My Thoughts on the *Obergefell* Opinion

Jonah Mann
Summer 2015

I was very happy to learn that the Supreme Court ruled that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex." I agree that it does! But upon reading the Court's opinion in *Obergefell*, I quickly became disappointed. I believe that the Fourteenth Amendment's Equal Protection Clause prohibits same-sex marriage bans; the Court, however, found the prohibition in the Fourteenth Amendment's Due Process Clause[1], where I do not believe it exists. Having yet to find any writing that adequately addresses my thoughts on this matter, I wanted to compose and share my detailed reaction to it both because I believe it constitutes an error of law and because I feel it deprives me of a certain vindication that I crave.

How the Court arrived at its conclusion

The Court's opinion, written by Justice Kennedy, is based on the idea that the freedom to get married is a fundamental liberty. Much of the text of the opinion is devoted to highlighting the importance of marriage in an effort to demonstrate that marriage is indeed fundamental. The Chief Justice actually agrees in his dissent that "[t]here is no serious dispute that, under our precedents, the Constitution protects a right to marry".

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of… liberty… without due process of law". Bans on same-sex marriage, the majority concludes[2], unconstitutionally deprive gay people of the liberty to get married.

My critique of the Court's reasoning

Unlike Justices Roberts and Kennedy, and contrary to over a century of Supreme Court precedent, I do not believe that "liberty" includes a fundamental right to a government-recognized marriage. I agree with Justice Thomas, who defines "liberty" in his dissent "as freedom from government action, not entitlement to government benefits."

Justice Thomas and I understand civil marriage to be a contractual arrangement that two people can enter in order to receive a set of benefits which as of right now happens to include reduced inheritance taxes, surviving spouse Social Security eligibility, reduced auto insurance rates, and the right to sue a third party for wrongful death. This contractual arrangement was

---

[1] Justice Kennedy does also use the words "Equal Protection Clause", but as Chief Justice Roberts writes in his dissent, "the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position".

[2] The Chief Justice believes the majority's conclusion is erroneous, writing, "The fundamental right to marry does not include a right to make a State change its definition of marriage."

created by state governments (and supplemented by the federal government) as a matter of social policy.

The goal of this social policy is, I presume, to facilitate household formation. I understand a household to be an entity formed by a group of people whereby the formants merge at least some of their assets and responsibilities—financial, legal, social, and otherwise—and are free to share and redivide them internally however they see fit. In recent times, romantic love has been a primary motivator behind household formation in our society.

I believe that no government is under any obligation to offer a special contractual arrangement to facilitate household formation. While I do believe that the freedom to form a household is a fundamental liberty, I do not buy that the freedom to do so with the facilitation of a government-created special contractual arrangement is a fundamental liberty guaranteed by the Constitution.

<u>The reasoning that I believe should have been used</u>

Per the Equal Protection Clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws." I understand this to mean that, if a state does offer civil marriage, that is to say, if a state does create a special contractual arrangement to facilitate the formation of households with romantic love as a primary motivator, then the state cannot deny the use of that arrangement to any person. And a gay person is in fact a person.

It is necessary to acknowledge that romantic love plays at least some role in modern household formation because without it, a sham counterargument can be fabricated. Under a same-sex marriage ban, it is still legal for gay men to marry women, and for lesbian women to marry men. Therefore, one could argue, a same-sex marriage ban does not deny anyone equal protection of the laws: Non-straight people can still use civil marriage to facilitate the formation of opposite-sex households, just like everyone else. This argument falls apart once it is acknowledged that romantic love plays at least some role in modern household formation. The thing about same-sex marriage bans that violates the Equal Protection Clause is that they deny gay men and lesbian women the protection and facilitation of civil marriage in forming households that have any romantic love while offering it to everybody else.

The Chief Justice reminds in his dissent that "[i]t is casebook doctrine that the modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing."[3] (This is also the Court's established methodology for reviewing due process claims, though Justice Kennedy did not follow it in this case.) A real Court opinion would typically establish a level of scrutiny for its review, and then apply that scrutiny to arrive at a determination. I will not flesh that out here, as I doubt that any of my readers actually

[3] Internal quotation marks and citation omitted.

believe that same-sex marriage bans are even rationally[4] related to any legitimate government interest. (Bigotry is not rational.) I was hoping, albeit excessively optimistically, that the Supreme Court would have found the same.

The dissent's application of the Equal Protection Clause and my critique thereof

I find some support for my ideas in the Chief Justice's dissent. He acknowledges that the Equal Protection Clause is relevant to the issue of marriage, writing, "[t]here is no serious dispute that, under our precedents, the Constitution… requires States to apply their marriage laws equally." He even agrees with me that "the denial of certain tangible benefits" to same-sex couples constitutes (or at least "might" constitute) an infringement of the Equal Protection Clause.

That is where my agreement with the Chief ends and suddenly turns into disbelief. He stops just short of saying that same-sex marriage bans themselves violate the Equal Protection Clause, instead writing:

> It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits.

So not only the Chief Justice but also Justice Scalia and Justice Thomas, who both signed this dissent too, all believe that the Equal Protection Clause "might" require that states that offer tangible benefits to opposite-sex couples under the name "marriage" must also offer at least some of those same benefits to same-sex couples, but under some separate name. What?! How could there not have been a single liberal justice at the conference table to bring up *Brown v. Board*? "[E]ven though the… 'tangible' factors may be equal… in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." I acknowledge that *Brown v. Board* was about race and education, but I don't believe that it's a huge jump to posit that "separate but equal" might be problematic for other classes and in other areas too. The Civil Rights Act of 1964 extended that idea well beyond just race and just education. One Harvard Law professor even called this case "the *Brown v. Board* of the gay rights movement." Why didn't Justice Kennedy respond to this—or to any of the Chief Justice's criticism—in his opinion? I am surprised that the Chief Justice wrote this and that it has received so little attention.

---

[4] *Rational basis review* is the lowest level of scrutiny applied by the Court.

Why Supreme Court was the right place to decide this issue

I am happy that this issue was decided by the Supreme Court. The conservative justices and many others consider the inclusion or exclusion of same-sex couples from the protections of marriage to be "a question of social policy", and therefore believe that the issue should be decided by legislatures. I've made it clear above that I consider the offering of civil marriage itself to be a question of social policy. The question here, however, is not whether a state should offer a tool to facilitate household formation; it's whether a state that does offer such a tool may deny equal use of that tool to gay people. Gay people, it turns out, are people, and therefore they have a constitutional right to equal protection of the laws. To quote Ayn Rand, political hero of adolescents and many prominent conservatives, "Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities".

Our society has a place where individuals can get official declarations that they are being wronged by laws that are not merely disfavored policy choices but unconstitutional violations of their rights. That place is the judiciary. For a legislature to even hold a vote on my right to equal protection of the laws implies that it has a say. I am glad to have received the dignity[5] of a decision from the judiciary, our society's official place for righting this kind of wrong.

Why I care that the "wrong" reasoning was used

While I am glad to have received a decision from the judiciary, I wanted the dignity of an official recognition that bans on same-sex marriage are a violation of my constitutional right to equal protection of the laws. Instead, in the words of Justice Alito, the Court "invent[ed] a new right" for me, one which, as I laid out above, I don't believe exists. For Justice Kennedy to base this decision on something so shaky deprives me, I feel, of the dignity I sought.

The Equal Protection Clause has a great history of overturning bigotry, and I wanted the vindication of having gay rights added to its jurisprudence. It's annoying to have to settle for some contrived right conjured up by the straight white cis male swing justice to jive with his idealistic concept of individual freedom. I didn't need a fake right made up for me; I just wanted acknowledgement that I wasn't being treated equally. But whatever, I'll take it. Getting to spend time caring about something as minor as this is a privilege.

[5] Justice Kennedy uses the word "dignity" nine times in the text of his opinion, so I'm alluding to it here.