The Fundamental Right to Divorce, or,
Family Law and the Fundamental Right to Travel

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Same-sex marriage is on the verge of receiving constitutional protection. On April 28, 2015, the United States Supreme Court heard oral argument in the consolidated cases styled *Obergefell v. Hodges*.[1] The Court received briefing and argument on two discrete questions: (1) "Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex" (the constitutional right to marry question); and, (2) "Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state" (the recognition question).[2]

While numerous states and their constituents struggle with the Supremacy Clause[3] consequences relating to the constitutional right to marry question, I was always more interested in the second question, the recognition question, which implicates the Constitution's Full Faith and Credit Clause[4] and possibly the fundamental right to travel. Initially, when I submitted my paper proposal for this meeting, the Supreme Court had not yet granted certiorari in *Obergefell*. I wanted to further develop and discuss the recognition question first addressed in my 2013 Villanova Law Review article, *Unbreakable Vows: Same-Sex Marriage and the*

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[1] James Obergefell, et al. v. Richard Hodges, et al., Supreme Court Docket Nos. 14-556, 14-562 (Tanco v. Haslam), 14-571 (DoBoer v. Snyder), 14-574 (Bourke v. Beshear)(January 16, 2015).
[2] *Id.*
[3] U.S. Con., Art. VI, para 2 reads in pertinent part: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
[4] U.S. Con., Art. IV, Sect. 1 reads in pertinent part: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Fundamental Right to Divorce.[5] But, so much has changed since January, 2015, that both my paper focus and presentation have become far more fluid than originally conceived.

It is entirely possible that my original proposal will be moot by the time I give my presentation. Even as this draft is being revised and submitted, the Supreme Court is poised to issue its opinion in *Obergefell* any day. The upside to this situation, literally awaiting the Court's decision to assess how my presentation will change, is that I will likely have the privilege of being one of the early voices addressing *Obergefell*. The downside is that this draft becomes just shy of meaningless.

If the Supreme Court finds a constitutional right to marry, which is not a foregone conclusion, the recognition question becomes essentially irrelevant. If the Supreme Court finds a national right to marry, states would be hard pressed to ignore other states' lawfully issued constitutionally-mandated marriages that, at present, many states refuse to recognize. But, these "if" contingencies remain dependent upon the Court expanding current same-sex marital rights.

So, what will be the legal and constitutional relevance of *Obergefell* once the opinion is finally issued? In classic law school parlance, the answer is "it depends." Currently, the state responses to a predicted national right to marry have varied from Alabama State Supreme Court Justice Roy Moore's recent proclamation that

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[5] Mary Margaret Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILLANOVA L. REV. 169 (2013).

constitutionally mandated same-sex marriage will "destroy our country"[6] to the North Carolina legislature's recent votes to preserve religious liberty for those conscientiously opposed to same-sex marriage.[7] As we await the Court's decision, here are a few key items to look for:

1) **Who writes the majority opinion?**

Justice Anthony Kennedy has authored every major case expanding protection for sexual orientation to date. *See Romer v. Evans*, 517 U.S. 620 (1996)(striking down Colorado's Amendment 2 under Equal Protection Grounds in a 6-3 decision); *Lawrence v. Texas*, 539 U.S. 558 (2003)(overruling *Bowers v. Hardwick* and finding that criminal proscriptions against homosexual sodomy violate the Constitution's protection of individual liberty); *United States v. Windsor*, 570 U.S. ____ (2013)(ruling part of the Defense of Marriage Act unconstitutional and granting federal tax exemption to surviving spouse of female New York couple that was legally married in a location that permitted same-sex marriage and resided in a state the recognized same-sex marriage).

In each of these cases, the Court has expanded protections for gays and lesbians, but never with precision of language or by announcing consistent

[6] Ken Meyer, *Roy Moore: SCOTUS Gay Marriage Ruling Could 'Destroy the Country,'* Mediatate.com (June 3, 2015). Judge Moore further proclaimed that "[w]hat the Supreme Court is about to do, if they do it, is not redefine marriage but destroy the institution of marriage." *Id.*

[7] Marti Maguire, *North Carolina Senate Overrides Governor's Veto of Marriage Opt-Out Bill*, Reuters.com (June 2, 2015). Reuters reports that "This bill allows magistrates and other officials to refuse to perform marriage or issue marriage certificates by citing a 'sincerely held religious objection.'" *Id.* The law still requires a 3/5 override of the Governor's veto by the House.

constitutional standards of review.[8] Thus, if Justice Kennedy is revealed to be the opinion's author, that mere fact would portend a victorious result for same-sex couples, but not necessarily a victory for constitutional clarity.

If the author is not Justice Kennedy, there is more hope for a constitutionally transparent ruling. Conspicuously absent from *Romer*, *Lawrence* and *Windsor* is an orderly approach to constitutionally assessing sexual orientation claims. What standard of review is appropriate and, for future cases, should govern? That question has yet to be answered with sufficient clarity in any of the three previous Kennedy opinions.

If the author is one of the four liberal leaning Justices (Breyer, Ginsburg, Kagan or Sotomayor), expect a major victory for same-sex couples. Some pundits have even suggested that the recent dialogue between Justices Scalia and Breyer in *Kerry v. Din* (a plurality opinion in an immigration case addressing, tangentially, the marital rights of a U.S. citizen and her Afghan husband to reside together in the United States)

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[8] Justice Scalia's dissenting opinion in *Romer* correctly notes that the test being applied by Justice Kennedy's majority opinion is not traditional rational basis review. *Romer v. Evans*, 517 U.S. 620, 640 (Scalia, J., dissenting). Scalia characterizes his dissent as vigorous and argues, with invectives at times, that the Court has unnecessarily entered a culture war. *Id.* at 636-652.

foreshadows a broad victory for same-sex marriage.[9] I, however, am not entirely convinced.[10]

If the author is one of the three conservative leaning Justices (Alito, Scalia or Thomas), it will be a difficult day for same-sex couples and an assured setback for constitutionally-based sexual orientation rights. In other words, if any of these three Justices author the majority opinion, there will likely be a renewal of states' rights. Justice Scalia, particularly in *Romer*, relied heavily on local democracy and the democratic process.[11] And, if the pundits are correct that Justice Scalia's unnecessarily verbose opinion in *Din* signals something beyond merely the immigration question *Din* resolves, there is little doubt that same-sex marriage will not be receiving constitutional liberty protection from the conservative wing of the Court.[12]

If the Chief Justice authors the majority opinion, the result is absolutely uncertain. Some predict Chief Justice Roberts will strive to be "on the right side of history," suggesting that as cultural shifts occur,

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[9] *Kerry v. Din*, 576 U.S. ____ , *3 (2015)(reversing a Ninth Circuit opinion finding that a U.S. citizen had a marital liberty interest in gaining review of her Afghan husband's denied visa application).

[10] For those reading clues into the broader same-sex marriage question, Justice Breyer's dissent in *Din* does rely on the liberty interests of marriage, using the more generic term "spouse" to discuss the liberty protection the Court "has long recognized, [in] the institution of marriage, which encompasses the right of spouses to live together and to raise a family." *Id.* at *2-3 (Breyer, J., dissenting). Justice Breyer further notes that such institution is "central to human life, requires and enjoys community support and plays a central role in most individuals' 'orderly pursuit of happiness.'" *Id.* (Breyer, J., dissenting).

[11] *Romer*, 517 U.S. at 636 ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by the normal democratic means, including the democratic adoption of provisions in state constitutions")(Scalia, J., dissenting).

[12] In the second paragraph of his plurality opinion, Justice Scalia devotes his energy to attacking Justice Breyer's dissent. *Din*, 576 U.S. ____, *2. Justice Scalia proclaims that "[w]hat Justice Breyer's dissent strangely describes as a 'deprivation of her freedom to live with her spouse in America,' is in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America." *Id.*

constitutional shifts often accompany such cultural shifts. It bears noting that the Chief Justice recently joined Justice Scalia's plurality opinion in *Din*, which uses strong language to limit the ever-expanding nature of constitutional liberty interests gaining fundamental right status.[13]

The Justice selected as the ultimate author should shed important – if not immediate – light on both the relief granted, if any, and the breadth of the right recognized, if any.

2) What is the basis of the decision – liberty (substantive due process) or equal protection?

Romer was an equal protection case. In contrast, *Lawrence* found a constitutional right to engage in same-sex sodomy based on liberty rather than equal protection.[14] As Justice Kennedy noted, in writing for the *Lawrence* majority, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[15] Yet, despite finding a substantive due process protection,

[13] *Id.* at *5 (noting that despite historical evidence strictly limiting constitutional liberties, the Court "has seen fit on several occasions to expand the meaning of 'liberty' under the Due Process Clause to include certain implied 'fundamental rights'"). This entire discussion may simply be dicta as the decision, Justice Kennedy's concurring opinion demonstrates, could be resolved on far narrower grounds than selected by Justice Scalia and the plurality.

[14] *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)(observing that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"). Certiorari was originally granted on both equal protection and substantive due process grounds. *Id.* at 564. The majority opted to address the substantive due process argument directly, including a reconsideration of *Bowers v. Hardwick*. *Id.* at 574. Justice O'Connor, however, wrote a concurring opinion joining based on an equal protection violation. *Id.* at 579 (O'Connor, J., concurring).

[15] *Id.* at 575.

the *Lawrence* Court failed to properly apply the traditional constitutional scrutiny for substantive due process, strict scrutiny review.[16]

Instead, as Justice Scalia's dissenting opinion appropriately criticizes, a new "liberty" right is declared without actually achieving fundamental right status.[17] This vacillation between liberty interests and equal protection cloud even the Court's most recent decision in this area, *United States v. Windsor*.[18] It is difficult to tell, precisely, whether *Windsor* was an equal protection or substantive due process case.[19]

Will the Court, if it finds a constitutional right to same-sex marriage, anchor the right to marriage in equal protection of substantive due process? In other words, will Justice Kennedy's "dignity" jurisprudence or equality jurisprudence prevail, constitutionally speaking? If the Court finds an equal protection violation, the decision could, perhaps should, present a clearly articulated standard of constitutional review based on sexual orientation rather than gender.

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[16] *Id.* at 578 (finding simply that the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

[17] *Id.* at 586 (observing that "nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right")(Scalia, J., dissenting)(emphasis in original). *See also id.* at 593 (properly denoting the Court's "opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest").

[18] Justice Kennedy concludes his majority opinion with a rather confounding statement of the law:

> This requires this Court to hold, as it does now, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of laws.

Windsor, 570 U.S. ____, *25 (2013).

[19] *Id.* at *16 (Scalia, J., dissenting).

Justice Kennedy, uniformly considered the swing-vote in *Obergefell*, first spoke of the dignity involved in same-sex relations in *Lawrence*.[20] And, again in *Windsor*, Justice Kennedy uses variations of "dignity" 12 separate times.[21] While his questions during the *Obergefell* oral argument were chameleon-like (seemingly opposing a redefinition of marriage that has existed for millennia, but equally condemning a definition of marriage that focuses primarily on biological connections to children), Justice Kennedy once again emphasized individual dignity in challenging the states' exclusion of same-sex couples from marriage.

Does this emphasis on individual dignity serve as a harbinger that a broad-based ruling is imminent? Not necessarily. But, neither does this focus strengthen or diminish the chances of an equal protection ruling.

My hope is that regardless of the outcome, the ruling issued has clear statements of constitutional law grounded in precedent and that any right granted, or denied, is done so under traditional standards of constitutional review. Anything less may fail to generate societal confidence and buy-in, undermining the Court's perceived legitimacy.

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[20] *Lawrence*, 539 U.S. at 567.

[21] *Windsor*, 570 U.S. ____, passim (2013)(observing several uses of the term "dignity," "indignity" and "dignify" to support the Court's ultimate holding).

3) If, and only if, some variation of a constitutional right to marry is found, what does Justice Scalia's dissent proclaim as the next step in this unsettling process?

Justice Scalia has accurately forecast each and every same-sex advancement, both in expansion of the right declared[22] and, presciently, even in pace of achievement. Court observers should recall Justice Scalia's prediction following *Windsor* that "the second, state-law shoe (constitutionalizing same-sex marriage rights) [would] be dropped later, maybe next Term."[23] Scalia missed this projection by a single year.

If Justice Scalia dissents (which he undoubtedly will if any form of constitutional marriage protection is afforded same-sex couples), what does he advise will be the next, logical (and likely) consequence? I anticipate that religious liberty will be emphasized, much as it was implicitly invoked in the *Romer* dissent.[24] And, as we have seen throughout the country, religious liberty and individual liberty appear destined for conflict in this particular arena.

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[22] *Id.* at 604. (Scalia, J., dissenting). "The Court today pretends that . . . we need not fear judicial imposition of homosexual marriage. . . . Do not believe it. . . . If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and elderly are allowed to marry." *Id.* *See also*, *Windsor*, 570 U.S. ____, *21-22 (Scalia, J., dissenting)(repeating his admonishment that *Windsor* is but one more stone in the road to nationalizing same-sex marriage).

[23] *Windsor*, 570 U.S. ____, *16 (Scalia, J., dissenting).

[24] *Romer*, 517 U.S. 620, 636 (Scalia, J., dissenting). Justice Scalia opens his dissent with a bold statement: 'The Court has mistaken a Kulturhampf for a fit of spite." *Id.* This term, while generically used to indicate a cultural struggle, has a very precise history. *See britanica.com.* This term, of German origin, signifies the very real cultural attack by Germany on the Catholic Church, of which Justice Scalia is a member. *See oxforddictionaries.com* (Kulturkampf). *See also*, *britannica.com* indicating that the "climax of the struggle came in 1875, when civil marriage was made obligatory throughout Germany." One can only surmise whether Justice Scalia intended to use such a unique term, with its precise historical meaning, when he penned his *Romer* dissent.

4) Is it possible that the Court will take the less judicially active approach, finding either no constitutional right to same-sex marriage or resurrecting the federalism narrative set forth in *Windsor* by granting the more limited right to marital recognition?

Anything is possible. And, with this sharply divided Supreme Court – on this divisive issue – I believe it is foolhardy to make a strong prediction on the outcome of the case basely solely on the briefs, oral arguments and existing case law. Case law has yet to clearly delineate the contours of liberty as a substantive due process right. But, under the governing precedent of *Washington v. Glucksberg*, the only way to find a fundamental right to same-sex marriage is to ignore *Glucksberg*'s commands to: (1) narrowly define the right being considered, and, (2) constrain the expansion of fundamental rights to those with strong historical and traditional support.[25]

To find a fundamental right to same-sex marriage under existing case law requires cognitive dissonance. Much like the issue of physician assisted suicide, which *Glucksberg* analyzed as a subset of suicide, the question of same-sex marriage has consistently confronted voters and legislators that "continue for the most part to reaffirm their States'

[25] 521 U.S. 702, 710 (1997)("We begin, as we do in all [substantive] due process cases, by examining our Nation's history, legal traditions and practices"). *See also*, *id.* at 720-21 (noting that the "established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' [and], Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest").

prohibitions" on same-sex marriage.[26] Most of the rapid advancements in same-sex marriage have occurred in the judicial arena, not through the state legislative process. This parallel rightly invokes *Glucksberg*.

Will the Court again follow Justice Kennedy's lead in *Lawrence*, relying on international law and "recent" history, jettisoning *Glucksberg*'s requirements?[27] To find a fundamental right to same-sex marriage would require either deft precedent dodging or a reaffirmation of *Lawrence*'s approach toward modern history. Alternatively, a finding that the question of marriage remains the quintessential state right would comport with both history *and* precedent and provide the states with additional time to consider whether to join a growing chorus for equality. Federalism principles and judicial restraint favor a finding against nationalizing, through constitutional status, the right to same-sex marriage.

But, what if the Court splits the proverbial baby? What if the Court yields to history and precedent on the first question, the marriage question, by acknowledging *Glucksberg*'s impediment, but mandates recognition of valid same-sex marriage licenses issued by states permitting same-sex marriage? Does not the Full Faith and Credit Clause provide the Court with the best solution to this controversial issue? States retain their right to govern and decide for themselves who can

[26] *Id.* at 716.
[27] *Lawrence*, 539 U.S. at 571-72 (contenting that the majority believed "our laws and traditions of the past half century are of most relevance here"). *See also*, *id.* at 572-73.

lawfully marry in their jurisdictions. Yet, states that prohibit same-sex marriage must still recognize the valid marriage licenses issued by co-equal states? Is this not the best way forward as our society continues to debate the wisdom of constitutionalizing same-sex marriage and removing from the states the quintessential state right?[28]

Reasonable minds can, and do, differ on the proper approach to deciding this thorny constitutional issue. Some prefer the Court to modernize its approach (ala *Lawrence*) and find that the growing number of states and countries accepting same-sex marriage mandates a constitutional finding in favor of such right. Others, particularly those preferring a less activist court, would prefer to see the issue take shape in the legislative spheres rather than the judicial arena.

Fortunately, for us all, we will have an answer from the Court shortly. Until then, I encourage you to pay particular attention to these four issues. Who writes the majority opinion, the legal basis (or bases) of the majority opinion, whether Scalia writes a vigorous dissent, and whether the Court defers the nationalization of marriage question to the still evolving state legislatures could very well affect the lasting nature of any ruling issued.

[28] *See e.g., Lawrence*, at 605 (Thomas, J., dissenting)(observing that the law before the *Lawrence* Court was "uncommonly silly"). However, rather than expand the constitutional rights of individuals, Justice Thomas opted to retain the traditional deference afforded properly passed legislation, underscoring the distinctions between the judiciary's role and the legislature's role in lawmaking: "If I were a member of the Texas Legislature, I would vote to repeal [the law]. . . . Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and other similarly situated." *Id.*