

## Two Thoughts About *Obergefell v. Hodges*

JUSTICE JOHN PAUL STEVENS (RET.)\*

The Supreme Court’s holding in *Obergefell v. Hodges*<sup>1</sup> that the right to marry a person of the same sex is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment is significant, not only for persons invoking that right but also for scholars interested in the development of constitutional law. Two aspects of the decision clarify our understanding of the meaning of the Constitution. First, the “original intent” of the Framers and the original public understanding of the constitutional text do not always identify the current meaning of its provisions; and second, the rejection of *Lochner v. New York*,<sup>2</sup> while broadening the power of government to regulate economic affairs, left intact the underlying doctrine of substantive due process.

Most scholars agree that a study of the original intent of the Framers or the original public understanding of the Constitution’s words should play a role in determining the meaning of its text. Some of those scholars also believe that the meaning of constitutional text may not be changed without following the procedure for amending the Constitution set forth in Article V. Indeed, I think that is the central predicate of the “originalist” school of constitutional interpretation.<sup>3</sup> Because I think it so unlikely that the Framers or the public at the time of the Framing believed that States could not limit the right to marry to heterosexual couples, it seems clear that the majority’s decision in *Obergefell* implicitly rejected the basic premise undergirding the originalist view of constitutional interpretation.

Indeed, the *Obergefell* majority not only rejected original intent as the sole benchmark for constitutional meaning but also suggested that the Framers of the Fourteenth Amendment intentionally crafted that provision in broad terms to guard against such static interpretation. Writing for the Court, Justice Kennedy explained:

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

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>3</sup> See, e.g., Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 418 (2013) (“[T]he proper way to change ‘this Constitution’ is provided in Article V. Judges are not allowed to update the text of the Constitution by changing the meaning it had at the time of enactment.”); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *NW. U. L. REV.* 1627, 1672 (2013) (“To an originalist . . . the Constitution can be changed when the people collectively act to change it, but the people must act in compliance with the original meaning of Article V—the constitutional text that dictates the procedures for effectuating constitutional change.”); *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting) (citing constitutional amendment process as the appropriate response to the majority’s observation that the Framers “did not presume to know the extent of freedom in all of its dimensions” (quoting *id.* at 2598 (majority opinion))).

dimensions, and so they entrusted to future generations 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 stricture, a claim to liberty must be addressed.<sup>4</sup>

The majority rightly noted, moreover, the circularity that would result if the Constitution's guarantees of liberty and equality were limited to the Framers' conception of those principles: "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."<sup>5</sup>

In addition to rejecting the originalist method of constitutional interpretation, *Obergefell* reaffirmed the post-*Lochner* doctrine of substantive due process. The principal dissent in the case, written by Chief Justice Roberts, criticized the majority for relying on that doctrine, which produced the decisions in *Lochner*<sup>6</sup> and *Dred Scott v. Sandford*.<sup>7</sup> According to the dissent, the majority's analysis evoked the flawed logic of those decisions by "confus[ing] [the Justices'] own preferences with the requirements of the law" and inappropriately constitutionalizing a particular "theory of marriage" without sufficient regard for whether the right is "deeply rooted in this Nation's history and tradition."<sup>8</sup> The Court's subsequent rejection of *Lochner* and *Dred Scott*, the dissent argued, illustrates that the majority's application of the substantive due process doctrine was unsound.<sup>9</sup>

The dissent's view wrongly assumes that the Court's cases overruling *Lochner* called into question the entire doctrine of substantive due process, whereas in fact those decisions merely rejected its application to economic

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<sup>4</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>5</sup> *Id.* at 2602; see also *id.* at 2603 ("[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.").

<sup>6</sup> *Id.* at 2615–16 (Roberts, C.J., dissenting) ("[T]he majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."). In *Lochner*, the Court invalidated a New York law barring bakery employees from working more than sixty hours per week on the ground that the law "necessarily interferes with the right of contract between the employer and employees," which is "part of the liberty of the individual protected by the Fourteenth Amendment." *Lochner*, 198 U.S. at 53.

<sup>7</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. In *Dred Scott*, the Court struck down the Missouri Compromise, reasoning that "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 . . . could hardly be dignified with the name of due process of law." *Id.* at 450.

<sup>8</sup> *Obergefell*, 135 S. Ct. at 2611–12, 2618 (Roberts, C.J., dissenting) (third quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>9</sup> *Id.* at 2618.

regulation.<sup>10</sup> The dissent cites Justice Holmes's famous observation that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," or, for that matter, any other theory of economic regulation.<sup>11</sup> Few today would dispute that proposition; as I wrote in dissent in *McDonald v. City of Chicago*, "[e]ver since 'the deviant economic due process cases [were] repudiated,' our doctrine has steered away from 'laws that touch economic problems, business affairs, or social conditions.'" <sup>12</sup> But the rejection of the doctrine's application to economic regulation does not diminish the Fourteenth Amendment's protection of certain "especially significant personal interests" pertaining to, for example, "marriage, procreation, contraception, family relationships, and child rearing and education."<sup>13</sup>

The *Obergefell* dissenters, moreover, declined to mention that, with the exception of Justice Thomas, they had relied on substantive due process to support their dubious holding that the Second Amendment imposes limits on the States' power to regulate handguns in *McDonald*.<sup>14</sup> It seems bizarre to conclude that a right to own handguns is "among those fundamental rights

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<sup>10</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . ."); *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation [directed at business practices]. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.'" (third alteration in original) (quoting *Ribnik v. McBride*, 277 U.S. 350, 375 (1928) (Stone, J., dissenting))); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) ("[I]f such laws [pertaining to economic regulation] 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.'" (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934))).

<sup>11</sup> *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

<sup>12</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 879 (2010) (Stevens, J., dissenting) (second alteration in original) (citation omitted) (first quoting *Glucksberg*, 521 U.S. at 761 (Souter, J., concurring in judgment); and then quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

<sup>13</sup> *Id.* (second quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)); see also *id.* at 879–80 ("[Substantive due process] safeguards, most basically, 'the ability independently to define one's identity,' 'the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny,' and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty." (citations omitted) (first quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984); and then quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719 (7th Cir. 1975)); *Obergefell*, 135 S. Ct. at 2597 ("The fundamental liberties protected by [the Due Process] Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

<sup>14</sup> *McDonald*, 561 U.S. at 767.

necessary to our system of ordered liberty” but that the right to choose one’s spouse is not.<sup>15</sup>

The right to marry—like the right to decide whether to have an abortion, or the right to control the education of your children—fits squarely within the category of liberty protected by the Due Process Clause of the Fourteenth Amendment. The *Obergefell* majority, furthermore, correctly framed the right to marriage in terms of the Fourteenth Amendment’s protection of liberty rather than “privacy.” In my view, Justice Stewart’s reliance on “the ‘liberty’ that is protected by the Due Process Clause of the Fourteenth Amendment” in *Roe v. Wade*,<sup>16</sup> and Justices Harlan’s and White’s reliance on the substantive content of the word “liberty” in *Griswold v. Connecticut*,<sup>17</sup> were far better explanations for those two correct decisions than the concept of “privacy” developed by the majority opinions. So, too, in *Obergefell*, I am persuaded that a fair reading of the word “liberty” best explains the real basis for the Court’s holding in the marriage case.

While “privacy” concerns “the individual’s interest in protection from unwarranted public attention, comment, or exploitation,” the liberty protected by substantive due process goes to “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny.”<sup>18</sup> Such fundamental decisions surely include the choice of marital partner.

The *Obergefell* dissenters objected that same-sex marriage could not be protected by substantive due process because it lacks deep roots in this Nation’s history and was unheard-of by the generation that wrote and ratified the Fourteenth Amendment.<sup>19</sup> As Justice Scalia wrote in his dissent:

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. That resolves these cases. 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

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<sup>15</sup> *Id.* at 778.

<sup>16</sup> *Roe v. Wade*, 410 U.S. 113, 168 (1973) (Stewart, J., concurring).

<sup>17</sup> *Griswold*, 381 U.S. at 500–01 (Harlan, J., concurring in judgment); *id.* at 502–03 (White, J., concurring in judgment).

<sup>18</sup> *Fitzgerald*, 523 F.2d at 719.

<sup>19</sup> *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (“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.”). I have previously noted my rejection of this narrow historical test. *See McDonald*, 561 U.S. at 875–76 (Stevens, J., dissenting) (“[A] rigid historical methodology . . . is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently ‘rooted’ . . .”).

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, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification.<sup>20</sup>

Of course, as many scholars have pointed out, under this logic the Equal Protection Clause would not prohibit racial segregation, which remained widespread after enactment of the Fourteenth Amendment.<sup>21</sup> More generally, as I observed in *McDonald*, this approach to constitutional interpretation threatens to “countenance[] the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history.”<sup>22</sup> The *Obergefell* majority rightly recognized that the right to personal choice regarding marriage is “inherent in the concept of individual autonomy” and thus essential to our scheme of ordered liberty—regardless of whether one would choose to marry a person of the same or opposite sex.<sup>23</sup>

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<sup>20</sup> *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting) (footnote omitted).

<sup>21</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 75–76 (1990) (“The inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life.”); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252–53 (1991) (“Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful . . . . To strike down public school segregation in *Brown*, therefore, required the Justices consciously to burst asunder the shackles of original intent.”). But see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952–53 (1995) (quoting Klarman, Bork, and others but arguing nonetheless that “the belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment” (footnote omitted)).

<sup>22</sup> See *McDonald*, 561 U.S. at 876 (Stevens, J., dissenting) (footnote omitted).

<sup>23</sup> *Obergefell*, 135 S. Ct. at 2599.