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A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable?

BY PROFESSOR CARL H. ESBECK

Obergefell v. Hodges, 135 S. Ct. 2584 (June 26, 2015), declared that the right to marry is fundamental. The U.S. Supreme Court thereby struck down the laws in approximately thirty states that denied a marriage license to all but opposite-sex couples. The Court mentioned no standard of review, but convention is that a “fundamental right” gets strict scrutiny.¹

This is a Fourteenth Amendment ruling and the Fourteenth Amendment requires “state action.” Accordingly, the direct and immediate impact of *Obergefell* is only on governmental actors: local, state, and federal.² The private sector, including religious organizations, other NGOs, and commercial enterprises, are not directly and immediately implicated. Thus, for example, to hold a license to operate issued by the government, to be awarded a government social-service grant, or to enter into a government contract does not make one a state actor.³

There is also no requirement that state and local governments affirmatively implement *Obergefell* in the private sector. While a state may choose to implement “marriage equality” in various ways, such steps go beyond the requirements of *Obergefell*. That said, it must be expected that the Court’s rhetoric concerning the harm incurred by same-sex couples when denied the ability to marry will motivate some state and local officials to seek to extend marriage equality.⁴

Obergefell did not extend the rigor of the Equal Protection Clause to “sexual orientation” as a protected class. That would have threatened further damage to religious liberty. *Obergefell* is about the right to marry by obtaining a license from the state, not a right to be free of discrimination on the basis of sexual orientation. However, as previously acknowledged (*supra*, note 4), the “demean” and “disparage” litany by the Supreme Court will give a boost to state and local officials eager to take the next step, as they see it, for sexual equality. So expect a push in more liberal jurisdictions to challenge all remaining classifications by authorities based on sexual orientation. Not only did *Obergefell* speak of gays and lesbians as a class and wrote empathetically about them, but in *obiter dicta* Justice Kennedy twice said that being gay or lesbian is an immutable characteristic. *Id.* at 2594, 2596. A class formed around an unchangeable characteristic, one that historically was a badge of invidious discrimination,

is a typical prerequisite to courts declaring a class of persons as specially protected as a matter of equal protection. Accordingly, it can be expected that a few lower court judges—ones liberally inclined—will declare sexual orientation a “suspect class” under the Equal Protection Clause. True, the Court in *Obergefell* was intentional in not taking this step. But, from experience, we should assume that a few liberal jurists will be unable to restrain themselves and they will take the step not taken in *Obergefell*.

Although any such step is still pursuant to the Fourteenth Amendment and thus binding only on state actors, there are adverse consequences for religious organizations. If the class of gays and lesbians is a “suspect class” under the Equal Protection Clause, then progressive government officials can argue there is a “compelling interest” in affirmatively attacking such discrimination in the private sector. Further, when the discrimination is by a person or organization acting on a religious belief, then there is a clash of two fundamental rights. In such a contest, does gay equality or religious liberty prevail? The answer is not clear, but likely it will be case-by-case as influenced by what is at stake and the particular equities at hand.

No Longer E Pluribus Unum

The worldviews and religious values of Americans are diverse and becoming more so. Given our deepening differences, reflective citizens are quietly asking if it is no longer prudent to take for granted domestic tranquility. American politics is polarized and vitriolic. So is our public discourse. We often do not actually talk to those with whom we disagree, spend time in the same room with them, or even personally know any of them.

Americans who hold to the beliefs and practices of historic Christianity seek to live in peace amidst this widening diversity. These Christians want to exercise their faith free of regulation and censorship, not just within the seclusion of home and house of worship but also in public settings like the workplace, the campus, the professions, the charities, and main street’s trades and commerce. Many have only recently come to grips with the fact that they are a minority in their own country. Even as others disagree with them, people who take their faith seriously expect to be treated with respect and dignity. They

are still surprised when this does not happen. Their self-image is as a child of God, flawed but by grace forgiven and actively trying to discern and obey his will. They are assured that God has a plan for their life, one that will bring good rather than ill if only they will follow the revealed truths in the Bible. To submit to God's will is not understood by them as a loss of liberty, though this is a paradox to others. Submission, rather, is seen as embarking on a new journey that frees the Christian to live aligned with the natural order of how things were meant to be. As an incident to God's plan—not its center—is the proper use of one's body, not to frustrate or deny pleasures, but to do what is best for one physically and emotionally, and to enable sexually fulfilling and stable relationships. Sexuality is a gift, but it can be abused. We are embodied souls; what is done to the body can't help but affect the spirit. God loves his children and does not want any harm to come to them by their making choices at odds with his created order.

Roughly in parallel to the aspirations of these Christian claimants, Justice Anthony Kennedy's opinion in *Obergefell v. Hodges* describes gays and lesbians as also wanting to live in peace amidst America's cultural diversity. As Justice Kennedy describes it, they too seek respect and dignity by having their identity as couples legitimated by the state. 135 S. Ct. at 2593. The liberty elevated in *Obergefell* is, we are told, the product of self-definition, in this instance a union of two women or two men who are committed to one another and wanting society to publicly ascribe jural meaning to that union. Kennedy writes that "[a]s the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects... . With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right imposes stigma and injury of the kind prohibited by our basic charter." *Id.* at 2601-02. In some instances, homosexual identity does go much deeper than sexual pleasure. At its best, the gay and lesbian movement has many qualities we associate with the church. There is a broad acceptance of others, a strong sense of common cause, and a thirst for justice. They are passionate about sharing their views and unashamed to be recognized for what they believe.

In this matter, arguments for equality are merely instrumental and thus unhelpful. Equality can be powerful rhetoric, but adds nothing of substance and can evoke emotions that cloud reason.

In prior cases, Justice Kennedy has characterized religious liberty in terms strikingly similar to his description of gay rights. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Kennedy joined the Court's opinion but filed a separate concurrence. In doing so, he wrote about religious liberty in words identical to those used in *Obergefell* concerning the right to marry.

"In our constitutional tradition, freedom means that all persons have the right to believe ... in a divine creator and a divine law. For those who **choose this course**, free exercise is essential in **preserving their own dignity and in striving for a self-definition** shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. ... It means, too, the right to **express those beliefs and to establish one's religious** (or nonreligious) **self-definition** in the political, civic, and


economic life of our larger community. ... '[T]he American community is today, as it long has been, a rich mosaic of religious faiths.' ... Among the reasons the United States is **so open, so tolerant, and so free is that no person may be restricted or demeaned by government for exercising his or her religion**" (*Id.* at 2785, 2786; emphasis added, citations omitted).

As can be seen, both sides of this religion/gay divide make powerful rights claims. And, without endorsing Kennedy's parity of these two rights, it must be admitted that the claims are in

some respects parallel. The religious individual as a child of God, and the gay or lesbian individual with same-sex attraction, want to take his or her self-understanding and live true to it. This understanding is the totality through which each sees all reality. And there is a desire to be true to that basic identity not just in private but in open public settings. In all their interactions with government, both groups desire to avoid rejection or embarrassment or penalty such that each can live out his or her sense of self in public peace.

Rights in Conflict?

What we have, from the Court's point of view, are two vigorous assertions to a substantive right that, when honored, necessarily limits and checks government. Are these two fundamental



rights necessarily in conflict? No. The civil law can protect the right of same-sex couples to marry while at the same time safeguard the right of religious persons and organizations not to recognize these marriages.

Obergefell is a Fourteenth Amendment case. It operates only against the government. So same-sex couples, say a majority of the Justices, have a right to civil marriage. The right is against only the government. They also enjoy all the incidental privileges and benefits of married couples, from tax breaks, to inheritance and pension rights, to medical decision-making authority as to one's spouse. 135 S. Ct. at 2601. But government does not occupy the universe of public social space. There is a civil society, variously called the private sector or the public square of ideas and NGOs and commerce. This is that big social space devoid of "state action." To be sure, affirmative government is ever whittling away at this social space. But it still remains a big space. And here is the arena where these two fundamental rights do not need to be in juridical conflict. Both religious individuals and gay and lesbian individuals can believe in and practice their core identity, even as they reject that of the other. They are in conflict as to beliefs, but not in conflict of laws.

We have to do this right, however. This will entail, if not moral agreement or even mutual civility, a devotion to the principle that neither claimant should enlist the power of the state to get the other to renounce their core beliefs or to act contrary to them.

In this matter, arguments for equality are merely instrumental and thus unhelpful. Equality can be powerful rhetoric, but adds nothing of substance and can evoke emotions that cloud reason. Equality requires a preferred class to which a claimant wants to be elevated. The formula is "Like things must be treated alike, while different things may be treated differently." The question remains: Are these two things like one another? Only if they are "like" one another does fairness require equal treatment. The question of whether two things are alike is ultimately substantive. *Obergefell* answered in the affirmative as to same and opposite-sex marriages. (Wrongly, I believe.) It held that for same-sex couples to enter into a marriage recognized by the state is a fundamental right as a matter of Substantive Due Process. However, with its express placement in the text of the First Amendment religious freedom is also a fundamental right. Under the law, therefore, the two are seemingly equivalent. Both are substantive rights, and both enjoy the highest protection from the government's regulation in the form of licensing, certifying, accrediting, taxing, funding, and the like.

Framing the Question Properly

That is not all. Gay and lesbian groups insist that respectful treatment by the government is not enough. In certain important private transactions, such as employment, housing, commerce, and education, both the religious and gay claimants want not to be judged adversely on account of their core

understanding, religious, in one instance, homosexual, in the other. Our society has responded by enacting statutes to regulate these important venues in the private sector. These statutes, of course, are known as Civil Rights Acts requiring nondiscrimination in these transactions in regard to certain historically oppressed classes. Given our nation's history, racial and religious minorities immediately come to mind. Also gender and disability are, as of late, protected classes.

And, now, we arrive at the legislative efforts to add "sexual orientation" to our nation's venerable civil rights laws. If our legislators do so, then what is to be done when the protection of the class of sexual orientation conflicts with the protection of religion freedom?

The response by Christians thus far, as is well known, is to insist that religious individuals and organizations be exempt from these new nondiscrimination laws protecting sexual orientation.

This framing of the issue has had the unfortunate effect of shifting the debate away from a clash of human rights that have to be balanced and toward one of equal treatment or equality. The rejoinder from the gay and lesbian community is to characterize the insistence on religious exemptions as seeking an elevation above generally applicable law. It is said that Christians are seeking to avoid a law all others must obey, indeed, a "right to discriminate," the latter now a synonym for homophobic hate.

Anyone who has endured the first year of law school learns that the first step to legal clarity is not getting the right answer but it is asking the right question. This is an instance where framing the question properly is important.

When there are two human rights being claimed and they appear to be colliding, there are two ways of posing the conflict of laws question. The first is to concede that both are legitimate rights-claims and the task is to balance the two with the aim that both rights be harmonized where possible so that both are substantially realized. The second is that, for the common good, society has promulgated a rule of equality as to certain oppressed claimants defined by a class to which the other claimants—the religious—want a special dispensation.

The first framing is more just because it avoids the bias that it is the religious rights-claimant who is against the common good, that is, in the second framing it is as if the religious is asking for a special privilege to be excused from a law that is binding on everyone else. But the religious are not asking to be elevated above the common good, and it is anti-religious prejudice to so presume. The religious claimants are only asking that their claim to liberty be weighed on the merits over against the liberty claim asserted by gays and lesbians.

Is Religion Special?

Secular scholars are asking: Why is religion special? Why should religious claims get special protection? Have not we, as an American polity, outgrown the First Amendment's special carve-out for religion? What these scholars really mean is: Religion is not special, indeed it is unprogressive

and thereby harmful. Or, more precisely, they mean religion is not special to public intellectuals, that small class of Americans from which these scholars come. Thus, they advocate that government stop giving religion First Amendment protection, as if their opinions and beliefs should be preferred and negate the First Amendment. They, of course, are not so blunt as to ask the courts to ignore the First Amendment. So they devise clever ways for the courts to limit and otherwise construe the text away.

Religion is not special to public intellectuals ... thus, they advocate that government stop giving religion First Amendment protection, as if their opinions and beliefs should be preferred and negate the First Amendment.

But religion is special. It was right to recognize religious freedom in the Bill of Rights in 1789-91, and it remains right to do so in the twenty-first century. Human beings are meaning-seeking creatures. Religion is intrinsic to our nature, not a choice, not a lifestyle, not a social construct. We ask, indeed, we can't help but ask: Where did we come from? Why are we here? Is there meaning or purpose to life? What happens after we die? The answers humans give constitute the definition of what law means when we protect "religion." The answers given are what people believe is worth sacrificing for, even dying for. And that's why religion has, and should retain, the highest protection the civil law can give to life's ultimate beliefs and practices.

Radical Pluralism

This is hardly the first time a western society, one significantly shaped by historic Christianity, has divided over absolutes. One of John Locke's (1688) insights was that a nation's unity is not to be found in agreement in creedal specifics. In an open and free society, and given the inevitable differences in human opinion, a nation-state organized on unity in a particular biblical creed is unattainable. Civic unity, rather, is found in the operative rule that when one faction is attacked all are threatened and all will come to the defense of the faction being menaced by government. A faction's assurance that when pressured by government the other factions will rally to its defense is what in time leads to each faction's sense of juridical and domestic security, perhaps even a patriotic affection for that nation and its laws.

Dissenting in *Obergefell*, Justice Samuel Alito predicted that the marriage ruling "will be used to vilify Americans who are unwilling to assent to the new orthodoxy." 135 S. Ct. at 2642. Everyone has an interest in that not happening, even the gay and lesbian community. Christian advocacy groups, or the better ones, have over time learned the Lockean principle that, "When all are protected, Christians are protected." That has to now be broadened to, "When all fundamental rights are protected, religious freedom is protected." The same principle works for gay rights.

In the turmoil after *Obergefell*, the one optimistic note is the frequent call by Christians to pluralism as an organizing principle. Pluralism does not see American diversity as a problem. Rather, it sees diversity as inevitable, as a given, as the human condition. But the necessary project to educate American citizens in a mature pluralism so as to peacefully govern ourselves is in its infancy.

This will not be easy. Christians, who understandably feel threatened by what's coming downstream to *Obergefell*, will have to come to believe that gays and lesbians will rise in defense of their religious exercise. In turn, when gays and lesbians are threatened, Christians will have a duty to rally to the defense of their liberty—not a defense of the moral rightness of their sexual practices, but that they have a civil right to

engage in their sexual practices even as Christians think their conduct morally wrong.

This is pluralism; radical pluralism. We are asking Christians to love their neighbors, even those who seek to harm them. Indeed, especially those who seek, as a matter of pay-back, to harm them. This will take a maturity in the Christian community that it does not presently have. And that means civic education in our churches and para-church organizations. There is work to be done and, to be honest, resistance to overcome within the very ranks of the church. But, then, as a radical teacher once observed: "If we do good only to those who do good to us, of what credit is that to us? Even sinners do that." (Luke 6:33).



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ENDNOTES

- 1 The opinion implicitly puts to one side marriage among three adults, incestuous marriage, and the minimum age to marry without parental consent, all current state restrictions on the right to marry. Presumably these familiar limitations and others will be tested in the future and will have to pass strict scrutiny.
- 2 The federal government is not strictly a "state actor," but nevertheless is bound by the Court's holding via the Due Process Clause of the Fifth Amendment. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court struck down as a violation of the Fifth Amendment a congressional act limiting the federal definition of marriage to opposite-sex couples. Although not ordered in *Windsor* to do so, the Obama Administration proceeded to aggressively alter the definition of "marriage," "spouse," "wife," and "husband" throughout federal law. Accordingly, *Obergefell* will have limited impact on federal law as many alterations have already been made by the executive branch.
- 3 *Blum v. Yaretsky*, 457 U.S. 991 (1982) (government licensure); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (government funding).
- 4 Rather than attribute an invidious motive to those who opposed same-sex marriage, including religious opposition, the *Obergefell* Court, 135 S. Ct. at 2602, focused on the effects of that opposition—using various action verbs: stigmatize, disrespect, subordinate, exclude, deprive, disparage, diminish, demean, disable, deny, wound, injure, harm, humiliate. The Court's rhetoric is an impressive thesaurus, managing to avoid only the action verb "discriminate."