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ROBERTS, KENNEDY, AND THE SUBTLE DIFFERENCES THAT MATTER IN *OBERGEFELL*

Joseph Landau*

I.

By upholding a nationwide right to marry for same-sex couples in *Obergefell v. Hodges*,¹ the Supreme Court's enormously significant decision resolves a major civil rights question that has percolated through our legal system and coursed through our culture for some time. The ruling was not an unforeseen outcome, but it brings welcome clarity by ensuring marriage rights for same-sex couples throughout all fifty states. Building on *United States v. Windsor*²—a 2013 decision striking down section 3 of the Defense of Marriage Act (DOMA), which prevented gay and lesbian married couples from receiving federal benefits—*Obergefell* is an important and fitting capstone to prior cases about the constitutional rights of same-sex couples.³

Obergefell and *Windsor* feature an especially vibrant debate between Justice Kennedy and Chief Justice Roberts, two Justices whose overlapping judicial philosophies lead them to agree on most legal outcomes.⁴ Both Justices value respectfulness of political process, yet both are, as a matter of principle, prepared to intercede when there are especially strong reasons for doing so. Both Justices are largely committed to the views of the more traditionally conservative wing of the Court, yet both have been willing to move to the middle to preserve certain democracy-reinforcing values, as witnessed by their mutual votes in the 2014–2015 Term to uphold portions of the Affordable Care Act in *King v. Burwell*.⁵

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1. 135 S. Ct. 2584 (2015).

2. 133 S. Ct. 2675 (2013).

3. *Id.* at 2696. Section 3 of DOMA defined marriage as “a legal union between one man and one woman,” reserving “the word ‘spouse’” under federal statutory and regulatory law “only to a person of the opposite sex who is a husband or a wife.” See Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

4. During the four consecutive Terms ending in 2014, Chief Justice Roberts and Justice Kennedy were in agreement 88 percent of the time. See Jeremy Bowers, Adam Liptak & Derek Willis, *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (July 3, 2014), <http://www.nytimes.com/interactive/2014/06/24/upshot/24up-sctus-agreement-rates.html> [<http://perma.cc/UJB6-WL2F>].

5. 135 S. Ct. 2480 (2015).

Nevertheless, the two Justices are at loggerheads in the gay rights cases. Kennedy's majority opinions and Roberts's dissents in *Obergefell* and *Windsor* reveal a nuanced difference of opinion regarding the institutional role of the judiciary that leads them to dramatically different outcomes.⁶ The gay rights cases show Justice Kennedy to be a functionalist whose view of constitutional adjudication varies based on the particular circumstances of a given controversy. Chief Justice Roberts, by contrast, is a formalist whose bright-line approach to the separation of powers admits no exception and leads ineluctably to the conclusion that emerging civil rights issues must always be left to the political process.

Yet Kennedy's functionalism in *Obergefell* and *Windsor* also has formalist undertones of its own, rooted largely in procedural matters, and therein lies at least one major difference between Roberts and Kennedy. Kennedy appears genuinely concerned about legal regularity, notice, and the manageability of rights—and this instinct drives him to intervene in cases that Chief Justice Roberts would leave entirely to the political process. Justice Kennedy's unusual blend of formalism and functionalism, hardly unique to his gay rights opinions, fuels a dispute with the Chief Justice that has emerged in the contexts of national security and criminal sentencing and will likely resurface in future controversies as well.⁷

II.

Chief Justice Roberts's dissenting opinion in *Obergefell* credits the plaintiffs' "strong arguments rooted in social policy and considerations of

6. Roberts and Kennedy also sparred over the question of standing in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), with Roberts writing the majority opinion and Kennedy the dissent. *Hollingsworth* considered the issue of whether private intervenors who defended California's Proposition 8—a voter initiative that restricted marriage to different-sex couples—had Article III standing to appeal the trial court decision striking down Proposition 8 in federal district court. *Id.* *Hollingsworth* raised different questions than those in *Obergefell* and *Windsor* and will not be addressed at any length.

7. In *Boumediene v. Bush*, 553 U.S. 723 (2008), Roberts and Kennedy took to opposite sides on the availability of habeas corpus protections for foreign national detainees at Guantanamo Bay. Both Justices adopted a separation of powers analysis—with Kennedy vindicating the petitioners' access to habeas based on deeper concerns about procedural regularity at Guantanamo, *see id.* at 779–92, and Roberts adopting a purely formalist analysis based on legislative supremacy and judicial restraint, *see id.* at 801–26 (Roberts, C.J., dissenting). In *Graham v. Florida*, 560 U.S. 48 (2010), Roberts and Kennedy again engaged a substantive disagreement highlighting their disparate takes on procedural regularity. Much of Kennedy's majority opinion that the Eighth Amendment bars life sentences without parole for juveniles who commit nonhomicide offenses appeared rooted in a concern about the disparate application of current sentencing regimes across the various states. *See id.* at 74–75 (finding a bright-line rule "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment"). While Chief Justice Roberts agreed that the particular sentence was unwarranted in the case at bar, he sharply rejected Kennedy's blanket Eighth Amendment rule as a curative to sentencing inequities. For Roberts, "judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions" and the ultimate decisions should therefore be left to "sentencing judges applying their reasoned judgment to each case that comes before them." *Id.* at 96 (Roberts, C.J., concurring).

fairness” and acknowledges that their “position has undeniable appeal.”⁸ But where unenumerated rights are concerned, he believes the Supreme Court should never venture into ongoing disputes of political significance: “[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”⁹ Thus, the same-sex marriage debate must continue to unfold in the precincts of politics, the media, and culture—not the courts.

Even as Justice Kennedy reaches a contrary outcome, he pays lip service to a view—not altogether different from the Chief Justice’s—that “it is most often through democracy that liberty is preserved and protected in our lives.”¹⁰ Yet Kennedy casts the democratic process in far more open-ended terms. His is a dialogic jurisprudence informed through consultation with a broad group of governmental and non-governmental actors in the framing of a conversation about rights. The marriage debate, he explains, has been shaped by “referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings.”¹¹ And “[t]here has been extensive litigation in state and federal courts” as well.¹² Respecting dialogue means being open to considering all of these various sources, including ones that might not traditionally carry legal or constitutional weight. Kennedy thus rejects the argument “that it would be appropriate . . . to await further public discussion and political measures before licensing same-sex marriages”;¹³ for Kennedy, a sufficient amount of discussion and political change has already occurred.

Interestingly, Justice Kennedy does not rely exclusively on legislative success in the form of enacting statutes or passing referenda; he is also interested in the less concrete manifestations that have shaped the marriage landscape—“debates,” “grassroots campaigns,” and “studies, papers, books, and other popular and scholarly writings.”¹⁴ The *conversation*—regardless of actual legislative outcome—drives the constitutional change, and when a certain saturation point is reached, “individuals need not await legislative action before asserting a fundamental right.”¹⁵ In those circumstances, the Court must step in “even if the broader public disagrees and even if the legislature refuses to act.”¹⁶

After laying out this broad and open-ended conception of the marriage debate, Justice Kennedy recognizes the inequitable state of affairs it has produced. An array of legislation, voter initiatives, and court decisions has caused an “impermissible geographic variation in the meaning of federal

8. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

9. *Id.*

10. *Id.* at 2605 (majority opinion).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

law.”¹⁷ Same-sex couples in some states enjoy state law protections of “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access”;¹⁸ and the like, while similarly situated couples in other states lack those same protections. This is not a small problem, and the inequity raises large concerns about evenhandedness and the equitable administration of law, something the Supreme Court is uniquely equipped to respond to—and resolve. When the laws become this unmanageable, unworkable, and inequitable, “[t]he Nation’s courts are open.”¹⁹

III.

Windsor also featured a dispute between Kennedy and Roberts that arose out of the Obama Administration’s refusal to defend in court the constitutionality of section 3 of DOMA.²⁰ The Obama Administration’s litigation position raised an apparent justiciability problem because the plaintiff in that case, Edie Windsor, had prevailed at the district court level (and again before the court of appeals), and the Obama Administration appealed its losses in court in an effort to sustain—not overturn—the rule of law articulated below.²¹

The justiciability question—whether the Court could reach the merits of a suit in which the appellant, while technically losing the case, had agreed with the legal analysis by the inferior court—provoked another tense and sharp debate between Chief Justice Roberts and Justice Kennedy. Roberts believed the Court should leave the matter solely to the political process and not hear the merits. During oral argument, he criticized the President for lacking “the courage of his convictions” by refusing to defend (while continuing to enforce) a law his administration determined was unconstitutional.²² Roberts chastised the President for placing the issue in the Court’s hands, seemingly saying (in the Chief Justice’s words), “[o]h, we’ll wait till the Supreme Court tells us we have no choice.”²³

While Justice Kennedy’s majority decision delivered a very different outcome—namely, that the Obama Administration’s enforce-but-not-defend policy did not deprive the Court of jurisdiction to rule on the statute’s constitutionality and that the law was in fact unconstitutional²⁴—he appeared to agree with Roberts’s starting point that, as a general matter, the President should not “challenge statutes in the judicial forum rather than

17. *Id.* at 2606.

18. *Id.* at 2601.

19. *Id.* at 2605.

20. See Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<http://perma.cc/KW9E-D988>].

21. *United States v. Windsor*, 133 S. Ct. 2675, 2683–84 (2013). Once the Obama Administration refused to defend DOMA, others stepped in to argue in favor of the statute’s constitutionality. *Id.* at 2684.

22. Transcript of Oral Argument at 12, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

23. *Id.*

24. *Windsor*, 133 S. Ct. at 2686.

making the case to Congress for their amendment or repeal.”²⁵ But Kennedy did not see *Windsor* as an ordinary case. The Obama Administration had come to a “principled determination” that state-sponsored sexual-orientation discrimination was unconstitutional, and that position led it to conclude that DOMA could no longer be sustained.²⁶ This view was the product of a long period of deliberation and was consistent with many of the Obama Administration’s contemporaneous interpretive decisions about LGBT rights.²⁷ Its position also resonated with a growing chorus of state executive branch actors and legislatures, as well as a number of state and federal courts.²⁸ While “the integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise,”²⁹ the executive’s position was consistent with a growing consensus across multiple governments and institutions. And that consensus, once again, brought Kennedy to a flexible jurisprudence that sharply contrasted with that of the Chief Justice.

Just as the “impermissible geographic variation in [marriage] law”³⁰ motivated Kennedy’s constitutional analysis in *Obergefell*, concerns about procedural regularity influenced his *Windsor* opinion. Without a definitive ruling from the Supreme Court on the constitutionality of section 3 of DOMA,

[t]he district courts in 94 districts throughout the Nation would be without precedential guidance . . . involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations . . . Rights and privileges of hundreds of thousands of persons would be adversely affected . . . [I]t is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. . . . [T]he costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved.³¹

These conflicting legal regimes produced “unusual and urgent circumstances”³² necessitating the Court’s exceptional exercise of jurisdiction over the case and attendant resolution of the substantive question of DOMA’s unconstitutionality.

25. *Id.* at 2689.

26. *Id.*

27. See Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719, 1756–65 (2014) [hereinafter Landau, *Presidential Constitutionalism*]; see also Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 624–47 (2012).

28. Landau, *Presidential Constitutionalism*, *supra* note 27, at 1764–65, 1764 nn. 250–52.

29. *Windsor*, 133 S. Ct. at 2689.

30. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015).

31. *Windsor*, 133 S. Ct. at 2688.

32. *Id.*

IV.

Chief Justice Roberts's formal approach to institutional process in *Obergefell* and *Windsor* has the benefit of clarity—it purports to say exactly when, and only when, courts can intervene to resolve substantive disputes. By contrast, Kennedy's is a largely functionalist methodology that changes case by case and from one context to the next. While the metes and bounds of Kennedy's functionalism are not always clear, *Windsor* and *Obergefell* provide some indication of what seems to matter most to Kennedy. The "impermissible geographic variation"³³ in *Obergefell* and the "costs, uncertainties, and alleged harm and injuries"³⁴ in *Windsor* point to Kennedy's deeper commitment to uniformity, notice, and equitable administration of the law. Thus, Kennedy's jurisprudence is couched not only within the separation of powers, but concerns about procedural regularity and consistency. Put differently, there is more than a hint of formalism underlying Kennedy's functionalism—a subtlety within his jurisprudence that marks an important dividing line with the Chief Justice.

Dialogue and consensus are also important values for Kennedy. While his criteria for Court action are not entirely self-evident, they take note of (without requiring) legislative success and are driven by a consensus-based approach across various institutions (and not just governmental ones) about the right answer to a given legal question. Majoritarian policy debates seem to drive Kennedy—at least in part—as well as the sense that rights need protection when unevenly handled or administered.³⁵ This is a far cry from the classic individual rights conception associated with *United States v. Carolene Products*,³⁶ which addressed the need to protect "discrete and insular minorities" from untoward prejudice.³⁷ Kennedy's is a different brand of jurisprudence; as the gay rights cases indicate, he is comfortable leaving many important rights questions unresolved. Neither of his majority opinions in *Windsor* nor *Obergefell* addresses (let alone resolves) the question whether governmental distinctions based on sexual orientation trigger heightened judicial scrutiny or are subject to existing sex discrimination protections; thus, the opinion's doctrinal ramifications are less apparent.³⁸

But even as Justice Kennedy claims to embrace the Chief Justice's belief in limited judicial interference within ongoing policy debates, he makes

33. *Obergefell*, 135 S. Ct. at 2606.

34. *Windsor*, 133 S. Ct. at 2688.

35. For an intriguing look at the role majoritarian consensus plays within Justice Kennedy's death penalty jurisprudence, see David Menschel, *Justice Kennedy Quietly Empowers Death Penalty Opponents*, AM. CONST. SOC'Y BLOG (July 2, 2014), <https://www.acslaw.org/acsblog/justice-kennedy-quietly-empowers-death-penalty-opponents> [<http://perma.cc/DKX9-7A8J>].

36. 304 U.S. 144 (1938).

37. *Id.* at 153 n.4.

38. See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23 (2015) ("In lieu of a straightforward, and far more defensible, decision based purely on the Equal Protection Clause, Justice Kennedy's reliance on the Due Process Clause is deeply problematic." (footnote omitted)).

room for exceptional judicial interventions—even if only narrowly. And although Kennedy embraces a minimalist approach in *Windsor* and *Obergefell* by leaving undecided so many large doctrinal questions about LGBT discrimination, his opinions wax grandiloquently about the “dignity in the bond between two men or two women” and the way that the “expression, intimacy, and spirituality” of love holds “true for all persons, whatever their sexual orientation”³⁹—language that will likely invite more expansive elaboration by the lower courts and, quite possibly, the Supreme Court.

V.

The Chief Justice’s *Obergefell* dissent provides a full-throated critique of Kennedy’s dialogical conception of constitutional development. Roberts accuses Kennedy’s majority opinion of “omit[ting] even a pretense of humility” and “openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’”⁴⁰ He chastises the majority for “[s]tealing this issue from the people”⁴¹ and for “cast[ing] a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.”⁴² Moreover, he warns that “[t]here will be consequences to shutting down the political process on an issue of such profound public significance,” for “[p]eople denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.”⁴³ Finally, he intimates that *Obergefell* could be the *Roe v. Wade* of gay rights,⁴⁴ invoking comments by Justice Ginsburg a decade after *Roe* that the decision’s “[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”⁴⁵ Yet *Obergefell* has led to little significant backlash⁴⁶—and

39. *Obergefell v. Hodges*, 135 S. Ct. 2564, 2599 (2015).

40. *Id.* at 2612 (Roberts, C.J., dissenting) (quoting the majority opinion).

41. *Id.*

42. *Id.*

43. *Id.* at 2625.

44. 410 U.S. 113 (1973).

45. *Obergefell*, 135 S. Ct. at 2625 (quoting then-Judge Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)). Roberts’s analogy obscures an important difference between the two cases: unlike *Obergefell*, *Roe* was construed as potentially inviting legislation (and movements to enact that legislation). See, e.g., *Roe*, 410 U.S. at 170–71 (Stewart, J., concurring) (“These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law.”).

46. While some counties across Kentucky, Alabama, and North Carolina are currently refusing to grant marriage licenses to same-sex couples or halting marriage operations altogether, the vast majority of the states affected by the Court’s decision in *Obergefell* have adhered to the ruling without incident. See *Freedom to Marry on Track to Close, Despite Marriage Holdouts*, WASHINGTON BLADE (Sept. 11, 2015), <http://www.washingtonblade.com/2015/09/11/freedom-to-marry-on-track-to-close-despite-marriage-holdouts/#sthash.G8ETB1mA.dpuf> [<http://perma.cc/6T9M-NE5A>].

neither for that matter did *Windsor*, which precipitated a marked acceleration in the pace of marriage recognition across the states.⁴⁷ Rather, momentum toward full LGBT rights only seems to be increasing within the political branches.⁴⁸

While some will criticize Justice Kennedy's *Obergefell* decision for lacking in a sufficiently clear doctrinal holding, the decision to leave things undecided is characteristic of his larger judicial philosophy. Moreover, saying less about the precise doctrine could have the intention of prompting other institutions—namely Congress—to act. Seen this way, judicial minimalism might reflect a hunch (or hope) that, once the Court acts, a larger multi-branch dialogue will continue to take shape and evolve both inside and outside Congress. Meanwhile, *Obergefell*'s strong rhetoric indicates to legislators, especially those previously reluctant to support LGBT rights, that there are strong and compelling legal and moral bases to do so, especially now that the Court has brought full marriage recognition to all fifty states.

* * *

The gay rights cases are illustrative of a number of important jurisprudential differences between Chief Justice Roberts and Justice Kennedy that will likely recur in the future. As references to *Obergefell* swell within state and federal judicial opinions, not to mention legal briefs on a variety of issues (many of which have nothing to do with gay rights),⁴⁹ one should bear in mind not only *Obergefell*'s core holding, but also the subtle distinctions that lead Chief Justice Roberts and Justice Kennedy to reach such wildly different legal outcomes in *Obergefell*, *Windsor*, and beyond.

47. See *Obergefell*, 135 S. Ct. at 2597.

48. Shortly after the opinion, the Equal Employment Opportunity Commission issued a ruling that sexual orientation based discrimination in the workplace is unlawful under existing sex discrimination protections. See EEOC Appeal No. 0120133080, 2015 WL 4397641, at *4–5 (July 15, 2015). This opinion will not displace court of appeals rulings to the contrary, but it will take effect in most jurisdictions, where it will undoubtedly help root out sexual orientation discrimination in the workplace. Meanwhile, Democratic legislators in Congress have proposed legislation that would eliminate sexual orientation discrimination in public accommodations, housing, and employment while adding sex discrimination protections that are absent from certain federal anti-discrimination laws. See Equality Act, S. 1858, H.R. 3185, 114th Cong. (2015). While that bill lacks the Republican support it needs in order to pass, there are indications of shifting Republican sentiment on LGBT rights more generally. See, e.g., Philip Elliott, *Republicans in Early Nominating States See Opposition to Gay Rights Fizzle*, TIME (July 2, 2015), <http://time.com/3945083/republicans-gay-rights/> [<http://perma.cc/5Q5B-5ZTK>].

49. See Zoe Tillman, *How the Supreme Court's Gay-Marriage Ruling Is Playing in Trial Courts*, NAT'L L.J. (July 27, 2015), <http://www.nationallawjournal.com/home/id=1202733182260?slreturn=20150708104111> (“In the month since the U.S. Supreme Court’s landmark same-sex marriage ruling, federal and state judges are citing the decision in an array of cases, including some that don’t involve same-sex couples.”) [<http://perma.cc/96E8-432H>].