OBERGEFELL V. HODGES: RETHINKING JUSTICE SCALIA'S ORIGINALISM.

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Since Ronald Reagan appointed Justice Antonin Scalia to the U.S. Supreme Court in 1986, Scalia's jurisprudence and judicial activity have been the subject of significant scholarly attention. The thesis of this article centers on the methodology adopted by the Court to create new unenumerated constitutional rights, and how Justice Scalia often rejects such methodology. In doing so, this article provides a critical analysis of the majority opinion in Obergefell v. Hodges, as well as the dissent of Justice Scalia. The article sheds light on the shortcomings of Justice Scalia's approach in his vicious attack on the Court for recognizing same-sex marriage as a constitutional right protected by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. However, this casts him as a pragmatic interpreter of the constitution more than an originalist. For the purposes of this article, my intention is not to digress into an analysis of the majority opinion in Obergefell. Instead, my primary focus will be to consider Justice Scalia's dissent. In doing so, I emphasize Scalia's main disagreements with the majority before analyzing his dissent in an attempt to demonstrate how Justice Scalia, in several dissenting points, departed from originalist theory to a more pragmatic approach of constitutional construction.

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I. OBERGEFELL V. HODGES DEFINED

The decision in *Obergefell v. Hodges*[489] legalized same-sex marriage across the country, placing the Supreme Court at the forefront of LGBT issues. It was described by major newspapers as "the biggest Supreme Court same-sex marriage case in U.S. history"[490] and by President Barack Obama as a "victory for America".[491]

In a 5–4 majority decision, Justice Anthony Kennedy, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and

[489] *Obergefell v. Hodges*, 135 U.S. 576, 2584 (2015).
[490] Samantha Stark, *How a Love Story Triumphed in Court*, NY TIMES (June 26, 2015); Richard Wolf, *The 21 most famous Supreme Court decisions*, USA TODAY (June 26, 2015).
[491] Mollie Reilly, *Obama Praises Supreme Court's Decision to Legalize Gay Marriage Nationwide*, THE HUFFINGTON POST (June 26, 2015).

Elena Kagan, sided with the plaintiffs in arguing that "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[492]

This language reveals that the Court grounded its decision firmly in the Constitution, characterizing a same-sex marriage ban as a violation of the Due Process Clause as well as the Equal Protection Clause.[493] The Court cited *Loving v. Virginia*[494] as a precedent in which the Court invalidated bans on interracial marriage for violating "the central meaning of the Equal Protection Clause."[495] It overturned, as well, its sole prior direct decision on same-sex marriage in *Baker v. Nelson*.[496]

Before the right of same-sex marriage was recognized, the United States witnessed major legal shifts that protected the rights of gays and lesbians. Either by popular vote,[497] state law,[498] or court ruling,[499] thirty-seven states and Washington D.C. formally legalized same-sex marriage prior to *Obergefell*. The eventual guarantee of the right to marriage for same-sex couples was therefore not the culmination of one lawsuit or the effort of one state legislature.

The ruling in *Obergefell* significantly strengthened the rights of same-sex couples in the US. This included the right to adopt and all spousal, family, and employment benefits tied to marriage. However, to

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[492] *Obergefell*, 135 U.S. 576, 2608 (majority opinion).

[493] *Obergefell*, 135 U.S. 576, 2604–05 (majority opinion). The Court identified the legal issues of the case in the following questions: (1) Whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex?; (2) Whether the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex and to recognize a marriage between two people of the same-sex when their marriage was lawfully licensed and performed out-of-State?; and (3) Whether the ban on same-sex marriage constitutes a sex-based inequality that violates the Equal Protection Clause?

[494] *Loving v. Virginia*, 388 U.S. 1 (1967).

[495] In *Loving v. Virginia*, the Court argued "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id*. at 12.

[496] *Baker v. Nelson*, 409 U. S. 810.

[497] E.g. Maine Question 1: Citizen Initiative (2012) "An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom" was approved in a popular referendum by 52.60%. Additionally, in Maryland, same-sex marriage was legally recognized when the Civil Marriage Protection Act of 2013 was approved by 52.4% of voters. Further, in the State of Washington, voters approved a 2012 bill, Senate Bill 6239, legalizing same-sex marriage in a popular referendum by 54%.

[498] See, e.g. Delaware Civil Marriage Equality and Religious Freedom Act of (2013); Hawaii Marriage Equality Act of (2013); Illinois Religious Freedom and Marriage Fairness of (2014); Minnesota Civil Marriage Act of (2013); New Hampshire Civil Marriage and Civil Unions Act of (2010); New York Marriage Equality Act of (2011); Rhode Island Marriage Act of (2013); and Vermont Marriage Equality Act of (2009).

[499] See, e.g. *Searcy et al v. Strange*, 81 F.Supp.3d 1285 (2015) (Alabama); *Hamby v. Parnell*, 56 F. Supp. 3d 1056 (2014) (Alaska); and *Connolly v. Jeanes*, 73 F. Supp. 3d 1094 (2014) & *Majors v. Horne*, 14 F. Supp. 3d 1313 (2014) (Arizona).

Scalia, the opinion was grounded in flimsy reasoning and based on the dubious consideration that the right of same-sex marriage is a tributary of the fundamental right to marriage based on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. According to the Court, these clauses are inextricably linked.[500] The Court's decision was vulnerable to attack.

On one hand, the Court reasoned coherently when citing its long-established precedent that the right to marriage is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. They established this precedent before stretching its meaning and significance to include the right of same-sex couples to marry, thus classifying same-sex marriage as a fundamental right as well. This was a stain on the majority opinion, since the Court's standard for identifying unremunerated fundamental rights under the Due Process Clause is limited to rights "deeply rooted in this Nation's history and tradition."[501] It would certainly be inaccurate to argue that the right to same-sex marriage is deeply rooted in the meaning of such standard or is not so universally denied.

Conversely, the majority rightly noted that the history of denying same-sex couples the right to marry reflected prejudice and severe discrimination against them. In doing so, Justice Kennedy, writing for the majority, decided not only to rely solely on the Fourteenth Amendment's Due Process Clause, but to claim that a ban on same-sex marriage violates the Equal Protection Clause as well, arguing that the two clauses cannot be separated:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each

[500] "The right of same-ex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived too, from that Amendment's guarantee of the equal protection of laws." *Obergefell*, 135 U.S. 576, 2598 (majority opinion).

[501] See, e.g. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (majority opinion); *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court, however, tried to respond to this point by arguing that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians." *Id*., at 2602. Although this statement highlights the Court's approach in rejecting the any originalist intent that could have been shared by the Framers in interpreting the Fourteenth Amendment, this is only true regarding other decisions when the Court's reasoning was heavily centered around the Equal Protection Clause instead of the Due Process Clause.

> may be instructive as to the meaning and reach of the other.[502]

The *Obergefell* majority, moreover, carefully framed the right to marry in accordance with the right to choose where one's children are educated or the right to an abortion. This comparison allowed many rights to fit into the category of personal liberties that should be protected under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.[503] The Court used this point to argue against laws that ban same-sex marriage as an unlawful breach of the right to liberty:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.[504]

It should be noted that the Court's opinion, even after raising the equal treatment argument, primarily relied on the finding that the right to marriage is a fundamental right that should not be denied to same-sex couples, rather than deciding the case by subjecting the contested anti same-sex marriage laws to a certain level of review. Despite that the Court was justified to argue that the Fourteenth Amendment's Due Process and Equal Protection Clauses must be invoked since a fundamental right was denied in the discrimination against gays and lesbians, it failed to show that the longstanding exclusion of gays and lesbians as well as the historical prejudice against them deserve to be evaluated based on strict scrutiny or heightened rational basis review. In previous decisions on gay rights, the Court ruled that discriminatory laws should be subjected to a heightened rational basis scrutiny if it is motivated by hostility against gays and lesbians.[505]

Under the Equal Protection Clause, the Court has typically subjected laws that inflict harm to the minimal rational basis scrutiny standard of review, unless the law is likely to discriminate against a suspect's class, race or sex, in which case it deserves a higher level of

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[502] *Obergefell*, 135 U.S. 576, 2598 (majority opinion).
[503] John Paul Stevens, *Two Thoughts About Obergefell v. Hodges*, 77 OHIO ST. L. J. 913, 916 (2016).
[504] *Obergefell*, 135 U.S. 576, 2604 (majority opinion).
[505] See, e.g. *United States v. Windsor*, 570 U.S. 744 (2013).

scrutiny, heightened scrutiny or strict scrutiny. Surprisingly, however, the *Obergefell* majority did not regard the contested anti same-sex marriage laws as discriminatory statutes directed at a suspect class that deserve a higher level of scrutiny.[506]

In a famous case decided in 1938,[507] the Supreme Court developed a three-level framework to decide cases involving classifications under the Due Process and the Equal Protection Clause of the Fourteenth Amendment. Each level of review requires that statutory classifications should have a certain degree of relationship with a governmental objective defined in the challenged law.[508] The Court's approach and analysis differ from case to case; however, most classifications are subject to the first level of review, the rational basis review. For a challenged classification to pass this default level of review, it must be rationally related to legitimate government purposes.[509] In applying this level of review, long-established precedents support the view that the rational relation between the classification and the purpose of the law would be established so long as the legislature "could rationally have decided that [the classification] might foster" a legitimate state purpose or interest.[510] With that being the case, the legislature's error in establishing the relation between the classification and the purpose of the law cannot stand alone to invalidate the statute. With regard to the legitimate purpose of the law, the Court is of the opinion that a slightly conceivable basis is sufficient to prove such legitimate purpose.[511] Further, according to the Court, it is the burden of "those attaching the rationality of the legislative classification to negative every conceivable basis which might support it."[512]

One of the first Supreme Court cases to address gay rights was *Romer v. Evans* (1996). Here, the Court triggered the minimal rational basis standard of review to strike down an amendment to the Colorado State Constitution (Amendment 2) which denied any kind of preferential treatments to homosexuals and refused to regard them as a protected class deserving of minority status.[513] The Court's majority ruled Colorado's

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[506] Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367 (2016).

[507] *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

[508] Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through Romer v. Evans*, 32 IND. L. REV. 357, 358 (1999).

[509] See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

[510] See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

[511] See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

[512] *Id.*

[513] The Amendment provided "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or police whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota

amendment unconstitutional since it lacked "a rational relationship to legitimate state interests." In reaching such a decision, the Court highlighted the core of the rational basis standard of review, arguing that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[514] According to the Court, Amendment 2 to the Colorado State Constitutional failed to pass this test because it tried to confer a "broad and undifferentiated disability on a single named group"[515] and because it is "inexplicable by anything but animus toward the class it affects."[516]

It is worth noting that Justice Scalia, in his dissent of the Court's opinion, did not disagree with triggering rational basis review; however, he asserted that the challenged amendment did not deprive any person from the protection of law.[517] Further, citing the decision of the Court in one of its oldest precedents, *Davis v. Beason* (1980),[518] where the Court held that laws against polygamy should not be construed to mean an "impermissible targeting" of polygamists, Scalia disapprovingly asked "Has the Court concluded that the perceived social harm of polygamy is a 'legitimate concern of government,' and the perceived social harm of homosexuality is not?"[519]

The second level of review developed by the Court is intermediate scrutiny. According to the Court, in order for a challenged law to pass the intermediate scrutiny test it must further an important government interest by means that are substantially related to that interest.[520] The intermediate scrutiny standard of review is usually triggered by the Court in cases involving gender-based classification under the Fourteenth Amendment's Equal Protection Clause.

For instance, the first case in which the Court determined that gender-based classifications are to be subjected to intermediate scrutiny was *Craig v. Boren* (1976).[521] In this case, the Court ruled an Oklahoma statute, which prohibited the sale of nonintoxicating 3.2% alcohol beer to men under the age of 21 and women under the age of 18, unconstitutional. In reaching such opinion, the Court declared that "classifications by gender must serve important governmental objectives and must be substantially

preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."

[514] *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

[515] *Id.*, at 632.

[516] *Id.*

[517] *Id.*, at 651 (Scalia, J., dissenting).

[518] *Davis v. Beason*, 133 U.S. 333 (1890).

[519] *Romer v. Evans*, 517 U.S. at 651 (Scalia, J., dissenting).

[520] See, e.g., *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150; *Craig v. Boren*, 429 U.S. 190, 193 (1976).

[521] *Craig v. Boren*, 429 U.S. 190 (1976).

related to achievement of those objectives."[522] Accordingly, the Court deduced that the State of Oklahoma failed to show a substantial relationship between the law and the maintenance of traffic safety.[523]

The third and the most stringent standard of judicial review used by the Supreme Court is strict scrutiny. Unlike the lesser standards, rational basis review and intermediate scrutiny, strict scrutiny is the highest level of review whereby a challenged law or policy are to be deemed constitutional only if the legislature's purpose is to further a compelling governmental interest, and that the law or policy is narrowly tailored to achieve that interest.[524] The Supreme Court has often employed strict scrutiny when deciding cases involving a fundamental right protected by the Due Process Clause of the Fifth and Fourteenth Amendments, or a suspect classification, such as race and national origin. Thus, content-based restrictions on rights fully protected by the Fifth and Fourteenth Amendment's Due Process Clause like life, liberty, or property as well as restrictions based on race and national origin are deemed valid if they are "narrowly tailored to serve a compelling state interest."[525]

It can therefore be argued that the majority opinion in *Obergefell* implicitly noted that laws banning same-sex marriage are indeed discriminatory on the basis of sex and that sex discrimination is a suspect classification.[526] It describes how "invidious sex-based classifications in marriage remained common through the mid-20th century"[527] and how "responding to new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage."[528] However, the Court refrained from endorsing such an approach in a more explicit way or alternatively to recite the well-established and undisputed principle that discrimination based on an individual's sexual orientation does in fact constitute a suspect classification.

The *Obergefell* decision was not the first in which the Court linked the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to strike down a classification-based restriction on marriage, such as *Loving v. Virginia*'s ruling that laws prohibiting interracial marriage are unconstitutional.[529] However, the *Obergefell* majority differed from that of *Loving*. Unlike *Loving*, which emphasized equality over liberty, *Obergefell* emphasized liberty over equality. The Court grounded

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[522] *Id*., at 197.
[523] *Id*., at 204.
[524] See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Boos v. Barry*, 485 U.S. 312, 334 (1988); *United States v. Grace*, 461 U.S. 171, 177 (1983).
[525] *Id*.
[526] Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALI. L. REV. CIR. 126, 130 (2015).
[527] *Obergefell*, 135 U.S. 576, 2603 (majority opinion).
[528] *Id*. at 2603.
[529] *Loving*, 388 U.S. 1 (1967).

its decision largely on the Due Process Clause, reserving only a few pages for the analysis of the Equal Protection Clause.[530]

Further, unlike *Loving*, in which the majority opinion clearly noted that the Due Process Clause or Equal Protection Clause may stand alone as the basis for invalidating laws prohibiting interracial marriage, an examination of *Obergefell* reveals that the majority opinion was reluctant to declare whether the Due Process or the Equal Protection Clause by themselves can generate the same outcome independently. More precisely, the *Obergefell* majority was not confident whether same-sex marriage is a sufficiently important right to deserve the protection of the Due Process Clause without any helping hand, as well as whether such right, if denied for discriminatory motives, justifies raising the Equal Protection Clause. In short, the Court was of the opinion that combing both the Due Process and Equal Protection Clauses is necessary to nullify laws banning same-sex marriage for violating the Fourteenth Amendment.

Although the *Obergefell* decision is decisive in granting gays and lesbians the right to marry, and to reveal their sexual orientation, the apparent vagueness and confusion of the Court rendered the decision unresponsive regarding whether protections granted by the Fourteenth Amendment extend to accommodate discrimination against gays and lesbians in employment, housing, or other forms of social benefits and accommodations.[531]

II. DISSENT OF JUSTICE ANTONIN SCALIA

It should first be noted that nothing in Scalia's dissent shows he opposed legal recognition of same-sex marriage; rather, his dissent reveals that he vehemently disagreed with the majority's position that the recognition of same-sex marriage should be legally established by a final decision from the United States Supreme Court,[532] as will be discussed.

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[530] Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015).

[531] Hermann, *supra* note 18, at 367, 368. In *Zarda v. Altitude Express* (2018), the United States Court of Appeals for the Second Circuit held, by a vote of 10-3, that discrimination based on sexual orientation violates Title VII's prohibition of discrimination on the basis of sex. The Court argued that sexual-discrimination constitutes sex discrimination because "sexual orientation is a function of sex." The Court, further, claimed that firing a man because he's attracted to men "is a decision motivated, at least in part, by sex." Thus, the Court concluded, "an employer's opposition to association between particular sexes, and thereby discriminates against an employee based on their own sex" is prohibited. *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. 2017).

[532] *Obergefell*, 135 U.S. 576, 2611-43 (Scalia, J., dissenting).

A. CREATION OF NEW UNENUMERATED CONSTITUTIONAL RIGHTS

Scalia opened his dissenting opinion with a bold statement: "[t]he substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance."[533] In fact, this was the first of many powerful statements that display Scalia's disagreement with the majority. Scalia sees the ruling as an attempt by the Court to expand its zone of influence, which Scalia considered improper.[534] Specifically, Scalia's dissent in part focused on the proper role of the Court in interpreting the Constitution.[535] According to him, the rights of same-sex couples to marry as well as the benefits of marriage to homosexual couples, are enshrined under the liberty protected by the Constitution. Thus, Scalia summarily dismissed the notion adopted by the Court's majority that protecting homosexual couples entails the creation of a new unenumerated constitutional right.

Frustrated by the position taken by the Court, Scalia attacked the majority opinion and described it as "couched in a style that is as pretentious as its content is egotistic,"[536] which reflects "showy profundities [that] are often profoundly incoherent."[537] Further, Scalia viewed the majority opinion to be a reflection of ugly judicial "hubris."[538] According to Scalia, for a panel of nine unelected justices to decide over a highly debatable issue by a final decree is an act of egotism and arrogance. Consequently, for Scalia, the question of same-sex marriage constituted a fundamental core of the democratic dialogue in American society, and for a group of unrepresentative justices to resolve it represents a violation to the principle of "no social transformation without representation."[539]

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[533] *Id*. at 2626.

[534] Hermann, *supra* note 18, at 389.

[535] *Obergefell*, 135 U.S. 576, 2627 (Scalia, J., dissenting).

[536] *Obergefell*, 135 U.S. 576, 2630 (Scalia, J., dissenting).

[537] *Id*.

[538] "[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons." *Obergefell*, 135 U.S. 576, 2607 (majority opinion).

[539] *Obergefell*, 135 U.S. 576, 2630 (Scalia, J., dissenting). In a hyperbole, Justice Scalia condemned the majority's opinion from the lens that it installs the Court's nine justices as the real rulers instead of the people. "Today's decree says," wrote Scalia, "that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." *Obergefell*, 135 U.S. 576, 2584, 2627 (Scalia, J., dissenting). Scalia was of the opinion that it is not the Court's role to decide the issue in question, recognizing same-sex marriage. Instead, it should be left to ordinary citizens and to the states.

Secondly, Scalia's dissent was structured around criticizing the majority's claim that its opinion granted same-sex couples the right to marry without ignoring the voices of those who oppose same-sex marriage for religious beliefs or other reasons. Justice Scalia critiqued the Court's substantive due process analysis, arguing that it reflected "the majority's likes and dislikes."[540] Justice Scalia opined further that

> Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes.[541]

According to Justice Scalia, the *Obergefell* opinion is a stark example of the Court constructing policy. "The opinion in these cases," argued Scalia, "is the furthest extension in fact— and the furthest extension one can even imagine—of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention."[542]

This argument is where Justice Scalia renders the credibility of his dissent vulnerable. That is, fabricating rights not mentioned in the Constitution is one of the most enshrined functions of supreme courts, especially in common law systems. What Justice Scalia has denied as one of the Court's duties was confirmed by the Court in many of its well-known precedents. Many unenumerated rights have been recognized by the Court.[543] However, one could see Scalia's responding normatively to such judicial activism. That is, despite that he agreed with the Court's conduct when establishing new unenumerated constitutional rights in many instances, he would still condemn such conduct in *Obergefell*. This could be attributed to the strong pragmatic approach adopted by Justice Scalia in *Obergefell* that he viewed legalizing same-sex marriage will lead to

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[540] *Id*. at 2630-31.

[541] *Id*. at 2630.

[542] *Id*. at 2626-27.

[543] *E.g.,* the Court has recognized unenumerated rights such as, the right to procreate (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)); the right to bodily integrity (*Rochin v. California*, 342 U.S. 165, 172–73 (1952)); the right to abortion (*Roe v. Wade*, 410 U.S. 113, 153 (1973); and the right to marry (*Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

negative consequences and that hearing the case at this time was not proper.

Interestingly, in 2000, Justice Scalia endorsed the idea of creating new constitutional rights when he joined the opinion in *Bush v. Gore* that expanded the meaning and significance of the Equal Protection Clause, protecting individuals' votes from "later arbitrary and disparate treatment."[544] In this case, Justice Scalia agreed that the scope of the Equal Protection Clause extends to protect Florida voters in the 2000 presidential election from a recount ballot, since a recount would violate the "equal dignity owed to each voter."[545] The counterargument stands that the majority opinion, joined by Scalia, is not creating a new right but merely protecting the individual liberties of citizens. However, it should be noted that the Court has held in decisions prior to *Bush v. Gore* that there is no specific constitutional right to vote, and that the citizens' right to vote "is not a constitutionally protected right,"[546] but instead "a citizen has a constitutionally protected right to participate in elections."[547]

Likewise, in *Shelby County v. Holder*, which struck down part of the Voting Rights Act of 1965 (requiring states to obtain approval from the Justice Department before changing their election laws), Justice Scalia joined an opinion that fabricates a new constitutional right. Justice Scalia agreed with the Court that the contested part of the Act violated the constitutional "principles of federalism" and that subjecting a state to "preclearance" based simply on past discrimination violates the so-called the right to "equal sovereignty of the states."[548]

In joining the *Shelby County* majority, Justice Scalia signified he had no issue with judicially fabricating new unenumerated constitutional rights. Invented by the Court's majority and joined by Justice Scalia, the newly constitutional right to equal sovereignty dictates that Justice Scalia agreed to extend the scope of the Equal Protection Clause of the Fourteenth

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[544] "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Bush v. Gore, 531 U.S. 98, 104-05 (2000).

[545] "History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id*. at 104.

[546] See e.g. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[547] See e.g. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34, 35 n.74, 78 (1973).

[548] "Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty." Shelby County v. Holder, 570 U.S. 2 (2013).

Amendment. Any attempt by Congress to single out Southern states for preclearance by the Department of Justice would then represent a constitutional violation. Further, the right to equal sovereignty, according to the Court, is protected by the Fifteenth Amendment as it "commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future."[549]

B. THE AMERICAN DEMOCRATIC PROCESS

As noted, Justice Scalia doubted the Court's authority to decide on the issue of same-sex marriage. According to Scalia, such an issue is largely a matter of local or state law, and that its basis must first be established by the people themselves before any federal judicial intervention. That said, Justice Scalia viewed the *Obergefell* decision as undermining the democratic process of the United States. "I write separately," said Scalia, "to call attention to this Court's threat to American democracy."[550]

Accordingly, Justice Scalia prioritized the basic definition of democracy, rule by the people. His dissent contended that the Court lacks the required authority to legally make marriage equality the law of the land. Justice Scalia was not concerned with the substance of the law, and instead was troubled by the question of sovereignty. According to Scalia, law can decide what sort of marriage should be legally accepted in the country; however, what really matters is who has the authority to make such law. For Scalia, it is not the Court.

> "The substance of today's decree is not of immense personal importance to me," [Scalia's dissent reads], "[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance…It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court…This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in

[549] *Id*. at 2627-68, 2629.
[550] *Obergefell*, 135 U.S. 576, 2626–27 (Scalia, J., dissenting).

> the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[551]

It is worth noting that Justice Scalia's dissent in *Oberegfell* was not the first time he emphasized the importance of the democratic process to contend that the people are the best party to decide the issue in question. For instance, in the famous abortion rights case, *Planned Parenthood v. Casey*, Justice Scalia, concurring with the majority opinion in part and dissenting in part, wrote:

> "[M]y views on this matter are unchanged…The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense…"[552]

Likewise, in his dissent in *Lawrence v. Texas* in 2003, Justice Scalia anticipated the recognition of same-sex marriage in the United States after the Court invalidated sodomy laws in Texas and thirteen other states.[553] He asserted that to resolve a highly debated issue by a final judicial decree confiscated the right of the citizens to continue discussing it.[554]

In his dissent, Justice Scalia regarded "moral disapproval," which is the outcome of a foregoing democratic debate about homosexuality, as in itself a rational basis, which represents a legitimate state interest to limit marriage to opposite-sex couples and ban homosexuality.[555] Accordingly,

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[551] *Id*.

[552] *Planned Parenthood v. Casey*, 505 U.S. 833, 979-08 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted).

[553] Hermann, *supra* note 18, at 390.

[554] One could argue that issuing a final judicial decree on an issue that stymies public discussion constitutes a "confiscation" of a right, as Scalia claims. Therefore, to oppose *Obergefell* as a judicial decree that stymies public discussion constitutes protecting an existing right, not fabricating a new one. However, such argument is unlikely to prevail. In fact, one of Scalia's main problems with the *Obergefell* decision is the Court's attempt to fabricate a new unenumerated constitutional right, which is the right of same-sex couples to marry. With that being the case, Scalia's conduct in defending the right of the people to continue discussing the unsettled issue of homosexuality and same-sex marriage does not detract from the credibility of his idea opposing the establishment of a new unenumerated constitutional right in *Obergefell*, since he viewed the right of the people to talk and engage in a democratic dialogue is an enumerated constitutional right supported by the First Amendment.

[555] *Lawrence v. Texas*, 539 U.S. 558, 604-06 (2003) (Scalia, J., dissenting).

Justice Scalia regarded the Court's approach in recognizing the right of same-sex couples to intimate relations, ignoring the right of states to ban same-sex sexual relations, as an implicitly entailed recognition of same-sex couples' right to marry, notwithstanding public disapproval.[556] Justice Scalia wrote

> "The Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[557]

Unlike *Obergefell* and *Shelby County*, in which Justice Scalia largely focused his argument on the authority of the Court to establish new unenumerated constitutional rights, and narrowly tailored it to address the imminent threat to American democracy, he grounded his dissent in *Lawrence* on the moral objection to same-sex marriage and sexual activity that must be respected by the Court, which amplified the rhetoric of the democratic process argument. According to Justice Scalia, without legal and judicial consideration of the moral disapproval of homosexuality, there would not be any justification for a legal-judicial denial of same-sex marriage, which happened in *Obergefell*. In his dissent of the Court's opinion in *Lawrence*, Justice Scalia argued

> "If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting all pretense of neutrality) “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to

[556] Hermann, *supra* note 18, at 390.
[557] *Lawrence*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

> homosexual couples exercising "[t]he liberty protected by the Constitution."[558]

C. ORIGINALISM V. PRAGMATISM

Justice Scalia distinguished himself as one of few textual originalists who stuck with the "original meaning" of constitutional provisions,[559] and ascertained the "meaning of the words of the Constitution to the society that adopted it."[560] Attempting to define originalism, Justice Scalia once said, "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."[561]

Justice Scalia once self-identified as a "fainthearted originalist"[562], but later repudiated and classified himself as a "stouthearted originalist."[563] However, when it comes to majoritarian moral disapproval and the concept of democracy,[564] Justice Scalia is still more of a fainthearted originalist, or as some scholar described him, a "dogmatist." In one of his widely cited speeches, Justice Scalia claimed that

> "[M]y only authority as a judge to prevent the state from doing what may be bad things is the authority that the majority has given to the courts…To say, "Ah, but it is contrary to the natural law," is simply to say that you set yourself above the democratic state and presume to decide what is good and what is bad in place of the majority of the people. I do not accept that as a proper function…Yes, it is dogmatic democracy…I have been appointed to apply the

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[558] *Id*. at 604-05.

[559] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

[560] Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 253 (2009) (citation omitted).

[561] Antonin Scalia, Pew Forum, University of Chicago Divinity School, Session Three: Religion, Politics, and the Death Penalty (Jan. 25, 2002).

[562] See Scalia, *supra* note 50, at 862.

[563] See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, http://nymag.com/news/features/antonin-scalia-2013-10 [https://perma.cc/UK5W-4DQD].

[564] It seems like when it comes to rights of homosexuals, Justice Scalia saw moral stakes as a main feature of the democratic process. According to him, morality is a legitimate state interest that should be decided by the public themselves. It should be noted, however, that Justice Scalia preferred not to openly argue for maintaining majoritarian moral disapproval. He insisted, instead, that the Court should not take side in the culture war. The role of the Court, Scalia said in his dissenting opinion in *Lawrence v. Texas*, is not to take sides in the culture wars but to assure, as a "neutral observer, that the democratic rules of engagement are observed." In fact, Scalia's argument on majoritarian moral disapproval is unlikely to prevail, since it seems inconceivable to advance criminal punishments and discrimination against homosexuals on moral grounds only.

> Constitution and positive law. God applies the natural law."[565]

Accordingly, when the issue in question is related to religion or sex-based classification, or concerned with moral disapproval or the concept of democracy, Scalia's version of originalism is applied to track the original meaning of the constitutional text as it has been understood by the framers. With that said, the question here is to what extent pragmatism is different from this version of originalism adopted by Scalia.

Pragmatism comprises two fundamental aspects. Pragmatists, such as Justice Stephen Breyer and Judge Richard Posner, defined the first aspect of pragmatism as an approach to develop a needed renovation of constitutional construction to meet modern societal needs.[566] The second fundamental aspect of pragmatism can be described as the attempt to interpret the constitutional text in such a way that preserves a healthy political society by promoting the democratic process.[567] In Justice Breyer's first book as a Supreme Court Justice, titled *Active Liberty* (which was in part a response to Justice Scalia's book on originalism),[568] Justice Breyer argued that constitutional pragmatism enhances political participation in American society.[569]

While originalists see the meaning of the constitution as fixed and enduring, pragmatism gives substantial consideration to the consequences of alternative decisions and the interpretation of these decisions by society. In more straightforward language, a pragmatic judge would potentially oppose a constitutionally-valid decision or interpretation if it is likely to have negative consequences on society,[570] or if ample evidence suggests that the public are not yet prepared to accept such a decision or to adopt such interpretation.[571] Further, another evident difference between originalism and pragmatism lies in how the Constitution is to be seen and read. Specifically, originalists regard the Constitution as a text that has been written by the dead and unchanged since the time of its drafting,[572] and should thus be construed according to how the framers viewed it in their time.[573] On the other hand, pragmatisms claim that the constitution has a

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[565] Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian Univ. (May 2, 1996), *in* 26 ORIGINS 81, 88–89 (1996)).

[566] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); RICHARD A. POSNER, HOW JUDGES THINK (2008).

[567] Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901 (2008).

[568] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[569] Breyer, *supra* note 75.

[570] MATTHEW GUILLEN, READING AMERICA: TEXT AS A CULTURAL FORCE 93-4 (2007).

[571] *Id*.

[572] Reva B. Siegel, *Heller & Originalism's Dead Hand – In Theory and Practice*, 56 UCLA L. REV. 1399, 1401 (2009).

[573] The claim that the Constitution should be interpreted according to the understanding prevailed during the time of its drafting and ratification occupies a great deal of originalists' scholarly

living, dynamic meaning that should change and evolve over time,[574] and thus in interpreting the Constitution, societal changes and developments should be given great consideration.[575]

A cursory examination of the United States Supreme Court's jurisprudence reveals that it has never promoted originalism as a central school of constitutional interpretation, even with Justice Scalia on the bench.[576] Originalism had a marginal role to play in cases decided by the Court regarding abortion,[577] affirmative action,[578] free speech,[579] commerce clause,[580] the right to keep and bear arms,[581] and sex determination.[582] Many legal scholars insisted that these cases involve judicial lawmaking that could not be justified on originalist grounds.[583] The outcomes are decided with acknowledgment that part of the Constitution is unwritten,[584] or that creating unenumerated rights requires the Court to go beyond the meaning of the constitutional text to consider more liberal approaches to constitutional interpretation.[585]

Likewise, in *Obergefell*, the Court did not interpret the Constitution according to the original intent of the Framers, with considerable regard to how it was understood by the people of the drafting era, as is the basic predicate of originalism. Writing for the majority, Justice Kennedy opined:

> "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations

works. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980).

[574] See, e.g., William H. Rehnquist, *Observation, The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) ("At first blush it seems certain that a living Constitution is better than what must be its counterpart, a dead Constitution. It would seem that only a necrophile could disagree.").

[575] Adam Winkler, *A Revolution Too Soon: Woman Suffragists and The "Living Constitution"*, 76 N.Y.U. L. REV. 1456, 1463 (2001).

[576] Jamal Greene, *Essay: The Age of Scalia*, 130 HARV. L. REV. 144, 158 (2016).

[577] See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[578] See *Fisher v. University of Texas*, 579 U.S. ___ 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[579] See *United States v. Alvarez*, 567 U.S. 709 2537 (2012); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Morse v. Frederick*, 551 U.S. 393 (2007).

[580] See *NFIB*, 132 S. Ct. 2566 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Lopez*, 514 U.S. 549 (1995).

[581] See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[582] See *United States v. Virginia*, 518 U.S. 515 (1996).

[583] Lawrence B. Solut, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L 155, 160 (2006)

[584] See, e.g. Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975).

[585] Solut, *supra* note 84, at 163.

> a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed."[586]

This opinion clearly demonstrates that the Court did not stop at the limit of refusing to rely on the original intent of the Framers in interpreting the Fourteenth Amendment; it instead went further to intentionally construe the Amendment in a broader sense, stretching its language to accommodate the right of same-sex couples to marry.[587]

The Court's rejection of originalism reached its acme in its argument that the historical exclusion of same-sex marriage, as well as the Framer's understanding of the principles of liberty and equality, do not justify banning the right of same-sex couples to marry: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[588] The Court, moreover, argued "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[589]

Unlike the majority, Justice Scalia's recalled his originalist origin in his reliance on how the language of the Fourteenth Amendment was understood by the Framers, and common societal practices around the time the Amendment was drafted, thus rejecting the majority's claim that a State's ban on same-sex marriage violates the Fourteenth Amendment:

> "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so...When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text..."[590]

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[586] *Obergefell*, 135 U.S. 576, 2598 (majority opinion).
[587] See Stevens, *supra* note 15, at 913.
[588] *Obergefell*, 135 U.S. 576, 2602 (majority opinion).
[589] *Id*. at 2603.
[590] *Id*. at 2628 (Scalia, J., dissenting). In dissenting the *Obergefell* decision, Chief Justice John Roberts argued that "[A] State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our

A careful reading of Justice Scalia's dissent shows he began as a pure originalist when, as noted earlier, he refuted the Court's approach of introducing the right of same-sex couples to marry as a new unenumerated constitutional right protected by the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. The originalist tune was evident in Justice Scalia's dissent, emphasizing that the only constraints mentioned in the Constitution are ones to be followed, and thus what is not mentioned in the Constitution falls within the margin of discretion of the States.

Specifically, since the constitutionality of same-sex marriage was never a concern in 1868, when the Fourteenth Amendment to the United States Constitution was adopted, it is relevant to the scope of protection provided by the Due Process and the Equal Protection Clauses of the Fourteenth Amendment since little evidence exists that the Framers of the Fourteenth Amendment understood a right to same-sex marriage could ever exist.

In reaching such a conclusion, Justice Scalia entirely refrained from consulting contemporary literary resources including dictionaries and judicial precedents, focusing only, instead, on relevant societal and moral perceptions prevalent at the time the Fourteenth Amendment was adopted.

Although Justice Scalia began this dissent as a pure originalist, he later moved toward a more pragmatic approach. Scalia faulted the majority for maintaining that substantive Due Process and Equal Protection of law justify finding a right to same-sex marriage. This argument is to a great extent true, but not entirely conclusive. In a dissent, joined by Justice Scalia, Chief Justice Roberts expressed deep concerns regarding how the *Obergefell* majority ignored the religious liberty of those who oppose same-sex marriage for religious beliefs:

> "[H]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage...Unfortunately, people of faith can take no comfort in the treatment

Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition…The real question in these cases is what constitutes "marriage," or—more precisely—who decides what constitutes "marriage"? The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us…There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical…Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."… The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now." *Id*. at 2611 – 2614 – 2584, 2623 – 2640. (Roberts, C.J., dissenting).

> they receive from the majority today. Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate...By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history...have acted to "lock...out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors."[591]

Further, as mentioned, Justice Scalia was alarmed and plead that the majority opinion constituted a threat to the democratic process in the United States:

> "[U]ntil the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote…A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[592]

Reading these two excerpts together demonstrates how Justice Scalia, a firm believer in originalism, gave up the originalism theory of constitutional construction, adopting, instead, a pragmatism liberal constructionism. Justice Scalia's separate dissent and Chef Justice Roberts' dissent, which was joined by Justice Scalia, could be construed to mean that he was concerned that the majority opinion is likely to confer negative consequences on American society in terms of threatening the democratic process and restricting the religious liberty of those who oppose same-sex marriage because of their faiths.

As mentioned earlier in this article, a preliminary question raised by pragmatic judges, when faced with a case concerning constitutional rights, is whether a possible legal conclusion is likely to lead to negative consequences. In other words, like textualists and intentionalists, pragmatic judges will carefully apply both constitutional text and judicial precedents to the case in question attempting to reach what they consider a just legal conclusion. However, according to them, this just legal conclusion is closely linked to the anticipated consequences that are likely to be generated. Thus, a pragmatic judge will set aside a constitutionally justified decision or interpretation if it will lead to negative consequences.

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[591] *Id*. at 2625–26 (Roberts, C.J., dissenting) (citations omitted).
[592] *Id*. at 2629 (Scalia, J., dissenting).

In *Obergefell*, Justice Scalia, as a pragmatic dissenter, tried to justify his refusal of the majority's legal conclusion by pointing towards the negative consequences the decision would likely confer upon American society. As noted, Scalia was concerned in his dissent that the majority's opinion in *Obergefell* obfuscates the democratic process in American society by seizing the opportunity of the people to engage in any productive dialogue about the constitutionality of same-sex marriage. Scalia's pragmatic leanings, however, were more evident when he expressed great concerns regarding the possibility that the majority's opinion would confer negative consequences on religious liberties. Scalia viewed the *Obergefell* decision in terms of potential negative consequences on religious liberties, especially when people of faith on American soil practice their religions in ways that may be seen to conflict with the newly created right to same-sex marriage.

In the recent case of Masterpiece *Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court addressed Justice Scalia's concern that legalizing same-sex marriage by a final decisive judgment would negatively affect the exercise of religious liberty in the United States. In this case, the Court tried to answer the question of whether owners of public accommodations have the right to deny service to the public based on the First Amendment's Free Speech and Free exercise clauses. The case concerned the Masterpiece Cakeshop, a bakery in Lakewood, Colorado, which denied serving a wedding cake to a gay couple because of the owner's religious beliefs. Under the Colorado Anti-Discrimination Act, the Colorado Civil Rights Commission found the bakery's conduct to be discriminatory. The owner of the bakery appealed to the Supreme Court, which granted a certiorari. In a 7-2 decision, the Court on narrow grounds and without providing any guidance to lower courts ruled that the Colorado Civil Rights Commission showed an unjust religious bias against Masterpiece Cakeshop in its decision.[593]

The Court decided the case on the narrowest imaginable grounds, declaring that although the owner of a business serving the public "might have his right to the free exercise of his religion limited by generally applicable laws,"[594] "religious hostility on the part of the State itself"[595] violates the "State's obligation of religious neutrality"[596] under the Free Exercise Clause of the First Amendment to the Constitution. Nonetheless, the case is a great example of how Justice Scalia's negative consequence concerns in *Obergefell* could be manifested.

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[593] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).
[594] *Id.*
[595] *Id.*
[596] *Id.*

The *Masterpiece Cakeshop* decision proves that Scalia's dissent in *Obergefell,* and his argument that legalizing same-sex marriage could have negative consequences on religious liberties in the United States, are not without merit. In fact, the pragmatic approach adopted by Justice Scalia in his dissent of the *Obergefell* decision not only worked to prove his view that legalizing same-sex marriage will hurt the exercise of religious liberties in the future, but also to emphasize that the Court was wrong to hear the *Obergefell* case and declare same-sex marriage as an unenumerated constitutional right. While nothing in the majority opinion in the *Masterpiece Cakeshop* case indicates that the Court overturned its decision in *Obergefell*, it is obvious that after nearly three years, the Court became convinced that recognizing the right of same-sex couples to marry could negatively impact freedom of religion, which was one of Scalia's main reasons to dissent against the *Obergefell* decision.[597]

Justice Scalia's pragmatic approach, and reliance on the concepts of majoritarian moral disapproval and the advance of the democratic process in American society, should not be construed to mean that Justice Scalia was a lawless dissenter in *Obergefell*. That is, despite criticism, Scalia's argument that a state's ban on same-sex marriage does not violate the Due Process and the Equal Protection Clauses of the Fourteenth Amendment was the outcome of an obeisance to the Framer's intent. Likewise, without violating the Constitution, Justice Scalia has been interpretive in his pragmatic approach, and has claimed that the *Obergefell* decision constrains the American democratic process and restricts the

[597] It should be noted that Scalia's dissent in *Obergefell* was not the first incident of him raising the issue of democracy opposing the majority decision. For instance, in dissenting the majority decision in the case of *Romer v. Evans* (1996), Justice Scalia condemned the Court's conduct engaging in judicial activism to invalidate Amendment 2 to the Constitution of Colorado, which denied protected status to homosexuals, without having a precedent to rely on. Scalia argued that since the Court lacks a precedent to ground its decision on, the entire issue should be left to the general public to decide by the democratic processes. The dissent provided "I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war. But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes." *Romer v. Evans*, 517 U.S. at 652 (Scalia, J., dissenting).
Likewise, in *United States v. Windsor* (2013), Justice Scalia, joined in full by Justice Clarence Thomas and in part by Chief Justice John Roberts dissented the majority opinion, which held that restricting the interpretation of the term "marriage" and the term "spouse" to apply only to opposite sex partners is unconstitutional, on the ground that the Court has no authority to do so, and that such determination should be left to the public judgment. Justice Scalia wrote "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation." *United States v. Windsor*, 570 U.S. 744 (2013) (Scalia, J,. dissenting).

religious liberty of those who oppose same-sex marriage.[598] Specifically, the merit and credibility of Scalia's dissent could be seen as interpretative in his adopted pragmatic approach. That is, he strived to justify his position on strong and well-recognized constitutional bases, as the Framers intended. Although Scalia believed the Court should not have heard *Obergefell* from the beginning, since a final decision regarding the constitutionality of same-sex marriage would lead to negative consequences, he also tried to support his pragmatic argument using other methods of constitutional construction claiming that the Constitution should be read in the context of its text and the intentions of the Framers.

III. CONCLUSION

The decision made by the United States Supreme Court in *Obergefell v. Hodges* is a groundbreaking civil liberties decision whereby the Court discerned a new constitutional right, the right of same-sex marriage, by rejecting many of the restrictions placed on the Due Process and Equal Protection analysis.[599] *Obergefell* recognized the right of same-sex couples to marry as fundamental, arguing that the traditional form of marriage, involving the union of a man and a woman, can be changed according to the public mood once society is prepared to accept the concept of same-sex marriage.[600]

According to the majority opinion in *Obergefell*, the analysis of Due Process is strictly linked to that of the Equal Protection.[601] The former establishes that a right to liberty exists for same-sex couples, which justifies their access to the fundamental right to marry.[602] The Equal Protection Clause, the Court claimed, represents the main point that states are no longer allowed to discriminate against same-sex couples either by banning same-sex marriage or by refusing to issue same-sex marriage licenses.[603]

Justice Scalia, in dissent, objected that the debate over same-sex marriage could be resolved by the authority of the Court rather than the

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[598] In fact, Justice Scalia's pragmatic approach in seeing the *Obergefell* decision implicates negative consequences to those people who oppose same-sex marriage for religious reasons proves right. That is, after *Obergefell*, officials in some states refused to issue marriage licenses to same-sex couples citing religious beliefs. For instance, after *Obergefell*, nine Alabama counties no longer issue any marriage licenses including same-sex marriage licenses. Additionally, officials in one Texas county claim they will refuse issuing licenses to same-sex couples. See Josh Blackman and Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243 (2015).

[599] Yoshino, *supra* note 23, at 179.

[600] *Obergefell*, 135 S U.S. 576, 2584, 2607-08 (majority opinion).

[601] *Id*. at 2602-03.

[602] *Id*. at 2599.

[603] *Id*. at 2601.

democratic process.[604] His dissent, moreover, asserted that the language of the Constitution does not establish the right of same-sex couples to marry.[605] Justice Scalia reached this conclusion by faulting the majority's substantive Due Process and Equal Protection analysis that, according to him, history and traditions preclude the finding of a right to same-sex marriage and that the failure to identify a suspect class would result in no determination of whether a state's discrimination against same-sex couples is justified.[606]

In dissenting against the Court's analysis of the substantive Due Process and Equal Protection claims, Justice Scalia recalled his origin as a conservative originalist by arguing that neither the country's history and traditions, nor the Framer's intent, authorize the Court to create the right of same-sex couples to marry. However, a careful examination of Justice Scalia's dissent reveals that it was pragmatic in part, and proves Justice Scalia's concern that the *Obergefell* decision was likely to have negative consequences on the American democratic process as well as the religious liberty of those who oppose same-sex marriage for religious purposes.

Although Justice Scalia's dissent could easily be criticized as an arcane originalist attempt to rob the Court of its authority to establish a new unenumerated fundamental right, especially considering he had proven such authority to the Court in earlier precedent, this neither makes him as a lawless judge, nor does it reflect a negative view of his career on the Court. Justice Scalia is now dead, but his judicial legacy and effect on American constitutional law will endure past his death.

[604] *Id*. at 2626–27 (Scalia, J., dissenting).
[605] *Id*. at 2630.
[606] Hermann, *supra* note 18, at 395-96.