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PRECEDENT, STARE DECISIS, AND *OBERGEFELL*'S CONTINUED VITALITY

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ABSTRACT

The Supreme Court's decision in Obergefell v. Hodges represented a momentous victory for gay and lesbian couples. After years of litigation in state and federal court, the fundamental right to marriage was recognized in the context of same-sex relationships. If history is any indication, however, the fight for marriage equality is not over. In the past, landmark Supreme Court decisions that have furthered social movements in areas of divisive constitutional law have encountered heavy resistance by those content with the status quo.

This resistance often occurs when state or local governments (or even individual citizens) refuse to implement newly recognized constitutional rights. Relatedly, resistance has also taken the form of legal challenges seeking to destabilize or overrule a particular constitutional precedent.

This Note addresses the possibility that Obergefell will be subject to the latter kind of resistance—a constitutional challenge at the Supreme Court. As this Note will show, if such a challenge is not certain, it is at least possible. That reality leads to the primary focus of this Note. If a constitutional challenge to Obergefell ever reaches the Supreme Court, how should the case be decided? Relying on the stare decisis factors identified in Planned Parenthood of Southeastern Pennsylvania v. Casey—as well as other background considerations that are nearly impossible to ignore—this Note concludes that Obergefell's

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extension of a constitutional marriage right to same-sex couples should continue as good law.

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INTRODUCTION

In *Obergefell v. Hodges*[1] the Supreme Court of the United States recognized that same-sex couples have a constitutional right to participate in the institution of marriage.[2] However, the history of social conflict as well as the attitude of certain Court justices might indicate that the decision is primed for a constitutional challenge.

In general, even after achieving success in the judiciary, social movements almost always meet backlash publicly, politically, and in the courts. One example of this is *Roe v. Wade*, which recognized that women have a fundamental right to terminate pregnancies.[3] In the decades following this decision, the Court entertained "a series of abortion-related legal challenges, many of which . . . presented the question of whether

1. Obergefell v. Hodges, 576 U.S. 644 (2015).
2. *See id.* at 665.
3. *See* Roe v. Wade, 410 U.S. 113, 153–56 (1973).

Roe was properly decided."[4] Most prominent among these challenges was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] which would have overruled *Roe* had Justice Souter and Justice O'Connor not "persuaded [Justice] Kennedy to change his mind" at the last minute.[6] Resistance to other judicially recognized civil rights can be found in the aftermath of *Brown v. Board of Education*[7] as well as *Lawrence v. Texas*.[8]

In addition to historical reasons, there are contemporary reasons to believe that a constitutional challenge to *Obergefell* is possible. In 2017, for example, the Supreme Court considered *Pavan v. Smith*, which presented the question of whether state officials were required to put the names of both spouses in a lesbian marriage on a child's birth certificate.[9] Arkansas, despite requiring children's birth certificates to include both spouses of a heterosexual relationship, allowed state officials "to omit a married woman's female spouse from her child's birth certificate."[10] Relying on the "constellation of benefits" that *Obergefell* provided—which explicitly included birth certificates—the Court concluded that such treatment was unconstitutional.[11] In reaching that conclusion, the Court reasoned:

> Several of the plaintiffs in Obergefell challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex

4. Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 313 (2020) (footnote omitted).

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

6. Robert Barnes, *The Last Time the Supreme Court Was Invited to Overturn* Roe v. Wade*, a Surprising Majority Was Unwilling*, WASH. POST (May 29, 2019), https://www.washingtonpost.com/politics/courts_law/the-last-time-the-supreme-court-was-invited-to-overturn-roe-v-wade-a-surprising-majority-was-unwilling/2019/05/29/2cd37b30-7b39-11e9-8bb7-0fc796cf2ec0_story.html. In fact, overruling *Roe* seemed so certain before Justice Kennedy's unexpected switch that Chief Justice Rehnquist had written a draft opinion and circulated it among the justices. *Id.*

7. Brown v. Bd. of Educ., 344 U.S. 1 (1952); *see also* Cooper v. Aaron, 358 U.S. 1, 4 (1958) (addressing arguments which attempted to provide constitutional rationale for defying desegregation almost five years after *Brown* was decided and concluding that *Brown* could not be "nullified openly [or] directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation").

8. Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Tom Dart, *Texas Clings to Unconstitutional, Homophobic Laws—and It's Not Alone*, GUARDIAN (June 1, 2019, 2:00 PM), https://www.theguardian.com/world/2019/jun/01/texas-homophobic-laws-lgbt-unconstitutional (explaining that even though *Lawrence* declared anti-sodomy laws to be unconstitutional over fifteen years ago, a number of states still refuse to remove such laws from their penal codes).

9. *See* Pavan v. Smith, 137 S. Ct. 2075, 2076–78 (2017) (per curiam).

10. *See id.* at 2078.

11. *See id.* at 2078–79 (quoting Obergefell v. Hodges, 576 U.S. 644, 670 (2015)).

> couples differently from opposite-sex couples. That holding applies with equal force to [this case].[12]

With this backdrop in mind, it seems apparent that the Court's decision to disallow Arkansas's conduct was "required by the narrowest understanding of stare decisis."[13] Therefore, the fact that Justice Gorsuch wrote a dissenting opinion joined by Justice Thomas and Justice Alito might "suggest[] that there were in 2017 [before Justice Kavanaugh and Justice Barrett joined the bench,] already three votes to narrow, ignore, or overrule [*Obergefell*]."[14]

Moreover, in 2015, two same-sex couples from Kentucky brought claims in federal court against Kim Davis, a county clerk who refused to issue them marriage licenses following the *Obergefell* decision.[15] The Court of Appeals for the Sixth Circuit affirmed the district court's decision, which found that the plaintiffs, despite Davis's personal religious objections, had pleaded a violation of their constitutional right to marriage.[16] In 2020, Davis's petition for certiorari to the Supreme Court was denied;[17] however, that was not the end of the matter. Despite "most denials of certiorari [being] handed down without explanation or comment," Justice Thomas took the rare step of issuing a statement that accompanied the Court's certiorari denial.[18] In it, he slammed the *Obergefell* decision alleging that "victims of th[e] Court's cavalier treatment of religion" are just beginning to surface.[19] According to Justice Thomas, "[b]y choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment . . . the Court has created a problem that only it can fix."[20] Justice Alito joined Justice Thomas's denial statement.[21]

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12. *Id.* at 2078 (citations omitted).

13. Christopher R. Riano & William N. Eskridge, Jr., *The Unfinished Business of LGBTQ+ Equality: Five Years After* Obergefell v. Hodges, N.Y. STATE BAR ASS'N (June 3, 2020), https://nysba.org/the-unfinished-business-of-lgbtq-equality-five-years-after-obergefell-v-hodges/.

14. *Id.*; *Pavan*, 137 S. Ct. at 2079.

15. Ermold v. Davis, 936 F.3d 429, 432 (6th Cir. 2019).

16. *Id.* at 432, 437–38.

17. Elura Nanos, *Clarence Thomas Refuses to Hear Kim Davis's Case, but Calls* Obergefell *Decision a 'Problem' Only SCOTUS 'Can Fix'*, LAW AND CRIME (Oct. 5, 2020, 10:45 AM), https://lawandcrime.com/supreme-court/clarence-thomas-refuses-to-hear-kim-daviss-case-but-calls-obergefell-decision-a-problem-only-scotus-can-fix/.

18. *Id.*

19. Davis v. Ermold, 141 S. Ct. 3, 3 (2020) (mem.).

20. *Id.* at 4.

21. *Id.* at 3. Shortly after the statement's issuance, Justice Alito continued the assault on *Obergefell* by publicly criticizing the decision at a Federalist Society event. *See* Ben Tobin

Importantly, this Note does not seek to prove that *Obergefell* will face a constitutional challenge in the future. Instead, it merely operates under the premise that *Obergefell* could face a constitutional challenge in the future. The history of social justice as well as the current landscape of the Court supports this premise.

With that background set, the rest of this Note proceeds to analyze the apparent merits of a constitutional challenge to *Obergefell*. It unfolds in three parts. Part I recognizes the reality that some justices on the Court believe *Obergefell* was wrongly decided in the first instance and discusses the implications this has on the case's precedential value. The Note ultimately sides with the majority view on this issue, concluding that "for precedent to mean anything, [stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."[22] After establishing that justices seeking to overrule *Obergefell* should possess a "special reason"[23] beyond mere disagreement with the original decision, Part II discusses *Casey* and its related stare decisis factors. The *Casey* factors, although originally articulated in the context of abortion, also "inform[] the Court's understanding of stare decisis in nonabortion contexts."[24] These factors include: (1) whether the decision has proven unworkable in practice; (2) whether the decision is subject to special reliance interests; (3) whether the decision has been abandoned as a doctrine; and (4) whether the facts on which the decision was based have changed.[25] Part III discusses the ever-present concern of institutional legitimacy, which was discussed in *Casey* but not included in its list of factors.[26] After considering all of these factors, this Note concludes that if presented with the opportunity, the Court should not overrule *Obergefell*.

Before proceeding to the substance of these discussions, however, a caveat is in order. This Note only seeks to weigh the merits of a constitutional challenge to *Obergefell*. That is, it considers whether overruling *Obergefell*'s central holding—which says that same-sex couples have a constitutional right to marriage—would be justified based on various factors identified by the Court. However, one could also

& Andrew Wolfson, *After Defending Kim Davis, Justice Samuel Alito Criticizes SCOTUS' Same-Sex Marriage Ruling*, LOUISVILLE COURIER J. (Nov. 14, 2020, 3:24 PM), https://www.courier-journal.com/story/news/politics/2020/11/13/supreme-courts-samuel-alito-gay-marriage-ruling-curbing-freedom-speech/6276361002/.

22. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

23. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

24. Murray, *supra* note 4, at 329; *see also* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (explicitly weighing the *Casey* factors in the context of LGBTQ rights).

25. *See Casey*, 505 U.S. at 854–55.

26. *See id.* at 865–66.

analyze the merits and likelihood of the Court "limiting the right [to marriage] and curtailing its breadth."[27] In the context of abortion, this approach has been relentlessly employed by the Court's conservatives for almost 30 years.[28] As it pertains to marriage equality, however, this Note will not consider that possibility.

I. WRONGLY DECIDED

Although this Note does not take the position that *Obergefell* was wrongly decided, there are reasons to believe that others think differently.[29] *Obergefell* was originally decided by a 5-4 majority, with Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito each authoring their own dissenting opinions.[30] Chief Justice Roberts also issued his first and still only dissent from the bench (i.e. oral dissent).[31] Not surprisingly, each of these justices grounded their dissents in stern methodological commitment, specifically a text-constrained originalist understanding of the Constitution.[32] These justices believed that *Obergefell* was wrongly decided in the first instance, and considering

27. *See* Murray, *supra* note 4, at 347.

28. *See id.* at 318 (explaining that "*Casey* furnished the template for . . . distinguish[ing] or narrow[ing] past decisions," so that every abortion case is "a fresh opportunity to utterly reimagine" abortion precedent); *see also* Gonzales v. Carhart, 550 U.S. 124, 190–91 (2007) (Ginsburg, J., dissenting) (declaring that the majority opinion, which narrowly interpreted prior abortion precedent, was an obvious "effort to chip away at a right declared again and again by [the] Court").

29. In relation to the constitutional soundness of *Obergefell*'s reasoning, one article that I found interesting was, Christopher R. Leslie, *Dissenting from History: The False Narratives of the* Obergefell *Dissents*, 92 IND. L.J. 1007 (2017), which addressed the arguments made by the *Obergefell* dissenters and explained why their positions were misleading. *But see* Gregg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631 (2018) (criticizing *Obergefell* for glorifying marriage and denigrating non-marital couples).

30. *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting); *id.* at 713 (Scalia, J., dissenting); *id.* at 720 (Thomas, J., dissenting); *id.* at 736 (Alito, J., dissenting).

31. Oral Dissent of Chief Justice Roberts at 0:00, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14–556), https://www.oyez.org/cases/2014/14-556; Joan Biskupic, *Dissents from the Bench: A Supreme Court Tradition Missing During Covid*, CNN (June 30, 2021, 7:16 AM), https://www.cnn.com/2021/06/30/politics/dissent-from-the-supreme-court-bench/index.html.

32. *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting) (stating that "[t]he right [the Court] announces has no basis in the Constitution"); *id.* at 713–14 (Scalia, J., dissenting) (arguing that the majority opinion "is 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 721 (Thomas, J., dissenting) (claiming the majority "ignores the text" of the Constitution); *id.* at 736 (Alito, J., dissenting) (stating that "[t]he Constitution leaves [this] question to be decided by the people of each State").

that justices do not "lightly let go of . . . deeply held interpretive commitments,"[33] this belief—for the three dissenting justices still alive[34]—likely persists. Chief Justice Roberts's choosing *Obergefell* to be his first oral dissent, for instance, exemplifies the deeply-ingrained disagreement,[35] as such displays are exceedingly "rare, occurring at most only a few times each year[,] . . . [when Justices] wish to underscore that, in their view, the majority opinion is flawed or *fundamentally wrong*."[36] And the *Davis* certiorari denial, where Justice Thomas and Justice Alito continued to argue, five years after *Obergefell*, that the right to same-sex marriage "is found nowhere in the text" of the Constitution,[37] provides additional evidence of the fundamental disagreement at issue. Even more, during his time in office, President Trump appointed three conservative justices to the Court,[38] adding to the count of justices who likely believe that *Obergefell* was wrongly decided.

So, what does this mean? Well, according to some "fearless originalists," the Court should *never* follow a wrongly decided constitutional precedent.[39] Justice Thomas seems to subscribe to this view. Relying on "the Constitution's supremacy over other sources of law[,]" he claims that "[w]hen faced with a demonstrably erroneous precedent . . . [the Court] should not follow it."[40] Therefore, *Obergefell*'s contradiction with his understanding of the Constitution—i.e. the fact that he believes the decision was wrongly decided—is likely enough to overturn the decision on its own; no other analysis is required. However,

33. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013).

34. Because of Justice Scalia's death in 2016, only three of the *Obergefell* dissenters remain on the Court today. *See Antonin Scalia*, OYEZ, https://www.oyez.org/justices/antonin_scalia (last visited Apr. 6, 2022).

35. Chief Justice Roberts began his oral dissent by asking the other justices, "just who do we think we are[?]" and ended his oral dissent by telling proponents of marriage equality to "[c]elebrate the achievement of a desired goal, celebrate the opportunity for a new expression of commitment to a partner, celebrate the availability of new benefits. But . . . not [to] celebrate the Constitution [because] it had nothing to do with [the decision]." Oral Dissent of Chief Justice Roberts, *supra* note 31, at 0:43, 11:22.

36. Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices*, 102 LAW LIBR. J. 7, 8, 21 (2010) (emphasis added) (stating that "[w]hatever can be said about . . . oral dissents, one thing is clear: Justices issue them when they feel strongly about the case at hand").

37. Davis v. Ermold, 141 S. Ct. 3, 3 (2020) (mem.).

38. Anita Kumar, *Trump's Legacy Is Now the Supreme Court*, POLITICO (Sept. 26, 2020, 8:41 PM), https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058.

39. *See, e.g.*, Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (using the term "fearless originalis[t]" to describe a person who believes that "it is the Constitution and not precedent that binds present and future Justices").

40. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

for most others, including many originalists, the analysis does not end there. Justice Scalia, for example, characterized himself as a "faint-hearted originalist" because of his willingness to follow certain precedents that contradicted the Constitution's text or original meaning.[41] In fact, Justice Scalia attacked Justice Thomas's unyielding approach to originalism, stating that he could not follow it because he considered himself "an originalist and a textualist, [but] not a nut."[42]

Justice Scalia's position has persisted as the Court's members have continuously relied on the principle that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[43] In other words, the belief that a case was wrongly decided serves as an entry point for case reconsideration but is not enough to overrule the precedent by itself. For example, in *June Medical Services L.L.C. v. Russo*,[44] Justice Roberts refused to join the conservative wing of the Court in their attempt to overrule *Whole Woman's Health v. Hellerstedt*,[45] arguing that "for precedent to mean anything, the doctrine [of stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."[46] In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[47] Justice Kagan chided the majority for overruling a prior case when there were not any "special justifications" present.[48] The Court's newest member, Justice Barrett, has similarly stated that "[t]he doctrine [of stare decisis] serves as an intertemporal referee, moderating any knee-jerk conviction of rightness by forcing a current majority to advance a

41. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861, 864 (1989) (arguing that originalists should "adulterate [originalism] with the doctrine of *stare decisis*" so that certain cases stand even if evidence is found which "demonstrate[s] unassailably that [the decision] got the meaning of the Constitution wrong").

42. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (Apr. 28, 2008, 7:32 AM), https://www.npr.org/templates/story/story.php?storyId=89986017.

43. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992); *see also* Citizens United v. FEC, 558 U.S. 310, 408–09 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that a special reason did not exist for departing from established campaign financing precedent); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (plurality opinion) (finding that a "special justification" warranted departure from stare decisis).

44. June Medical Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

45. Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016).

46. *June*, 140 S. Ct. at 2133–34 (Roberts, C.J., concurring).

47. Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

48. *See id.* at 2487 (Kagan, J., dissenting).

special justification for rejecting the competing methodology of its predecessor."[49]

Since this Note does not find *Obergefell*'s rationale to be erroneous, its analysis could theoretically end here. That is, if there is not a belief that the decision was wrongly decided in the first instance, then there is no reason to look for a special justification to overrule the case. But many of the Court's current justices—perhaps even a majority of the Court's current justices—subscribe to methodological commitments and political ideologies that do not align with *Obergefell*'s decision. However, as we have seen, a belief that *Obergefell* was wrongly decided in the first instance will not be the end of the analysis for most of these justices. Rather, such a determination would only represent a starting point of the analysis. Almost all of these justices—with the possible exception of Justice Thomas—would look at other factors in order to determine *Obergefell*'s precedential value. Accordingly, in the next two Parts, this Note will analyze these other factors.

II. THE *CASEY* FACTORS

The doctrine of stare decisis is familiar. Latin for "let the decision stand[,]"[50] stare decisis seeks to promote the "evenhanded, predictable, and consistent development of legal principles . . . and contribute[] to the actual and perceived integrity of the judicial process."[51] However, stare decisis is rarely, if ever, described as an absolute rule.[52] Rather, the "default setting of continuity"[53] that the doctrine establishes can be overcome if "special reason[s]"[54] are presented.

Moreover, according to many—including current and non-current Supreme Court justices—stare decisis is at its weakest in constitutional cases.[55] This is true because unlike other decisions that can easily be

49. Barrett, *supra* note 33, at 1723.

50. *Stare Decisis*, ENCYC. BRITANNICA, https://www.britannica.com/topic/stare-decisis (last visited Apr. 6, 2022).

51. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

52. *See, e.g.*, *id.* at 828 (stating that "*[s]tare decisis* is not an inexorable command"); Helvering v. Hallock, 309 U.S. 106, 119 (1940) (describing stare decisis as "a principle of policy and not a mechanical formula of adherence to the latest decision").

53. Barrett, *supra* note 33, at 1724.

54. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

55. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (explaining that "[t]he Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine"); Barrett, *supra* note 33, at 1713 (stating that "constitutional cases are the easiest to overrule"); Vieth v. Jubelirer, 541 U.S. 267, 269 (2004) (stating that "*[s]tare decisis* claims are at their weakest with respect to a decision interpreting the Constitution"); Lawrence v.

changed by the democratic process, "the onerous process of constitutional amendment makes mistaken constitutional interpretations difficult for the People to correct." [56] This does not mean, however, that every constitutional challenge should succeed.[57] Rather, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court articulated a "series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law."[58] These considerations, commonly referred to as the "*Casey* factors,"[59] include:

> [1] whether the rule has proven to be intolerable simply in defying practical workability; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or [4] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[60]

Importantly, the *Casey* factors "have not only guided the Court in its review of subsequent abortion cases . . . but also explicitly informed the Court's understanding of stare decisis in nonabortion contexts."[61] In this way, *Casey* has rightly been characterized as a "precedent on precedent."[62] As a result, the following subsections will analyze the *Casey* factors in order to determine the merits (or lack thereof) of overruling *Obergefell*.

Texas, 539 U.S. 558, 586–87 (2003) (Scalia, J., dissenting) ("I do not myself believe in rigid adherence to *stare decisis* in constitutional cases."); Rutan v. Republican Party of Ill., 497 U.S. 62, 110 (1990) (Scalia, J., dissenting) (stating that "in the field of constitutional adjudication . . . the pull of *stare decisis* is at its weakest" (citing Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962))); Mitchell v. W.T. Grant Co., 416 U.S. 600, 627 (1974) (Powell, J., concurring) (stating that stare decisis "has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation" (citing St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 93 (1936) (Stone and Cardozo, JJ., concurring in result))); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419–20 (1983) (stating that "the doctrine of *stare decisis* . . . [is] perhaps never entirely persuasive on a constitutional question").

56. Barrett, *supra* note 33, at 1713.
57. *See id.* at 1723.
58. *Casey*, 505 U.S. at 854.
59. *See, e.g.*, Murray, *supra* note 4, at 329–32.
60. *Id.* at 328–29; *Casey*, 505 U.S. at 854–55.
61. Murray, *supra* note 4, at 329.
62. *See id.* at 328–29.

A. Unworkability

The first *Casey* factor is whether the precedent at issue has proven intolerable because of its practical unworkability.[63] Importantly, unworkability existed before *Casey*, first gaining doctrinal momentum in the 1980s as an argument for overturning *Roe* in the context of abortion.[64] During this time, however, the doctrine's meaning became increasingly unclear due to abortion opponents offering "many competing definitions of unworkability" in the hopes of finding one that would lead to *Roe*'s reversal.[65] For instance, by the time *Casey* was argued, the unworkability definitions used by abortion opponents included concepts as distinct as political divisiveness, substantive error, and "inconsistent interpretations in the lower courts."[66] And despite *Casey*'s offering "a comprehensive analysis of when precedents no longer deserve[] deference," the case gave very little guidance about what the workability factor actually meant.[67] The decision clarified that political opposition does not make a precedent unworkable, but it did not clarify much more.[68] Consequently, as unworkability doctrine has developed, the Court itself has adopted contradictory definitions of what it means for a precedent to defy practical workability.[69] As a result, "[w]hile the justices [today] seem to discuss a single concept of unworkability, more than one understanding runs through the case law."[70]

Most frequently, "the Court identifies precedents as unworkable because the lower courts interpret them in conflicting ways."[71] This rule primarily seeks to foster *vertical consistency* in the federal judiciary. In this way, inconsistent application of a rule in the lower courts can indicate an unworkable opinion because "the more inconsistent rulings that a precedent generates, the more unworkable it seems."[72] In many cases, an opinion is likely to produce inconsistent results if the stated rule is "inherently vague, confusing, or standardless."[73] In *Johnson v.*

63. *See Casey*, 505 U.S. at 854.

64. Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1225–28 (2018).

65. *Id.* at 1230.

66. *See id.*

67. *Id.* at 1248.

68. *See* Ziegler, *supra* note 64, at 1232; *Casey*, 505 U.S. at 854–55, 867–68.

69. *See* Ziegler, *supra* note 64, at 1244.

70. *Id.*

71. *Id.* at 1249.

72. *Id.* at 1248.

73. *Id.* at 1244; *see also* Johnson v. United States, 576 U.S. 591, 605 (2015) (arguing that the inconsistent application of a prior decision was due to the rule's being a "judicial morass that defie[d] systemic solution" (quoting United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (per curiam) (Agee, J., concurring))). *But see* Vieth v. Jubelirer, 541 U.S. 267,

United States, for example, the Court harped on inconsistent lower court application, stating that the precedent at issue was unworkable because "the experience of the [lower] federal courts le[ft] no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the [rule]."[74] According to the Court, the inconsistent application in the lower federal courts was due to the fact that the rule was "a black hole of confusion and uncertainty" that frustrated any attempt to impose "some sense of order and direction."[75]

Next, unworkability concerns also arise when "the Court concludes that later precedents have undercut a rule, creating doctrinal uncertainty."[76] This concern primarily seeks to foster *horizontal consistency* within the Court's own jurisprudence. In *Lawrence v. Texas*, for example, the majority opinion defined unworkability in terms of doctrinal consistency, stating that the earlier precedent of *Bowers v. Hardwick* was unworkable because "the precedents before and after its issuance contradict[ed] its central holding."[77] Specifically, the Court described *Casey* and *Romer v. Evans* as "[t]wo principal cases decided after *Bowers* [that] cast its holding into . . . doubt."[78] This doctrinal uncertainty within the Court's own jurisprudence was part of the reason that *Bowers* was overruled.[79]

Finally, unworkability doctrine is also prevalent in cases that are "internally incoherent" due to "logical inconsistency."[80] *Hudson v. United States*, for instance, provides an example where a precedent's application was not only logically inconsistent, but logically impossible. The Court explained that:

> Halper's test for determining whether a particular sanction is "punitive," and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. If a sanction must be "solely" remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause. Under

267–68 (2004) (stating that the justiciability standard at issue had been consistently applied by lower courts for eighteen years despite its being incredibly vague).

74. *Johnson*, 576 U.S. at 605.
75. *Id.* (quoting *Vann*, 660 F.3d at 787 (per curiam) (Agee, J., concurring)).
76. Ziegler, *supra* note 64, at 1248.
77. Lawrence v. Texas, 539 U.S. 558, 577 (2003).
78. *Id.* at 573–75.
79. *See id.* at 573–75, 577.
80. Ziegler, *supra* note 64, at 1247.

> Halper's method of analysis, a court must also look at the "sanction actually imposed" to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even "attempting a second time to punish criminally."[81]

In sum, the Court looks for unworkability by identifying: (1) vague rules that engender inconsistent lower court application; (2) contradictory doctrinal developments in its own jurisprudence; and (3) logical incoherence or impossibility in a certain rule. In relation to *Obergefell*, however, there is quite clearly not a logical complication of the sort found in *Hudson*. Accordingly, the following discussion will not engage that part of unworkability doctrine.

1. *Obergefell* Is Not a Vague Rule that Engenders Inconsistent Lower Court Application

Obergefell's central holding is not vague. It provides a categorical rule which guarantees marriage equality to same-sex couples. As a result, "[a] substantial majority of the jurisdictions that imposed same-sex marriage proscriptions have seemingly implemented comprehensive marriage equality relatively expeditiously and smoothly. . . . [They] have thoroughly assessed their laws and modified any provisos that [previously] den[ied] full marriage equality[.]"[82] Moreover, there is no evidence that lower courts are incapable of dealing with issues if/when they arise. For example, in 2015 a Kentucky clerk, Kim Davis, refused to issue marriage licenses to same-sex couples.[83] According to the district court, "the Plaintiffs' fundamental right to marry was so 'obvious' after *Obergefell* that the Defendant had fair notice that . . . [a] 'no marriage licenses' policy was unconstitutional."[84] The district judge "required [Davis] to grant licenses," and when Davis continued to refuse, "found Davis in contempt for violating court orders."[85] The Court of Appeals for

81. Hudson v. United States, 522 U.S. 93, 102 (1997) (citations omitted).

82. Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 32 (2015).

83. Yates v. Davis, No. 15-62-DLB-EBA, 2017 WL 4111419, at *1 (E.D. Ky. Sept. 15, 2017), *aff'd sub nom.* Ermold v. Davis, 936 F.3d 429 (6th Cir. 2019).

84. *Id.* at *9.

85. *See* Tobias, *supra* note 82, at 49.

the Sixth Circuit affirmed the district court's decision, finding that the plaintiffs had successfully pleaded a violation of their constitutional right to marriage.[86] This case illustrates that *Obergefell*'s central holding—granting same-sex couples access to the institution of marriage—is applied easily by lower courts because of its unambiguous character.

Inevitably, there will be more cases running through the lower courts as litigants, like Davis, test the confines of marriage equality. Two recent state supreme court cases, *Smith v. Pavan*[87] and *Pidgeon v. Turner*,[88] provide ready examples of such litigation. Both of these cases denied benefits to same-sex couples by narrowly reading (or perhaps altogether misreading) *Obergefell*.[89] Although at odds with the "jurisdictions that [have] . . . implemented comprehensive marriage equality,"[90] these cases do not indicate that *Obergefell* issued an unworkable standard. *Obergefell*'s holding resolved an intensely divisive issue. In the past, cases that have resolved similarly divisive issues—such as *Roe* and *Brown*—also engendered inconsistent application in the lower courts, especially in the short-term.[91] At least in part, inconsistent application in these scenarios seems to have been the result of judicial unwillingness to accept the definitive resolution of a divisive issue, not ambiguous rulemaking. With *Obergefell*, the situation is the same: the divisive nature of the case makes it prone to future litigation and disingenuous application. However, this does not make *Obergefell* unworkable.

In sum, "[a] substantial majority of the jurisdictions . . . [have] implemented comprehensive marriage equality . . . smoothly."[92] Moreover, the Kim Davis case provides evidence that lower courts can easily apply *Obergefell*'s standard when issues arise. On this note, the fact that a small number of jurisdictions are unwilling to faithfully apply *Obergefell* does not provide evidence of unworkability, as history shows

86. *Ermold*, 936 F.3d at 432.

87. Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016), *cert. granted, rev'd per curiam,* 137 S. Ct. 2075 (2017).

88. Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017).

89. *See id.* at 78, 89 (holding that *Obergefell* did not necessarily require same-sex spouses to receive marriage benefits "on the same terms . . . [as] heterosexual spouses"); *Pavan*, 505 S.W.3d at 173, 177 (holding that "refusal to issue birth certificates with the names of both [same-sex] spouses" did not violate *Obergefell*).

90. Tobias, *supra* note 82, at 32.

91. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 426, 452 (1983) (affirming the dismissal of two abortion regulations that the district court had upheld and invalidating an additional regulation that the appellate division had upheld), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Cooper v. Aaron, 358 U.S. 1, 15–17 (1958) (addressing opposition to *Brown* in the lower courts).

92. Tobias, *supra* note 82, at 32.

that such conduct is expected in the short-term. Accordingly, *Obergefell* cannot be classified as unworkable based on issuing a vague rule that engenders inconsistent lower court application.

2. *Obergefell* Has Not Been Succeeded by Contradictory Doctrinal Developments in the Court's Jurisprudence

Despite the Court's composition significantly changing, doctrinal developments have not contradicted *Obergefell*. In fact, as Part II.C will discuss more thoroughly, the Court's jurisprudence over the past six years has largely strengthened *Obergefell*'s precedential value. One example is *Pavan v. Smith*, which stated (again) that same-sex couples are entitled to "the constellation of benefits that the States have linked to marriage."[93] In this way, although presenting the opportunity for contradictory doctrinal development, *Pavan* actually affirmed *Obergefell*. More notable is *Bostock v. Clayton County*, which held that employment discrimination based on sexual orientation violated Title VII of the Civil Rights Act of 1964.[94] To be sure, *Bostock*, being a case of statutory interpretation,[95] did not affirm (or even talk about) the constitutional liberty that *Obergefell* relied upon. Nevertheless, *Bostock*'s holding, which continued to expand rights for gay and lesbian individuals, represented a clear effort by the Court to harmonize sexual orientation jurisprudence. In other words, before *Bostock*, there was a gaping inconsistency in the laws affecting gay and lesbian individuals, as federal law recognized marriage equality for same-sex couples while simultaneously permitting employment discrimination based on sexual orientation. Rather than perpetuating this disparity, the Court reconciled these two areas of law, and, in so doing, developed its jurisprudence in a way that supported *Obergefell*, not contradicted it.

In short, the Court's jurisprudence continues to expand rights for gay and lesbian individuals, and therefore, *Obergefell* has not been eroded by doctrinal developments. *Bowers*, a case which deprived gay and lesbian people of their ability to show intimacy,[96] represents a good point of comparison. *Lawrence* found *Bowers* to be unworkable because subsequent case law had "contradict[ed] its central holding" by expanding gay and lesbian rights.[97] *Obergefell*, representing one case in

93. Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (per curiam) (quoting Obergefell v. Hodges, 576 U.S. 644, 670 (2015)).

94. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

95. *See id.* at 1738–39.

96. Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

97. *Lawrence*, 539 U.S. at 577.

a line of precedents that have continued to expand gay and lesbian rights,[98] is the inverse of *Bowers*, as the precedents before and after its issuance support its holding, not contradict it. Accordingly, unworkability also cannot be established by looking at the Court's sexual orientation doctrinal developments.

B. Reliance Interests

The second *Casey* factor is whether a decision is subject to the kind of reliance that lends a special hardship to the prospect of overruling.[99] Stare decisis has long defended this interest,[100] with some calling its protection the "paramount" concern of the doctrine.[101] According to *Casey*, the relevant inquiry is "the cost of a rule's repudiation as it would fall on those who have relied reasonably on [its] continued application."[102] Of importance here, when a precedent recognizes a "constitutional liberty interest," such as the fundamental right to same-sex marriage, "individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course."[103]

In the case of same-sex marriage, there are massive societal reliance interests. The most obvious of these is found in the "constellation of benefits that the States have linked to marriage."[104] As the Court identified in *Obergefell*, these benefits are both "material" and "symbolic."[105]

1. Reliance on the Material Benefits Conferred by *Obergefell*

The material betterment provided by marriage equality arises from the definitive legal rights, benefits, and responsibilities that states confer

98. This line of precedent includes: Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

99. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

100. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, *fosters reliance on judicial decisions*, and contributes to the actual and perceived integrity of the judicial process." (second emphasis added)).

101. Barrett, *supra* note 33, at 1730.

102. *Casey*, 505 U.S. at 855.

103. *Lawrence*, 539 U.S. at 577 (2003) (citing *Casey*, 505 U.S. at 855–56).

104. Obergefell v. Hodges, 576 U.S. 644, 647–48 (2015).

105. *See id.* at 669 ("[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering *symbolic* recognition and *material* benefits to protect and nourish the union.") (emphasis added).

on married couples.[106] According to *Obergefell,* these benefits are far-ranging and include areas of:

> [T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody . . . rules."[107]

Importantly, before *Obergefell*'s recognition of marriage equality, same-sex couples could not consistently rely on these benefits, as "the process of trying to replicate marriage benefits through contracts [was] itself extremely burdensome,"[108] imposing "'significant financial and estate planning obstacles' on same-sex couples."[109] Accordingly, if a same-sex couple could not afford a lawyer, the couple would likely be "unable to procure" many important legal benefits.[110] And even when same-sex couples had the means to employ legal services, knowledge could still be a problem, as many same-sex couples were not aware of the vast legal benefits denied to their unions, which made them "less likely to protect themselves through private [contracts]."[111] Perhaps worst of all, even same-sex couples who took the time and paid the money to jump through every legal hoop that society placed in front of them could still be denied benefits, as many "[h]ospitals, employers and other institutions" would ignore same-sex couples' faithfully executed legal documents, saying "[w]e don't care what the law says, you are not married."[112] Moreover, there are certain marriage benefits—such as tax deductions—that can *only* be granted by the government, and therefore, could not be replicated by same-sex couples through private contract.[113] In some cases, even *legally married* same-sex couples could be denied rights when residing in a state that did not recognize marriage equality.[114] In sum, before *Obergefell*'s constitutional recognition of

106. *See id.* at 669–70.
107. *Id.*
108. Leslie, *supra* note 29, at 1041.
109. *Id.* at 1042 (citing Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 914 (S.D. Miss. 2014).
110. *Id.*
111. *Id.*
112. *Id.* at 1044 (citing Tina Kelley, *Couples Not Rushing to Civil Unions in New Jersey*, N.Y. TIMES (Mar. 21, 2007), http://www.nytimes.com/2007/03/21/nyregion/21civil.html).
113. *Id.* at 1042 n.239.
114. *Id.* at 1043.

marriage equality, same-sex couples could not, no matter how hard they tried, "replicate the rights that married couples receive automatically."[115]

Practically, this landscape resulted in countless hardships for same-sex couples. For instance, through evasion of the Family and Medical Leave Act, states without marriage equality could "effectively prevent gay [and lesbian] employees from taking unpaid leave to care for a sick spouse."[116] Similarly, public schools frequently provided spousal benefits to legally married heterosexual educators but refused to provide the same benefits to educators in same-sex relationships.[117] For example, in Michigan, the state legislature enacted a statute that prohibited "public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners."[118] Moreover, localities across the country could (and did) use zoning ordinances as a way of preventing same-sex couples from living together,[119] one of which was upheld by the Louisiana Supreme Court the year before *Obergefell* was decided.[120] Same-sex couples could not even die with peace and dignity, as many nursing homes refused to allow unmarried same-sex partners to live together and frequently (up to ten percent of the time) ignored medical powers of attorney when assigned to a resident's same-sex partner.[121] This resulted in same-sex partners being separated for months and dying alone.[122] Similarly, traveling to different states was treacherous for same-sex couples who happened to get sick or injured on the road, as the "checkerboard pattern of law across the nation and the related hospital visitation rights that accompany marriage"[123] resulted in many same-sex spouses being refused hospital visitation access to their sick or injured partner.[124] Furthermore, traveling was particularly

115. *Id.* at 1038.

116. *Id.* at 1043.

117. *See* CATHERINE A. LUGG, US PUBLIC SCHOOLS AND THE POLITICS OF QUEER ERASURE 106 (2016) (stating that after *Obergefell*, "[p]ublic school districts that provide spousal benefits to legally married non-queer educators must now provide them to their queer colleagues").

118. *See* Leslie, *supra* note 29, at 1044–45 (citing Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524, 529 (Mich. 2008)).

119. *See id.* at 1036 (stating that "[s]ome cities restrict land use to single-family dwellings where family is defined as people related by blood, adoption, or marriage").

120. *Id.* at 1037, 1037 n.202.

121. *See id.* at 1038.

122. *See id.*

123. Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 25 (2016).

124. *See, e.g.*, Leslie, *supra* note 29, at 1043–44 (describing a horrific incident where a man was denied hospital visitation access for hours, and as a result, his same-sex partner "died without ever knowing that [he] was desperately trying to say goodbye").

dangerous for same-sex couples with children because one partner might lose parental rights when traveling through a state without marriage equality, resulting in the family unit legally dissolving and reforming as it drove across the country.[125]

Similar problems could also occur at home. For instance, same-sex marriage bans frequently complicated (and sometimes altogether thwarted) the adoption process for many gay and lesbian couples. States enacted laws that prohibited couples from adopting if they were "in a relationship that [was] not a legally valid and binding marriage under the laws of [the] state."[126] In this situation, similar to when a same-sex couple traveled through a state without marriage equality, only one same-sex partner had legally recognized parental rights.[127] The consequences of this were real. In cases of emergency, for example, "schools and hospitals could refuse to recognize one of an injured child's parents as having decision-making authority."[128] Moreover, if the legally recognized parent died, a state could then remove children from the non-legally recognized parent's custody, resulting in the children losing both parents—"one by death and one by forcible legal removal"—and the surviving parent losing their partner and their children.[129] And in many jurisdictions without marriage equality, "if a third party wrongfully killed" a same-sex partner, the surviving spouse could not sue the tortfeasor for wrongful death or loss of consortium, leaving the surviving spouse without legal recourse.[130] Finally, because of the possibility of legally sanctioned retaliation, same-sex couples could not safely conduct religious ceremonies to celebrate their unions or even hold themselves out as married.[131]

Clearly, the Supreme Court was not exaggerating when asserting that the states had linked a "constellation of [material] benefits"[132] to marriage, as there are countless rights, responsibilities, and securities that the institution confers. With this in mind, it is perhaps also not an

125. *See id.* at 1040.

126. *Id.* at 1039, 1039 n.218. "Other states prevented adoption by a gay co-parent by forbidding second-parent adoptions, . . . which [is when] a person . . . adopt[s] his or her partner's biological (or adoptive) child, unless the parents [were] legally married." *Id.* at 1039.

127. *See id.*

128. *See id.* at 1040.

129. *See id.* at 1040, 1040 n.224.

130. *Id.* at 1043.

131. *See id.* at 1046–49 (explaining two situations, one where a law student's job offer was terminated because she held a religious ceremony to celebrate her same-sex marriage and another where a judge-nominee's campaign was derailed because he held himself out as married to another man).

132. Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

exaggeration to say that every gay and lesbian person who is married (or who one day may be married) as well as their children have a substantial reliance interest in *Obergefell*. This is true for gay and lesbian people across the country, regardless of where they live, because as we have seen, the material benefits associated with marriage cannot be fully conferred by a single state. Instead, reaping the full rewards of marriage requires a federal rule that binds hostile states. *Obergefell* provided that rule, and now people are relying on it. As a result, "the cost of . . . [*Obergefell*'s] repudiation as it would fall on those who have relied reasonably on . . . [its] continued application"[133] would be substantial.

Even more, same-sex couples—and the LGBTQ+ community in general—may also reap future legal benefits from *Obergefell* because the decision established, or at least began the process of establishing, a formal equality regime at the federal level for LGBTQ+ individuals.[134] A formal equality regime is important because it requires governments to "bear the significant burden of proving that . . . suspect laws are constitutional,"[135] and therefore, establishes "a legal regime in which invidious use of a particular classification is deemed presumptively unlawful."[136] In the contemporary constitutional context, the Supreme Court generally establishes a formal equality regime through recognition of a group's protected class status.[137] In *Obergefell*, although not making an explicit proclamation, the majority opinion arguably recognized sexual orientation as a protected class by analyzing the suspect class factors and using suspect class language.[138] While some do not believe that *Obergefell* actually recognized sexual orientation as a protected class,[139] there can be no doubt that the opinion's analysis, at the very least, strengthened the case for treating sexual orientation as a protected class.[140]

133. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

134. *See* Bernhardt, *supra* note 123, at 17.

135. *Id.*

136. Katie R. Eyer, Brown*, Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 1 n.3 (2015).

137. *See id.*

138. *See* Bernhardt, *supra* note 123, at 17.

139. *See* 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. 255, 265 (2017) (stating that *Obergefell* "did not resolve the question of whether sexual orientation discrimination is entitled to heightened scrutiny").

140. *See* Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1016–17 (2016) ("While *Obergefell* made no reference to standard of review . . . [i]t is conceivable that . . . [the decision planted the seeds for protected class status] by touching on elements commonly used in heightened-scrutiny analysis, including references to the history of anti-gay discrimination and the political obstacles to gay political gains, along with two . . .

Considering that the absence of formal equality may legally sanction[141] discrimination that would otherwise be unlawful, gay and lesbian litigants are relying on *Obergefell*'s promise that a formal equality regime is here or coming. This provides another reason why *Obergefell* is "subject to a kind of reliance that would lend a special hardship" to it being overruled.[142]

2. Reliance on the Symbolic Benefits Conferred by *Obergefell*

The benefits granted and now relied upon are "more than just material."[143] According to the *Obergefell* majority, the significant material benefits conferred by marriage indicates a *symbolic* importance, so that "exclusion from [the institution of marriage] has the effect of teaching [people] that [gay and lesbian individuals] are unequal in important respects."[144]

To legally prohibit a gay person from marrying someone of the same sex "is tantamount to actually banning gay identity[,]" as it suppresses "predictable gay conduct in seeking long-term companionship."[145] Accordingly, by recognizing same-sex marriage as a constitutional right, *Obergefell* transcended the institution of marriage. Indeed, after *Obergefell* was issued, many gay and lesbian people "experienced [a] shared sentiment that it was really the first time that they felt themselves to be true Americans."[146] For many decades, same-sex marriage bans "impose[d] stigma" on gay and lesbian people.[147] *Obergefell*, however, represented a symbolic victory in that it accepted another crucial component of gay and lesbian identity and thereby took another step toward relieving gay and lesbian people of "second class

assertions that sexual orientation is immutable." (footnotes omitted)); see also Matthew Hoffman, Obergefell *Ruling Strengthens Case for Treating Sexual Orientation as Suspect Classification*, CASETEXT (June 26, 2015), https://casetext.com/analysis/obergefell-ruling-strengthens-case-for-treating-sexual-orientation-as-suspect-classification (arguing that *Obergefell* "strongly reinforces" the arguments for treating sexual orientation as a protected class); Bernhardt, *supra* note 123, at 17 (arguing that sexual orientation is subject to heightened scrutiny because *Obergefell* analyzed the Suspect Class Doctrine's four factors—history of discrimination, ability to contribute in society, immutability, and lack of political power—in a way that indicated protected class status).

141. *See* Eyer, *supra* note 136, at 1 n.3, 2 (stating that one of the biggest costs associated with not having formal equality is "litigation losses").

142. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

143. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

144. *See id.*

145. *See* Bernhardt, *supra* note 123, at 29.

146. *Id.* at 2.

147. *Obergefell*, 576 U.S. at 671.

status in America."[148] The rising acceptance of same-sex marriage in the years following *Obergefell* provides evidence of the decisions' symbolic impact. National support for same-sex marriage has grown by ten percent since *Obergefell* was issued.[149] This "fairly sharp[]" increase in public support is likely due, at least in part, to *Obergefell*, as "younger people-turned-recent adults can't remember a time before same-sex marriage was legal."[150] Even more, despite religious communities traditionally opposing same-sex marriage, almost "all [are now] in majority support[,]"[151] with *Obergefell* being credited as "open[ing] the door" to conversations with many of these organizations.[152] Meanwhile, for the children of same-sex couples, *Obergefell* gave recognition and legal structure to parental relationships, allowing children "to understand the integrity and closeness of their own family and its concord with other families in their community."[153]

Accordingly, overruling *Obergefell* would do more than take legal benefits away from same-sex couples. It would rob the entire gay and lesbian community, as well as children of same-sex couples, of a symbolic victory that has engendered progress, acceptance, and understanding. In other words, it would rob the gay and lesbian community of hardly won dignity and respect. To the extent that gay and lesbian individuals want to retain and build upon such progress (which goes without saying), the symbolic benefits of *Obergefell* engender a substantial reliance interest.

The symbolic benefits relied upon by the gay and lesbian community are even greater when considering that *Obergefell* established (or strengthened the case for) a formal equality regime.[154] This is because "[h]eightened scrutiny communicates to the broader community . . . that

148. Bernhardt, *supra* note 123, at 30; *see also* LUGG, *supra* note 117, at 106 (stating that "the status of queer Americans has been one of official 'stigmatized pariahs,' and only now has that official stigma begun to fade, thanks to a host of US Supreme Court decisions, starting with *Romer* . . . and continuing through *Obergefell*").

149. In 2015, the year *Obergefell* was decided, sixty percent of Americans supported same-sex marriage. *See* Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx. By 2020, support had grown to seventy percent. Scottie Andrew, *70% of Americans Support Same-Sex Marriage—a New High—a New Survey Finds*, CNN (Oct. 22, 2020, 6:14 PM), https://www.cnn.com/2020/10/22/us/same-sex-marriage-support-increases-trnd/index.html.

150. Andrew, *supra* note 149.

151. *Id.*

152. Riano & Eskridge, Jr., *supra* note 13.

153. Obergefell v. Hodges, 576 U.S. 644, 668 (2015) (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).

154. *See* discussion *supra* Part II.B.i.

[gay and lesbian people] deserve equal dignity under the law."[155] Indeed, even above legal protection, the most important benefit of a formal equality regime is the "moral messaging that a formal equality regime provides."[156]

> When the federal government—be it Congress, the Court, or the President—adopts formal equality guarantees, it sends a deep message about what we, as a nation, believe is the type of invidious discrimination that should be deemed illegitimate. Conversely, the lack of such a clear, formal regime leaves that key moral question open to contestation. For the many who *rely* on the law's capacity to persuade, this moral ambiguity is troubling indeed.[157]

In other words, *Obergefell*'s intangible benefits are greater because of its impact on formal equality. It follows, therefore, that greater reliance interests are also at stake.

In total, the material and symbolic benefits that *Obergefell* conferred to same-sex couples are substantial. Accordingly, *Obergefell* is undoubtedly "subject to a kind of reliance that would lend a special hardship to . . . overruling."[158] As a result, reliance interests favor retaining *Obergefell*, not overruling it.

C. Remnant of Abandoned Doctrine

The third stare decisis factor analyzes whether "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[159] According to *Casey*, the primary inquiries under this factor are: (1) whether subsequent developments in caselaw have disturbed the recognized constitutional interest; (2) whether the precedent, in conjunction with other holdings, represents a "rational continuum" of development in that area of law; and (3) whether the precedent has been tested and upheld.[160]

In this case, as addressed in Part II.A.ii, the Court's post-*Obergefell* jurisprudence has actually strengthened, as opposed to weakened, the case for marriage equality. Specifically, *Bostock*, which held that employment discrimination based on sexual orientation violated Title

155. Bernhardt, *supra* note 123, at 17.
156. Eyer, *supra* note 136, at 11.
157. *Id.* (emphasis added).
158. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).
159. *Id.* at 855.
160. *See id.* at 857–59.

VII,[161] continued to expand gay and lesbian rights, representing a clear effort by the Court to harmonize *Obergefell* with other areas of sexual orientation law. Accordingly, the primary development in the Court's jurisprudence since *Obergefell* did not disturb marriage equality; it supported marriage equality.

The advancement of gay and lesbian rights is not limited to *Bostock* either. Instead, over the past twenty-five years, there has been a "rational continuum"[162] of development in the area of sexual orientation jurisprudence.[163] In 1996, *Romer* struck down class-based legislation directed at gay and lesbian individuals holding that "[i]f the constitutional conception of 'equal protection of the laws' mean[t] anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[164] In 2003, *Lawrence* continued advancing gay and lesbian rights, overturning the earlier precedent of *Bowers* and holding that homosexual sodomy bans were unconstitutional.[165] Then, in 2013, the Court invalidated the Defense of Marriage Act ("DOMA") under the Fifth Amendment, officially recognizing same-sex marriage under federal law.[166] *Obergefell*, in 2015, completed the process of marriage equality, finding all state-enacted same-sex marriage bans to be unconstitutional under the Fourteenth Amendment.[167] Finally, in 2020, *Bostock* once again expanded LGBTQ+ rights, holding that employment discrimination based on sexual orientation violated Title VII.[168] These cases form a pattern in the Court's recent jurisprudence, each expanding gay and lesbian rights in a different way. It would be incorrect then to say that *Obergefell* was an isolated case, as virtually all of the precedents before and after its issuance support its central holding.

Obergefell has also withstood testing. Specifically, in *Pavan*, Arkansas probed *Obergefell*'s outer limits by arguing that access to

161. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

162. *Casey*, 505 U.S. at 858 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

163. *See, e.g.*, LUGG, *supra* note 117, at 106 ("[T]he status of queer Americans has been one of official 'stigmatized pariahs,' and only now has that official stigma begun to fade, thanks to a host of US Supreme Court decisions, starting with *Romer* . . . and continuing through *Obergefell* . . . .").

164. Romer v. Evans, 517 U.S. 620, 624–26, 634–35 (1996) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

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

166. United States v. Windsor, 570 U.S. 744, 775 (2013).

167. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

168. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

marriage does not necessarily confer all of marriage's benefits.[169] The Court, however, reaffirmed that same-sex couples are entitled to the entire "constellation of benefits that the States have linked to marriage."[170] In this way, when given the opportunity to limit *Obergefell*'s holding, the Court refused to do so.

No matter what avenue is considered, there is no indication that *Obergefell*'s rule represents "a remnant of abandoned doctrine."[171] In fact, the Court's subsequent caselaw and doctrinal trends support the decision. Accordingly, this factor also counsels in favor of retaining *Obergefell*.

D. Changed Facts

The final stare decisis factor is whether "facts have so changed . . . as to have robbed the old rule of significant application or justification."[172] In this case, facts have not changed in a way that would rob marriage equality of its application or justification. Indeed, as has already been indicated, facts have changed so to provide additional *support* for marriage equality. First, contrary to the arguments of equality opponents,[173] there is no evidence that the institution of marriage has been demeaned as a result of marriage equality. In fact, by recognizing marriage as the lone institution capable of conferring the full rewards of a committed relationship, *Obergefell* has solidified marriage's on-going significance.[174]

Moreover, national support for same-sex marriage has grown by ten percent since *Obergefell*, currently reaching a record-high seventy percent support rate.[175] Even more, despite religious communities

169. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

170. *Id.* at 2077 (quoting *Obergefell*, 576 U.S. at 646–47).

171. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)).

172. *Id.*

173. *Obergefell*, 576 U.S. at 657 ("To [respondents], it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex."); *see also* Leslie, *supra* note 29, at 1052 (describing one instance during DOMA debates, where a member of Congress stood up and "accused 'homosexual extremists' of leading a 'direct assault' against [the institution of marriage].").

174. *See, e.g.*, David Pimentel, *The Impact of* Obergefell*: Traditional Marriage's New Lease on Life?*, 30 BYU J. PUB. L. 251, 275 (2015) ("The proliferation of alternatives to marriage—e.g. domestic partnerships and designated beneficiaries—has certainly contributed to the ongoing erosion of marriage as a meaningful legal institution . . . [however] because these options were created mostly to accommodate same-sex couples, who now have full access to marriage, [these alternatives] may be swept aside. . . . In this sense, the *Obergefell* decision may not signal traditional marriage's demise as much as its rebirth . . . .").

175. *See* Andrew, *supra* note 149; McCarthy, *supra* note 149.

traditionally opposing same-sex marriage, "almost all [are now] in majority support".[176] In fact, *Obergefell* has been credited as "open[ing] the door" to conversations with many of these religious organizations.[177] This demonstrates that the facts surrounding another traditional justification for sexual orientation discrimination, "morality,"[178] have changed in a way that *support* same-sex marriage, not undermine it. As a result, there is no basis to believe that changed facts have robbed marriage equality of its application or justification. Accordingly, this factor weighs in favor of upholding *Obergefell*.

III. INSTITUTIONAL LEGITIMACY

One of the purposes of stare decisis is to preserve the legitimacy of the Court by assuring the public that the rule of law will remain consistent and predictable despite changes to the Court's composition.[179] Overruling a precedent "upon a ground no firmer than a change in [the Court's] membership" invites the public perception that the Court "is little different from the two political branches of the Government."[180] Considering that the federal judiciary is supposed to be insulated from political forces, such a perception would likely result in "lasting injury" to the apparent legitimacy of the Court.[181] This is especially true for precedents that uphold long-standing and deeply-entrenched societal expectations, such as "the freedom from racial discrimination by the

176. Andrew, *supra* note 149.

177. Riano & Eskridge, Jr., *supra* note 13.

178. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 582 (2003) ("Texas attempts to justify its [sodomy ban] . . . by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.").

179. Barrett, *supra* note 33, at 1725–26; *see also* Payne v. Tennessee, 501 U.S. 808, 850 (1991) (Marshall, J., dissenting) (criticizing the majority for overruling two prior precedents, specifically stating that "[i]t takes little real detective work to discern just what *has* changed since this Court decided [the prior precedents]: this Court's own personnel . . . which until now has been almost universally understood *not* to be sufficient to warrant overruling a precedent."); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (stating that "[e]ven when the prior judicial resolution seems plainly wrong to a majority of the present Court, adherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a 'law which binds [it] as well as the litigants.'") (alteration in original) (quoting ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976)).

180. Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

181. *Id. But see* Barrett, *supra* note 33, at 1728 (concluding that "a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it").

government, the general reach of the commerce clause, and . . . the legality of paper money."[182]

Importantly, however, even if a precedent is not deeply entrenched into society, departure may nonetheless threaten institutional legitimacy "if serious public debate still surrounds [the] issue."[183] *Casey* described this type of precedent as follows:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[184]

According to the *Casey* plurality, *Roe v. Wade* and *Brown v. Board of Education* represented examples of sufficiently divisive cases.[185] However, few other cases are thought to be divisive enough to warrant such treatment as evidence must exist that the public will be "sufficiently concerned that the Court is of two minds about the matter."[186] When such an issue is present, however, the *Casey* plurality made clear that the decision would garner a "rare precedential force to counter the inevitable efforts to overturn it," so that "only the *most convincing justification*" would suffice to overrule.[187] The Court went on to state that overruling such a precedent "in the absence of the most compelling reason . . . would subvert the Court's legitimacy beyond any serious question."[188]

Moreover, in recent years the Court's legitimacy has garnered even more attention, as Chief Justice Roberts—a noted institutionalist who is concerned with the "maintenance of respect for the Court" and the "generally-accepted expectations of the citizenry"[189] —has placed

182. *See* Monaghan, *supra* note 179, at 749–50 (stating that "stare decisis operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society").

183. *See id.* at 751.

184. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866–67 (1992).

185. *See id.* at 867.

186. Monaghan, *supra* note 179, at 751.

187. *Casey*, 505 U.S. at 867 (emphasis added).

188. *Id.*

189. Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/.

particular emphasis on protecting the Court's legitimacy.[190] In fact, early in his tenure, Roberts made it his "high priority to keep any kind of partisan divide out of the judiciary," announcing that the time was "ripe for a . . . refocus on functioning as an institution, because if . . . [the Court did not, it was] going to lose its credibility and legitimacy."[191] Today, however, despite Chief Justice Roberts frequently attempting to moderate between ideological wings,[192] it seems that the Court's legitimacy has become more questioned than ever. For example, just weeks after his inauguration, President Joe Biden created a commission to study potential judiciary reforms including Supreme Court expansion and federal judge term-limits.[193]

Relying on all this, it is clear that institutional legitimacy should play a critical role in any case that considers *Obergefell*'s continued vitality. First, the Court's composition has significantly changed in the years following *Obergefell*, with Justice Gorsuch, Justice Kavanaugh, and Justice Barrett all joining the bench.[194] Overruling *Obergefell* with this backdrop—ostensibly "upon a ground no firmer than a change in [the Court's] membership"[195]—would injure the Court's reputation by inviting the public perception that "[p]ower, not reason, is the . . . currency of [the] Court's decisionmaking."[196]

Second, even though *Obergefell* is not a long-standing precedent, its recognition of a constitutional right to same-sex marriage has already started to become entrenched as a societal expectation. As discussed in Part II.D, public support for same-sex marriage has continued to swell in the years following *Obergefell*. In the year *Obergefell* was decided, 2015, Americans were nearly split on the issue, with sixty percent supporting

190. *See* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.

191. *Id.*

192. In several high-profile decisions, including *National Federation of Independent Business v. Sebelius*, *Bostock v. Clayton County*, *June Medical Services L.L.C. v. Russo*, and *Department of Homeland Security v. Regents of the University of California*, Chief Justice Roberts defied political expectations and attempted to foster collaboration among the justices. *See* Gerson, *supra* note 189.

193. Tyler Pager, *Biden Starts Staffing a Commission on Supreme Court Reform*, POLITICO (Jan. 27, 2021, 2:52 PM), https://www.politico.com/news/2021/01/27/biden-supreme-court-reform-463126; *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE, https://www.whitehouse.gov/pcscotus/ (last visited Apr. 6, 2022).

194. *Current Members*, SUP. CT. OF U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 6, 2022).

195. Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

196. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

same-sex marriage.[197] By 2020, however, support had grown to seventy percent.[198] According to the survey, this "fairly sharp[]" increase in support for same-sex marriage is likely due to the fact that "younger people-turned-recent adults can't remember a time before same-sex marriage was legal."[199] In other words, the right to same-sex marriage has begun the process of becoming a societal expectation, and therefore, overturning the precedent would "contribute . . . to a failure of confidence in the lawfulness of [the Court's] fundamental features."[200]

Third, despite changing societal expectations, LGBTQ+ equality has historically been—and continues to be—a divisive issue, surrounded by substantial public debate.[201] In *Lawrence v. Texas*, for example, Justice Scalia argued that homosexual sodomy was "an issue as 'intensely divisive' as the issue in *Roe*."[202] And in relation to same-sex marriage, the discourse has been similarly intense with opponents of marriage equality often resorting to slander, lies, and belittlement.[203] For instance, a long-used fabrication was that gay people should not marry or raise families because they molest children.[204] Federally, Congress passed DOMA in 1996, which limited the rights that same-sex couples could gain through marriage[205] because of the depravity, immorality, and unnaturalness that apparently attended gay and lesbian couples.[206] Meanwhile, in the states, same-sex marriage bans were accompanied by similar rhetoric, with the sponsor of one bill going so far as to say that "homosexuals should be put on a boat and shipped out of the country."[207] Perhaps unsurprisingly, this animosity only intensified during the *Obergefell* oral argument, as opponents of same-sex marriage "held signs in front of the Supreme Court," declaring that "Homo Sex Is Sin" and "Your Sin of Sodomy Is Worthy of Death."[208] Meanwhile, in the courtroom

197. McCarthy, *supra* note 149.
198. Andrew, *supra* note 149.
199. *Id.*
200. Monaghan, *supra* note 179, at 750.
201. Hoffman, *supra* note 140 (stating that "while public attitudes toward gay people have shifted dramatically toward tolerance and acceptance, these gains are uneven, with prejudice and antipathy toward gay people remaining widespread in many parts of the country.").
202. Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992)).
203. *See* Leslie, *supra* note 29, at 1052–56.
204. *See id.* at 1054.
205. *Gay Marriage*, HISTORY (May 27, 2021), https://www.history.com/topics/gay-rights/gay-marriage.
206. Gill v. Off. of Pers. Mgmt., 699 F. Supp. 2d 374, 378–79 (D. Mass. 2010).
207. Leslie, *supra* note 29, at 1053 (quoting Andersen v. King Cnty., 138 P.3d 963, 980 (Wash. 2006)).
208. *Id.*

itself, a man stood up and yelled "[i]f you support gay marriage, you will burn in hell!"[209] Even today, despite a rising tide of acceptance, the issue remains divisive, with twenty-eight percent of Americans continuing to oppose equality,[210] including powerful voices such as Clarence Thomas and Samuel Alito.[211] Accordingly, to say that "serious public debate"[212] surrounds marriage equality is an understatement. The issue has historically been, and continues to be, so intensely combative that it is fair to characterize *Obergefell* as one of those "few cases" [213] that, like *Roe*, is divisive enough to caution against overturning because to do so would "threaten the stability and continuity of the political order."[214]

In short, all of these concerns combined with the presently growing distrust of the Court make institutional legitimacy a critical factor in any case that "cleanly present[s]"[215] the question of overruling *Obergefell*. All justices, not just Chief Justice Roberts, must consider this issue, as it presents yet another reason to leave *Obergefell* alone.

CONCLUSION

The history of social conflict as well as the attitude of certain Court justices might indicate that *Obergefell* is primed for a constitutional challenge. This Note argues that if such a challenge ever comes to fruition, the Court should not overrule *Obergefell*. First, *Obergefell* was not wrongly decided; however, even if it were, that would not be enough to overrule the decision on its own. "[F]or precedent to mean anything . . . [stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."[216] Next, recognizing that any attempt to overrule *Obergefell* would likely require a "special reason,"[217] this Note proceeded to analyze the stare decisis factors articulated in *Casey*. As applied to *Obergefell*, none of these factors weighed in favor of overruling. The decision is not unworkable, and there are tremendous reliance interests at stake for gay and lesbian individuals and their families. Further, subsequent developments harmonize the rule with other areas

209. *Id.* (quoting MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON 357 (2015)).
210. Andrew, *supra* note 149.
211. Davis v. Ermold, 141 S. Ct. 3, 3 (2020).
212. Monaghan, *supra* note 179, at 751.
213. *Id.*
214. *Id.*
215. *Davis*, 141 S. Ct. at 4.
216. June Medical Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).
217. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

of sexual orientation law and facts have changed to further support marriage equality. Not only this, but overruling *Obergefell* would also irreparably harm the Court's legitimacy in the eyes of the public. Accordingly, the final determination is simple. *Obergefell* should not be overruled.