masters marriage, the sting of its domination is distinctively lorded over marriage's own historical and traditional rulers. In context, this cannot be a reference to married women, whose "legal existence[s]" were, according to Blackstone, "suspended during . . . marriage, or at least . . . incorporated and consolidated into that of the[ir] husband[s]." ¹²² Nor,

¹¹⁹ 1 BLACKSTONE, *supra* note 26, at *430 (footnote omitted) (spelling alterations to reflect modern usage). For related views on the "male-governed" and "patriarchal" aspects of marriage at common law, see Robin Bradley Kar, *Against Marriage Essentialism: A Legal Grounding for Obergefell and Same-Sex Marriage*, 2016 ILL. L. REV. 1581, 1586–91, and for a description of the prerogatives of husbands "as master[s] of [their] household[s]," see Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

¹²⁰ See, e.g., 1 BLACKSTONE, *supra* note 26, at *441 ("The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason." (spelling alterations to reflect modern usage)). A description of children "[u]nder coverture" as "their fathers' assets," is in Colker, *supra* note 10, at 409 & n.131 (citing Amber Bailey, *Redefining Marriage: How the Institution of Marriage Has Changed to Make Room for Same-Sex Couples*, 27 WIS. J.L. GENDER & SOC'Y 305, 317 (2012)).

¹²¹ For a discussion of the possible pay out of these ideas for originalist modes of constitutional interpretation, see Case, *supra* note 10, at 688–89.

¹²² 1 BLACKSTONE, *supra* note 26, at *430 (spelling alterations to reflect modern usage).

for that matter, could it be a reference to the children born into a marriage. What it is, of course, is a reference to the idea, consistent with the logic of the Chief Justice's dissent, that *Obergefell*'s mastery of marriage involves the mastery of the institution's historical and traditional masters: marriage's barons, its lords, its little-k kings. Relaxing certain qualifications about the history of sexuality in order to gather and articulate the crucial point: The logic of positions that the Chief Justice's dissent stakes out indicates that *Obergefell* seizes men's historical and traditional authority in and over marriage, thus placing these men—in contemporary terms, presumptively heterosexual men—under the Supreme Court's authority, hence its control.¹²³ Heterosexual men's authority in marriage having long been the basis for their authority not only in private, but also in public life and in politics, after *Obergefell*, their powers as governors in all these spheres of social existence now belong to their new masters up on the Supreme Court.¹²⁴

F. From Political to Sexual Mastery—Of Castration and Forced Sodomy

The Chief Justice's dissent, with its compulsion for repetition, returns to this impression of *Obergefell* as a decision that masters heterosexual men in different ways. Without exaggeration, the rhetoric through which the dissent presents various aspects of its doctrinal maneuverings offers a veritable treasure trove of imagery in which presumably heterosexual men are symbolically mastered by forces that *Obergefell* is taken to represent.

Vitally, the mastery that *Obergefell* is seen to be foisting on heterosexual men is not limited to impersonal and highly structured modes of institutional or political control, as by the Court elevating itself over marriage and married men in marriage and public, political life. The mastery that *Obergefell* imposes on heterosexual men is also achieved instead through modes of domination that, at the level of metaphor, involve heterosexual men's bodily subjection to erotic subordination. *Obergefell* sexually targets, hence persecutes, heterosexual men, compromising their own historical and traditional powers of sexual domination, with the immediate effect of unmanning them.¹²⁵

¹²³ Presumptions of male heterosexuality, like heterosexuality itself, are, of course, historically conditioned. For histories on sexuality, including sexual identity, see generally, for example, JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (Univ. of Chi. Press 2d ed. 1997) (1988); 1 MICHEL FOUCAULT, *HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Vintage Books ed. 1990) (1978); and JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995). Both the co-authored work by John D'Emilio and Estelle Freedman and the work by Jonathan Katz are cited in *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

¹²⁴ A different sense of whom *Obergefell* "victimize[s]," which focuses on "religious and cultural conservatives," is in Seidman, *supra* note 12, at 136.

¹²⁵ An alternative route to much the same conclusion passes through those traditions that critically view marriage as a form of hierarchy, master-servant relations, and domestication. See, e.g., EMMA GOLDMAN, *Marriage and Love*, in *ANARCHISM AND OTHER*

From one direction, the Chief Justice's dissent's rhetoric indicates *Obergefell* launches a frontal assault on heterosexual men's phallic potency—the powers associated with the “masculine member”—that zeroes in on marriage's historical and traditional “roots.”¹²⁶ References like this to “roots,” common enough in constitutional decisions, are readily overlooked in the dissent as stock, hence insignificant, tropes.¹²⁷ Or they may be so overlooked until it is recognized that marriage's history and tradition are so tightly bound up with male dominance that the dissent's references to marriage's roots function significantly as metonyms for male heteropatriarchal power.

Seriously, then, but not without irony, notice how marriage's roots are, for the dissent, a constitutional polestar that guide, govern, and point the way, arrow-like, for the dissent's constitutional thought. Also, as suggested by the dissent, marriage's roots are big, long, and plunge deep into the U.S. Constitution's soil. Not insignificantly, these roots are all-encompassing: They snake out to penetrate and govern all of known historical time and social space, which helps explain the dissent's sense that these roots are venerable and venerated the world and its history and traditions over, hence deserving of the worship, including constitutional worship, that they have long, until *Obergefell*, received. No small aside, when the dissent traces marriage's roots back to their own roots in the hazy foundations of human civilization and to a state of shared human existence prior to, hence unresponsive to, the “moving

ESSAYS 233, 241–44 (2d rev. ed. 1911). Seen in their light, *Obergefell* may appear to lock heterosexual men into marriage on equal terms with all women, now including lesbian women, as well as with homosexual men. Thanks to Robin West for conversation on this point. See *infra* text accompanying notes 269–70 for related thoughts.

¹²⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611, 2614, 2616, 2618–19, 2621–22 (2015) (Roberts, C.J., dissenting). For a remarkable study on the metaphor of the “root,” from which the language of “masculine member” in the text is also drawn, see generally CHRISTY WAMPOLE, *ROOTEDNESS: THE RAMIFICATIONS OF A METAPHOR* (2016), which, among other things, following Werner Hamacher, notes that “*Rute* is the word for the *radix*, which stands in Latin not only for vegetable root, for origin, source, firm ground, and soil, but also, as in *radix virilis* for the masculine member.” *Id.* at 46 (quoting WERNER HAMACHER, *The Second of Inversion: Movements of a Figure Through Celan's Poetry*, in *PREMISES: ESSAYS ON PHILOSOPHY AND LITERATURE FROM KANT TO CELAN* 337, 367 (Peter Fenves trans., 1999)).

¹²⁷ There are other opinions even in *Obergefell* that focus on marriage's “roots” as the basis for its present day constitutional form. See, e.g., *Obergefell*, 135 S. Ct. at 2632 (Thomas, J., dissenting); *id.* at 2640, 2642 (Alito, J., dissenting). Related articulations are in *Lawrence v. Texas*, 539 U.S. 558, 567–72 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 703, 716, 721–22, 727 (1997); and *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986), *overruled by Lawrence*, 539 U.S. 558. Nor are these the only root metaphors within the Supreme Court's constitutional jurisprudence. For some engagement, see Michael C. Dorf, *Tainted Law*, 80 U. CIN. L. REV. 923, 925–30 (2012); Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 12 & n.38 (2005); and Russell Hittinger, *A Crisis of Legitimacy: A Response to Critics*, 44 LOY. L. REV. 83, 93 (1998). See also Vicki C. Jackson, *Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors*, 75 Fordham L. Rev. 921, 948, 954 (2006).

force[s] of world history,” it suggests that marriage’s roots are manifestations of human nature and its biological substrate: cross-sex sex and its procreative consequences.¹²⁸ In this sense, marriage’s roots have, and are references to, objective reality unto universal truth.

Obergefell’s vision of marriage is none of this by contrast. Stated succinctly, it does not measure up. Justice Samuel Alito’s dissent takes the view that the *Obergefell* majority’s vision of marriage “lacks deep roots,” as opposed to reflecting the “long-established tradition” of cross-sex marriage,¹²⁹ with a palpable emphasis on the “long.” This comparison, however, may seem generous when it is set along side the Chief Justice’s dissent’s evaluation. By that opinion’s yardstick, the roots of the vision of marriage that *Obergefell* embraces are so small that they amount to practically nothing at all, having, as the dissent puts it at one point, “little or no cognizable roots in the language or even the design of the Constitution,”¹³⁰ an exposition that echoes Justice Scalia’s sense of the Court’s earlier decision in *Windsor*, which his dissent in that case saw emerging from a “diseased root,” and whose justifications were both “rootless and shifting.”¹³¹ Whatever *Obergefell* can properly claim for itself about its constitutional endowments, the decision, being contrary to marriage’s objectivity and truth as they have for millennia been understood, *Obergefell*’s at-most nubby roots stab down into the insecure, “shifting,” subjective, extra-constitutional soil of “social policy and considerations of fairness.”¹³² This is not much.

Just so, even a shifting and rootless decision with a vision of marriage like *Obergefell* embraces is not peril-free. It is, in fact, distinctively dangerous. The dominance that this ruling achieves comes precisely through an opinion that has upended what marriage has historically and traditionally meant. The relevant imagery that the Chief Justice’s dissent supplies here arrives in an abstract description of constitutional fact: “Expanding a right suddenly and dramatically is likely to require tearing it up from its roots.”¹³³ This theoretical possibility is materialized by *Obergefell*: It “[e]xpand[s] [the] right [to marry]

¹²⁸ See *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting).

¹²⁹ *Id.* at 2640 (Alito, J., dissenting).

¹³⁰ *Id.* at 2618 (Roberts, C.J., dissenting) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)). Compare *id.*, with *Hardwick*, 478 U.S. at 194 (describing the right to engage in same-sex intimate relations as “having little or no cognizable roots in the language or design of the Constitution”).

¹³¹ *United States v. Windsor*, 133 S. Ct. 2675, 2698, 2705 (2013) (Scalia, J., dissenting). A look at the “literary” dimensions of Justice Scalia’s *Windsor* dissent, which flags its references to “roots,” is in Micah Mattix, *Scalia’s Literary Dissent*, AM. SPECTATOR (July 1, 2013), https://spectator.org/55312_scalias-literary-dissent/ [<https://perma.cc/23C8-72VQ>]. Repeated references to “roots” are also found in Justice Scalia’s dissenting opinion in *Lawrence*, 539 U.S. at 588, 593–98 (Scalia, J., dissenting).

¹³² “Shifting” comes from *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting). The language of “social policy and considerations of fairness” is from *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

¹³³ *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting).

suddenly and dramatically” from what it was (a right of traditional, cross-sex marriage) to what it now is (a right to cross-sex and same-sex marriage).¹³⁴ According to the figural logic of the dissent, when *Obergefell* dilates the right to marry this way, it has “likely,” if not certainly, torn the historical and traditional right to marry “up from its roots.”¹³⁵ To piece the symbolism together: *Obergefell*’s quick and bold expansion of the right to marry tears that right up from its roots—roots that are themselves metonymic references to the phallic power of heterosexual men. *Obergefell* thus symbolically performs heterosexual men’s castration.¹³⁶

Should the imagery somehow not be thought to extend that far, or should the idea otherwise prove too disquieting to accept, then there is, more modestly, the way in which the dissent unquestionably reflects a sense that *Obergefell* has engaged in a kind of castration in the limited sense of blunting the powers of marriage’s historical and traditional roots, hence the phallic power of heterosexual men, in ways that, if they do not render it non-existent as by tearing it out, anyway make it inert—heterosexual men being made if not into eunuchs then eunuch-like: ineffectual, no longer empowered to rule marriage or its institutional definition and meaning. Either way, metaphorically, heterosexual men are made actually or practically phallus-less by this decision.¹³⁷

A powerful second for this sentiment is found in vivid detail in Justice Antonin Scalia’s memorable, separate *Obergefell* dissent. Its angry, opening salvo fulminates about how the Supreme Court has made itself “my Ruler” (the “my” being intended as a reference to Justice Scalia, though it also covers Justice Thomas, who joins the opinion) as well as the “Ruler of 320 million Americans.”¹³⁸ This concern about being “Ruled,” which is a concern about mastery by any other name, is expressly rearticulated later in the dissent as a problematic of subordination, which implies that *Obergefell* is an act of

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ For other discussions of symbolic castration in constitutional doctrine, see, for example, Adler, *supra* note 18, at 1130–40; Adler, *supra* note 19, at 238–39, 243–47, 250; and Thomas, *supra* note 11, at 1818–19.

¹³⁷ Symbolic castration is also achieved by *Obergefell*’s negation of the normativity of male-female sexual difference. If male heterosexuality’s phallic authority in marriage is traceable to male-female sexuality in coital two-in-one union, then *Obergefell*’s disaffirmation of that sexuality as the basis for the contemporary constitutional meaning of marriage implies the elimination of the grounds for male heterosexuality’s phallic authority, hence that authority itself.

¹³⁸ *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting); cf. President Barack Obama, Remarks by the President at the Democratic National Convention (July 27, 2016) (transcript available at <https://www.whitehouse.gov/the-press-office/2016/07/28/remarks-president-democratic-national-convention> [<https://perma.cc/PWY9-XX4K>]) (offering that, within the U.S. political tradition, “[w]e don’t look to be ruled”).

domination.¹³⁹ The hierarchy theme carries through the rhetorical stitch of Justice Scalia's dissent until, finally, in its closing paragraph, the concern about being "Ruled" is inflected with an express reference to the *Obergefell* Court's swelled, "o'erweening pride"—a pride that the dissent makes clear is one that "goeth before a fall."¹⁴⁰ The fall in this setting arrives abruptly, almost in the gesture of a chop, with *Obergefell* causing the deflation of the Court's authority, which traces through an originalist methodology back to the patriarchal authority of the Founding Fathers.¹⁴¹ Seeing this authority in its male and phallic terms, Justice Scalia's dissent expresses an outraged, and plainly uncomfortable, sense about where *Obergefell*'s falsely o'erswelled pride has pushed the Court: "one step closer to being reminded of"—here are the last two words of Justice Scalia's dissent—"our impotence."¹⁴²

Formally, the "impotence" of which Justice Scalia's dissent speaks is produced by *Obergefell*, in which the Court has exceeded its proper bounds, requiring the Court's powers to be cut back, while at the same time also merely being spotlighted by the decision, "impotence" being a state or condition that *Obergefell* is "remind[ing]" the dissent about.¹⁴³ In both cases, the impotence referred to by Justice Scalia's dissent arrives after and as a result of a fall that itself results from the Court's "o'erweening pride"¹⁴⁴—a pride that is evidently so humiliating that Justice Scalia's dissent is driven to think to say in a self-referential way that "[i]f . . . I ever joined an opinion for the Court" like *Obergefell*, "I would hide my head in a bag."¹⁴⁵ Technically, the dissent is indicating the shame it would feel were it to join a ruling that starts out as *Obergefell* does, and is meant in this way to correct the Justices

¹³⁹ As the dissent comments: "A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy." *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

¹⁴⁰ *Id.* at 2631.

¹⁴¹ See *id.* at 2628, 2629–30. Additional, related discussion of originalism and its connection to the authority of the Founding Fathers is in Thomas, *supra* note 11, at 1820.

¹⁴² *Obergefell*, 135 S. Ct. at 2631 (Scalia, J., dissenting). Recalling that Justice Thomas joins Scalia's *Obergefell* dissent, it may or may not be that a sense of impotence like this conditions Justice Thomas's own *Obergefell* dissent, which Justice Scalia, for his part, joins. *Id.* (Thomas, J., dissenting). If it does, it might help make sense of Justice Thomas's dissent's performance, which unfolds a series of ideas about constitutional meaning that, in certain respects, whatever their supports in history or theory and however intelligible they may be, have about them a certain dream-like and otherworldly air. What, for instance, would it mean, if the "liberty" protected by the Due Process Clauses were limited to procedural protections? *Id.* Were "interpreted to include [nothing] broader than freedom from physical restraint"? *Id.* at 2633. In such a case, what would happen to protections for marriage and family law and sexual intimacy and personal choice? What if human dignity and humanity itself were deemed unimplicated by governmental actions, including, at an extreme, slavery's authorization? *Id.* at 2639. To press these points as matters of first principles in relation to *Obergefell* is to imagine its eradication in its entirety.

¹⁴³ *Id.* at 2631 (Scalia, J., dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2630 n.22.

who have joined it by indicating how they ought to feel about that choice. Revealingly, the affective state the dissent thus refers to is one that it indicates it has imagined and experienced, which is an equally apt way to understand the affect the dissent associates with *Obergefell*'s "reminde[r] of" "impotence" with which the opinion comes to its deflated, defeated end.¹⁴⁶

Returning, to the Chief Justice's dissent: What *Obergefell* achieves as a decision that symbolically sexually masters heterosexual men is not only accomplished by, as it were, a frontal assault on heterosexual phallic authority. There is also a symbolically rearguard action that *Obergefell* mounts, which "gnaws at the roots of" male heteropatriarchal authority from within the heterosexual male body that the dissent imagines *Obergefell* places under sexual attack.¹⁴⁷

How *Obergefell* imposes this form of sexual mastery and how it functions, as in what it does to heterosexual men who are made to suffer it, initially come to light through the language that the dissent mobilizes to explain why the Constitution does not protect marriage equality for same-sex couples.

Speaking generally, the Chief Justice's dissent maps the terrain of judicial review that *Obergefell*, by its own lights, involves by noting that the claimed constitutional right to marriage equality presented in the case is special. The reason it is special, not ordinary, is, as the dissent explains, that it touches "the most sensitive category of constitutional adjudication."¹⁴⁸ This is the dissent's way of indicating that *Obergefell* implicates substantive due process decision-making impacting the Due Process Clause's substantive liberty guarantee, which, in turn, requires some judgment about the meaning of this "most sensitive" and open-ended portion of constitutional text.¹⁴⁹ According to the dissent, judges deciding cases touching on this constitutional soft spot must "'exercise the utmost care' in identifying implied fundamental rights," particularly where text alone might indicate there are no substantive, only procedural, rights to be found.¹⁵⁰ The risk of announcing rights in this situation is that "unelected federal judges" will use their institutional powers illegitimately to "strike down . . . laws on the basis of" their own pliable sense of what fundamental rights should be.¹⁵¹ An interpretive practice like this, which inserts meaning into the Constitution that does not belong there, rather than deriving meaning from it that does, is a prospect that, notes the dissent,

¹⁴⁶ See *id.* at 2631.

¹⁴⁷ See Thomas, *supra* note 11, at 1823 (quoting JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS 191 (1985)).

¹⁴⁸ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

¹⁴⁹ For affinities on this line between the Chief Justice's dissent in *Obergefell* and the Supreme Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), consider Thomas, *supra* note 11, at 1814–28.

¹⁵⁰ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

¹⁵¹ *Id.*

“raises obvious concerns about the judicial role.”¹⁵² By making the Constitution reflect not the high meaning given to it by the Founding Fathers and the American people, but the degraded meaning of being reduced to a receptacle for “the policy preferences,”¹⁵³ elsewhere, the “naked policy preferences,”¹⁵⁴ of the “Members of this Court,”¹⁵⁵ illicit movements in relation to the Constitution’s “most sensitive category of . . . adjudication,”¹⁵⁶ the Court threatens to “transform” the Constitution in ways that undermine the basic nature of the constitutional enterprise.¹⁵⁷ When the Constitution’s nature is violated this way—when the Court has engaged in interpretive infidelity, as it has, at times, done, and vowed not to repeat—the consequences can be, as *Dred Scott* taught the Court “the hard way,” most severe.¹⁵⁸ What *Dred Scott* taught when it made the Supreme Court the Constitution’s master was that judicial supremacy, achieved by inserting into the Due Process Clause of the Fifth Amendment liberty and property rights to own and keep enslaved persons that the Charter did not contain, could divide the Court, transform the Constitution, and pave the way for the nation to be torn asunder by Civil War, the violence and bloodshed of which involved a decided loss of national well-being, integrity, and even forced surrender and humiliation, to say nothing of, but not to forget, the loss of human life that came as a result.¹⁵⁹

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *Glucksberg*, 521 U.S. at 720).

¹⁵⁴ *Id.* at 2621. The language of “naked policy preferences” is unique in Supreme Court opinions. While Chief Justice Roberts’s *Obergefell* dissent is the only one to use it, Justice Scalia’s *Obergefell* dissent rehearses the theme when describing the majority opinion in the case as “a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.” *Id.* at 2629 (Scalia, J., dissenting). Other variations on the “naked” theme are not unheard of in Supreme Court decisions. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O’Connor, J., dissenting) (“naked preferences”), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); see also, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2678 (2015) (Roberts, C.J., dissenting) (“naked appeals to public policy”); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“a naked intuition” (quoting *Beach Commc’ns, Inc. v. FCC*, 965 F.2d 1103, 1105 (D.C. Cir. 1992) (per curiam))); *Baker v. Carr*, 369 U.S. 186, 296 (1962) (Frankfurter, J., dissenting) (“mere naked power, rather than intrinsic right” (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 51 (1849) (Woodbury, J., dissenting))); *Luther*, 48 U.S. (7 How.) at 51 (Woodbury, J., dissenting) (“the authority of naked majorities”); *Jenkins v. Pye*, 37 U.S. (12 Pet.) 241, 244 (1838) (“the broad and naked principle”).

¹⁵⁵ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (quoting *Glucksberg*, 521 U.S. at 720).

¹⁵⁶ *Id.*

¹⁵⁷ The language of “transformation” reappears at multiple junctures in the Chief Justice’s dissent. *Id.* at 2612, 2614, 2616. It is also found in *id.* at 2594–95 (majority opinion), and *id.* at 2629 (Scalia, J., dissenting).

¹⁵⁸ *Id.* at 2616 (Roberts, C.J., dissenting).

¹⁵⁹ See *id.* at 2616–17.

By its own terms, the Chief Justice's dissent's account of substantive due process interpretation is intended to present propositional truths about this mode of constitutional adjudication, including its stakes, details of which are axiomatic constitutional facts that *Obergefell* spurns. At the same time, the observations convey an additional layer of meaning. Here, presented together, are the dissent's references: decision-making by the Court's "Members" that touches on "the most sensitive category of constitutional adjudication"—a demand for a delicate practice in this touchy area lest the Court's role and the Constitution's as well be transformed via naked judicial policy preferences inserted into the Constitution's open-ended provisions, text from which meaning is supposed to emerge, not be put in—an insertion of meaning that is against the nature of the enterprise and can lead to a rending of the Court, the Constitution, and the nation in ways that have historically included bloodshed, loss of well-being and integrity, as well as surrender, humiliation, and even death.¹⁶⁰ As certain as it is that all this involves abstract declarations about constitutional interpretive practice and constitutional history, it also constitutes a representational rendering that reveals the libidinal stakes of *Obergefell*'s rule-making. Constitutional review as a matter of substantive due process, at least as described in the Chief Justice's dissent, sounds like nothing so much as talk, written from the perspective of an opinion that is an heir to the authority of the Founding Fathers, about sodomitical sexual relations, or to be exact about it, anal sex, that places male heteropatriarchal authority, the authority of heterosexual men, hence, representationally, them, on the receiving end of the Court's stick.

Clarifying the stakes of the imagery and the damage that *Obergefell*'s interpretive practices involve is the dissent's sense, expressed elsewhere, that *Obergefell* is no mild or workaday substantive due process ruling, but an "aggressive application" of the doctrine that involves a "sharp" "break" from the past.¹⁶¹ As the opinion puts it: *Obergefell*'s "aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*."¹⁶² The reference to a "sharp" "break" that returns the Court to *Lochner*'s "unprincipled approach" to substantive due process decision-making, which itself harkens back to *Dred Scott*, indicates that *Obergefell* is being seen as a deviant substantive due process ruling, the method of which abandons the firm grounding of the teachings of history and tradition, reflected in the "decades of precedent" following that approach.¹⁶³ This deviation is also a way of indicating that *Obergefell*'s "sharp" "break" from the past involves an "aggressive" and "unprincipled," hence violent and unwarranted, insertion of meaning into the

¹⁶⁰ *See id.*

¹⁶¹ *Obergefell*, 135 S.Ct. at 2618 (Roberts, C.J., dissenting); *see also infra* text accompanying note 162.

¹⁶² *Obergefell*, 135 S. Ct. at 2618–19 (Roberts, C.J., dissenting).

¹⁶³ *Id.*

Constitution.¹⁶⁴ On one level, this language sounds like a reference to action that forcefully snaps something in half, replicating the imagery of *Obergefell* as inflicting an externally castrating wound. The dissent's emphasis on the sharpness of the break that *Obergefell*'s "aggressive application of substantive due process" works, is, however, equally in keeping with an act of aggressive insertion that, as with *Obergefell*'s "sudden[] and dramatic[]" expansion of the Constitution's text, evokes an edge, something knife-like, hence sharp, where a "break" signifies something that, in view of the sharp insertion, is not rendered into parts but instead torn or shredded and broken in that sense from its previous unpierced, unpoled, and intact state.¹⁶⁵ If castrating, it is an internally produced wound.¹⁶⁶

That this action happens in an "aggressive" manner marks a point of return to the curious line from the opening of the Chief Justice's dissent,¹⁶⁷ in which the opinion, seemingly in passing but really, ultimately, not, hints that *Obergefell* is an act of judicial will, of desire, of naked policy preferences being inserted into the Constitution through an act of "force" that ramifies them.¹⁶⁸ Resituated in relation to the anal eroticism the dissent's discussion of substantive due process practice surfaces, these ideas intimate that *Obergefell*'s interpretive buggery, which takes heteropatriarchal authority, hence heterosexual men, as its targets, as those whom it masters through acts of sodomitical anal sex, does not involve the kind of same-sex intimacies that the *Obergefell* majority has in mind—loving and consensual intimacies of a marital sort—so much as acts, indeed, given the repetition of the imagery in the dissent, multiply repeated acts, of aggressive, sharp, painful, "breaking," forceful, tearing, and, recalling the equation to *Dred Scott*, bloody and wound-producing, potentially way-of-life-and-world-destroying, not to mention potentially lethal, penile-anal sex. Not easygoing consensual same-sex love-making on a lazy Sunday afternoon, the imagery that surfaces across the dissent stirs ideas of nightmarish and unwanted, even non-consensual, forcible sexual acts that resemble nothing so much as anal rape. When the dissent later explains that *Obergefell* exalts its "Members[]"¹⁶⁹ desires in an "accumulation of power [that] does not occur in a vacuum," and says that this accumulation of power "comes at the expense of the people,"¹⁷⁰ it is hard not

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 2618; cf. Farley, *Lacan & Voting Rights*, *supra* note 36, at 297–301 (discussing phallic aggression and race inequality).

¹⁶⁶ A relation between male-male anal sodomy—and, for that matter, even heterosexual, male-female penetrative sex—and castration is established, among other sources, in Freud, *Wolf Man*, *supra* note 1, at 41–47, 78.

¹⁶⁷ See *supra* text accompanying note 45.

¹⁶⁸ *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); see also *id.* at 2631 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

¹⁶⁹ *Id.* at 2622 (Roberts, C.J., dissenting).

¹⁷⁰ *Id.* at 2624.

to see that, significantly among the people at whose expense *Obergefell* comes, are marriage's historical and traditional masters: heterosexual men.

Nor is that the entire picture the Chief Justice's dissent offers. *Obergefell*'s "accumulation of power," coming at heterosexual men's expense through sex acts that they are ultimately powerless to resist, as the dissent is powerless to stop the *Obergefell* Court from doing what it does, *Obergefell*'s sexual mastery of heterosexual men is consonant with the thirst for power that *Obergefell* demonstrates.¹⁷¹ This is a thirst that is not easily slaked. To the dissent's evident chagrin, *Obergefell* manifests its appetites in a way that, once indulged, seems to generate a desire for more.¹⁷² Hence the dissent's insistence that *Obergefell* is the start of something that can only but leave the Court "free to roam where unguided speculation might take" it, peripatetically imposing its desires on the nation.¹⁷³ Against the backdrop of the erotic tale the Chief Justice's dissent's rhetoric unfolds, this is a reckoning of *Obergefell* as manifesting and materializing a sexual beast that, if a millennia-old institution like marriage cannot stop, nothing can.¹⁷⁴ This beast, with its desires for mastery, let loose and on the prowl, is reminiscent of old and hateful stereotypes of homosexual men, with symbolic fangs out and dripping, on an unstoppable "sexhunt."¹⁷⁵ In this instance, it is *Obergefell* and *Obergefell* alone that decides where and how and against whom "the sexual

¹⁷¹ See *id.*

¹⁷² There's a cross-reference to be noted here to Justice Scalia's *Windsor* dissent, where it focuses on the *Windsor* Court's hunger: "The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case." *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting). Along related lines, Robert Bork spoke of "the habit of legislating policy from the bench, once acquired," as "addictive and hence by no means confined to constitutional cases." BORK, *supra* note 53, at 16.

¹⁷³ *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹⁷⁴ See *id.* at 2622.

¹⁷⁵ The term is John Rechy's. JOHN RECHY, *THE SEXUAL OUTLAW* 28, 71, 163, 245, 247, 284–85, 299 (1977); see also JOHN RECHY, *CITY OF NIGHT* (1963). Recognizing this is a homophobic stereotype does not mean that this is the only way the image can work. Transvalued accounts are not only in Rechy's work, but also in DENNIS COOPER, *CLOSER* (1989); DENNIS COOPER, *FRISK* (1991); DENNIS COOPER, *GUIDE* (1997); DENNIS COOPER, *PERIOD* (2000); DENNIS COOPER, *THE TENDERNESS OF THE WOLVES* (1982); DENNIS COOPER, *TRY* (1994); JEAN GENET, *MIRACLE OF THE ROSE* (Bernard Frechtman trans., Grove Press, Inc. 1966) (1951) [hereinafter GENET, *MIRACLE OF THE ROSE*]; JEAN GENET, *THE THIEF'S JOURNAL* (Bernard Frechtman trans., Grove Press, Inc. 1964) (1949) [hereinafter GENET, *THIEF'S JOURNAL*]; GARY INDIANA, *HORSE CRAZY* (1989); and OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (Michael Patrick Gillespie ed., W.W. Norton & Co., Inc. 2d ed. 2007) (1890). Other sources in this tradition can be found in Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179, 190–206 (2011) (review essay).

powers” of marriage—powers that *Obergefell* usurps and reverses to target heterosexual men—“may [and will] be used.”¹⁷⁶

Any lingering skepticism that the rhetoric of the Chief Justice’s *Obergefell* dissent is suffused with imagery that represents *Obergefell* as involved in acts of sexual mastery targeting heteropatriarchal male authority, hence heterosexual men, accomplished by forced sodomy, ought to be put to rest no later than when the dissent reaches its own substantive end. Drawing to a close, immediately before adding a coda, almost in paroxysm, the dissent reaches a certain crescendo of metaphor and tone.

The dissent affirms its appreciation that the powers *Obergefell* exercises to redefine marriage may be “tantalizing” to future “Members of this Court.”¹⁷⁷ In saying this, the dissent formally disclaims the experience of these powers for itself, though, in order to disavow it this way, it must have had the experience, tasting, however fleetingly, what is “tantalizing”¹⁷⁸ about *Obergefell*’s deployments of power, before rejecting it. Armed this way with an experience and understanding of the pleasures of wielding the powers of mastery as *Obergefell* does, or perhaps it is the pleasures of having those powers lorded over it, the dissent immediately distances itself from these sensations. The indication is that it has settled into an experience of *Obergefell* that is the opposite of “tantalizing”¹⁷⁹: by turns, dizzying, vertiginous, consistent with boundaries having been violated, which they imaginarily have been on multiple occasions by this point in the dissent. Whatever else it is, this is not the same experience of delight the opinion describes others potentially having.¹⁸⁰

Lacking the security of history and tradition and the Court’s pre-*Obergefell* identification with the Founding Fathers to supply it protections against *Obergefell*’s naked preferences and erotic predations, the dissent indicates an intense sense of unease, of wooziness even, in the face of the present tense *Obergefell* has hurled it, along with the Court, into. Hence the dissent’s reference to the crushing weight of “the heady days of the here and now” that *Obergefell* has placed it under.¹⁸¹ What the Court and the pro-same-sex-marriage forces it has aligned itself with may feel as exhilarating “headiness”—a phenomenology of freedom itself—the dissent experiences

¹⁷⁶ *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (quoting *Poe*, 367 U.S. at 546 (Harlan, J., dissenting)). For a bit of context on Justice Harlan’s view, see *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), and Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 887 (2016).

¹⁷⁷ *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *Id.* at 2623. It may be worth recalling in this setting, *see infra* text accompanying notes 182–84, that freedom can be a vertiginous and even a nauseating experience. *See, e.g.*, JEAN-PAUL SARTRE, NAUSEA (Lloyd Alexander trans., New Directions Publ’g Corp. 1964) (1959); *see also* DREAD: THE DIZZINESS OF FREEDOM (Juha van ’t Zelfde ed., 2013).

painfully and melancholically in the register of dread about the so-called freedom the majority and its supporters are celebrating.¹⁸² While the dissent repeatedly claims it does not begrudge the celebrations it knows *Obergefell* will inspire, it most certainly does, saying more than once that they have nothing whatsoever to do with the Constitution as *Obergefell* purports is the case.¹⁸³ The logic of the dissent's rhetoric at the end of its opinion illuminates the reasons for this ironic stance of pretending to countenance celebrations of *Obergefell* with equanimity while clearly resenting them: The revelry it expects to follow in *Obergefell*'s wake is the celebration of unconstitutional, lawless domination in a decision that claims to respect freedom but is about its elimination, performing, hence endorsing, political, as well as sexual, conditions of slave-like servitude.¹⁸⁴ To understand this point of view makes sense of the language and tone of this portion of the opinion, which, at times, somehow evokes shifting sensations of vulnerability, adriftness, lostness, violation, in the spirit of a feeling of being naked, violated, and wounded, curled up in a ball of agony after being sexually mastered, the Obergefellian victim in silenced humiliation, surrender, and defeat, driven to the ground like the once-proud forces of Southern "Rebellion" at Appomattox. So far from being tantalized, the dissent at this point evokes an experience of traumatic, or post-traumatic, shock.

Clearly resentful about what *Obergefell* has done, the dissent beats a retreat amidst this dizzying confusion produced by violation to an interior space of clarity from which it can and does rise above the abject woundedness of its situation to explain that it need not and should not have been brought about. Writing as though it has hit upon—or been driven to a point where it has discovered—an inner reservoir of dignity from which to reimagine its predicament, the dissent explains that what *Obergefell* has wrought need not have happened and must not be repeated in the future. In an unusually optimistic and wistful rush, situated in an opinion otherwise rife with images of chaos and violence and Cassandra-like talk of doom, the dissent momentarily abandons visions of *Obergefell*'s violent predations in order to reach for a vision of the Court in which it is released from the need to speak in

¹⁸²This dissent's position could be understood as a reflection of a yearning for what Peter Gabel has referred to as "the pact of the withdrawn selves." See generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). But see generally Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

¹⁸³*Obergefell*, 135 S. Ct. at 2611–12, 2626 (Roberts, C.J., dissenting). Observations on *Obergefell*'s lack of proper constitutional ground are also found in *id.* at 2616–24.

¹⁸⁴The expectation of revelry finds expression in *id.* at 2626. Toni Massaro describes the Chief Justice's dissent's ironic stance in relation to celebrations over *Obergefell* as "clenched-teeth sarcasm." Massaro, *supra* note 3, at 338–39. For a different treatment, see Seidman, *supra* note 12, at 143.

the erstwhile voice of heteropatriarchal authority that might be associated with the Founding Fathers.¹⁸⁵

At just this juncture, the dissent begins to speak in more qualitatively feminine registers. Paralleling the “ricochet[ing]” between paternal and maternal metaphors that Kendall Thomas saw at work in *Bowers v. Hardwick*, the Chief Justice’s *Obergefell* dissent adopts a maternal and highly moralistic stance.¹⁸⁶ From it, the dissent decries the majority opinion as “both prideful and unwise,” having already bemoaned its capacity to “sully” people of faith who would resist it, attempting, like the dissent, to defend marriage’s historical and traditional meanings in the present day.¹⁸⁷ At the very same instant, the dissent, breaking from the present, vaults itself into an imagined future in which *Obergefell*’s mastery has itself been overcome. In that situation, the Court appears in the dissent’s language to be a prim and proper ladylike vessel of the Constitution, which uses the Court’s powers in ways that are “more modest and restrained” than *Obergefell*, “more sensitive,” “more attuned” to the “proper bounds” of judicial power than *Obergefell*, “less pretentious” than the majority, and showing greater respect for “the bonds of . . . history and tradition,” which exist to guard against the perversions of the Constitution by the Court.¹⁸⁸ In this future condition, the Court is ready to hold tight to the judicial vows of interpretive fidelity, interpretive chastity, to the Constitution and to the prelapsarian past. In this dreamed-of future, the Court, dedicated to not repeating *Obergefell*’s mistakes of self-indulgent vow-breaking and interpretive excess—excess that, in this setting, remains erotically charged—is a Court that is fully dedicated to respecting “the bonds of . . . history and tradition.”¹⁸⁹

This dreaming looks to be incredibly hopeful, but the dissent harmonizes its vision by setting it in the key of a lament. This is, after all, a restoration after *Obergefell*’s devastation. This is, after all, a situation that follows a ruling that masters the Constitution through an opinion the “driving themes” of which are what the Court desires and what same-sex desiring petitioners want.¹⁹⁰ This is, after all, a future that comes after a ruling in *Obergefell* that

¹⁸⁵Of course, this might not actually be an optimistic and wistful rush at all, only another form of denial of the intensity of the negative experiences it has registered in relation to the majority’s text.

¹⁸⁶Thomas, *supra* note 11, at 1823. Alternatively, it might be possible to follow Thomas’s account of a seemingly similar gender reversal in the context of *Bowers v. Hardwick*, and thus to say that the Chief Justice’s *Obergefell* dissent is staging a gender “reversal into its opposite,” *id.* at 1821 (quoting Freud, *Instincts and Their Vicissitudes*, *supra* note 26, at 126–27), in order to excuse or exempt itself from the sexual attentions of what in this setting initially appears to be a homosexualized force of male-male sexual predation. *See supra* note 26.

¹⁸⁷The language of “both prideful and unwise” is from *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting), and “sully” from *id.* at 2626.

¹⁸⁸*See id.*

¹⁸⁹*See id.*

¹⁹⁰*See id.* at 2618–19.

has, as the dissent characterizes it, “burst” the bonds of history and tradition, though the dissent does not say it: wide open.¹⁹¹

And so it is that with this image of historical and traditional bonds, once held to tightly, as part of the Court’s project of keeping faith with the Constitution and maintaining its text intact, bonds that *Obergefell*’s illegitimate privations have ruptured, that the dissent’s substantive argument against comes to a halt.¹⁹² The dissent’s own final formal visual representation, its final picture of *Obergefell*, is as a decision that, through its aggressive application of substantive due process doctrine resulting from the indulgence of the naked policy preferences of its “Members,” produces a gaping hole in the Constitution’s text.

In view of the dissent’s erotic imagery, of forced sodomy in particular, this reference to the bonds of history and tradition being burst like this, resulting in the production of a hole in the Constitution, is readily suited to interpretation as an indication—a manifestation—of a sexual trauma that involves something “most sensitive”¹⁹³ previously held tight that has now been forced open and wrecked. The dissent’s metaphors of apparent scenes of sexual predation involving repeated acts of anal sodomy targeting heterosexual men are such that no real leap of imagination is required to appreciate what this hole is in a symbolic sense. Whether this state of affairs, in which heteropatriarchal phallic power has been exploded from within, can be repaired, less recovered from, the dissent, not at all hopeful about the future under *Obergefell*, refuses to accept it with total resignation in the register of utter despair. The dream it thus dreams aloud is of a future in which the ruined Constitution and the Court that has ruined it have been elevated to a state of presently lost grace. In it, the Court will have returned to interpretive practices, less sexual than chaste: “modest and restrained,” “sensitive,” “attuned” to the “proper bounds” of judicial authority, and faithful to the teachings and the authority of the past as the guide on its path.¹⁹⁴ *Obergefell* wantonly sacrifices all this, but however dim the future is, it may not be completely irretrievable, even if it is the case, as the dissent’s maternal metaphors suggest, that the heteropatriarchal authority of the Founding Fathers and subsequent generations has been sacrificed in ways that leave it open to the Court to serve, at most, as a

¹⁹¹ See *id.* at 2626. “[U]nder the heading ‘imagos of the fragmented body,’” Jacques Lacan “group[s] together” “images of castration, emasculation, mutilation, dismemberment, dislocation, evisceration, devouring, and bursting open of the body.” JACQUES LACAN, *Aggressiveness in Psychoanalysis*, in *ÉCRITS: A SELECTION* 10, 13 (Bruce Fink trans., W.W. Norton & Co., Inc. 2002) (1966).

¹⁹² This locution accounts for the final coda in the dissent.

¹⁹³ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

¹⁹⁴ See *id.* at 2626.

“maternal vessel” for the Constitution.¹⁹⁵ Even in that unmanned capacity, very great things may result.¹⁹⁶

G. Persecution, Unmanning, Panics: An Initial Look

These are the dreams of *Obergefell* that are found in the Chief Justice’s dissent’s text. What is to be made of them?

One hypothesis for understanding begins by returning to Freud’s account of Daniel Schreber’s case. According to Freud, Schreber’s erotic delusions of persecution and unmanning were attendant upon and resulted from a certain breakthrough of previously repressed homosexual desires that had long coexisted with his conscious and acted-upon heterosexual sexual object choices.¹⁹⁷ If this was true of Schreber’s case, might it not also be true of the Chief Justice’s dissent’s dreams of *Obergefell*’s sexually mastering—both persecuting and unmanning—heterosexual men? Might these dreams not be taken as indications that homosexual sexual investments, if only on an unconscious level, function along with an active heterosexuality as psychic drivers within the text of the dissent?¹⁹⁸

Posed this way, the answer must be in the negative: There are no pure, unadulterated homosexual desires to be found in the dissent’s fantasies of the sexual mastery of heterosexual men. Not that those desires are totally absent, only that matters are more complicated than that.

Closer to the mark, without falling out of step with Schreber’s sexual delusions of persecution and of unmanning, is a hypothesis holding that the dissent’s fantasies of heterosexual men’s sexual mastery, considered with the opinion’s larger rhetorical structure, give evidence of a textbook case of an anti-gay homosexual sexual panic. In it, homosexual desires are complexly and ambivalently felt, and ultimately denied through an impassioned refutation that would decimate *Obergefell*, figured as the external source and embodiment of those desires.

To bring these dynamics into sharper focus, the dissent’s fantasies about *Obergefell*’s sexual mastery of heterosexual men generally record psychic experiences of the perfect substitutability of same-sex for cross-sex sex, a substitution that is fully in keeping with *Obergefell*’s declaration of the basic normative equivalence of the sexual forms.¹⁹⁹ In the imaginary realm figured

¹⁹⁵ See Thomas, *supra* note 11, at 1821 (describing “the dominant figural self-representation” of the Court in *Bowers v. Hardwick* as that of the “maternal vessel of the Constitution”); see also *Obergefell*, 135 S. Ct. at 2613–15, 2626 (Roberts, C.J., dissenting).

¹⁹⁶ This is differently demonstrated by the majority opinion in the case.

¹⁹⁷ See, e.g., Freud, *Psycho-Analytic Notes*, *supra* note 23, at 59–61.

¹⁹⁸ This might help explain why, within the dissent, *Obergefell*’s imaginary sexual predations have discernibly homosexual sexual dimensions.

¹⁹⁹ For *Obergefell*’s account of the normative equivalence, see *Obergefell*, 135 S. Ct. at 2598–605. As a general proposition, it remains the case that “[g]ay and straight

by the dissent, heterosexual men are sexually treated by *Obergefell*, a pro-homosexual opinion that looks to be a deeply homosexualized force, the way that heterosexual women are more often treated by heterosexual men: phallus-less and subject to sexual subordination by a phallus through penetration. Although the dissent's rhetoric characterizes *Obergefell*'s acts of sexual mastery as involving force and as being against heterosexual male victims' wills, these imaginary acts can in fact be neither. On the psychic plane, no material action, hence no real non-consent to it, can be found. This is why the dissent's fantasies of heterosexual men being sexually mastered by *Obergefell* are properly understood as fantasies: manifestations of desires that are on some textual level affirmatively felt.²⁰⁰ That these desires are intensely erotically charged is suggested in context by the dissent's multiplication of them through repetition.²⁰¹ In this sense, when *Obergefell* sexually masters heterosexual men, whether by castration or forced sodomy undertaken violently and non-consensually, or both, it delivers to the dissent exactly what its dreaming indicates it sexually wants. Then again, it couldn't not. The acts of sexual mastery that *Obergefell* performs, reflecting the dissent's own fantasies, are onanistic means by which the dissent dreams and practically satisfies itself.²⁰²

The presence of these affirmative desires, though, is not unchecked in the Chief Justice's dissent, its desires themselves are not unambivalently felt. Eventually, perhaps at just that moment when the fantasies reach their fevered pitch of violence and destruction (though, really, the precise dynamics remain elusive), the thought has evidently dawned on the dissent that its desires for the homosexualized sexual mastery of heterosexual men that *Obergefell* entails constitute a traumatic loss.²⁰³ To realize and to manifest these desires is

marriages are both alike and unlike along an infinite number of dimensions," Seidman, *supra* note 12, at 127, a point that holds both across and within identitarian lines.

²⁰⁰ On fantasy as desire affirmatively felt, consider Freud's observation: "No other kind of 'Yes' can be extracted from the unconscious; there is no such thing at all as an unconscious 'No'." Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria* (1905), reprinted in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 26, at 3, 57.

²⁰¹ As Roland Barthes elaborates, "repetition itself creates bliss." ROLAND BARTHES, THE PLEASURE OF THE TEXT 41 (Richard Miller trans., Hill & Wang 1975) (1973). For a recent engagement with "repetition" in Freud's work, see generally M. Andrew Holowchak & Michael Lavin, *Beyond the Death Drive: The Future of "Repetition" and "Compulsion to Repeat" in Psychopathology*, 32 PSYCHOANALYTIC PSYCH. 645 (2015).

²⁰² As Freud offers in *The Interpretation of Dreams*: "[A] dream is the fulfillment of a wish." SIGMUND FREUD, THE INTERPRETATION OF DREAMS (FIRST PART) (1900), reprinted in 4 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD at xi, 121 (James Strachey ed. & trans., 1953) (emphasis omitted). Discussion of refinements can be found in in PETER GAY, FREUD: A LIFE FOR OUR TIME 107–09 (1988).

²⁰³ The dynamic relationship between fantasy and trauma—wherein fantasy is identified as a possible source of trauma—is not unproblematically rendered in Freud's work. One flashpoint has circled around Freud's "seduction theory," see generally Sigmund Freud, *The Aetiology of Hysteria* (1896), reprinted in 3 THE STANDARD EDITION

to achieve the forfeiture of the status, authority, and psychic satisfactions that come with being a heterosexual male sexual subject who takes his own heterosexual sexual objects—females—in sex.²⁰⁴ At some point in this progression, this psychic experience of loss overcomes and displaces dream-level desires for homosexualized sexual subordination. As that happens, a transvaluation of the dissent's fantasies takes place. They are reconfigured from dreams into nightmares to be avoided by any means. While this process of transformation ultimately drives the dissent to deny any desires for homosexualized sexual mastery, the desires that were, to a certain point, the dissent's own, do not disappear. They are externalized, projected onto others, like those who are said to find *Obergefell's* deployments of power “tantalizing.” Those who delight over, even celebrate, the traumatic suffering of the now heterosexual victims of *Obergefell's* homosexualized sexual mastery are subject to the intense critical and resentful heat of the dissent, energies that manifest in the opinion's deployment of the tools available to it—chiefly, tools of doctrine and tools of rhetoric—to attempt to take down *Obergefell*, the projected external source of the dissent's own phantasmatic trauma, figured as a force of sexual mastery that targets and ruins heterosexual men.²⁰⁵ If it is standard to think of an anti-gay homosexual panic as a psychic

OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 189 (James Strachey ed. & trans., 1962), which Freud held to for a time before abandoning it, as recounted in Sigmund Freud, *An Autobiographical Study* (1925), reprinted in 20 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3, 33–35 (James Strachey ed. & trans., 1959). For reconsideration of the abandonment of the seduction theory, see JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 107–44 (1984). Additional engagement with the reconsideration effort is in JANET MALCOLM, IN THE FREUD ARCHIVES (1983). For the view that “no one is ever made sick by his fantasies,” because “[o]nly traumatic memories in repression can cause the neurosis,” see 3 ROBERT FLEISS, SYMBOL, DREAM, AND PSYCHOSIS 212 (1973) (emphasis omitted).

²⁰⁴ Without missing its historical specificities across space and time, aspects of this grammar of gender are old. For some discussion, see 2 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE USE OF PLEASURE 46–49, 125–30, 162–63, 176–82, 215–25 (Robert Hurley trans., Vintage Books 1986) (1984). The modern locution that puts the conventional grammar of gender in bold is Catharine MacKinnon's: “Man fucks woman; subject verb object.” Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982). There is a return to this theme *infra* notes 208–09 and accompanying text.

²⁰⁵ If, as in some standard Gestalt dream-work, see FREDERICK L. COOLIDGE, DREAM INTERPRETATION AS A PSYCHOTHERAPEUTIC TECHNIQUE 85–86 (2006) (discussing FREDERICK S. PERLS, GESTALT THERAPY VERBATIM 67 (1969)), the dreamer occupies all the subject positions in a dream, the dissent might be thought to occupy all the subject positions that its account of sexual mastery involves. If this is right, in the fantasy-nightmare of the dissent, it is both object and subject, victim and victimizer, cause of pain and pleasure, all, which, if true, reveals something utterly solitary and self-referential in the account, perhaps marking the ultimate kind of emasculation, but anyway of narcissism, one mode of eroticism's expression. See generally Sigmund Freud, *On Narcissism: An Introduction* (1914), reprinted in 14 THE STANDARD EDITION OF THE COMPLETE

event in which someone seeks to “punish[] someone else for [same-sex] desires that are properly [that person’s] own,” the dissent shows signs of being in the midst of one such event.²⁰⁶ Conjuring *Obergefell* as a dream of homosexual sexual mastery involving castration and forced sodomy, the dissent, having made *Obergefell* into a sexual fantasy-turned-nightmare, does everything it can to wipe it out, lashing out at it for doing to heterosexual men what it itself wants done to them, hence itself.

If the hypothesis that the Chief Justice’s dissent is in the midst of an anti-gay homosexual panic is correct, so is a corollary: The Chief Justice’s dissent’s anti-gay homosexual panic implies a related panic about gender. The dissent’s fantasies about *Obergefell*’s sexual mastery of heterosexual men affects them, after all, not only as heterosexuals but also as heterosexual *men*. Within the historical and traditional world of male dominance and the male-female gender binary that has been a part of it—a world that the dissent approves of as the basis for marriage’s constitutional form—the castration and forced sodomy of heterosexual men are necessarily emasculating in their effects.²⁰⁷ Both these acts invert a conventional grammar of gender—in one famous locution, “[m]an fucks woman; subject verb object”²⁰⁸—in a way that turns heterosexual men as sexuality’s objects into not-men, which is to say into women, a gender conversion whose success is demonstrated by the dissent no later than that moment in its closing breaths when it undertakes its own “sex-change” to speak in decidedly feminine registers.²⁰⁹

To telescope the idea here just a bit, the dissent’s fantasies of heterosexual men losing their gender status as men by virtue of *Obergefell*’s acts of castration and forced sodomy are experienced, like the loss of heterosexual sexual status, with ambivalence. It is easy to appreciate why the dissent’s fantasies would generate aversion to the point of dread. What is being dreamed about are acts of castration and forced sodomy, right? The real wonder in this setting is how such fantasizing could be imagined not to produce aversion unto dread rising to the level of a trauma. More mystifying still is how there could be affirmative desire *for* the sexualized attacks that the dissent dreams up on the other side of its ambivalence. What could possibly explain a desire for

PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 26, at 67. Some of what this may be taken to suggest becomes clearer *infra* notes 254–65 and accompanying text.

²⁰⁶The description of what is entailed by an anti-gay homosexual panic comes from Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). Engagement with Halley’s work, though not on this point, is in Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004).

²⁰⁷For the dissent’s approval of the male-female gender binary as the basis for marriage’s constitutional form, see, for example, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613–15, 2619 (2016) (Roberts, C.J., dissenting), and also *id.* at 2594 (majority opinion), describing, as a view that it will ultimately reject, the idea that “[m]arriage . . . is by its nature a gender-differentiated union of man and woman.”

²⁰⁸MacKinnon, *supra* note 204, at 541.

²⁰⁹See *supra* notes 186–96 and accompanying text.

castration's pain or the sharp agony of anal rupture that tears heterosexual men's phantasmatic anuses, like *Dred Scott* tore the nation, apart?²¹⁰ What could be desirable about the idea of heterosexual men, after *Obergefell*'s sexual attacks, being forced into the unmanly position of being bloodied, wounded, and humiliated, in surrender and sexual defeat?

Horrific as these forms of sexual violence and injury are to contemplate, even on a psychic level, they function within the dissent as forms of abjection, usefully understood in this context not as referring to a purely negative experience or affective state of total domination, but rather to a complex and highly contingent terrain of (by turns and all at once) violence, delight, injury, and pleasure, which spotlights, as the dissent itself does, the ecstatic possibility of a transcendent redemption, a rebirth of sorts, that occurs when it does precisely through and as a result of the most horrific forms of sexual debasement and wounding.²¹¹ Within the dissent itself, it is the sexual mastery unto emasculated ruin that *Obergefell* is imagined to perform that drives heterosexual men onto this unmanned, feminine ground.²¹² It is the sexual mastery resulting in emasculated ruin which *Obergefell* is imagined to perform that places these no-longer-men face-to-face at last with an untouchable feminine dignitary core—a dignitary core that manifests the kind of dignitary essence described by Justice Clarence Thomas's dissent, according to which dignity inheres in the person and cannot be affected by material acts of State or practices of human slavery.²¹³ Much less imaginary slavery of an erotic kind. The moment when the fires of *Obergefell*'s phantasmatic sexual predations burn brightest is when they crystallize to leave in their ashes something rock

²¹⁰ See *supra* notes 96–100 and accompanying text.

²¹¹ Illustrations of abjection's transcendent dimensions functioning this way are found, for example, in SCHREBER, *supra* note 22, at 117, 126, 129, 211–15, as well as in GENET, *MIRACLE OF THE ROSE*, *supra* note 175; GENET, *THIEF'S JOURNAL*, *supra* note 175; and JEAN-PAUL SARTRE, *SAINT GENET: ACTOR AND MARTYR* (Bernard Frechtman trans., George Braziller, Inc. 1963) (1952). More recent academic engagements with the theme are in DEAN, *UNLIMITED INTIMACY*, *supra* note 18; DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* (Michael Lucey trans., Duke Univ. Press 2004) (1999); DAVID M. HALPERIN, *WHAT DO GAY MEN WANT? AN ESSAY ON SEX, RISK, AND SUBJECTIVITY* (2007); and *GAY SHAME* (David M. Halperin & Valerie Traub eds., 2009). For critical reactions (beyond those found in *GAY SHAME*, *supra*), see, for example, Judith Halberstam, *Shame and White Gay Masculinity*, 23 *SOC. TEXT* 219 (2005), and Hiram Perez, *You Can Have My Brown Body and Eat It, Too!*, 23 *SOC. TEXT* 171 (2005).

²¹² See *supra* text accompanying notes 193–96.

²¹³ As Justice Thomas's dissent remarks: "[H]uman dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting). This line of thought is engaged by Seidman, *supra* note 12, at 120–21.

solid, powerful, upright, untouchable, unreachable, and, in their own way, a pure experience of transcendent pleasure.²¹⁴

Beyond the castration and the forced sodomy that *Obergefell*'s sexual mastery of heterosexual men involves, and exactly in virtue of them, a new spirit is found and rises in the rhetoric of the Chief Justice's dissent. Imagining itself achieving perfect, almost saint-like institutional conditions, and speaking in a pure, feminine voice, the dissent is in full contact with the idea of the Supreme Court assuming and undertaking its responsibilities as a chaste, "maternal vessel" for the Constitution—if not for the first time, then once again.²¹⁵ As the dissent temporarily relinquishes all the violence of its own desire to savage *Obergefell* at precisely this moment, it suggests an experience of a majestic, even mythic, feminine power.²¹⁶ This power is utterly confident and self-possessed in a way that reveals the dissent dreamily inhabiting a mode of feminine gendered existence that recognizes and affirms the pleasures of never being touched, much less sexually mastered, again, achieved, paradoxically, through phantasmatic sexual mastery that is emasculating, hence traumatizing.²¹⁷ If the pleasures attendant upon this trauma are formally suppressed in the structure of an argument that neglects to mention them, they are nevertheless hidden in plain sight in rhetoric that signals a clear impulse to destroy *Obergefell*, their source, treated by the dissent as the proper object of punishment for gender-based fantasies that are really all of the dissent's own devising.

H. Deeper Grounds: A Picture Emerges

One reason for venturing these explanations of the Chief Justice's dissent's fantasies about *Obergefell*'s sexual mastery of heterosexual men as

²¹⁴ Reflections on queerness and "untouchability," in the register of "Christ's words to Mary Magdalene after his resurrection: 'Noli me tangere' (Don't touch me)," or Leslie Feinberg's line from *Stone Butch Blues* that, "Touch is something I could never take for granted," appear in Heather K. Love, *Emotional Rescue*, in *GAY SHAME*, *supra* note 211, at 256, 264–65. Love comments: "Untouchability runs deep in queer experience." *Id.* at 264. Continuing:

"Noli me tangere" is . . . an apt motto for queer historical experience, but its effects are unpredictable. While it serves as protection against the blows of normal life, the family, and homophobic violence, it also works against other forms of community and affiliation, including, of course, queer community.

Id. at 265. The idea in the text imagines other versions of the experience, queer or not, gendered in particular ways, along these general lines.

²¹⁵ See Thomas, *supra* note 11, at 1821.

²¹⁶ For discussion of the majestic feminine, see generally, for example, JOSEPH CAMPBELL, *GODDESSES: MYSTERIES OF THE FEMININE DIVINE* (Safron Rossi ed., 2013). Further discussion is in ORIT KAMIR, *EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW* 19–42 (2001).

²¹⁷ See *supra* note 214.

hypotheses for understanding is that, however accurate they are, they present at most only part of a picture. Fundamentally, the dissent's anti-gay and gender panics unfold on a larger panic-ridden field. On which, heterosexual men's sexual undoing as heterosexuals and as men is nothing less than a precondition for an active process by which heterosexual men are "transformed" into sexual subjects of a wholly different sort.²¹⁸ Reconstituted by *Obergefell*, heterosexual men's sexual mastery involves their reconstitution as erotic beings who, no longer exclusively heterosexually- or male-identified, are defined by a broad and fluid array of sexual subject positions that speak to an eroticism that is polymorphously perverse.²¹⁹

The crucial sign of these possibilities emerges in the Chief Justice's dissent as it subtly supplies a perspective on *Obergefell* in which it appears as an embodied force that performs the sexual mastery—both the castration and the forced sodomy—that the dissent fantasizes about. Delivering its bottom-line reasons for concluding that the Supreme Court's right-to-privacy case law, including *Lawrence v. Texas*, offers marriage equality no constitutional protections, the dissent observes that privacy doctrine is unavailing in *Obergefell* because marriage equality advocates "do not seek privacy" but something "[q]uite the opposite" of it.²²⁰ What that opposite is, according to the dissent, is "public recognition of their relationships, along with corresponding government benefits."²²¹

This account of the pro-marriage-equality aims behind the *Obergefell* litigation exposes privacy doctrine's alignment with the Constitution's deepest fault lines.²²² Privacy doctrine will not give marriage equality advocates what they want, the dissent explains, because the right to privacy is a "right to be let

²¹⁸ The language of "transformation" is found in Freud's study on Schreber, *see, e.g.*, Freud, *Psycho-Analytic Notes*, *supra* note 23, at 16–17, 20–21, in Schreber's autobiography, *see, e.g.*, SCHREBER, *supra* note 22, at 73, and—repeatedly—in the Chief Justice's dissent, *see supra* note 157.

²¹⁹ *See Polymorphous*, *adj.*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/147248?redirectedFrom=polymorphous#eid> [<https://perma.cc/2CLK-ACQG>] (defining the term "polymorphous perverse," a "[s]pecial use[]" of "polymorphous," as "designating or characterized by sexuality that can be excited and gratified in many ways, and is regarded as normal in young children but abnormal in adults"); *see also id.* ("The constitutional sexual predisposition of the child is more irregularly multifarious than one would expect, that it deserves to be called 'polymorphous-perverse', and that from this predisposition the so-called normal behavior of the sexual functions results through a repression of certain components." (quoting SIGMUND FREUD, *SELECT PAPERS ON HYSTERIA AND OTHER PSYCHONEUROSIS* 191 (A.A. Brill trans., 1909))). Another sense of the term in Freud's *Three Essays on the Theory of Sexuality*, as noted by *id.*, makes clear that "under the influence of seduction children can become polymorphously perverse." FREUD, *THREE ESSAYS*, *supra* note 26, at 191; *see also id.* at 232–33. The use of the term in the text follows the initial definition without losing sight of the other.

²²⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting).

²²¹ *Id.*

²²² *See id.* at 2619–20; *see also infra* notes 224–25 and accompanying text.

alone.”²²³ Being a freedom *from* governmental action, the right to privacy entails no positive entitlements *to* State action, which is what marriage equality advocates seek.

In saying this, the dissent brings to mind the obvious point that the Court’s right-to-privacy case law, like all constitutional doctrine on some level, has developed in the shadow of the Constitution’s basic orientation as a charter of negative, not positive, rights.²²⁴ This idea, or one very much like it, is what the dissent has in mind when it observes, in the sentence that is key for introducing some colorful and ultimately telling imagery, that: The Supreme Court has “consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”²²⁵ Doctrinally, it follows from this that marriage equality, amounting to a demand for State action, is inconsistent with the right to privacy, as it is inconsistent with the precepts of the constitutional order. No constitutional doctrine could, therefore, properly support it.

Bracketing what *Obergefell* recognizes—that discriminatory line drawing by the State in defining marriage is state action that the State, consistent with the negative Constitution, can be required not to undertake—from the perspective of the dissent, *Obergefell*’s recognition of constitutional marriage equality, partly building on the Court’s right-to-privacy doctrine, achieves what “consistent” past practice by the Court never has allowed.²²⁶ *Obergefell*, to use the dissent’s expression, lets “litigants . . . convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”²²⁷ Naturally, in order for the Court to give these constitutional

²²³ *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 n.10 (1972)).

²²⁴ There are other treatments of the point in the *Obergefell* dissents. *See, e.g., id.* at 2631 (Thomas, J., dissenting) (“Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.”); *id.* at 2634 (“In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.”); *id.* at 2637 (“[O]ur Constitution is a ‘collection of ‘Thou shalt nots,’ not ‘Thou shalt provides.’” (citation omitted) (quoting *Reid v. Covert*, 354 U.S. 1, 9 (1957) (plurality opinion))); *see also id.* at 2627 (Scalia, J., dissenting) (“These cases ask us to decide whether the Fourteenth Amendment contains a limitation that *requires* the States to license and recognize marriages between two people of the same sex.” (emphasis added)); *cf. id.* at 2640 n.1 (Alito, J., dissenting) (describing the dissent’s use of “the phrase ‘recognize marriage’ as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons”).

²²⁵ *Id.* at 2620 (Roberts, C.J., dissenting). For commentary on positive and negative rights in the literature on *Obergefell*, *see, for example*, Appleton, *supra* note 76, at 929–31, 933–41, 942 n.143, 949–53; Kari E. Hong, *Obergefell’s Sword: The Liberal State Interest in Marriage*, 2016 ILL. L. REV. 1417, 1438–39; Powell, *supra* note 10, at 72–73, 76; Seidman, *supra* note 12, at 139–41; and Yoshino, *supra* note 3, at 159–62, 167–69.

²²⁶ The precise term the dissent uses is “consistently.” *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

²²⁷ *Id.*; *see also supra* note 225.

powers to lesbians, gay men, and same-sex couples, it must have them in hand itself. Possession by the Court in this setting, though, is scarcely nine-tenths of the law. It is constitutional mischief. More than theft, the Court steals a constitutional power that does not belong to it. Nor could it. Properly, no constitutional sword even exists.²²⁸

It is scarcely possible to overstate the significance of this general point. The dissent's reasoning indicates that, in delivering marriage equality rights, *Obergefell* undertakes a radical transformation of the Constitution in ways that no Supreme Court decision before it ever has.²²⁹ Before *Obergefell*, the Supreme Court's powers of judicial review encompassed the tremendous, but limited, power to review State action for its conformity with a basically negative Constitution. After *Obergefell*, the Court possesses this tremendous power plus the heretofore unheard of, unthinkable, and limitless general power to demand State action in order to vindicate positive constitutional rights. This may help explain the observation in Justice Scalia's separate dissent that *Obergefell* "is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention."²³⁰ Not even *Lochner* nor *Dred Scott*, the most extreme and illegitimate examples of the traditional powers of judicial review, went as far as *Obergefell* does.²³¹ From this perspective, it is as the Chief Justice's dissent says: *Obergefell* finds no bearing in either the Constitution or any of the Court's precedents.²³²

However colorful the dissent's imagery of constitutional shield and sword may generally be, as a doctrinal matter it is bloodless and unexceptional. It serves jurisprudentially as a mere means by which the dissent recounts constitutional axioms that, in its estimation, the *Obergefell* Court has renounced.

As it happens, the ideas of negative and positive constitutional rights underlying the imagery of shield and sword do not surface in *Obergefell* for the first time in the Chief Justice's dissent.²³³ In addition to being traceable to

²²⁸ At least not as a weapon that the courts wield. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220–28 (1978); see also LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004). These remarks, of course, are in the context of domestic U.S. constitutional law.

²²⁹ Some, differently sympathetic to *Obergefell*, have noted the possibility with a different sensibility. See, e.g., Appleton, *supra* note 76, at 950–53; Yoshino, *supra* note 3, at 168–69.

²³⁰ *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

²³¹ See generally *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

²³² See, e.g., *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting). This perspective should be taken into account when criticizing the Chief Justice's dissent for announcing that the Constitution "ha[s] nothing to do with it." *Id.*

²³³ See *id.* at 2620.

arguments made by State defenders of traditional marriage, the invocation of these images in the dissent echoes symbolic associations that are found of all places in the *Obergefell* Court's own majority opinion.²³⁴

Like *United States v. Windsor*, and *Lawrence v. Texas* before it, *Obergefell* cloaks itself in the mantle of justice, the great symbol of which, it hardly needs saying, is Lady Justice: a blindfolded but fearsome woman who, in one hand, holds disc-like shields that serve as the great balance she impartially measures, and who, in the other, brandishes the great sword that she wields as the balance requires.²³⁵ *Obergefell* thus portrays itself as a justice-delivering ruling that invites others to see it in these terms. When the Chief Justice's dissent accepts this invitation, it recognizes *Obergefell*'s self-presentation, noting the way the ruling is based on the majority's evolved sense of the "nature of injustice."²³⁶ But seeing this picture, the dissent expresses the view that *Obergefell*'s self-portrait as a justice-delivering ruling less honors than discredits it. For the Court to do justice this way is not for it to do constitutional law as it should. Nor could it, to the extent that doing justice like this involves wielding both a constitutional shield and sword.

Recalling that within the Chief Justice's dissent *Obergefell*'s lawless mastery operates on a sexual plane, it is sexually significant for the dissent to configure *Obergefell* as bearing both a shield and a sword.²³⁷ In this setting,

²³⁴For relevant arguments about positive and negative constitutional rights in the State briefs defending state bans on same-sex marriage, see Brief for Respondent at 24, 27, *DeBoer v. Snyder*, 135 S. Ct. 2584 (2015) (No. 14-571) [hereinafter *DeBoer* Respondent Brief]; Brief for Respondent at 14, 20, 39, *Obergefell*, 135 S. Ct. 2584 (No. 14-556); Brief of Respondents at 26, *Tanco v. Haslam*, 135 S. Ct. 2584 (2015) (No. 14-562). Indeed, the Michigan brief in *DeBoer v. Snyder* invokes the language of constitutional "shield" and "sword," observing: "The petitioners request a transformation of the substantive-due-process doctrine from one that protects negative rights as a shield into one that guarantees positive rights as a sword—a change that would have far-reaching impacts in areas of the law that have nothing to do with marriage." *DeBoer* Respondent Brief, *supra*, at 27. On the symbolic associations in *Obergefell*, see *infra* notes 235–36 and accompanying text.

²³⁵For examples of how, certainly from *Lawrence* on, the Supreme Court's lesbian and gay rights rulings have proudly been presented as justice-delivering rulings, see *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2695–96 (2013); and *Obergefell*, 135 S. Ct. at 2598. The now-classic image of justice as blindfolded was not always thus. Costas Douzinas, *A Legal Phenomenology of Images*, in *LAW AND ART: JUSTICE, ETHICS AND AESTHETICS*, *supra* note 40, at 247, 252–53. An engaging study on the iconography of justice is in JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

²³⁶*Obergefell*, 135 S. Ct. at 2612, 2621, 2623 (Roberts, C.J., dissenting) (quoting *id.* at 2598 (majority opinion)).

²³⁷Along these lines, it may be worth noting that *Obergefell* on this level replicates a move that can be seen to be operating in slightly different terms in *Windsor*, a decision in which the Court's opinion aligns itself with the evolution of thinking on same-sex marriage as reflected in the laws of the State of New York. See *Windsor*, 133 S. Ct. at 2689. In the course of protecting New York's laws, hence identifying with the State, *Windsor* brings itself into a relation with its symbolic representation: the Statue of Liberty. Perhaps

shield and sword are not simply symbols that *Obergefell* somehow holds in hand, but references to bodily configurations. Within the standard Western archive of sexual and gender imagery, the shield, with its power of negation, along with the sword, with its power to undertake and to command action, are, respectively, references to (can you guess?) feminine and masculine energies that themselves signify sexualized and gendered body parts: female and male genitalia. Hidden beneath its robes, *Obergefell*, this armed creature lawlessly doing justice, this figure that imposes its “naked . . . preferences” on the nation, mastering democracy, mastering marriage, including marriage’s historical and traditional masters—heterosexual men—has two sex organs: a vagina/shield and penis/sword.²³⁸ Seen this way, within the dissent *Obergefell* is a hermaphroditic power, a he-she-they being, *Obergefell*-the-hermaphrodite, a kind of monster that undertakes the sexual mastery of heterosexual men.²³⁹

Nor is this the only appearance of a hermaphroditic force in the Chief Justice’s dissent. Key to the dissent’s explanation of why the Constitution protects only cross-sex marriage is a human figure that, like *Obergefell*-the-hermaphrodite, combines man-woman and male-female attributes, including male and female sexual body parts, while representing something more than its elements in its distinctive combination of them. To say this is loosely to refer to marriage as the institutional manifestation of the male-female union as husband and wife, but it is even more exactly a means of invoking the biological combination—“the first bond of union”²⁴⁰—that, in species-typical functioning, “naturally” produces the children whom marriage, according to

coincidentally or perhaps not, this Lady Liberty sports on her head a shield-like crown-wreath out of which jut what appear to be multiple sword-like spikes.

²³⁸The quoted language “naked . . . preferences” is, in the original, “naked policy preferences.” *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

²³⁹Important work on intersexuality and the law, which underscores the history of discrimination against intersex persons, is undertaken by JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW* (2012). An important perspective on intersex issues and trauma is offered by Moonhawk River Stone, *Approaching Critical Mass: An Exploration of the Role of Intersex Allies in Creating Positive Education, Advocacy and Change*, 12 *CARDOZO J.L. & GENDER* 353, 354–57 (2005). Bearing in mind the mapping of intersex and trans identities that Stone sketches, *id.* at 359–61, and without overlooking how “many in the intersex movement have shifted away from an identity politics model,” Julie Greenberg et al., *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 *MICH. J. GENDER & L.* 13, 14 (2010) (quoting Greenberg’s remarks), and that a critical trans politics does, as well, *see generally* DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011), it should be recognized that this is not the only reading of the figure of *Obergefell* in the Chief Justice’s dissent that might be offered.

²⁴⁰*Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting) (“For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife . . .” (quoting MARCUS TULLIUS CICERO, *DE OFFICIIS* bk.1, at 57 (E.H. Warmington ed., Walter Miller trans., Harvard Univ. Press 1913) (c. 44 B.C.E.))).

the dissent, centrally exists to protect.²⁴¹ Although the dissent does not anywhere depict cross-sex sexual union, its account of what marriage is about—and for—presupposes “natural” male-female sexual intercourse.²⁴² Within the dissent’s mindset, heterosexual coitus is an essential, maybe the most essential, feature of what marriage symbolizes and secularly sacralizes.²⁴³ A vision of the two-in-one-flesh union of man and woman that operates through their sexual conjunction as a single reproductive force that, for so long as it lasts, is made up of them both, is imbedded in the dissent’s normative structure. The conjugal couple at marriage’s core is, like *Obergefell*, a man-woman, male-female, but also greater than the sum of its parts.²⁴⁴ Think here of the lines from Ovid’s *Metamorphoses*, in which “a lovestruck water nymph named Salmacis attempts to seduce Hermaphroditus, the son of Hermes and Aphrodite, at the edge of her fountain,”²⁴⁵ and who, when Hermaphroditus “rejects her advances, . . . asks the gods to join them forever,” the result being “a single creature of fused male and female body parts.”²⁴⁶

The gods heard her prayer. For their two bodies, joined together as they were, were merged in one, with one face and form for both. As when one grafts a twig on some tree, he sees the branches grow one, and with common life come to maturity, so were these two bodies knit in close embrace: they were no longer two, nor such as to be called, one, woman, and one, man. They seemed neither, and yet both.²⁴⁷

²⁴¹ *Id.*; *accord id.* at 2641 (Alito, J., dissenting) (“For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”).

²⁴² *See id.* at 2613 (Roberts, C.J., dissenting) (“The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman.”).

²⁴³ *See id.*

²⁴⁴ A variation on this view is found in the majority opinion. *See id.* at 2594 (majority opinion) (“[Marriage’s] dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just two persons.”); *id.* at 2608 (“In forming a marital union, two people become something greater than once they were.”); *see also id.* at 2599 (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

²⁴⁵ Leah DeVun, *The Jesus Hermaphrodite: Science and Sex Difference in Premodern Europe*, 69 J. HIST. IDEAS 193, 193 (2008). Thanks to Karl Whittington for the introduction to DeVun’s work. Ruth Gilbert observes that “Ovid’s story of ‘Salmacis and Hermaphroditus’ provided a founding fable about the mutability of gender boundaries which was to be echoed throughout the art and literature of the Renaissance.” RUTH GILBERT, *EARLY MODERN HERMAPHRODITES: SEX AND OTHER STORIES* 57 (2002).

²⁴⁶ DeVun, *supra* note 245, at 193.

²⁴⁷ 1 OVID, *METAMORPHOSES* bk. IV, at 205 (G.P. Goold ed., Frank Justus Miller trans., Harvard Univ. Press rev. 2d ed. reprt. 1971) (c. 8 C.E.). The original reads:

So long as certain liberal, rationalist suppositions about bodily integrity being preserved during the sexual act are not too strictly maintained, and even if they are, the male-female couple in sexual union is readily seen as a hermaphroditic force.²⁴⁸

The nature of the hermaphrodite being duality, there is a certain almost-logic to the replication of the hermaphrodite in the two forms that it takes in the Chief Justice's dissent. As man-woman, male-female, and sword-shield, the hermaphrodite pairs the dual forces of creation-destruction.²⁴⁹ For its own

vota suos habuere deos; nam mixta duorum corpora iunguntur, faciesque inducitur illis una. velut, si quis conducatur cortice ramos, crescendo iungi pariterque adolescere cernit, sic ubi complexu coierunt membra tenaci, nec duo sunt et forma duplex, nec femina dici nec puer ut possit, neutrumque et utrumque videntur.

Id. at 204. Worth noting in this setting is that Hermes, Hermaphroditus's father, is often represented as carrying a wand (see, for example, Giambologna's *Mercury* (c. 1580), a bronze statue housed in the Bargello Museum in Florence), while Aphrodite, Hermaphroditus's mother, is often represented in a shell (see, for example, Sandro Botecelli's *The Birth of Venus* (c. 1486), a painting in the Uffizi Gallery in Florence). Thanks to Courtney Cahill for the reminder about the representations of Hermes and Aphrodite and to Karl Whittington for the selection of the images. For a different myth of "man-woman," see PLATO, *Symposium*, in PLATO, *LYSIS, SYMPOSIUM, GORGIAS* 73, 133–45 (Jeffrey Henderson ed., W.R.M. Lamb trans., Harvard Univ. Press 1925) (c. 360 B.C.E.).

²⁴⁸ The religious and spiritual dimensions of this two-in-one-flesh union ideal should be familiar. See *Genesis* 1:27 (King James) ("So God created man in his *own* image, in the image of God created he him; male and female created he them."); DeVun, *supra* note 245, at 212 (referring to a "hermaphroditic *adam* and, by extension, a hermaphroditic creator," while noting that this reading was "repeatedly denounced by Christian theologians," the need for which "may indicate the persistence of such an interpretation"); *id.* ("The production of Eve from Adam's rib may also have suggested the embodiment of the female within the male at the moment of creation . . ."); see also *Mark* 10:8 (King James) ("[A]nd they twain shall be one flesh: so then they are no more twain, but one flesh."). These ideas made their way into briefs filed in *Obergefell*, see, e.g., Brief Amicus Curiae of Public Advocate of the U.S. et al. in Support of Respondents at 36, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), though sometimes ostensibly stripped of their religious dimensions, see, e.g., Brief of Amici Curiae 47 Scholars in Support of Respondents & Affirmance at 4, 7–8, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574); Brief of Amici Curiae 100 Scholars of Marriage in Support of Respondents at 4–6, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574); Brief of Amicus Curiae Ryan T. Anderson, Ph.D. in Support of Respondents at 2, 4–5, 7–8, 11, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574); *supra* note 244. For a study critically engaging the idea of "one-flesh union" from a liberal direction, see NICHOLAS C. BAMFORTH & DAVID A.J. RICHARDS, *PATRIARCHAL RELIGION, SEXUALITY, AND GENDER* 228–78 (2008).

²⁴⁹ Cf. Sigmund Freud, *Analysis Terminable and Interminable* (1937) ("[O]ur two primal instincts, *Eros* and *destructiveness*, the first of which endeavors to combine what exists into ever greater unities, while the second endeavors to dissolve those combinations and to destroy the structures to which they have given rise."), *reprinted in* 23 *THE*

rhetorical purposes, the dissent cleaves these contrasting energies and drives them into different—and opposing—hermaphroditic forms.²⁵⁰ Thus, one hermaphrodite, reflected in heterosexual coital union, and coitus in cross-sex marriage above all, is in the affirmative, an elemental force of creativity. Generative, this hermaphrodite is the ordinary biological condition for human procreation, hence biological, hence social, life, without which “neither civilization nor progress” would exist.²⁵¹ By contrast, the other hermaphrodite found in the dissent, represented by *Obergefell*, is in the negative, an elemental force of destruction. Degenerative, this hermaphrodite’s male-female combination turns not inward toward rebirth but outward, monstrously, toward the nullification of the social life and social worlds that its coital twin has formed through eons of concerted effort, threatening to release forces whose operation can throw social, including legal and political life, headlong past constitutional disruption into chaos, anomie, violence, social disorder, war of all against all, the likes of which have not been seen on U.S. soil since the Civil War.²⁵²

Curiously, while the Chief Justice’s dissent noticeably figures *Obergefell*-the-hermaphrodite as a destructive force, its dangers, as reflected by the dissent, are not exhausted by its negative powers. It is true that the dissent is concerned to the level of a trauma with how *Obergefell*-the-hermaphrodite unmakes heterosexual men as both heterosexuals and as men, but another look at the opinion indicates that the trauma heterosexual men endure—of being unmade in terms of their sexuality and their gender—is both widened and deepened by what *Obergefell*-the-hermaphrodite does with these men after they have been stripped of their heterosexuality and manhood through castration and forced sex.

To see what that larger reconstruction project looks like, and who (or what) *Obergefell*-the-hermaphrodite makes heterosexual men into after their

STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 31, at 209, 246.

²⁵⁰ These forms have histories. For aspects of them, in which “[t]he androgynous ideal suggested a harmonious transcendence of the sexed body,” while “many dreams of divine androgyny were also shadowed by the phantom of monstrous hermaphroditism,” see GILBERT, *supra* note 245, at 19–20. More on “monstrous hermaphroditism” is in *id.* at 19–25.

²⁵¹ See *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)); see also *id.* at 2601 (majority opinion) (quoting *Maynard*, 125 U.S. at 211).

²⁵² On the monstrousness of *Obergefell*-the-hermaphrodite as hermaphrodite, consider *supra* note 250. See also, e.g., LORRAINE DASTON & KATHARINE PARK, *WONDERS AND THE ORDER OF NATURE: 1150–1750*, at 173–214 (1998); GREENBERG, *INTERSEXUALITY AND THE LAW*, *supra* note 239, at 11 (quoting CHRISTOPHER J. DEWHURST & RONALD R. GORDON, *THE INTERSEXUAL DISORDERS*, at vii (1969)); KATHLEEN P. LONG, *HERMAPHRODITES IN RENAISSANCE EUROPE 19–27*, 215–35 (2006); Lorraine Daston & Katharine Park, *The Hermaphrodite and the Orders of Nature: Sexual Ambiguity in Early Modern France*, 1 *GLQ* 419, 423 (1995).

de-heterosexualization and their un-manning, it is useful to recognize that, in keeping with ages-old stories of the hermaphrodite as possessed of alchemical powers of “metamorphoses” or “transmutation,” when the dissent discusses heterosexual coital union, it credits it with the “natural” consequences of procreation: the children born of this union are born in their parents’ image.²⁵³ Translated from biological into phantasmatic terms, the dissent thus figuratively maps the hermaphrodite’s creative powers as involving the powers of not merely sexual reproduction but self-reproduction. If so, when *Obergefell*-the-hermaphrodite’s sexuality expresses itself as the sexual mastery of heterosexual men, these men are the hermaphrodite’s reproductive putty who, once undone as who they once were, may be remade into hermaphrodites themselves.

The larger stakes of this transformation come into view through an apprehension of the multiple and complex subject positions available to *Obergefell*-the-hermaphrodite as it sexually masters heterosexual men. Recall, to start, the Chief Justice’s dissent’s own normative hermaphroditic figure: the union of male and female in heterosexual union.²⁵⁴ Contemplating this conjunction, *Obergefell*-the-hermaphrodite may be imagined to occupy a heterosexualized subject position when it sexually masters heterosexual men. This position could be inflected by an emphasis on the hermaphroditic male who engages (as, say, the heterosexual men in the *Obergefell* majority do) in a mastery of heterosexual male brothers in a way that is readily figured as an act of erotic treason, which, if inexplicable in other ways, may draw into doubt the sexual identity of its perpetrator.²⁵⁵ Doing this, the heterosexualized subject position of sexual mastery that *Obergefell*-the-hermaphrodite works is just as easily shifted to an emphasis on the hermaphroditic female, an upstream version of what the dissent sees heterosexual men becoming when they, sexually mastered, are stripped of their heterosexual manhood.²⁵⁶

Other possibilities must be noted. Homosexuality having long been considered a kind of hermaphroditism of the psyche or the soul, *Obergefell*-the-hermaphrodite’s sexual mastery of heterosexual men is readily accomplished from a homosexualized subject position.²⁵⁷ This

²⁵³ The language of “metamorphoses” and “transmutation” is from DeVun, *supra* note 245, at 194. For the relevant underlying discussion in the dissent, see *Obergefell*, 135 S. Ct. at 2612–13 (Roberts, C.J., dissenting).

²⁵⁴ See *Obergefell*, 135 S. Ct. at 2612–13 (Roberts, C.J., dissenting).

²⁵⁵ Leah DeVun draws attention to the views of the author of *De Secretis Mulierum* who believed “that while a hermaphrodite participates in both male and female natures, he should always be called ‘male’ simply because the male is the worthier sex.” DeVun, *supra* note 245, at 197 (citing PSEUDO-ALBERTUS MAGNUS, WOMEN’S SECRETS: A TRANSLATION OF PSEUDO-ALBERTUS MAGNUS’S *DE SECRETIS MULIERUM* WITH COMMENTARIES 116 (Helen Rodnite Lemay ed. & trans., 1992)).

²⁵⁶ See *supra* notes 216–17 and accompanying text.

²⁵⁷ On homosexuality as psychic, or actually “psychical,” hermaphroditism, see, for example, FREUD, THREE ESSAYS, *supra* note 26, at 141–45. On homosexuality as “hermaphroditism of the soul,” see 1 FOUCAULT, *supra* note 123, at 43.

homosexualized subject position could obviously be that of the male homosexual (whose male-male erotic attractions directed at heterosexual men, as the apotheoses of manhood, may manifest through what Leo Bersani has called a “love of the cock,”²⁵⁸ expressed through castration or forced sodomy). Or this homosexualized subject position could be held by *Obergefell*-the-hermaphrodite as a lesbian woman (who, consistent with certain conventional myths, might like, if not to be made love to by heterosexual men, then anyway to castrate or sodomize them, making them into lady-loved women).²⁵⁹

These binary sexuality and gender subject positions are also subject to being combined in ways that appropriate elements of each, indeed all of them, in which case it would not exactly be a homosexual or a heterosexual *Obergefell*-the-hermaphrodite who masters heterosexual men, but a bisexual *Obergefell*-the-hermaphrodite that does.²⁶⁰ In this case, *Obergefell*-the-hermaphrodite’s bisexuality could be, but need not be, in the form of either a bisexual male or a bisexual female. Alternatively, it could be in the form of a bi-sexualized and bi-gendered man-woman who castrates and forcibly sodomizes heterosexual men with the bodily appurtenances that are available to it.

These prospects bring still others into view. To the extent that *Obergefell*-the-hermaphrodite operates sexually to master heterosexual men in a bi-sexualized and bi-gendered modality, it might be thought of not as an individual but rather as a multiple *Obergefell*-the-hermaphrodite that does what the dissent dreams is being done to heterosexual men. In this sense, the emphasis would be on the plural, the poly, form—the “they”—that the hermaphrodite can take on and in its nature is . . . or are.²⁶¹ And if the

²⁵⁸ BERSANI, HOMOS, *supra* note 18, at 103. In the present setting, it is worth observing a bit of the context for Bersani’s use of the expression:

If it is time to sing the praise of the penis once again, it is not only because a fundamental reason for a gay man’s willingness to identify his desires as homosexual is love of the cock (an acknowledgment profoundly incorrect and especially unpopular with many of our feminist allies), but also because it was perhaps in early play with that much-shamed organ that we learned about the *rhythms* of power, and we were or should have been initiated into the biological connection between male sexuality and surrender or passivity—a connection that men have been remarkably successful in persuading women to consider nonexistent.

Id.

²⁵⁹ Judith Butler speaks of “the phallic lesbian as potentially castrating” in JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 55 (Routledge Classics ed. 2011). See also RENÉE C. HOOGLAND, *Basic Instinct: The Lesbian Spectre as Castrating Agent*, in LESBIAN CONFIGURATIONS 24 (Columbia Univ. Press 1997).

²⁶⁰ Terms like “ambisexual,” “omnisexual,” “pansexual,” or “polysexual” might be as or more aptly used in this setting. See *infra* note 263. “Bisexual” is relied on at this moment in the text because of its present-day familiarity.

²⁶¹ This may provide an unexpected angle of vision on the Chief Justice’s dissent’s discussion of polygamy. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621–22 (2015) (Roberts, C.J., dissenting). Thanks to Kyle Serrott for the association.

recursive nature of the Chief Justice's dissent's dreams about sexual mastery is recalled,²⁶² it is easily imagined that and how *Obergefell*-the-hermaphrodite could occupy all of these various subject positions—including the positions as multiply constituted subjects—in different combinations, some of them or all of them at once, when sexually lording itself over heterosexual men. And if all these sexual and gender combinations may be in play at the same time, the dualistic nature of the hermaphrodite suggests it might also be the case that none of them would be.²⁶³ In that circumstance, *Obergefell*-the-hermaphrodite would best be understood as representing forces that rise above, without being at all reducible to, present-day conventions of sexuality and gender.

There are various things that this final prospect could mean. Perhaps the most accessible way to think about them is to imagine that *Obergefell*-the-hermaphrodite's sexual mastery of heterosexual men drives against the formation and security of heterosexual male sexualized and gendered egos, returning the objects of its sexual predations to what, in a psycho-sexual sense, is an infantile state of sexuality and gender. On this view, *Obergefell*-the-hermaphrodite's sexual mastery of heterosexual men would ultimately entail their transmutation into sexual subjects—hermaphrodites—who are polymorphously, even polymorphingly, perverse.²⁶⁴ Their sexuality and gender identities may in this sense be thought of as having been fully queered: post-identitarian, post-sexuality, and post-gender in their forms, forms in which sexuality and gender identifications, as well as sexuality- and gender-based eroticism, press away from their conventional associations with sex and desire while moving toward what Michael Foucault referred to as “bodies and pleasures,” in ways that are wildly fluid, sprightly, trickstery, and intensely perverse.²⁶⁵

²⁶² See *supra* Part III.F.

²⁶³ As Leah DeVun observes, “hermaphrodites were a source of confusion and even suspicion to their contemporaries, necessitating their division into binary gender categories of male and female, and conveying the extent to which *neitherness* and *bothness* had the potential to threaten social and natural norms.” DeVun, *supra* note 245, at 198. Along a wholly different track, writing about the idea of “polysexuality,” Francois Peraldi observes that the term “points toward the ‘real of sex’ which still lies untouched, unthought of, but [is] perhaps alluded to by Freud when he suggested that libido had no gender.” Francois Peraldi, *Introduction* to POLYSEXUALITY (Francois Peraldi ed., Thomas Gora et al. trans., 1981).

²⁶⁴ If so, this may shed a distinctive light on some of the traditional opposition to extending federal anti-sex-discrimination protections to gender nonconforming individuals discussed, among other places, in Julie A. Greenberg, *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149 (2002). It certainly illuminates the observation that “[t]he sex-gender binary in Western society, particularly American society, is itself an act of violence upon human diversity.” Stone, *supra* note 239, at 357.

²⁶⁵ The language of “bodies and pleasures” is from 1 FOUCAULT, *supra* note 123, at 157. Guy Hocquenghem gives voice to a version of the sensibility this way:

The thought that *Obergefell*-the-hermaphrodite's sexual mastery of heterosexual men may make children out of them, reproducing them as infant-like in their erotic compositions, casts into relief two of the dissent's deep identifications.²⁶⁶ The dissent's persistent identifications with the heterosexual men who suffer *Obergefell*-the-hermaphrodite's sexual predations sit in a beautiful relation to its identifications with the children, including the infants, whom the coital hermaphrodite—the male-female heterosexual sexual union—creates. It is not for nothing that when the dissent refers to these children, they—like the formerly heterosexual men whom *Obergefell*-the-hermaphrodite has rendered infant-like—have neither sexual nor gender

Wanting the fundamental freedom to enter into these revolutionary practices entails our escaping from the limits of our own “self.” We must turn the “subject” within ourselves upside-down; escape from the sedentary, from the “civilized state” and cross the spaces of a limitless body; live in the willful mobility beyond sexuality, beyond the territory and repertory of normality. . . .

. . . .
 What we want, what we desire is to kick in the façade over sexuality and its representations so that we might discover just what our living body is.

. . . .
 We want to be able to exercise each of our vital functions experiencing their full complement of pleasure.

. . . .
 We want to be rid of sexual segregation. We want to be rid of the categories of man and woman, gay and straight, possessor and possessed, greater and lesser, master and slave. We want instead to be transsexual, autonomous, mobile and multiple human beings with varying differences who can interchange desires, gratifications, ecstasies, and tender emotions without referring back to tables of surplus value or power structures that aren't already in the rules of the game.

Guy Hocquenghem [sic], *To Destroy Sexuality*, in POLYSEXUALITY, *supra* note 263, at 260, 261–64. Practically tracing some of the relationship between polymorphous perversity and early what-would-now-be-known-as “queer” activism, Terry Evans observes, with DENNIS ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* (Penguin Books 1973) (1971) in mind, that: “Altman argues that a sexually liberated society would be based on a belief in a neo-Freudian polymorphous perversity where sexual identities would become obsolete and the nuclear family would be one of many ways in which social and community life would be organised.” Terry Evans, *Bisexuality: Negotiating Lives Between Two Cultures*, 3 J. BISEXUALITY 91, 98 (2003). Producing and writing within a different tradition, Andrea Dworkin expressed not wholly dissimilar dreams: “If human beings are multisexed, then all forms of sexual interaction which are directly rooted in the multisexual nature of people must be part of the fabric of human life, accepted into the lexicon of human possibility, integrated into the forms of human community.” DWORKIN, *supra* note 115, at 183.

²⁶⁶ As an aside, this may be tallied as one point at which this reading of the Chief Justice's dissent may be thought to coincide with a certain return to Jerome Frank's psychoanalytic jurisprudence, and, as Charles Barzun describes it, its “most controversial aspect”: its view “that the longing for legal certainty stems from an unconscious desire in judges and laypeople to maintain the sense of security that a person's father provides in childhood.” Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFF. L. REV. 1127, 1130 (2010); *see also, e.g.*, FRANK, *supra* note 16, at 18, 235.

identifications.²⁶⁷ Their sexualities and their genders are held totally in abeyance. This is consistent with the sense, from aught that appears in the dissent, that these children are in the tender, formative moments of their development. Indeed, it is their developmental needs that constitute the basis for affirming marriage as the union of one man to one woman as husband and wife: Marriage, on this view, is the means by which children are to be provided stable, supportive, and nurturing environments in which to grow up.²⁶⁸ It is marriage that gives them the blessings of parents and a family life at a time when they are weak, vulnerable, and largely, if not entirely, defenseless against the world, hence in need of, and in their innocence deserving of, the protections that heterosexual marriage—and also the dissent—provides them. If the needs of children are central to the dissent's historical and traditional account of the purposes of marriage, at no moment may children be more vulnerable in their basic needs than as infants, when they are wholly dependent upon their parents for everything.

The cross-tabbed identifications of the Chief Justice's dissent with heterosexual men and with the offspring of heterosexual sexual union are best read in light of one another. They are not disparate conceptual points, but through the dissent's fantasy structure are linked in what may be thought of as a relation of cause and effect. Reconstructed, their relation looks like this: *Obergefell*, a hermaphroditic force, as *Obergefell*-the-hermaphrodite, which sexually dominates heterosexual men by means of castration and forced sodomy, strips them of their heterosexuality and their manhood while transmuted them into hermaphrodites with infant-like erotic dispositions. In psychologized terms, the psychic disorganization of heterosexual men and their reorganization in a more or less permanently disorganized state of infantile eroticism is a sign—a very powerful sign, perhaps the most powerful sign yet—of the trauma that the dissent's own sexual fantasies have hurled it into.

Out of this constellation of points emerge some possible explanations for certain cultural-discursive puzzles that have seemed mysterious to many for a long time—puzzles that surface in the dissent in ways that give clues to their possible resolution. How could allowing same-sex marriage be a threat to heterosexual marriage and to the children born from it?²⁶⁹ Once marriage equality is imagined as phantasmatically achieved by the sexual mastery of heterosexual men, who are both castrated and forcibly sodomized in the process, a process that thus de-heterosexualizes and unmans them, how could

²⁶⁷ For references to “child” or “children” without any discernible sexual or gender identification, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613–14, 2619–20, 2622, 2626 (2015) (Roberts, C.J., dissenting).

²⁶⁸ *Id.* at 2613.

²⁶⁹ A variation on the puzzle is noted and engaged by *Obergefell* as without “foundation.” *Id.* at 2606–07. Elsewhere, “the assertion that straight people will no longer marry because gay people do” has once again recently been dismissed as “ludicrous.” Seidman, *supra* note 12, at 141.

they possibly fulfill their husbandly duties? How could these ruined non-heterosexual non-men sexually perform their spousal obligations and father children? Indeed, if marriage equality reflects the de-heterosexualization and unmaning of heterosexual men in a way that constitutes a trauma that positively transforms them into an infantile, erotic state, how could they themselves, cooing and ah-ah-ing in their somatic pleasures, possibly undertake to perform what, consistent with the historical and traditional definition of marriage and marital intimacy, is an act of male-identified dominance? To the extent that erstwhile heterosexual men begin to reconstitute themselves as heterosexuals and as men, *Obergefell*-the-hermaphrodite is waiting, standing guard, ready to re-slay them through its sexual predations, which, if they do not exactly aim to lock heterosexual men into weak and vulnerable sexual conditions, do anyway intend to keep them psychologically organized, really: disorganized, this way. But whatever the precise mechanisms, within the operation of the dissent's fantasies of hermaphroditic sexual predation, if marriage equality entails the sexual domination of heterosexual men, it must be the end of marriage, and of children, who will thus never come into being through male-dominated heterosexual coitus, and who are, symbolically anyway, themselves thus destroyed. No wonder that all this can manifest, as the dissent does, in apocalyptic tones. What *Obergefell*-the-hermaphrodite promises is not only the end of heterosexual men themselves, but also in consequence, the orderly function of a male-dominant heterosexuality. This, in turn, promises the end of marriage, of children, and—by extension—the collapse of social life and the social world, including its institutions, including the Constitution, including the Court, that have been built upon it. Everything is to be reconfigured within the context of a new sexuality and gender order that *Obergefell*-the-hermaphrodite—with its domination not just of the Constitution, of heterosexual men, but of all recorded and maybe even unrecorded world history—is to bring about.²⁷⁰

Read this way, Chief Justice Roberts's *Obergefell* dissent reverberates with, while uncannily echoing aspects of, one of Freud's most famous studies—a study, as it happens, of infantile neuroses popularly referred to as the “Wolf Man” case.²⁷¹ In this case, famously, Freud's patient, the Wolf Man, bears witness as an infant boy to what Freud refers to as a “primal scene” in which the infant's parents are engaged in “a coitus *a tergo* [from behind], three times repeated.”²⁷² The boy, who both does and who does not understand what

²⁷⁰ This line of vision underscores some of the potential stakes of the important work on intersexuality and marriage equality under law that has already been undertaken. See, e.g., GREENBERG, INTERSEXUALITY AND THE LAW, *supra* note 239, at 53–64; Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 402–14 (2004).

²⁷¹ Freud, *Wolf Man*, *supra* note 1.

²⁷² *Id.* at 36–39 (alteration in original) (offering a description of the scene that the Wolf Man boy bears witness to). The boy's age is “established as being about one and a half

is happening between his parents, is traumatized by the sight, which subsequently shapes his conscious heterosexual and unconscious homosexual sexual lives.²⁷³ On the unconscious side of the ledger, the primal scene inspires fantasies of homosexualized castration and violent sodomy at his father's hands, fantasies of homosexuality that have detectable gender components: the young boy being "used by his father like a woman—like his mother in the primal scene."²⁷⁴ Seeing and understanding his parents' conjunction, and complexly identifying and disidentifying with the sexuality that he sees taking place, the boy experiences his parents' male-female union in that moment as the basis for his own traumatic negation.²⁷⁵ He—an infant—is irrelevant, non-existent to his parents who are, in that moment, lost in sex *more ferarum*, translated: in the manner of beasts.²⁷⁶ At some point in this experience, the infant boy is so overwhelmed by the scene unfolding before

years." *Id.* at 36. *But see id.* at n.1. Reference to the scene as the "primal scene" in its "earliest published use" is in *id.* at 39 & n.1. On the coitus being both "*a tergo*" and thrice repeated, see *id.* at 37 & n.5. A vital clarification is in Freud:

I should myself be glad to know whether the primal scene in my present patient's case was a phantasy or a real experience; but, taking other similar cases into account, I must admit that the answer to this question is not in fact a matter of very great importance. These scenes of observing parental intercourse, of being seduced in childhood, and of being threatened with castration are unquestionably an inherited endowment, a phylogenetic heritage, but they may just as easily be acquired by personal experience.

Id. at 97. As Freud elsewhere observes: "It is also a matter of indifference in this connection whether we choose to regard it as a primal scene or as a primal phantasy." *Id.* at 120 n.1 (emphasis omitted); *see also, e.g., id.* at 39, 48–60, 67 n.1, 80–81, 95, 103 n.1, 121 n.1. The context within which Freud ventures his methodological "indifference" to the materiality of the primal scene may help make the remark more intelligible, but it is, finally, only one point of view, and a not unproblematic one at that. *See* MASSON, *supra* note 203, at xvii; K.R. Eissler, *Comments on Erroneous Interpretations of Freud's Seduction Theory*, 41 J. AM. PSYCHOANALYTIC ASS'N 571, 574–82 (1993); *supra* note 203.

²⁷³ On the Wolf Man boy's understanding, and some of what Freud means by it, including the difficulties with the notion, see Freud, *Wolf Man*, *supra* note 1, at 37–39, 37 n.6, 45 n.1, 120 & n.1, 121 n.1. The traumatic effects of the primal scene, subject to clarifications and qualifications, see, for example, *id.* at 43–45, are noted in *id.* at 39 *et seq.* On the primal scene's influences on the boy's subsequent sexual development, see, for example, *id.* at 40–47, 55–58, 63–65, 70–71, 78, 109.

²⁷⁴ *Id.* at 64; *see also, e.g., id.* at 41–47. An element of incest is thus attendant upon this homosexual fantasy—not, it should be noted, the only indication of incestuous relations in the case. *See, e.g., id.* at 19–21. An exploration of the incest taboo that explores and weaves some of these themes together in different ways is in Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005).

²⁷⁵ The notion of the infant's experience of a traumatic negation in this sentence and the next is a re-reading of the elements of Freud's account.

²⁷⁶ The use of "*more ferarum*" and its slightly different translation as "in the fashion of animals" are in Freud, *Wolf Man*, *supra* note 1, at 41; *see also id.* at 57.

him that he finally undertakes to “interrupt[] his parents’ intercourse.”²⁷⁷ He accomplishes this “by passing a stool.”²⁷⁸ The release of his bowels—a sign of his own erotic excitement—gives the boy “an excuse for screaming.”²⁷⁹ The screaming brings the sexual scene to a halt.²⁸⁰

Beyond the ways in which *Obergefell*-the-hermaphrodite, this male-female conjunction, like the male-female union in the Wolf Man study, produces a trauma that sends the dissent to an infantile psychic space, and beyond the dissent’s fantasies of castration and forced sodomy, which include the pleasures of homosexuality and femininity that ring inside the Chief Justice’s dissent’s account—even beyond all this, there is a sense in which *Obergefell*-the-hermaphrodite’s sexual predations become at some point obviously too much for the dissent to bear. And so it is that the dissent delivers itself as an emotional eruption, its writing, its pulse, at times so impassioned and fevered it can only be heard as a kind of screaming. The desired effect of this vocalization, of course, is to get what *Obergefell*-the-hermaphrodite is doing to stop. Tragically, unlike the primal scene recounted by Freud, in which the infant boy’s screaming brings his parents’ coitus to a halt, the Chief Justice’s dissent’s protestations fall on deaf ears. *Obergefell* stays its course. The dissent’s fantasy-nightmare of heterosexual men being subjected to a force of hermaphroditic sexual domination, its own primal sexual scene, ceaselessly goes on.

Here, then, is an account of the dissent’s very plainly troubled sense that *Obergefell* produces a stunning—and shocking—experience of a disorienting and dizzying immediacy, an experience of “the heady days of the here and now.”²⁸¹ It also explains the dissent’s equally plainly troubled sense that the advent of *Obergefell* draws with it the end of an ages-old, known, and largely settled, if also a hierarchical, world of sexuality and gender. The abrupt negation of this world has suddenly been replaced with a world in which new forms of sexuality and gender, frighteningly complex, are ascendant.²⁸²

²⁷⁷ *Id.* at 80–81. Freud indicates the generality of this method of interrupting “sexual intercourse between parents” based on other cases that he encountered. *Id.* at 59.

²⁷⁸ *Id.* at 80.

²⁷⁹ Freud maintains that “there can be no question of how we are to regard” the boy’s passing a stool: “It is a sign of a state of excitement of the anal zone (in the widest sense). . . . The fact that our little boy passed a stool as a sign of his sexual excitement is to be regarded as a characteristic of his congenital sexual constitution.” *Id.* at 81. That the act “gave [the boy] an excuse for screaming” is indicated by *id.* at 80. Freud’s assessment continues with the confident observation that “a grown-up man in the same circumstances would feel an erection.” *Id.* at 81.

²⁸⁰ This is the implication of the “interruption” of the intercourse. *See id.* at 37–38, 80.

²⁸¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

²⁸² Justice Alito’s *Obergefell* dissent expresses its concerns with *Obergefell* in a different fashion, marshaling imagery indicating an inversion of homosexuality’s traditional “closet.” Now emptied of its erstwhile inhabitants, the closet that *Obergefell* constructs is apparently to be populated by “those who oppose same-sex marriage” as a function of their “rights of conscience.” *See id.* at 2642 (Alito, J., dissenting); *id.* (“I

Obergefell thus represents the traumatically felt loss of an old rationalizing sexual and gender order, certainly for heterosexual men, some of whom—as reflected by the Chief Justice’s dissent—are such novitiates that their own profound sense of sexuality-based and gender-based vulnerability erupts in infant-like screaming. “No!” to these new ways of life, of being, of living, with their new configurations and ways of identifying oneself or themselves in sexuality and gender terms, as well as in friendship and in the intimate and loving relationships that *Obergefell* portends. The toppling of an old constitutional, cultural, and symbolic order in which heterosexual men were—or anyway, felt—secure in their place atop a male-dominant hierarchy, a perch from which they ruled over women, over children, and homosexuals, over the institutions of private and public life, including family, democracy, and the State, has somehow been brought about, and by, no less, an opinion written by a (heterosexual) man and joined by (presumably) heterosexual women and a man, who govern an institution that is supposed to preserve—not radically change—the social order. This is destruction, this is chaos, sexuality and gender and the forms of power that they reflect circulating more complexly and contingently than anything that traditional marriage and the laws built up around it have ever supposed. Or allowed.

Against this, there is more than defiance in the question that the Chief Justice’s dissent insistently asks of the majority opinion in the case, challenging its decision to upend what is seen as millennia of well-settled history and tradition: “Just who do we think we are?”²⁸³ This plainly defiant and very angry question also has a detectably sad and tragic ring to it, a ring of crying disorientation, as though after *Obergefell*, the dissent no longer knows what its place or identity is.²⁸⁴ Outside the dissent’s own perspective, it is hard to recognize its anguish and not feel something by way of response. How is someone steeped in the old ways to know who or what one is when straight men are no longer straight men, when straight is gay, when heterosexual procreative sex is the same as sodomitical relations, when sodomy is the basis for marital intimacy, when marriage is not-marriage, when freedom is domination, when liberty is war—when, in short, up is down. Perhaps as bad as anything else, particularly for the Supreme Court, how is someone who is steeped in the old ways that the Constitution has long protected to know who or what one is when the Constitution is not the Constitution anymore?

It is very easy in the age of *Obergefell* to figure the dissent’s dream-like tally of the majority opinion in normative and highly critical terms, critical here being meant in an entirely negative sense. Far more challenging, if also

assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes . . .”). If true, it is certainly a reminder, to borrow from Justice Scalia’s dissent, of their “impotence” in the face of what *Obergefell* achieves. *Id.* at 2631 (Scalia, J., dissenting); see also *supra* notes 138–46 and accompanying text.

²⁸³ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

²⁸⁴ Toni Massaro describes this question as “bristling with indignation.” Massaro, *supra* note 3, at 339.

more illuminating, is to apprehend how the dissent's plainly pained and traumatized reactions to *Obergefell* are, finally, reflections of psychological sensibilities that, especially in their lack of rationality and proportion, reflect larger cultural fantasies that, like it, view *Obergefell* as a sun-bright sign of the decline and fall of American civilization. This, of course, could easily be the very fall that Justice Scalia's separate dissent seems to have in mind and senses must come to pass as a result of the "o'erweening pride" demonstrated by the Court's opinion in the case for daring to upend history and tradition while lifting the Court, Ruler-like, over everything that was known, lived, and experienced before, to rule all that it now surveys without any warrant in the Constitution or the Court's precedents.²⁸⁵ But in agony—think of any of the great passions—there can also be great beauty.

Understanding the Chief Justice's dissent's rhetoric to reflect wild and fevered dreaming that, being pure fantasy, is wholly unreal, it is nevertheless the case that in fantasies hard truths may be found.²⁸⁶ In this case, and in this sense, the Chief Justice's dissent's dreaming is exactly right: The meaning of heterosexual manhood, indeed, the meanings of sexuality and gender, are not at all the same after *Obergefell* as they were before it. No one who lives under its rule, no one who lives under the Constitution it constructs, can be unchanged by this decision. It is much easier to condemn the Chief Justice's dissent than to take the challenge of its dreaming seriously, and marveling at it, to ask—as everyone ought to—the very question that the dissent directs to the Court, while inviting its audience to consider: "Just who do we think we are?"²⁸⁷

²⁸⁵ See *supra* text accompanying notes 144–46.

²⁸⁶ As Herbert Marcuse puts it: "Uncompromising adherence to the strict truth value of imagination comprehends reality more fully." MARCUSE, *supra* note 18, at 149. Or, as André Breton more dreamily remarks: "Imagination alone offers me some intimation of what *can be . . .*." ANDRÉ BRETON, *MANIFESTOES OF SURREALISM* 5 (Richard Seaver & Helen R. Lane trans., Univ. of Mich. Press 1969) (1962).

²⁸⁷ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).