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Fundamental Differences: How the Legal Lineage of *Obergefell* Can Help Us Frame a Response to It

Donald Roth

In many ways, it was an expected blow.

Nevertheless, the *Obergefell* decision still set conservative circles reeling, a fact which exposed a critical weakness: while the coming of the same-sex marriage ruling was predictable, its opponents haven't necessarily articulated a response which goes beyond political or theological opposition to gay relationships. For a variety of political and legal reasons, gay marriage is *fait accompli* in the United States; however, this does not mean that the cause is lost, particularly for Christians. Instead, this opens up an opportunity for the Christian view of marriage not to stand in opposition to society's liberalizing vision but in antithesis to it. That is, with the legal sword removed as an obstacle to so-called marriage equality, the Christian view of marriage becomes not an enemy but another option, and that may prove much more effective as an avenue for persuasion than it first appears.

To learn how this might be the case, we first need to understand the decision's place in the history of the court, then we can seat this within a framework of comparable cases, and, finally, we can draw some ideas from this to help frame future advocacy.

The Emerging Jurisprudence of Liberty

First, it is important to recognize that the *Obergefell* decision is part of a solidification of a growing movement on the Supreme Court to define and strengthen the concept of “liberty” as a fundamental right guaranteed by the Constitution. This is not to say that the United States was founded without a fundamental respect for liberty, but a peculiar definition of that right has become more prominent in recent jurisprudence, and it represents a move to something new that is arguably grounded in a post-modern philosophical anthropology that merits criticism. The emergence of a new “liberty” right has been largely shaped by the judicial impact of one member of the Court: Justice Anthony Kennedy.

Justice Kennedy is arguably the most influential justice on the Supreme Court of the United States at this time. This is because, with the retirement of Sandra Day O'Connor in 2006, Kennedy became the sole “swing vote” on the Court: that is, on many contentious ideological issues, the Court splits between the (formerly) four “Conservative” justices and the four “Liberal” justices, with Kennedy unanimously playing the tie-breaking role.¹ At the same time that Kennedy has taken on this key role, his vision of the nature of rights granted by the Constitution has been evolving to embody an expanded conception of the right to “liberty” granted by the Due Process

¹ According to SCOTUS Blog, Kennedy has been in the majority on 100% of the 5-4 decisions since the Court's 2007 term. “5-4 Cases, October Term 2013 Stat Pack” *SCOTUS Blog* (accessible via: http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_5-4_cases_OT13.pdf)

clause of the 5th and 14th Amendments.² However, both this conception of liberty and its relation to precedent prove problematic.

For Kennedy, “[a]t 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.”³ At first blush, this might seem like a fitting description of a libertarian freedom of conscience, but, digging deeper, issues emerge. For one, this statement makes an explicit presumption that one’s beliefs define their personhood, and not beliefs only, but the ability to put these beliefs into action, which Kennedy describes as “choices central to personal dignity and autonomy.”⁴ This means that human dignity is not inherent, but conditional, and government restrictions which limit a freedom of choice are inherently dehumanizing.⁵

While this analysis can be helpful in identifying government overreach in some circumstances—the restriction of free choice bound up in American slavery was dehumanizing in relegating certain persons to the status of livestock—it carries with it an implicit assumption that personhood is bound up in freedom of choice, something which can be granted or denied by the government. Justice Thomas argues forcefully and persuasively in his dissent that dignity must be rooted in something other than choice for the simple reason that this means that the government cannot take it away, hence its designation as an *inalienable* right.⁶

² The Amendments state, in parallel to one another, that persons cannot be “deprived of life, liberty, or property without due process of the law.” U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

³ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 851.

⁴ *Id.*

⁵ We can see Kennedy reach essentially this conclusion in *Lawrence v. Texas*, 539 U.S. 558 (2003) at 575 (stating that the *Bowers* precedent upholding sodomy bans “demeans the lives of homosexual persons”).

⁶ “The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose

Essentially, Kennedy's concept of liberty is a libertarian sentiment born of the same stock that rejects the concept of "legislating morality." While this is a common modern sentiment, its implications chip away at the very foundation of a social order, as every legal prescription and proscription telling us what we can and can't do has within it an implied morality. Society favors law-abiding behavior, and setting any law legislates the morality of continuing in that vein. For this reason, we largely waste of time to quibble over whether a law legislates some "morality," since this is not only inherent to the task of law-making, but deeply rooted in our jurisprudence.⁷ Our nation itself was founded on Enlightenment principles such as the social contract, wherein people sacrifice some measure of personal autonomy of choice for the greater goal of social order. If a restriction of choice or a restriction of action along the lines of majoritarian morals is to be counted dehumanizing, then the entire enterprise of government itself must be said to have this effect.

While Kennedy's philosophical anthropology stands to a degree at odds with the Enlightenment principles animating the Constitution, it raises even deeper issues for someone professing a Christian view. From this perspective, Kennedy's vision implies a philosophical anthropology which says people are persons in their most fully realized sense only when they operate as a law unto themselves, free to "be who they are" without the disapproving glares of society. At its base, then, this is a view of mankind which falls prey to the same desires that first led humanity astray in the Garden. Although made in His image, we often long not to *serve*, but to *be*

their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

⁷ Indeed, the police power long recognized as belonging to the states includes the right to legislate in the interest of the general welfare, including its morality. See, e.g. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (Upholding mandatory vaccination laws over personal objections on the basis of the state's interest in the common welfare).

God, and we chafe at the notion that anyone ultimately possesses the ability to restrict our delusion.

I will work this out at more depth later, but it is worth at this point positing what an alternative Christian philosophical anthropology might be. John Witte, in his excellent work *God's Joust, God's Justice*, traces the development of the concept of rights in the western tradition, particularly since the Reformation. In the book, Witte highlights the important and often neglected contributions of Luther and some of the early Reformers to a view of the state grounded in an essential view of persons as *simul iustus et peccator*: since mankind stands equal before the throne of God, individuals should likewise stand equal before the bar of God's delegated hand of justice in this world (that is, government). At the same time, since mankind is plagued by sin, the government should serve as a restraint on evil, and mankind's own tendency to abuse such power should be checked and balanced through the divine institutions of church, home, and state.⁸ This idea would be developed further by statesman Abraham Kuyper to the concept of sphere sovereignty, a notion which he would define politically by the principle that "political authority operates alongside many other authorities that are equally absolute and sacred in the natural and spiritual world, in society and family. Every attempt by political authority to try and rule over one of those other areas is therefore a violation of God's ordinances and resistance to it is not a crime but a duty."⁹

So how might this view of human nature and the purpose of the state stand at odds with Kennedy's formulation? To start, this view affirms the notion that human dignity and equality are innate and inalienable, and the government overreaches where it seeks to restrict those things. Given the varied substantive definitions, this might not stand at odds with Kennedy's concept of dignity, but the notion that individuals are communally governed

⁸ John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition*, 38-41 (Grand Rapids: Eerdmans 2006).

⁹ Abraham Kuyper, *Our Program* 21, trans. and ed. by Harry Van Dyke (Lexham Press 2015).

by a variety of institutions serves a caution for the notion that any perceived mistreatment of an individual be remedied solely by the government. If the family is anchored in the institution of marriage, and if that entity serves as a co-regent over individuals, then the government should be exceedingly cautious about stepping in to try to redefine the boundaries under which that institution operates. Yes, because of human sin, the government may act as a check on abuses within the family, but weighing in to enforce a new definition of that entity should be a last, rather than first, resort. In the view of sphere sovereignty, the state should take a more modest role that supports the flourishing of other spheres, one which favors the enforcement of so-called negative liberties¹⁰ over the expansion of positive liberties.¹¹ This is not to say that no positive liberties are recognized, but when the Court is going to mandate entitlement to them, it must be careful in doing so.

More could be said on the root issues which lie behind a postmodern concept of liberty, but the primary importance to my thesis here is to highlight this root problem and see how it has been applied so that we might begin to formulate a response to it, and, with this explanation of the definitional concern, we can turn to its application.

Progressive Fundamentals

In my discussion above, I asserted that the thrust of Kennedy's philosophical anthropology stands at odds with the very enterprise of government. This is not an assertion that Kennedy himself stands at odds with that enterprise, it is a *reductio ad absurdum* which illustrates that the capacity of choice is an inappropriate grounding for human dignity. Indeed, no Justice on the Supreme Court believes that someone's fundamental self-

¹⁰ That is, the right to be free from interference in things like privacy, speech, and religious exercise.

¹¹ That is, the right to assert a positive entitlement to something, such as a right to healthcare, food, or a living wage.

identification as a cannibal would entitle them to fully realize their personhood by killing and eating another person. Instead, even if we were to adopt Kennedy's approach, we would see universal agreement that some line must be drawn restricting a person's liberty to fully express themselves, but deciding exactly where this line would be drawn would be difficult, and, when that line is drawn by the Supreme Court, it has a deep national impact which may have unintended consequences. For these reasons, a concern for judicial restraint has established a jurisprudence in the Court that only those "principle(s) of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹² The *Obergefell* majority does not completely eschew this line of analysis, but they do twist it by application of a progressive, teleological hermeneutic to history that forces precedent to dance to their tune.

In *Obergefell*, the majority seats its analysis in a mixed narrative of both continuity and change. It hangs its precedential hat on the hook that marriage has been long recognized as a fundamental right, but it emphasizes a narrative of change to argue that the substantive definition of marriage itself is an evolving concept. In doing so, the majority plays a sort of bait and switch, taking the part it most likes about the traditional right to marriage but gutting the concept of any static meaning, and this is not the first time that this sort of tactic has been applied, but before we consider other examples of this

¹² See, e.g. *Snyder v. Massachusetts*, 291 U.S. 97 (1934) at 105. Justice Alito also argues this point in his dissent. *Obergefell* at 2640-41 (Alito, J., dissenting) ("Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights.").

hermeneutic in action, we should how it operates in this case with greater precision.

A. Obergefell relies on a Progressive, Teleological Hermeneutic

Speaking for the majority, Justice Kennedy starts his rhetorical movement first by emphasizing the centrality of marriage: “From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage.”¹³ From this point, the majority moves quickly to seat the definition of marriage within a context of evolution and change that stands parallel to an ever-mounting recognition of the rights of homosexual persons. Kennedy starts his historical review with the assertion 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.¹⁴

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,” and he speaks of that liberty interest

¹³ *Obergefell* at 2593-94.

¹⁴ *Id.* at 2595-97.

in the sense discussed above.¹⁵ He moves from this re-centering on the fundamental nature of marriage to elucidate four reasons for why marriage is fundamental, and Kennedy brings his analysis home by arguing that each of these four purposes are either equally applicable to or even furthered by same sex marriage.

First, the majority argues that “the 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.” By this line of reasoning, marriage should be available to anyone, subject only to their personal preferences and the consent of a willing spouse (or spouses).¹⁶

Second, the Court argues that marriage “supports a two-person union unlike any other in its importance to the committed individuals.”¹⁷ 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. By the logic of the liberty interest that Kennedy favors, it is then dehumanizing to limit the self-actualization available to those who choose the avenue of marriage to craft their identities.

Kennedy carries this logic further with his third argument, that marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”¹⁸ While stating that same sex couples can provide loving homes, the majority makes the unstated assumption that these homes are in every way equal to mixed gender households, meaning that current marriage laws run afoul of equal protection and actually “harm and humiliate the children of same-sex couples” because they create the stigma that same sex parents are somehow less desirable.¹⁹

¹⁵ *Id.* at 2597-98.

¹⁶ *Id.* at 2599.

¹⁷ *Id.* at 2599.

¹⁸ *Id.* at 2600-01.

¹⁹ *Id.* at 2601.

Finally, Kennedy reiterates that “[m]arriage 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.²⁰

Looking over the fabric of this argument, it becomes clear that several assumptions are at play which seriously skew the result. For one, the majority does not answer the point made by the various dissents that one consistent feature across all of the historical examples given is that marriage in all of those cases was between a man and a woman. Far from being an accidental anomaly, the majority’s own acknowledgement of the family orientation of marriage points to the essential aspect of this characteristic across historic marriage practice. Secondly, other than the fact that homosexual individuals seek to marry and society has been increasingly inclined to sympathy toward the group, there’s little about Kennedy’s arguments on the four fundamental aspects of marriage that necessitates extending marriage to same-sex couples unless that is an *a priori* inclination. While one might recognize an equal access claim to have marriage as one would like it (addressing the first foundation), little argumentation is given to link the other foundations beyond the fact that same-sex couples can love one another and children. Again, the reasoning serves the foregone conclusion.

At the end of the day, even the majority would not contest that same-sex marriage is a new innovation; however, the majority has a vision of history marching forward from a backward past into a progressively enlightened future that somehow makes this innovation simultaneously new and rooted in tradition all at once.

²⁰ *Id.* at 2601-02.

B. *This Hermeneutic is not new*

Of course, this is not the first time that historical or precedential analysis has been cast in a way that skews the result. The dissents in *Obergefell* focus on comparing the majority's reasoning to the now-abandoned progeny of *Lochner v. New York*, a period in the Court's history where an invented notion of freedom of contract led the Court to invalidate a number of labor reforms.²¹ However, there are far more recent and valuable points of comparison, specifically in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas*.

This approach reared its head notably in the somewhat convoluted reasoning underpinning the *Roe v. Wade* majority. Section VI of *Roe* is a litany of historical precedent designed to suggest that opposition to abortion is a relatively new invention. While citing some contrary precedent, the majority argues that earlier society did not treat abortion, especially before quickening – the beginning of observable fetal movement – as homicide, then it uses this analysis to suggest that society was much more accepting of abortion than recent developments.²² While the Court only takes its analysis so far as finding the decision to terminate a pregnancy to be a protected matter of privacy, it still fashions this fundamental seemingly on the assertion that abortion was permissible at some point through history, conveniently sidestepping the fact that quickening was long viewed as the beginning of life such that the historical consensus on opposing the termination of prenatal life was much more uniform than the majority suggested.

While *Roe* took the first step of a jurisprudence that would be embraced in *Obergefell*, it sat on shaky ground until the second step was made in *Planned Parenthood v. Casey*. In shoring up the legal case for abortion, *Casey* leaned heavily on the precedential value of *Roe* while making the important shift from defending abortion as a private decision to a matter of liberty and

²¹ See, e.g., *Obergefell* at 2617 (Roberts, C.J., dissenting).

²² *Roe v. Wade*, 410 U.S. 113, 129-48 (1973).

autonomy that a woman is entitled to make.²³ In doing this, *Casey* cast the scope of liberty quite broadly. In addition to the quote discussed previously regarding the anthropological underpinnings of Kennedy's approach to liberty,²⁴ *Casey* openly discarded any specific limitation to the scope of the liberty interest protected by the 5th and 14th Amendments, saying "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."²⁵ The majority then went even further to quote Justice Harlan's dissent from *Poe v. Ullman*, where he said the right to liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."²⁶ The conclusion reached was that, since reasonable minds could disagree as to abortion, the government had no business banning it, at least in the early stages of pregnancy.

In *Lawrence v. Texas*, Justice Kennedy first brought these two rhetorical moves together in an opinion which invalidated Texas' anti-sodomy laws. Kennedy began the body of his analysis by tracing decisions such as *Griswold v. Connecticut* (finding prohibitions on contraceptives to married couples violated their right to privacy) and then subtly shifting the grounds of analysis away from a focus on the negative liberty of privacy, that is, keeping the government out of certain affairs, and toward grounding this right in what the majority characterizes as the broader, encompassing right to liberty.²⁷ In fact, Kennedy would reason his rejection of Texas' anti-sodomy statutes not as a matter of infringing on typically private relations but because it infringed

²³ *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (1992).

²⁴ *See supra* n.3.

²⁵ *Casey* at 848.

²⁶ *Id.*

²⁷ *Lawrence v. Texas*, 539 U.S. 558, 564-68 (2003).

on an individual's choice of sexual activity, something Kennedy found to "demean the lives of homosexual persons."²⁸

Again, like in *Obergefell*, Kennedy was not content simply to shift the grounds of analysis from privacy to his preferred liberty framework, he also cast a highly skewed gloss over history to suggest that social opposition to homosexual activity was of relatively recent vintage, and a vintage that was more recently being repudiated by broader society.²⁹ He did this to suggest that the legal reasoning in the case explicitly overturned in *Lawrence, Bowers v. Hardwick*, had been wrongly decided when it found no fundamental right to engage in sodomy. The dissent excoriates Kennedy for this move, pointing out that the Constitution only prevents states from infringing fundamental liberty rights and that Kennedy's historical analysis is selective at best, if not outright deceptive.³⁰ By any fair analysis, the majority's claim here that any right to same sex relationships might be deeply rooted in our Nation's history is suspect at best.

Taken as a whole, the rhetorical approach taken in *Obergefell* is troubling, but hardly new. It is a hallmark of the Court's more activist decisions, but that doesn't mean that those decisions don't have a lasting legal impact, and perhaps the legacy of *Roe* is most instructive as a point of comparison on this front.

Learning from the Past: *Roe* Advocacy

As explained above, abortion has seen historical exegesis and an eventual precedential argument that mirrors what was used to justify *Obergefell*, and, in many ways, this makes it an excellent test case for strategizing what the way forward can look like. In this regard, there are two principal messages that I

²⁸ *Id.* at 575.

²⁹ *Id.* at 567-572.

³⁰ *Id.* at 592-598 (Scalia, J., dissenting).

think are particularly important: first, this precedent is unlikely to go away, and, second, this does not mean that opposition to this holding is doomed.

With perhaps the exception of *Lochner*, the lesson of most of the more activist judicial opinions of the past century is that they stick around. In general, conservative justices are less apt than liberal ones to upset settled precedent, and, despite strong initial backlash to *Roe*, *Casey* marked what was likely the high water mark in seeking to repeal the earlier decision. While *Casey* did alter the rules of the game in ways that are yet unresolved, it upheld the essential holding of *Roe*, and, after so many years, it's unlikely that any but the most lopsidedly conservative future Supreme Court would ever disturb that. Given the moderate to significant step left that Justice Scalia's recent death likely signals for the Court, it's unlikely that there will be a coalition anytime in the near future to disturb the consensus behind *Obergefell*.³¹ Given this fact, the traditional marriage movement wastes some of its valuable political capital if it pushes for an absolutist rollback of the decision. After all, even if *Obergefell* were overturned today, that would not invalidate same-sex marriage, only return the issue to the States, a significant number of whom already recognized the practice.

However, I don't think this is grounds for losing hope as to advocacy around this issue. Abortion is a good comparison case because it is, in many ways, a comparable social hot button, but one with a longer history behind it than the relatively recent successes of the gay rights movement. Also, with this issue, there are some reasons for optimism. Firstly, Gallup polling has shown not only a resurgence of the pro-life position since its low ebb in the 1990s, but this change in the wind has been led by an increasing opposition to abortion among the 18 to 29-year-old demographic.³² This suggests that there was a period in the wake of *Roe* which saw increased support for

³¹ Whether the Senate moves to confirm an Obama nominee or the Democratic candidate wins the presidential election, the majority of most likely scenarios see a leftward shift for the Court.

³² Lydia Saad, *Generational Differences on Abortion Narrow*, Gallup (March 12, 2010), <http://www.gallup.com/poll/126581/generational-differences-abortion-narrow.aspx>.

abortion, particularly as issues came to a point near the decision of *Casey*. The data is insufficient to draw a causal link between the high water mark of efforts to repeal *Roe* and the waning support for abortion, particularly those that say it should be legal in all circumstances, but the correlation is clear. Again, while causation is unproven, it would not be inconsistent with information we have about the polarizing effects of more confrontational approaches to the issue, and a heightening of the culture war dynamic around that time might have actually done more harm than good. Regardless of why, however, polling does indicate that something about the pro-life position has been becoming more attractive, and this may have to do with a shift in approach among those who advocate for it.

One very successful approach that departed from the culture war dynamic was pioneered by the Vitae Foundation and first described in a ground-breaking essay on the website *First Things* back in April of 1998. In that essay, Paul Swope, a project director with the foundation, described a radical reimagining of pro-life advocacy around an empathetic understanding of the psychology of a woman faced with an unwanted pregnancy. In extensive research, the organization learned that women would tend to carry their children to term when “guilt wins out over shame, when they feel that the pregnancy will not end their own current and future selves, and that the unborn will be better off alive than dead.”³³ Taking their research to heart, the foundation sponsored a thirteen week television campaign in the Boston area in 1997. In independent polling conducted to test the effectiveness of these advertisements, the study showed a 7% increase (308,000 people) in the population supporting the pro-life position, a shift that was explicitly linked to those who remembered the foundation’s advertisements.³⁴ While unlikely to lead to total victory for the pro-life movement, this type of advocacy has

³³ Charles T. Kenney & Paul Swope, *A New Understanding of the Trauma of Abortion*, Vitae Foundation (January 2015),

<http://vitaefoundation.org/wp-content/uploads/2015/01/trauma-of-abortion-long.pdf>.

³⁴ Paul Swope, *Abortion: A Failure to Communicate*, *First Things* (April 1998), <http://www.firstthings.com/article/1998/04/004-abortion-a-failure-to-communicate>.

a tremendous cumulative effect, and the traditional marriage movement can learn much from modeling this type of approach.

Leaning into the Future: Holistic Advocacy

Moving forward, I believe that my analysis shows that the root issue which brought about the *Obergefell* decision is not just an isolated political preference for the gay lobby but a fundamentally different approach to both government and, ultimately, philosophical anthropology, that favors a radically self-centered view of the person. For those locked in a worldview that sees personhood as the ability to define the rules of their own universe around their personal desires, it will be incredibly difficult to achieve persuasive traction on the issue of marriage. This becomes evident when we pursue the same empathic line of reasoning that the Vitae Foundation used to drive its pro-life advocacy.

The Pro-life Movement is faced with a much more winnable battle when advocating for unborn children. As described above, it seeks to help balance guilt over shame. Where typical culture war-type advocacy focuses on piling on the guilt, the Vitae Foundation worked to chip away at the perception of shame. Where the typical pro-life advocacy focuses on the definitional life of the unborn child, the Vitae Foundation addresses the nearer issue for women in their self-identification and supports the idea that a woman's identity/self will not be lost by carrying a child to term. The power of empathy helped to focus the movement on the parts of the balance that struck most closely to women facing the abortion decision, but, ultimately, pro-life advocacy could be successful without having to challenge the fundamental worldview of self-definition.

With traditional marriage, the task will be more difficult, because the decision involved is about resolving a personal dissonance between sexual desires and self-expression weighed against potential shame and interpersonal backlash. Furthermore, the point of decision isn't at the point of getting married. Instead, this path is largely embarked upon around the

time an individual is considering whether or not to come out. At that level, the LGBT movement has been very successful in both encouraging people to be their “authentic selves” while working to minimize the social stigma of making the transition. Both the pregnant woman and the closeted person face the same perceived future of a destruction of the self in the face of an untenable status quo, but while pro-life advocates can help relieve that tension by helping women come to peace with who they perceive themselves to be (moral people), traditional marriage advocates would need to convince someone that they’ve had their fundamental assumptions wrong all along.

This is not to say I believe the cause to be lost, just that this line of analysis suggests that a more fundamental strategy must be taken. Drawing our cues from the pro-life movement, I don’t believe that we invest our resources well if we rely on winning victory through the courts or even by Constitutional amendment, legislative workaround or any other of the typical tools in the culture warrior toolkit. Instead, we must see this as a fundamental effort to shift worldviews. We should seek to emphasize the deficiencies of a worldview centered on self-definition, recognizing that, while we do have individual characteristics, our personhood has a relational dimension to it. We are who we are because we have been endowed with certain characteristics by our Creator, and this not to pursue life, liberty, and happiness in isolation, but because our happiness is best seated in lives lived in joyful service to both our God and to one another. These ideas, that we save our lives by losing them, that we find ourselves by giving up ourselves, that we stand simultaneously individual and collective, sinner and (for those in Christ) saint, are foolishness to the world’s wisdom, yet they resonate deeply for those who can hear their Savior’s call. Rather than fighting in the front lines of the marriage wars (which aren’t even the front lines of the persuasive fight), we should step back and see where we can offer a different way to those struggling with who they are. Authors like Debra Hirsch make a start at this sort of thing by helping to give a more holistic view of sexuality that moves past defining a person by their genital preferences. In her book, *Redeeming Sex*, she talks frankly about her own transition out of lesbianism

not because someone sat her down and told her it was wrong, but because she realized that there was more to her sexuality than her sexual partners.³⁵ This is the type of reasoning that offers a genuine alternative to those wrestling with sexual orientation. It doesn't ask people to rewire their desires but to broaden their horizons. While desire may shift over time, a broader, more holistic, and communally integrated view of the person allows for someone to face the thought of abstaining from desired behavior without viewing that as a subversion or reduction of the self.

Of course, all of these ideas will only work if the Christian community and others in the traditional marriage camp can live them out themselves, and this may mean coming face to face with the frank realization that we all feel the seductive call of the ethos behind Kennedy's definition of "liberty," not because it's a reflection of truth, but because our sinful parents were wooed by the very same inclination in the Garden. Ultimately, we must ourselves live better and model the alternative way, allowing us to stand not primarily in opposition, but in antithesis to the way of the world. After all, the struggle with *Obergefell* is rooted in a view of who we are as persons that makes each of us a law unto ourselves, and the Christian church has been called to struggle against that worldview from the very beginning. We have not given up that struggle since, and we should not give it up now, but we should still recognize it and winsomely pursue it for what it is.

³⁵ Debra Hirsh, *Redeeming Sex: Naked Conversations about Sexuality and Spirituality* (Downers Grove: InterVarsity, 2015).