

SAME-SEX MARRIAGE AFTER OBERGEFELL:

THE STATE OF THE UNION IN THE U.S. AND INTERNATIONAL IMPLICATIONS (INCLUDING JUSTICE KENNEDY’S TOP 10 ERRORS)

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I INTRODUCTION

This is the first of two articles dealing with same-sex marriage (‘SSM’) and religious liberty in America, following *Obergefell v. Hodges*¹ in the Supreme Court of the United States (‘SCOTUS’). However, I write also with a global context in mind. I initially presented this material as a symposium paper on religious liberty at Petra Christian University in Surabaya, in May, 2015.

This article addresses the issue of the mandatory legalization of SSM in America in *Obergefell*, and the lack of solid jurisprudence to support it. The second article will address religious liberty issues facing Christian wedding vendors who are opposed in conscience to SSM, according to their sincerely held religious beliefs. That article will survey some of the recent cases involving bakers, florists, planners, photographers (and even clergy), and discuss some current developments (like the gender-neutral toilet and locker-room wars in America today). As of this writing, SCOTUS has not decided this second issue facing vendors. It will do so soon.

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¹ 576 US 11 (2015).

Shortly after the initial paper presentation in Indonesia, SCOTUS, acting against all dictates of common sense and sound reason, ruled in *Obergefell v. Hodges* that all Fifty States in the U.S. must now allow same-sex couples the right to marry (i.e., issuing actual State marriage licenses). Accordingly, SCOTUS has taken this decision away from the voters in every State, trampling on democracy in the process. The vote was five Justices to four, and so came down to one vote. Justice Kennedy wrote the majority opinion and is often considered the ‘swing vote’ in SCOTUS on this sort of issue. The decision has boiled over into heated, angry responses not only in America, but around the world. I will discuss some of *Obergefell’s* specifics below. This outcome would not have happened without a general worldview shift to secular humanism within the constitution of SCOTUS’ Justices, as simply reflected in American culture.

In this article, I consider the now extinguished right of one nation’s citizenry, after *Obergefell*, to define marriage in the traditional way (i.e., historically and/or religiously), as the lifelong union of a man and a woman. This of course also involves the right to establish a marriage definition through the legislative (democratic) process. Still greater issues underlie the rights of a people to decide this issue for themselves, in regard especially to any religious views they have on the matter, amidst what is a growing secularist view of marriage in America.

Consider some of these underlying issues, for instance: Is it an improper entanglement of Church and State for a State in the U.S. to support a religious view of marriage? Is there even such a thing as a non-religious view of marriage? Does legislation of an historical, religious view of marriage improperly discriminate against same-sex couples? Are attacks and threats against Christians who hold to the traditional view of

marriage justified? Is this like the civil rights movement? Is SSM a human right? Should supporters of traditional marriage be called bigots and be harassed at every turn for expressing their view? In terms of lawmaking and the democratic political process, should LGBT activists' attempts to exclude the Christian and multi-religious view of marriage in that law-making process be applauded (as it is in America's media, educational, and secular legal institutions); or, is that stringent effort to eliminate the Christian view of marriage in the democratic lawmaking process an invidious attack on the religious liberty of Christians (or of Jews, Muslims, Hindu's and other religious persons for that matter)? How should this work in a pluralistic society, like America, Australia, and in Asia?

I suppose you may already guess some of my suggested answers to these questions. In any event, this specific jockeying for supremacy of secular humanism (as ideology in its own right) against Christianity (and other religions) in a society, to determine the correct view of marriage, is an important introductory theme I wish to explore in this article.

II SECULAR HUMANISM'S OWN RELIGIOUS INDOCTRINATION ON MARRIAGE AND OTHER SOCIAL ISSUES

Some who argue against the traditional view of marriage do so historically on the ground the traditional view of marriage is a religious one, violating a so-called separation of Church and State. In this article, I take the view secular humanism itself, as an antagonist of Christianity, and including its underlying atheism, is its own brand of religious ideology. So this topic is in some ways really an issue of competing religious views on marriage and other social issues. Secular humanism is

a religious belief system since it makes claims about ultimate reality. It even claims a supreme being (man) as the highest order of intelligence. It disavows any others.

I thus assail in this paper the fiction that secularism is somehow ‘neutral’, and can give us a trustworthy and just definition of marriage, while conventional religions like Christianity, cannot. Some say the Christian view is *biased*, but that says nothing more valuable than saying to a secularist, *secularism is biased*. The real issue is which view better reflects the truth on a given point. The truth includes, of course, that neutrality itself is a myth, and no laws are ultimately neutral in their values. Everyone, including the secular humanist, or atheist, believes in something. She has her own doctrinal beliefs – a creed, as it were, and is biased toward it. So this charge of bias says nothing helpful.

To understand how secular humanism is a belief about ultimate reality, with its own formal creed, just see the Humanist Manifestos, I, II, III, and the churches of atheism springing up in record numbers in California and England.² Secularism is not religiously neutral, but is itself a religious ideology, and attacks Christianity among others. Secular ideology is highly involved in the political and lawmaking process, and in the specific move toward SSM. Its proponents in fact seek to silence and injure those with deviant viewpoints, such as Christians.

² The American Humanist Association (AHA) website has links to all three Humanist Manifestos. The Humanist Manifesto I (to some extent II also) specifically describes humanism as religious throughout; although some secularists today seek to separate the word ‘religious’ from secular humanism, I consider such semantics essentially unconvincing. See <http://americanhumanist.org/Who_We_Are/About_Humanism>. AHA’s website also shows a logo and supporting connection to the LGBTQ Humanist Council; see <www.lgbthumanists.org>. See also Gillian Flacus, ‘Atheist “Megachurches” Crop Up Around the World’, *Huffington Post* (online), 11 November 2013 <http://www.huffingtonpost.com/2013/11/10/atheist-mega-church_n_4252360.html>.

That is an underlying subject I wish to address in this set of articles, since the very notion of SSM is steeped in a secularist mindset. I cannot deny that some supposed Christians have joined the so-called SSM crusade. I do say they have simply adopted the secularist mindset in doing so, and are completely deceived on this issue, or perhaps just ignorant.

Secularists of course say marriage is whatever we want to call it. It is a fluidly defined, genderless institution, about sexually involved grown-ups of either sex committing to each other at some level, for some unspecified period of time (not always for life), and who receive some social status conferred upon them by their government. Christianity, along with most faiths, holds biological sex or gender (male and female) is intrinsic to marriage. It is historically so understood as part of God's created order, honoring the complementarity of the two sexes.

III STRUCTURING THE ISSUES IN AMERICA AND INTERNATIONALLY

I note this clash of Christian and secular worldviews has led to the two very hotly contested issues on SSM, comprising precisely the subject matter of each of my two articles. These issues can be separated along U.S. Constitutional lines, each lining up neatly with the two religion clauses in the First Amendment of the Constitution (the Establishment and Free Exercise of Religion clauses). So for instance, the subject of this first article, concerning the right of American citizens to define marriage in the States or in the Nation as a whole in the traditional way, potentially involves, among several constitutional issues, the question of establishing a religion. The subject of the second article, concerning the right of individuals and small businesses to decline participation in same-sex

weddings and similar events in accordance with their sincerely held religious beliefs, involves the free exercise of religion.

Both the Establishment Clause and Free Exercise Clause of the First Amendment are essential components of American constitutional jurisprudence on religious liberty and human rights. I will discuss some of these constitutional principles and other laws in more detail below, setting the stage for showing *Obergefell's* inadequacies. I am also aware of the spreading internationalization of SSM and LGBT issues, and of *Obergefell's* likely influence in heating up or starting debates in several countries, including in my present domicile, Indonesia.

For instance, this clashing of values between secular³ and Christian religious views on marriage and other social issues is a hot issue not only in America, but now in Australia, Asia, and around the globe. Australia is getting ready for its referendum on SSM in a matter of months, and at the religious liberty symposium in Indonesia, another speaker was already discussing the theme of persecution against religious businesses in America because of SSM (and this was prior to *Obergefell*, in the world's largest Muslim-populated nation, and on the other side of the world from America). It is a central claim in this paper, however, that *Obergefell* is an unreliable piece of jurisprudence to affect any international policy or changes on this issue in any nation. In order to see *Obergefell's* shortcomings, a delving into the American legal system is necessary.

³ I use the term 'secular' in this article a bit 'tongue in cheek', in its assumed, common use, as depicting 'non-religious' stuff. As said, any divide between 'secular' and 'religious' is actually just artificial, as secularism *is* itself a religious view. I appreciate readers keeping that in mind while going ahead in this article.

IV CONSTITUTIONAL AND STATUTORY FRAMEWORK PROTECTING RELIGIOUS LIBERTY IN AMERICA CURRENTLY

A *Constitutional Provisions*

The US Constitution contains a couple of key religious freedom principles in its First Amendment. In short, the First Amendment provides: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .’.⁴

The first clause of the First Amendment (up to the comma), is known as the Establishment Clause. Its initial intent was to prevent the U.S. Congress from establishing a State Church; that is, ‘institutionalizing’ a single national Church (i.e., one of the various Christian ones). It served to prevent Congress from establishing and institutionalizing an official state religion under that Church (such as Germany and England have had at times, and which some of the individual States at one point had).⁵ I see it as something that can loosely be characterized as a ‘freedom from a state religion’ provision, in the strictest sense of freedom from an institutional religion imposed upon everyone at the national level. This was so people could practice their own religions (again contemplating this within one of the versions of Christianity).

The second clause (after the comma) is known as the Free Exercise clause, and is available to all citizens. I could characterize it more as a ‘freedom to exercise one’s religion’ clause, without imposition or

⁴ *United States Constitution* amend I (1791).

⁵ See John Eidsmoe, *God and Caesar, Biblical Faith and Political Action* (1997) 19-24 (giving an excellent history, including the First and Fourteenth Amendments (applying the religion clauses to the States)).

interference from a national or state religion. I deal with this more in my second article, concerning Christian wedding vendors being able to carry on their businesses according to their sincere religious convictions. This first article relates more to the Establishment Clause, since many seem to feel that support for traditional marriage amounts to establishing a state religion. This is incorrect, as I discuss this below.

In addition, several States in the U.S. have similar religious provisions. Virginia's Constitution for instance, provides:

SEC 16: That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.⁶

B *Statutes*

In 1996 the United States Congress passed the *Defense of Marriage Act* ('DOMA'), signed into law by then President Clinton after enjoying widespread, bipartisan political support. The Act preserves the traditional definition of marriage as the union of one man and one woman for purposes of federal law and government.⁷ Regrettably, this definition, as part of DOMA, was overturned in 2013 in *United States v Windsor*,⁸ a case I discuss in significant detail below.

⁶ *Virginia Constitution* §16 (1776).

⁷ *Defense of Marriage Act* 110 Stat. 2419 (§ 3, containing the traditional marriage definition, was stricken).

⁸ 570 US 12, (2013).

In 1993, the Congress passed the first ever national *Religious Freedom Restoration Act* ('RFRA').⁹ A subsequent *Religious Land Use and Institutionalized Persons Act 2000* ('RLUIPA') expands upon RFRA and helps interpret its application in corporate settings.¹⁰ Several States have also passed (or are now debating) their own State RFRA's. In the meantime, many state, local, and city governments have recently passed Sexual Orientation, Gender Identity ('SOGI') laws, seeking to prohibit discrimination on the basis of sexual orientation or identity. It is not hard to see the imminent clash between RFRA's and SOGI's. As these laws involve more the issue of free exercise of religion, however, I will discuss them chiefly in the second article.

In addition to Constitutional provisions and statutes, countless local and municipal laws, rules, and ordinances also relate to the Establishment Clause. Case law from SCOTUS, and at the federal and state levels also forms a huge part of America's jurisprudence on the issues of either establishing religion or its free exercise. All laws and cases, however, are subject to final constraints imposed by the Constitution's First Amendment, as interpreted by SCOTUS.

C *Synopsis in America Today*

At present, America is plagued by a serious secular-leftist-humanist anti-Christian purging effort, seen in her educational, legal, social and even corporate institutions. The idea is to cleanse from American life the Christian view of just about anything, including marriage. Non-establishment of religion is no longer about escaping a state-imposed religion (the intended meaning), and not even just about keeping religious

⁹ 107 Stat. 1488, 42 USC. § 2000bb.

¹⁰ 114 Stat. 803, 42 USC. § 2000cc.

views out of the public square (an incorrect view in the first place), but it goes deeper now to keeping religious views entirely to oneself (certainly an impermissible view). Secular humanism's social agenda is to keep Christian views from influencing conversations on important social issues, and to keep it in its special *religious worship* box. America seems to have shifted from the very limited idea of freedom from a state-imposed religion or an institutionalized national Church, to the idea of freedom from religion in every aspect of American life, save for what elite consensus will allow inside the walls of a church, and even this is subject to secular attack now.

Secularism is successfully causing the Establishment Clause to stray so far from its intended meaning that it is turning into a monster, swallowing up the second clause on free exercise of religion altogether. Freedom of religion is now being replaced with freedom from religion in virtually all aspects of American life. This is unsupportive of the intent of the First Amendment, and violates basic human rights and justice. But just how did America get herself onto this secular slide; how did she manage to stray so far from the First Amendment's intentions?

V THE SLIDE TOWARD A SECULAR AMERICA AND LOSS OF RELIGIOUS LIBERTY

I believe a short but sure answer to these questions is a growing trend toward Statism in America. She has moved increasingly in recent decades to a view of life that sees a greater role for the State than in the past, causing far too much blending of the government and private sectors. In large part, this is due recently to the growing regulatory apparatus of government over commercial enterprises, in turn due to the economic meltdown and recession in 2008 and 2009. In some sense, then, the

business world is also largely responsible for this trend, but Statism started long before this crisis. Still, big banks and financial institutions clearly sparked the financial crisis in 2008, in significant part due to their greed and avarice in the sham mortgage-backed-securities industry, which led to a stunning rash of new government regulations. This in turn strengthened the intertwining of government and big business.

In addition, America is still in its second term with its most socialist-inclined President to date, Barak Obama. The idea of Statism, like Socialism, is to increasingly hand over to the government many of the functions in society intended for handling in the private sector, such as by businesses, families, and even the Church (consider Abraham Kuyper's sphere sovereignty). In my view, this ends in confusion in the minds of the average person, as the norms in a State, intended as applying to government, tend to get swept into the private sector as well, becoming new norms everywhere, applicable to all. A separation of Church and State, once understood to limit the reach of government, now more easily seeps slowly but ever so surely into a separation of Church (and religion) from society: i.e., business, schools, culture, and just about every inch of society outside one's family and individual life or one's actual house of worship.

Simultaneously, America's media, cultural, and educational systems are very secular and clearly hostile to religious viewpoints. Media and educational elites have been leaders in promoting homosexuality as a normal lifestyle, which they say must not be criticized or even challenged. If someone voices a criticism, she/he is automatically (but incorrectly) accused of religious bigotry. In this setting, it is hard to imagine religion, specifically Christianity, ever getting a fair shake.

Since most of American legal education now is avowedly secular (just a product of its culture) it is not really surprising to see judicial decisions continually going against religious persons in court on these issues. This, of course, only exacerbates the slide away from truth, since the judicial and legal systems give legal and social support to restrictions against religious liberty on questions like SSM and other social issues, reinforcing the speed of this secular slide.

This growing secularism has resulted in a twisting of the First Amendment's Establishment and Free Exercise Clauses. Its incorrect application of the Establishment Clause asserts that traditional definitions of marriage are discriminatory against gays and promote a view of religion improperly imposed by the State on others. Such marriage laws, they say, must be stricken under the Establishment Clause. This view is incorrect.

VI THE SEMINAL ISSUE: IS A STATE'S DEFINITION OF NATURAL (TRADITIONAL) MARRIAGE REALLY A VIOLATION OF THE CONSTITUTION?

A *Short Answer*

The answer of course is no, but several scholars and jurists sincerely (or some not so sincerely) think otherwise. I suppose they are simply deceived, and some are just being dishonest. In any event, SCOTUS in the *Obergefell* case has concluded State natural marriage laws do indeed violate the Constitution. Just how remains a bit of a mystery for many scholars.

B *Justice Kennedy's Concoction of SSM*

Justice Kennedy, who wrote the majority opinion, appears to use a strange amalgam of various intertwined (he says that) Due Process (he means substantive due process, ('DP')) and Equal Protection ('EP')) rights in the Fourteenth Amendment. His conclusion takes at least two steps. In the first step, he mixes substantive DP and EP together to create a general liberty interest, which he says everyone is given, to define and dignify their own sexual identities. It is a right, this liberty interest, of seeking and finding one's human destiny – one's very own core identity, or what it means to be human for that person (the italicized words are his own, and show a culmination of his thinking over several years). Notably, however, this destiny/identity interest, as a liberty interest, is spelled out only in very limited terms, based solely one's so-called sexual identity. It seems Kennedy views sexual identity as the core and essence of one's human identity (a shallow view), and he avers it is fixed (it's one's destiny). In both assumptions he is incorrect. Meanwhile, he suggests a person's actual sex is something incidental, or fluid – perhaps a bunch of appendages we have to work around, sometimes surgically, to achieve that real identity. He insists no stigmas shall attach to such identities, nor to anyone's liberty interest in pursuing them.

In a second step, he adds something he calls marriage as a necessary ingredient to vindicate the initial liberty interest in one's identity (i.e., sexual identity). Succinctly, he says the liberty interest/right in one's sexual identity can only be vindicated by a second right of marriage. To him this is the only viable way to dignify someone's sexual destiny (again his words); nothing short of marriage will do. This is Justice Kennedy's human rights recipe for his SSM creation.¹¹ It comes not as one product

¹¹ Justice Scalia, in dissent, took J. Kennedy to task for his special rights concoction. *Obergefell*, 576 US at ___ (Scalia J dissenting at 6-8), available at <http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>.

off the Constitutional shelf but is a bunch of ingredients mashed together to serve up a new rights dish. Justice Kennedy's SSM rights recipe also has another very important ingredient in it: he says it is simply time to allow this. Very convincing, isn't it?

Indeed, the SCOTUS decision is so chock full of errors in law, philosophy, and U.S. Constitutional interpretation, I am sure it deserves the attention of a treatise to address it. Someone else can have the honor. I will give a shorter list of criticisms and analysis here. I will address this case on a couple of levels of constitutional analysis, first involving the Establishment Clause, and second the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

VII INCORRECT INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AND CORRECTIONS

To give some credit, I suppose if any is due, Justice Kennedy's majority opinion in *Obergefell* is not grounded on a claim that State traditional marriage definitions violate the Establishment Clause of the First Amendment. Instead, the majority grounded its view mostly on the Fourteenth Amendment's EP and DP clauses. Still, I discuss the arguments based on the Establishment Clause because they have been common in this debate, and undergird the thinking that has brought it this far.¹² This refrain from use of the Establishment Clause to support arguments in favor of SSM is a small consolation, in any event.

¹² The Establishment Clause of the First Amendment is applicable to the States by the Fourteenth Amendment. Each State also has its own constitutional version of an establishment and free exercise clause. The arguments in each are essentially the same, and I treat them as such.

A *Establishment Clause Arguments*

A summary of the Establishment Clause arguments made by many SSM adherents typically goes something like this: The traditional definition of marriage is that of the union of a man and a woman, and although many people having sincere religious beliefs hold this view (i.e., Christians, etc.), they may not assert it as the basis of legislation; this, say the SSM supporters, violates the separation of Church and State (it violates the Establishment Clause).

As noted, the argument then expands to say a traditional view of marriage not only violates the separation of Church and State, but also improperly discriminates against homosexuals. SSM advocates accordingly claim the historical view violates the Equal Protection and Due Process Clauses in the Fourteenth Amendment, which applies to all the States.¹³ In short, if religious views are even allowed in the lawmaking process, they must not violate the DP and EP Clauses of the Constitution. Religiously supported views simply cannot be superimposed in society via legislation, say SSM supporters, especially if those laws might improperly discriminate against certain groups, such as homosexuals.

SSM activists see the traditional marriage laws as mainly conservative in viewpoint, acrimoniously targeting gays (how they get there is sometimes very strange), and they would oppose those laws even if they were not based on religion. Even Justice Kennedy acknowledged other secular (non-religious) arguments have been raised in good faith, to support traditional marriage laws.¹⁴ This does not mean however, Establishment

¹³ A Due Process Clause exists in the Fifth Amendment also, but applies chiefly to actions of the federal government (some contend it also contains some equal protection elements as well).

¹⁴ *Obergefell*, 576 US at ___ (4, 23).

Clause arguments against traditional marriage have evaporated. They undergird the discussion. SSM advocates, including those in this Court, know this. Consequently, I address these. This sort of argument is of course where the secular liberal side gets it so wrong. I offer some illustrations:

In *Varnum v Brien*, 763 NW 2d 862 (Iowa, 2009), the Supreme Court of Iowa indicated many Iowans reject same-sex marriage as a civil institution ‘due to sincere, deeply ingrained – even fundamental – religious belief.’¹⁵ The Court said that while religious institutions and individuals may continue to abide by their religious views of marriage in their own religious institutions and practices, those views are not apt for the civil and secular institution of marriage. It said incorporation of a religious view of marriage into Iowa’s state, civil institution of marriage violates the establishment clause in its own Constitution (art I, § 3), and violates the entire doctrine of separation of Church and State:¹⁶ ‘[O]ur task [is] to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation ... This proposition is the essence of the separation of Church and State.’¹⁷ If so (and it isn’t), Iowa would also have to scrap its laws against murder, theft, child abuse, rape, incest, deceit, contract breaches, and so on, since religious views against these harmful things surely shaped those laws.

The Iowa Supreme Court’s statement is simply incorrect, but it suffices to show its garbled view that a religious definition of marriage, if applied in the secular, civil realm, somehow impermissibly establishes a religion.

¹⁵ 763 NW 2d, 904.

¹⁶ Ibid 905-906.

¹⁷ Ibid 905.

But when has marriage ever been completely irreligious; isn't it spiritual? The Iowa Supreme Court improperly confused the idea of religious influence in law with the idea of an institutional separation of Church and State.

Similarly, theologian Wayne Grudem, in his book, *Politics According to the Bible* highlighted the statements of David Boies, a lawyer opposing the traditional definition of marriage in California's notorious 'Proposition 8' cases.¹⁸ Attorney Boies incorrectly stated that while many Californians have genuine religious beliefs that marriage should be between a man and a woman, 'the Establishment Clause . . . says that a majority is not entitled to impose its religious beliefs on the minority.'¹⁹ I guess his side is entitled to impose theirs?

B *Incorrectness of Establishment Clause Arguments*

The views expressed above are fundamentally incorrect on several grounds.

First, it is impossible to extract out from any nation's laws their religious and philosophical, ideological underpinnings, and erase them. Law is inherently a moral inquiry. It absorbs and then encapsulates moral and religious viewpoints and principles. (I am speaking here of course about the many valuable ethics in religion systems as valid contributors to human law, in contrast to institutionalized rituals and ceremonies, which is a different matter.)

¹⁸ See Wayne Grudem, *Politics According to the Bible* (2010) 31, citing 'Prop. 8 Defenders Say Plaintiffs Attacked "Orthodox Religious Beliefs"' *Wall Street Journal*, 10 February 2010. Proposition 8 was one of the most prolific and controversial constitutional referenda, upholding the traditional definition of marriage in California. It was stricken by the Ninth Circuit Court of Appeals in 2012, and appealed to SCOTUS. See *Hollingsworth v Perry* 570 US 12 (2013) (SCOTUS declining, however, to examine the actual merits of the case).

¹⁹ Wayne Grudem, *Politics According to the Bible* (2010) 31.

Human law is born of the cultural and societal norms of any people it serves, and these cultural and societal norms are influenced by the religious ideology of its people. Morals and values shape laws, and morals and values are shaped by religious ethics in some important ways too. Separating law from religion (for its ethical ideology) is not realistic, nor should it be attempted. Ideologies can replace each other, but they are never absent in crafting basic human values, and the laws that come from those values.

Both in terms of its influence in society over time (sometimes over several generations), as well as its influence on specific pieces of legislation in a society, religion plays an essential role. Sometimes it is not an obvious one. In its broader influence in society over time, religious ethics have a leavening effect on social values, like yeast in bread. Since human laws are inherently derived from morality (ultimately), it would be the height of hypocrisy to allow viewpoints to shape laws from one aspect of society, say secular humanists and atheists, while excluding the perspectives of Christians and those from other religions.

The First Amendment was never intended to promote that kind of invidious viewpoint discrimination against Christian and similar religious perspectives in policy and legal debate. Religious values and ethics have infiltrated and deeply shaped this rather mythical creature known as 'secular society.' As indicated, the Establishment Clause (including any State's version thereof) was only designed to prevent the Congress from institutionalizing and imposing a formal State Christian religion, that is, a State Church. Instead, the proper approach in democratic, pluralistic societies is this: we should consider all serious moral values coming to the table on a particular social issue (such as SSM, abortion, stem-cell use, cloning, and so on), coming from virtuous, reliable ethical sources;

then, we should consider the merits of those positions in healthy debate; next, our lawmakers, with our input, should choose among those perspectives, crafting a law they think works best. That is, they try to craft laws they think promote the greatest good, happiness and justice for the people. Sociologically speaking, we should then monitor that situation, and if what is passed as law does not promote happiness, welfare and justice as it should – something we can empirically measure over time – we have to consider changing that law.

Congress has passed laws that sounded good but did not work (Prohibition of alcohol, was likely one of them, and exceeded the demands of biblical virtue).²⁰ Then it had to repeal the law. Since repeal is difficult to do, this gives all the more reason we need the inclusion of a variety of interested and reliable, time-tested values and perspectives at the beginning of the lawmaking process. Allowing only a secular humanist ideology, as a religious viewpoint in itself, to control all the outcomes in the political, legislative landscape, while ignoring ethical ideologies born of virtuous religions such as Christianity, is blatant viewpoint discrimination that is likely itself a violation of the Constitution.

As one scholar explains it, the sources of moral influence in lawmaking can come from any variety of springs. Come they will, and we should allow those voices that intend good in a democratic society to speak. So, any individual's ethical sources might be the inspirational poetry of Henry Wadsworth Longfellow, the lyrics of Bob Dylan, or views of Freud, or Nietzsche, or Plato, or Aristotle, or common sense, or Gandhi, or the Magna Carta, or the Humanist Manifestos, or the Universal Declaration of Human Rights, or lessons from history, or science, or Karl

²⁰ Ibid 63.

Marx, or Scripture, or the Ten Commandments.²¹ All of these sources make claims about ultimate reality and impact the conscience, and so are inherently religious in nature; a conscience is also something a lawmaker must use, if s/he is to do the job correctly.

Some ideas and sources we will inevitably accept as good and valid, while others we will reject as incorrect and flawed in the lawmaking process, viewed in the hindsight of history as one of our greatest teachers. To reject Christian viewpoints on social issues, however, as somehow establishing a religion, is simply incorrect. It is viewpoint discrimination and smacks of deep hypocrisy, and is also terrible interpretation of the Constitution. The First Amendment disestablishes a State Church (States' establishment clauses do not differ); it has never meant the exclusion of moral viewpoints on social issues embodied in great religions (i.e., those containing excellence in moral values), such as Christianity.

I have included an Appendix diagram illustrating the above values-driven lawmaking process. It illustrates why viewpoint exclusion of Christians and other sincere religions is wrong. Instead, we should be considering their ethical and moral values as real sources and contributions to law, and not do so simply as an accommodation, but because it is inevitably so and valuable. Let the best system of moral sources win in the end.

Second, if the views of the Iowa Supreme Court, attorney Boies, and similar views on the establishment of religion are correct (which they are not) then most of the good laws in society would not even survive. As I already stated, States would have to strike their statutes criminalizing murder, homicide, grand larceny (stealing), adultery, and rape, among so

²¹ Ibid 33-34 (specifically citing Bob Dylan, Confucius, and others; tying this also to free speech rights of their adherents).

many others, since these all have religious sources supporting them. Notably, all such laws have supporting structures in religion including something as common as the Ten Commandments and similar Scriptures. Such laws are not merely somehow coincidentally similar with ancient religious values, they were shaped by them in history, and such laws are easily supported by other religious ethics as well. And yet we do not strike such laws because of their supportive religious underpinnings and connections, as somehow impermissibly establishing a religion. This is why cases like *Varnum* are so deeply incorrect.

Lastly, this exclusion of Christian viewpoints on morality from lawmaking cannot be the intended meaning of the Establishment Clause since it would simply be too easy to get around. All that proponents of traditional marriage would have to do is articulate secular reasons in support of traditional marriage and other social issues. Such an approach, which is not really necessary and slightly saddening to see, is exactly what many Christian advocates are trying to do. They do this in order to avoid the threat of confusion with religious issues their simple-minded opponents cannot seem to avoid. I suggest their approach still has some merit, but should work alongside ethical and religious values, instead of replacing them. After all, valid social science and valid religious ethics should affirm each other in the long run, and do. Examples of such more ‘secular-sounding’ arguments include historical, cultural, traditional, and very importantly, simple biological reasons for supporting marriage as the union of a man and a woman. Sociologically and scientifically speaking, for instance, it is simply good secular policy to have laws steering sexual intercourse among individuals in society into an enduring male-female parenting relationship for the security of children and all involved, including the mates. This social arrangement is ideal for building strong

families, which in turn builds strong societies, and this has been shown historically as truly optimal, especially when families have both a mother and father in a low-conflict setting.²²

VIII A SHORT HISTORY OF THE LAW ON SSM IN AMERICA

This section is an interlude, introducing the setting for Equal Protection and Due Process Clause analysis on SSM. In order to understand this section, it is helpful for international readers to keep in mind the US has both the federal and state legal systems. Interaction between the two can be complex, and SCOTUS has the final say on what is or is not constitutional.

A *DOMA and Its State Renditions*

Prior to June 2013, the United States had a federal definition of marriage in the DOMA. Individual States passed similar laws or constitutional amendments, or already had them for some time. About thirty-seven States still had enactments existing as of 2013; all States had the traditional, natural definition in some form prior to 2003.²³ Each of these laws defined marriage traditionally as a male-female union. DOMA had

²² Arguments such as these have been raised in *Obergefell* and the cases preceding it. See *Obergefell*, 576 US at ___ (Kennedy J at 23), (Roberts J dissenting at 6-7) (citing Noah Webster's first American Dictionary and others); (Alito J dissenting at 4, 6); *DeBoer v Snyder*, 772 F 3d 388, 404-405, 408 (6th Cir. 2014) (see 19-20, 23). Social science studies are now a very important factor in the SSM cases. I suggest its underdeveloped data on the impact of children in same-sex parent households is another reason SCOTUS should have decided to wait this out, allowing the States to sort out the data and decide. See *Obergefell*, 576 US at ___ (majority opinion) (see 23-24) (noting but dismissing the point).

²³ See *DeBoer*, 772 F 3d, 396 (see 7) (giving a breakdown of recent changes); Robert Barnes, 'Supreme Court Agrees to Hear Gay Marriage Issue', *Washington Post* (online), 16 January 2015 <<http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/>> (showing changes in gay marriage States between 2012 and 2015 as a result of *Windsor* and providing a handy geographical map of these changes).

been a part of federal legislation since 1996. It was virtually unanimously passed by both Houses of Congress, it enjoyed widespread bipartisan support, and was signed into law by President Clinton.²⁴ It also defined marriage traditionally as ‘the legal union between one man and one woman as husband and wife.’²⁵ SCOTUS overturned this definition in *United States v Windsor*, 570 US__ (2013), by a slim 5 – 4 margin. Justice Kennedy again wrote the majority opinion of the Court.

B *Windsor’s Impact*

In *Windsor*, Edith Windsor and Thea Spyer were long time domestic partners in a relationship dating back to the 1960s, and living in New York. When Spyer became ill, the couple sought to wed, and did so in Canada in 2007. New York recognized their same-sex marriage as of that date, but the federal government (including the IRS) did not, on account of the federal definition of marriage in DOMA as the legal union of only a man and a woman. This meant that after Spyer died, Windsor had a very large tax burden to pay on her inherited income, since technically, she was not the spouse of Spyer under federal law, but was under N.Y. State law. She claimed this violated equal protection, and due process under the Fifth Amendment of the Constitution.²⁶

The SCOTUS majority held DOMA’s traditional view of marriage was unconstitutional as violating the Fifth Amendment of the U.S. Constitution. The rationale of Justice Kennedy’s majority opinion was that DOMA conflicted with the New York State definition of marriage, which by this time had changed, allowing Windsor and Spyer to be

²⁴ See <<http://www.alliancedefendingfreedom.org/page/SCOTUS-Marriage-Decision/DOMA-Loss>>.

²⁵ 1 USC § 7 (the *Dictionary Act*).

²⁶ See *Windsor*, 570 US__ (slip op, 3, 20, Parts I, IV).

married. And this, said Justice Kennedy, improperly trounced on a valid N.Y. State marital status conferred on the couple, by depriving them of marriage benefits at the federal level (i.e., as to inheritance tax exemption rights). SCOTUS said this disparity between a State's valid definition and the different federal one had worked an injustice for the lesbian couple that traditional married couples would not have experienced. Central to Justice Kennedy's rationale was the highest value he placed on the separate States being able to determine the definition of marriage as they saw fit. That is, there should not be a uniform definition of marriage (traditional or newfangled) at the federal level: the States can each decide who can and who cannot marry, and what a marriage is.²⁷ Strangely, and prophetically, Justice Kennedy added some language to the opinion seemingly supporting the New York definition as a fair and reasonable one, suggesting perhaps it is the one all States should adopt.²⁸

However, the centerpiece of his decision was clearly that the definition of marriage is a state law issue, not a federal one, and a national definition would not be allowed. In *Obergefell*, Justice Kennedy then proceeded to ignore his own holding, imposing a national definition of marriage on all the States (the one allowing same-sex couples to marry instead of the

²⁷ I do not wish to imply by anything I say in this article that a national definition of marriage is inappropriate, or that *Windsor* was correctly decided. A sovereign nation indeed has a right to set a uniform marriage law and policy (especially if it is godly), and most nations of the world have one. So did the US in DOMA. Sovereigns can also legitimately adopt a traditional view of marriage as their national standard and most do (nothing in the Cosmos prevents it). So, a different holding in *Windsor*, affirming DOMA, would have been entirely legitimate in theory, albeit a bit confusing in application within our federalism system, since States can define marriage separately. If uniformity is the goal, a correct national standard should apply and abide. DOMA had that.

²⁸ Ibid 2693. Setting a requirement for all the States to allow SSM is really the same as creating a federal definition, as it requires striking the traditional ones and making new SSM-agreeable ones. *Windsor* did not go this far; *Obergefell* did. I am again not saying *Windsor* was correct in all respects. It did support States' rights on this issue, however. It did not last long.

traditional one), showing himself irresistibly incapable of honoring his own holding in *Windsor*. Seeing a Supreme Court Justice engage in such blatant self-contradiction in this important line of cases was surprising to many, but not to some.²⁹

In the *Windsor* decision, Justice Kennedy also stated the purpose of DOMA was to injure a class of individuals (homosexual couples wishing to marry), but he cited no support for this. Essentially he and the majority failed to acknowledge solid, rational arguments in support of the traditional definition of marriage (as indicated above) – ones that are not based on hate or animus against homosexuals, but on the best interests of society and its children.

An important practical purpose of DOMA was to preserve the status quo of a uniform, historical, and time-honored definition of marriage, so that thousands of items of federal laws and regulations, such as tax and inheritance laws, would have a single uniform definition of marriage (and similar terms) applicable to them. DOMA's intent was not to injure, as seen in its wide support (and Justice Kennedy was incorrect in saying it was). Still, in a Christian-rooted country, it would hardly seem necessary to codify a traditional view of marriage. In all likelihood, DOMA's supporters initiated the law anticipating strong challenges from LGBT activists to redefine marriage so that it could be changed into something entirely new: a gender-irrelevant institution suiting their interests.³⁰

Interestingly, many of the supporters of DOMA and similar laws included

²⁹ See concerns of Judge Martin Feldman in a Federal District Court case after *Windsor*, *Robicheaux v Caldwell* 2 F Supp 3d, 910, 917,7 (ED La, 2014) (see 9) (noting an 'amorphous but alluring' redefinition of equality in *Windsor*); see also *Windsor*, 570 US__ (Scalia J dissenting) (see 16, Part II.A, 22, Part II.B.) (Justice Scalia calling this right from the start, and seeing Kennedy's hypocrisy in advance).

³⁰ See *Windsor*, 570 US__ (see 21); see Scalia J, dissenting (see 20) (explaining Congress' rationale was to preserve valuable social definitions, and not injure).

prominent liberals like Bill and Hillary Clinton, and Barak Obama (signing a similar Illinois state law). Such supporters suddenly changed their views immediately prior to the *Windsor* decision, saying they were wrong in opposing SSM initially.³¹ Such changes are hypocritical, and betray any principled and honest approach in these so-called leaders on SSM.

Windsor's aftereffects were dramatic, and also confusing. After *Windsor*, there was no longer a federal definition of marriage and this threw into confusion the definition not only of that term, but such other terms as 'married', 'marital', and 'spouse' contained in over a thousand federal laws and regulations. After *Windsor*, the meaning of the term 'marriage' (and similar words) in federal law would likely have to fluctuate with the States – not an ideal situation.³² I suppose it can be said now, via *Obergefell*, Justice Kennedy has virtually single-handedly solved the confusion of various State marriage definitions by making SSM part of a new uniformity imposed on all States. And he was not even elected. Still, this hardly justifies *Obergefell* (in fact, Kennedy J never mentioned uniformity as a rationale, but I am sure it was in his mind all along).

C *States of Confusion*

³¹ See Juliet Eilperin and Robert Barnes, 'Obama's Words in Same-Sex Marriage Filing to Court is a Major Shift for Him', *Washington Post* (online), 6 March 2015 <http://www.washingtonpost.com/politics/obamas-words-in-same-sex-marriage-filing-to-court-is-a-major-shift-for-him/2015/03/06/83940fa0-c339-11e4-9271-610273846239_story.html>; see Ali Elkin, 'Hillary Clinton's Evolution on Same-Sex Marriage: Sounds a Lot Like Some Republicans', *Bloomberg Politics* (online), 28 April 2015. <<http://www.bloomberg.com/politics/articles/2015-04-28/hillary-clinton-s-evolution-on-same-sex-marriage-sounds-a-lot-like-the-gop>>; Taylor Berman, 'Bill Clinton Calls the Anti-Gay Marriage Act He Signed Into Law Unconstitutional', *Gawker* (online), 7 March 2013. <<http://gawker.com/5989353/bill-clinton-calls-the-anti-gay-marriage-act-he-signed-into-law-unconstitutional>>.

³² Justice Scalia raised such concerns in *Windsor* (see 19-21).

Immediately after *Windsor*, LGBT activists and activist judges began claiming a major victory. In a rash of irrational opinions by sympathetic judges in various States, state laws with traditional marriage definitions were overturned almost overnight. In a swift stampede spanning less than two years, twenty-two States had their traditional marriage definitions swept away by anxious judges supportive of the homosexual and secularist agenda. It was like watching falling dominoes. Homosexual couples flocked in droves to civil magistrates to immediately get their marriage licenses.

However, none of this was a consequence intended or authorized by *Windsor*. The case only overturned the federal definition of DOMA, saying emphatically our Constitution leaves the determination of marriage rights and restrictions up to the individual States. It is a matter of state law. In the US, we moved from a slight number in 2013 of about thirteen States incorporating the genderless definition of marriage (and 37 staying in favor of traditional marriage), to then about 38 (including D.C.) adopting the genderless definition in that short time span.³³ Just prior to *Obergefell* in 2015, only a handful of States were still left standing for traditional marriage. It was a complete change of events. But the changes were mostly illegal. Traditional marriage laws were thrown out in serial fashion typically without any real voting by citizens either in constitutional referenda or through the statutory process. The

³³ See Robert Barnes, Robert Barnes, 'Supreme Court Agrees to Hear Gay Marriage Issue', *Washington Post* (online), 16 January 2015 <<http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/>> (showing maps and comparisons between 2012 and 2015); see *DeBoer v. Snyder*, 772 F 3d, 396, 405, 416 (see 7, 20, 35) (claiming 19 States actually in favor of SSM, and 31 against, according to actual state-based determinations, and excluding recent federal judicial interference). In only 11 States and the District of Columbia, however, have the citizens of any State actually voted in some way for SSM. See *Obergefell*, 576 US at ____ (Roberts J dissenting at 9).

executioners were primarily activist judges and attorney generals indoctrinated in their secularist ideology (this being the daily diet served up at most American law schools since the last several decades).

D *The Faithful Few States Surviving After Windsor, and Their Superior Reasoning*

After *Windsor*, only a handful of courts kept the sane view that each State should be entitled to craft its own marital laws though the democratic process (as *Windsor* said). Some went on to give cogent and sound analysis, showing how keeping a traditional view of marriage is rationally based in furtherance of a legitimate state interest. This is because it has the most proven capacity for building strong families and societies. And this is an important constitutional analysis, which most courts seemed to overlook, even though this rational basis conclusion is something most people instinctively know is true. The Sixth Circuit Court of Appeals, was the first and only federal appeals court (since *Windsor*) to issue a smartly articulated decision to this effect, in *DeBoer v Snyder*.³⁴ *DeBoer* involved an issue of whether four States, Ohio, Michigan, Tennessee, and Kentucky, could keep their traditional definitions of marriage, or whether the Constitution of the United States required abandoning them.³⁵ An earlier Eighth Circuit appellate decision, *Citizens for Equal Protection v Bruning* 455 F 3d 859, 864–868 (8th Cir. 2006) also contained some

³⁴ Cert. granted, 83 USLW 3315 (16 January 2015).

³⁵ *DeBoer* was a consolidated appeal from a set of four Federal District Court cases in each of those States. *DeBoer v Snyder*, *Obergefell v Hodges*, *Tanco v Haslam* 7 F Supp 3d 759 (Tennessee 2014), and *Bourke v Beshear* 996 F Supp 2d 542 (Kentucky 2014). In the appeal of *DeBoer v Snyder* to SCOTUS the case was renamed to *Obergefell v Hodges*, 576 U.S. 11 (2015) (the case coming from Ohio).

initial valuable insights, showing a rational basis for traditional marriage, in stabilizing homes.³⁶

Because these cases affirmed each State's traditional marriage definitions, this created a conflict with some other federal appellate courts which struck down traditional marriage (these are the Fourth, Seventh, Ninth, and Tenth Circuits, and we have eleven main ones in the U.S plus two special Circuit Courts). This 'split in the Circuits' required SCOTUS to address this issue, by hearing an appeal from *DeBoer*, and this appeal is the *Obergefell* case we now have handed down to us from SCOTUS.³⁷

In two of the four Federal Circuit Courts of Appeal just noted (the Fourth and Tenth Circuit Courts), there were split decisions. In each case a single dissenting justice stood out and wrote a sound and well-reasoned opinion explaining why those States' statutes or Constitutional Amendments, keeping a traditional view of marriage, should not be stricken.³⁸

In the Federal District Court level (which is the one immediately below the Appellate Circuit Courts I have mentioned above), a couple of sound, post-*Windsor* opinions also existed, and I mention them only for their sturdy articulation of what SCOTUS should have reasoned, which was

³⁶ 455 F 3d, 864–868 (noting the constitutionally rational basis of a State's legitimate interest in channeling procreative human sexual intercourse into stable family relationships, through the historical concept of marriage).

³⁷ The four Federal Circuit Courts examining the issue, and agreeing with lower courts in overturning state traditional marriage definitions are: *Bostic v Schaefer*, 760 F 3d 352 (4th Cir. 2014); *Baskin v Bogan*, 766 F 3d 648 (7th Cir. 2014); *Latta v Otter*, 771 F 3d 496 (9th Cir. 2014), rehearing en banc denied, 771 F 3d 496; *Bishop v Smith*, 760 F 3d 1070 (10th Cir. 2014); *Kitchen v Herbert*, 755 F 3d 1193 (10th Cir. 2014). The Sixth Circuit alone sought to preserve four States' traditional definitions in *DeBoer*. The Fifth, Eleventh and other Circuits seemed to be awaiting the SCOTUS decision. I already mentioned the Eighth Circuit above.

³⁸ See *Bostic*, 760 F 3d, 385-98 (Niemeyer J dissenting); *Kitchen*, 755 F 3d, 1230-40 (Kelly J concurring in part and dissenting in part).

ignored in *Obergefell*. Specifically, a very good opinion came from Judge Feldman in *Robicheaux v Caldwell* from the Eastern District of Louisiana in 2014.³⁹ *Robicheaux* soundly indicated the States have legitimate interests in keeping a traditional view of marriage, including the importance of channeling sexual activities of individuals into the confines of a traditional marriage to raise children; this helps reduce illegitimacy and strengthens families and society. Similarly, each State has a legitimate interest in linking children to intact and thriving families formed by their own biological parents, as the ideal.⁴⁰ Said traditional marriage definitions and rationales are of course rationally related to those legitimate government interests I have just mentioned (more on the importance of this italicized wording immediately below).

XIX OBERGEFELL V HODGES: WHAT SCOTUS SHOULD HAVE DECIDED IN A REAL EP, DP CLAUSE ANALYSIS

In a thoroughly principled approach, SCOTUS should not have voted to impose SSM on all Fifty States. It should have allowed each State to determine the issue itself, as it has historically, and as mandated again in *Windsor*. This is because the Equal Protection (EP) and Due Process (DP) Clauses in the U.S. Constitution do not require SSM. DP Clause

³⁹ 2 F Supp 3d 910 (Louisiana 2014); see footnote 29 (information and cases).

⁴⁰ *Robicheaux* (slip op, 8, 15). Only three other Federal District Courts issued similar opinions, with good and sound reasoning, including the importance of States' rights in support of traditional marriage: *Conde-Vidal v Garcia-Padilla*, 54 F Supp 3d 156 (DPR 2014); *Merritt v Attorney General*, No. 13-215, 2013 WL 6044329 (Louisiana 14 November 2013); *Sevcik v Sandoval*, 911 F Supp 2d 996 (Nevada 2012) (a case decided actually before *Windsor*). However, the vast majority of Federal District Courts addressing the issue could not act quickly enough to overturn state traditional marriage definitions in their hot pursuit to change culture after *Windsor*, probably illegally at the time. See *Robicheaux* (see 7-8).

arguments had been virtually abandoned by advocates in recent SSM cases, until Justice Kennedy sought to resurrect them in *Obergefell*.⁴¹ Although EP Clause arguments are considered by some to have greater importance, I (with the dissenters in *Obergefell*) do not believe that Clause should have afforded anyone a right to SSM.⁴² I will address the typical EP and DP Clause arguments in basic detail especially for the sake of informing international colleagues.

A Equal Protection Analysis

The Equal Protection Clause in the U.S. deals with classifications of people (individuals or groups) to see if they are either being deprived of a fundamental right,⁴³ or are otherwise being treated unequally in the law. In short, the EP Clause may strike down a law if it deprives someone of either of these guarantees. It states in relevant part: ‘nor shall any State . . . deny to any person equal protection of the laws.’ It requires that similarly situated persons be treated similarly in the law. It employs three

⁴¹ *Obergefell* (see 10, 18-20); see (Roberts J dissenting at 9) (noting the Solicitor General basically dropped any DP arguments in oral argument).

⁴² See *Conde-Vidal*, 54 F Supp 3d, 167-68 (citing and explaining *Baker v Nelson*, 409 US 810 (1972) (SCOTUS dismissing an appeal from the Minnesota Supreme Court’s holding that marriage is between a man and a woman, having been so since the time of Genesis)). While *Baker* is not a full merits opinion, it clearly affirmed the Minn. Supreme Court’s indications there is no such thing as a constitutional right to same-sex marriage, and indicated an alleged right to same-sex marriage is not even a federal question. See *Baker*, 810 (overruled in *Obergefell* (see 23)).

⁴³ Resort to ‘fundamental rights’ verbiage (and the meaning of this) in the EP test is itself suspect since it tends to blur any intended line between the DP and EP Clauses, which Justice Scalia had warned about, and I tend to agree with him. See *Obergefell* (Scalia J dissenting at 8-9). Since SCOTUS has in fact used this fundamental rights prong in EP Clause analysis (sometimes), I include it here as part of this analytical framework, like it or not. I also note that Justice Alito in *Windsor* separates this prong, saying nothing about it in his EP analysis. See 133 S.Ct. (Alito J dissenting at 10-13). Some of the Justices have also criticized the use and span of implied ‘fundamental rights’ championed under the vague idea of ‘substantive due process’ in the DP Clause. (Scalia J dissenting at 17); (Alito J dissenting at 7) (expressing caution about substantive due process).

levels of scrutiny to determine if a law violates equal protection, according to the classification of people impacted by the law. In short, these are:

a) Heightened, or strict scrutiny. If a law burdens (negatively affects) either:

(i) someone's fundamental rights (like a right to educate one's own children, or voting);⁴⁴ or

(ii) a suspect (protected) class of people (i.e., African Americans or other ethnic groups),

then the classification singled out in the law must be *narrowly tailored to achieve a compelling state interest* (i.e., the law must have a compelling state interest to justify and single out a certain class of people or to impact one of their fundamental rights). If the law does not meet that standard of strict scrutiny, it is unconstitutional and will be stricken (few laws that are examined under strict scrutiny survive).

b) Intermediate scrutiny (used typically only in gender classifications): if a law burdens a quasi-suspect class (i.e., it uses a gender-based classification) then the classification in the law must be substantially related to an important government interest (these laws are easier to pass muster).

c) Rational basis review or scrutiny: If a law does not burden someone's fundamental right, or a suspect class (or a quasi-suspect class), then the classification in the law need only be rationally related to a legitimate state interest to be valid; i.e., generally, a specific law that does not single

⁴⁴ Note again the concern I have with the imprecise meaning of this prong and its inclusion in EP Clause analysis.

out a suspect or protected class of people, nor threaten a fundamental right, will survive if there is a rational basis for its existence, serving a legitimate government interest (these laws are the easiest to survive).⁴⁵

If a law is not subject to strict scrutiny, it is usually then reviewed under the easier, rational basis standard. SSM was never a fundamental right (until *Obergefell* invented it) and actually still lacks that quality of a right, and traditional marriage laws have not targeted a ‘suspect class’. Homosexuals have never been found to constitute a suspect class, and even Justice Kennedy in *Obergefell* did not say they were (to the disappointment of SSM advocates). First, a fundamental right is only one that is deeply embedded in the nation’s history and traditions; it is a right so valuable and essential to the concept of ordered liberty that justice and fairness could not exist without it.⁴⁶ Marriage (like also raising a family, educating one’s children, and several others) is considered a fundamental right, but same-sex marriage is not. It is new.⁴⁷ It is not even considered a right by all in the homosexual community. Some gays oppose it because they cherish unshackled promiscuity, and could care less about identifying with ‘marriage’, while others oppose it on religious grounds, sharing the same true meaning of marriage in traditional Christianity, and still others oppose it as not ideal for raising a family.⁴⁸

⁴⁵ *Windsor* (Alito J dissenting at 10-13).

⁴⁶ *Washington v Glucksberg* 521 US 702 (1997) (no right to suicide; listing traditional rights of marriage, procreation, etc.).

⁴⁷ It would also be circular and improper reasoning to attempt to construct a new definition of marriage by incorporating SSM into it, and then saying it is a fundamental right to marry, but that is exactly what Justice Kennedy and the majority in *Obergefell* attempted to do. See 576 U.S. at ___ (see 17, 22-23).

⁴⁸ D Mainwaring, ‘I’m Gay and I Oppose Same-Sex Marriage’, (2013) *Public Discourse*, The Witherspoon Institute. Find at <<http://www.thepublicdiscourse.com/2013/03/9432/>>.

Second, sexual identity/orientation has never been accepted by SCOTUS as a suspect and specially protected class, in contrast to race, ethnicity, etc. In order to qualify as a suspect class, sexual identity or orientation would have to characterize a group which ‘exhibits obvious, immutable, or distinguishable characteristics that define them as a discreet group.’⁴⁹ Those with alternative sexual identities lack these attributes. As the American Psychiatric Association (APA) explained, sexual orientation covers a wide range of sexual desires and is not an immutable characteristic (like one’s race or skin color).⁵⁰ Sexual orientation can change and no evidence exists to show people are born gay. Sexual identity consists of a mixture and range of various sexual inclinations on a wide spectrum (i.e., it is not a discreet group); it is a behavioral characteristic, and might include sexual experimentation or curiosity growing up.⁵¹

⁴⁹ *Bowen v Gilliard* 483 US 587, 603 (1987).

⁵⁰ Nevertheless, Kennedy J twice claimed sexual orientation is immutable in *Obergefell* (see 4, 8). His lack of support, except for a smack of agendized, biased ‘science’ does not count for anything. For a good discussion of the legal analysis, see Gene Schaerr and Ryan Anderson, ‘Legal Memorandum, Memo to Supreme Court: State Marriage Laws Are Constitutional (no. 148)’, *Heritage Foundation* (online), 10 March 2015, 6-7 <<http://www.heritage.org/research/reports/2015/03/memo-to-supreme-court-state-marriage-laws-are-constitutional>>.

⁵¹ Gene Schaerr and Ryan Anderson, ‘Legal Memorandum, Memo to Supreme Court: State Marriage Laws Are Constitutional (no. 148)’, *Heritage Foundation*, 10 March 2015. Some SSM advocates, like the Justices in *Obergefell*, say SSM should be allowed under *Loving v Virginia* 388 US 1 (1967). In that case, SCOTUS struck down a Virginia marriage law forbidding interracial marriages. But the Court still considered marriage to be the union of a man and woman, never doubting it. Also, one’s sex and gender are intrinsic to marriage and define it; race does not. Ryan Anderson, ‘7 Reasons Why the Current Marriage Debate Is Nothing Like the Debate on Interracial Marriage’, *The Daily Signal* (online), 27 August 2014 <<http://dailysignal.com/2014/08/27/7-reasons-current-marriage-debate-nothing-like-debate-interracial-marriage/>>.

Marriage laws supporting the traditional definition of marriage should not be subject to strict scrutiny (i.e., for targeting a suspect class or fundamental right), but should only be analyzed under a rational basis standard for their support. Such an articulated, rational basis of course exists. It is to channel sexual intercourse into a structure that supports child rearing, and builds strong traditional families that benefit society; many other supporting rationales exist.⁵² Since traditional marriage is rational, state laws supporting it should have been allowed to stand.

B *Due Process Analysis*

As indicated, the Due Process Clause of the Fourteenth Amendment had not been getting much air time before *Obergefell* as an argument in support of SSM (the Solicitor General in that case did not rely on it in oral argument).⁵³ Since Kennedy decided to revitalize it, combine it with equal protection, and extract out of it new, fundamental, liberty interests in (i) one's sexual identity and (ii) dignifying that identity through SSM, it is a good idea to shed some light on it.

Essentially, in order to constitute a due process violation, the right claimed as being violated must be (1) articulated with particularity, and (2) fundamental (in the order of magnitude discussed above, as deeply rooted in the nation's history and traditions, so that ordered liberty could not exist without it).

Supporters of SSM cannot simply argue marriage is a fundamental right (it is, we all know), and say gay couples should thus have it. Instead, they

⁵² See *DeBoer* (see 19) (marriage constructively directs sexual intercourse in society); *Robicheaux*, 2 F Supp 3d (see 8, 15) (marriage channels sexual intercourse into stable male female relationships and ideally links children with their biological parents, a mom and a dad).

⁵³ Transcript of Oral Argument, *Obergefell v Hodges* (28 April 2015), available at <www.scotusblog.com>.

must show *SSM* itself is a fundamental right. It is incorrect for them to try to establish it as so: (a) start by simply reiterating marriage is a fundamental right, as all cases say it is, (b) then injecting that same-sex couples should also have it, and (c) voilà, safely concluding marriage is a fundamental right for same-sex couples. This is sheer legal ‘bootstrapping’ (insufficient, circular reasoning). It leaves open the question still to be answered and assumes what has yet to be shown: why should same-sex couples⁵⁴ be allowed to marry in the first place? The answer (says Kennedy J) is because they want to, and have said so in no uncertain terms, and are also generally good people entitled to it.⁵⁵ Is that indicative of a fundamental right, however? It is not. But this circularity of argument is precisely what *SSM* advocates say all the time, and it is the very essence of Justice Kennedy’s majority’s opinion in *Obergefell*; the entire holding is grounded in circular reasoning. It is sheer judicial bootstrapping.⁵⁶ *Obergefell* casts aside all definitions of what a marriage is (in its essence), and is a reflection again of simple Court politics; one view of morality is simply substituted for another according to who is in charge. If we change the Court’s composition we can change the result, but a genuine fundamental right to *SSM* was never shown in this case.

As I noted, the very best the majority could come up with is (i) some kind of individual, self-autonomy right to follow one’s sexual identity (destiny) (as if this sexual side is all there is to someone’s identity), and (ii) solemnizing and recognizing that right through nothing short of marriage, on equal terms with complementary-sex couples (as if it could

⁵⁴ The term opposite-sex couples as suitable for marriage (juxtaposed against same-sex couples) sounds slightly ignoble. I think a better term in conveying the truth of marriage is to say it is for complementary-sex couples.

⁵⁵ *Obergefell* (see 5, 15).

⁵⁶ *Ibid* (see 6, 10, 12-18, 22-33) (saying, in sum, it is time to confer on same-sex couples the same dignifying and economic state benefits that have been enjoyed by couples in traditional marriage).

ever be the same thing).⁵⁷ Justice Kennedy insists marriage is a necessary second step, so it shall be given, he says. It is as if marriage is some sort of status thing a State can dole out to certain candidates, rather than a thing already defined in itself, inherently, as a male-female union.⁵⁸

I should ask: does the Constitution equally give anyone a right to a career of his/her choosing, one that best suits their self-identity and expresses who they are, and dignifies that identity with an actual job? I ask because careers, skills, talents, and socio-economic roles can shape a person's identity just as much if not more so than his/her sexual identity? Is this suitable career match a right given in the Constitution? It is not.

C *Summary and International Implications*

Justice Kennedy and the majority in *Obergefell* did not ground their decision on a straightforward analysis of either equal protection or due process. Instead Kennedy resorted to a creative mixture of ideas in both clauses, intermingling them, to shape a new liberty interest in seeking out one's sexual identity, as a kind of fundamental right to individual autonomy and self-expression. It is a right to be all you think you are, sexually speaking, followed by a necessary second right of marriage to solemnize and approve the first right. Regrettably, Justice Kennedy failed to see that marriage has already been exclusively defined in nature, and that simply changing the label of something cannot change what it is. Marriage is not a creature of any State legislative process, and is not designed to injure and harm. Its existence precedes statutes, even if incorporated into them only for definitional purposes. It is what it is and always will be, all clever wordplay aside. So-called 'same-sex marriage'

⁵⁷ *Obergefell* (see 2, 10, 13).

⁵⁸ *Ibid* (see 10, 13-14).

is really just an imitation of actual marriage; it is not real marriage, and never can be.

Kennedy's analysis is shaky ground to rest new rights upon, given the sweeping implications for every State across the nation. It is also not one likely to be embraced very widely internationally.⁵⁹ As evidence of this weak foundation, Justice Kennedy's critics are not only the case dissenters, nor the millions of Americans with similar views, but even liberal scholars expressing serious concerns about the basis of this decision. They question vaguely included 'dignity rights', the absence of a straightforward EP Clause analysis, and implications of all this to our nation.⁶⁰ Dignity is something we already have as humans anyway. I next

⁵⁹ The results in Western Europe are a little bit mixed. States like the UK and Ireland (summer 2015) have voted to allow SSM, and Norway has approved it since 2000. But the European Court of Human Rights has made it abundantly clear in several cases that SSM is not a fundamental human right under Article 12 of the European Convention on Human Rights (examining other provisions too). It has said so again more recently in regard to Finland and a transgender marriage case there. See Stefano Gennarini, 'European Court: Gay marriage is not a human right', *LifeSite* (online), 25 July 2014 <<https://www.lifesitenews.com/news/european-court-gay-marriage-is-not-a-human-right>>. The European Court has decided this is essentially a matter left up to each country (but all this was pre-*Obergefell*). Since Justice Kennedy is notorious for trying to apply international law in important cases, he should have at least followed that same reasoning before ignoring States' rights in *Obergefell*.

⁶⁰ *Obergefell* (Scalia J dissenting at 8-9); (Alito J dissenting at 2-8); see Jeffrey Rosen, 'The Dangers of a Constitutional "Right to Dignity"', *The Atlantic* (online), 29 April 2015 <<http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>> ('expansion of the constitutional right to dignity may produce far-reaching consequences that [gay couples] will later have cause to regret'); see also Jonathan Turley, 'Obergefell and the Right to Dignity', Blog, Columns (online), 5 July 2015 <<http://jonathanturley.org/latest-column/>> (noting the elusiveness of a right to dignity in this context, and that Justice Kennedy failed to consider homosexuality as a protected class, raising concerns over harms to other freedoms, like religion and speech). So it seems many liberals should also feel cheated by *Obergefell*, since it stopped short of defining sexual orientation as a protected class. It is too elusive to measure and call a class.

summarize much of what I have already said, adding some things into a short list of errors.

XX A SHORT TOP 10 LIST OF GLARING ERRORS IN KENNEDY'S OPINION AND IN HIS WORLDVIEW

As I said, an entire treatise should be devoted to this subject. I intend here only to summarize some arguments I have already made, and to include Justice Kennedy's most glaring mistakes in the majority opinion. I state these in the third-person singular for convenience sake:

1) Justice Kennedy has failed to comprehend that inherent in the definition of marriage is a male-female union. It is essential to it; it is not marriage without that; this is simple etymology and biology. It is as if in Kennedy's mind, a circle asked to be a square: we can pretend to give it that so-called 'right', and label the circle a 'square', and even give it equal status with a square, but it will always be a circle.⁶¹ SSM, similarly, will never actually be marriage.

2) Justice Kennedy consistently confuses the incidents and benefits of marriage, with the institution itself. It is as if he actually defines marriage as some sort of status conferred upon individuals by the State, attaching to it a series of benefits and civil rights the recipients of the status are intended to enjoy. I saw no clear definition of marriage from him, and what this 'right to marry' is, apart from his status concept, giving same-sex couples the same treatment as complementary-sex couples. Surely, if

⁶¹ Squares and circles are both shapes, but marriage does not exist at this level of generality; it has a much more specific meaning, as if a specific kind of shape itself. Several internet sites showing a simple etymology of the word marriage are available. Since the male-female union is distinct in so many ways, it should have its own distinct label. It has earned it.

marriage is a fundamental right, it should be carefully defined by this Court. It is not.⁶²

3) Justice Kennedy confuses sameness with equal treatment; the latter can be achieved, if society so chooses, without trying to redefine what something is to make it the same as something it is not.⁶³ A simple illustration is voting rights given to women. In that instance, we did not rename women, ‘men’ simply to give them the same voting rights as men. Similarly, in the American civil rights movement, we did not deem African Americans ‘white’ in order to give them the same rights as white Americans. Similarly, gay couples are inappropriately called ‘married’ in order to achieve similar rights of married couples. Statutes can address inequalities, if necessary, but they can’t actually create sameness of actually different things. Same-sex couples and complementary ones are simply not the same, and no amount of state treatment and relabeling can change that. Get over it.

4) In several places Kennedy says marriage is something for couples of either sex. He assumes two people for marriage, without giving any rational basis for so limiting it to two, since it is all about one’s sexual identity. Some people’s identity may cause them to want many spouses, choosing marriage with either sex and in any amount of spouses they wish. If Kennedy intends marriage as only for couples, he should have

⁶² *Obergefell* (see 15, 17).

⁶³ It is very strange that in *Obergefell*, Kennedy never seriously addressed the idea of civil unions, as potentially giving gay couples the same rights and equal treatment as traditional, married couples, since it is the benefits of marriage it seems he is after. This was the solution initially reached by the California Supreme Court in the Proposition 8 cases, and by the European Court of Human Rights in its jurisprudence. It is as if Kennedy cannot see the benefits of marriage as something distinct from marriage itself (see point 2). Again, we cannot simply turn different things into the same thing by giving them the same label. SCOTUS has no magic wand to change this reality. It is only pretending in a world of judicial make-believe. So the decision is hollow in the end.

supported this with a solid rationale. But his rationale supporting SSM cannot support his own assumption of couples, since it assumes validity of any sexual unions, in and among each of the sexes. This effectively permits various combinations of sexual interrelationships, in some vague set of commitments to each other, including group marriages.⁶⁴ Sexual identity would seem to allow just about anything: pedophilia, incest, and multiple partners with all of it. It is one's identity, after all, and who are we to judge that? So it is a sinless issue for Kennedy and the majority.⁶⁵ Anything should go.

5) In some places, Kennedy says homosexuality is 'immutable'. Scientifically, this is sheer nonsense. Sexual identity is not even clear-cut, but can and often does reflect a wide variety in a spectrum of sexual attractions and experiences, and sometimes involves sheer experimentation or youthful curiosity. It can fluctuate over an individual's life span, and can also honestly change completely.

6) Kennedy essentially says gender or sex is irrelevant to the institution of marriage (I am using his terms interchangeably, indicative of his intent). But if one's sex is irrelevant to marriage, why is it virtually everyone has a biological sex (intersex variants aside)? If it doesn't matter in marriage, when would it matter? Every individual owes his/her very existence to

⁶⁴ The case has scores of references to couples or two people. *Obergefell* (see 2, 3, 12-19, 22, 23, and so on).

⁶⁵ Justice Kennedy also inexplicably intones sexual identity is morally alright if it is for gay and straight couples, specifically of the adult variety (this would seem to alleviate some concerns of Kennedy's willingness to embrace incest, bestiality, pedophilia and other variations usually considered immoral). But who gave him the moral authority to judge which sexual identities are approved and which are not, or to so limit these identities to straight and gay adult couples? He has no authority to say which sexual identities are approved, and to draw a line around the approved ones against the others, does he? Kennedy certainly has no authority and no expertise to determine an informed public consensus on the issue, if that is all there is to it, which it is not. Such authority is not his to assume.

the coupling of a singular male and female, to two sexes. The same individual will also likely inherit a distinct male or female sex from his/her biological parents. Sex and gender are thus indispensable to human existence itself. It matters. Human life cannot exist without the male and female sexes. To disparage sex as irrelevant to marriage is an insult to the species. Although Kennedy claims his neutering of marriage in no way harms opposite-sex couples, in fact he insults everyone whose inherited biological sex and identity as a male or a female actually matters in their marriage.⁶⁶ If one's sex as male or female is irrelevant to marriage, when would it ever matter? It would not. So, America is also embroiled now in a toilet and locker room sharing conundrum, confusing itself as to whether being a male or female makes any difference inside the toilet or shower.

7) Justice Kennedy, the majority, and countless SSM advocates have had the hardest time grasping another important distinction: asserting conduct is immoral is not equivalent to hating the people doing it (it should be so easy to get). I can call my friend's sinful lifestyle immoral, and this is not hating him. But force me to accept it as moral and good when I think it is not, then we have a problem. Animus, however, lies in the hearts of those who encounter others who will not accept their conduct, instead considering it immoral. So, who hates who in this discussion? It is the LGBT advocates and their sympathizers who hate those who will not agree with them.⁶⁷

⁶⁶ So now there are efforts to eliminate male and female toilets and locker rooms, ban terms like Mr. and Mrs., man and woman in some college campuses in the U.S., and even some court documents in child care cases are being changed to 'Parent 1' and 'Parent 2' (instead of the terms Mother and Father), infuriating many parents.

⁶⁷ I can give some credit to Justice Kennedy in *Obergefell* for seeming to graduate beyond his silly idea in *Windsor* that opponents of SSM are homophobic bigots,

8) Kennedy's insistence on avoiding stigma for children of same-sex-couple households (by giving the parents a dignified status of marriage), is hollow, ineffectual (it does not actually achieve this), and is insulting to single-parent and similarly situated families having children but no marriage. Stigma is not the issue for any of these children; sympathy is.⁶⁸

9) The case is an oozing self-contradiction in Kennedy's career. In *Windsor*, Kennedy clearly stated the definition of marriage is a matter left to the States. So he struck down a single, federal definition of marriage (DOMA) in that case. In an act of supreme judicial hypocrisy, he and the majority, have now instituted a single federal definition of marriage (it is the one in California, or Massachusetts, or New York mandating SSM). He has betrayed the very thing he said he and the Congress could not do: impose a national definition. He did it, and he knows it.⁶⁹

10) The decision simply is not true. SSM is a lie; it is not marriage. And the greater lie in *Obergefell* suggesting we can simply change things in the law by relabeling them, sets a bad precedent and message to all, including our children and future generations. It speaks a message that it is alright to conjure legal fictions, not based on what is real, in order to manipulate and twist the legal meaning of things, so someone can achieve

and by acknowledging sincere, good faith arguments in favor of traditional marriage (see 4). But vestiges of this sentiment still sadly remain (see 19), and secularists are quick to exploit this for shallow political gain, especially through social and mainstream media.

⁶⁸ Several related issues surround Kennedy's stigma argument and show its insufficiency: What about cohabitating couples with children, straight and gay, who do not want to get married? Can SCOTUS just deem them married, with some swipe of its judicial wand, and solve the stigma their children might face? Isn't that what it has attempted in this case? And what about single gay parents, who do not want to marry, but insist on living an active gay lifestyle? How do we solve that child's stigma; how can the Court solve any such stigmas?

⁶⁹ I intend nothing about the importance of this violation by placing it ninth on this list (it is only a matter of sequence). Its severity is unimaginably profound and the dissenters have rightly taken Justice Kennedy to task for his switch.

their cherished agenda. Isn't this what communism did? We may as well throw out the welcome mat for complete corruption in our legal system (if we have not already). This word-shuffling game is a bad approach. It lacks legal integrity, and has serious implications for all sorts of social institutions. It does not inspire hope toward a good and just society. If we can do this with marriage, we can do it with anything.

I am not sure how Justice Kennedy sees himself after his historical decision in *Obergefell*. I imagine he considers himself a champion in some great social cause, and perhaps a hero of sorts in this case and what it achieves. I suggest however, if history survives another hundred years, he and his supporting cast of four other Justices in *Obergefell* will be seen in hindsight not as the heroes of this case, but as its goats.

XXI CONCLUSION

Secular humanism is the ideological underpinning that gave us SSM, and specifically ushered in *Obergefell*, with its imposed new sort of marriage applicable now in all Fifty States. Far from being neutral, as it claims to be, secular humanism is just another religion, an ideology seeking to supplant the Christian worldview (along with other similar religions) on important social and legal issues of the day. It seeks to inform the law itself and shape it. This is impermissible viewpoint discrimination. Christian ethics belong at the table of public discourse on important social issues, not just because this is right in a pluralistic society, but because its ethics are superior, time-tested, and usually indicate what is best for society. A Christian ethic would not twist marriage into a shape called same-sex marriage which the framework of marriage itself cannot hold. Secular humanism, in the end, will irreparably harm society, if left unchecked.

Justice Kennedy and the majority in *Obergefell* invented new sexual identity and marriage rights and contorted the Fourteenth Amendment's EP and DP clauses to somehow locate these so-called rights in the Constitution. SSM is a concocted creation not having the status of a fundamental right (a human right), and is especially not a sweeping right, if one at all, to be imposed all across the nation as somehow commanded in our Constitution. Kennedy even betrayed his own holding in *Windsor* (confirming that issues of marriage or SSM are left for the States to decide), to achieve his contrary result in *Obergefell*.

I hit most of the problems in a Top 10 list of his jurisprudential and worldview mistakes immediately above. In short, they show Kennedy's non-comprehension of what marriage is. In a sincere Equal Protection Clause analysis (i.e., not the one SCOTUS' majority craftily invented), state traditional marriage laws should have easily survived the applicable rational basis review.

In the end, for Justice Kennedy and the majority, this case is really about legitimating homosexuality in our society. Marriage (and having children) seems to be the instrument for getting that done. I don't believe *Obergefell* can or should accomplish this. Certainly, legalizing something has some impact on public perception and gaining acceptance of it. I assume this legalization of SSM will cause many more in the public to accept homosexuality as morally acceptable conduct, and this state mandated marriage status proves it. But not everyone will be so easily fooled, and not everyone should be compelled to agree, nor forced to act contrary to their beliefs, nor to accept or participate in something they feel is wrong (and in fact, is).

In order to get the universal change of mind Kennedy and his companions seek, we would have to eviscerate the First Amendment entirely and make it illegal for someone to believe that homosexual conduct (and not just its inclinations) is a sin, and that SSM is its supporting, institutional, immoral counterfeit. Even something that drastic cannot succeed in changing minds, however. It can't take away what people really believe in their consciences, in the religion of their hearts and in Scripture, and in how they raise their children to think accordingly. An effort that severe is likely to cause a civil war, a real one. It is absurd in any case to seriously suggest the legalization of anything controversial (like SSM) requires everyone's support of it.⁷⁰

Something else should be said about the manner of Justice Kennedy (and the majority) reaching his agenda via this case. If his objective was to have a uniform national policy implementing SSM, this has got to be the least effective way to make it stick. This is the most divisive, underhanded, and unprincipled way of going about it. The States, and citizens, should have had a vote and say on this issue. This whole case might implode one day under the enormous weight of its sheer invalidity.

I believe in history this case will be regarded as a huge mistake. Intelligent nations around the world would do well to soundly scrutinize the *Obergefell* case, and flatly reject it. This article is aimed at informing and influencing American and international audiences toward higher, better thinking about so-called SSM.

⁷⁰ The growing, recent, despicable weaponising of *Obergefell* into a bullwhip to injure and humiliate other Americans of good conscience, character and will, especially small vendors in the wedding industry, is the subject of the second article.