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Obergefell v. Hodges: Majority Opinion got the Analysis Wrong, but the Answer Right

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OBERGEFELL V. HODGES: THE MAJORITY OPINION GOT THE ANALYSIS WRONG, BUT THE ANSWER RIGHT

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Abstract

Although the U.S. Supreme Court reached the correct result in *Obergefell v. Hodges*, its substantive due process and equal protection analyses were wrong. First, the majority opinion discusses the concept of equal dignity, which has no legal definition nor has it been used in prior Supreme Court jurisprudence. The majority made another mistake in using substantive due process when *Obergefell* could have been decided on the basis of equal protection alone.

Despite these mistakes, there were parts of the opinion the Court did decide correctly. The end result -- that same-sex couples have the right to marry -- was the correct outcome. This is based on the fact that the Supreme Court has defined marriage as a fundamental right and banning marriage to same sex couples would be discrimination on the part of the government. While the majority was also correct in overruling the prior method of defining fundamental rights set forth by *Glucksberg*, the Court should not have made defining fundamental rights so unlimited in scope. Justice Kennedy removed the prior standard for defining fundamental rights without creating a new standard for judges to follow in the future, leaving the future of substantive due process cases uncertain. This neglect to implement a new standard to replace *Glucksberg*'*s* standard leaves substantive due process open to judicial interpretation. The Court also came close, but still neglected, to create a quasi-suspect class on the basis of sexual orientation. The Court should have created standards that were not so overly broad for future decisions regarding substantive due process, and it should have classified sexual orientation as a quasi-suspect class

DEDICATION

To my parents,
For supporting me, inspiring me, and guiding me as I
Pursue my dreams.

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Introduction

The legal battle for marriage equality , the right of same sex couples to marry, has been fought over several decades. The first case to reach a state supreme court was when a same sex couple applied for a marriage license in Minnesota in 1970.[1] Minnesota denied the couple a marriage license, and this set off a series of chain reactions of state legislatures banning same sex marriage starting with Maryland in 1973,[2] and even federal legislation prohibiting same sex marriage.[3]

President Clinton signed the federal Defense of Marriage Act, commonly known as DOMA, into law in 1996.[4] DOMA defined marriage as a legal union between a man and a woman, and denied same sex couples benefits that were afforded to opposite sex couples.[5] Despite DOMA being federal law, Massachusetts became the first state to legalize same-sex marriage in 2003.[6] This was notable, as it was the first state to openly defy DOMA. Other states began to follow suit.[7] It was not until 2013 that the Supreme Court declared DOMA's definition of marriage deprived same sex couples of their Fifth Amendment right to equal protection.[8]

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[1] Susan Boland, *A timeline of the Legalization of Same-Sex Marriage in the U.S.,* Georgetown Law Library (Jan. 14, 2020), https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201.
[2] *Id*.
[3] *Id*.
[4] *Id.*
[5] Kimberly Kelley, *Defense of Marriage Act*, Encyclopedia Britannica (March 1, 2018), https://www.britannica.com/topic/Defense-of-Marriage-Act
[6] Susan Boland, *A timeline of the Legalization of Same-Sex Marriage in the U.S.,* Georgetown Law Library (Jan. 14, 2020), https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201.
[7] *Id*.
[8] Gautam Raghavan, *Obama Administration Statements on the Supreme Court's DOMA Ruling*, the White House President Barack Obama (June 27, 2013), https://obamawhitehouse.archives.gov/blog/2013/06/27/obama-administration-statements-supreme-court-s-doma-ruling
The Fifth Amendment contains the prohibition against denying to any persons the life, liberty, and property without due process of law.

Following these legislative battles and victories for marriage equality, *Obergefell v. Hodges* was filed with the federal district court for the Southern district of Ohio. Other cases with similar grounds also filed cases in other districts. The circuit courts were split on these cases, and the Supreme Court granted certiorari to resolve the dispute, consolidating the cases into the singular case *Obergefell v. Hodges*.

Obergefell v. Hodges is the landmark case in which the Supreme Court of the United States ruled that state bans on same sex marriage are unconstitutional. Justice Anthony Kennedy wrote the majority opinion, which used a combination of substantive due process and equal protection concepts to expand the fundamental right to marry to same sex couples. That fundamental right was established in *Meyer v. Nebraska*.

Substantive due process, derived from the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, is a concept that allows courts to identify and protect fundamental rights from government interference that are not explicitly identified in the Constitution. The Supreme Court has used substantive due process to protect the right to privacy,[9] marriage,[10] and interstate travel[11] among others.

Equal protection arises from the Fourteenth Amendment which says, "No State shall… deny to any person within its jurisdiction the equal protection of the laws."[12] The Equal Protection Clause protects people within United States from discrimination by the government. This clause has been used to protect against racial discrimination[13] and sex discrimination[14].

[9] *Roe v. Wade*, 410 U.S. 153 (1973).
[10] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
[11] *Kent v. Dulles*, 357 U.S. 116 (1958).
[12] U.S. Const. amend. XIV, § 1.
[13] *Brown v. Board of Education of Topeka*, 347 U.S. 495 (1954).
[14] *Reed v. Reed*, 404 U.S. 77 (1971).

The Court came to the correct conclusion in allowing same sex couples the right to marry. However, the majority made mistakes in the opinion that will have lasting consequences on the courts until the Supreme Court remedies the problem it created. The Court used substantive due process, rather than equal protection alone to decide *Obergefell* and it also created new standards for substantive due process that are far too broad.

Despite these mistakes, the dissenters are incorrect in their own analysis of *Obergefell* and do not provide adequate reasoning to exclude same sex couples from the right to marry. Justice Roberts and Scalia argue that the decision on same sex marriage should have been left to the people while Justice Thomas argues substantive due process should not be used at all. These arguments are poorly made and do not invalidate the decision made by the majority. *Obergefell* did provide the right to marry for same sex couples was protected under the Constitution, but it did not go far enough to protect same sex couples.

What *Obergefell* Got Right

Despite the majority opinion's mistakes, sections of the majority opinion were correct. The majority held that, "the definition [of the fundamental right of marriage] must include same-sex couples because their exclusion irrationally restricts those person's liberty and irrationally discriminates against that class of persons."[15] The majority correctly found that same sex couples have the right to marry.

Even before Obergefell, numerous Supreme Court cases recognized that marriage is a fundamental right. In *Meyer v. Nebraska*, the Supreme Court held, "the right 'to marry, establish a home, and bring up children' is a central part of liberty protected by the Due Process Clause."[16] In the years following this decision, numerous cases have referred to the right to marry as a fundamental right. The Court in *Skinner v. Oklahoma ex rel. Williamson* said marriage is "one of the basic civil rights of man."[17] In *Cleveland Board of Education v. LaFleur* the Court declared that, "this Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[18] The Court in *Turner v Safley* proposed that, "[T]he decision to marry is a fundamental right."[19]

None of these cases, or any of the cases regarding marriage as a fundamental right, held that marriage is a right reserved only for opposite sex couples. This likely is a product of the times, and the Court not necessarily realizing the full impact of one of its decisions. For example,

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[15] Matthew R. Grothouse, *Article: Implicit In the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1023 (Summer 2016).
[16] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[17] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).
[18] *Cleveland Board of Education v. LaFleur*, 414 U.S. 639-40 (1974).
[19] *Turner v. Safley* 482 U.S. 95 (1978).

the Court in *Plessy v. Ferguson* ruled that state segregation did not violate the equal protection clause.[20] This case upheld the doctrine of separate but equal. It was not until 1954 that the Court overruled *Plessy v.* Ferguson in *Brown v. Board of Education*.[21] The Court in *Brown* acknowledged that separate but equal was truly not equal, and held that state segregation was not constitutional. The Court is capable of changing its decisions when it sees a group has been wronged by the law. Similarly, in *Bowers v. Hardwick* the Court upheld the constitutionality of a Georgia law criminalizing homosexual sodomy[22]. The Court overruled this decision almost two decades later in *Lawrence v. Texas.*[23] Before *Obergefell* the Court never held that marriage was strictly a union of a man and a woman, as DOMA would attempt to define marriage.

President Bill Clinton signed the Defense of Marriage Act (DOMA) into law in 1996. Section 3 of DOMA defined marriage as between a man and a woman. In 2013, the Supreme Court in *United States v. Windsor* found that DOMA violated the Fifth Amendment.[24] When discrimination by the government is challenged in the Supreme Court, the Court must examine the government's actions under a test of constitutional scrutiny. There are three levels of constitutional scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny was established in *Skinner v. Oklahoma*[25] and is used on the basis of race. Intermediate scrutiny was established in *Craig v. Boren*[26] and is used in cases of sex discrimination. Rational basis review is the lowest level of constitutional scrutiny. It was established in *Nebbia v. New*

[20] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[21] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[22] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[23] *Lawrence v. Texas*, 593 U.S. 558 (2003).
[24] *United States v. Windsor* 570 U.S. 775 (2013).
[25] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).
[26] *Craig v. Boren*, 429 U.S. 197 (1976).

York[27]. Rational basis review tests whether the government's actions are rationally related to a legitimate government interest[28]. The Court's reasoning in *Windsor* was that no legitimate government purpose overcame the purpose and effect of DOMA, which was to disparage and injure those living in marriages "less respected than others."[29]

Regarding *Obergefell*, the Supreme Court was correct to hold that marriage as a fundamental right that includes same-sex couples. There was no precedent to hold that marriage was exclusively for opposite sex couples, and indeed the Supreme Court struck down such a definition from the federal government two years before deciding *Obergefell*. Had the Court supported a definition of marriage as between a man and a woman, that would have supported legal discrimination on the part of the states who passed bans on same sex marriage in a manner similar to how the Court upheld racial discrimination in *Plessy v. Ferguson*. There would have been no legitimate purpose for such discrimination by the Court, just as there was none for the federal government in DOMA. Such discrimination would not pass a rational basis review, as there is no legitimate government interest that would be served by the government discriminating against same sex couples and denying them the right to marry.

Although *Obergefell* should have been decided on equal protection alone, as will be explained further in the next section, the manner in which the Court used substantive due process to determine that same sex couples have the right to marry was apt. The majority, "focused not on inventing a new right, but on whether the exclusion of a certain class of individuals from the definition of a fundamental right was constitutionally permissible."[30]

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[27] *Nebbia v. New York*, 291 U.S. 502 (1934).
[28] *United States v. Caroline Products Company*, 304 U.S. 144 (1938).
[29] *Id.*
[30] Matthew R. Grothouse, *Article: Implicit In the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1063 (Summer 2016).

Justice Kennedy cites four principles and traditions that demonstrate why marriage is a fundamental right. He articulates these principles and applies them to same sex couples to show that same sex couples should be included in the fundamental right to marry. The first principal is that, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[31] Kennedy references this principle as the reason *Loving v. Virginia* invalidated interracial marriage bans under the Due Process Clause.[32] Kennedy uses this principle as basis to determine that people have the right to choose to get married and to decide who they marry. In *Loving* this principle defended the right of individuals to choose to marry a person of a different race. The principle is used here to defend the right of individuals to choose who they marry.

The second principle Kennedy references is that, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to committed individuals."[33] This principle was used in *Griswold v. Connecticut*, which held that married couples had the right to use contraception.[34] *Griswold* said that marriage is a right, "older than the Bill of Rights."[35] This principle recognizes that marriage, although not expressly enumerated in the Constitution, is a right the Court has continually recognized throughout its jurisprudence because its origin is indeed older than the Constitution, and its importance demands the Constitution protect it.

The third principle Kennedy draws upon is that marriage, "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and

[31] *Obergefell v. Hodges*, 135 S. Ct. 2599 (2015).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Griswold v. Connecticut*, 381 U.S. 486 (1965).

education."[36] Kennedy uses *Zablock v. Redhaili* to support this principle, which says, "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."[37] Kennedy argues that, "excluding same-sex couples from marriage conflicts with a central premise of the right to marry"[38] because same sex couples can provide, "loving and nurturing homes to their children"[39] and because, "most states have allowed gays and lesbians to adopt… and many adopted and foster children have same-sex parents…this provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[40] Kennedy argues that by not allowing same sex marriages, children of same sex couples suffer a stigma because their families are seen as lesser than families with opposite sex parents.[41] This would contradict the protection of marriage's safeguarding children and families.

The final principle Kennedy enumerates is that, "this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[42] Kennedy argues that because even states view marriage as part of the social order, the state supports married couples with benefits regarding taxation, inheritance, and property rights, hospital access, and health insurance among others.[43] Kennedy says that because the state, "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."[44] Because the state grants benefits to

[36] *Obergefell v. Hodges*, 135 S. Ct. 2600 (2015).
[37] *Zablocki v. Redhail*, 434 U.S. 384 (1978).
[38] *Obergefell v. Hodges*, 135 S. Ct. 2600 (2015).
[39] *Id.*
[40] *Id.*
[41] *Id*.
[42] *Id* at 2601.
[43] *Id.*
[44] *Id*.

couples who are married, same sex couples being excluded from these benefits constitutes unjust discrimination by the government and could not be allowed under the Constitution.

Kennedy uses these four principles to argue, under Substantive Due Process, that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited"[45] by the Constitution. These principles relate to standards set by *Washington v. Glucksberg* regarding substantive due process. These two standards necessitated that fundamental rights are, "deeply rooted in this Nation's history and tradition"[46] and a, "careful description of the asserted fundamental liberty interest"[47]. The four principles relate to the fact that marriage is deeply rooted in the nation's history, and the right to marry is already an established right.

Kennedy establishes that the facts of *Obergefell v. Hodges* satisfy the standards of *Glucksberg*, then proceeds to overrule the *Glucksberg* standards. Kennedy begins by reiterating that, "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution"[48]. He does this in order to rebut Scalia's dissent, in which Scalia state that the people should have been the decision makers regarding same sex marriage. He then cites Justice Harlan's dissent in *Poe v. Ullman* in which Harlan states that the protection of fundamental rights, "has not been reduced to any formula."[49] The method in *Glucksberg* attempted to reduce the identification of fundamental rights down to narrow instructions, and Kennedy rejects *Glucksberg*'s two prong test.

[45] *Id.* at 2603.
[46] *Washington v. Glucksberg*, 521 U.S. 721 (1997)
[47] *Id.*
[48] *Obergefell v. Hodges*, 135 S.Ct. 2598 (2015).
[49] *Poe v. Ullman,* 367 U.S. 497 (1961) (Harlan, dissenting).

He first rejects the history and tradition section of *Glucksberg* by arguing, "rights come not from ancient sources alone… They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[50] This shift in viewpoint is important to the development of constitutional law as it can allow the Court to overrule its own prior decisions when those decisions are better understood as wrong as years go by such as in *Brown v. Board of Education*. This viewpoint also allows for the protection of fundamental rights that may previously not have been recognized by the Court. Kennedy describes prior discrimination against same-sex couples. He includes the instance of discrimination by the American Psychiatric Association that once considered homosexuality a mental disorder and treated homosexuality as an illness.[51] He then goes on to say that the American Psychological Association changed this opinion, and after 1973 homosexuality was no longer considered a mental disorder or illness.[52] These points show the change that occurred in the nation's reported opinion of homosexuality that, had the Court only used the nation's traditions to determine whether same-sex couples had the right to marry, the Court would have arrived at the incorrect result. Kennedy's argument shows that, "the fact that this discrimination against same-sex couples inflicts significant psychological harm justifies ignoring our nation's history of LGBT discrimination in the context of marriage, treating it as a part of our history that deserves to be discarded."[53] Kennedy indeed discards these earlier opinions of homosexuality and instead rules state bans on same-sex marriage unconstitutional, despite the nation's long history of prejudice against them.

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[50] *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015).
[51] *Id* at 2596.
[52] *Id*.
[53] Thomas A. Bird, *Note: Challenging the Levels of Generality Problem: How Obergefell v. Hodges Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. PL'Y 590 (2016).

The second element of the *Glucksberg* standard required, "a careful description of the asserted fundamental liberty interest."[54] The *Obergefell* majority acknowledged that, "while this [careful description] approach may have been appropriate for the asserted right there... it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage."[55] The majority's argument is, "the implication is that the 'careful description' as posed by the *Glucksberg* majority might very well have been the undoing of many previously held fundamental rights"[56].

Kennedy was right to overrule the *Glucksberg* standards for substantive due process. Those standards were too narrow. To allow fundamental rights to be defined only by history and tradition would be to the detriment of minority groups in America who receive little protection from majority votes that discriminate against them. One of the purposes of the Court is to protect minority groups from a majority that would seek to discriminate against them. Justice Stone in *United States v. Carolene Products Co.* emphasized this point. He said that when cases came to the Court to determine the validity of "statutes directed at particular religious… or national… or racial minorities"[57] and those cases, "call for a correspondingly more searching judicial inquiry."[58] It is the Court's duty to inquire on whether the government may or may not discriminate against minorities. The *Glucksberg* standards dismantled that protection by only allowing rights to be fundamental if they were in accordance with the history and tradition of the nation.

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[54] *Washington v. Glucksberg*, 521 U.S. 721 (1997).
[55] *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015).
[56] Dave Rodkey, *Article: Making Sense of Obergefell: A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 769, (Summer, 2018).
[57] *United States v. Carolene Products Co.,* 304 U.S. at 152 (1938).
[58] *Id.*

Overruling the *Glucksberg* method for defining fundamental rights was a triumph of the *Obergefell* opinion. However, this triumph led to one of *Obergefell*'s greatest mistakes. After overruling the prior standard for defining fundamental rights, Kennedy created a new standard which is overly broad, confusing, and left too much to individual judicial interpretation.

Mistakes Made in *Obergefell*

Justice Kennedy's overruling of the *Glucksberg* method for defining and identifying fundamental rights is a victory for the case and the plaintiffs, but how Kennedy replaced the *Glucksberg* method is problematic. An examination of Kennedy's new standard for determining whether a right should be determined in its most general or most specific form says, "Judges must closely examine the intrinsic principles of this general right and then make a determination: are the central meanings of the broad right – the primary reasons why our society respects it – clearly incompatible with the other more specific, less general rights"[59]. A simpler way of stating this is, "Judges must inquire into whether the new application of the right considered in the present suit is consistent with the core values of the more general, traditional version of the right"[60]. Justice Kennedy's new test creates, "a balancing test between the individual's liberty interest and the governmental interest"[61].

While the previous *Glucksberg* test was inconsistent with prior precedent, this new test from Kennedy does remedy that inconsistency. However, it only further complicates the process by which the Court defines fundamental rights. The *Glucksberg* test determined that the Court needed to use the narrowest definition of a right before examining it and determining whether it is fundamental. This new test requires that judges must examine the asserted right in the case and determine whether the intrinsic value of that right is consistent with the more general right and whether that is consistent with the country's legal values.

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[59] Thomas A. Bird, *Note: Challenging the Levels of Generality Problem: How Obergefell v. Hodges Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. PL'Y 581 (2016).
[60] *Id.*
[61] Dave Rodkey, *Article: Making Sense of Obergefell: A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 778, (Summer, 2018).

Not only is this new test overly complicated, but it leaves much to judicial interpretation. The judge may determine how to describe the more general definition of a right, compare it to the right at issue, and determine whether that stated right is consistent with the nation's values. These standards create opportunities for inconsistencies between the federal circuit courts. The Supreme Court would then need to resolve these inconsistencies, which the Court created in the first place. The Court has created a convoluted standard for future judges and more work for itself in the future when inconsistencies occur. A pragmatic reason behind this new standard could be the desire to be rid of the *Glucksberg* standard and to give appellate judges more power regarding substantive due process cases. However, this still created the issue of inconsistencies between circuit courts.

Since *Obergefell* was decided, there are no Supreme Court cases citing *Obergefell* regarding substantive due process. These cases seem to avoid *Obergefell* and its new standard altogether, likely because it is simply too complicated and gives little in the way of guidance to courts deciding future substantive due process issues.

Despite the Court's use of substantive due process in deciding *Obergefell*, substantive due process was not necessary to reach the conclusion that same sex couples should have the right to marry. *Obergefell* should have been decided on the basis of equal protection alone.

Chief Justice Roberts, in his dissent in *Obergefell*, notes how the majority opinion does not acknowledge any prior cases or doctrinal background of substantive due process.[62] During oral argument, he made the point that, "I'm not sure it's necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him, and Tom

[62] *Id* at 2618.

can't. And the difference is based on their different sex. Why isn't that a straightforward question of sexual discrimination?"[63] Chief Justice Roberts simplifies the argument. A woman could marry a man, but a man could not marry a man. This is clearly grounds for a case based solely on sexual discrimination. The Chief Justice used this argument because if *Obergefell v. Hodges* was decided on the basis of equal protection alone the *Glucksberg* standards would not have been overruled.

Loving v. Virginia's majority opinion provides precedent for basing *Obergefell* on equal protection. The Court in *Loving* ruled that laws prohibiting interracial marriages violated the Constitution based on the Equal Protection Clause.[64] "The Court in *Loving* explained that a law discriminates by race when it denies an otherwise lawful marriage based on the race of the participants."[65] This discrimination can be applied in *Obergefell*'s situation because, "by the same reasoning, reserving marriage to one man and one woman necessarily discriminates based on the sex of the participants."[66] If the law cannot discriminate based on the race of the participants to a marriage, then by similar reasoning the law should not be able to discriminate based on the sex of participants to a marriage.

Denying marriage to same sex couples discriminated based on the sex of those who could be married would not meet the test of intermediate scrutiny. Intermediate scrutiny requires that the policy being proposed by the government further an important government interest. The means by which the government does this much be substantially related to that interest in order

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[63] Chief Justice Roberts, Transcription of Oral argument, at 61-61, Obergefell v. Hodges, 135 S. Ct. 2584 (2015). (Nos. 14-556, 14-562, 14-571, 14-574).
[64] Loving v. Virginia, 388 U.S. 12 (1967).
[65] Kim Forde-Mazrui, *Article: Calling Out Heterosexual Supremacy: If Obergefell Had Been More Like Loving and Less Like Brown*, 25 VA. J. SOC. PL'Y & L. 297 (2018).
[66] *Id*.

for the government policy to overcome intermediate scrutiny. There is no important government interest that is served by denying same sex couples the right to marry. In *Craig v. Boren*, the Court proposed the test of intermediate scrutiny on the basis of sex discrimination. In order for the government to pass a law that discriminates on the basis of sex the discrimination must, "serve important governmental objectives and must be substantially related to achievement of those objectives."[67] There is no governmental objective that would be served by not allowing same sex couples to be married, nor would this discrimination be related to any relevant governmental objective.

The respondents in *Obergefell* proposed reasons of their own as to why same sex marriage should not be permitted. Respondents argued, "allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages."[68] If this argument were seriously considered under the intermediate scrutiny test, the government's objective would be to protect the institution of marriage. Discriminating on the basis of sex by not allowing same sex couples to be married would not meet the standard of substantially serving a government interest in this instance because, "it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so."[69] Thus, marriage as an institution is not harmed by allowing same sex couples to marry, and they would have correctly and more easily been able to conclude that discriminating on the basis of sex and not allowing same sex couples to be married is unconstitutional under the Equal Protection Clause.

[67] *Craig v. Boren*, 429 U.S. 197 (1976).
[68] *Obergefell v. Hodges*, S. Ct. 2606 (2015).
[69] *Id* at 2607.

Had the Court used equal protection rather than a combination of equal protection with substantive due process, the Court would not have doomed future cases of substantive due process with a standard so open to judicial interpretation that it might create problems.

Although the Court does make mistakes in the *Obergefell* majority opinion, these are clearly not the mistakes defined by the dissenters of *Obergefell*. The dissenters argue different reasons as to why *Obergefell*'s majority is incorrect, and the end result that bans on same sex marriages are unconstitutional. The dissenters' arguments are faulty and, in the case of Justice Thomas, unnecessary. They do not adequately reflect the mistakes of *Obergefell* and make plenty of mistakes on their own.

Mistakes Made by the Dissenters

The dissenters to *Obergefell* did not correctly describe the mistakes of *Obergefell*. Justice Thomas, Justice Scalia, and Chief Justice Roberts each wrote a dissenting opinion and each has at least one flaw that weakens their argument. Chief Justice Roberts and Justice Scalia argue the decision regarding same sex marriage should have been decided by the people. Justice Thomas's argument relies on logic that is not congruent with prior Supreme Court precedent.

Thomas argues against the use of substantive due process not only in *Obergefell* but argues that the Court should not use substantive due process to define and protect fundamental rights at all. Thomas said, "by straying from the text of the Constitution, substantive due process exalts judges at the expense of the people from whom they derive their authority."[70] Thomas argues that liberty is defined narrowly saying, "as used in the Due Process clauses, 'liberty' most likely refers to 'the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint unless by due course of law."[71] Kennedy, in the majority opinion, seems to counter this argument saying, "the generations that wrote and ratified the… Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted future generations a charter protecting the right of all persons to enjoy liberty as we would learn its meaning."[72] The Framers did not claim to know, through the Constitution nor through the Bill of Rights, all that liberty would encompass. This is exactly why they left powers not enumerated within the Constitution

[70] *Obergefell v. Hodges*, 135 S. Ct. at 2631 (2015) (Thomas, dissenting).
[71] *Id* at 2632.
[72] *Id* at 2597.

or the Bill of rights to the people.[73] Thomas' overly narrow definition of liberty deprives people the right to challenge and change the definition of liberty through the court system.

Thomas believed the doctrine of substantive due process to be indefensible[74]. His opinion is not supported by Supreme Court precedent. Justice Thomas disregards the concept of *stare decisis* in his dissenting opinion regarding substantive due process's place in the law. The Supreme Court has long been using Substantive Due Process as a tool of justice and, "it has long been established that the liberty aspect of Due Process encompasses implied rights, including the right to privacy and the right to marry… This concept is also found in the Tenth Amendment, which states that the list of rights enumerated in the Constitution is not exhaustive."[75] If the concept of Substantive Due Process is, as Justice Thomas says, indefensible, removing it would be detrimental to fundamental rights protected by the Supreme Court using Substantive Due Process.

Justice Thomas makes an argument fatal to his opinion saying that the petitioners cannot, "claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions,"[76] and he says, "petitioners have been left free to engage in… enjoying the society of one's spouse – without governmental interference."[77] Justice Thomas is woefully incorrect here. He claims that the petitioners, who are same sex couples, have been free to go about their daily lives as a couple without interference from the government. This is clearly false. If petitioners were truly able to go about their daily lives, then

[73] U.S. Const. amend. X.
[74] *Id*.
[75] Megan M. Walls, ARTICLE: OBERGEFELL V. HODGES: RIGHT IDEA, WRONG ANALYSIS, 52. Gonz. L. Rev. 143, (2016/2017).
[76] *Obergefell v. Hodges*, 135 S. Ct. 2635 (2015) (Thomas, dissenting).
[77] *Id.*

the petitioners would be able to get married without interference from the government. Though this was true in many states at the time, to say there was no governmental interference is blatantly false.

This argument brings up the difference between positive and negative rights. A negative right is a concept under which the government denies a person their rights. A positive right is when the government gives something to the people, such as the governmental benefits of marriage. The argument can be made here that the governmental benefits of marriage are a positive right and therefore the government is not interfering with the couples' right to marry. This is false. While it is true the benefits provided by the government when two people marry is a positive right, the government chose to interfere in the lives of same sex couples by discriminating against them and denying the couples those benefits. The government provides a service to those who are married, but when the government chose to discriminate against same sex couples they interfered with their liberty.

Not only did state governments deny couples the right to marry,[78] but the federal government enacted the Defense of Marriage Act, which defined marriage as between one man and one woman[79] and denied marriage benefits to same sex couples. Same sex couples were not allowed to operate without governmental interference, as Justice Thomas claimed, but were also forbidden from going about their daily lives due to governmental restrictions. This, along with Thomas' narrow definition of liberty, are weak arguments against the majority's conclusion that same sex couples should be permitted to marry, and do not withstand careful scrutiny.

[78] *Id* at 2593.
[79] *Id* at 2597.

Scalia's dissent in *Obergefell* is as hypocritical as it is incorrect. Justice Scalia echoes a similar sentiment in his opinion in *Romer v. Evans*. Justice Scalia believes the people should made the decision on whether same sex marriage is allowed because they are not biased with animus, but with tradition. The Supreme Court in *Romer* held that Amendment 2 of the Colorado state constitution, "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else… Amendment 2 violates the Equal Protection Clause."[80] The Supreme Court struck down the Amendment on the basis that Amendment 2 negatively classified homosexuals when it was legislatively unnecessary.

Justice Scalia argued in *Romer* that, "the Court had erroneously assumed that Coloradans who voted to strip away antidiscrimination protection for gays and lesbians through Amendment 2 were motivated by hatred rather than 'traditional sexual mores'."[81] The crux of Scalia's argument here is that the legislature did not rely on hatred or animus when making the classification, but instead was protected the 'traditional sexual mores' of the people of Colorado. This does not constitute a legal argument that would support amendment 2 and, "Scalia was wrong in concluding that such mores are a constitutionally legitimate reason to discriminate against gays and lesbians."[82]

In *Obergefell*, Justice Scalia also criticizes an idea that many have criticized the Supreme Court for since its inception. This idea resolves around the concept that, at a minimum, five unelected Supreme Court Justices can make decisions more millions of Americans[83]. Justice Scalia uses this idea to criticize the majority opinion in *Obergefell* for striking down bans on

[80] *Romer v. Evans*, 517 U.S. 635 (1996).
[81] Kim Forde-Mazrui, *Article: Calling Out Heterosexual Supremacy: If Obergefell Had Been More Like Loving and Less Like Brown*, 25 VA. J. SOC. PL'Y & L. 287 (2018).
[82] *Id*.
[83] *Obergefell v. Hodges*, 135 S.Ct. 2616 (2015) (Roberts, dissenting).

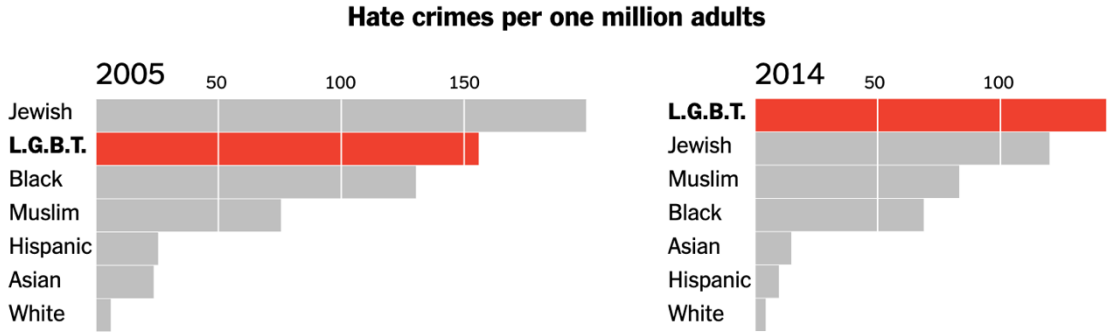
same-sex marriage, similar to the way he criticized the majority opinion in *Romer* for striking down Amendment 2.

This argument tends to gain traction when a Supreme Court decision is made that one political party or another does not agree with, or when a Supreme Court Justice disagrees with the majority opinion. This argument may have support, but the opposite argument has an excellent rebuttal. "Although some do criticize [the power of 5 unelected judges to veto democratically passed laws] and question its Constitutional foundation, the Court nonetheless exercises the power on a regular basis and it is difficult to understand how any Justice who regularly exercises this power can criticize it."[84] Justice Scalia did not criticize this power in the majority opinion in *Washington v. Glucksberg*, in which he created a new set of standards for Substantive Due Process that had, theretofore, never been used standards that *Obergefell* overruled and changed. In fact, not only did Scalia not criticize the power of the small majority when writing his *Glucksberg* opinion, he never mentioned the issue at all. Though Scalia created these standards in a case in which there was not a fundamental right,[85] the new standards he created affected substantive due process for the next several decades. He, an unelected judge, made the decision on how to define fundamental rights under substantive due process without the opinion of the people. He criticizes this power yet he readily uses this power when it serves his interests.

Scalia furthers this argument by discussing how the public was already debating the question of whether same sex marriage should be legal and that, "[I]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their

[84] Matthew R. Grothouse, *Article: Implicit In the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1070 (Summer, 2016).
[85] Washington v. Glucksberg, 521 U.S. 720-721 (1997).

views."[86] Scalia calls this debate respectful, but the reality for same sex couples was anything but. According to FBI, members of the LGBT community increasingly became a higher target for hate crimes over the ten years before *Obergefell* was decided.[87] Members of the LGBT community experienced the highest number of hate crimes per one million adults in 2014, just one year before *Obergefell* was decided. (See Table 1)[88].



(Table 1).

Proponents of same sex marriage gained significant attention between the years of 2005 and 2014. In 2004 Massachusetts was the first state to recognize same sex marriage[89] followed by many other states. In 2013, in *United States v. Windsor*, the Court struck down the Defense Against Marriage Act's definition of marriage as between one man and one woman.[90] These advances for same sex marriage gained positive as well as negative public attention. To try and

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[86] *Obergefell v. Hodges*, 135 S. Ct. 2627 (2015) (Scalia, dissenting).
[87] Haeyoun Park & Iaryna Mykhyalyshyn, L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group, The New York Times (2016), https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html.
[88] *Id.* Justice Scalia arguing that the debate over same sex marriage is respectful can be denied due to the rise in hate crimes against the L.G.B.T. community in the decade before *Obergefell* was decided. If the debate were truly respectful, there would not be a rise in hate crimes against the community.
[89] Susan Boland, *A timeline of the Legalization of Same-Sex Marriage in the U.S.,* Georgetown Law Library (Jan. 14, 2020), https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201.
[90] Gautam Raghavan, *Obama Administration Statements on the Supreme Court's DOMA Ruling*, the White House President Barack Obama (June 27, 2013) ,https://obamawhitehouse.archives.gov/blog/2013/06/27/obama-administration-statements-supreme-court-s-doma-ruling

argue that this decision should be left to the people's respectful debate, when some of those people are committing crimes against LGBT people at an increased rate, and the Court is the proper place for the question of the legality of same sex marriage is a foolish argument.

Chief Justice Roberts' dissent is perhaps the most well-known and quoted of *Obergefell's* dissents. Despite being well known and often used as argument against *Obergefell*'s decision, this dissent relies on faulty argument.

Roberts argues that, "distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage."[91] This argument is incorrect because, "tradition in and of itself is not a legitimate government interest."[92] This does not hold up to legal scrutiny. Tradition has never been considered a legitimate government interest. Even in *Washington v. Glucksberg* which, until *Obergefell*, set standards on how to determine whether a right was fundamental, did not describe tradition as a legitimate government interest. In and of itself alone Tradition was used as a guideline for determining whether a right was fundamental,[93] not the sole basis for the government to discriminate against a class of citizens.

Roberts also expresses concern about how *Obergefell* coincides with the First Amendment regarding the practice of religion.[94] However, it must be noted that, "The First Amendment says, 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'… Congress played no role in *Obergefell*… the *Obergefell*

[91] *Obergefell v. Hodges*, 135 S. Ct. 2623 (Roberts, dissenting).
[92] Matthew R. Grothouse, *Article: Implicit In the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1074 (Summer 2016).
[93] Washington v. Glucksberg, 521 U.S. 720-721 (1997).
[94] Obergefell v. Hodges, 135 S. Ct. 2625 (2015) (Roberts, dissenting).

decision does not prohibit the free exercise of religion."[95] The majority opinion in *Obergefell* even takes the time to address these concerns, arguing that religious exercise is not being infringed upon by its decision.[96] Roberts' argument, while primarily being incorrect, had also been addressed in the majority opinion and was unnecessary to address at all in his own dissenting opinion.

Roberts addresses a similar argument to Scalia. He argues that the Court, "seizes for itself a question the Constitution leaves to the people."[97] Both Scalia and Roberts argue that legally allowing same sex marriages should be left to the states and to the people. However, the Court granted certiorari to *Obergefell* to review two specific questions: "the first… is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex,"[98] and, "the second… is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a state which does grant that right."[99] Roberts suggests these questions should be left to the people, but these are questions the people cannot answer because the people do not have the power to answer these questions.

Although the Tenth Amendment grants powers not enumerated to the federal government to the states,[100] the power to answer questions of constitutionality rest with the Supreme Court. The Court gave itself this power in the case *Marbury v. Madison*, in which Chief Justice Marshall said, "it is emphatically the province and duty of the judicial department to say what the law is… those who apply the rule to particular cases, must out of necessity expound and

[95] Megan M. Walls, *Article: Obergefell v. Hodges: Right Idea, Wrong Analysis*, 52 GONZ. L. REV. 144, (2016).
[96] Obergefell v. Hodges, 135 S. Ct. 2607 (2015).
[97] *Id* at 2612 (Roberts, dissenting).
[98] *Id* at 2593.
[99] *Id*.
[100] U.S. Const. amend. X.

interpret the rule."[101] *Marbury* calls the constitution paramount law[102] and that, "the judicial power of the United States is extended to all cases arising under the constitution."[103] The questions argued by the petitioners in *Obergefell* concern the Fourteenth Amendment to the Constitution. Thus, these questions arise from the Constitution, and the Court has the power to answer these questions. The state bans on same sex marriage represent laws in opposition to the Constitution. Marshall in *Marbury v. Madison*, questions whether the constitution must, "yield to the legislative act,"[104] that contradicts the Constitution. The answer, Marshall finds, is that "a law repugnant to the Constitution is void."[105] Marshall enumerated the Court's ability to answer questions regarding the laws of the United States, and also further explained that laws contrary to the Constitution were void. The Supreme Court has had jurisdiction regarding questions of the constitutionality of laws, and the power to strike down such laws for centuries since the landmark of *Marbury*.

In *Obergefell*, state legislatures enacted laws banning same sex couples from being married and refusing to recognize same sex marriages performed in states that did allow same sex couples to marry[106]. When petitioners brought their questions of constitutionality to the Court, the Court used its jurisdiction to answer these questions, declared the marriage bans as being contrary to the Constitution,[107] and deemed that states could not refuse to recognize lawful same sex marriages performed in other states[108]. These questions could not have been answered

[101] *Marbury v. Madison*, 5 U.S. 177 (1803).
[102] *Id* at 178.
[103] *Id*.
[104] *Id* at 179.
[105] *Id* at 180.
[106] *Obergefell v. Hodges*, 135 S. Ct 2593 (2015).
[107] *Id* at 2607.
[108] *Id* at 2608.

by the people. Only the Supreme Court has the jurisdiction to answer these questions and the power to determine whether laws are constitutional.

The arguments proposed by the dissenters as to why *Obergefell* should not have struck down the bans on same sex marriage do not provide sufficient reasoning. The dissenters' arguments are flawed and mistaken. Justice Thomas argues that substantive due process should not be used in the Court at all, and Scalia and Roberts argue that the people should answer questions rather than the court despite these questions being within the Court's jurisdiction to answer. These arguments are weak, and because of these weak arguments the dissenters are in the minority, on the wrong side of history regarding *Obergefell*.

How *Obergefell* Should Have Gone Further

While *Obergefell* reached the correct conclusion in declaring that same sex couples are included under the fundamental right to marry, the majority missed a distinct opportunity to create a protected class for sexual orientation. As mentioned previously, *Obergefell* lists several instances in which the nation had discriminated against same-sex couples in the past. The medical community, such as the American Psychiatric Association, previously discriminated against same-sex couples by considering their sexual orientation, homosexuality, a disease or mental disorder[109]. Same sexual intimacy was a crime in many states[110]. Gays and lesbians were prohibited from much government employment, barred from military service, targeted by police, and burdened in their rights to associate.[111] Even the Supreme Court had previously shown prejudice against this class.

In *Bowers v. Hardwick* decided in 1986, the Supreme Court upheld laws that banned homosexual sodomy. The respondent in that case, "asserted that there must be a rational basis for the law,"[112] and also said, "there was [no rational basis] in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is moral and unacceptable. This was said to be an inadequate rationale to support the law."[113] The majority opinion responded to this by saying, "The law is constantly based on notion of morality… we are unpersuaded that the sodomy laws… should be invalidated on this basis."[114]

[109] *Obergefell v. Hodges*, 135 S. Ct. 2596 (2015).
[110] *Id*.
[111] *Id*.
[112] Bowers v. Hardwick, 478 U.S. 196 (1986).
[113] *Id.*
[114] *Id*.

Justice Kennedy, similar to his opinion in *Obergefell* overruling parts of *Glucksberg*, overruled the decision of *Bowers* in *Lawrence v. Texas* saying, "*Bowers* was not correct when it was decided, and it is not correct today… it ought not to remain binding precedent… *Bowers v. Hardwick* should be and now is overruled."[115] Despite this obvious legal discrimination, the Supreme Court opted not to further protect same-sex couples by declaring sexual orientation a protect class. The Court, "neglected to bind future courts in stare decisis to the protection of same-sex couples and LGBT minorities and bypassed the opportunity to deter future attempts to deprive the community of fundamental rights… the Circuit Court split on whether sexual orientation is a suspect class, and what level of judicial scrutiny the issue requires, remain unresolved."[116]

There are four criteria the Court has cited regarding determining whether a suspect classification is present in a case. These criteria are important in determining whether the group in question needs protection from the government in the form of suspect classification. The first criteria is that, "the group has historically been discriminated against or have been subject to prejudice, hostility, or stigma, perhaps due, at least in part, to stereotypes."[117] In *Obergefell*, Kennedy said that the laws in question in the case, "burdened the liberty of same-sex couples,"[118] and that, "especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm… the imposition of this disability… serves to disrespect and subordinate [gays and lesbians]."[119] This clearly

[115] Lawrence v. Texas, 539 U.S. 578 (2003).
[116] Megan M. Walls*, Article: Obergefell v. Hodges: Right Idea, Wrong Analysis*, 52. GONZ. L. REV. 141, (2016).
[117] Robert Wintemute, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, and the Canadian Charter, Clarendon Press (1997).
[118] *Obergefell v. Hodges*, 135 S. Ct. 2604 (2015).
[119] *Id.*

describes a long history of discrimination in the United States. One of the criteria the Court has previously used to designate a suspect class applies to sexual orientation, but not just one.

The next set of criteria describes a group having, "distinguishing characteristics that define them as a discrete group,"[120] and being, "a minority or politically powerless."[121] The distinguishing characteristic of gays and lesbians is their sexual orientation. This is a distinguishing characteristic that defines them as a discrete group. Furthermore, they are a minority in the United States[122] and have been politically powerless. The evidence that they are politically powerless comes from the long history of legal discrimination against them Kennedy referenced in *Obergefell*.

The final piece of criteria the Court has used when determining whether a group is subject to suspect classification by the Supreme Court is that the characteristic that defines the group, "bears no relation to the ability to perform or contribute to society."[123] Sexual orientation clearly does not inhibit people from contributing to society. There are at least seven billionaires in the United States who are gay or lesbian.[124] There are ten politicians in the current United States Congress that are gay, lesbian, or bisexual.[125] A person's sexual orientation does not limit people from contributing to society, and, thus, these criteria also apply to identifying sexual orientation as a suspect class.

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[120] *Lyng V. Castillo*, 477 U.S. 638 (1985).
[121] *Id*.
[122] Gary J. Gates, In U.S., More Adults Identifying as LGBT, Gallup.com (2019), https://news.gallup.com/poll/201731/lgbt-identification-rises.aspx (Apr 3, 2020).
[123] *Frontiero v. Richardson*, 411 U.S. 686 (1972).
[124] Natalie Robehmed, MEET THE WORLD'S LGBT BILLIONAIRES, Forbes, https://www.forbes.com/sites/natalierobehmed/2014/03/03/meet-the-worlds-lgbt-billionaires/ (2014).
[125] Daniel Reynolds, MEET THE 10 GAY, LESBIAN, AND BISEXUAL MEMBERS OF THE 116TH CONGRESS, advocate.com, https://www.advocate.com/politicians/2019/1/03/meet-10-gay-lesbian-and-bisexual-members-116th-congress#media-gallery-media-1 (2018).

Three criteria the Court has previously used to identify groups subject to suspect classification by the Court also apply to sexual orientation; yet the Court in *Obergefell* refused to grant suspect classification on the basis of sexual orientation. Justice Kennedy brought up the long history of discrimination, legally and societally, against people of different sexual orientation, particularly gays and lesbians. He brought up this information yet did not act on it in a way that would protect sexual orientation from further legal discrimination. *Obergefell* did not go far enough with this opinion. It did not create a quasi-suspect class for sexual orientation, providing future protection for those who had been previously discriminated against by the law. This must be rectified by the current Supreme Court due to *Obergefell's* failure to act when it had the opportunity.

Although Kennedy did not implement these protections in *Obergefell*, Kennedy likely had reasons for not doing so. *Obergefell* was decided by a slim 5-4 majority in the Court. Kennedy may not have been able to write the opinion as he would have wanted because he needed to comply with the other four justices in the majority. If one justice disagreed with the opinion and left, Kennedy would have lost the majority. It is understandable why Kennedy may not have been able to enact these protections, but nevertheless, the opinion would be better off having these protections.

Conclusion

The Court was correct in granting same sex couples the right to marry in *Obergefell* and to overrule the prior standard of substantive due process from *Glucksberg*. However, the Court made a phenomenal mistake when, in overruling the *Glucksberg* standard, it failed to establish a standard that would help courts when making decisions based on substantive due process. Instead it created a system of interpretation that will cause more confusion in the future. The Court should have announced standards for substantive due process that were broader than those standards Scalia created in *Glucksberg*, but the standards set in place now by *Obergefell* are far too broad. There are no concrete guidelines to guide judges in making decisions regarding substantive due process. Justice Kennedy should have been clearer in the standards that he wanted to set for substantive due process, rather than opening the door for individual judicial interpretation and conflict.

The dissenters made mistakes when looking at *Obergefell*. Justice Roberts and Scalia argued that the question of same sex marriage should be left to the people, not to the Supreme Court, and were wrong in their analysis. Justice Thomas argued that substantive due process should not be used at all, a dissonant argument when compared to the decades of precedent from the Court using substantive due process. These arguments are weak when answering the question of constitutionality regarding same sex marriage, and the majority was right to disagree with the dissenters.

The Court should have protected sexual orientation as a suspect class, just as the Court did for sex in *Mississippi University for Women v. Hogan*[126]. Justice Kennedy referenced the

[126] *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

legal and societal history of discrimination against same sex couples, but did not act upon it to ensure that such discrimination would be less likely to reoccur. Instead ,the Court now must address or consider future cases concerning employment discrimination based on sexual orientation when that question could have and should have been answered in *Obergefell*.

Obergefell is a landmark decision regarding the rights of same sex couples, but many cases seem to ignore its change to substantive due process[127]. This is likely due to the new standard for substantive due process that *Obergefell* created is convoluted and undesirable to use. It is unlikely any judge would want to use this standard to create precedent for substantive due process cases. This needs to be addressed and changed by the Court soon to avoid further issues and contradictions within substantive due process case law.

Obergefell is a case to be celebrated regarding the rights of same sex couples. After centuries of discrimination, same sex couples were finally allowed the right to marry thanks to this case. However, simply because a case is triumphant in one area does not make it perfect in another. *Obergefell*'s new substantive due process standard leaves much to be desired, and the lack of protection in the form of a suspect class for sexual orientation creates new problems for the future. These issues will have to be clarified by the Court eventually, but for now *Obergefell* remains a case to be both celebrated and read with reservation for the future.

[127] See References.

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