

## *Colloquium Introduction*

### **A Reader's Guide to the *Obergefell v. Hodges* Colloquium**

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The idea for this Colloquium on *Obergefell v. Hodges*,<sup>1</sup> like the *Ohio State Law Journal*'s decision to proceed with it, was forged in the light of what was, for many—though assuredly not all—a moment of triumphant constitutional promise. The Supreme Court's announcement in *Obergefell* of a constitutional right to marriage equality, consistent with the Fourteenth Amendment's Due Process and Equal Protection Clauses,<sup>2</sup> effectively declared the end of legal discrimination against same-sex sexuality, intimacy, and love in the marriage setting. This liberty, this equality, *Obergefell* trumpeted, manifested the deep values of the American people. And not only deep but also enduring: The vote in the case may have been close, but Justice Anthony Kennedy's majority opinion for the Court presented itself as written with an eye to history.<sup>3</sup> By its own terms, *Obergefell* is meant to be a fixed feature of the constitutional firmament, to endure for the ages, just as marriage itself has, in a certain sense, from time out of memory.

Despite some notable flashpoints of early legal resistance to the Supreme Court's *Obergefell* ruling,<sup>4</sup> lower courts and other legal actors at the federal and state levels have faithfully understood the decision's constitutional teaching, finding it easy to appreciate how far-reaching *Obergefell*, by its own compass, is. In addition to announcing a nationwide marriage equality rule, this decision's deeper logic indicates the Constitution's commitment to liberty and equality in marriage and family law generally, while also pointing a way forward for other aspects of law-governed social life. Given the present organization of the pro-LGBTQ rights movements, it came as no great surprise when, on the heels of *Obergefell*, the Supreme Court agreed to take a case in which *Obergefell*'s constitutional reach could be extended as a matter of federal anti-discrimination law, effectively applying *Obergefell*'s liberal

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

<sup>2</sup> *See id.* at 2602–05.

<sup>3</sup> *See generally id.* The Court split 5–4. *Id.*

<sup>4</sup> *See, e.g.,* Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), [http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?\\_r=0](http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0) [https://perma.cc/9JSU-K3L8].

understanding of liberty and equality in the transgender rights setting, making for another legal first.<sup>5</sup>

To say all this is to describe some of the features and gestalt of the legal and broader social field on which the contributions to this Colloquium were initially commissioned and written. In this general setting, the question *Obergefell* has persistently raised is a reframed version of a question that Chief Justice Roberts's dissent sharply asks.<sup>6</sup> What sounds dissonant in the dissent's formulation has been for others a harmonious wonder: What other old ways of life, of living, of being, and, of course, of discriminating, might yield to the principles of liberty and equality that *Obergefell* holds the Constitution to embrace? What liberty, what equality, and in what new settings, operating in what new ways, might follow with time from this case? Whatever *Obergefell* might come to mean in the shorter or longer term, the majority opinion and the liberal values it reflects have for some time now, since the announcement of the decision, seemed axiomatic, beyond reasonable question, hence secure, as the decision intends itself to be. So much has this been the case, anyway, that efforts engaging *Obergefell* in the direction of fortifying the ruling may have seemed, substance aside, practically unnecessary, more, on a certain level, for the historical record than anything else. Friendly academic critiques of the decision that have been circulated and published—suggesting, at times, that *Obergefell* is, if anything, too conservative a ruling—have invariably taken it for granted that *Obergefell*'s insistence that discrimination against lesbians and gay men and same-sex intimacies, including in marriage, is state-based irrationality that has no proper place in our constitutional tradition and system.<sup>7</sup>

*Obergefell*'s status as a new but fixed part of the American way of life has been affirmed by, among others, those who have exercised in the most concrete of ways the constitutional liberty and equality that the decision guarantees. By late June 2016, just shy of a year after *Obergefell* was handed down, Gallup reported that the number of adults in same-sex marriages in the

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<sup>5</sup> Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 2016 WL 4565643 (S. Ct. Oct. 28, 2016) (mem.) (granting certiorari); *see also* *Supreme Court Will Hear Title IX Transgender Discrimination Case and Case Challenging Social Media Restrictions on Sex Offenders*, LGBT BAR ASS'N GREATER N.Y. (Nov. 4 2016), <http://le-gal.org/supreme-court-will-hear-title-ix-transgender-discrimination-case-case-challenging-social-media-restrictions-sex-offenders/> [<https://perma.cc/P474-XLT9>].

<sup>6</sup> *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting) (“If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?”).

<sup>7</sup> *See, e.g.*, Ruth Colker, *The Freedom to Choose to Marry*, 30 COLUM. J. GENDER & L. 383 (2015); Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016); Ruthann Robson, *Justice Ginsburg's Obergefell v. Hodges*, 84 UMKC L. REV. 837 (2016); *see also, e.g.*, Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016).

United States stood at 981,000, “and, thus,” rounding numbers, approximately “491,000 same-sex marriages in the U.S.”<sup>8</sup> This estimate of the number of same-sex marriages was “up from roughly 368,000” just a year earlier, which, by Gallup’s good math, meant that there were “approximately 123,000 same-sex marriages . . . since the *Obergefell v. Hodges* decision, with increases apparent among those living in states where same-sex marriage was already legal as well as those where it was not.”<sup>9</sup> With the passage of time, the present numbers of same-sex marriages are assuredly north of these figures, with federal and state governments having conformed their marriage and family law rules and practices to square with *Obergefell*’s constitutional demands. To say this is not in any way to forget how *Obergefell* has altered the course of the lives of those inside the LGBTQ communities who are in relationships and those who are not, as it has expanded the meaning of marriage in the United States. If, in important respects, it now seems impossible to put the genie of same-sex marriage entirely back in the bottle, it is in no small part because, like LGBTQ communities, the balance of the American people have responded to the broad understanding of the right to marry affirmed by *Obergefell* with high levels of support nationwide. According to recent figures, a majority of Americans now steadily support same-sex marriage, with the highest levels of approval for it in the under-fifty and, in particular, the under-thirty crowd.<sup>10</sup>

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<sup>8</sup> Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict*, GALLUP (June 22, 2016), <http://www.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx> [https://perma.cc/9HR4-HDKS]. Compare GARY J. GATES & TAYLOR N. T. BROWN, WILLIAMS INST., MARRIAGE AND SAME-SEX COUPLES AFTER *OBERGEFELL* 1, 3–4 (Nov. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf> [https://perma.cc/PKD4-CE6G] (discussing same-sex marriage numbers after *Obergefell*), with GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY (Mar. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [https://perma.cc/6DR7-UR25] (discussing same-sex marriage numbers before *Obergefell*).

<sup>9</sup> Jones, *supra* note 8.

<sup>10</sup> Hannah Fingerhut, *Support Steady for Same-Sex Marriage and Acceptance of Homosexuality*, PEW RES. CTR. (May 12, 2016), <http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/> [https://perma.cc/UYM3-KD3J]; Justin McCarthy, *Americans’ Support for Gay Marriage Remains High, at 61%*, GALLUP (May 19, 2016), <http://www.gallup.com/poll/191645/americans-support-gay-marriage-remains-high.aspx> [https://perma.cc/7DS7-3D6A]. For more granular, pre-*Obergefell* breakdowns of support for same-sex marriage by state, see ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE (Apr. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf> [https://perma.cc/T2SY-KGEU]; ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., TRENDS IN PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE (Apr. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Trends-in-Public-Support-for-Same-Sex-Marriage-2004-2014.pdf> [https://perma.cc/Y79S-E49P]; and Jessica Walthall & Joanna

As this Colloquium on *Obergefell v. Hodges* heads to press shortly after the November 2016 election, *Obergefell*'s constitutional status has acquired a new punctuation mark behind it—a question mark that before the election it did not have.<sup>11</sup> With public promises by President-elect Donald J. Trump to appoint Justices to the U.S. Supreme Court with pro-life commitments in the run-up to the election as well as after it, eyes have been insistently fixed on *Roe v. Wade*,<sup>12</sup> as well as its progeny, notably *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>13</sup> which may well confront exacting pressures before too long.<sup>14</sup> Of course, the originalist methods of constitutional interpretation that have in various settings been mobilized against *Roe* and its progeny also align with critical appraisals of *Obergefell* and its own constitutional methodological grounds. No one who has read *Obergefell* can miss how the opinions dissenting from the Court's ruling in the case variously expressed the view that this new marriage decision is not supported by the Constitution itself, which would thus, as the dissents variously map out, leave the question of marriage equality to the democratic political processes.<sup>15</sup>

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Piacenza, *Attitudes on Same-Sex Marriage in Every State*, PRRI (Apr. 20, 2015), <http://www.prii.org/spotlight/map-every-states-opinion-on-same-sex-marriage/> [<https://perma.cc/4444-QT5R>].

<sup>11</sup> See, e.g., Liam Stack, *Trump Victory Alarms Gay and Transgender Groups*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/11/us/politics/trump-victory-alarms-gay-and-transgender-groups.html> [<https://perma.cc/69NC-48E6>]; cf. also, e.g., Dominic Holden, *These Are the LGBT Rights Trump Could Start Reversing on Day One*, BUZZFEED NEWS (Nov. 11, 2016), [https://www.buzzfeed.com/dominicholden/these-are-the-lgbt-rights-trump-could-start-reversing-on-day?utm\\_term=.qqRWNWm4Q9#.cfVvxvAr2e](https://www.buzzfeed.com/dominicholden/these-are-the-lgbt-rights-trump-could-start-reversing-on-day?utm_term=.qqRWNWm4Q9#.cfVvxvAr2e) [<https://perma.cc/5HGM-VJSE>]; Claire Landsbaum, *The Future of LGBT Rights Under President Trump Is Not Pretty*, N.Y. MAG. (Nov. 11, 2016), <http://nymag.com/thecut/2016/11/what-will-lgbt-rights-look-like-under-president-trump.html> [<https://perma.cc/H3KJ-PAW3>].

<sup>12</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>13</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

<sup>14</sup> Aaron Blake, *The Final Trump—Clinton Debate Transcript, Annotated*, WASH. POST (Oct. 19, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/> [<https://perma.cc/MS79-WXTR>]; *60 Minutes: The 45th President* (CBS television broadcast Nov. 13, 2016) (transcript available at <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/> [<https://perma.cc/4YX4-XLJG>]); see also *Fox News Sunday: Gov. Mike Pence Talks Role in Campaign; Sen. Claire McCaskill on New Controversy Facing Clinton* (Fox television broadcast Aug. 14, 2016) (transcript available at <http://www.foxnews.com/transcript/2016/08/14/gov-mike-pence-talks-role-in-campaign-sen-claire-mccaskill-on-new-controversy/> [<https://perma.cc/3ZYJ-THYX>]) (“Well, I’m pro-life, I don’t apologize for it. I’d like to see *Roe* versus *Wade* overturned and consigned to the ash heap of history. . . . I believe in the sanctity of life, and I stand for that principle, and I’m grateful to be standing with Donald Trump in his strong commitment to the right to life.”) (remarks by then-Gov. Mike Pence).

<sup>15</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612–13 (2015) (Roberts, C.J., dissenting); *id.* at 2626–29 (Scalia, J., dissenting); *id.* at 2631–38 (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting).

Principles of *stare decisis* are conceptually robust enough to preserve *Obergefell* against attempts at future reversal, not least of all in view of the fact that the Chief Justice's *Obergefell* dissent went out of its way to express the view that the Constitution might well countenance limits on discrimination against lesbians and gay men and same-sex intimacies in the context of marriage and family life.<sup>16</sup> Reliance on *Obergefell* and popular support for its conclusion, along with the complexities and inequities that would ensue from the legal patchwork that could follow a decision reversing it, undoubtedly prospectively, might likewise preserve it against being overturned in the longer haul.

With the question mark behind *Obergefell* having been added, however, it is possible that its contours could be filled in. Asked about marriage equality on *Fox News Sunday* in January 2016, then-candidate for the Republican Party nomination for President, Donald J. Trump, questioned *Obergefell*:

If I'm . . . elected, I would be very strong on putting certain judges on the bench that I think maybe could change things.

. . . .

. . . I wish that it was done by the state. I don't like the way they ruled. I disagree with the Supreme Court . . . it should be a states' rights issue. . . .

This is a very surprising ruling. . . . I can see changes coming down the line, frankly.<sup>17</sup>

When pressed "to button this up," "[S]ir, are you saying that if you become [P]resident, you might try to appoint [J]ustices to overrule the decision on same-sex marriage?," the reply that was returned was: "I would strongly consider that, yes."<sup>18</sup>

Perhaps more significantly, and perhaps indicating what consideration of this issue has yielded with time for reflection, in his first major national television interview after the November election, President-elect Trump told *60 Minutes*' Leslie Stahl, when she brought the topic up, that he has been a "supporter" of the LGBTQ community, and mentioned LGBTQ people at the Republican National Convention, even going so far as to note the positive responses that the move garnered.<sup>19</sup> When asked directly whether he was a supporter of marriage equality, too, he replied: "[I]t's irrelevant because it was already settled. It's law. It was settled in the Supreme Court. I mean it's done. . . . It's done. . . . [T]hese cases have gone to the Supreme Court. They've been settled. And, I'm fine with that."<sup>20</sup>

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<sup>16</sup> *Id.* at 2623–24.

<sup>17</sup> *Fox News Sunday: Ted Cruz Attacks Donald Trump's Financial Record; Trump Responds* (Fox television broadcast Jan. 31, 2016) (transcript available at <http://www.foxnews.com/transcript/2016/01/31/ted-cruz-attacks-donald-trump-financial-record-trump-responds/> [<https://perma.cc/E74U-6JVX>]) (remarks of Donald J. Trump).

<sup>18</sup> *Id.*

<sup>19</sup> *60 Minutes: The 45th President*, *supra* note 14.

<sup>20</sup> *Id.*

Against this general backdrop, the contributions to this Colloquium on *Obergefell*, initially written at a moment when *Obergefell*'s future seemed nothing but certain, when the questions about *Obergefell* were all realistically in the direction of how it might be extended, not whether it itself would endure as good law, may look somewhat different when read in the current and soon-to-be emerging constitutional landscape. It is easy to imagine that the contributions will take on resonances and shades of meaning that may not have been intended for them at the time they were originally produced. Some of the conceptual bids that they make may already seem different than they did just a short time ago, although none is at this moment close to any expiration date. In any case, while the contributions are available to be read in the light of complex and still-unfolding, large-scale cultural and legal contests over social meaning—not only of liberty and equality but also of marriage, gender, and sexual orientation difference, and the boundaries of private and public life, among other things—they might most generously be read for perspectives and insights they offer from a certain moment in time. The modes of experience and thinking that imbue the works with their energies may shift with events that are developing, but glimpses of them may not yet slip entirely out of reach for a spell at least, if ever. To the extent that the contributions to this Colloquium imagine not only conditions of a present but also of futures that *Obergefell* has seemed to open up, perspectives on these horizons will be preserved in these pages—in writing, in thoughts, in hopes—suspended in amber across space and time. Whatever happens with *Obergefell* itself as a matter of constitutional doctrine, as a constitutional promise and as a lived reality, it will endure one way or another.

What follows next are the contributions that actually make up the Colloquium, which begins with a contribution by Justice John Paul Stevens (Ret.) offering “two thoughts” about *Obergefell*.<sup>21</sup> After that are articles written by Professors Susan Appleton,<sup>22</sup> Suzanne Kim,<sup>23</sup> Jane Schacter,<sup>24</sup> and yours truly.<sup>25</sup> Immense thanks are due to all the contributors to the Colloquium for all their efforts, as well as to those who helped them in them. Sincere appreciation also goes out to the *Ohio State Law Journal*, and in particular to Andrew Mikac, who, as Editor in Chief, committed the *Journal* to publishing this Colloquium, to Marissa Alfano, the Editor in Chief who delivered on that promise, and to other members of the editorial board, including Executive Editor Ashley Bailes and Chief Managing Editor Stephanie Kortokrax, as well as a group of first-rate managing editors, who, in different ways, worked and oversaw the process of getting individual contributions and the entire

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<sup>21</sup> Justice John Paul Stevens (Ret.), *Two Thoughts About Obergefell v. Hodges*, 77 OHIO ST. L.J. 913 (2016).

<sup>22</sup> Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919 (2016).

<sup>23</sup> Suzanne A. Kim, *Relational Migration*, 77 OHIO ST. L.J. 981 (2016).

<sup>24</sup> Jane S. Schacter, *Obergefell's Audiences*, 77 OHIO ST. L.J. 1011 (2016).

<sup>25</sup> Marc Spindelman, *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039 (2016).

Colloquium to their published state, with the assistance of a terrific group of staff editors. Thanks, finally, also go to Professor Suzanne Kim. Her ideas, energy, and input on the form and structure of the initial idea for this Colloquium were invaluable. Without her, quite literally, this Colloquium in these pages would not have happened.

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<sup>26</sup>Note from the Editors: The *Ohio State Law Journal* would like to express sincere appreciation to Professor Marc Spindelman for his involvement in organizing this Colloquium and for his assistance in bringing it to publication.