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Abstract

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Posting about the Supreme Court ruling on same-sex marriage from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

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A Summary and Initial Response to the Same-Sex Marriage Ruling

 allinallthings.org/a-summary-and-initial-response-to-the-same-sex-marriage-ruling/

Donald Roth

Yesterday's decision upholding the Affordable Care Act (see my summary and analysis [here](#)) was an important win for the Obama Administration, but it will likely be completely overshadowed by today's decision in [Obergefell v Hodges](#), the case which has legalized same-sex marriage across the United States. Unlike yesterday's case, the issues in this one are fairly straightforward: same-sex couples wish to marry or have their marriages recognized in states which currently do not recognize such unions; does the Constitution require this recognition? The answer, by an unsurprising 5-4 margin, was a resounding "yes." While the issues aren't as complicated this time, the case is much longer, but never fear, I've boiled down the 103 pages of text into a roughly two-page summary for you, and I'll offer some brief thoughts and responses at the end.

The Decision

The primary components of this decision depend on both a narrative of continuity and change. The majority says that marriage has always been a fundamental institution in society, but it also says that what exactly that institution looks like has been the subject of ongoing change and evolution.

The Court's change argument looks to past practices, saying that marriage was once a matter of parental negotiation over various political, religious, and financial concerns. This evolved into a view of marriage as a "single, male-dominated legal entity" which was abandoned when "society began to understand that women have their own equal dignity." Citing a line of legal developments seeing a similar increase in the recognition of the dignity of homosexuals, the majority sees the availability of marriage to these individuals as a logical next step. Reviewing the evolution of marriage, Kennedy asserts that "[t]hese new insights have strengthened, not weakened, the institution of marriage," and it's clear from his opinion that he sees the expansion into same-sex marriage in much the same light.

After placing marriage in a context of cultural change and evolution, Kennedy reaffirms the centrality and fundamental nature of marriage within our legal system. He cites significant legal history upholding marriage as a fundamental right, saying that these were a reflection of the Fourteenth Amendment's guarantee of protection from deprivation of "life, liberty, or property, without due process of law." He goes on to define liberty as extending "to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."

Kennedy specifically enumerates four reasons why marriage is a fundamental right under the Constitution, and he explains that each of these four reasons applies with equal force to same-sex couples:

1. "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy." The majority draws language directly from precedent in cases like *Loving v. Virginia*, which said the freedom to marry "resides with the individual and cannot be infringed by the State."
2. Marriage "supports a two-person union unlike any other in its importance to the committed individuals." This argument is tied into the first, seeing marriage as a way for people to define their identities by reference to their commitment to another person.

3. Marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” The majority’s primary argument here is that current marriage laws “harm and humiliate the children of same-sex couples.”
4. “Marriage is a keystone of our social order.” Kennedy cites the 1888 decision of *Maynard v. Hill*, saying “marriage is ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’” He then mentions that this sentiment “has been reiterated even as the institution has evolved in substantial ways over time.” However, Kennedy’s primary argument on this point seems to be that marriage, as central to the social order, carries with it a wide variety of legal and material benefits, which it is unfair to deny to same-sex couples.

In addition to this summary of the primary reasoning, two other significant issues should be pointed out. First, the opinion goes seemingly out of its way to make sure that it does not announce a specific standard of scrutiny applicable to orientation-based discrimination.¹ Second, the opinion does say “it must be emphasized that religions ... may continue to advocate with the utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”

The Dissents

Not surprising many who have followed this issue, the Court’s four more traditionally conservative justices² dissented from this opinion. Chief Justice Roberts’ primary concern was that the majority removed the question of same sex marriage from the democratic process based more on personal feeling than Constitutional principle, and he condemns the Court for taking the “extraordinary step of ordering every State to license and recognize same-sex marriage,” saying, “Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.” Roberts sees the “union of a man and a woman” as a fundamental characteristic of marriage in a way that none of the changes mentioned by the majority affected, and he argues that things like “[r]emoving racial barriers to marriage ... did not change what a marriage was any more than integrating schools changed what a school was.”

Roberts’ dissent also goes on to strongly criticize the grounds of the majority’s conclusion, comparing it extensively to the infamous *Lochner v. New York*³ decision on the grounds that Kennedy’s definition of liberty reflects more of a personal philosophy than a legal judgment: “Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*. The majority opens its opinion by announcing petitioners’ right to ‘define and express their identity.’ The majority later explains that ‘the right to personal choice regarding marriage is inherent in the concept of individual autonomy.’ This free-wheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be free in his person and in his power to contract in relation to his own labor [citing *Lochner*].”⁴

Justices Scalia, Thomas, and Alito also dissented. Scalia emphasized his concerns with removing the same-sex marriage question from the democratic process. Thomas criticized Kennedy’s definition of personal dignity as being something granted by the government, rather than inherent to a person, saying that the Constitutional guarantee of liberty is about a freedom from restraint, not a guarantee of entitlement to benefits. Finally, Alito reinforces all three of the other dissents, adding in some of his own historical analysis of what the Constitution does and does not protect.

The Implications

This article has already gotten too long for a more searching analysis of this case, which may come at a later time, but it’s important to make a few observations on the practical import of this case and to pose some of the very important questions that this case raises which might help guide your own analysis.

As a matter of practical implication, it's obvious that this case means that same-sex couples across the country can now marry; however, as noted, this case explicitly avoids resolving the question regarding orientation-based classifications. The majority does seek to placate these concerns a little, but most of the dissents raise the question of what this line of cases means for things like religious schools who seek to offer married housing only to heterosexual couples and the fundamental question of whether private organizations who oppose same-sex marriage can maintain their tax exemption, something even the Solicitor General⁵ said will be an issue after this decision. So, in many ways, the pebble has dropped in the pond, and we're waiting to see what the ripples will be.

Finally, however, I want frame up a couple of questions that might help the Christian community wrestle with their response to this decision and to spur discussion of these issues in the coming days and weeks.

1. What do you think marriage is?

This question may seem obvious, but I would encourage you to read again over the basic contours of Kennedy's argument. What do you agree with there? What do you have a problem with? For me, I see a lot that I agree with, particularly in his 2nd-4th propositions about the fundamental nature of marriage, but I have issues with other areas. At the same time, in oral arguments, Justice Ginsburg said that "traditional marriage" was done away with long ago when we stopped viewing women as property. What about that statement rings true and/or false?

2. What are the essential characteristics of our humanity?

This may seem like a daunting question to wrestle with, but anthropology (philosophy of man) is absolutely crucial to this case. As I've mentioned [before](#), Kennedy has a very particular view of what personhood is. As he⁶ said all the way back in *Planned Parenthood v. Casey*, *"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."* Does the first sentence "define the attributes of personhood" for Christians? Is there a difference in how we answer this as a church versus how we would answer this as a civil society?

3. What does it mean to be free?

Central to Kennedy's conception of personhood is this idea of personal autonomy. He says that to be full persons, we must be free to essentially construct our reality. In this case, he says, "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." Are we dehumanized when we do not possess a full menu of options regarding how we wish to live and conceive of our lives? In some ways, it sounds like any rule but "everyone does what is right in their own eyes" does affirmative harm to the people being ruled. How do we wrestle with/respond to that as Christians?

4. What is the best balance of being "ruled by laws or men"?

This is an issue I framed up in my summary and analysis of the Affordable Care Act decision handed down yesterday, but it's a concern raised explicitly by the dissenting judges. Whether you think that this concern applies to this case or not, the question remains vital to civil society. It's undeniable that reality involves a bit of both, since the administration of the law involves some interpretation and latitude in enforcement;⁷ however, what should that balance look like? Based on this case, what sort of questions should be left up to the democratic process, and when should the judiciary step in?

There are many more questions that could be asked, but hopefully this spurs some reflection. What do you think?

Footnotes

1. One of the hottest issues surrounding this issue is whether distinctions made on the basis of orientation would be viewed as legally suspect and therefore subject to more careful review. The most careful review available is “strict scrutiny,” which applies to racial classifications, while gender and legitimacy are subject to a slightly lower standard of “intermediate scrutiny,” and everything else gets “rational basis review.” The golden issue in this is if orientation-based classifications received strict scrutiny, which might unlock a significant body of precedent for the exceptional legal efforts permitted to reverse the stain of formal institutional racism. ↩
2. That is, John Roberts, Antonin Scalia, Clarence Thomas, and Samuel Alito. ↩
3. *Lochner* and a variety of related cases put up substantial barriers to economic reforms of the early 20th Century on the basis of a perceived “freedom to contract.” This included overturning laws against child labor, protecting worker safety, and many other labor issues. This line of jurisprudence was radically abandoned in the 1930s, at least partly under the threat from the president to pack the court with his own nominees by adding a seat for every justice over 70. This is known as the “switch in time that saved nine.” ↩
4. Citations have been removed from this quotation. ↩
5. That is, the chief lawyer representing the United States, who in this case was arguing in favor of same-sex marriage. ↩
6. As pointed out to me by a friend of mine, I incorrectly attributed this statement to O'Connor in my initial article, when Kennedy is almost certainly the author of this particular statement. ↩
7. For example, while the law may say the speed limit is 55, if the police won't pull you over unless you're going over 60, the functional law is actually a speed limit of about 60. This means that the administrative enforcement of the law actually changes what the law is, but, since we anchor enforcement to the statute itself, we don't talk about the law as if the speed limit were 60 mph. ↩