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Obergefell v. Hodges; The Constitution in Support of Social Engineering

Mr. Justice Kennedy delivered the long-awaited opinion of the United States Supreme Court, holding that, consistent with the Federal Constitution, the states may not define marriage as only between a man and a woman. The Fourteenth Amendment to the United States Constitution, by a long line of cases, applies to the states the Fifth Amendment guaranty of equal protection of the laws to the states.

The question in *Obergefell* was whether equal protection of the law prohibits states from defining marriage only as between couples of the same sex and deprives the states of the authority to determine what genders may marry within their borders.

The reasoning of Justice Kennedy is supplied in his lengthy introduction addressing the "transcendent importance of marriage." He states, "Rising from the most basic human needs, marriage is essential for our most profound hopes and aspirations." Justice Kennedy clearly was informed by his view that the sacred, holy and special relationship of marriage should not be restricted based upon gender.

Justice Kennedy applied equal protection to couples of the same sex by reasoning that "[W]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim for liberty must be addressed." The right to marry is protected by the Constitution; the fact that marriage is sought by people of the same gender should not vitiate those rights notwithstanding the history of how marriage has been defined previously. After discussing at some length the nature of marriage, Justice Kennedy cited case law that same-sex couples have the same right as opposite-sex couples who enjoy intimate association.

When I was clerking for Judge Muir, a man who is now my law partner, Ron Travis, represented a criminal defendant in the case of *U.S. v. Brewer*. The government had charged Mr. Brewer with both involuntary and voluntary sodomy with another inmate. The jury acquitted Mr. Brewer of involuntary assault and Travis, many years ahead of his time, filed a motion to upset the conviction for voluntary sodomy based on the rights of consenting same-sex couples to engage in intimacy. The judge turned to me and said, "I am inclined to grant the motion, but you are a young liberal law review-type guy; why don't you draft the opinion for me?" I drafted the opinion to deny the motion to dismiss the conviction. It was my belief that in the prison setting, it is sometimes very difficult to know what is voluntary and what is involuntary. However, Judge Muir's decision did question laws outlawing sodomy, notwithstanding their Biblical history. I took a little heat for that from my more liberally inclined friends for some time.

Kennedy's opinion, love it or hate it, reads like an essay on the importance of marriage and the difficulty encountered by same-sex couples who "are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." Justice Kennedy simply believes that same-sex marriage is a social principle that should be respected as part of the inalienable rights of loving human beings who happen to be of the same gender.

The court also relied upon decisional case law which overturned the ban against black and white marriage. Laws prohibiting marriages between same-sex couples, burden the rights of each member of the partnership. The grave and continuing harm which Justice Kennedy found exists cannot be tolerated under the Constitution. "The court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

The court went further and found that same-sex marriages in one state must be recognized in another. The major dissent was written by Chief Justice Roberts, who recognized the appeal of the same-sex couples. The Justice argued that whether same-sex marriage is a good idea is of no concern to the court since it is not a super-legislature. The fundamental right to marry does not include the right to make a state change its definition of marriage. "A State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage." As a matter of constitutional logic, the Chief Justice is undoubtedly correct. It is a painful distortion of the Constitution to find that the equal protection clause prohibits states from defining marriage as a union between people of different sexes. The implications contorting the Constitution so dramatically may be unappealing when the road it takes is not as acceptable to a majority of the population.

For example, in *Bush v. Gore*, the United States Supreme Court stole the election from Albert Gore, who received the majority of popular votes. The court stopped the recount in Florida simply because it did not want the disruption of a contested election. The court even went so far as to state that its decision should not be regarded as any particular precedent.

In the much criticized *Citizens United* case, the Supreme Court of the United States equated money with free speech, invalidating laws on campaign contributions. Activist conservatives and liberal social engineers have a lot in common. Mr. Justice Black would roll over in his grave to see how the Constitution has been interpreted by those with a conservative or a liberal agenda.

Roberts, in *Obergefell,* realized that he will be subject to much criticism, but his understanding of the constitutional limitations on our antique document are hard to argue with from an academic point of view. This difficult social issue is behind us, at least for the time being, but should it have arrived through an amendment to the Federal

Constitution or individual legislation in the States? To many that would be regarded as a conservative point of view, but my father, may his soul rest in peace, used to say that, "Even a reed can only be bent so far before it breaks." If our Constitution is currently socially unacceptable, antiquated and thoroughly useless as written, then perhaps it is time to rewrite it in the interests of honesty.

Justice Cardozzo, in The Nature of the Judicial Process, explained how courts legislate. The Supreme Court of the United States represents powerful political forces. Some Presidents have been surprised by their appointees, and others have nominated reliable advocates for their political points of view. What is perhaps most compelling about the *Obergefell* decision is not the outcome, but the implications for the future. When a social policy issue is driven hard enough and strong enough, the United States Supreme Court is going to bend and interpret the Constitution in a way which satisfies the politics of the time.

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