



Critical Analysis of *Obergefell v. Hodges*

Travis Weber, Esq.

What did the Court hold in *Obergefell*?

In a 5-4 opinion, the Supreme Court held in [*Obergefell v. Hodges*](#)¹ that states must license same-sex marriages and recognize such licenses issued by other states. The decision was based on the due process and equal protection provisions of the Fourteenth Amendment.

In the majority opinion, authored by Justice Kennedy (and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), the justices combined their own view and judgment of the institution of marriage with prior cases affirming sexual autonomy to create a purported basis for their decision.

How did the Court err?

The Court improperly took on the role of social problem-solver

In reading the right to same-sex marriage into the Constitution, the Court played social policy maker instead of judge. This issue should have been left to the states, but the Court chose instead to make extensive claims regarding social policy and create a right to same-sex marriage under the Constitution.

In *Obergefell*, the Court made social pronouncements it has no authority or expertise to make, such as “[i]t would misunderstand (those seeking same-sex ‘marriages’) to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.”² Regardless of their accuracy (these claims are quite absurd when examined in light of the stated aims of the LGBT movement backing the challengers in *Obergefell*, and when considering that by its own hand the Court now “disrespect[s] the idea of marriage”), the Court has no authority or expertise to make such claims in the first place.

The Court’s further social assertions—such as “new insights have strengthened, not weakened, the institution of marriage”³ and “many persons did not deem homosexuals to have dignity in their own distinct identity”⁴—are attempts to legitimize its reasoning and conclusions. In addition to lacking the authority to make such statements, however, the Court’s claims do not legitimize its legal reasoning.

This decision and others like it are enabled primarily by an understanding which fails to take a realistic view of the Court’s limited power based on the text of the Constitution, devalues a strict

separation of powers, and disregards any serious consideration of deferring to the states due to federalism.

Justice Kennedy should have heeded his own advice, from just last term in *Schuette v. BAMN*,⁵ that sensitive public policy matters should be left to the states. He did refer to *Schuette*, observing that “this Court reaffirmed the importance of the democratic principle in *Schuette* . . . , noting the ‘right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.’ . . . Indeed, it is most often through democracy that liberty is preserved and protected in our lives.”⁶

But he (unfortunately) decided not to follow his own pro-democracy precedent. Why did Justice Kennedy decide to not follow his own advice? Although he cited constitutional rights language from *Schuette* (which no one would disagree with on its face), in essence, Justice Kennedy appears to feel differently about private sexual matters compared to other issues, as evident in his consideration of *Bowers v. Hardwick*⁷ and *Lawrence v. Texas*⁸ in the *Obergefell* opinion.

Such thinking reveals a Court further departing from a limited view of its own role. As Chief Justice Roberts noted in dissent, had the Court followed *Schuette*, at least the people on the losing side will know “that they have had their say.” Instead, the Court denied its own reasoning (indeed, Justice Kennedy denied *his* own reasoning) from *Schuette*.

The Court’s utter disregard for limits on its role also enables its hypocrisy, such as that evidenced by the *Windsor*⁹ majority’s blatant contradiction¹⁰ of itself in this decision—which Justice Scalia pointed out in dissent:

“It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today): ‘[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States’.”¹¹

The Court further entrenched itself in an erroneous notion of substantive due process

The Fourteenth Amendment provides that the government shall not “deprive any person of . . . liberty . . . without due process of law.”¹² This protection ensured that people could not be detained by the government without fairness and proper process.

However, for years, the Court has applied a notion called “substantive due process” which has dictated that this “liberty” itself actually contains all sorts of freedoms and benefits (though not mentioned in the Constitution) that the government is required to provide the individual. Of course, such freedom cannot be absolute, so these “freedoms” are whatever the Court decides should be provided. Because they are not expressly provided for in the Constitution, in essence, the Court creates these new “rights.” This approach diminishes the ability of the people to govern themselves as they see fit, for as more and more “rights” are created, the people are increasingly unable to act through their legislatures in ways which cannot simply be struck down by the Court in the name of “liberty.”

As Justice Thomas pointed out in dissent, this theory by which rights “come into being” under the Fourteenth Amendment would not have been recognized by the Framers¹³. There is no “right” to have the state recognize same-sex relationships, because there is no liberty to government benefits, just liberty from proactive government interference with one’s liberty.¹⁴ The claim that such liberty includes the right to marry someone of the same-sex is only the latest wound to proper due process, and the most recent way in which “substantive due process” has been used to restrict true freedom as the Constitution and Bill of Rights intended it.

The Court exercised naked political will in overlooking gaping differences between this case and its prior marriage cases

Even assuming that “substantive due process” is valid and should be applied here, the Court failed to apply its own precedent on the subject correctly, and overlooked huge logical gaps throughout its use of precedent and case law on marriage. All of the marriage decisions on which the majority relies pertained to marriage between a man and a woman. None of them dealt with a marriage between two people of the same-sex, and none of them ever contemplated that marriage could be anything but between a man and a woman. To claim all those decisions contemplated such relationships as constitutionally protected marriages is an incredible leap in legal reasoning.

For instance, Justice Kennedy quoted the 1888 case *Maynard v. Hill*,¹⁵ which relied on de Tocqueville to explain that marriage is “‘the foundation of the family and of society, without which there would be neither civilization nor progress.’ Marriage, the *Maynard* Court said, has long been ‘a great public institution, giving character to our whole civil polity.’”¹⁶ Does Justice Kennedy sincerely believe that the *Maynard* Court, which he quotes, contemplated its holding as applying to marriages besides those between men and women? Or that that Court would view such same sex marriages as helpful to the “social order?” Yet Kennedy proceeded to claim “[t]here is no difference between same- and opposite-sex couples with respect to [the] principle” that marriage plays an important part in the “social order.”¹⁷ Here, the Court not only clearly departed from its own law on the subject, but it also made claims it has no authority or expertise to make (as discussed above).

The Court also attempted to rely on *Loving v. Virginia*¹⁸ for the claim that marriage is “‘one of the vital personal rights essential to the orderly pursuit of happiness by free men’.”¹⁹ What the Court failed to elaborate on is that the racially-based law at issue in *Loving* restricted liberty based on an immutable characteristic lacking an inherent moral content. Such a race-based restriction is clearly wrong and unconstitutional, and striking down such laws does not alter the natural structure of marriage between men and women. The Court’s same-sex marriage decision, however, alters the structure of marriage between men and women, and ascribes immutability to behavior which is clearly not. *Loving* must be twisted in order for one to claim it supports the result in *Obergefell*, for while race is immutable, benign, and irrelevant to one’s character or conduct, homosexual conduct is not immutable and those who practice same-sex intimacy are engaging in behavior that has intrinsic moral content.

The Court has largely discarded any notion of higher authority as informing human affairs

The members of the Court have failed to keep in mind what higher law or natural law would have said about the legal issue before them (as justices have done in the past). Earlier in our nation's history, Supreme Court Justice Joseph Story referred to man's "responsibility to [God] for all our actions."²⁰ Can we imagine if such reasoning was applied in the marriage decision today? The Court's current reasoning is more understandable when one views marriage (as the majority appears to do here) as simply an interaction between civil government and the individual and not as one ordained by any authority higher than human desires or government.²¹

In essence, the Court arrived at its conclusion here by viewing marriage as simply whatever man says it is; once its reasoning is divorced from higher authority, the Court more easily appends same-sex "marriage" to its view of what marriages should be constitutionally protected.

How did the Court claim due process supports its decision?

To claim due process supports the decision by the majority in *Obergefell*, the Court first held that Fourteenth Amendment substantive due process protections required states to license same-sex marriage. In the Court's view, this right extends to "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."²² Which rights are protected by substantive due process "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries."²³

The Court started by recognizing that it has long protected the "right to marry"—relying on rulings in the racial, child support, and prison contexts. The Court recognized that none of these dealt with same-sex marriage, and attempts to excuse its forthcoming logical leap: "The Court, like many institutions, has made assumptions defined by the world and time of which it is a part."²⁴

At one point of flimsy reasoning, the Court basically acknowledged it is recognizing this right for the first time—yet marginalized *Washington v. Glucksburg*,²⁵ the case governing recognition of due process rights—and proceeded to rely on four reasons for doing so:

(1) "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."²⁶ "Choices about marriage shape an individual's destiny."²⁷ "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation."²⁸

(2) Relying on *Griswold v. Connecticut*,²⁹ the Court claimed: "A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."³⁰

(3) "A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."³¹

(4) “Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”³²

This reasoning is flawed on multiple levels. In its first two points, the Court focused on “two persons” but ignores the complementary nature of man-woman unions, something homosexual unions can never replicate. Ironically, Justice Kennedy’s third point is precisely why marriage *is* only between a man and a woman—because children need a mom and a dad. In addition to erroneously inferring that same-sex couples can procreate, the Court here relied on *Pierce v. Society of Sisters*,³³ a case which by no means contemplated that marriage could be anything other than a one man, one woman union. In using his fourth point as a basis for this decision, Justice Kennedy turns a blind eye to the fact that our traditions and social order have always understood that marriage is between a man and a woman.

In essence, the Court made up the law here. It has no grounds for claiming these “four principles” justify its result. Moreover, *even if* the four principles are accepted, its application of the principles to same-sex marriage is flawed, as it twisted whatever precedent it relies on beyond recognition, and filled in the gaps by making social pronouncements out of thin air and without a solid foundation in law. Ultimately, this opinion illustrates how judicial reasoning strays from truth when it fails to recognize its boundaries and accord respect to what higher law and natural law say about human relationships.

How did the Court claim equal protection supports its decision?

While the Court mostly relied on due process in its opinion, it also held that the state laws at issue violated the Fourteenth Amendment’s equal protection provision. In its earlier marriage cases, the Court asserted, equal protection and due process grounds had been intertwined. The Court attempted to show that due process and equal protection also intertwine to protect same-sex marriage in this case. The equal protection grounds are less clear and do not feature as prominently as the due process arguments in the majority opinion.

Again, Justice Kennedy personally decided that same-sex marriage will not harm natural marriage, and made another policy pronouncement: “Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”³⁴

This is, of course, an absurd and illogical insertion into the argument. No one has ever suggested that same-sex marriage will discourage marriage between a man and a woman; to invite this idea into the debate can be perceived as an effort to diminish the weight of opponents’ arguments by tainting them with one so ridiculous as not previously having been made.

With such thinking, it could hardly be expected that the Court would follow *Baker v. Nelson*,³⁵ an earlier case in which it rejected a same-sex marriage claim. Unsurprisingly, the Court overruled *Baker*.³⁶

The Court also concluded that its reasoning requiring states to license same-sex marriages would undermine any opposition to recognizing such marriages from out of state.³⁷ Thus, the Court held that states must issue same-sex marriage licenses and must recognize same-sex marriages performed in other states.³⁸

Unfortunately, the truth that the Court's result harms marriage by removing its Author from consideration, whether or not such was intended, was missed here.

If there is a silver lining to the ruling, it is that the decision is heavily based on due process grounds, and focused less on equal protection (and avoiding animus entirely). Moreover, the Court did not say that homosexuals were a suspect or quasi-suspect class, or that such a class was entitled to review under a heightened or strict scrutiny standard. All this means that there could be more leeway to protect religious freedom when regulating matters related to same-sex marriage.

Did the Court make accommodations for religious liberty in its opinion?

The Court does briefly address religious liberty concerns:

“Finally, it 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. The same is true of those who oppose same-sex marriage for other reasons.”³⁹

While this recognition of religious liberty protections is better than nothing, it does not accurately capture a satisfactory vision of how religious liberty should be (or even currently is) constitutionally or statutorily protected. As Chief Justice Roberts noted in his dissent, the absence of free exercise (as opposed to free speech) language in the above paragraph is “ominous[],”⁴⁰ and several dissenting Justices make similar observations.

On the bright side, the Court's statements about religious liberty (known as “dicta”) do not pertain to the holding of the case (which only affects government licensing and recognition of same-sex marriages). *Obergefell* did not directly implicate any religious liberty issues, so religious liberty precedent and case law stands unaffected by this decision.

What did the dissenters say?

Chief Justice John Roberts

Chief Justice Roberts wrote a dissenting opinion (joined by Justices Scalia and Thomas), noting that the majority ruling was a policy decision, not a legal decision. He observed that the changes

in marriage laws over time (while changing the regulation of marriage in some respects) did not, as the majority claims, alter the “structure” of marriage as between a man and a woman:

“In short, the ‘right to marry’ cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.”⁴¹

He also aptly pointed out that *Dred Scott v. Sandford*⁴²—a case in which the Court tried (and failed) to “solve” a social issue—was the Court’s first foray into substantive due process.⁴³

The Chief also recognized that the majority’s claim that marriage is restricted to “two” people just can’t logically hold up under its own reasoning, and could easily be extended to plural marriage:

“Although the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.”⁴⁴

He continued:

“Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.”⁴⁵

Chief Justice Roberts then quoted *Schuette*⁴⁶ and noted that although there is still a losing side in a democratic debate, at least those people will know “that they have had their say,”⁴⁷ unlike here, where the court disenfranchised over 50 million Americans.

He also recognized religious liberty issues which may arise:

“Today’s decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage

democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage. . . . The First Amendment guarantees, however, the freedom to 'exercise' religion. Ominously, that is not a word the majority uses."⁴⁸

He predicted more religious liberty issues:

"Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . . There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."⁴⁹

The Chief lastly took issue with the majority's statement that laws supporting natural marriage are demeaning; he did not like the majority's implication that those supporting such laws wish to demean anyone, and observed that "while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition."⁵⁰

Justice Antonin Scalia

Justice Scalia also dissented (joined by Justice Thomas) and accused the majority of legislating, not judging.

He aptly pointed out that the *Windsor* majority blatantly contradicted itself today:

"It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today): '[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States'."⁵¹

Justice Scalia concluded with a warning:

"With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence."⁵²

Justice Clarence Thomas

Justice Thomas also dissented (joined by Justice Scalia), and noted the danger (as evidenced today) of substantive due process doctrine—by which rights “come into being” under the Fourteenth Amendment. He argued the Framers recognized no “right” to have the state recognize same-sex relationships; there is no liberty to government benefits, just liberty from adverse government action.

He continued by focusing on the threat to religious liberty this decision represents, and recognized that while this ruling may change governmental recognition of marriage, it “cannot change” the religious nature of marriage: “It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”⁵³

Justice Thomas also pointed out the problems with the majority’s conception of religious liberty:

“Religious liberty is about more than just the protection for ‘religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.’ . . . Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

. . . .

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.”⁵⁴

Justice Samuel Alito

Justice Alito also dissented (joined by Justices Scalia and Thomas), arguing that the Court’s decision is based on a flawed understanding of what marriage is, and that it takes the decision out of the hands of the people who have the authority to decide it.

He also believes this decision threatens religious liberty:

“It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. . . . The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the 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.”⁵⁵

Justice Alito recognized that the Court has made it impossible for states to consider how to legislatively protect conscience rights should they want to do that while at the same time legislatively authorizing same-sex marriage.⁵⁶

His conclusion is an appropriate “take-away” from this decision, and carries in it a warning for all (whether or not they support same-sex marriage) to heed:

“Most Americans—understandably—will cheer or lament today’s decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority’s claim of power portends.”⁵⁷

Travis S. Weber, Esq., is the Director of the Center for Religious Liberty at Family Research Council.

¹ 135 S. Ct. 2584 (2015).

² *Id.* at 2608.

³ *Id.* at 2588.

⁴ *Id.* at 2596.

⁵ 134 S. Ct. 1623 (2014).

⁶ *Obergefell*, 135 S. Ct. 2584, 2605.

⁷ 478 U.S. 186 (1986).

⁸ 539 U.S. 558 (2003).

⁹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁰ In *Windsor*, the Court struck down a federal definition of natural marriage as unconstitutional, *id.* at 2695, but emphasized that states were to be left free to regulate marriage as they saw fit. *Id.* at 2691-92.

¹¹ *Obergefell*, 135 S. Ct. 2584, 2628 (Scalia, J., dissenting).

¹² U.S. Const. amend. XIV.

¹³ *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

¹⁴ *Id.* at 2634-36 (Thomas, J., dissenting).

¹⁵ 125 U.S. 190 (1988).

¹⁶ *Obergefell*, 135 S. Ct. at 2601.

¹⁷ *Id.*

¹⁸ 388 U.S. 1 (1967).

¹⁹ *Obergefell*, 135 S. Ct. at 2598 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

²⁰ Joseph Story, Commentaries on the Constitution 3 § 1865 (1833).

²¹ *Obergefell*, 135 S. Ct. at 2595 (stating the institution of marriage has “evolved over time”).

²² *Id.* at 2589.

²³ *Id.* (internal citation omitted).

²⁴ *Id.* at 2598.

²⁵ 521 U.S. 701 (1997).

²⁶ *Obergefell*, 135 S. Ct. at 2589 (citing marriage cases in context of race, child support, and prison).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 381 U.S. 479 (1965).

³⁰ *Obergefell*, 135 S. Ct. at 2589.

³¹ *Id.* at 2590.

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- ³² *Id.* at 2601.
- ³³ 268 U.S. 510 (1925).
- ³⁴ *Obergefell*, 135 S. Ct. at 2607.
- ³⁵ 409 U.S. 810 (1972).
- ³⁶ *Obergefell*, 135 S. Ct. at 2605.
- ³⁷ *Id.* at 2607.
- ³⁸ *Id.* at 2608.
- ³⁹ *Obergefell*, 135 S. Ct. at 2607.
- ⁴⁰ *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).
- ⁴¹ *Id.* at 2619 (Roberts, J., dissenting).
- ⁴² 60 U.S. 393 (1856).
- ⁴³ *Obergefell*, 135 S. Ct. at 2616-17 (Roberts, J., dissenting).
- ⁴⁴ *Id.* at 2621 (Roberts, J., dissenting).
- ⁴⁵ *Id.* at 2624 (Roberts, J., dissenting).
- ⁴⁶ *Id.* at 2624-25 (Roberts, J., dissenting).
- ⁴⁷ *Id.* at 2625 (Roberts, J., dissenting).
- ⁴⁸ *Id.* at 2625 (Roberts, J., dissenting).
- ⁴⁹ *Id.* at 2626 (Roberts, J., dissenting).
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 2627-28 (Scalia, J., dissenting).
- ⁵² *Id.* at 2631 (Scalia, J., dissenting).
- ⁵³ *Id.* at 2638 (Thomas, J., dissenting).
- ⁵⁴ *Id.* 2638-39 (Thomas, J., dissenting).
- ⁵⁵ *Id.* at 2642-43 (Alito, J., dissenting).
- ⁵⁶ *See id.* at 2643 (Alito, J., dissenting).
- ⁵⁷ *Id.* at 2643 (Alito, J., dissenting).