The meaning of marriage:

why the US Supreme Court got it wrong

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On 26 June 2015, the Supreme Court of the United States ruled (5:4) that same-sex 'marriage' is a fundamental right under the US Constitution.[1] This decision by five unelected judges has automatically legalised same-sex 'marriage' in all 50 US states, including those where voters had rejected same-sex 'marriage' via democratic referendums.

The majority ruling was splashed across world headlines – but very few media outlets reported the four dissenting opinions, including that of US Chief Justice John Roberts. All four were scathing of the majority judgment, pointing out that it ignores both logic and precedent, and exceeds the Court's power. Each opinion expressed deep concern that the Court has ushered in a new form of tyranny.

The four edited opinions below exclude most references and include added headings.



Chief Justice John Roberts
joined by Justices Scalia and Thomas

Just who do we think we are?

Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment."[2]

The fundamental right to marry does not include a right to make a State change its definition of marriage. And 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 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.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage… Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent… As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

Man-woman marriage has existed across all civilisations

There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage", or – more precisely – *who decides* what constitutes "marriage"? The majority largely ignores these questions.

As the majority acknowledges, marriage "has existed for millennia and across civilizations". For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. [Petitioners concede] that they are not aware of any society that permitted same-sex marriage before 2001.

The purpose of marriage: to provide optimal conditions for human survival

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history – and certainly not as a result of a prehistoric decision to exclude gays and lesbians.

It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage… As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[3]

Marriage has meant a man-woman union throughout US history

This singular understanding of marriage has prevailed in the US throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman". Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children.

To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its

stability, roles, and values accepted by all". The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." 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 core meaning of marriage has remained unchanged

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love… Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy", were repealed by many States and ultimately struck down by this Court… The majority may be right that the "history of marriage is one of both continuity and change", but the core [man-woman] meaning of marriage has endured.



Over the last few years, public opinion on marriage has shifted rapidly… In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Unelected judges should not determine social policy

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples", but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."[4] That decision interpreted the Constitution correctly.

Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

Allowing unelected federal judges to select which un-enumerated rights rank as "fundamental" – and to strike down state laws on the basis of that determination – raises obvious concerns about the judicial role.

The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers".[5] The majority acknowledges none of this doctrinal background, and it is easy to see why: its aggressive application of substantive due process breaks sharply with decades of precedent.

'Right to privacy'

[T]he privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits… [A]lthough the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

The majority decision could justify polyamory

Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world.

If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage… If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But petitioners have not pointed to any.

The majority ruling threatens religious freedom

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice.

The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage.

The First Amendment guarantees, however, the freedom to "exercise" religion. Ominously, that is not a word the majority uses.

Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

The majority ruling unfairly denigrates the other side

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… It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

[A] much different view of the Court's role is possible. That view is more modest and restrained… It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment.

It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds.

And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.



Justice Antonin Scalia

joined by Justice Thomas

The US no longer deserves to be called a democracy

[I]t is not of special importance to me what the law says about marriage. 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.

The opinion in these cases is 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.

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 the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification.

A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America.

Hubris: discovering a 'fundamental right' missed by all judges in the past 135 years

Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City.

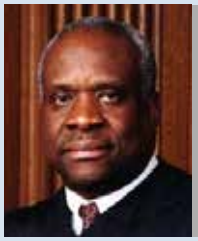
Eight of them grew up in east- and west-coast States… Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination.

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since.

Majority judgment: 'pretentious', 'egotistic', 'incoherent'

The opinion is couched in a style that is as pretentious as its content is egotistic … [and] the opinion's showy profundities are often profoundly incoherent. [For example:] "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality – whatever that means – were freedoms?)

The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.



Justice Clarence Thomas

joined by Justice Scalia

Majority decision undermines the liberty the US Constitution sought to protect

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.

The Framers created our Constitution to preserve that understanding of liberty.

Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect.

Along the way, it rejects the idea – captured in our Declaration of Independence – that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property".

I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property.

[I]t is hard to see how the "liberty" protected by the [Due Process] Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property".

Same-sex couples already enjoy full constitutional liberty

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships.

To the contrary, they have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please.

Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor … can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children.

The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

They want, for example, to receive the State's *imprimatur* on their marriages – on state issued marriage licenses, death certificates, or other official forms.

And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the [Constitution's] Framers would have recognized.

Former laws banning inter-racial marriage are quite different from laws defining marriage as man-woman

The suggestion that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery".[6] Maryland's 1664 law prohibiting marriages between "'freeborne English women' " and " 'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong slavery in the colony. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves".

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history.

Ryan Anderson as Amicus Curiae [explained] that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time.

Religious liberty now under threat

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The majority … [judgment] makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons … as they seek to teach the principles that are so fulfilling and so central to their lives and faiths".

Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

Our Constitution – like the Declaration of Independence before it – was predicated on a simple truth: one's liberty, not to mention one's dignity, was something to be shielded from – not provided by – the State.

Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society.

I respectfully dissent.



Justice Samuel Alito

joined by Justices Scalia and Thomas

No country allowed same-sex 'marriage' until the Netherlands in 2000

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'"[7] And it is beyond dispute that the right to same-sex marriage is not among those rights.

Indeed: "Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

"What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges."[8]

[The] understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one.

For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. This development is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed in a great variety of countries and cultures all around the globe.

Far-reaching consequences

As I wrote in [a previous judgment]: "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects… But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

"We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.

"At present, no one – including social scientists, philosophers, and historians – can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment."[9]

Some are determined to stamp out every vestige of dissent

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also … be used to vilify Americans who are unwilling to assent to the new orthodoxy… The implications … will be exploited by those who are determined to stamp out every vestige of dissent.

I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Today's decision will have a fundamental effect on this Court and its ability to uphold the rule of law…

Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

References

1 Supreme Court of the United States, *Obergefell v Hodges*, 576 US (26 June 2015): http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

2 *The Federalist*, No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)

3 James Q Wilson, *The Marriage Problem* (HarperCollins Publishers, 2002), 41.

4 *DeBoer v Snyder*, 772 F 3d 388 (CA6 2014).

5 *Griswold v Connecticut*, 381 US (1965) (Harlan, J., concurring in judgment).

6 Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2009), 19.

7 *Washington v Glucksberg*, 521 US 701, 720–721 (1997).

8 *United States v Windsor*, 570 US (26 June 2013) (Alito, J., dissenting) (slip op., at 7).

9 *United States v Windsor*, 570 US (26 June 2013),(dissenting opinion) (slip op., at 8–10).