THE SUBSTANCE OF SUBSTANTIVE DUE PROCESS

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Abstract: *Due process is arguably the most elusive concept in constitutional law. Justices have invoked it to protect a wide range of activities, but the Supreme Court has never specified where the boundaries of due process lie. In Obergefell v. Hodges, the Court held that the due process clause included a right to homosexual marriage, irrevocably making it a legal discussion rather than a policy discussion. Thus, instead of discussing whether legalizing homosexual marriage is good policy, one must examine whether Justice Kennedy's expansive interpretation of the 14th Amendment's Due Process Clause is legitimate. Justice Kennedy's opinion contains defenses for the majority's decision, but most are rooted in policy rather than the Constitution. The majority opinion follows in the tradition Dred Scott v. Sandford, Lochner v. New York, and others, who had a political goal, and accomplished it by disguising a policy decision as constitutional interpretation.*

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In the past decade, few—if any—American political debates have been as contentious and divisive as the debate over same-sex marriage. In 2003, Massachusetts became the first state to recognize same-sex marriage when the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health* (2003). From 2003 to 2015, eleven states had passed legislation in support of same-sex marriage, while others passed legislation to explicitly define marriage as being between one man and one woman.[1] The citizens of each state could decide whether their state would recognize same-sex marriage or not. These debates abruptly became immaterial following the Supreme Court ruling in *Obergefell v. Hodges* (2015).[2] Given the role of *stare decisis* in constitutional law, it is unlikely that same-sex marriage will again be discussed as a purely policy issue; for better or for worse, it is now a matter of constitutional law. As noted in the dissents in *Obergefell v. Hodges*, one can critique either the conclusion of the case, its methodology, or both.[3] While the conclusion is debatable, the methodology is obviously suspect. What the majority styled as constitutional interpretation was a divergence from precedent and an aspirational attempt to legislate from the bench, taking a power reserved to the states.

When examining *Obergefell v. Hodges*, it is

1 Goodridge v. Department of Public Health, 440 Mass. 309 (2003); Obergefell v. Hodges, No. 14-556, (U.S. June 26, 2015) (Scalia J., dissenting); *Id.* (Kennedy, J., majority opinion).

2 Obergefell v. Hodges, No. 14-556, (U.S. June 26, 2015) (Kennedy, J., majority opinion).

3 *Id.* (Scalia, J., dissenting); *Id.* (Roberts, C.J., dissenting).

important to note that a critique of the decision is not necessarily contingent on a specific stance on the subject of gay marriage rights. One can believe that something ought to be legalized, but was not legalized constitutionally, just as one can believe that a policy should not have been implemented, but nonetheless believe its implementation was constitutional. As justices on both sides of the decision note in their opinions, there are compelling policy arguments for both sides. Nonetheless, the justices each purport to ground their arguments in constitutional analysis, rather than in policy. The primary provision of the Constitution evoked by Justice Kennedy in his majority opinion was the Fourteenth Amendment, specifically the Due Process Clause and the Equal Protection Clause.[4] According to Justice Kennedy, the Fourteenth Amendment and the guarantees of liberty found elsewhere in the Constitution "require a State to license a marriage between two people of the same sex… and recognize a same-sex marriage licensed and performed in a State which does grant that right."[5] One may, as Justice Scalia does, argue against Justice Kennedy's interpretive model, while being indifferent to gay marriage as a public policy issue.[6]

To understand the arguments made by the justices in their opinions in *Obergefell v. Hodges*, it is important to understand the history of due process, especially the interpretations of the Fourteenth Amendment. One can

4 *Id.* (Kennedy, J., majority opinion).
5 *Id.* at 3.
6 *Id.* at 1-9 (Scalia A., dissenting).

observe the first hints of an expansive interpretation of due process in one of the most infamous Supreme Court cases, *Dred Scott v. Sandford* (1857).[7] Dred Scott, a slave of John Emerson, accompanied his master from the slave state of Missouri to Illinois, a free state, and later returned to Missouri.[8] Scott argued that, because he had travelled to a state where slavery was prohibited, he was now a free man. Although the case concerned slavery, it was also framed as a property rights case: did Emerson have an absolute right to his property, regardless of his location in the United States? The Court held that Emerson did. In his majority opinion, Chief Justice Roger Taney expounded on his interpretation of the Fifth Amendment's Due Process clause:

> The rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[9]

Taney intimated a substantive element of due process which

7 *Id.* at 1-29 (Roberts, C.J., dissenting).

8 *Scott v. Sandford, in* The Oxford Companion to the Supreme Court of the United States, 888 (Kermit L. Hall ed., 2nd ed. 2005).

9 Dred Scott v. Sandford, 60 U.S. 393 (1857).

protected liberty and property from arbitrary legislative restrictions.[10] Most of the contemporaneous criticism of the decision centered on Taney's view of black people as property, while the substantive interpretation of due process remained mostly uncontested.[11] Shortly after being handed down, the decision was overturned by the Thirteenth and Fourteenth Amendments.

The Fourteenth Amendment was ratified in 1868 to help enforce the Thirteenth Amendment, which banned slavery nationwide.[12] The first section of the Fourteenth Amendment states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[13]

The Fifth Amendment's Due Process Clause was applicable to violations by the federal government, but not to violations by the states. To prevent states from restricting the rights of newly freed slaves, the authors of the Fourteenth Amendment added a Due Process Clause which was applicable to the states, protecting life, liberty and property.[14] The other

10 Justin Buckley Dyer, Slavery, Abortion, and the Politics of Constitutional Meaning 304 (2013).
11 *Id*.,at 24-26.
12 U.S. Const. art. XIII.
13 U.S. Const. art. XIV, § 1.
14 *Id.*; *Fourteenth Amendment, in* The Oxford Companion to the Supreme

distinctive clause in the amendment is the Equal Protection Clause, which provides that states must protect all people within their jurisdictions equally. These two clauses were cited as the primary constitutional basis for the majority decision in *Obergefell v. Hodges*.[15] How did the Fourteenth Amendment shift from primarily guaranteeing the rights of former slaves to containing a right to same-sex marriage?

In his *Obergefell v. Hodges* dissent, Justice Roberts noted that while *Dred Scott*'s holding was overturned by Thirteenth, Fourteenth, and Fifteenth Amendments, "Its approach to the Due Process Clause reappeared … in a series of early 20th century cases."[16] One of the most important—and controversial—of these cases is *Lochner v. New York* (1905), which reinforced and expanded the substantive interpretation of Due Process and ushered in a new era of activist Supreme Court rulings, known as the "Lochner Era."[17] Joseph Lochner owned a bakery in the state of New York, whose legislature had passed a law limiting (among other things) the total hours that bakers could work each week.[18] Lochner was indicted twice for an employee surpassing the weekly limit of 60 hours.[19] Lochner appealed, and the Supreme Court ruled New York's law unconstitutional. Justice Rufus Peckham wrote in his majority opinion, "[The

Court of the United States, 359 (Kermit L. Hall ed., 2nd ed. 2005).

15 Obergefell v. Hodges, No. 14-556, 19 (U.S. June 26, 2015) (Kennedy, J., majority opinion).

16 *Id.* at 12 (Roberts, C.J., dissenting).

17 Dyer, *supra* note 10, at 43.

18 *Lochner v. New York, in* The Oxford Companion to the Supreme Court of the United States, 588 (Kermit L. Hall ed., 2nd ed. 2005).

19 *Id.*

question at hand] is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[20] The Court held that the right of contract was a substantive right, protected by the Fourteenth Amendment, which could not be restricted by the law—even though the New York legislature followed proper procedure in passing the law.[21]

The effect of the Lochner ruling was sweeping: over the following thirty years, conservative Supreme Court majorities consistently struck down economic regulations. Liberal justices, especially Oliver Wendell Holmes, wrote scathing dissents which criticized the majority for using the guise of constitutional interpretation to advance preferred policies. In one such dissent, Holmes wrote, "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical…"[22] Nonetheless, the Court was clear; economic legislation that violated rights which were substantive in the court's view would be struck down.[23] By the mid-1930s, a frustrated Franklin Delano Roosevelt

20 Lochner v. New York 198 U.S. 45, 57 (1905).
21 *Id,.*generally.
22 *Id.* at 75 (Holmes C.J.., dissenting).
23 *Id.,* generally; *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

was threatening to expand the Court by adding progressive justices, in hopes of preventing the Court from continuing to strike down New Deal legislation.

Before Roosevelt could carry out his threat, the court changed its view of due process. In 1937, Justice Owen Roberts abruptly switched his position in the landmark decision, *West Coast Hotel Co. v. Parrish* (1937). In *West Coast Hotel Co. v. Parrish*, the plaintiff, Elsie Parrish, filed suit for the difference in wages between what she had been paid and the state minimum wage.[24] The court ruled in her favor, holding that state legislation superseded the individual freedom of contract and overturning *Lochner v. New York*, *Adkins v. Children's Hospital* (1923), and many other precedents from the Lochner Era. In his majority opinion, Chief Justice Charles Hughes wrote:

> "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law… the Constitution does not recognize an absolute and uncontrollable liberty… Though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."[25]

The Court denied the broad substantive right to contract and hinted at a more deferential attitude in the area of economic policy. Thereafter, the Court assumed the

24 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

25 *Id.* at 398.

rationality of economic regulations, and seldom interfered with legislation.[26] Although economic due process had died, the concept of substantive due process soon reappeared in a different area.

A year later in *United States v. Carolene Products Co.* (1938), Justice Harlan Stone attempted to set forth a systematic framework to determine which cases the Court would address. In an initially obscure footnote to his majority opinion that is now known simply as "Footnote Four," Justice Stone wrote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth… legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation… [and] statutes directed at particular… minorities.[27]

Stone identifies three categories which would be subject to more stringent analysis: legislation which violates the Bill of Rights or the Fourteenth Amendment, legislation

26 *Substantive Due Process*, *in* The Oxford Companion to the Supreme Court of the United States, 276 (Kermit L. Hall ed., 2nd ed. 2005).

27 U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938).

that restricts political processes like voting, and legislation that discriminates against minorities. This new model of determining which cases would be reviewed was not universally accepted among the justices; however, in the years that followed, the Court deferred to the legislature in economic matters but reviewed more cases involving civil rights.[28]

In the following years, the Court used the Due Process and Equal Protection clauses to rule in favor of integration, most famously in *Brown v. Board of Education* (1954). But the Court also "discovered" a new type of substantive due process: cases concerning privacy and individual autonomy.[29] The court continued further afield in *Griswold v. Connecticut* (1965), holding that the Bill of Rights contains "penumbras" of certain unremunerated rights.[30] What exactly is meant by "penumbra" and how justices should discern what rights are within these "penumbras" is unclear. The Court was clear in its decision: the "penumbral rights of privacy and repose" included a right of married couples to use contraceptives.[31] Later, in *Roe v. Wade* (1973), the penumbral right of privacy was held to encompass the right of a pregnant woman to procure an abortion.[32] The Court claimed it was bound to protect not only enumerated rights, but also the "emanations from those guarantees that help give them life

28 Substantive Due Process, *supra* note 26, at 276.
29 Brown v. Board of Education, 347 U.S. 483 (1954).
30 Griswold v. Connecticut, 381 U.S. 479 (1965).
31 *Id.* at 485.
32 Roe v. Wade, 410 U.S. 113 (1973).

and substance."[33] The gradual expansion of what is protected by the Fourteenth Amendment still continues.

With the understanding of how the Fourteenth Amendment has been historically interpreted, one can evaluate the reasoning of Justice Kennedy in his opinion. After a brief overview of the facts, Justice Kennedy presents the two central questions: first, whether the Fourteenth Amendment requires states to license marriages between two people of the same sex, and second, whether states must recognize such marriage licenses legally obtained in other states.[34] Obviously, if the Fourteenth Amendment does require each state to license marriages for same-sex couples, the second question is moot, so Justice Kennedy begins by addressing the first question. He examines the history of same-sex relations, before launching into his constitutional justification in the third section of his opinion. In the fourth section of his opinion, Kennedy addresses some counterarguments. He concludes his opinion in the fifth section.

Justice Kennedy notes that historically, marriage has promised "nobility and dignity", and has been a central part of cultures throughout history.[35] He adds, "It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex." Nonetheless, Kennedy argues,

33 *Griswold*, 381 U.S. at 484.
34 Obergefell v. Hodges, No. 14-556, 2-3 (U.S. June 26, 2015) (Kennedy, J., majority opinion).
35 *Id.*

the public understanding of marriage has fundamentally changed over time.[36] As examples, he cites the practice of arranged marriage and the doctrine of coverture, ideas which were once considered part of marriage. In addition to these past changes, Kennedy notes a shift towards greater public tolerance of homosexuality and the legalization of same-sex marriage in various states, concluding that, "The states are now divided on the issue of same-sex marriage."[37] Kennedy offers very little concrete reasoning for why the past history or the current status necessitates a decision legalizing same-sex marriage. In his dissent, Chief Justice Roberts notes that the historical changes noted did not affect the basic definition of marriage as the "union… of one man and one woman."[38] While it might be convenient for the Supreme Court to resolve the current division among the states on the issue of same sex marriage, neither convenience nor extraordinary conditions can create or enlarge constitutional power, as Chief Justice Hughes noted in his majority opinion in *Schechter Poultry Corp. v. United States* (1935).[39] The history of the issue is not sufficient to justify the decision.

Kennedy provides a more concrete defense in the following section, declaring, "The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights… [and] extend to certain personal choices central to individual dignity and

36 *Id.* at 4.
37 *Id.* at 10.
38 *Id.* at 7 (Roberts, C.J., dissenting).
39 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

autonomy, including intimate choices that define personal identity and beliefs."[40] Citing Justice Harlan's dissent in *Poe v. Ullman*, he adds that, although it is the duty of the Judiciary to identify and protect these fundamental rights, there is no formula for executing this task, (1961).[41] Rather, justices are to "exercise reasoned judgement."[42] However, as Justice Roberts mentions in his dissent, Harlan cautions that the Court is not, "'free to roam where unguided speculation might take them.' They must instead have 'regard to what history teaches' and exercise not only 'judgment' but 'restraint.'"[43] Justice Kennedy claims that when "new insights" into the meaning of the Constitution are found, they must be addressed, presumably by the Court.[44]

In his opinion, Kennedy names "four principles and traditions" which he claims demonstrate the Constitution's protection of same-sex marriage. His first claim is that the right to personal choice regarding who one marries is inherent to individual autonomy. However, as Justice Thomas notes, homosexual private religious ceremonies and homosexual cohabitation are legal in all states and civil gay marriages are legal in some states.[45] The only thing lacking is government entitlements, something not encompassed by the traditional meaning of "liberty."[46] The second principle is that the right

40 *Obergefell*, slip op. at 10 (Kennedy, J., majority opinion).
41 *Id.*; Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).
42 *Obergefell*, slip op.. at 10 (Kennedy, J., majority opinion).
43 *Obergefell*, slip op. at 18 (Roberts, C.J., dissenting); *Poe,* 367 U.S., at 542 (1961).
44 *Obergefell*, slip op. at 20 (Kennedy, J., majority opinion).
45 *Id.* at 1-18 (Thomas, J., dissenting).
46 *Id.* at 7.

to marry is fundamental because it "supports a two-person union unlike any other in its importance to the committed individuals."[47] The third principle is that the right to marry "safeguards children and families."[48] Finally, Kennedy adds that "marriage is a keystone of social order."[49] Justice Roberts comments in his dissent, "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." While these are good policy arguments, they are not Constitutional arguments.

Justice Kennedy relies heavily on precedents from *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987), which are Supreme Court cases overturning bans on interracial marriage, bans based on a failure to pay child support, and bans based on a person's status as an inmate, respectively. Justice Thomas observes in his dissent that these cases all involved "absolute prohibitions on private actions associated with marriage," not merely a lack of government recognition and benefits.[50] These cases do indicate protection from some restrictions on marriage, but it is not immediately clear that these precedents indicate a protection of same-sex marriage. Certainly that was not the interpretation at the time. The majority claims that marriage has been fundamentally misunderstood by every society until 15 years ago, and they have discovered what

47 *Obergefell*, slip op. at 13 (Kennedy, J., majority opinion).
48 *Id.*
49 *Id.* at 16.
50 *Id.* at 11. (Thomas, J., dissenting).

has slipped past other Supreme Court jurists for over a century.[51] The majority's policy arguments and precedents are not convincing.

The decision is most disturbing because it seemingly leaves very little to restrain the justices in their determination of what rights are regarded as "fundamental rights." In his majority opinion in *United States v. E. C. Knight Co.* (1895), Chief Justice Fuller warned, "Acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[52] Justices must exhibit caution when interpreting the Constitution, as the precedents they set may later prove destructive. The Fourteenth Amendment "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[53] Same-sex marriage is not part of that history and tradition. Instead, in the words of Justice Scalia,

> [The five justices in today's majority] 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… and they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies,

51 *Id.* at 7 (Scalia, J., dissenting).
52 United States v. E. C. Knight Co., 156 U.S. 1, 13 (1895).
53 Washington v. Glucksberg 521 U.S. 702, 721 (1997).

stands against the Constitution.[54]

The "self-restraint" and "utmost care" required when interpreting the due process clause are noticeably absent in the majority's decision.[55] It is doubtful that a meaningful check on judicial power remains in the absence of self-restraint.[56]

Other problems may arise from the precedent set in *Obergefell v. Hodges*. When the government guarantees "positive liberties," these liberties can conflict with others' "negative liberties." As noted by Justice Thomas, the petitioners did not seek the right to cohabitate, hold a religious marriage ceremony, or raise children, but rather to gain government recognition and benefits.[57] There has already been conflict between these rights and claims of free exercise of religion as protected by the First Amendment in cases like *Craig v. Masterpiece Cakeshop*. If the Court follows the precedent of *Obergefell v. Hodges* and continues to guarantee positive, government-endowed rights, such conflicts may become more frequent, as the courts give deference to new liberties, such as the protection of same-sex marriage, at the expense of liberties like free exercise of religion.

The original meaning of the Due Process Clause was that certain procedural steps must be taken before

54 *Obergefell*, slip op. at 7 (Scalia, J., dissenting).
55 Collins v. Harker Heights, 503 U.S. 115 (1992).
56 United States v. Butler, 297 U.S. 1 (1936) (Stone, J., dissenting).
57 *Obergefell*, slip op. at 9 (Thomas, J., dissenting).

certain rights were abridged. However, over the past 150 years, that meaning has slowly but steadily expanded to include substantive rights to property, as seen in *Dred Scott v. Sandford*, contract, as seen in *Lochner v. New York*, and more recently, privacy and dignity, in cases like *Roe v. Wade* and *Obergefell v. Hodges*. The expansion of judicial power is reminiscent of Abraham Lincoln's fear that the Supreme Court would no longer be checked, but instead be an "eminent tribunal" with the government practically in the hands of the Court. Justices throughout Supreme Court history have emphasized the need for judicial restraint and for basing fundamental rights on the deeply rooted tradition and history of the nation. The majority in *Obergefell v. Hodges* did neither. Instead, it disguised a policy decision as constitutional law, thereby further obscuring the meaning of the due process clause.