

2022

Love is Love: The Fundamental Right to Love, Marriage, and Obergefell v. Hodges

Reginald Oh

Cleveland-Marshall College of Law, Cleveland State University, r.oh@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Fourteenth Amendment Commons](#), [Law and Gender Commons](#), [Sexuality and the Law Commons](#), and the [Supreme Court of the United States Commons](#)

How does access to this work benefit you? Let us know!

Repository Citation

Oh, Reginald, "Love is Love: The Fundamental Right to Love, Marriage, and Obergefell v. Hodges" (2022). *Law Faculty Articles and Essays*. 1237.

https://engagedscholarship.csuohio.edu/fac_articles/1237

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

LOVE IS LOVE: THE FUNDAMENTAL RIGHT TO LOVE, MARRIAGE, AND *OBERGEFELL V. HODGES*

Reginald Oh *

*“He who loves has discovered the clue to the meaning of
ultimate reality.”*¹

*“[U]nconditional love will have the final word in reality.”*²

Martin Luther King, Jr.

INTRODUCTION

Fourteenth Amendment substantive due process fundamental rights doctrine is about love. It is, at least, based on a close reading of Justice Anthony Kennedy’s majority opinion in *Obergefell v. Hodges*,³ the case in which the Supreme Court held that same-sex marriage is a fundamental right of individual autonomy and dignity.

This Article will argue that, as a descriptive matter, *Obergefell* is best understood as an opinion about love, not just marriage. Thus, when Kennedy writes about the “transcendent purposes of marriage,”⁴ implicit within that statement is the assumption that marriage’s transcendence flows from love. Similarly, when Kennedy asserts that “marriage is essential to our most profound hopes and aspirations,”⁵ implicit is the assumption that it is *love* which makes marriage essential for fulfilling profound hopes and aspirations. And in declaring that choices regarding marriage are “inherent in the concept of individual autonomy,”⁶ Kennedy

*Professor of Law, Cleveland-Marshall College of Law, Cleveland State University.

1. MARTIN LUTHER KING JR., STRENGTH TO LOVE 152 (2010).

2. Martin Luther King Jr., Nobel Prize Acceptance Speech, Oslo, Norway (1964), <https://www.nobelprize.org/prizes/peace/1964/king/acceptance-speech/>.

3. 576 U.S. 644 (2015).

4. *Id.* at 670.

5. *Id.* at 657.

6. *Id.* at 665.

is implicitly declaring that choices about *love* are central to individual autonomy.

Indeed, it is love that helps make sense of Kennedy's opinion. If love is not considered an essential aspect of Kennedy's reasoning, then the opinion is rendered less coherent, emptied of much of its substance, and made vulnerable to critiques from both the right and the left.

From the right, Justice Scalia tears down Kennedy's opinion as completely lacking substance. He derides Kennedy's opinion as consisting of nothing more than "mystical aphorisms" of the kind you would find in a "fortune cookie."⁷ Scalia also asserts that "the opinion's showy profundities are often profoundly incoherent."⁸

From the left, legal scholars criticize Kennedy's opinion for pushing "marital supremacy" and for demeaning non-marital relationships and families.⁹ Scholars, for example, seize on language in the opinion which seems to suggest that people who do not marry "are condemned to live in loneliness,"¹⁰ and argue that Kennedy inappropriately valorizes marriage as the only route to interpersonal connection and happiness.¹¹ In doing so, Professors Leonore Carpenter and David Cohen argue that Kennedy is "shaming those who do not participate" in marriage.¹²

Similarly, Professor Melissa Murray surmises that, for Kennedy, "life outside of marriage is not only undignified, it is a dismal affair."¹³ As a substantive matter, Murray suggests that *Obergefell's* valorization of marriage puts the rights of unmarried couples and families at risk.¹⁴ She warns that "*Obergefell's* pro-marriage impulse . . . demeans and challenges the status of nonmarriage. More troublingly, it calls into question the promise of constitutional protection for nonmarriage. . . ."¹⁵

I suggest that these criticisms are justified, if Kennedy's opinion is understood to be just and only "a love letter to *marriage* itself."¹⁶ However, if *Obergefell* is understood to be about the importance and centrality of *love* to individual autonomy, self-definition, and the pursuit of happiness, then the criticisms fall to the wayside.

7. *Id.* at 719 n.22 (Scalia, J., dissenting).

8. *Id.* at 719.

9. Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEORGETOWN L.J. ONLINE 124 (2015).

10. *Obergefell*, 575 U.S. at 681.

11. *See* Carpenter & Cohen, *supra* note 9, at 127.

12. *Id.*

13. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 2016 CAL. L. REV. 1207, 1215 (2016).

14. *See id.* at 1210.

15. *Id.*

16. Carpenter & Cohen, *supra* note 9, at 129 (emphasis added).

It is love that is the heart and spirit of *Obergefell*.

Part I of this Article will discuss the concept of love. Part II will examine Justice Kennedy's majority opinion in *Obergefell* and argue that it expresses unconditional love for LGBT people in tone, language, and substance. Part III will argue that, in *Obergefell*, Kennedy's key reasons for concluding that marriage is central to individual autonomy and is therefore a fundamental right under substantive due process, all implicitly invoke love. In fact, the proffered reasons do not make much sense unless love is understood as underlying them. Part IV will discuss some of the implications of understanding *Obergefell* as an opinion about love.

I. LOVE

Love is difficult to define. Words fail to capture its full, multi-faceted essence. What is it exactly? Is love a concept or principle? An ethic or value? A decision? A feeling or emotion?

Definitions of love abound. Merriam-Webster's Dictionary defines love as "strong affection for another arising out of kinship or personal ties."¹⁷ Philosopher Simon May defines love as "the rapture we feel for people . . . that inspire[s] in us the hope of an indestructible grounding for our life."¹⁸ For May, love fulfills the "need to feel at home in the world"¹⁹ in the deepest, most meaningful sense possible. Existential psychologist Erich Fromm defines "mature love" as "*union [with another person] under the condition of preserving one's integrity, one's individuality.*"²⁰ For Fromm, love is not just an emotion but an "*active power in man.*"²¹

A. *The Core Elements of Love*

No matter how love is defined, the various permutations of love share some core elements.²² Four elements are care, respect, understanding, and acceptance.²³ To *care* for a person is to have "active concern for the life and growth of that which we love. Where this active concern is lacking,

17. Love, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/love>.

18. SIMON MAY, LOVE: A HISTORY 6 (2011).

19. *Id.*

20. ERICH FROMM, THE ART OF LOVING 19 (2006) (emphasis in original).

21. *Id.* (emphasis in original).

22. See *id.* at 24. The elements are drawn from Erich Fromm, *supra* note 20, and Jean Vanier, *infra* note 31.

23. See *id.*

there is no love.”²⁴ Active concern for the life and growth of a person is about caring for that person’s happiness and well-being.²⁵

To *respect* someone is “to see a person as he is, to be aware of his unique individuality”²⁶ and to treat that person on his own terms with positive regard and dignity. Respect is about honoring and dignifying a person’s autonomy. Respect must go along with care to prevent love from devolving into a possessive, controlling relationship.²⁷ Care and respect together make love an active concern for the life and growth of a person according to *that person’s terms*.²⁸ In an intimate relationship, mutual care with respect is what preserves the autonomy of each person in the relationship.²⁹

To *understand* a person means to know and be familiar with his or her character, identity, sense of self, desires, needs, and/or point of view.³⁰ To be able to care for another person on her terms, one needs to know and understand what her terms are. Empathy and being able to see from the beloved person’s perspective are necessary to truly understand another person.

To *accept* a person means normalizing the various aspects of a person, including her faults and flaws, her existential human brokenness.³¹ Acceptance is about being nonjudgmental about a person’s identity, personality, or temperament. For example, if a person is quiet and soft-spoken, accepting that person means thinking that her quietness is a normal aspect of herself rather than a glaring flaw that needs to be changed. Respect and acceptance go together. One must first be able to normalize a person’s quiet demeanor before being able to treat that person’s quietness with dignity. In some ways, acceptance is the key to love. It is hard to imagine being able to truly care for, respect and understand another person if one does not accept all aspects of that person.³²

Back to the question that began this part of the Article—what is love? The answer is that, because of its multi-dimensional elements, love cannot

24. *Id.* at 25.

25. See STEPHEN G. POST, UNLIMITED LOVE: ALTRUISM, COMPASSION AND SERVICE 19 (2003).

26. FROMM, *supra* note 20, at 26.

27. *See id.*

28. *Id.* at 27.

29. *See id.*

30. *Id.* Fromm uses the word “knowledge” or “knowing” to describe understanding.

31. See JEAN VANIER, BECOMING HUMAN 29-31 (2008). What I call acceptance, Vanier calls “forgiveness.”

32. *Id.* at 29.

be reduced to a moral principle, value, action, choice, decision, feeling, or emotion. It encompasses all of those and more.

B. *Two Kinds of Love*

With the core elements of love in mind, I turn now to discuss two specific kinds of love: intimate love and universal unconditional love. While theorists also describe other kinds of love such as parental love, this section will focus on the two kinds of love most relevant to my analysis of *Obergefell*.³³

First, there is intimate or romantic love.³⁴ Intimate love can be defined as an interpersonal union between individuals involving a “sexual dimension along with the desire for reciprocity and an actively shared form of life.”³⁵ For existential psychologist Rollo May, intimate love is “union with the partner that is the occasion for human tenderness.”³⁶ Intimate love is not a universal love. It is typically understood as a love shared exclusively by two lovers.³⁷

Second, there is universal unconditional love for all of humanity.³⁸ At its core, universal unconditional love for others is altruistic and other-regarding. In Martin Luther King, Jr.’s words, universal unconditional love “is an overflowing love which seeks nothing in return.”³⁹

Fromm calls universal unconditional love “brotherly love,” which he defines as “the experience of union with all men, of human solidarity, of human at-onement. Brotherly love is based on the experience that we are all one.”⁴⁰ The experience that all of humanity is one means that universal unconditional love is a love of equality, of “love between equals.”⁴¹ Universal unconditional love, unlike intimate love, is the love of inclusion, not exclusion.

A Buddhist term for universal unconditional love is often translated in English as “loving-kindness.” In the Pali language, loving-kindness is

33. FROMM, *supra* note 20, at 36-76 (discussing multiple kinds of love).

34. *Id.* at 49-53.

35. Elke Elisabeth Schmidt, *Are Lovers Ever One? Reconstructing the Union Theory of Love*, 46 *PHILOSOPHIA* 705, 707 (2017).

36. See ROLLO MAY, *LOVE AND WILL* 75 (1969).

37. See FROMM, *supra* note 20, at 49.

38. ACARIYA BUDDHARAKKHITA, *METTA: THE PHILOSOPHY AND PRACTICE OF UNIVERSAL LOVE* v (1989).

39. See Martin Luther King Jr., Speech at Illinois Wesleyan University (1966), <https://www.iwu.edu/mlk/page-5.html>.

40. FROMM, *supra* note 20, at 44.

41. *Id.*

called “metta.”⁴² Metta is layered and multidimensional; it is “a universal, unselfish and all-embracing love” that encompasses “loving-kindness, friendliness, goodwill, benevolence, fellowship, amity, concord, inoffensiveness and non-violence.”⁴³ Metta is an “attitude of love and friendliness . . . which seeks the well-being and happiness of others.”⁴⁴

For Buddhists, Metta is the love of aspiration and social transformation. It can grow “boundless with practice and [overcome] all social, religious, racial, political, and economic barriers.”⁴⁵ In doing so, it can bring the world “concord, peace, and mutual understanding,” thereby promoting “human well-being.”⁴⁶ Similarly, Martin Luther King, Jr. believed that “the way of love” can challenge and overcome “force, coercive tyranny, and bloody violence” for “unarmed love is the most powerful force in the world.”⁴⁷

In the next part, I turn to *Obergefell* and argue that love is key to understanding that decision.

II. *OBERGEFELL* AND UNCONDITIONAL LOVE FOR LGBT PEOPLE

Justice Kennedy’s opinion in *Obergefell* is loving in language, tone, and substance.

The opinion actually mentions the term *love* multiple times and does so with unambiguous approval. The first time that the word love appears in the opinion is in the beginning of the opinion in the statement of facts: “Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They *fell in love* and started a life together, establishing a lasting, committed relation.”⁴⁸ The opinion repeats that line two paragraphs down: “Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, *fell in love*.”⁴⁹

Obergefell starts with love and ends with love. In the last substantive paragraph of the opinion, it declares that “marriage embodies a *love* that may endure even past death.”⁵⁰

42. BUDDHARAKKHITA, *supra* note 38, at v.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. KING, *supra* note 1, at 153.

48. *Obergefell*, 576 U.S. at 658 (emphasis added).

49. *Id.* at 659 (emphasis added).

50. *Id.* at 681 (emphasis added).

In using the language of love, the Court infuses the opinion with a loving tone. To fully appreciate *Obergefell*'s tone, one just needs to read the Court's opinion in the interracial marriage case, *Loving v. Virginia*.⁵¹ The word love never appears in Chief Justice Earl Warren's unanimous opinion. There is no description of the relationship between the Lovings, no discussion about how they met or whether they fell in love. It reads like a typical constitutional law decision, relying on technical language to discuss doctrine.

Not only is *Obergefell* loving in tone, it is loving in substance. The opinion expresses the core elements of love towards LGBT people. First, it expresses *care*. The Court shows an active concern for the life and growth of LGBT partners when it asserts that "[s]ame-sex couples . . . may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."⁵² The Court cares about the happiness and well-being of LGBT couples and wants them to be able to have fulfilling, meaningful lives.

The Court expresses that care with *respect*. It does so, for example, when it expresses disapproval that throughout much of the nation's history, "many persons did not deem homosexuals to have dignity in their distinct identity."⁵³ Instead of disapproving of LGBT identity, the Court in *Obergefell* shows respect and positive regard for it. The Court honors LGBT people and the terms by which they want to live their lives. The Court concludes the opinion with an emphatic statement of respect: "[LGBT partners] ask for equal dignity in the eyes of the law. The Constitution grants them that right."⁵⁴

The Court *understands* LGBT partners and their fight for same-sex marriage. The Court knows how LGBT couples view marriage and refuses to mischaracterize their desire to marry. The Court asserts, "[i]t would *misunderstand* [LGBT] men and women to say they disrespect the idea of marriage."⁵⁵ With genuine understanding, the Court states that, in seeking access to marriage, "their plea is that they do respect [marriage], respect it so deeply that they seek to find its fulfillment for themselves."⁵⁶

Finally, the Court is *accepting* of LGBT people in their full humanity. The Court asserts that same-sex sexual orientation is "a *normal*

51. 388 U.S. 1 (1967).

52. *Obergefell*, 576 U.S. at 670.

53. *Id.* at 660.

54. *Id.* at 681.

55. *Id.* (emphasis added).

56. *Id.*

expression of human sexuality. . . .”⁵⁷ In that statement, the Court is normalizing LGBT sexual orientation. In criticizing American society for having treated LGBT people as criminals and outcasts,⁵⁸ the Court is critical of society for long refusing to accept that there is nothing wrong or abnormal about LGBT people and their sexual identity.

Ultimately, when the Court concludes that opposing same-sex marriage serves only to “disrespect and subordinate” LGBT people, it is implicitly arguing that such opposition is *unloving*, because blocking LGBT couples from marriage is uncaring, disrespectful, and unaccepting based on a misunderstanding of LGBT people and their motivations.⁵⁹ And if blocking access to marriage is unloving, then the decision to grant same-sex couples the right to same-sex marriage is a loving one. *Obergefell* is an expression of unconditional love for LGBT people.⁶⁰

Love is not just the general theme in *Obergefell* as a matter of language and rhetoric, it is also a key concept central to the Court’s fundamental rights doctrinal analysis, as the next part of this Article will demonstrate.

III. *OBERGEFELL*, THE RIGHT TO MARRY, INDIVIDUAL AUTONOMY, AND LOVE

This Part will first lay out Fourteenth Amendment substantive due process fundamental rights doctrine, then discuss marriage and its connection to the right of individual autonomy. Third, it will analyze Kennedy’s six key reasons in *Obergefell* for deeming marriage, including same-sex marriage, a fundamental right of individual autonomy. It will argue that the concept of love underlies and is central to each of the reasons.

A. *The General Right of Individual Autonomy and Dignity*

Under substantive due process, certain rights that are not enumerated in the Bill of Rights are considered implied constitutional rights, and laws infringing on those rights are subject to strict judicial scrutiny. Modern substantive due process doctrine can be traced back to *Griswold v.*

57. *Id.* at 661.

58. *See id.* at 667.

59. *Id.* at 675.

60. If granting LGBT people the constitutional right to same-sex marriage is implicitly an expression of universal unconditional love, then I want to suggest that *Obergefell* can be interpreted as a decision asserting that universal unconditional love should be viewed as a core principle underlying the Fourteenth Amendment. That argument, however, is a topic for another article.

Connecticut, a 1965 decision that established the general right of privacy.⁶¹ In *Griswold*, the Court held that a law banning married couples from using contraceptives violated a specific articulation of the general right of privacy, the right of marital privacy.⁶² The Court, however, did not fully explain the nature of the right of privacy and the kinds of rights that fall within it. In 1992, the Court in *Planned Parenthood v. Casey* fleshed out the contours of the right of privacy.⁶³ The issue in *Casey* was whether *Roe v. Wade* should be upheld.⁶⁴ In *Roe*, the Court held that the right to terminate a pregnancy, like the right of marital privacy, is a fundamental right because it falls under the general right of privacy.⁶⁵ The Court in *Roe* failed, however, to explain why the right to abortion did so. In *Casey*, the Court provided that explanation, reasoning that the general right of privacy is at its core is about protecting individual autonomy and dignity.⁶⁶ Thus, “intimate and personal choices” that reinforce an individual’s autonomy are those that are “central to the liberty protected by the Fourteenth Amendment.”⁶⁷

While *Casey* has been overruled with respect to its abortion holding,⁶⁸ its general discussion of individual autonomy is still good law, at least for now. For the *Casey* Court, the choices and decisions that are important to personal autonomy are those that define “one’s concept of existence, of meaning, of the universe, and of the mystery of human life.”⁶⁹ Put another way, substantive due process is about protecting choices that express “personal identity and beliefs.”⁷⁰ Such choices include rights of “marriage, procreation, contraception, family relationships, child rearing, and education.”⁷¹

The question arises: why and how is marriage central to individual self-definition and identity? The following sections will examine that question in depth.

61. 381 U.S. 479 (1965).

62. *See id.*

63. *See Casey*, 505 U.S. 833 (1992).

64. 410 U.S. 113 (1973).

65. *See id.* at 153.

66. *See Casey*, 505 U.S. at 851.

67. *See id.*

68. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S.Ct. 2228, 2242 (2022).

69. *Id.*

70. *Obergefell*, 576 U.S. at 663.

71. *Id.* (emphasis added).

B. Marriage as a Fundamental Right

While the Court declared that marriage is a fundamental right long before *Obergefell* was decided, up until *Obergefell* in 2015, the Court never fully explained why marriage is a right central to individual autonomy. The Court first held that the right to marry is fundamental under the Fourteenth Amendment in *Loving v. Virginia*⁷² and struck down bans on interracial marriage for violating that right. However, the *Loving* Court's fundamental rights analysis can be boiled down to the proposition that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁷³ In 1976, the Court in *Zablocki v. Redhail* conducted a fairly in-depth analysis of why marriage is a fundamental right,⁷⁴ but its analysis omitted any discussion of the connection between marriage and individual autonomy.

In *Obergefell*, the Court finally explains its understanding of the relationship between marriage and individual autonomy. The Court asserts that there is an "abiding connection between marriage and liberty" and that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."⁷⁵ In making the argument, the Court mentions that marriage is an important union involving just *two* people.⁷⁶

In addition, the Court also explains that marriage is a fundamental right because it is a means of protecting families and children,⁷⁷ and because of all the rights, benefits, and responsibilities that the state bestows upon a married couple.⁷⁸ While the points about protecting children and rights/benefits are important to the Court's ultimate conclusion that same-sex marriage is a protected right, this Article will leave those points aside and focus on the key claim that marriage, understood as a two-person union, is central to individual autonomy.⁷⁹

In connecting marriage to individual autonomy, the Court asserts that "the decision whether and whom to marry is among life's momentous acts

72. 388 U.S. 1 (1967).

73. *See id.* at 12.

74. 434 U.S. 374 (1978).

75. *Obergefell*, 576 U.S. at 665.

76. *Id.* at 666.

77. *Id.* at 667.

78. *Id.* at 669.

79. Kennedy's point about marriage as a two-person union is a limiting principle. The argument that there is a fundamental right to plural marriage would fail because of the two-person union limitation. Thus, I do not treat the point as a separate argument in support of same-sex marriage as a fundamental right of autonomy.

of self-definition”⁸⁰ that profoundly shapes an “individual’s destiny.”⁸¹ Through marriage, a couple “define themselves by their commitment to each other.”⁸² Why exactly is marriage a *momentous* act of self-definition? As will be argued below, all the reasons that the Court in *Obergefell* provides in connecting marriage to individual autonomy and self-definition implicitly invoke the concept of love.

C. Love, Relationships, and Individual Autonomy

Before turning to *Obergefell*, I want to examine the general claim that marriage enhances or protects individual autonomy, because that claim may seem counter-intuitive. Why? Because marriage specifically and relationships generally arguably undermine individual autonomy. In entering a marriage, each spouse gives up some of his or her freedom. Neither spouse can do whatever he or she wants anymore. Some decisions are made jointly, some decisions are made by the other spouse. Over the course of a marriage, a spouse may even lose her sense of self as she stops making decisions to meet her own interests and makes decisions based on what she thinks her spouse might want or desire.⁸³ A spouse may want to rent a Star Wars movie to watch, but end up renting *Schindler’s List* because that is what he thinks his spouse would rather watch. How does marriage enhance individual autonomy, then, if it does at all?

To cogently argue that marriage enhances individual autonomy, love must enter the equation. Recall that Fromm defines love as “*union with another person under the condition of preserving one’s integrity, one’s individuality.*”⁸⁴ In making that argument, Fromm does not reduce autonomy to the ability to do whatever one wants or desires. Rather, autonomy is something deeper. Autonomy is about being true to one’s self and developing and growing according to one’s core values and principles. Autonomy is about authenticity and integrity.

If autonomy is about authenticity, then love can indeed enhance and protect individual autonomy. That is because what Fromm calls “mature love” embodies what theologian Martin Buber calls an I-Thou relationship.⁸⁵ In an I-Thou relationship, one person (the “I”) consciously

80. *Obergefell*, 576 U.S. at 666.

81. *Id.*

82. *Id.* at 667.

83. Darlene Lancer, *How We Lose Ourselves in Relationships*, PSYCH. TODAY (Oct. 3, 2020), <https://www.psychologytoday.com/us/blog/toxic-relationships/202010/how-we-lose-ourselves-in-relationships>

84. FROMM, *supra* note 20, at 17 (emphasis in original).

85. See generally MARTIN BUBER, I AND THOU (2000).

views and relates to another person (the “Thou”) as a separate, independent, autonomous human being. The “I” does not seek to control, use, or exploit the “Thou.” The central goal of an I-Thou relationship is to preserve the autonomy of the “Thou.” To protect another person’s authenticity and integrity, one must relate with respect, understanding, and acceptance, all of which are the core elements of love. To relate to another person as a “Thou” and protect her autonomy, then, means being *loving* towards that person.

In contrast to an I-Thou relationship, there is what Buber calls an I-It relationship. In such a relationship, the “I” views the other person as an “It,” as someone who is there to serve the interests of the “I.” An I-It relationship is one marked by possessiveness, exploitation, and manipulation.⁸⁶ As such, an I-It relationship is not caring, respecting, or accepting of the other person. Mature love is absent in an I-It relationship, and as a result, such a relationship is indifferent to the preservation of autonomy.

A loving relationship understood as an I-Thou relationship, on the other hand, is one that is mutually liberating. As Thich Nhat Hanh writes, true love is loving a person “in such a way that the person you love feels free, not only outside but also inside.”⁸⁷ Feeling free means being empowered to be true to one’s self, to be truly self-directing.⁸⁸ Thus, when love in the I-Thou sense exists in a marriage or committed relationship, the relationship indeed can protect and enhance individual autonomy.

Poet Rainer Maria Rilke provides a metaphor for a love that protects individual autonomy in his poem, *Love Song*.⁸⁹ He writes that, for two lovers, “everything that touches us, me and you, takes us together like a violin’s bow, which draws one voice out of two strings.”⁹⁰ The two lovers, the separate violin strings, are connected together through the violin’s bow, their love, to create something new and greater, the music. Being united by a violin bow doesn’t mean the individual strings fuse into one string. Rather, love, the violin’s bow, connects the strings, the two lovers, and creates something new, the music, *only* to the extent that the two strings remain separate, autonomous strings.

In the next section, I turn to the reasons that Kennedy provides in connecting marriage to autonomy and self-definition, and argue that each

86. See FROMM, *supra* note 20, at 26.

87. THICH NHAT HANH, TRUE LOVE (2011).

88. See VANIER, *supra* note 23, at 27-28.

89. See ALLPOETRY.COM, <https://allpoetry.com/poem/8505787-Love-Song-by-Rainer-Maria-Rilke>.

90. *Id.*

of those reasons invoke love. And because they do so, Kennedy's claim about marriage and autonomy ultimately is coherent and defensible.

D. *Marriage and Love*

I identify six reasons or themes in *Obergefell* that Kennedy provides in arguing that marriage is central to individual autonomy: (1) Marriage's purposes are profound, meaningful, and transcendent; (2) Marriage is something greater than two people; (3) Marriage creates a safe haven and remedies loneliness; (4) Marriage is an enduring personal bond; (5) Marriage supports a special two-person union; and (6) Marriage enables the couple to pursue freedoms such as expression, intimacy, and spirituality. I address each reason in turn.

1. Love Makes Marriage Profound and Transcendent

One key theme for Kennedy is the claim that marriage is something profound, transcendent, and deeply meaningful. He begins Part II of his opinion by proclaiming that marriage is of "*transcendent* importance"⁹¹ and "essential to our most *profound* hopes and aspirations."⁹² He later asserts that both different-sex and same-sex couples who seek to marry are making "*profound* choices" that are "among life's momentous acts of self-definition."⁹³ Given the special nature of marriage, Kennedy concludes that a "[s]ame-sex couple, too, may aspire to the *transcendent* purposes of marriage and seek fulfillment in its highest *meaning*."⁹⁴ And as he began his opinion, he ends it in the same way by declaring in his last full substantive paragraph that "no union is more *profound* than marriage. . . ."⁹⁵

What does Kennedy mean when he describes marriage as transcendent and profound? Transcendent is defined as "beyond the limits of ordinary experience" or "beyond comprehension."⁹⁶ Profound is defined as something "penetrating to the depths of one's being" and having "deep meaning" and "broad significance."⁹⁷ A transcendent marriage, then, is something so extraordinary and meaningful that it affects a person to her very core, to her very state of being.

91. *Obergefell*, 576 U.S. at 656.

92. *Id.* at 657.

93. *Id.* at 666.

94. *Id.* at 670 (emphasis added).

95. *Id.* 681 (emphasis added).

96. *Transcendent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/transcendent>.

97. *Profound*, DICTIONARY.COM, <https://www.dictionary.com/browse/profound>.

The problem with the claim is that, throughout history, marriage had been long understood and described in decidedly ordinary and functional terms. Kennedy even admits that “marriage was once viewed as an arrangement by the couple’s *parents* based on political, religious, and financial concerns. . . .”⁹⁸ There is nothing transcendent about a marital arrangement based on politics or finances, and individual autonomy is obviously undermined when a marriage is arranged by third parties.

For most of human history, marriage was viewed as something basic and essential for human survival, like eating food and drinking water, not as something extraordinary and transcendent. Anthropologists and sociologists, for example, reduced marriage to an expression of the “biological urge to mate and reproduce.”⁹⁹ “In 1949, the eminent anthropologist George Peter Murdock defined marriage as a universal institution that involves a man and a woman living together, engaging in sexual activity, and cooperating economically.”¹⁰⁰ Similarly, the Royal Anthropological Institute of Britain in 1949 “defined marriage as a union between a man and woman such that children born to the woman are the recognized legitimate offspring of both partners.”¹⁰¹ Needless to say, both definitions do not describe marriage as something profound or transcendent.

In present times, however, marriage is widely thought of in profound and transcendent terms. At some point in history, something transformed marriage into what it is today. That something was love. In the nineteenth century, people started to think of marriage as a profound choice and relationship about *love*. It is love that imbues marriage with its profound quality, not marriage divorced from love.

Indeed, anthropologist Charles Lindblom argues that love does not just possess the quality of transcendence, it actually *is* transcendence.¹⁰² Love is transcendent because it takes people out of their ordinary experience and is a catalyst for “self-transformation.”¹⁰³ Existential psychologist Rollo May echoes Lindblom, arguing that love “always drives us to transcend ourselves.”¹⁰⁴

98. *Obergefell*, 576 U.S. at 659 (emphasis added).

99. STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 24 (2005).

100. *Id.* at 26.

101. *Id.* at 27.

102. See Charles Lindblom, *The Future of Love* 12 (1998) (“love is an experience of transcendence”) (paper on file with author).

103. Charles Lindblom, *Love and Culture* 2 (paper on file with author).

104. MAY, *supra* note 36, at 76.

Thus, while Kennedy is correct in asserting that there “are untold references to the *beauty* of *marriage* in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literatures in all their forms,”¹⁰⁵ such references likely pale in comparison to the untold references to the beauty of *love*. The transcendent, profound nature of love is why “romantic *love* . . . has been portrayed in songs, poems, novels, and films as an ultimate value in itself: compelling, overwhelming, ecstatic, uniquely blissful—indeed, the most powerful emotional event of one’s life.”¹⁰⁶ The transcendent nature of love compared to the functional nature of marriage divorced from love is why we think of Shakespeare’s *Romeo and Juliet* as a love story, not a marriage story.¹⁰⁷

And it is not just romantic love that is understood to be transcendent and profound, but universal unconditional love as well. Martin Luther King Jr. contends that universal unconditional love is “the great unifying force of life” and that the person “who loves has discovered the clue to the meaning of ultimate reality.”¹⁰⁸ For King and other spiritual and religious thinkers, love is a way to commune with the highest power in the universe. It is safe to say that there is nothing more profound and transcendent than communing with God and discovering the meaning of ultimate reality.

For Kennedy’s argument to work, then, implicit within it must be the assumption that marriage is profound and transcendent to the extent it could be or is based on love. Supporting that reading is the passage in *Obergefell* in which Kennedy *explicitly* connects the profound nature of marriage to love when he asserts that “no union is more *profound* than marriage, for it embodies the highest ideals of *love*. . . .”¹⁰⁹ And if a marriage is profound because it is an embodiment of love, then any relationship is made profound through love, a point that Kennedy understands. Indeed, in *Obergefell*, Kennedy describes the nonmarital committed relationships of the various plaintiffs in a profound, loving manner.¹¹⁰

Ultimately, if love makes marriage so profound so that it affects the very depths of a person’s state of being, then love lends support to the

105. *Obergefell*, 576 U.S. at 657 (emphasis added).

106. Lindblom, *Love and Culture*, *supra* note 103, at 13.

107. I myself had to conduct research to confirm if *Romeo and Juliet* were indeed married. My guess is that many people are uncertain or do not know if the love story of *Romeo and Juliet* involved them getting married to each other.

108. KING, *supra* note 1, at 152.

109. *Obergefell*, 576 U.S. at 681 (emphasis added).

110. *Id.* at 658.

claim that marriage is a momentous act of self-definition. It is the profound nature of love that connects marriage to individual autonomy.

2. Love is Greater than the Sum of its Parts

A second theme is that marriage is something greater than the two individuals who make up the marital union. It is a “greater than the sum of its parts” argument. Kennedy writes that marriage’s “dynamic allows two people to find a life that could not be found alone,” and in that way marriage is “greater than just two persons.”¹¹¹ Through marriage, “two people become something greater than once they were.”¹¹²

Kennedy’s contention closely resembles claims made about *love* in two ways. First, love between two persons is said to create something new and bigger than the two individuals themselves, a greater joint identity.¹¹³ The claim is that a “physical, psychological, or spiritual union between two lovers . . . form[s] a new entity, the *we*.”¹¹⁴ The “we” language comes from philosopher Robert Nozick, who argues that the desire to create a greater joint identity “is intrinsic to the nature of love.”¹¹⁵ That joint identity, the *we*, is akin to the music created by two violin strings connected by a violin bow (love) in Rilke’s poem. The music is a metaphor for the life that can only be found through a loving relationship like marriage.

Second, love is said to make a person into a better human being.¹¹⁶ Being *loved* by a person does so by healing a person and making that person whole. Nozick contends, “[i]n the full intimacy of love, the full person is known and cleansed and accepted. And healed.”¹¹⁷ Being *loving* towards another person does so by making a person more virtuous. Recall that to love a person means being giving, caring, respecting, understanding, and accepting. To be loving, then, is to become a giving, caring, respectful and understanding person. It is no wonder that Martin Luther King Jr. once said that “the greatest of all virtues is love.”¹¹⁸

Love, then, is key to and implicit in Kennedy’s claim that marriage creates greatness. As Kennedy contends, marriage embodies love because

111. *Id.* at 657.

112. *Id.* at 681.

113. *See generally* Schmidt, *supra* note 35.

114. *Id.* at 706 (emphasis in original).

115. *See* Robert Nozick, *Love’s Bond*, in *THE PHILOSOPHY OF (EROTIC) LOVE* 417-32 (Robert C. Solomon & Kathleen M. Higgins, eds. 1991).

116. *Id.* at 422.

117. *Id.*

118. *See* KING, *supra* note 1, at 153.

it aspires to “the highest ideals of . . . fidelity, devotion, sacrifice, and family.”¹¹⁹ All those ideals involve being giving, caring, respecting, accepting, and understanding; they all involve the core elements of love, and therefore is about loving and being loved. And in loving and being loved, one becomes healed and more virtuous. It is a marriage of *love* that makes a married couple greater than once they were.

3. Love Creates Safe Haven and Casts Away Loneliness

A third theme in *Obergefell* is that marriage remedies a person’s loneliness and meets the need for interpersonal connection. Kennedy contends that marriage “fulfills yearnings for security, safe haven, and connection that expresses our common humanity. . . .”¹²⁰ Marriage fulfills “the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”¹²¹ Marriage, therefore, is a “response to the universal fear that a lonely person might call out only to find no one there.”¹²² When a person marries another person, she gains safe haven and is not “condemned to live in loneliness.”¹²³

Love is essential to the claim that marriage creates connection and safe haven. To understand why, we need to only imagine a couple in a loveless marriage. A loveless marriage is one in which true care, respect, understanding, and acceptance are missing. If the spouses in a marriage do not care for each other and do not feel cared for by the other, it would be difficult to argue that they are truly “there for each other.” Moreover, marriage does not make people immune to loneliness. It is possible to be lonely within a marriage. Loneliness is a subjective experience, something internal to a person. It is a feeling and sense of alienation, separation, and isolation. A loveless marriage in which the spouses do not care for and understand each other is a marriage of disconnection and separation, a marriage of loneliness. Disconnection in a marriage is not just possible, it is common.¹²⁴ There is even a name for the condition of loneliness in a marriage: the lonely wife or walkaway wife syndrome.¹²⁵

119. *Obergefell*, 576 U.S. at 681.

120. *Id.* at 666.

121. *Id.* at 667.

122. *Id.*

123. *Id.* at 681.

124. Kendra Cherry, *What To Do If You’re Married But Lonely*, VERYWELLMIND (Nov. 9, 2021), <https://www.verywellmind.com/what-to-do-if-youre-married-but-lonely-5207913>.

125. Sasha Konikovo *12 Signs of Walkaway Wife Syndrome (Before It Happens)*, HUMANS, <https://vocal.media/humans/12-signs-of-walkaway-wife-syndrome-before-it-happens>.

Implicit in Kennedy's argument is the assumption that love must be present in a marriage to create safe haven and connection. When Kennedy asserts that marriage can fulfill the need to be understood and cared for, and provide for human connection, he invokes the core elements of love. Moreover, love is the antidote, not just for a momentary feeling of loneliness, but for a persistent feeling of loneliness. As Fromm argues, the ultimate answer to the central problem of human existence, *existential* loneliness, "lies in the achievement of interpersonal union, of fusion with another person, in *love*."¹²⁶

4. Love is Enduring

A fourth theme in *Obergefell* is that marriage is a permanent or enduring relationship. Kennedy describes marriage as a "lifelong union"¹²⁷ and an "enduring bond."¹²⁸ The putative *enduring* quality of marriage is what gives marriage many of its special and profound attributes. For example, Kennedy contends that it is only through an *enduring* bond or relationship, not a temporary or fleeting one, that a married couple can find freedoms such as "expression, intimacy, and spirituality."¹²⁹

Kennedy's argument, however, is weak if he is claiming that the act of getting married ensures that a couple's relationship will be a lifelong one. It is widely known that many marriages today end in divorce. Marriage used to be enduring by sheer force of law, as it was difficult to get divorced. But, with the advent of no-fault divorce, marriages are neither in theory nor in practice immutable commitments.

Kennedy, however, is not arguing that marriage inherently creates and guarantees an enduring relationship. Rather, a better reading of his opinion is that he believes that a marriage endures if it is based on love. In fact, Kennedy does not just imply that a marriage endures if it is based on love, he explicitly makes that argument. Kennedy writes that "marriage embodies a *love* that may *endure* even past death."¹³⁰ If marriage is an embodiment of love, then, love and marriage are deeply intertwined. If love endures, the marriage endures. If love dies, the marriage likely dies.

Is Kennedy suggesting that marriage is the only kind of committed relationship that can embody an enduring love? Is he disparaging

126. FROMM, *supra* note 20, at 17 (emphasis in original).

127. *Obergefell*, 576 U.S. at 656.

128. *Id.* at 666.

129. *Id.*

130. *Id.* at 681 (emphasis added).

nonmarital relationships and dooming them to inevitable dissolution? The answer is no. In the opinion, Kennedy notes that the two of the unmarried co-plaintiffs in *Obergefell* “celebrated a commitment ceremony to honor their *permanent* relation in 2007.”¹³¹ He also notes that plaintiff James Obergefell and his partner “fell in love, and started a life together, establishing a *lasting*, committed relation” even without the benefit of marriage.¹³² For Kennedy, a nonmarital relationship certainly can be based on love, and it can endure through that love.

The point that it is love that enables a relationship to endure, marital or otherwise, is made even clearer when Kennedy asserts that physical intimacy “can be but one element in a *personal bond that is more enduring*.”¹³³ He was quoting his own language from *Lawrence v. Texas*, the case involving two men having sex together and convicted of violating Texas’s criminal same-sex sodomy law.¹³⁴ What does he mean by a personal bond that is enduring? He could not have been referring to marriage, because when *Lawrence* was decided in 2003, same-sex couples could not get married. His reference to an *enduring* personal bond, therefore, is to a bond that endures even if it does not lead to marriage. And what kind of nonmarital bond or relationship is likely to emerge from and endure beyond a one-night sexual encounter? A relationship based on love.

To be sure, Kennedy clearly believes marriage can *help* a loving relationship between two people endure. He is likely to agree with Nozick, who argues that marriage is an important step in the construction of an *enduring* “we” between a couple in a committed relationship. Marriage is about fulfilling the desire by the couple to make the “we” permanent: and stable “[m]arriage marks a full identification with that we.”¹³⁵ Through marriage, the *we* builds “itself a sturdier structure, knitting itself together more fully.”¹³⁶ In Nozick’s view of marriage, then, one reason for marrying is to create a *structure* that can help a loving committed relationship endure. But the structure does not guarantee that the relationship endures. Only an enduring love can do that.

131. *Id.* at 658 (emphasis added).

132. *Id.*

133. *Id.* at 667 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)) (emphasis added).

134. 539 U.S. 558 (2003).

135. Nozick, *supra* note 115, at 430.

136. *Id.*

5. Love Supplies the Rationale for Supporting a *Two-Person* Marital Union

A fifth theme in *Obergefell* is the assertion that marriage is about supporting “a *two-person* union unlike any other in its importance to the committed individuals.”¹³⁷ The emphasis on *two-person* union likely is Kennedy’s attempt to ensure that *Obergefell* does not become the basis for recognizing polygamous marriage as a fundamental right. Kennedy, however, devotes just one sentence to the claim.

Is there any basis for supporting the two-person union argument? I suggest that there is, and it is rooted in the conception of intimate love. The belief that intimate love is a union of *two* persons is deeply rooted in cultural traditions throughout history. There is wide consensus that the essence of intimate love is dyadic.

The theory of intimate love as a two-person union can be traced back to Plato.¹³⁸ In Plato’s *Symposium*, he tells a myth about the origins of humanity in which the gods split one person into two. Plato then writes, “[e]ach of us when separated, having one side only, like a flat fish, is but the indenture of a man, and he is always looking for his other half.”¹³⁹ For Plato, the search for one’s other half is the search for love. Finding love means reuniting with one’s other matching half and “making one [out] of two.”¹⁴⁰ Similarly, Fromm contends that intimate love is dyadic when he defines love as “the craving for complete fusion, for union with *one other person*. It is by its very nature exclusive and not universal. . . .”¹⁴¹

Could the two-person theory of intimate love expand to include more than two persons? As a matter of both theory and practice, intimate love is best understood as a dyadic pairing. As a matter of theory, committed intimate love is thought of as an exclusive love between lovers that creates a unified whole (a “we”). If “true” love is opened to more than two persons, however, it starts to lose its exclusive quality. If committed love can be among three, why not four? Five? Six? Relatedly, if a loving union can consist of more than two people, and additional people can be added at any time, then the “we” becomes less solid and coherent, less unified.

As a matter of practice, researchers who have studied romantic relationships involving more than two persons conclude that such relationships are highly unstable and often end up evolving over time into

137. *Obergefell*, 576 U.S. at 666 (emphasis added).

138. MAY, *supra* note 18, at 43.

139. PLATO, *SYMPOSIUM* (Benjamin Jowett, translator 2014).

140. *Id.*

141. FROMM, *supra* note 20, at 49 (emphasis added).

a dyadic pairing.¹⁴² Instead of making persons feel whole and integrated, being in a multi-partner relationship fragments and ruptures a person's identity, resulting in the experience of anxiety, emotional distress, and stress.¹⁴³ A person becomes "split" between different partners, unable to meet both their needs in equal fashion, and ends up prioritizing one partner over the other, and ultimately, choosing one over the other. In fact, every single person that the researchers interviewed told them that they were unable to maintain a relationship with multiple partners, and that being in a multi-partner relationship was stressful and dissatisfying.¹⁴⁴

Whether the dyadic union theory of love *should* be the basis for concluding that polygamous marriage is not a fundamental right is beyond the scope of this Article. As a descriptive matter, the *Obergefell* Court's understanding of intimate love as dyadic has support in theories about intimate love, and thus, love provides a rationale for limiting marriage to a two-person union.

6. Love Enables a Married Couple to Find Other Freedoms

The sixth theme in *Obergefell* is the claim that "[t]he nature of marriage is that, through its enduring bond, two persons can find other freedoms, such as expression, intimacy, and spirituality."¹⁴⁵ Marriage, therefore, "allows two people to find a life that could not be found alone. . . ."¹⁴⁶

What does Kennedy mean by "other freedoms?" Kennedy could be referring to those freedoms or activities that require a partner, such as sex or ballroom dancing. Or, because people do not like to go to a movie alone, perhaps Kennedy is referring to any activity in which people prefer to do it with another person. If marriage is just about having a convenient partner for joint activities, then a marriage need not be based on love to serve that purpose. However, Kennedy emphasizes that it is a marriage's *enduring* bond that enables a married couple to find other meaningful freedoms together. As I argued in the previous section, an enduring bond for Kennedy is one that endures because of love. If that is right, in referring to "other freedoms," Kennedy is referring only to those freedoms enabled by a *loving* bond between two people.

142. See William Jankowiak & Helen Gerth, *Can You Love More Than One Person at the Same Time? A Research Report*, 54 ANTHROPOLOGICA 1, 9 (2012).

143. See *id.*

144. See *id.* at 3.

145. *Obergefell*, 576 U.S. at 666.

146. *Id.* at 657.

What makes it fairly clear that Kennedy is implicitly claiming that it is love that enables a married couple to find a new life together are the three examples that he provides of “other freedoms.” Kennedy does not just randomly mention expression, intimacy, and spirituality. Those three freedoms are not only meaningful, they are all deeply connected to love.

First, creative and artistic expression is closely tied to love. Love inspires and is the subject of creative expression. Love is a ubiquitous theme in art, literature, television, and film. Love inspires expression, not just in art, but in private, intimate exchanges. We need only to think of love letters to one’s beloved. To the extent marriage inspires expression, then, it does so to the extent that it is based on love. A marriage devoid of love typically does not inspire expression, unless it is the expression of despair, loneliness, isolation, alienation, and suffering.¹⁴⁷ And even then, expression about the absence of love is ultimately still about love.

Second, intimacy is closely connected to love. When the Court refers to intimacy in *Obergefell*, it is likely referring to physical intimacy, which includes but is not reduced to sexual relations. Physical acts of intimacy also include holding hands, touching, and hugging. However, physical acts such as holding hands are not necessarily acts of physical *intimacy*. For example, when strangers hold hands as part of a religious ritual, we do not think of that act as involving intimacy. What makes holding hands an *intimate* act is if it is “an act . . . serving as a token of . . . affection, or the like.”¹⁴⁸ What is affection or something like affection? Love. The freedom to engage in physical intimacy, then, could be understood as the freedom to express or experience love and affection through physical acts such as hugging, touching, and sex. Physical intimacy and love are intimately related.

Moreover, if Kennedy is also referring to *emotional* intimacy, the link between love and intimacy is even stronger. Emotional intimacy is something that allows you “to connect more deeply with your partner through actions that express feelings, vulnerabilities and trust.”¹⁴⁹ Emotional intimacy is about emotional closeness or connection between two people, the hallmark of a loving relationship. When love is absent between two people, even if they are married, there is emotional distance

147. Agnes Callard, *The Problem of Marital Loneliness*, NEW YORKER, Sept. 25, 2021, <https://www.newyorker.com/culture/cultural-comment/the-problem-of-marital-loneliness> (analyzing Ingmar Bergman’s film *Scenes of Marriage* as a movie about marital loneliness).

148. *Intimacy*, DICTIONARY.COM, <https://www.dictionary.com/browse/intimacy>.

149. Wendy Rose Gould, *How To Build Emotional Intimacy With Your Partner—Starting Tonight*, NBCNEWS.COM, (Feb. 5, 2020), <https://www.nbcnews.com/better/lifestyle/how-build-emotional-intimacy-your-partner-starting-tonight-ncna1129846>.

and disconnection, the polar opposite of emotional intimacy. Emotional intimacy, then, virtually requires that love exists within a relationship.

Finally, spirituality is deeply connected to love. Of all the freedoms that a couple could achieve through marriage or a committed relationship, spirituality is the one most closely and intimately related to love. In fact, definitions of spirituality and love are so similar that a definition for one could be used to define the other.

Spirituality is defined as *connection with the sacred*.¹⁵⁰ That definition consists of two elements. The first element is *connection*. The second element is the *sacred*, which is often understood in a religious sense and used to describe God. However, the term sacred can also be defined as an “ultimate, *transcendent* . . . or divine force.”¹⁵¹

Turning back to love, recall that Fromm defines love as an “interpersonal union . . . with another person. . . .”¹⁵² Lindblom defines love as an experience of transcendence. Putting those two definitions together, love is connection with the transcendent through a relationship with another person. The definitions of love and spirituality are nearly identical.

Love and spirituality are also connected, not just by definition, but in human experience. Studies demonstrate that a person can find spirituality through a close relationship with another person. Nancy Dyson observes that “having a common bond with others is a major part of the spiritual dimension and . . . this is achieved through one’s relationships with others.”¹⁵³ The kinds of relationships that enable spirituality are “close relationships where there is unconditional acceptance.”¹⁵⁴ A loving relationship is the quintessential close relationship. A key component of finding spirituality, then, is love.

Love and spirituality are also connected because both are about achieving the same objectives: finding meaning in life¹⁵⁵ and achieving

150. See Ryan M. Niemiec, *The Decoding of the Human Spirit: A Synergy of Spirituality and Character Strengths Toward Wholeness*, 11 FRONTIERS IN PSYCHOLOGY 1, 1 (2020).

151. *Id.* at 2 (emphasis added).

152. FROMM, *supra* note 20, at 17.

153. See Jane Dyson, *The Meaning of Spirituality: A Literature Review*, 26 J. ADV. NURSING 1183, 1185 (1997).

154. *Id.* at 1186.

155. See *id.* at 1185.

wholeness.¹⁵⁶ Wholeness in the psychic sense is a “life affirming view of oneself.”¹⁵⁷ To achieve wholeness is to be healed.¹⁵⁸

Putting all the elements of spirituality together, finding spirituality means connecting with the sacred, gaining meaning in one’s life through doing so, and thereby achieving wholeness. Putting all the elements of love together, finding love is connecting with another person, gaining meaning in one’s life through doing so, and thereby achieving wholeness. Love is spirituality, spirituality is love.

Ultimately, for Kennedy, marriage enables two persons to find meaningful freedoms such as expression, intimacy, and spirituality, if it is a marriage based on love.

E. Obergefell is Love

Based on the preceding analysis, hopefully it has been made clear that love is deeply woven into the fabric of the Court’s reasoning in *Obergefell*. Given the connection between love and spirituality, the entire opinion is a deeply spiritual understanding of liberty and individual autonomy.¹⁵⁹ The connection between love and spirituality brings us back to marriage. If love between two persons gives meaning and purpose to an individual’s life and makes her whole, then the decision to enter into a committed, loving, relationship like marriage is indeed a momentous act of self-definition. For the *Obergefell* Court, love is what makes marriage a fundamental right of individual autonomy and dignity.

IV. IMPLICATIONS

What are some of the implications of understanding *Obergefell* as a decision about love? First, uncovering love as a central concept in *Obergefell* addresses the critique of it as a declaration of marital supremacy. If love indeed is the underlying explanation for same-sex marriage as a fundamental right, then *Obergefell* is making a declaration about the supremacy of love, not marriage. If that is the case, then *Obergefell* does not truly demean loving nonmarital relationships and condemn them to loneliness. If love is transcendent and profound, then a

156. See Niemiec, *supra* note 150, at 3.

157. *Id.* at 1.

158. See Pninit Russo-Netzer, *Healing the Divide Through Wholeness: Holding on to What Makes Us Human*, INT’L J. EXISTENTIAL PSYCH. & PSYCHOTHERAPY 2 (2018) (“to heal is to make whole”) (emphasis in original).

159. See Marc Spindelman, *Justice Gorsuch’s Choice: From Bostock v. Clayton County to Dobbs v. Jackson Women’s Health Organization*, 13 CONLAWNOW 11, 24-27 (2021) (arguing Justice Kennedy views abortion choice as spiritual undertaking).

nonmarital relationship based on love is transcendent and profound just like a marital relationship based on love.

One could take a few stray sentences in *Obergefell* and argue that, even if love is central to Kennedy's reasoning, the only kind of love he cares about is marital love, and therefore the case is ultimately still one about marital supremacy. That reading, however, is not consistent with the opinion as a whole. The better reading is that Kennedy believes that love is something that transcends all bounds. As he explicitly states, love is so transcendent that it can even endure past death. Something that is transcendent, beyond ordinary human experience, and can endure past death does not need to be connected to a formal, legal institution to exist. If love does need that connection, it would not be truly transcendent. Love, then, is not a product of marriage, for a marriage can be and often is devoid of love, a point that Kennedy understands. A loving relationship of any kind, on the other hand, obviously cannot be devoid of love. Love indeed is love.

Second, in the realm of rhetoric and public opinion, centering love in *Obergefell* makes it a highly persuasive argument for same-sex marriage. The power of the slogan, "love is love," cannot be understated. Framing the campaign for same-sex marriage as the fight for love played a large part in shifting public opinion on same-sex marriage.¹⁶⁰ The love-is-love movement culminated in the *Obergefell* opinion, not just as a tangential point, but as a central principle in support of same-sex marriage.

Simply put, it is difficult to argue against same-sex marriage if it is about love. If marriage is an important, highly meaningful means of expressing and acting upon love for another person, then on what basis could or should an LGBT person be prohibited from loving and being loved by her beloved? It would seem heartless and even cruel to deny same-sex couples from aspiring "to the transcendent purposes of" love and seeking "fulfillment in [love's] highest meaning."¹⁶¹

The power of love in cementing public support for *Obergefell* and same-sex marriage takes on great significance in light of the Court's decision in *Dobbs v. Jackson Women's Health Organization*¹⁶² eliminating a woman's choice about abortion as a fundamental right. Post-*Dobbs*, the looming question is what that decision means for the future of

160. See Evan Wolfson, "Love is Love" and Other Stories: The Role of Narrative in Winning the Freedom To Marry, THE FORGE, (July 22, 2020), <https://forgeorganizing.org/article/love-love-and-other-stories-role-narrative-winning-freedom-marry>.

161. *Obergefell*, 576 U.S. at 670.

162. 142 S.Ct. 2228 (2022).

same-sex marriage. Is *Obergefell* the next decision to be overruled by the *Dobbs* majority?

I suggest that, even if the *Dobbs* Court wants to overrule *Obergefell*, strong public support of same-sex marriage is likely to give the Justices some pause before pulling the trigger on overruling *Obergefell*. While the rhetoric of *life* may have had the rhetorical edge over the rhetoric of *choice* regarding abortion, *love* has a resounding rhetorical edge over any argument that could be made for taking away marriage from same-sex couples. The Justices are likely aware of the firestorm that would erupt if they eliminate same-sex marriage as a fundamental right. For the sake of maintaining public legitimacy, at least some of the Justices in the *Dobbs* majority may want to wait before overruling *Obergefell*, or, more likely, they may not want to overrule it at all. They understand that waging a war on love is a losing proposition.

Third, love is not just a persuasive rhetorical tool, love is also a substantive principle that supports marriage as a fundamental right of individual autonomy. Without love, marriage can be reduced to a state mechanism for providing certain government benefits to married couples. If so, marriage would not deserve to be a fundamental right of individual autonomy. However, when love is incorporated into the decision to marry, marriage is transformed from being just a means of obtaining government benefits into a meaningful expression and act of love. And as an expression and act of love, marriage can more readily be understood as a decision central to individual self-definition and identity.

If love is indeed the principle that explains why and how certain relationships are central to individual self-definition and autonomy, then, love itself can be understood as a fundamental right of individual autonomy. *Obergefell* very well may have established the fundamental right to love as a core liberty protected by the Fourteenth Amendment.

Moreover, love understood broadly helps to explain why other kinds of relationships have been recognized as fundamental rights. If *Obergefell* can be read to include different kinds of love beyond intimate love, then familial/parental love can be the basis for supporting rights of family autonomy and parental relationships with children. Love is the basis for fundamental rights regarding personal relationships.

Finally, going back to *Dobbs*, as a matter of doctrine, love supplies a basis for distinguishing same-sex marriage from abortion. If love is the basis for same-sex marriage as a fundamental right, the elimination of abortion as a fundamental right does not implicate same-sex marriage, because abortion is not about love and interpersonal relationships.

Abortion is best understood as a right of reproductive autonomy, not a right of love. Abortion implicates the line of fundamental right to reproductive autonomy cases protecting rights related to the use of contraception and forced sterilization. Abortion does not, however, implicate the line of fundamental right to love cases dealing with the formation and maintenance of loving interpersonal relationships. For a Justice like Brett Kavanaugh, love may provide him with a principle for upholding *Obergefell* in the aftermath of *Dobbs*.¹⁶³

CONCLUSION

Virtually all of the key arguments that the Court in *Obergefell* makes for deeming same-sex marriage a fundamental individual right of autonomy are rooted in love. Accordingly, *Obergefell* could be understood to have established the right to love as a fundamental right. A more in depth discussion about whether, as a normative matter, the right to love *should* be understood and recognized as a fundamental right is a topic for another article.

163. *Dobbs* puts into question the continuing viability of reproductive autonomy rights generally. My analysis differentiating rights of love from rights of reproductive autonomy is not to suggest that reproductive autonomy is and should no longer be a fundamental right of individual autonomy. My only point is that love is not a strong basis for explaining why reproductive autonomy rights are fundamental.