

What Hath *Obergefell* Wrought

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About Me:

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Recent Publications

Harmonizing State and Federal Anti-Discrimination Law: The Problem of the ADAAA

61 U. Louisville L. Rev. 479 (2023)

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52 N. Ky. L. Rev. ____ (2025) (forthcoming)



Did
Obergefell
Harm
Religious
Liberty?

The *Obergefell* plaintiffs sought only relief from the enforcement of state marriage bans.

The plaintiffs did not ask for:

- the states to impose similar indignities on anyone else,
- for any private actor to be compelled to do anything, or
- remedies from churches, religious organizations, or individual believers.

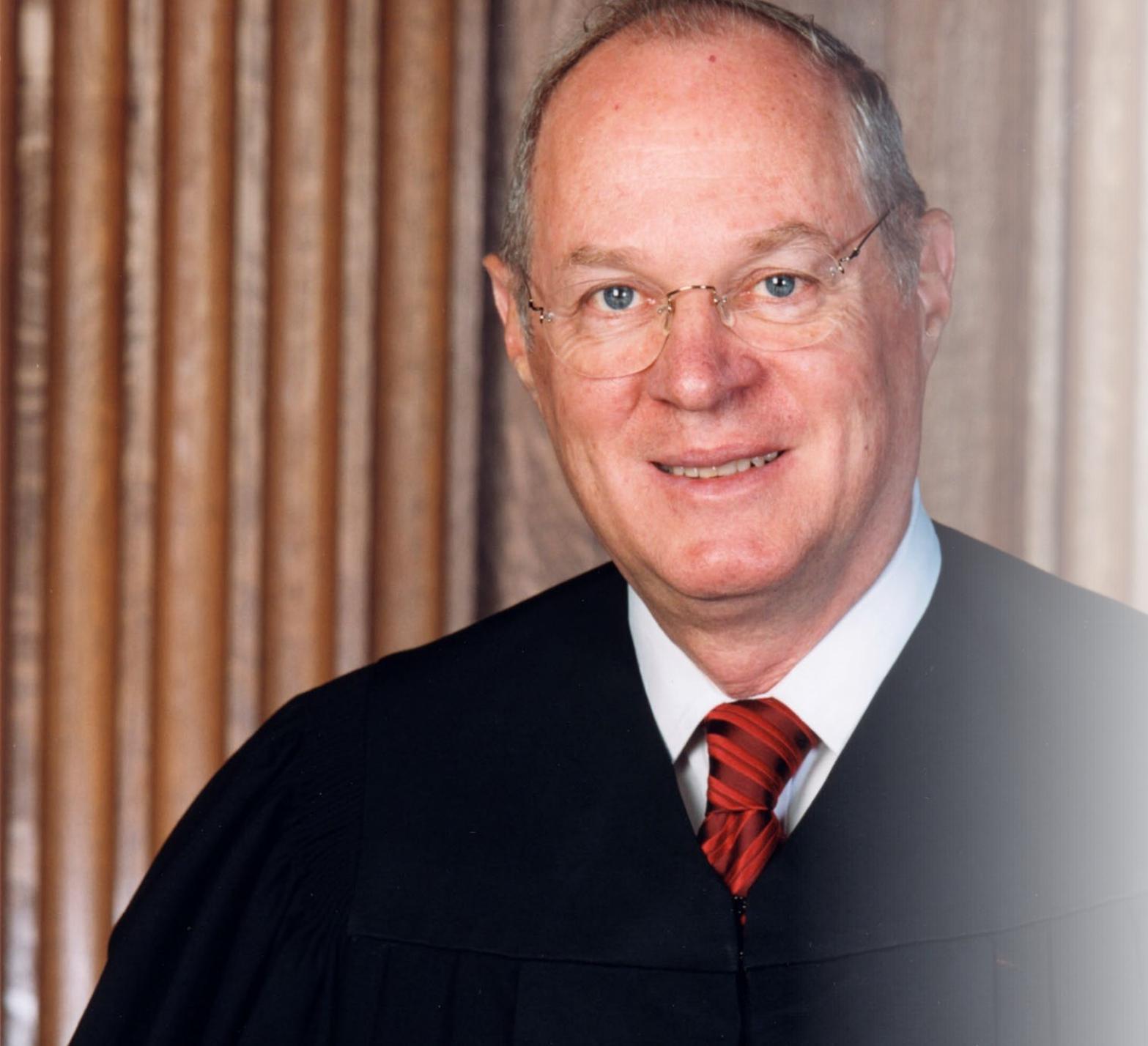
“Case is consolidated and petition for writ of certiorari ... granted limited to the following questions:

1. Does the Fourteenth Amendment require a state to license marriage between two people of the same sex?
2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?”





Nevertheless...

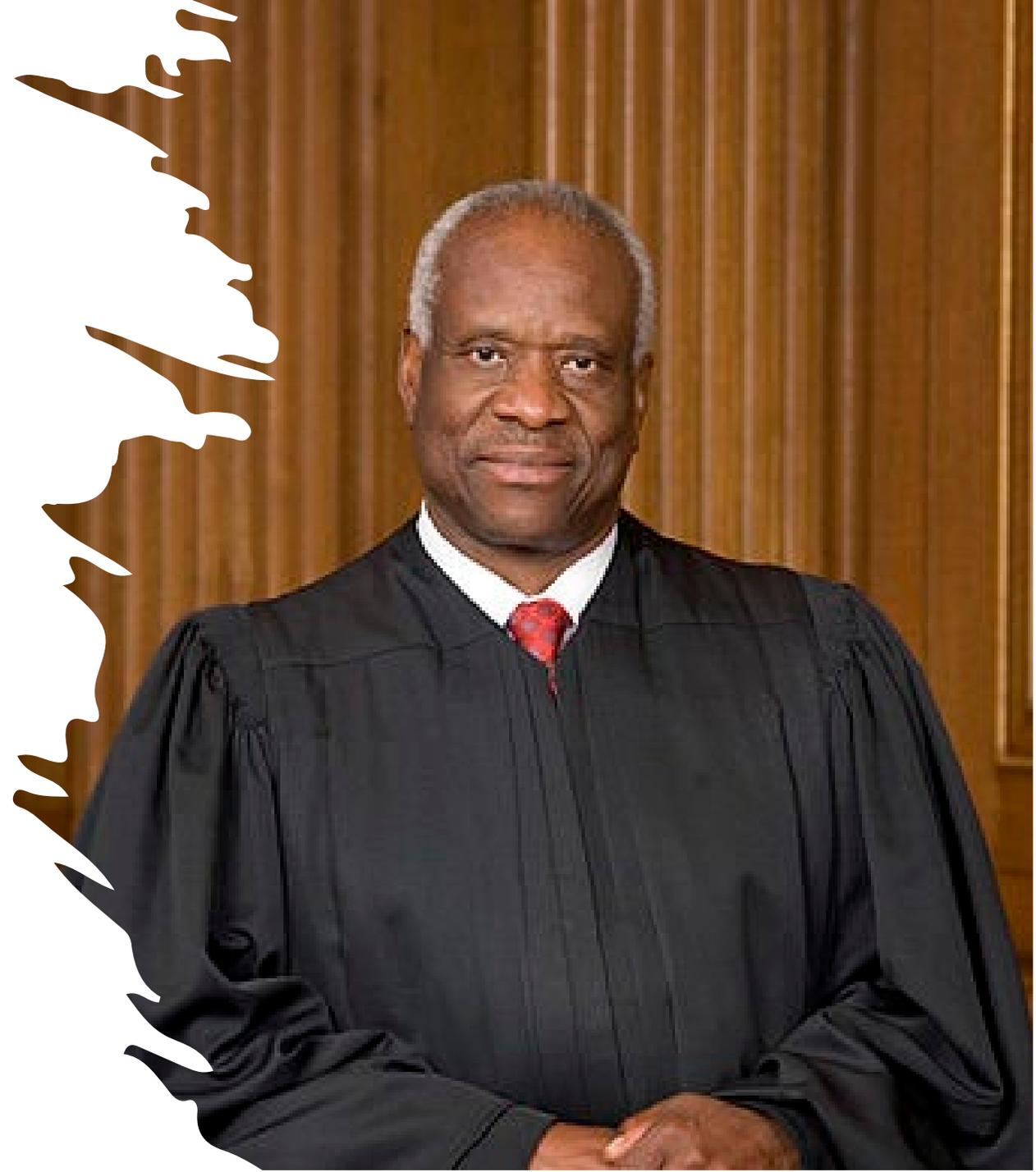


“[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”



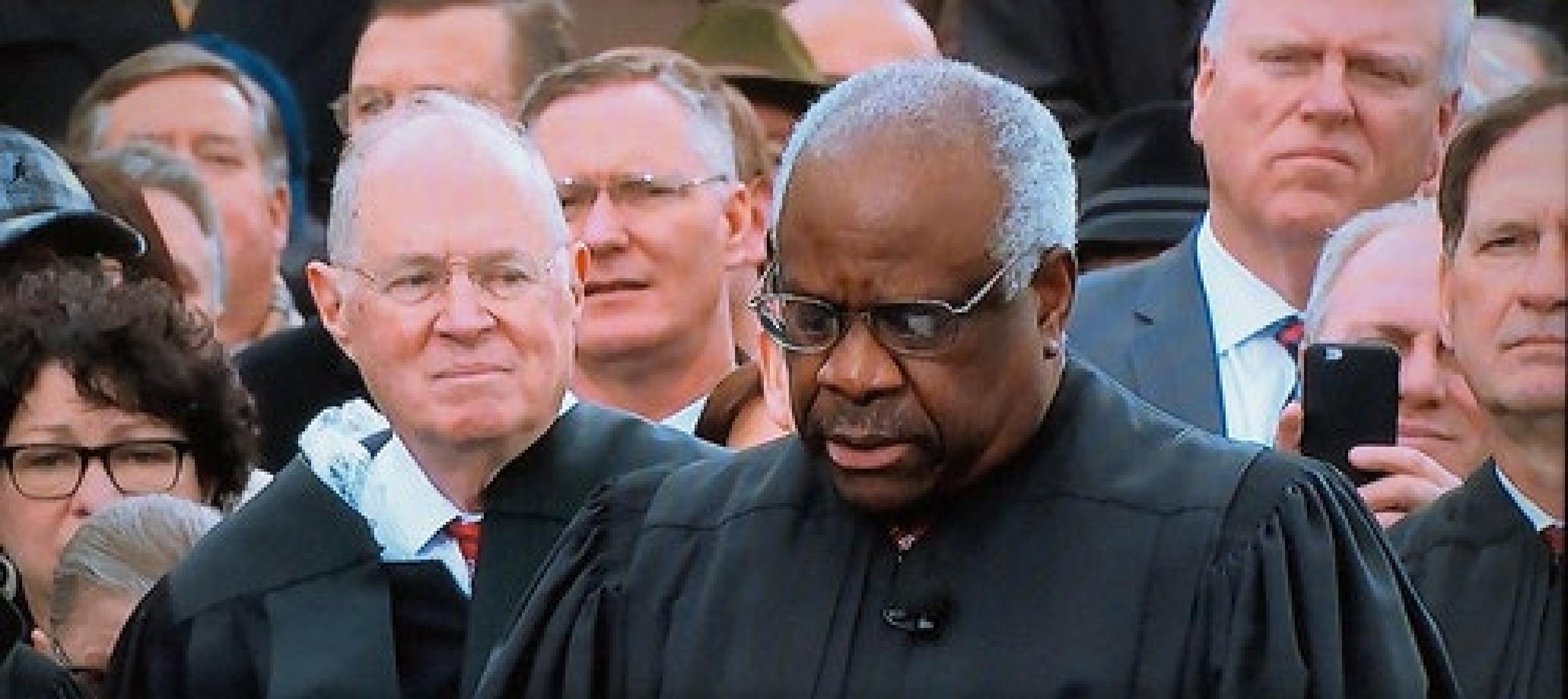
Why take the time to reassure religious opponents of marriage equality that *their* rights were not at risk?

“Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, **with potentially ruinous consequences for religious liberty.**”





“[T]he majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, **they will risk being labeled as bigots and treated as such by governments, employers, and schools.**”



Was Justice Thomas Right?

Thomas says “religious liberty” would be ruined.

What does he mean by “religious liberty?”

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“religious liberty is about freedom of action in matters of religion generally...”

Thomas says “religious liberty” would be ruined.

What does he mean by “religious liberty?”

“...and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.⁷”

Thomas offers no citations or definitional clarity for the terms “religious liberty” or “religious practice.”

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“Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies.”

Thomas was probably not talking about this:

U.S.

Clergy Charged For Marrying Gays

February 28, 2004 / 4:01 PM EST / CBS/AP



Two New York State ministers were charged Monday for marrying 13 gay couples, thrusting the clergy into the legal battle over gay marriage.

Unitarian Universalist ministers Kay Greenleaf and Dawn Sangrey were charged with multiple counts of solemnizing a marriage without a license, the same charges leveled against New Paltz Mayor Jason West, who last month drew the state into the widening national debate over same-sex unions.

The charges may be the first brought against clergy for performing same-sex unions, according to the Human Rights Campaign, a Washington, D.C.-based gay rights group.

That's unprecedented," said Mark Shields a spokesman for the Human Rights Campaign. He says that prosecutors would spend their time charging anyone with a crime who

More from CBS News

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...but that has yet to happen.

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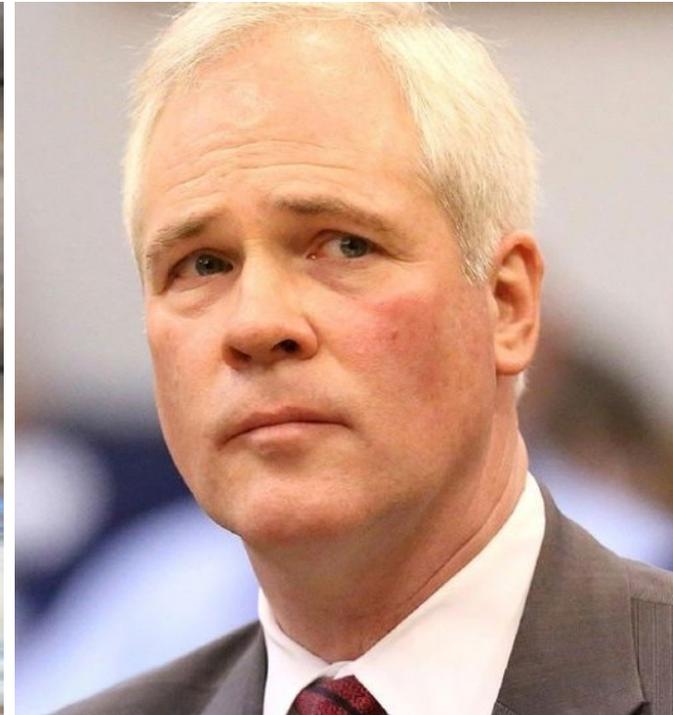
What *has* happened:



Kim Davis (KY)



Ruth Neely (WY)



Vance Day (OR)

Several state actors (a county clerk and two judges) were sued or sanctioned for refusing to treat equally all members of the public (to whom they owe a duty).

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“Davis may have been one of the first victims of this Court’s cavalier treatment of religion in its *Obergefell* decision, but she will not be the last. Due to *Obergefell*, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society...”

Statement of Justice Clarence Thomas respecting the denial of certiorari in *Davis v. Ermold*, 141 S.Ct. 3 (2020)

In his *Obergefell* dissent, Thomas offers no specific examples of how individual religious liberty would be threatened.

Instead, he cited only to an amicus brief filed by the Becket Fund for Religious Liberty (co-filed in support of neither party):

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“Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will ‘have unavoidable and wide-ranging implications for religious liberty.’”

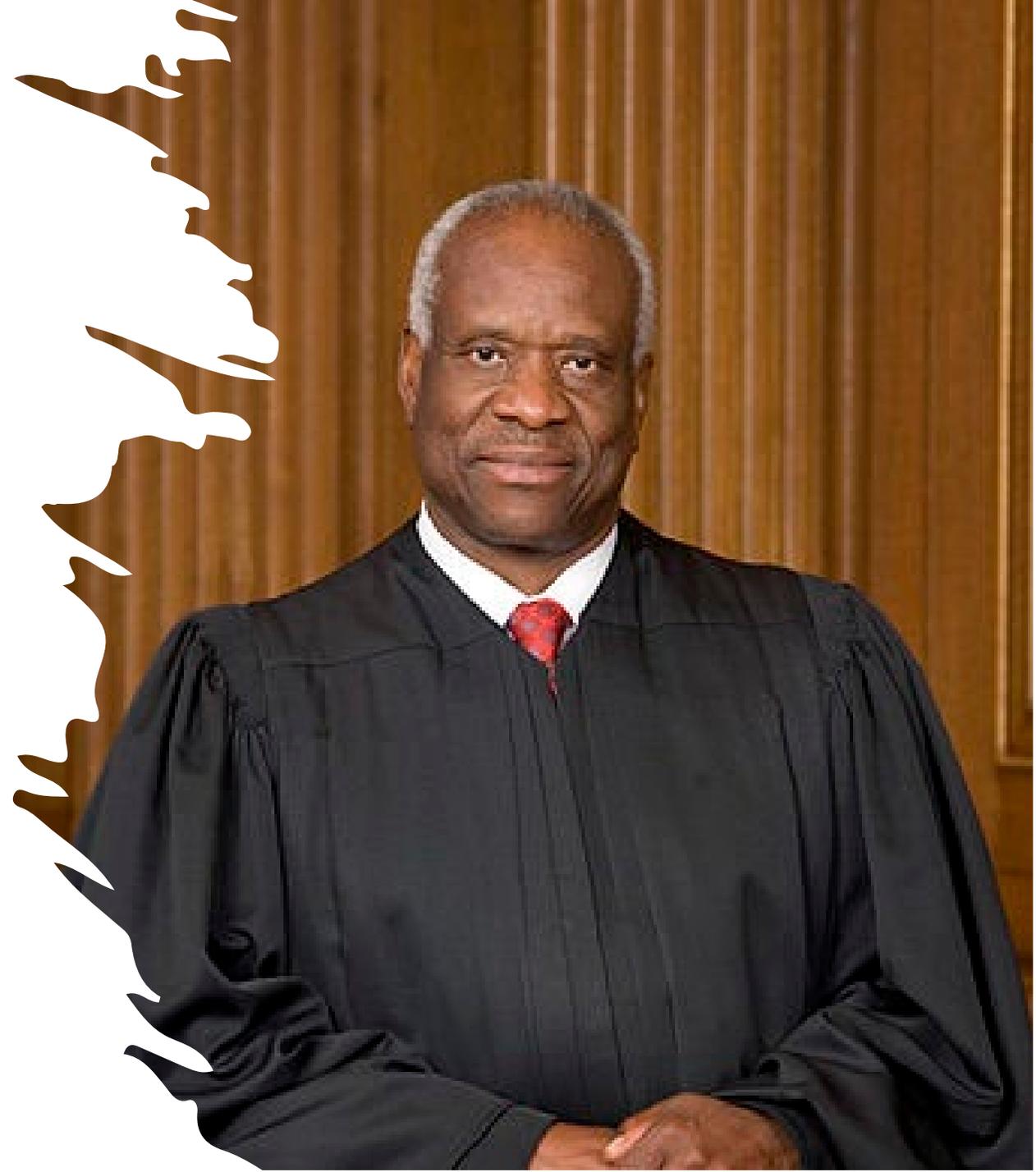
Becket Fund suggests that a broad ruling in *Obergefell* could lead religious organizations to lose:

- Leases to public parks and facilities
- Licenses for adoption agencies
- Financial aid and accreditation for private schools
- Government contracts and grants
- Tax-exempt status

(An expansive conception of collective liberty that includes an entitlement to government benefits.)

But just three pages earlier:

“As a philosophical matter, liberty is only freedom from governmental action, **not an entitlement to governmental benefits.** And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment.”



What was Becket (and Thomas) really worried about?

The possibility that noncommercial religious organizations and services might be reclassified as “public accommodations” and thus be subject to anti-discrimination laws.

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(That also hasn't happened.)

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Commercial actors (cake bakers, photographers, would-be web site designers) have raised religious freedom and free speech defenses to the enforcement of state and local anti-discrimination laws.

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(*Obergefell* had nothing to do with anti-discrimination laws but nevertheless gets cited as the source of subsequent conflict by Justices Thomas and Alito.)



Some Additional Notes on *Obergefell* and Religion

Many of the *Obergefell* plaintiffs are religious people—Catholic, Protestant, Unitarian, Jewish, and more.

And both Kentucky couples married after the decision were married in churches.



Obergefell really *was* a case about religious freedom ~~freedom~~
supremacy.

The state marriage bans, especially that of Kentucky, were the product of reactionary religious fervor.

State legislators cited biblical scripture repeatedly in support of the 2004 constitutional ban.

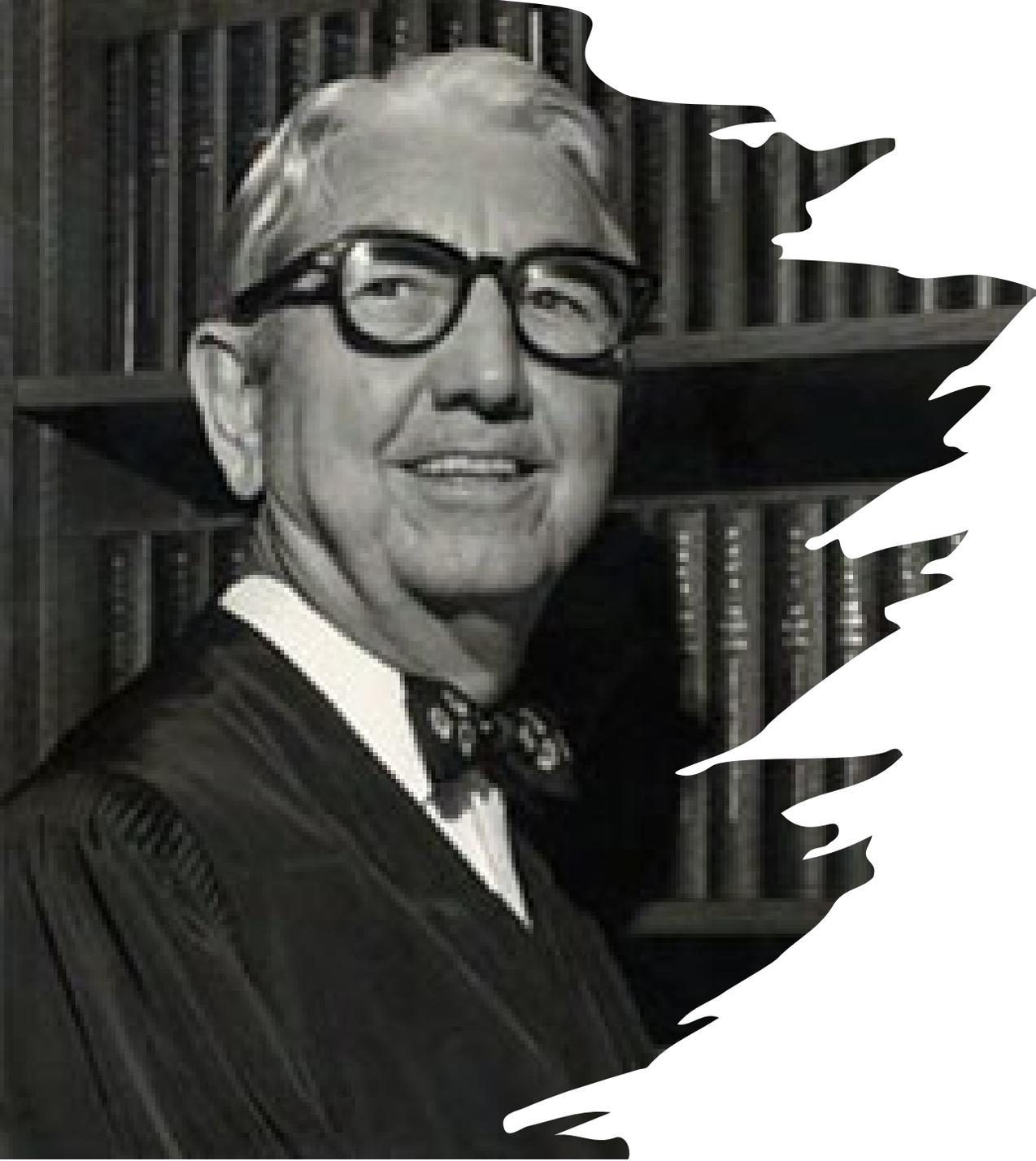
“We’ve had a couple Bible lessons here today, but if you look at it biblically, you can find, whether it’s the Old Testament or the New Testament, whichever you prefer—constant, constant references to a marriage being between a man and a woman.”

--KY Senator Ed Worley, March 11, 2004

The states' arguments were weak because they could not be honest about their religious motivations under the now-abrogated *Lemon v. Kurtzman*.

The legislative records were clear why the bans were passed, but a “religious purpose” for a law violated the establishment clause.

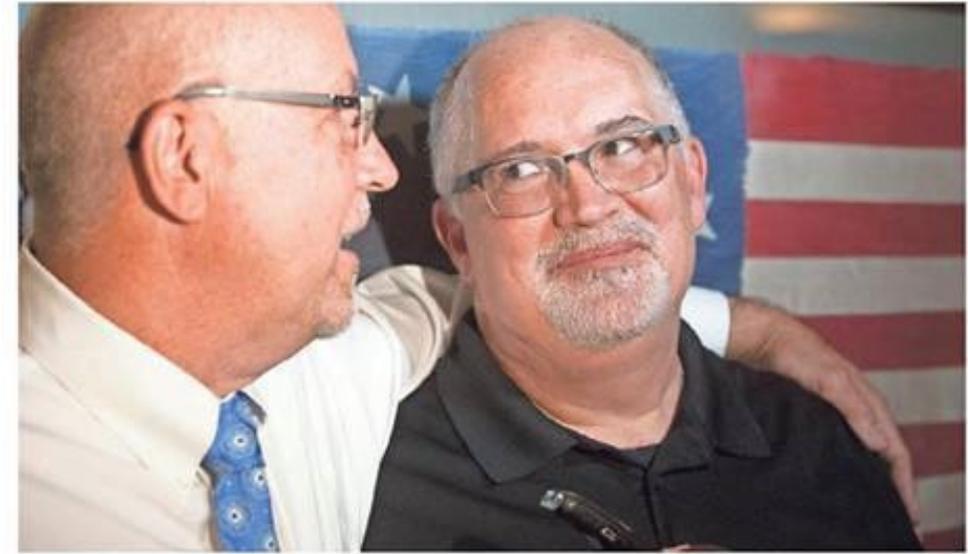
- Post hoc secular excuses (“boosting heterosexual procreativity and stable birth rates”) were understandably derided as “disingenuous” and “not those of serious people.”
- Vague defenses of the “traditional definition of marriage” were insufficient under precedent, devoid of coherent purpose, and beside the point—the plaintiffs did not challenge the states’ protection of opposite-sex marriages. Tradition continued.



“While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.”

Justice Tom Clark
Abington v. Schempp (1963)

May we be so lucky to gather in 2035 for
“Obergefell v. Hodges, 20 Years Later.”



Outside the Jefferson County Clerk's office, Timothy Love, puts his arm around his life partner, Larry Yuzan, right. They were the first to receive a marriage license in the county.

HAPPILY EVER EQUAL

Kentucky plaintiffs savor high court win

Chris Kenning
Staff Writer



Hours after Friday's historic Supreme Court ruling, plaintiffs Timothy Love and Lawrence Yuzan left their attorney's office and walked through downtown Louisville to the clerk's office that in 2014 denied them a marriage license. Accompanied by supporters and photographers, they were cheered several times by diners at sidewalk cafes and passing cars. Inside the Jefferson County Clerk's Office, a crowd of well-wishers hugged and snapped photos as the couple waited for the state to issue new forms. Finally they paid \$35 and signed the license for which they'd waited decades and pursued to the nation's highest court, with Mayor Greg Fischer arriving to hand them a congratulatory bottle of champagne.

See WKRN Page 7A



Chris Hartman, left, director of Louisville's Fairness Campaign, addresses the rally.

6 Kentucky couples at heart of ruling that validates same-sex marriage rights

Andrew Wolfson
Staff Writer



In a historic ruling reshaping the definition of the American family, the Supreme Court on Friday invalidated bans on same-sex marriage in Kentucky and across the country, holding that gays and lesbians have the constitutional right to marry. The court ruled 5-4 that states must grant same-sex couples licenses to marry and recognize such marriages performed in other states.



MORE REACTION

Top benefit of same-sex marriage is 'validation,' supporters say. 7A

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