

1 LOHIER, Circuit Judge, concurring:

2 I agree with the majority opinion, including its fact-specific determination
3 that the engagement relationship between Scott Matusick and his fiancée, Anita
4 Starks, is the type of intimate association protected by the First Amendment. I
5 write separately to emphasize that Matusick's arguments at trial focused on the
6 defendants' efforts to interfere with that relationship and to make clear that the
7 engagement relationship is entitled to constitutional protection because it has
8 played a "critical role in the culture and traditions of the Nation" since the
9 founding. Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

10 As an initial matter, the dissent acknowledges that Matusick and Starks's
11 "choice of each other as marital partners" may be protected by the intimate
12 association right, Dissenting Op., post, at 14 (emphasis omitted), but states that
13 Matusick did not present his case "on the theory that betrothal was the specific
14 protected relationship violated," id., post, at 16. First, I discern no constitutional
15 difference between undermining a person's choice of marital partner and
16 interfering with a betrothal relationship. Second, I disagree with the dissent's
17 characterization of Matusick's position at trial. The heart of Matusick's argument
18 was that defendants tried to interfere with his engagement relationship.

19 Throughout their jury addresses, Matusick's attorneys stressed that "Matusick's

1 termination was a form of discrimination because of his relationship with his
2 wife who was at that time his fiancée,” Joint App’x at 1894, and that “Matusick
3 was a victim of discrimination because he was dating and then became engaged
4 to an African American woman,” Joint App’x at 2905. At trial, moreover, Starks
5 testified that Matusick “acknowledged me as his fiancée” at work and introduced
6 her as his fiancée to his supervisor, Robert Mendez. Joint App’x at 1906-07; see
7 Joint App’x at 2101 (Matusick confirming that he told coworkers that he was
8 engaged and introduced Stark to some coworkers). The couple described to the
9 jury how they fell in love and became engaged.

10 Although the Court in Roberts did not list engagement relationships in its
11 non-exclusive roster of “highly personal relationships” that “might be entitled to
12 . . . constitutional protection,” 468 U.S. at 618-19, such relationships surely
13 qualify. There is virtually no doubt that the engagement relationship between
14 Matusick and Starks is one that the Framers would have recognized (setting
15 aside, of course, the issue of miscegenation). Indeed, engagement as a social
16 practice and a legally recognized relationship status predates the founding. In
17 colonial times, the English law of “spousals” recognized “spousals de futuro” –
18 in essence, betrothals – as a well-established form of contract that could be simple

1 or conditional, public or private, and binding upon children and adults alike. See
2 Wightman v. Coates, 15 Mass. 1, 6 n.a (1818) (reviewing the enforceability of
3 marriage promises under the laws of various European nations). See generally
4 Henry Swinburne, A Treatise of Spousals, or Matrimonial Contracts (1686);
5 Chester Francis Wrzaszczak, The Betrothal Contract in the Code of Canon Law
6 (Canon 1017) 183-86 (1954). While spousals de futuro were the custom in early
7 colonial New England, see Chilton L. Powell, Marriage in Early New England, 1
8 New Eng. Q. 323, 327 (1928), the modern social form of engagement replaced
9 formal betrothal customs “after a few years of life in the New World,” Alice
10 Morse Earle, Old-Time Marriage Customs in New England, 6 J. Am. Folklore 97,
11 101 (1893).

12 By the later 1700s American middle-class social practice with respect to
13 marriage involved “courting” — sustained social interaction between the sexes in
14 parents’ parlours, community gatherings, group or couples’ outings, and through
15 written correspondence. See, e.g., Ellen K. Rothman, Hands and Hearts: A
16 History of Courtship in America 22-26 (1984); see also Anya Jabour, Marriage in
17 the Early Republic 13-14 (1998). The key transition from courting to engagement
18 involved the exchange of promises between the engaged. See, e.g., Rothman,

1 Hands and Hearts, at 33-35. Couples would date their engagements from the
2 moment of that exchange, and they treated the mutual promises as momentous.
3 See, e.g., Jabour, Marriage in the Early Republic, at 18. Engagements could last
4 for an extended period of time. See Rothman, Hands and Hearts, at 57-75. Social
5 acknowledgment of an engagement varied, but a private announcement to family
6 was common, and the promise itself was nearly universal. Engaged and married
7 couples today will recognize many, if not all, of these attributes.

8 Engagement promises carried legal and economic as well as social
9 significance. American courts recognized the important status of engagement
10 and during the eighteenth century began to develop a civil cause of action for
11 breach of promise. These actions permitted a woman whose engagement
12 promise was breached to recover from a (former) fiancé and were available in
13 almost all of the States into the twentieth century. See Rebecca Tushnet, Rules of
14 Engagement, 107 Yale L.J. 2583, 2586-88 (1998); Robert C. Brown, Breach of
15 Promise Suits, 77 U. Pa. L. Rev. 474, 474-75 (1929). Early American courts did not
16 require formal indicia of engagement, holding instead that “young persons['] . . .
17 mutual engagements [could be] inferred from a course of devoted attention and
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1 apparently exclusive attachment, which is now the common evidence.”

2 Wightman, 15 Mass. at 5.

3 For these reasons I think there is no question that the engagement
4 relationship in general and in this case is a “highly personal relationship” entitled
5 to constitutional protection.