

ABSTRACT

Equality or Religious Liberty: An Examination of *Obergefell v. Hodges*

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The gay rights movement is perhaps the most rapidly progressing social and political movement of our generation. Within a mere sixty years, gay rights advocates arrived at the Supreme Court in pursuit of national recognition of same-sex marriage. Justice Kennedy, in his majority opinion in *Obergefell*, extended the right of marriage to same-sex couples through an argument founded in the rhetoric and structure of the civil rights cases *Brown v. Board of Education* and *Plessy v. Ferguson*. However, the use of these cases creates a substantial change in legal precedent for religious dissenters. Rather than relying on precedent involving the First Amendment (*Hosanna Tabor v. EEOC* and *Hobby Lobby v. Burwell*), cases involving religious dissent will be decided in light of precedent from the racial discrimination cases of the Civil Rights movement (*Bob Jones v. United States*). In light of this precedential shift, what does it mean to dissent from gay marriage in 2016? Does the equation of religious liberty with “Christian dissent from gay marriage” create a dangerous and narrow new definition of religious freedom? Finally, what do these unanswered questions mean for tolerance in the modern world?

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EQUALITY OR RELIGIOUS LIBERTY:
AN EXAMINATION OF *OBERGEFELL V. HODGES*

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INTRODUCTION

Melba Patillo Beals, one of the Little Rock Nine, speaks to a divided America in her memoir *Warriors Don't Cry*, encouraging humanity to accept the task we've been given: "to cope with our interdependence [and] to see ourselves reflected in every other human being and to respect and honor our differences."¹ The differences in race that provoked rallies and death threats ultimately paved the way for the fight for racial equality, which is still in progress today. However, when Melba Patillo climbed the steps of a rural high school in Arkansas amidst the jeers and threats of parents and objectors, she became a hero not only to the civil rights movement, but, indirectly, to the gay rights movement as well. The inextricable connection between the two movements advanced by advocates of gay rights seems to create a direct lineage from civil rights cases (*Plessy v. Ferguson*, *Brown v. Board of Education*, and *Bob Jones v. United States*) to the pivotal gay rights case of 2016: *Obergefell v. Hodges*.

The gay rights movement (distinct from the movement for racial equality) began taking shape in the late 1930s and early 1940s. The first Supreme Court case dealing with these issues came in 1952, two years before *Brown* in 1954 and, since then, the two movements have advanced in parallel lines. In 2016, Justice Anthony Kennedy released the majority opinion of the Supreme Court to a massive and diverse crowd of ordinary citizens, celebrities, and political activists. Even President Barack Obama made a statement about the expansion of equality achieved by *Obergefell*. However, Kennedy's

¹Beals, *Warriors Don't Cry* 134

opinion, in a surprising turn of events, relied on the philosophical foundation of the definitions of family, love, and equality built with the bones and structure of the arguments of Justice Warren in *Brown* and Justice Harlan in *Plessy*.

Justice Kennedy made his case for gay marriage on the foundation of the Civil Rights movement. Most fundamentally, he built his arguments in *Obergefell* on Warren's 'intangible factors,' using the precise language Warren had used to show the permanent emotional harm done to black children in segregated schools. Kennedy echoed this heritage in employing the language of 'dignity,' 'inferiority' and 'immaterial burdens.' But Kennedy also used the civil rights arguments of child welfare and dignity, the similar roles of education and marriage, the true significance and place of states' rights, and, finally, a heavy reliance on the Fourteenth Amendment. The response to his comparisons was varied, but largely praised by Americans and accepted without question by many citizens.

This connection – drawn so seamlessly by the Supreme Court – leaves unanswered questions for religious dissenters. What does it mean to dissent from gay marriage in 2016? Is a religious dissenter who disagrees with gay marriage comparable to a Southern member of the KKK in the 1960s? Is a woman who refuses to cater a gay wedding comparable to a white Arkansas parent throwing beer bottles at nine children walking up the steps to integrate a high school? Furthermore, does this boiling down of religious liberty to Christians dissenting from gay marriage create a dangerous new definition of religious freedom? Finally, what do these unanswered questions mean for tolerance in the modern world?

Many of these questions are answered by the racial discrimination case *Bob Jones v. United States*. Despite its character as a civil rights case, Kennedy's overt reliance on *Loving* and indirect reliance on *Plessy* and *Brown* creates a precedential shift for cases involving religious liberty. Instead of relying on cases involving religious discrimination like *Hosanna-Tabor v. EEOC* and *Hobby Lobby v. Burwell*, religious dissenters are forced to go up against racial discrimination cases. *Bob Jones* then becomes the lynchpin for Christians who dissent from gay marriage in business and educational realms.

The connection to the civil rights movement, however, not only creates a precedential shift for religious dissenters, but indirectly creates a new definition of religious liberty altogether. This new definition of religious liberty in popular culture is knit together with homosexuality, causing problems not only for Hindus, Muslims, and Jews who are now not included in this new understanding of religious freedom, but for tolerance both domestically and internationally. Is tolerance possible when the sides are no longer those who advocate for equality versus those who advocate for religious freedom, but those who advocate for equality versus those who advocate for *discrimination*?

In the following four chapters, I examine the history of the gay rights movement and then the landmark case *Obergefell v. Hodges*. In the third chapter, I analyze Kennedy's majority opinion in the context of the landmark civil rights cases *Plessy* and *Brown*. Finally, I will attempt to answer the unanswered questions Kennedy's analysis leaves behind for religious dissenters and the future of tolerance. Equality is an admirable

and necessary human right, but no more necessary than the fundamental First Amendment right to believe and practice one's spiritual beliefs.

CHAPTER ONE

A History of the Gay Rights Movement in the United States

When Harry Hay began exploring his sexuality, the word “homosexual” was unlisted in the dictionary – he and other gay men of the 1930s merely called themselves “temperamental.”¹ While those around Hay were afraid to oppose laws barring homosexuals from workplaces, organizations, and activities, Hay was unabashed about the need for political representation for gay men and women in the United States. Hay said in an interview with *Progressive Magazine*, “I was accustomed to walking alone... I was the only one who would say, ‘We've got to stand.’”² However, the fear of speaking out only grew in the 1950s during the Lavender Scare, in which Senator Joseph McCarthy deemed all homosexuals sympathizers (“fellow travelers”) of the Communist Party. McCarthy alleged that communism and homosexuality shared the same ideological principles—“both groups allegedly abhorred religion; rejected middle-class morality; were manipulative and cynical; and, finally, were eager to put their own cause above the national one,”³ using the *Diagnostic and Statistical Manual of Mental Disorders*’ (DSM II) definition of homosexuality as a mental illness caused by “troubled family dynamics or faulty psychological development.”⁴

¹Progressive Interview with Harry Hay

²Ibid.

³GLBQ Dictionary: McCarthyism

⁴The American Psychiatric Association

To combat the fear and prejudice inspired by McCarthy's propaganda, Hay formed the Mattachine Society in 1950, the first national gay rights organization, with the help of his partner Rudi Gernreich. The society began leading underground discussion groups for "hardened old queens,"⁵ who arrived cynical about the prospect of change but left feeling empowered. The groups engendered a collective realization that "all the things [they'd] been suffering were things that all the rest were suffering, too."⁶ Soon, nearly five thousand homosexual men were meeting in California to discuss gay rights and possibilities for advocacy in the political world. They began fighting the entrapment policies of local policemen, whom the Mattachine Society claimed would entice gay men into "doing things they'd never do"⁷ otherwise. One night in Westlake Park, Dale Jennings found himself being pursued by a self-identified homosexual, whom he then invited into his home for coffee. Jennings, a member of the Mattachine Society, was arrested immediately after offering food and drink to the man, who revealed himself as an undercover cop. Jennings was then thrown into the back of a police car. He described the experience to *Workers Magazine*:

There was the badge and the policeman was snapping the handcuffs on me with the remark, 'Maybe you'll talk better with my partner outside.' I was forced to sit in the rear of a car on a dark street for almost an hour while three officers questioned me. It was a particularly effective type of grilling. They laughed a lot among themselves. Then, in a sudden silence, one would ask, 'How long have you been this way?' I refused to answer. I was scared stiff... They drove over a mile past the suburb of Lincoln Heights, then slowly doubled back. During this time they repeatedly made jokes about police brutality, and each of the three instructed me to plead guilty and everything would be all right.⁸

⁵Interview with Harry Hay

⁶Ibid.

⁷Ibid.

⁸Workers Magazine 2005

“Plead guilty” was often the advice of the police, despite the Mattachine Society’s claims that the defendants were either innocent of the crimes with which they had been charged (under laws criminalizing same-sex public displays of affection and gender variant cross dressing) or had been entrapped by the police. Dale Jennings, with the help of both Hay and attorney George Shibley, took the situation to the courts, arguing against the law rather than defending Jennings’ own innocence or guilt. The Mattachine Society issued a pamphlet headlined “Call to Arms,” which read:

We the CITIZENS COMMITTEE AGAINST ENTRAPMENT, an anonymous body of angry voters in full sympathy with the spirit of rebellion in our community concerning police brutality against Minorities in general, ARE CONVINCED THAT NOW, ALSO, IS THE TIME TO REVEAL IN THE CLEAREST POSSIBLE MANNER THE FULL THREAT TO THE ENTIRE COMMUNITY OF THE SPECIAL POLICE BRUTALITY AGAINST THE HOMOSEXUAL MINORITY.⁹

Jennings’ trial was held on June 23, 1952, where he not only admitted his homosexuality before the court, but further argued that his actions were neither lewd nor lascivious. The jurors deliberated for over forty hours, stuck in a deadlock, until the judge eventually called for a retrial. However, only a few days later, the district attorney dropped the charges. This was not only the first time in California that a homosexual had been freed on a “vag-lewd” charge, but the first major victory claimed by the Mattachine Society. Despite their success, however, Hay was eventually seen as too radical for the organization that he created. His then wild belief that there was a homosexual brotherhood that, legally, should be considered a national minority became the grounds for his expulsion from the Mattachine Society. While Hay craved representation and national attention, the others merely hoped to attain the rights the heterosexual majority

⁹Workers Magazine 2005

enjoyed. This attitude remained constant until the Mattachine Society was forced to take on a much larger case – this time, in front of the Supreme Court.

In 1952, the Mattachine Society became embroiled in a legal dispute with the Post Office and the Federal Bureau of Investigation (FBI) over *ONE: The Homosexual Magazine*, a publication edited by one of their chapters in Los Angeles. The Los Angeles postmaster Otto Olesen objected to the magazine because of both a particular story (“Sappho Remembered”) which he said was “lustfully stimulating to the average homosexual reader”¹⁰ and because of advertisements which directed readers to “lewd” and “obscene” material.¹¹ The US District Court ruled in favor of Olesen, concluding, “the suggestion advanced that homosexuals should be recognized as a segment of our people and be accorded special privilege as a class is rejected.”¹² The Appeals Court upheld the decision unanimously, further stating that “Sappho Remembered” was a “calculated” attempt to “promote lesbianism.”¹³ The Supreme Court, however, reversed the decision, maintaining that the First Amendment right to free speech included speech about homosexuality. Jonathan Rauch, senior fellow at the Brookings Governance Studies Program, spoke reverently of the impact of *One* to both free speech and gay rights in a discussion aired on C-Span in 2014:

This is about whether we can be free as human beings to live our lives as who we really are and to be sovereign over our own mind... If the case had gone the other way, if the Supreme Court denied certiorari, which it very well might have done, Frank Camdy would have been in jail for his advocacy, and the people who came after him would have taken another generation to get where we are today. And the idea that I could now be

¹⁰Eskridge 1997

¹¹Ibid.

¹²*Washington Post*

¹³Ibid.

married in the state of Virginia, recognized by the Federal Government and by the State of Virginia, to a man, and that the Supreme Court will not only hear us today, but may rule in our favor all dates to that fateful decision in 1958.¹⁴

Thus *One* took its place as the first Supreme Court case that validated homosexuality on a national scale, even if there was still far to go.

Soon after the Supreme Court ruling, Illinois became the first US state to decriminalize homosexual sodomy by repealing its sodomy laws in 1963. Three years later in 1966, gay bars were declared legal in New York despite the fact that serving alcohol to homosexuals remained illegal. As a result, gay bars were often raided and closed by the New York Liquor Authority. To challenge the regulation against serving alcohol to homosexuals, the Mattachine Society staged a “sip-in” at the Julius Bar, during which they entered the bar, declared their sexual orientation, ordered a drink, and waited to be served or denied. If they were denied, they sued. When the cases were consolidated and went before the court, the judge sided with the Mattachine Society, arguing that the Constitution guarantees American citizens the right to assemble. Therefore, homosexuals, as American citizens, have the right to congregate. Dick Leitsch, the president of the Mattachine Society at the time, described the significance of the sip-in to NPR: “Until this time gay people had never really fought back. We just sort of took in everything passively, didn't do anything about it. And this time we did it, and we won.”¹⁵

The sip-in, however, was eclipsed three years later when the police raided the Stonewall Inn. It was just after 3 A.M. on June 28, 1969, and the police were camped outside of the Stonewall Inn, a gay club in New York City. While run-down and

¹⁴C-Span Discussion, *One Inc. v Oleson*

¹⁵NPR

denigrated even by the gay community, the club was mildly popular, if only because it was one of few bars that allowed dancing, had inexpensive drinks, and catered to underage patrons. Leitsch remarked that this raid was particularly personal, because the Stonewall Inn catered to those who were not welcome in regular homosexual establishments—drag queens, lesbians, and young homeless homosexuals. To these outcasts from the gay community, “the Stonewall became ‘home’... When it was raided, they fought for it... They had nothing to lose other than the most tolerant and broadminded gay place in town.”¹⁶ Instead of quietly vacating the premises, the patrons and local sympathizers began rioting against the police. The riot escalated, however, when three drag queens and a lesbian were forced into a police car. The crowd thronged around it, outraged, and began hurling glass bottles at the police. Leitsch described the riot to *The Atlantic*:

Fire hoses turned on people in the street, thrown barricades, gay cheerleaders chanting bawdy variants of New York City schoolgirl songs, Rockette-style kick lines in front of the police, the throwing of a firebomb into the bar, a police officer throwing his gun at the mob, cries of "occupy -- take over, take over," "Fag power," "Liberate the bar!" and "We're the pink panthers!" [They] smashed windows, uprooted parking meters, thrown pennies, frightened policemen, angry policemen, arrested mafiosi, thrown cobblestones, thrown bottles, the singing of "We Shall Overcome" in high camp fashion, and a drag queen hitting a police officer on the head with her purse.¹⁷

The riot lasted for several days, only ending when the New York Police Department was called in to control the mob. This was yet another critical point in the gay rights movement, as gay men and women began to resist both the police and the government's restriction of their activities.

¹⁶Dick Leitsch, *The Atlantic*

¹⁷Garance Frank Ruta, *The Atlantic*

Four years later, in 1973, the American Psychiatric Association (APA) released a statement on homosexuality that read:

The American Psychiatric Association opposes any psychiatric treatment, such as ‘reparative’ or ‘conversion’ therapy, which is based upon the assumption that homosexuality per se is a mental disorder, or based upon a prior assumption that the patient should change his/her homosexual orientation.¹⁸

Only a year later, in 1974, Kathy Kozachenko was elected to the Ann Arbor, Michigan City Council, making her the first openly gay American elected to public office.

Kozachenko paved the way for Harvey Milk, a gay Californian, to win a seat on the San Francisco Board of Supervisors three years later in 1977. Milk hoped to “introduce a gay rights ordinance protecting gays and lesbians from being fired from their jobs... and [led] a successful campaign against Proposition 6, an initiative forbidding homosexual teachers.”¹⁹ However, only a year later Milk was assassinated by former San Francisco supervisor Dan White. In two short years, on July 8, 1980, the Democrats become the first political party to endorse gay rights, declaring that their rules committee would not discriminate against homosexuals. Shortly after, Wisconsin became the first state to ban discrimination on the basis of sexual orientation. However, this swell of support for gay men and women and gay rights activists was soon overshadowed by the events of the 1980s.

On June 5, 1981, a seemingly typical Morbidity and Mortality Weekly Report was issued by the US Centers for Disease Control and Prevention (CDC), including a description of five cases involving a rare lung infection (*pneumocystis carinii pneumonia*) in five previously healthy gay men. Two had died by the time the report was

¹⁸American Psychiatric Association

¹⁹PBS Timeline

published, and the remaining three remained in unstable condition. This became the first official report of what would become the Acquired Immune Deficiency Syndrome (AIDS) epidemic, and the beginning of thirty years of “illness, fear, and death”²⁰ due to AIDS. Days later, the CDC was flooded with reports of similar cases among homosexuals from doctors all over the country. The disease spread worldwide to lesbians and heterosexual men and women through injection drug use, blood transfusions, organ transplants, and occupational exposure. By the end of the year, “there [was] a cumulative total of 270 reported cases of severe immune deficiency among gay men, and 121 of those individuals [had] died.”²¹ Fear and suspicion surrounded homosexuality, with rumors abounding that the disease was contagious and could be caught by occupying the same room or restaurant as homosexual men. In the July 22, 1985 issue of *The New York Times*, an anonymous New Yorker was quoted as saying, “These days you're not just coming out of the closet... but you're dragging a skeleton out of the closet with you. You're not only asking friends and relatives to accept someone who is gay, but also to accept someone who may be a carrier.”²² Since the epidemic began that fateful June, 39 million people have died from AIDS related illnesses.

Twenty-eight years passed after *One* was decided, the Supreme Court took another case involving gay rights and homosexuality. Nearly nine years after Milk was assassinated for his public support of gay men and women, *Bowers v. Hardwick* (1986) went before the Supreme Court. An Atlanta police officer had entered Michael

²⁰AIDS.gov Timeline

²¹Ibid.

²²*New York Times* “Impact of Aids”

Hardwick's home to serve an arrest warrant, and found two men engaging in sodomy. Hardwick was then arrested for violating a Georgia law prohibiting oral and anal sex, which applied to both homosexual and heterosexual men and women. Even though the charge was dropped, Hardwick, along with the American Civil Liberties Union (ACLU), challenged the legality of the sodomy law. The Supreme Court (in a 5-4 decision delivered by Justice Byron White) upheld the sodomy law, on the grounds that the Constitution contained no fundamental right to engage in sodomy, while the dissenters argued that this case was not solely pursuing a constitutional right to engage in sodomy, but rather a right to privacy. The gay community rallied in response to the controversial decision in *Bowers*, becoming especially vocal when Lewis Powell, the swing vote in *Bowers*, admitted that he had "probably made a mistake in siding with the majority."²³

Seven years after *Bowers*, in 1993, President Bill Clinton signed a law that instructed military personnel "don't ask, don't tell, don't pursue, and don't harass"²⁴ with regard to homosexual service. This law became known as Don't Ask, Don't Tell (DADT). While the law theoretically lifted a ban on homosexuals in the military instituted in World War II, it effectively maintained a modern statutory ban on their service. The law prevented homosexuals in the military from speaking about their sexual orientation, engaging in sexual activity, and also prohibited commanding officers from speaking to service members about sexual orientation. While President Clinton had coined DADT as the *liberalization* of homosexuals in the military, activists protested that

²³Constitutional Law 514

²⁴Britannica "Don't Ask, Don't Tell"

the policy forced gay members of service into secrecy. By 2008, over 12,000 service members had been discharged for refusing to hide their sexuality.²⁵

Three years after the employment of DADT, two uniquely significant and conflicting decisions shook the foundations of life for gay men and women in 1996; Supreme Court case *Romer v. Evans* and the Defense of Marriage Act signed into legislation by President Bill Clinton. *Romer* involved Colorado's Amendment 2, which stated that sexual orientation did not allow men and women to qualify for "minority status, quota preferences, protected status or claim of discrimination."²⁶ Richard G. Evans, a gay man, then sued both Governor Roy Romer and the state of Colorado, claiming that Amendment 2 violated the equal protection clause of the Fourteenth Amendment. In an opinion written by Justice Kennedy, the Supreme Court ruled that Amendment 2 imposed "a special disability upon [homosexuals] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."²⁷ Kennedy concluded that the purpose of Amendment 2 was to make homosexuals "unequal to everyone else"²⁸. Curiously, only a few short months later, democratic President Bill Clinton signed the Defense of Marriage Act. The act was only opposed by 81 of the 535 members of Congress. It read:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship... In determining the meaning of any Act

²⁵DADT Department of Defense website

²⁶Epstein 628

²⁷Epstein 630

²⁸Ibid. 631

of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife.²⁹

President Clinton later described the atmosphere around the passage of DOMA as “a very different time. In no state in the union was same-sex marriage recognized, much less available as a legal right, but some were moving in that direction. Washington, as a result, was swirling with all manner of possible responses.”³⁰

Despite the opposition to gay rights declared in DOMA by nearly all of Congress, *Time Magazine* shocked the world on April 14, 1997 with Ellen DeGeneres’ cover story “Yep, I’m Gay!” This article appeared after DeGeneres’ character came out of the closet on her sitcom *Ellen*, making her the first leading gay prime-time character ever and making DeGeneres the first openly gay television star. Ratings dropped and ABC quickly took *Ellen* off the air. Her article resulted in tremendous backlash – for three years after the headline debuted, both producers and directors refused to hire her. However, in 2001, DeGeneres started a new project: *The Ellen DeGeneres Show*. DeGeneres has since collected over sixty Daytime Emmy awards, Teen Choice awards, People’s Choice awards, and Primetime Emmy awards.

The *Romer* decision and DOMA legislation marked the beginning of a series of contradictory decisions regarding gay rights, gay marriage, and the right to privacy. For example, the Supreme Court decisions *Boy Scouts v. Dale* (2000) and *Lawrence v. Texas* (2003), decided within three years of each other, seem to simultaneously oppose and support gay rights. *Boy Scouts v. Dale* involved the revocation of adult membership in

²⁹The Library of Congress

³⁰Washington Post, “Bill Clinton: It’s Time to Overturn DOMA”

the Boy Scouts to James Dale because he had recently been the subject of an interview in which he had revealed his homosexuality. Dale filed a complaint, arguing that the revocation violated New Jersey laws against discrimination based on sexual orientation, while the Boy Scouts argued that as a private, nonprofit organization, they had the First Amendment right of expressive association to deny membership. As Rehnquist put it in his majority opinion, “freedom of association plainly presupposes a freedom not to associate.”³¹ Evan Wolfson, the lawyer who represented Dale before the Supreme Court, was quoted by the *New York Times* in 2000 as saying that the decision would require organizations “to declare themselves institutions with an anti-gay message, and we don't think there are many organizations in this day and age willing to declare themselves as that.”³² However, the Supreme Court voted 5-4 in favor of the Boy Scouts, arguing that Dale’s inclusion would “significantly affect its expression”³³ and that requiring Dale’s inclusion runs “afoul of the Scouts’ freedom of expressive association.”³⁴ Chief Justice Rehnquist commented as follows: “Indeed, it appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views.”³⁵ The Court, however, was split, as Justice Stevens argued for the minority, “The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different

³¹*Boy Scouts v. Dale* Majority Opinion, Rehnquist

³²New York Times, “New Jersey Case”

³³Epstein 440

³⁴Ibid. 440

³⁵New York Times, “New Jersey Case”

from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment.”³⁶

The same year, Vermont became the first state to legalize civil unions and partnerships to same-sex couples. The governor at the time, Howard Dean (a democrat) refused to acknowledge the idea of gay marriage, but the democratic legislature wished to extend marital rights to gay couples even if they weren't permitted to call them the unions “marriages.” William Lippert, the vice-chairman of the house judiciary committee who received the law, said, “We were trying to give it as much stature as possible, since we wouldn't be able to call it marriage.”³⁷ It was a radical act at the time, effectively coining the term “civil unions.”

Three years after *Boy Scouts*, police officers received a phone call about a possible weapons disturbance in John Geddes Lawrence's apartment in Houston, Texas, and upon investigation, entered the apartment to find Lawrence engaging in sodomy with Tyron Garner. They were arrested and convicted for violating a Texas law that criminalized homosexual sodomy (which stood in contrast to the Georgia law that had prohibited both heterosexual and homosexual sodomy in *Bowers*). In *Lawrence v. Texas* (2003), the Supreme Court ruled 6-3 in *favor* of Lawrence, arguing that homosexuals have a right to engage in private sexual acts. In a majority opinion penned by Justice Kennedy, he overturned *Bowers*, arguing that:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons

³⁶Ibid.

³⁷NPR: “How Vermont's Civil War Fueled the Gay Marriage Movement”

seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.³⁸

Justice O'Connor issued a concurring opinion, in which she argued that the law violated the Equal Protection Clause, rather than solely the Due Process Clause. Because the law applied only to homosexual sodomy, rather than heterosexual and homosexual sodomy, "Texas treats the same conduct differently based solely on the participants."³⁹

Only a year passed before Massachusetts became the first state to legalize gay marriage in 2004. This was a far cry from the legalization of civil unions in Vermont, and gave full marital rights to same-sex couples. Three years later, the Human Rights Campaign hosted the American Presidential Forum on LGBT Issues, Visible Vote '08. Six democratic presidential nominees attended, including both Barack Obama and Hillary Clinton, but no republican nominees attended the event. One nominee, Senator John Edwards, renounced his previous statements against gay marriage that stemmed from his Southern Baptist background, while Senator Barack Obama promised that his job as President would be to "make sure the legal rights that have consequences on a day-to-day basis for loving same-sex couples all across the country... are recognized and enforced."⁴⁰ This was the first presidential forum focused solely on LGBT rights.

A little over a year after Visible Vote, on November 8, 2008, Californians marched down the streets of San Francisco, Palm Springs, and Long Beach (among other

³⁸Constitutional Law 515-519

³⁹Ibid 519

⁴⁰CNN "Gay Forum"

cities) to protest Proposition 8, a ballot initiative that outlawed gay marriage. The ballot initiative overturned a May ruling by their state Supreme Court that declared same-sex marriage constitutional in the state of California. The march in San Francisco included 2,000 people across three city blocks, while the protest in Long Beach stretched over six blocks. CNN legal analyst Sunny Hostin reported that the decision placed married gay couples “in a legal limbo, a legal black hole.”⁴¹ Two couples sued the state officials responsible for Proposition 8 on the grounds that it violated their Fourteenth Amendment right to equal protection under the law. However, when the case reached the Supreme Court (in *Hollingsworth v. Perry*), Chief Justice Roberts announced that the petitioners did not suffer a “concrete and particularized injury that can be redressed through court action”⁴² and did not have standing under Article III of the Constitution.

In 2009, the Fox show *Glee* appeared on televisions across America, featuring an array of high school stereotypes including a closeted homosexual teenager (Chris Colfer as Kurt Hummel). The show has since added six more homosexual characters and two transgender characters, earning countless awards from GLAAD (the Gay and Lesbian Alliance Against Defamation) praising the show’s sexual diversity. Because of *Glee*’s success among mainstream viewers, shows like *Modern Family* and *The Fosters* were created, both of which claim to redefine “family.” *Modern Family* has a cast of characters that includes two gay men who adopt a child, while *The Fosters* centers around lesbian parents who both adopt and host foster children. In 2013, *The Fosters*

⁴¹CNN, “Same Sex Protests”

⁴²Oyez, “Hollingsworth v. Perry”

made waves when two thirteen-year-old boys shared a first kiss, the youngest same-sex kiss in the history of American television.

In the span of four short months, President Obama repudiated both *Don't Ask Don't Tell* and the *Defense of Marriage Act*. First, on December 22, 2010, President Barack Obama signed the legislation that became the Don't Ask Don't Tell Repeal Act. The Senate voted 65-31 in affirmation of repealing DADT, thus allowing homosexuals to serve openly in the US military. When the official repeal occurred on September 20, 2011, Obama proudly announced:

Today's achievement is a tribute to all the patriots who fought and marched for change; to Members of Congress, from both parties, who voted for repeal; to our civilian and military leaders who ensured a smooth transition; and to the professionalism of our men and women in uniform who showed that they were ready to move forward together, as one team, to meet the missions we ask of them.⁴³

While the majority of the military's policies remained the same (such as standards of conduct, personal privacy, and duty assignment), a significant change was made to policies involving release from service commitment ("There will be no new policy to allow for release from service commitments for Service members who are opposed to the repeal of DADT or to serving with gay and lesbian service members"⁴⁴). In the memorandum issued by the Under Secretary of Defense on the morning of the official repeal, Clifford L. Stanley describes the change:

Effective today, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program. It remains the policy of the Department of Defense that sexual orientation is a personal and private matter. Applications for enlistment or appointment may not be asked, or required to reveal, their sexual

⁴³Defense.gov DADT Repealed

⁴⁴Ibid.

orientation. Sexual orientation may not be a factor in accession, promotion, separation, or other personnel decision-making.⁴⁵

Only a few short months after Obama announced the planned repeal of DADT, his administration released a statement condemning the *Defense of Marriage Act*, and the administration's plan to fight for recognition for same-sex marriage on February 23, 2011. President Clinton joined the Obama administration, writing an opinion for the Washington Post that read:

Because Section 3 of the act defines marriage as being between a man and a woman, same-sex couples who are legally married in nine states and the District of Columbia are denied the benefits of more than a thousand federal statutes and programs available to other married couples. Among other things, these couples cannot file their taxes jointly, take unpaid leave to care for a sick or injured spouse or receive equal family health and pension benefits as federal civilian employees. Yet they pay taxes, contribute to their communities and, like all couples, aspire to live in committed, loving relationships, recognized and respected by our laws. When I signed the bill, I included a statement with the admonition that “enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination.” Reading those words today, I know now that, even worse than providing an excuse for discrimination, the law is itself discriminatory. It should be overturned.⁴⁶

Shortly after the repeal of DADT and the announcement of Obama's position on DOMA, GLAAD posted the “Where We Are On TV Report” for 2012. The number of LGBT (Lesbian, Gay, Bisexual, Transgender) characters on TV reached an all-time high of 4.4% of main characters on primetime TV series, a significant boost from the 2.9% found in 2011. The tide was turning significantly not only legally, but for social perceptions of homosexuality.

Two years following President Obama's decision not to recognize DOMA, the case *US v. Windsor* came before the Supreme Court in 2013. Edith Windsor, widow and

⁴⁵Defense.gov “Repeal Day Memo”

⁴⁶Washington Post, “Bill Clinton: It's Time to Overturn DOMA”

sole executor of spouse Thea Clara Speyer's estate, was fined nearly \$363,000 in taxes, because her marriage to Speyer was not recognized by federal law. Had their marriage been recognized, it would have qualified for an exemption and Windsor would not have been taxed. Windsor filed in district court, arguing that DOMA was unconstitutional. After disagreement between the district court and the court of appeals, Windsor's case went before the Supreme Court, with central questions as follows:

Does the executive branch's agreement with the lower court that the act is unconstitutional deprive the Supreme Court of jurisdiction to decide the case? (No)...

Does the Defense of Marriage Act, which defines the term "marriage" under federal law as a "legal union between one man and one woman" deprive same-sex couples who are legally married under state laws of their Fifth Amendment rights to equal protection under federal law? (Yes).⁴⁷

Justice Kennedy delivered the opinion of the court, arguing, "States have the authority to define marital relationships and... DOMA goes against legislative and historical precedent by undermining that authority."⁴⁸ Thus, the court held that DOMA violated same-sex couples' Fifth Amendment guarantee of equal protection, because it purposefully imposes a "disadvantage, a separate status, and so a stigma"⁴⁹ on same-sex couples that it does not impose on heterosexual couples.

In 2014, the Disney Channel featured its first homosexual couple on the show *Good Luck Charlie* – lesbian mothers of a child host a play date for their daughter and main character Charlie Duncan. According to an interview conducted by TV Guide with several Disney Channel representatives, "This particular storyline was developed under

⁴⁷Oyez: "US. V. Windsor"

⁴⁸Ibid.

⁴⁹Ibid.

the consultancy of child development experts and community advisors... Like all Disney Channel programming, it was developed to be relevant to kids and families around the world and to reflect themes of diversity and inclusiveness."⁵⁰

In 1996, when a Gallup poll questioned Americans about whether or not they supported gay marriage, a mere 32% rallied in support; but less than twenty years later, the number of Americans supporting it nearly doubled to 60%.⁵¹ Until the late 1980s, homosexuality was seen as a mental disability and an AIDS death sentence, but beginning in the 1990s, gay men and women experienced a radical transformation of reception by the public – they became a minority group seeking guaranteed Constitutional rights—rights now supported by over half of Americans. Gay activist Dan Savage sums this phenomenon up perfectly, “Really, when it comes to gay rights, there's two wars going on. The first war is political. But the culture war is over.”⁵² And now, as of June 26th, 2015, the political war is over too. The Supreme Court, split 5-4, issued a decision in the landmark case, *Obergefell v. Hodges*.

⁵⁰TV Guide, “Disney Allows Same Sex Couples”

⁵¹Gallup Poll, “Record High Americans Support Gay Marriage”

⁵²Newsweek, “Dan Savage/Jane Lynch”

CHAPTER TWO

Obergefell v. Hodges

The first layman to enter the Supreme Court on June 26, 2015 carried with him a photo, a hollowed-out wedding band encasing the ashes of his late fiancé, and a lucky keychain.¹ Jim Obergefell sat in the center of the gallery, watching intently as Justice Anthony Kennedy rose to deliver the majority opinion of the Supreme Court of the United States, unsure if ‘Obergefell’ would soon join surnames of similar judicial fame: Roe, Brown, and Lawrence. He confided in an interview that “I don’t feel like I belong in that company in some ways; I don’t feel worthy. This was just John and me fighting for our marriage. I know it is so much bigger than that, but when I think of this case, I keep coming back to just the two of us.”² The gay rights movement was propelled by individuals like Jim and John who were determined to resist what seemed like overwhelming odds. A mere eleven years before the Court announced their decision in *Obergefell*, the first American state had legalized gay marriage in 2004. In fact, in 2004, only six jurisdictions in the world recognized gay marriage as legal. It was not until 2013, in *United States v. Windsor*, that the United States seemed close, culturally, politically, and judicially, to the legalization of gay marriage, and not until two years later that the court came to a decision. Over one hundred and twenty amicus curiae briefs were filed, and Americans became both emotionally and personally invested in what is

¹People Magazine

²Ibid.

being called the landmark decision of our generation. The arguments in *Obergefell* soar past initial legal considerations, posing and answering philosophical questions about the definitions of marriage, family, and freedom of religion. Summary and analysis of the background, oral arguments, majority opinion, and dissenting opinions of the case display a divided nation, which mirrored a similarly divided Supreme Court.

In *Obergefell v. Hodges*, fourteen same-sex couples and two widows filed suits in their home states of Michigan, Kentucky, Ohio, and Tennessee, claiming that their Fourteenth Amendment rights had been violated by laws barring and refusing to recognize gay marriage. At the time, thirteen states had laws that did not recognize same-sex marriage. The individual cases (*Obergefell v. Hodges*, *Tanco v. Haslam*, *DeBoer v. Snyder*, and *Bourke v. Beshear*) were then consolidated into one case aimed for the Supreme Court, which attempted to answer two questions:

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state?³

Those who attempted to determine whether the answer was ‘yes’ or ‘no,’ were Mary L. Bonauto, Donald B. Verilli, John Bursch, Douglas Hallward-Driemeier, and Joseph F. Whalen.

³SCOTUS Blog

Oral Arguments

Bonauto and Verilli, Jr., Esq., represented the petitioners in an attempt to answer the first question with a definitive “yes.” As the Civil Rights Project Director at Gay & Lesbian Advocates and Defenders, Bonauto’s name has long been prominent among those involved in the fight for gay marriage. In 2004, Bonauto served as lead counsel for seven same-sex couples in *Goodrich v. Department of Public Health*, the case that established Massachusetts as the first state in the US to legally recognize gay marriage.⁴ In the oral arguments, Bonauto and Verilli cited three fundamental grounds because of which states should license marriages for same-sex couples: the concepts of dignity and second class status, the foundations of *Lawrence v. Texas*, *Loving v. Virginia* and *Turner v. Safley*, and the evolving definition of marriage.

Among the many consequences that Bonauto and Verilli cited for refusing to allow homosexuals the right to marry, the “stain of unworthiness,”⁵ (loosely defined as the effect this refusal would have on the personal dignity of gay Americans) is perhaps the most detrimental. She argued that the purpose of the Fourteenth Amendment is to protect men and women from being relegated to “second-tier status,”⁶ and that states with laws against gay marriage encourage federally endorsed “moral judgments and stereotypes about gay people.”⁷ She argued that these laws both ignore and exclude people whose “common humanity”⁸ should be acknowledged, celebrated, and embraced.

⁴<https://www.glad.org/about/staff/mary-bonauto>

⁵Ibid. 4

⁶Ibid. 4

⁷Ibid. 9

⁸Ibid. 10

Verrilli expanded on this idea, arguing that the exclusion of “gay and lesbian couples from marriage demeans the dignity of these couples”⁹ because “the opportunity to marry is integral to human dignity.”¹⁰ Verrilli argued that the laws forbidding gay marriage both marginalize and ostracize gay men and women, rather than treating them as “full and equal members of the community.”¹¹

Second, Bonauto and Verrilli cited three cases to defend the legality of same-sex marriage; *Lawrence v. Texas*, *Loving v. Virginia*, and *Turner v. Safley*. Verrilli cited *Lawrence v. Texas* as an assurance that “gay and lesbian couples [can] live openly in society as free people and start families and raise families and participate fully in their communities without fear.”¹² Bonauto encouraged a comparison between the gay rights movement and the civil rights movement that would provide precedent from *Loving* to reinforce the individual liberty pushed for by the petitioners:

Even if race was not used as a basis for discriminating in every single State as a matter of law by criminal law and constitutional law, it was incredibly pervasive. And again, changing that, as Virginia resisted in the *Loving* case, resisted and said, please, wait and see, eighty percent of the American public was with Virginia on that. But again, it was the question of the individual liberty of the person to do something that was considered a profound change in its time.¹³

Verrilli furthered this appeal to civil rights activism: “You may have states, perhaps most states, in which gay couples can live with equal dignity and status, but you will have a minority of states in which gay couples will be relegated to demeaning, second-class

⁹Ibid. 28

¹⁰Ibid. 28

¹¹Ibid. 31

¹²OA page 30

¹³Ibid. 17

status, and I don't know why we would want to *repeat that history*.”¹⁴ Justice Sotomayor affirmed the comparison of interracial and same-sex marriage, asking the questions, “Is gay marriage fundamental? Has black-and-white marriage been treated fundamentally?”¹⁵ *Turner*, mentioned least among these cases, represents yet another plea for recognizing the significance of individual liberty, despite the fact that those wishing to marry were incarcerated. The questions then become as follows: if prisoners may marry, why can't two people of the same sex? If a black man and white woman may marry, why can't two people of the same sex?

The petitioners' third justification for same-sex marriage is the “evolving” definition of marriage, which they defined as a “very extensive government institution that provides protection for families.”¹⁶ In denying marriage to gays and lesbians, the institution is unavailable to a class of Americans, which violates the Fourteenth Amendment protection of equality. Rather than arguing that same-sex marriage is a fundamental *change* in the definition of marriage, Bonauto and Verrilli concluded that this case “can be decided by thinking about marriage in exactly the way the Respondent States and other States define marriage now.”¹⁷ Just as heterosexual couples can have children biologically, through assisted reproduction and through adoption, homosexual couples can have children through assisted reproduction and through adoption. Crucially, gay marriage, to Bonauto and Verrilli, is not a new institution, but a facet of the ever-evolving nature of marriage as an institution. Bonauto's argument remained that marriage

¹⁴Ibid. 29, emphasis added

¹⁵Ibid. 61

¹⁶Oral Arguments, page 5

¹⁷Ibid. 32

becomes more equal as humans of all races, genders, and sexual orientations become more equal. To Bonauto and Verrilli, this is not a fundamental change at all, merely the next rotation in a cycle of evolution.

In conclusion, Bonauto responded to the issue of states' rights that is introduced in *Obergefell*. She argued primarily that while "states do have primacy over domestic relations... their laws must respect the constitutional rights of persons."¹⁸ She cited *United States v. Windsor* as the fundamental justification for this overriding constitutional right, but Justice Antonin Scalia argued that it is not "whether there should be same-sex marriage, but who should decide the point."¹⁹ Arguing that the issue should be left to the people to decide, Scalia cited eleven states that have voted to legalize same-sex marriage through their legislature or by referendum. Chief Justice Roberts agreed: "People feel very differently about something if they have a chance to vote on it than if it's imposed on them by the Courts."²⁰ Bonauto replies, however, that the result of waiting is "not neutral"²¹ and it "consigns same-sex couples to [an] outlier status."²² Verrilli concluded that if the issue of same-sex marriage is left to the political process, then the Court is effectively saying "the demeaning, second-class status that gay and lesbian couples now inhabit in States that do not provide for marriage is consistent with the equal protection of the laws. That is not a wait-and-see. That is validation."²³

¹⁸Ibid. 5

¹⁹Ibid. 13

²⁰OA page 22

²¹Ibid. 21

²²Ibid. 20

²³Ibid. 29

John J. Bursch, Esq., Special Assistant Attorney General of Lansing, Michigan, represented the respondents on behalf of the first question. A veteran Supreme Court advocate, Bursch has argued before the Court eight times since 2011.²⁴ He responds to Bonauto’s three points in the order that they were presented, pursuing further both the issue of dignity and the changing definition of marriage. He began by responding to the petitioners’ argument that the refusal of marriage bestows a second-class status on homosexual individuals, unduly stripping them of dignity they possess as Americans. He argued that “the marriage institution did not develop to deny dignity or to give second class status to anyone. It developed to serve purposes that, by their nature, arise from biology.”²⁵ Bursch maintained that the goal of marriage is procreation, and the State reserves the right to regulate marriage in order to preserve population growth. The state of Michigan continues to pursue the goal of keeping children with their biological parents—a goal, he argues, that all states ought to prioritize. He argues further that “the State of Michigan values the dignity and worth of every human being, no matter their sexual orientation or how they choose to live their life. *That’s not what this case is about.*”²⁶

His second argument was a response to the petitioners’ assertion that the definition of marriage is continuously evolving, by arguing that something as “fundamental as the marriage definition”²⁷ cannot be changed without significant

²⁴<http://www.nytimes.com/live/supreme-court-same-sex-marriage-arguments/about-the-lawyers-john-j-bursch/>

²⁵OA page 43

²⁶OA page 49, emphasis added

²⁷Ibid. 49

consequences. In particular, he worries that this will reduce “the rate that opposite-sex couples stay together, bound to their children.”²⁸ This new definition, according to Bursch, creates a new marriage that is founded upon “emotion and commitment”²⁹ rather than the preservation of the family unit. Michigan “doesn’t have an interest in love and emotion at all... the government’s solo interest in these cases isn’t about love. It’s about binding children to their biological moms and dads.”³⁰ If, he claimed, “you de-link marriage from creating children, you would expect to have more children created outside the bonds of marriage.”³¹ According to Bursch, the long-term consequences of gay marriage will include more children out of wedlock and more divorce among heterosexual married couples. After Bursch concluded his defense of traditional marriage, a second remained: whether states must recognize a marriage between two people of the same sex performed in another state.

Answering the second question on behalf of the petitioners was Douglas Hallward-Driemeier, Esq. Hallward-Driemeier’s answer to the second question before the Court can be summarized succinctly: “There is not only a right to be married, but a right to remain married; and there is a protected liberty interest in the statute of one’s marriage once it has been established under law.”³² He argued that there is no sufficient justification for current laws that do not recognize same-sex marriage, specifically observing that Kentucky “would have the Court believe that it is a sufficiently important

²⁸Ibid. 51

²⁹Ibid. 51

³⁰Ibid. 58

³¹Ibid. 67

³²OA part 2 page 5

interest to have that couple disregard their existing marriage vows and obligations to each other...even though the couple may already have children together”³³ because those vows and obligations do not legally exist in a state that does not recognize gay marriage. He criticized this as an irrational justification for discrimination. Using the foundations of *Loving*, he argued that criticism of the effects of same-sex marriage is unfounded, rejecting these possible negative consequences as “speculation.”³⁴ When asked about the wellbeing of children in adoptive families (by Justice Scalia), he argued that the interest the State has in providing stability for children “does not justify extinguishing marriages that already exist.”³⁵ He freely pointed out the apparent shortcomings of the defendants’ answer to the first question, breezily concluding, “It is quite interesting to note that in the first argument, Michigan was forced to argue some positions that I think are quite astonishing; that the State could limit marriages to couples who are capable of procreation without assistance, or indeed, that it could abolish marriage altogether.”³⁶

Arguing on behalf of the defendants for the second question was Joseph F. Whalen, Esq., Tennessee’s associate solicitor general. Whalen’s argument focused on States’ rights, summarized in his statement: “This Court’s cases have made clear that the Court draws a distinction between judgments of States and the laws of each State. The reason in part that the Court’s decisions have said is that otherwise, each State would be able to legislate for every other State.”³⁷ Therefore, under the Due Process clause of the

³³Ibid. 10

³⁴Ibid. 11

³⁵Ibid. 11

³⁶Ibid. 24

³⁷OA part 2 page 27

Fourteenth Amendment, there is a minimal requirement to “decline to apply another State’s substantive law.”³⁸ The coerced recognition of same-sex marriage forces the individual States to decide “whether or not to recognize the other State’s law under which that marriage was performed.”³⁹ Furthermore, he argued:

Other States have made the decision, and it certainly is their right and prerogative to do so, to expand the definition, to redefine the definition, and then to suggest that other States that have done nothing but stand pat now must recognize those marriages imposes a substantial burden on the State’s ability to self-govern.⁴⁰

Whalen continued to argue that Tennessee’s “entire domestic relations policy has been built around the expectation and the presumption that there is a man-woman relationship.”⁴¹ This expectation is the foundation of adoption law, he argues, concluding that the “traditional definition of marriage and adoption work [is] in tandem.”⁴²

Therefore, recognizing same-sex marriage not only violates the States’ rights under Due Process, but also changes fundamental laws protecting families and children in those States. The Oral Arguments concluded on April 28, 2015, leaving both petitioners and respondents to wait for two months until the Court issued its final decision on gay marriage.

³⁸OA part 2 page 27

³⁹OA part 2 page 32

⁴⁰OA part 2 page 39

⁴¹OA part 2 page 40

⁴²OA part 2 page 41

The Majority Opinion of the Court

Justice Kennedy delivered the Majority Opinion of the Court on June 26, 2015, in favor of the petitioners on both the first and second questions. His opinion is presented in thirds: the history of marriage, the modern requirements of the Fourteenth Amendment, and a list of four principles demonstrating the Constitutional nature of same-sex marriage. His conclusion is similarly delivered in thirds: a discussion of the Equal Protection Clause, an explanation of the Court’s refusal to await further legislation, and a paragraph emphasizing the importance of continuing to protect religious liberty.

First, he chronicled the history of marriage, clarifying that “the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect and need for its privileges and responsibilities,”⁴³ then continues to pen a defense of the evolving definition of marriage. He stated, “Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations,”⁴⁴ citing the evolving attitude towards same-sex marriage in *Bowers* and *Windsor*.

Second, he argued that the liberties protecting personal dignity and autonomy in the Fourteenth Amendment’s Due Process Clause extend to same-sex couples in their quest for nationalization of gay marriage, arguing that it is a an interest “so fundamental that the State must accord them its respect,”⁴⁵ arguing that while history and tradition

⁴³MO page 1

⁴⁴Ibid. 2

⁴⁵Ibid. 2

“guide and discipline the inquiry,”⁴⁶ “they do not set its boundaries.”⁴⁷ Third, the four principles providing a defense for marriage are as follows:

- (1) The right to personal choice regarding marriage is inherent in the concept of individual autonomy...
- (2) This Court’s jurisprudence is that the right to marriage is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals...
- (3) It safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education...
- (4) Marriage is a keystone of the Nation’s social order.”⁴⁸

Using the foundation of *Bowers*, he concluded that forcing gay men and women to wait for further legislation is impossible, arguing that the wait will cause “men and women [to] suffer pain and humiliation in the interim.”⁴⁹ He concluded with a reference to religious objectors, promising that they “may continue to advocate with utmost sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”⁵⁰

However, this belief does not and cannot validate the illegality of same-sex marriage.

Dissenting Opinions

Four justices filed dissenting opinions: Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. Rather than arguing against the morality or legality of same-sex marriage, the four justices focused on States’ rights, the role of the Supreme Court, and the newly introduced definitions of marriage and liberty.

⁴⁶Ibid. 2

⁴⁷Ibid. 2

⁴⁸MO page 6

⁴⁹Ibid. 5

⁵⁰Ibid. 27

Chief Justice Roberts' dissent focuses on the role of the Court and of judges, who both merely "have power to say what the law is, not what it should be."⁵¹ According to Chief Justice Roberts, "the people of a State [should be] free to expand marriage to include same-sex couples, or to retain the historic definition,"⁵² but neither should be able to affect the other's existing laws. The consequences of judge-made decisions are negative for both supporters and opponents of gay marriage, because decisions like these are not made by the voters, thereby "making a dramatic social change that much more difficult to accept."⁵³ To describe the mistake succinctly, Roberts argued:

The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own 'understanding of what freedom is and must become.'⁵⁴

He ended his dissent with an abrupt and derisive statement on the constitutionality of the majority opinion, "If you are among the many Americans who favor expanding same-sex marriage, by all means celebrate today's decision... but do not celebrate the Constitution. It had nothing to do with it."⁵⁵

Justice Scalia joined Chief Justice Roberts' dissent in full, similarly arguing that the Supreme Court has no role in the decision to legalize same-sex marriage.

⁵¹R Dissent Page 2

⁵²Ibid. 2

⁵³R Dissent Page 3

⁵⁴Ibid. 3

⁵⁵Ibid. 29

Comparable to Justice Thomas' later discussion of the concept of liberty, Scalia

remarked:

The opinion in these cases is the furthest extension in fact and 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. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.⁵⁶

Again, like Chief Justice Roberts, he declared that the debate over same-sex marriage has displayed "democracy at its best."⁵⁷ However, this judge-made decision, as Justice Scalia criticizes, is an opinion "lacking even a thin veneer of law."⁵⁸ He further argued that this case is "a naked judicial claim to legislative – indeed super-legislative—power; a claim fundamentally at odds with our system of government."⁵⁹ He labeled the Majority's opinion "egotistic" and "pretentious,"⁶⁰ concluding:

These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance and bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.⁶¹

Justice Thomas' dissent addressed the definitions, not of marriage, but of liberty and human dignity. His argument is summarized neatly in the first paragraph of his dissent:

⁵⁶S Dissent Page 2

⁵⁷Ibid. 2

⁵⁸Ibid. 4

⁵⁹S Dissent Page 5

⁶⁰Ibid. 7

⁶¹Ibid. 7

The majority invokes our Constitution in the name of a ‘liberty’ that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea – captured in our Declaration of Independence that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the State in our republic.⁶²

His critique was primarily against the use of the Due Process clause as a “font of substantive rights.”⁶³ The consequence of using it this way is an exaltation of judges at the expense of the people, allowing judges to roam freely among their personal opinions rather than grounding them in the Constitution. Furthermore, the concept of liberty invoked by the majority is not synonymous with the liberty mentioned in the Due Process Clause. He explained, “Liberty has long been understood as individual freedom from government action, not as a right to a particular governmental entitlement.”⁶⁴ He bolstered his arguments with references to the lack of grounds in *Loving* to support same-sex marriage.

Justice Alito’s dissent focused not on the oral arguments or the majority opinion, or even “what States should do about same-sex marriage.”⁶⁵ Alito is concerned with “whether the Constitution answers that question for them. It does not.”⁶⁶ Joined by Justice Thomas, he criticized the majority opinion’s use of the word ‘liberty,’ arguing that for social democrats, liberty “may include the right to a variety of government

⁶²T Dissent Page 2

⁶³Ibid. 2

⁶⁴Ibid. 7

⁶⁵A Dissent Page 2

⁶⁶Ibid. 2

benefits. For today's majority, it has a distinctively postmodern meaning."⁶⁷ He criticized the majority for claiming the "authority to confer constitutional protection upon [a] right simply because they believe that it is fundamental."⁶⁸ Their claim that the issue is the "right to equal treatment... [and their] reasoning is dependent upon a particular understanding of the purpose of civil marriage,"⁶⁹ which is to promote the well-being of those choosing to marry. He concluded with a discussion of the consequences of this decision. First, it will encourage the vilification of those who maintain a traditional understanding of marriage; second, it will employ the court's use of *Loving* to compare dissenters to bigots; and third, it will conflict with the Constitutional protection of religious freedom. While Alito conceded that many Americans will celebrate this decision, he concluded that "all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends."⁷⁰

The implications of this case are momentous for two groups of people who, ironically, seem staked in separate camps: homosexuals and religious individuals. As gay couples marry throughout the United States, questions arise about whether or not pastors retain the right to refuse to marry gay couples, whether bakers and cooks may refuse to cater gay weddings, and whether private, religious schools may retain their tax exempt status while maintaining policies that do not embrace homosexuality. However, these questions are just the beginning of those that will be faced in coming years as the courts

⁶⁷Ibid. 2

⁶⁸Ibid. 3

⁶⁹Ibid. 3

⁷⁰Ibid. 8

are forced to evaluate what the foundation of *Loving* will imply for conflicts between religious freedom and discrimination based on sexual orientation.

However, before turning to religious liberty, it is essential to explain in greater detail what a careful analysis of *Obergefell* reveals. It reveals that the use of *Loving*, combined with themes from *Brown v. Board of Education* and Harlan's dissent in *Plessy*, establish a definitive connection to the Civil Rights Movement. While remarks on religious liberty and the civil rights movement are anywhere from brief to nonexistent in Kennedy's majority opinion, the crucial question of where *Obergefell* leaves religious dissenters is far from clear. However, what *is* clear is that the future for advocates of religious liberty will depend upon Kennedy's connection of the Gay Rights Movement to the Civil Rights Movement, because this connection will decide case law for future religious dissenters embroiled in issues regarding gay marriage and gay rights.

CHAPTER THREE

The Intertwined Civil Rights and Gay Rights Movements

*“The United States took another step toward the ideal of equality envisioned by its founders. And we are all more free as a result.”*¹

*“The highest court in the land, the guardian of our national conscience, has reaffirmed its faith – and the undying American faith – in the equality of all men before the law.”*²

The concepts of equality, freedom, and dignity undergird the nation’s emotional response to *Obergefell v. Hodges*. However, only one of the aforementioned quotes is in response to Justice Kennedy’s majority opinion. The other refers to a case decided over sixty years ago. *Brown v. Board of Education* (1954), a landmark civil rights case, provided the structure upon which racial equality was built and desegregation achieved. Today it is indirectly used as the foundation for the gay rights movement. Using four critical arguments found in Chief Justice Warren’s majority opinion in *Brown* and Justice Harlan’s dissent in *Plessy v. Ferguson* (1896), Justice Kennedy makes his case for same-sex marriage upon the Civil Rights movement without a single direct reference to either case or to the movement itself.

Indeed, the plaintiffs’ oral arguments and the responses of the liberal-leaning justices on the Court in *Obergefell* had been full of references to the civil rights movement, both obliquely and directly. Solicitor General Donald Verilli argued vociferously that the two movements were nearly identical, stating that if the legality of

¹*Pennsylvania Patriot News* in response to *Obergefell*

²*New York Times* in response to *Brown*

same-sex marriage is left to the states, then “the outcome we’re going to end up with is something that will approximate the nation as a house divided that we had with *de jure* racial segregation.”³ He continued, “You will have a minority of states in which gay couples will be relegated to demeaning, second-class status, and I don’t know why we would want to *repeat that history*.”⁴ Justice Sotomayor affirmed the comparison of interracial and same-sex marriage, asking the questions, “Is gay marriage fundamental? Has black-and-white marriage been treated fundamentally?”⁵ Mary Bonauto directly compared racial discrimination to discrimination against same-sex couples, referring to the circumstances surrounding *Loving v. Virginia*:

Even if race was not used as a basis for discriminating in every single State as a matter of law by criminal law and constitutional law, it was incredibly pervasive... Virginia resisted in the *Loving* case... said, ‘please, wait and see,’ [and] eighty percent of the American public was with Virginia on that. But again, it was the question of the individual liberty of the person to do something that was considered a profound change in its time.⁶

Her comfort referencing racial discrimination as equal to sexuality discrimination betrays the ease with which she accepts the comparison. However, not all in the room were convinced by the comparison of anti-miscegenation laws to anti-same-sex marriage laws. In his dissenting opinion, Justice Thomas (the only African American on the Supreme Court) wrote, “The suggestion of petitioners and their *amici* that anti-miscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive

³Oral arguments in *Obergefell*, Part 1, page 29

⁴Ibid. 29, emphasis added

⁵Ibid. 61

⁶Ibid. 17

and inaccurate.”⁷ Thomas argued that anti-gay marriage laws do not share the “sordid history”⁸ of anti-miscegenation laws’ connection to slavery. Kennedy himself never mentioned *Brown* or *Plessy* directly, instead relying on Warren’s and Harlan’s legal reasoning in order to both emphasize the similarities between the cases and create a psychological association between the gay rights movement and the civil rights movement.

Five Arguments in Obergefell

Despite its prevalence in the oral arguments, the majority opinion shows no direct reliance on the civil rights cases. Yet there are many marked similarities between *Brown* and *Obergefell*. The primary argument in *Brown* depended upon the classification of tangible and intangible factors, focusing on the intangible harm of feelings of inferiority. Tangible factors were defined as physical differences between segregated and desegregated schools while intangible factors were the feelings of the African American children in response to those physical differences. Chief Justice Warren spoke emphatically of the significance of the intangible factors, arguing:

To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of *inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.⁹

These intangible factors, Warren argued, meant that black children felt less worthy than their white peers. This inferiority clearly implied a “second-class” status. He mentioned

⁷Dissenting Opinion, Justice Thomas, page 11

⁸Ibid. 11

⁹*A Short Course in Constitutional Law*, page 612 (emphasis added)

the concept of inferiority many times, describing the segregation policy as “denoting the inferiority of the Negro Group,”¹⁰ and pointing out that the same “sense of inferiority affects the motivation of the child to learn.”¹¹

In *Obergefell*, Kennedy described the exclusion of same-sex couples from marriage as resulting in “more than just material burdens,”¹² because the policy has the effect of “teaching that gays and lesbians are unequal in important respects.”¹³ Kennedy emphasized that these intangible factors “demean”¹⁴ gays and lesbians by “lock[ing] them out of a central institution of the Nation’s society.”¹⁵ The lack of a universal right to marry imposes a “stigma and injury of the kind prohibited by our basic charter.”¹⁶ Kennedy concluded that this denial of the right to marry “works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”¹⁷ All same-sex couples ask is “for equal dignity in the eyes of the law,”¹⁸ so that they are not “condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”¹⁹ Thus Kennedy’s rhetoric throughout emphasized the immaterial burdens that gays and lesbians must bear.

¹⁰Ibid. 612

¹¹Ibid. 612

¹²*Obergefell v. Hodges*, page 17

¹³*Obergefell v. Hodges*, page 17

¹⁴Ibid. 17

¹⁵Ibid. 17

¹⁶Ibid. 18

¹⁷Ibid. 22

¹⁸Ibid. 28

¹⁹Ibid. 28

Second, Kennedy argued that the right to marry “safeguards children”²⁰ by destigmatizing gay and lesbian families. He stated that without the promise of marriage, “the children would suffer the *stigma* of knowing their families are somehow lesser . . . [and thus] harm and humiliate the children of same-sex couples.”²¹ Brown’s central argument regarding children was that “to separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status.”²² Even these lesser points build upon the concepts of intangible factors like dignity, autonomy, and inferiority. Warren argued that these factors have a greater impact “when [they have] the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”²³ He pointed to individual autonomy, which he believed is denied when same-sex couples are refused the right to legal marriage, despite what may be the *inherent* “dignity in the bond between two men and two women who seek to marry and in their autonomy to make such profound choices.”²⁴ This concept of inherent dignity so prevalent in *Brown* is further emphasized in his next point, in which Kennedy quotes *U.S. v. Windsor*. He argued that the right to marry “dignifies couples who wish to define themselves by their commitment to each other.”²⁵ He then invoked the loss of dignity same-sex couples have endured by arguing

²⁰Ibid. 14

²¹Ibid. 15; emphasis added

²²*Brown v. Board* Majority Opinion

²³*Brown v. Board* MO

²⁴*Obergefell v. Hodges*, page 13

²⁵Ibid. 14

that their status has merely been upgraded from “outlaw to outcast,”²⁶ and that they do not “achieve the full promise of liberty”²⁷ to which American citizens are entitled under the Constitution. This mimics the inherent inequality espoused by Warren, with slavery as “outlaw” and segregated schools “outcast.” Kennedy’s opinion reads as an echo of the cries of Civil Rights activists who believed that the “equality” they were afforded under segregation was inherently unequal. Both inferiority and a lack of dignity are characteristics woven throughout *Brown* and *Obergefell* as immaterial burdens that cause grave harm to the minority group.

A third argument from *Brown* that appears in *Obergefell* concerns the role that education plays in a democratic society. Warren had argued that education is “the most important function of state and local governments.”²⁸ It is required for even the most basic public responsibilities and is a “principal instrument in awakening the child to cultural values, in preparing him for professional training, and in helping him to adjust normally to his environment.”²⁹ Justice Kennedy described marriage similarly, arguing that marriage is “a keystone of our social order,”³⁰ “the foundation of the family and of society without which there would be neither civilization nor progress.”³¹ Warren had argued that certain goods (job security and a flourishing economic life) required education as a prerequisite. Likewise, Kennedy listed the governmental rights that require

²⁶Ibid. 14

²⁷Ibid. 14

²⁸*A Short Course in Constitutional Law*, page 612

²⁹*A Short Course in Constitutional Law*, page 612

³⁰*Obergefell v. Hodges* Majority Opinion, page 16

³¹Ibid. 16

marriage as a prerequisite: taxation, inheritance and property rights, hospital access, and adoption rights. Beyond that, Kennedy and Warren both stressed the effects these institutions have on children, effects that may be either positive or negative.

Fourth, Kennedy's opinion recalled an argument from Justice Harlan's dissent in *Plessy* regarding states' rights. There Harlan warned of the unlawful and unconstitutional inequality that will likely result from leaving the decision of whether to desegregate to individual states. He argued that if segregation laws remain enforceable by states, they will continue

to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place a large body of American citizens, now constituting a part of the political community called the People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government.³²

Kennedy used this argument similarly with respect to the question of states' rights in *Obergefell*. The states cannot retain the right to invalidate same-sex marriages, because it would "teach the Nation that these laws are in accord with our society's most basic compact,"³³ and the allowance of "slower, case-by-case determination of the required availability of specific benefits to same-sex couples... would deny gays and lesbians many rights and responsibilities."³⁴ The 'equality' espoused by Kennedy mirrored Harlan's dissent:

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right... An individual can invoke a right to

³²*A Short Course in Constitutional Law*, page 608

³³*Obergefell v. Hodges*, page 26

³⁴*Obergefell v. Hodges*, page 26

constitutional protection even when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.³⁵

Furthermore, individual dissenters' sincere objection places "the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty has been denied."³⁶ Kennedy's disregard for the democratic process as a means of deciding the issue of gay marriage is founded in Harlan's opinions regarding desegregation. Both labeled individuals' beliefs personally significant but federally insignificant in comparison to the government interest in ending discrimination.

Finally, one of the obvious similarities between *Brown* and *Obergefell* is the reliance on the same foundational text – the Fourteenth Amendment. It requires a particular reading of the Fourteenth Amendment, however: "The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation."³⁷ Warren's interpretation is echoed by Justice Kennedy, who argued for a similarly evolving Fourteenth Amendment in *Obergefell*, in which "new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and judicial process."³⁸ This analysis reinforces the diminishing role of original intent in modern jurisprudence, since on

³⁵Ibid. 24

³⁶Ibid. 19

³⁷*Brown v. Board* Majority Opinion, p. 492-493, <http://supreme.nolo.com/us/347/483/case.html#492>

³⁸*Obergefell v. Hodges* Majority Opinion, page 7

Kennedy's view the history of marriage is "one of both continuity and change"³⁹ that has "evolved over time."⁴⁰

When Kennedy cited the Fourteenth Amendment, he specified that the liberties protected by the Due Process clause extend to "intimate choices that define personal identity and beliefs,"⁴¹ and maintained that history and tradition "guide and discipline this inquiry but *do not* set its outer boundaries... That method respects our history and learns from it without allowing the past alone to rule the present."⁴² Echoing Warren's argument, Kennedy elaborated on the role of the founders' intent in the Fourteenth Amendment:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.⁴³

Just as Warren argued for Constitutional amendments that evolve as equality evolves, Kennedy pleaded for yet another rotation in this evolving document in the pursuit of equality.

³⁹*Obergefell v. Hodges* Majority Opinion, page 6

⁴⁰*Ibid.* 6

⁴¹*Ibid.* 10

⁴²*Ibid.* 10, emphasis added

⁴³*Ibid.* 10

The Reaction to Obergefell and Further Questions

After the *Obergefell* majority opinion was released, journalists, law professors and even Vice President Joe Biden noted similarities to *Brown*. Not only were they saying that the landmark cases were connected, but that both similarly sought well-deserved equality for minorities using similar argumentative styles. Only a day after *Obergefell*'s victory was announced, University of California professor Erwin Chemerinsky boldly claimed on the SCOTUS blog that June 26, 2015 “will be remembered, like dates such as May 17, 1954, when the Court decided *Brown v. Board of Education*, as the Court taking a historic step forward in advancing liberty and equality.”⁴⁴ He continued by observing that “history will regard *Obergefell*, like *Brown*, as a decision that was clearly right and that was an important advance to creating a more equal society.”⁴⁵ The ACLU even posted a quiz on various social media sites that posed the question: “Can you name the Supreme Court decision these quotes were responding to, *Brown v. Board of Education* or *Obergefell v. Hodges*?”⁴⁶ Vice President Joe Biden spoke to this comparison in a speech before the gay rights activist group, Freedom to Marry: “This decision is as consequential as *Brown v. Board*. People agreed with you and agreed with me years before this decision was made. But now it’s settled. It’s settled in law.”⁴⁷

⁴⁴SCOTUS Blog, Chemerinsky, <http://www.scotusblog.com/2015/06/symposium-a-landmark-victory-for-civil-rights/>

⁴⁵Ibid.

⁴⁶<https://www.facebook.com/ACLUofTexas/posts/10153378733038605>

⁴⁷Joe Biden speech addressed to Freedom to Marry at Wall Street Cipriani in Manhattan

However, the question remains: why, despite the affinities in the oral arguments and in the substance of the majority opinion between gay right and civil rights, is there no explicit mention of *Brown* or *Plessy*? After all, when penning the majority opinion in *Romer v. Evans* in 1996, Justice Kennedy had begun, “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”⁴⁸ Kennedy clearly sees a connection between the Civil Rights movement and the Gay Rights Movement, but a pertinent question remains: why does he not mention it?

Despite the “neutrality” of the Supreme Court, the answer to this question tends to be answered differently based on the political leanings of the responder. A conservative might argue that Kennedy does not claim precedent in *Brown* because he cannot prove that it is precedent – there is in fact no direct or indirect connection between *Brown* and *Obergefell* because there is a fundamental problem with the analogy to interracial marriage. The Heritage Foundation’s Ryan Anderson describes this problem as follows:

The problem with the analogy to interracial marriage is that it assumes exactly what is in dispute: that sex is as irrelevant to marriage as race is. It’s clear that race has nothing to do with marriage. Racist laws kept the races apart and were designed to keep whites at the top. Marriage has everything to do with men and women, husbands and wives, mothers and fathers and their children, and that is why principle-based policy has defined marriage as the union of one man and one woman.⁴⁹

⁴⁸Majority Opinion, SCOTUS, *Romer v. Evans*

⁴⁹Ryan Anderson, <http://www.thepublicdiscourse.com/2015/07/15247/>

For conservatives, then, the reason is that the analogy simply does not work. Instead Kennedy uses civil rights themes and phrasing similar to *Brown* to evoke psychological association with the Civil Rights movement and to engender strong support for the gay rights movement.

Kyle Duncan, lead counsel for Hobby Lobby in *Hobby Lobby v. Burwell* and legal representation for fifteen states' amicus briefs in *Obergefell*, maintains that the significance of the Civil Rights movement to the gay rights movement is the compelling interest it provides the government. He argues, "They've used race in a very effective, systematic way...if homosexuality is like race, the government will have a compelling interest in coercing religious believers to toe the line, placing the religious believer at a very strong disadvantage."⁵⁰

However, more liberal political theorists might argue that there are no direct references to the civil rights movement because the analogy is so clear and correct *that it needs no elaboration*. The use of these themes and structure is a purposeful, tactical literary device to evoke collective acceptance of the decision and to convince those who remained unconvinced. *Obergefell* rightly mirrors *Brown* because the gay rights movement is the next logical extension of the Civil Rights movement. It represents another oppressed minority people group achieving the rights they have long since been denied because of bigotry and prejudice. John Davidson, the National Legal Director for Lambda Legal, argued that it is clear that *Obergefell* "rests on other legal landmarks that

⁵⁰Kyle Duncan Interview

advanced racial justice.”⁵¹ He maintains that this reliance on *Brown* and Harlan’s dissent in *Plessy* teaches us “an important lesson”.⁵²

All struggles for justice, liberty and equality are connected. And, thus, even as we celebrate this historic victory for same-sex couples and their families today, our thoughts are also with the families in Charleston and across the country who are mourning Rev. Pinckney and the other eight people murdered last week. We must ever remember that violence, hatred and inequality directed against any of us harm every one of us.⁵³

Camilla Taylor, Marriage Project Director for Lambda Legal agrees with this assessment, arguing that Civil Rights and gay rights are “inextricably linked philosophically if not literally,”⁵⁴ citing “the anti-miscegenation laws that were struck down in *Loving v. Virginia*, and the equal-protection arguments at the heart of the *Brown v. Board of Education* decision voiding the separate-but-equal doctrine.”⁵⁵ She observes that, just as in *Brown*, “our laws impact the way we feel about ourselves” and this impact is significant and sometimes unchangeable.

It is clear that Kennedy views the gay rights movement as the civil rights battle of our generation – a battle that will be won when equality and human dignity are bestowed upon homosexual couples and their children. However, not all benefit from this expanded definition of equality. Psychologically, the connection to the Civil Rights movement is a damning one for those who oppose gay marriage. Kennedy’s “grave and continuing harm” now applies to a new people group – religious dissenters. Justice Alito predicts that this comparison will be “used to vilify Americans who are unwilling to

⁵¹Lambda Legal, John Davidson article

⁵²Ibid.

⁵³Ibid.

⁵⁴Camilla Taylor US News and World Report

⁵⁵Camilla Taylor US News and World Report

assent to the new orthodoxy.”⁵⁶ He argues that Kennedy’s comparison “to laws that denied equal treatment for African-Americans and women... will be exploited by those who are determined to stamp out every vestige of dissent.”⁵⁷ Is he correct, though? What effects will this decision have for religious dissenters?

Religion is a factor that has an “increasing impact on public matters”⁵⁸ both domestically and internationally. According to Georgetown’s Thomas Farr, religious freedom is the lynchpin in nations with significant religious communities. He argues that these communities’ beliefs “will influence social norms and political behaviors, government policies, regional trends, and transnational movements.”⁵⁹ In my next chapter, I will address the effect this connection to the civil rights movement will have on religious dissenters and on tolerance.

⁵⁶Alito, dissent, page 7

⁵⁷Ibid.

⁵⁸Farr, *World of Faith and Freedom*, page 10

⁵⁹Ibid. 10

CHAPTER FOUR

Religious Liberty, Tolerance, and the Gay Rights Movement

“The air that we breathe is so polluted by mistrust that it almost chokes us.”¹

Dietrich Bonhoeffer said this in response to political and cultural division in Germany, but he could have easily been leading a discussion on the political and social rancor surrounding the gay rights movement and religious dissent. Religious advocates and minority rights activists, Democrats and Republicans all claim oppression, but who is the oppressor and who is the oppressed in the wake of *Obergefell*? The concept of ‘human rights’ is applied to both sides with equal vigor and animosity, and, again, both sides claim their human rights are not being respected or protected. Malcolm Evans describes this phenomenon with startling clarity:

‘Human Rights’ has itself become a religion or belief which is... as intolerant of other forms of value systems which may stand in opposition to its own central tenets as any of those it seeks to address... In seeking to assert itself in this fashion, [the government] risks becoming the oppressor of the believer, rather than the protector of the persecuted.²

The emphasis on human rights, tolerance, and discrimination betrays a discussion that is largely biased on both sides. In this chapter, I will discuss the legal ramifications of Kennedy’s comparison of the gay rights movement to the civil rights movement, the effect this will have on religious dissenters, and the precarious future it creates for tolerance in America.

¹Dietrich Bonhoeffer, *Letters and Papers from Prison*, page 11

²*Religious Liberty and International Law in Europe*, by Malcolm D. Evans, 160-161

Kennedy on Religious Liberty

In his majority opinion in *Obergefell*, Kennedy mentions the concepts of religion and religious liberty fewer than eight times. He introduces dissenters as “reasonable and sincere people”³ who believe marriage is “(by its nature) a gender-differentiated union of man and woman.”⁴ He acknowledges that this belief is “sacred to those who live by their religions,”⁵ but explains that it nevertheless cannot be codified into law:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is denied.⁶

After explaining the reasoning behind the Court’s implicit ruling against religious dissenters, Kennedy saves a single paragraph to address religious liberty. He emphasizes that dissenters “may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned,”⁷ referencing the First Amendment, which 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 their faiths, and to their own deep aspirations to continue the family structure they have long revered.”⁸ Yet despite Kennedy’s well-intentioned promise of tolerance, freedom of speech and freedom of religion, his discussion of religious liberty leaves behind a host of

³Obergefell MO 4

⁴Ibid. 4

⁵Ibid. 3

⁶Ibid. 19

⁷Ibid. 27

⁸Ibid. 27

unanswered questions. While he protects the right of the religious dissenter to advocate for traditional marriage and to maintain the biblical family structure in one's own home, Kennedy remains silent on the resulting precedential shift *Obergefell* creates for cases pitting religious dissenters against gay rights advocates. When, then, does a dissenter with an authentic and sincere personal belief become liable for discrimination after this new precedential shift?

Bob Jones, Civil Rights, and a Dangerous Precedential Shift

The psychological association with *Brown*, Harlan's dissent in *Plessy*, and the overt reliance on *Loving* create a situation in which previous precedent in religious liberty cases (*Wisconsin v. Yoder*, *Hosanna-Tabor v. EEOC*, and *Hobby Lobby v. Burwell*) will likely be surpassed by precedent in racial discrimination cases (*Bob Jones University v. United States*). Furthermore, the overt reliance of *Bob Jones* on the trifecta of *Loving*, *Brown*, and Harlan's dissent in *Plessy* creates a strong foundation upon which gay rights activists can build a case against religious dissenters in a variety of situations both involving and not involving gay rights. The lynchpin for religious dissenters in this precedential shift is *Bob Jones*.

Bob Jones University is a non-denominational Christian college that, in the 1970s, did not allow students involved in interracial marriages to enroll as undergraduates. Because of this policy, the IRS threatened to revoke their tax exemption under the newly established Revenue Ruling 71-447: "A private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption."⁹ Despite the

⁹IRS Revenue Ruling 71-447, link in bibliography

lack of prohibition of discrimination by “federal statutory law,”¹⁰ the IRS dictated that “developments of recent decades and recent years reflect a federal policy against racial discrimination which extends to racial discrimination in education.”¹¹ Therefore, it is the “the policy of the United States to discourage discrimination in such schools.”¹² While the IRS’s commitment to ending racial discrimination is indeed admirable and was necessary in its day, Revenue Ruling 71-447 seems to set a dangerous precedent in which the IRS allows ‘developments of recent decades’ to dictate who receives tax exemptions, rather than federal law and policy. Supreme Court Justice Lewis Powell found this analysis troubling, rejecting “any notion that the IRS should be authorized to ‘decide which public policies are sufficiently fundamental to require denial of tax exemptions.’”¹³ The consequence of this ruling is that for future discrimination cases, the IRS (seems) not to rely on federal laws prohibiting discrimination based on race or, presumably, sexual orientation. Instead they merely assert that “current developments” must underlie a policy that is “anti-discriminatory” in order to provoke a tax-exempt status change.

When the university filed against the IRS, the district court ruled in favor of Bob Jones under the First Amendment, but the appellate court reversed, sending the case to the Supreme Court. Chief Justice Warren Burger issued the majority opinion. He described the university as:

dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering

¹⁰Ibid.

¹¹IRS Revenue Ruling 71-447

¹²Ibid.

¹³Conscience 33

students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.¹⁴

This could describe many religious universities in America; it could potentially apply across all faiths. But at Bob Jones, university leaders also “genuinely believe that the Bible forbids interracial dating and marriage,”¹⁵ maintaining a rule against interracially married students:

There is to be no interracial dating.

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside of their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.¹⁶

Similarly worded statements against homosexuality and gay marriage stand in many religious universities' charters, but the threat these statements cause (both legally and politically) has instigated a quick change in wording by many of those same institutions.

After *Obergefell*, three Christian universities followed suit: Hope College, Belmont University, and Baylor University. Baylor changed its sexual misconduct policy (which listed homosexuality alongside sexual abuse and sex outside of marriage) to a more general statement on sexuality:

Baylor will be guided by the biblical understanding that human sexuality is a gift from God and that physical sexual intimacy is to be expressed in the context of marital fidelity. Thus, it is expected that Baylor students, faculty and staff will engage in behaviors consistent with this understanding of human sexuality.¹⁷

¹⁴Chief Justice Burger, Majority Opinion, *Bob Jones University v. United States*

¹⁵Chief Justice Burger, Majority Opinion, *Bob Jones University v. United States*

¹⁶*Ibid.*

¹⁷Baylor sexual misconduct statement

Similarly, Notre Dame extended health care benefits to all “legally married couples,” releasing statements that did not affirm the government’s same-sex marriage policy but did affirm the university’s commitment to following civil laws. While these changes are likely designed to prevent legal action from gay students and activists, *Bob Jones* is not merely a discussion of creating more tolerant policy.

Burger observes that while “[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes are entitled to tax exemption,”¹⁸ there is a necessary exception to this rule:

Underlying all relevant parts of the Code [is] the intent that entitlement to tax exemption *depends on meeting certain common law standards of charity* -- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. *The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.*¹⁹

Expanding on IRS Revenue-Ruling 71-447, Burger argues that it is not merely recent developments and public policy that dictate qualifications for tax-exempt status, but the standards of the common law and the interest of the public. The final line of the paragraph is perhaps the most damning – *Bob Jones* furthers the reasoning in IRS Revenue-Ruling 71-447, providing precedent rendering both federal law and public policy seemingly less significant than the ‘common community conscience’ and the attitude of modern society. Robert K. Vischer, in his book *Conscience and the Common Good*, remarked that this use of ‘conscience’ as interchangeable with public policy positions is indeed troubling:

¹⁸Bob Jones MO

¹⁹Ibid., emphasis added

Public policy positions almost always have a moral dimension, but labeling those positions ‘conscience’ connotes a sanctity and certainty that is problematic. Whether or not an organization should lose its tax-exempt status because of positions that run counter to widely held public opinion, conscience has little to do with public opinion. Indeed, public opinion may prove inimical to conscience’s flourishing.²⁰

When *Brown* was decided, its analysis was criticized for excessive emotional language and a perhaps too-heavy reliance on the definition of ‘dignity.’ Regardless, those who disagreed with the analysis agreed heartily with the conclusion that racial discrimination must be eradicated. Similarly, Justice Lewis Powell, in his concurring opinion in *Bob Jones*, admitted that, while he agrees that tax-exempt status cannot be extended to racially discriminatory schools, he remains “unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear ‘public benefit’ as defined by the Court.”²¹ Furthermore, he noticed troubling consequences of the court’s analysis: “Conditioning tax-exempt status on the organization’s ‘harmony with the public interest’ and alignment with ‘the common community conscience’ suggested...that ‘the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies.’”²² Powell argued further that tax exemption is not a tool used in order to “reinforce any perceived common community conscience”²³ but an “indispensable means of *limiting* the influence of government orthodoxy on important areas of community life.”²⁴ By referencing this community conscience, the Court ignores the

²⁰Conscience 34

²¹Powell concurring opinion in *Bob Jones*

²²Conscience and the Common Good 33

²³*Ibid.* 33

²⁴*Ibid.* 33

purpose of tax exemptions: “encouraging diverse, indeed often sharply conflicting, activities and viewpoints.”²⁵ This ‘common community conscience’ then becomes a significant factor in the deciding of tax exemptions, and the minority believer becomes not only culturally excluded but legally compromised by his belief. Powell argues that the IRS is not “invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote ‘public policy.’”²⁶ While the purpose of tax exemptions is to limit government intervention into the affairs of minority groups, this ‘common community conscience’ encourages the government’s extreme intervention through the very vehicle that is intended to protect them.

Chief Justice Burger relies on precedent set in *Brown* and references Harlan’s dissent in *Plessy* to further prove that discrimination in the realm of education is unacceptable, even in private institutions typically shielded from governmental regulation. He admits that there has been much division in the country over the issue, but it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising “beneficial and stabilizing influences in community life,” or should be encouraged by having all taxpayers share in their support by way of special tax status.²⁷

He concludes that it would be “wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which exert a pervasive influence on the entire educational process.”²⁸ With

²⁵Powell Concurring opinion Bob Jones

²⁶Powell concurring opinion Bob Jones

²⁷Bob Jones MO

²⁸Ibid.

respect to religious dissenters, Burger explains that “not all burdens on religion are unconstitutional... The state may justify a limitation on religious liberty by showing that it is *essential to accomplish an overriding governmental interest.*”²⁹ This ‘overriding government interest’ is a fluid entity, opaque enough to encompass future limitations that the federal government deems ‘essential.’ In *Bob Jones*, the government does have a fundamental, overriding interest in eradicating racial discrimination in education... discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.³⁰

Just as the government had an interest in preventing racial discrimination, the current administration has expressed a similar interest in preventing discrimination based on sexual orientation: “It is the policy of the government of the United States to provide equal opportunity in federal employment for all persons, to prohibit discrimination...because of race, color... [or] sexual orientation.”³¹ This aim to end discrimination on any count is admirable. However, as Justice Kennedy said in *Obergefell*'s majority opinion, when that sincere aim becomes enacted law, the federal government appears to “demean... or stigmatize... those whose own liberty is denied.”³²

However, this endorsement of the Gay Rights Movement as equivalent in stature to the Civil Rights Movement has caused ordinary laypeople to see “religious liberty” as something that means simply “anti-gay rights Christians.” This new definition of religious liberty—essentially redefining it to apply only to Christian businesses and

²⁹Ibid., emphasis added

³⁰Bob Jones MO

³¹<http://www.eeoc.gov/federal/otherprotections.cfm>

³²Kennedy MO 19

institutions which oppose gay marriage—is a gross simplification that overlooks its application to Muslims, Hindus, Jews, and Native Americans. All religions, religious institutions, and religious individuals will be negatively affected because they are characterized by a distorted and truncated image of religious freedom. Douglas Laycock describes this phenomenon:

The result of this history is that groups committed to sexual liberty naturally view traditional religion as their principal enemy... If traditional religion is the enemy, then it might follow that religious liberty is a bad thing, because it empowers that enemy. No one says this straight out, at least in public. But it is a reasonable inference from things that are said, both in public and private.³³

The conclusion of Kennedy’s invocation of the Civil Rights Movement and the resulting limited focus of religious liberty as a Christian fight against gay marriage is detrimental for people of all religions in the quest for religious freedom.

A New and Dangerous Definition of Tolerance

In *Democracy in America*, Alexis de Tocqueville presents a compelling argument about ‘tolerance’ and the resulting necessity of protecting the rights of *all* Americans:

The true friends of liberty and human grandeur must remain constantly vigilant and ready to prevent the social power from lightly sacrificing the particular rights of a few individuals to the general execution of its designs... There is no citizen so obscure that it is not very dangerous to allow him to be oppressed, and there are no individual rights so unimportant that they can be sacrificed to arbitrariness with impunity.³⁴

The social culture regarding gay rights has changed dramatically over the course of thirty years. In the 1980s, it would have been appropriate to view de Tocqueville’s “few individuals” as gay men and women whose rights were sacrificed to the culture of fear

³³Douglas Laycock, in *Sex, Atheism* (415) -151 in *Rise and Decline*

³⁴Alexis de Tocqueville

spread by the AIDS epidemic. The shameful nature of the treatment of these Americans has evolved into a living, breathing movement that has ironically become intolerant of the current minority of religious dissenters who were once the intolerant majority. The culture of ‘tolerance’ that the gay rights movement has created (and Kennedy has endorsed) is inherently discriminatory toward religious dissenters, spurred on by the civil rights language of *Obergefell*. The use of *Brown v. Board of Education*, *Plessy v. Ferguson*, and *Loving v. Virginia* creates a dynamic in which religious dissenters are equivalent to segregationists of the 1950s. Under this new definition of tolerance, “to be intolerant toward another’s beliefs is to be intolerant toward the person,”³⁵ the very definition of bigotry. Ben Crenshaw expands on this issue:

For practitioners of the new tolerance, intolerance is thought to be the supreme sin because it offends and disrespects persons. No one deserves to be offended or disrespected, and such an offense is considered an assault on their very dignity as a human being. This is why the rejection of same-sex marriage, homosexual practice, and transgenderism is believed to be an attack on the dignity of people with such attractions and lifestyles. This is why Justice Kennedy, in his majority opinion in *Obergefell v. Hodges*, appealed repeatedly to the dignity of LGBT individuals as a basis for their inclusion in the institution of marriage (as opposed to the metaphysical nature of marriage). To exclude them would have been an intolerant act, a defacing of their human dignity, and a supreme vice.³⁶

Crenshaw traces the underpinnings of this new tolerance to postmodern epistemology, which rejects metaphysical realism and maintains that “objective and universally binding truth claims are thought to be impossible.”³⁷ This new tolerance has led to a total eclipse of the old, rendering it “unrecognizable”³⁸ and causing “individuals who act according to

³⁵Ben Crenshaw, “Shut up, Bigot!” The Public Discourse

³⁶Ibid.

³⁷Ibid.

³⁸Ibid.

the old understanding of tolerance [to] be met first with befuddlement, and then with scorn.”³⁹

This scorn is only increased by the likening of gay rights activists to Rosa Parks and Martin Luther King, Jr. Justice Samuel Alito argues that the comparison “to laws that denied equal treatment for African-Americans... will be exploited by those who are determined to stamp out every vestige of dissent.”⁴⁰ He predicts the decision will cause the nation “bitter and lasting wounds,”⁴¹ because it will be “used to vilify Americans who are unwilling to assent to the new orthodoxy,”⁴² further observing 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.”⁴³

In his book *Rise and Decline of Religious Liberty*, Steven Smith explains this phenomenon in terms of providentialism and secularism. With respect to the gay marriage debate, those in favor of traditional marriage are the providentialists, while the gay rights advocates are secularists. He argues that because the Supreme Court has elevated the “secularist interpretation to the status of hard constitutional orthodoxy, the Court placed the Constitution itself squarely on the side of political secularism and relegated the providentialist interpretation to the status of constitutional heresy.”⁴⁴

³⁹Ibid.

⁴⁰Alito, dissent, page 6

⁴¹Ibid. 6

⁴²Alito, dissent, page 7

⁴³Ibid. 7

⁴⁴Smith, *Rise and Decline*, page 122

Previously, the primary function of the Constitution “was to assure citizens who might be on the losing side of a decision that there was something above and beyond the currently dominant view – namely, the agnostic Constitution—that did not confirm or embody that view, and hence that could still make a claim on their allegiance.”⁴⁵ The consequence of this constitutionally recognized secularism is that the old understanding of tolerance is destroyed. The new tolerance reigning in its place “wields the libel of bigotry in order to intimidate and silence dissenters and impose conformity.”⁴⁶

Because gay marriage has been declared the new constitutional orthodoxy, it has effectively “banish[ed] the other as a legitimate interpretation of the American constitutional order.”⁴⁷ In *Divided by Faith*, Benjamin Kaplan argues:

By blaming intolerance on primitive irrationality it obscures its true causes. And since no people want to consider themselves primitive, it encourages us to view intolerance as someone else’s vice, not our own. More subtly, the myth takes for granted the universal validity of a single definition of tolerance; our own.⁴⁸

This intolerance leads to an “increasingly rancorous political discourse,”⁴⁹ a consequence of the shift from open conversation to a discourse structured in terms of constitutional orthodoxy (political secularism) versus constitutional heresy (political providentialism). The final conclusion marks the end of political and social conversation regarding gay marriage, because those with opposing viewpoints cannot participate in free speech

⁴⁵Ibid. 102

⁴⁶Ben Crenshaw, “Shut up, Bigot!” The Public Discourse

⁴⁷Smith, *Rise and Decline*, page 101

⁴⁸Kaplan, *Divided by Faith*, page 6

⁴⁹Ibid. 124

without subjecting themselves to increasingly detrimental accusations as to their character.

Many might wonder why religious dissenters deserve tolerance or exemptions. Perhaps the most essential reason is that the religious dissenter is bound by what he perceives as an *absolute duty* to serve his God, which necessitates the freedom to exercise his religion through worship and practice. The consequences of ignoring that absolute duty are dire, even eternal. Like freedom of speech, freedom of religion is not merely a private means of self-expression. By nature, it requires public manifestation and, in the mind of the believer, this public manifestation (or lack thereof) has eternal consequences. Harvard's Michael J. Sandel describes the weight of this absolute duty as the "loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are."⁵⁰ Farr argues that freedom of religion and freedom to exercise one's religion is required for a free nation:

Properly understood, then, freedom of religion is the right to pursue the religious quest, to embrace or reject the interior and public obligations that ensue, and to enter or exit religious communities that reflect, or do not reflect, one's understanding of religious truth. *If people are not free in all these senses, they cannot be said to be living a fully human life.*⁵¹

In *World of Faith and Freedom*, Farr maintains that "while most of the world is steeped in religious thought and action, the agencies charged with understanding the world and furthering American interests in it are not yet up to the task. And, for the most part, there

⁵⁰Sandel, "Freedom of Conscience or Freedom of Choice" in *World of Faith and Freedom*, Farr, page 21

⁵¹Farr, *World of Faith and Freedom*, page 22 (emphasis added)

is little public pressure for them to change.”⁵² This lack of public pressure stems from the subscription of Americans to the new definition of tolerance. In order to reinstate the old understanding of tolerance and breathe new life into religious liberty, Crenshaw argues:

We must challenge postmodern thought at a fundamental level and reintroduce the old vision of tolerance into society. This will be most effective if we *practice* the old tolerance, visibly and powerfully demonstrating that it is possible to hold to objective truths and dissenting views while being respectful and loving toward those with whom we disagree. Such interpersonal virtues are rarely seen in a culture where social media exchanges and comment threads overflow with vitriol. Only by consistently and unfailingly teaching and practicing the old tolerance—and defending its epistemological foundations—will there be any chance of overturning the new tolerance.⁵³

Ultimately, Crenshaw argues that unless this old definition of tolerance is unearthed, tolerance as previously understood will be lost forever.

Alexis de Tocqueville once said that “[l]iberty cannot be established without morality, nor morality without faith.”⁵⁴ This conception of liberty and morality must be understood within the confines of conscience, “a bulwark against others’ control, embark[ing] on an inherently individualistic path.”⁵⁵ While revenue rulings and majority opinions have labeled conscience as something involving a community and the public interest, conscience is, at its heart, an individual conviction.

However, this individual conviction alone does not justify religious exemption. Andrew Koppelman argues that the justifications for religious exemption must “rest on some source of value external to the actor,”⁵⁶ rather than simply “the internal

⁵²Farr 15

⁵³Ben Crenshaw, “Shut up, Bigot!” *The Public Discourse*

⁵⁴Alexis de Tocqueville, “Democracy in America”

⁵⁵Conscience 34

⁵⁶Koppelman in Conscience

psychological makeup of the actor.”⁵⁷ Koppelman thus concludes conscience becomes legally relevant when “an individual is being coerced to act in a way that he is incapable of intending to act”⁵⁸ by the state. This coercion renders the abstract concept of conscience and belief concrete by forcing the individual, an American in possession of the Constitutional promise of liberty, to act in a way he finds himself incapable of acting. Conscience cannot exist as a trump for all competing interests, but “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁵⁹

⁵⁷Ibid.

⁵⁸Conscience 39

⁵⁹West Virginia v. Barnette 642

CONCLUSION

“Wildness puts us in our place. It reminds us that our plans are small and somewhat absurd. It reminds us why, in those cases in which our plans might influence many generations, we ought to choose carefully. Looking out on a clean plank of planet earth, we can get shaken right down to the bone by the bronze-eyed possibility of lives that are not our own.”¹

-Barbara Kingsolver, *Small Wonder*

America stands at a crossroads, with the future of tolerance, equality, and religious liberty dependent upon the next steps of our government and citizens. It is here, at this juncture, where we must think not of ourselves and our politics, but of the daughters and sons that we are impacting with our choices. Just as our decisions about pollution regulation and recycling impact the earth we leave for our children, our choices about equality and liberty shape the world of the next generation. The choice before us becomes whether we desire a world of equality or of religious liberty—or somehow, of both, if possible. On June 26, 2015, the Supreme Court set out a new direction for equality, and while many followed, others did not.

My thesis has attempted to explain how America arrived at this juncture, and how the paths offered to us were shaped by those in the Supreme Court and by conservative and liberal political groups. After reviewing the history of the gay rights movement, it became clear that a substantial group of Americans were not being treated as if they mattered or as if they were equal citizens. These men and women first turned to activists to press their cause, and then they themselves turned into activists, breaking new ground in a movement for equality. Despite the AIDS crisis in the 1980s, the

¹Barbara Kingsolver, *Small Wonder* 40

assassination of Harvey Milk, and the Supreme Court case *Bowers v. Hardwick*, the gay rights movement progressed with rapid momentum, achieving support from the Democratic party and even the President of the United States. Only a short sixty years after they began fighting for equality, the “outcasts” of the 1950s arrived at the steps of the Supreme Court, achieving the right to same-sex marriage in *Obergefell v. Hodges*.

Still, despite the outpouring of support for gay Americans, the majority opinion of the court was far from unanimous. The 5-4 split of the vote reflected the similarly divided citizens of the United States, conflicted over politics rooted in deep emotion and discussions of morality, while both sides vilified those who opposed their cause. Justice Kennedy, perhaps in an effort to remedy the quarrel, drew a connection from *Obergefell* to the civil rights movement through a five-fold argument structure using arguments from *Brown* and *Plessy* in his majority opinion. His central argument borrowed Justice Warren’s ‘intangible factors’ and named them ‘immaterial burdens.’ By using similar rhetoric, Kennedy proposed that the same invisible demons that plagued African-Americans and their children through anti-miscegenation and segregation laws also stripped the dignity from same-sex couples by means of anti-gay marriage laws. Kennedy’s majority opinion essentially yielded a precedential shift that primarily affects religious dissenters. Now, when the inevitable clashes between gay marriage and religious freedom occur, those who dissent for religious reasons must face precedent involving civil rights cases (*Bob Jones v. United States*) rather than First Amendment case law (*Hosanna-Tabor v. EEOC*, *Hobby Lobby v. Burwell*). This is a devastating blow for advocates of religious freedom, condemning dissenters as modern day segregationists.

In this situation, tolerance becomes increasingly difficult, if not impossible. Both sides of the debate are equally invested in the deeply personal fight for either equality or religious liberty, but the language of the case prevents a fair and honest conversation. When one side is endorsed both by the government and the Supreme Court and enforced as constitutional law, regardless of intention to protect the views of the opposing side, it becomes a new orthodoxy. As a result, the Constitution, the pinnacle of apolitical tolerance, is in a way manipulated – its words used to label gay marriage as constitutional orthodoxy and those who oppose it as constitutional heretics.

The question remains for those of us who are remain unsure of which good to choose: What is more important - equality or religious liberty? We, as a people, crave equality, and are desperate to make up for the wrongs of our past. The mere memory of segregation, lynchings, and KKK rallies nauseates us, and *Obergefell* offers a chance for redemption in the realm of equal rights. While not all citizens, justices, and politicians agree that the two movements are connected, the comparison has been injected permanently into the language surrounding gay rights. Regardless, America is committed to the free exercise of religion and the freedom from government intrusion in matters of the soul and spirit. It remains to be seen how these two imperatives will play out in the coming years.

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