Same-Sex Marriage and Religious Liberty Clashes in the U.S., After Obergefell v. Hodges: (An American Constitutional Challenge)

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INTRODUCTION

I am writing about an issue of a challenge to religious liberty, coming from a slightly different angle perhaps than other scholars in this Symposium. This involves recent attacks on religious liberty, or even religious viewpoints in the West (particularly in America), but not by a majority religion against a minority religion, *viz.*, not of one conventional religion against another; rather, this is about the attack of secularism and atheism in the West (particularly in America) against people of faith (particularly Christians). While in the East and Asia much of the religious persecution we hear about in the news is of a dominant religion (say Islam, in some places), against minority religions (i.e., Christianity), the issue in much of the West is very different, and centers around attacks and hostility of secular humanists in all walks of life against people of faith. In America, this is especially reflected against Christians. The battle is often about law and politics, but is deeply rooted in the academy, media, and entrenched in the American legal and judicial systems. And now, I would have to add, has spilled over into corporate America. The battle lines seem to be most sharply drawn in the immediate social contest over same-sex marriage (SSM).

In this article, I take the view secular humanism itself, including its undergirding atheism, is also a religion of sorts, and so this topic is in some ways an issue about the persecution of one religion against another. This is because secular humanism, including its underlying atheism, is really a belief system all by itself. It makes claims about ultimate reality. It even claims a supreme being (man) as the highest order of intelligence. It disavows any others. I thus assail in this paper the incorrect view that secularism is somehow “neutral,” and thus can be trusted, while conventional religions like Christianity, cannot (some say these are “biased”). The truth, of course, is neutrality itself is a myth: everyone, including the secular humanist, believes in something. She has her own structure of beliefs – a creed, as it were, and is biased toward it.

To understand how secular humanism is a belief about ultimate reality, with its own formal creed, just see the Humanist Manifestos, I, II, III, and the churches of atheism springing up in record numbers in California and England. Secularism is not religiously neutral, but is itself a religious ideology, and attacks Christianity among others. Secular ideology is highly involved in the political and lawmaking process. Its proponents in fact seek to silence and injure those with differing viewpoints, such as Christians. That is the subject I wish to address in this article. I wish to do so primarily in the current debates over SSM.

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1 The American Humanist Association (AHA) website has links to all three Humanist Manifestos. The Humanist Manifesto I (to some extent II also) specifically describes humanism as religious throughout; although some secularists today seek to separate the word “religious” from secular humanism, I consider such semantics essentially unconvincing. See [http://americanhumanist.org/Who_We_Are/About_Humanism](http://americanhumanist.org/Who_We_Are/About_Humanism). AHA’s website also shows a logo and supporting connection to the LGBTQ Humanist Council. *Id.: see [www.lgbthumanists.org](http://www.lgbthumanists.org).* See also Gillian Flacus, *Atheist ‘Megachurches’ Crop Up Around the World,* Huffington Post, Nov. 11, 2013, [http://www.huffingtonpost.com/2013/11/10/atheist-mega-church_n_4252360.html](http://www.huffingtonpost.com/2013/11/10/atheist-mega-church_n_4252360.html).
I suggest secular attacks against Christians on the issue of SSM show up in a couple of primary, related “hot topic” issues in American law and culture today. Secularists of course say marriage is whatever we want to call it. It is a fluidly defined, genderless institution, about sexually attracted grown-ups of any kind committing to each other at some level, and receiving some status from that. Christianity (and many other faiths) hold gender (male and female) is intrinsic to marriage. It is historically so understood as part of God’s created order, honoring the complementarity of two sexes. I am focusing this article on what I see as these two cosmic, linked areas of clashing on SSM, between secular humanists and conservative Christians today.

INTRODUCING THE TWO “HOTBED” ISSUES ON SSM IMPACTING RELIGIOUS LIBERTY IN AMERICA

In my view, the two most controversial issues on SSM in America in the last ten or so years have been: 1) the ability of the citizenry to define marriage traditionally in their States or the Nation as a whole, democratically, either in statutes, or constitutional amendments; and 2) the right of individuals and small businesses to carry on their services in accordance with their sincerely held religious values, even if that means declining an offer to provide their goods and services in same-sex weddings and similar events. I expound only briefly on these issues here to introduce the discussion:

Issue I, on State Traditional Marriage Definitions:

Essentially this involves the right of the citizenry to define marriage, in the traditional way (i.e., historically and/or religiously), as the lifelong union of a man and a woman. It also involves the right to do this through the legislative (democratic) process. In light of recent events, I wonder if this can ever happen. But greater issues underlie the rights of a people to decide this issue for themselves, in regard especially to any religious views they have on the matter, amidst what I see is a growing secular view of marriage in America. Consider for instance:

Is it an improper entanglement of church and state for a State to support a religious view of marriage? Is legislation of an historical, religious view of marriage “improper” discrimination against same-sex couples? Are attacks and threats against Christians who hold to their view of marriage justified? Should they be called bigots and be harassed at every turn for expressing their view? In terms of lawmaking and the democratic political process, should LGBT activists’ attempts to exclude the Christian view of marriage in that law-making process be applauded (as it is in America’s media, educational, and secular legal institutions); or, is that stringent effort to eliminate the Christian view of marriage in the democratic lawmaking process an invidious attack on the religious liberty of Christians (or of Jews, Muslims, Hindu’s and other religious persons for that matter)? How should this work in a pluralistic society, in Indonesia? I suppose you may already guess some of my answers to these questions. In any event this specific issue of secularist attacks against Christians over SSM is the first issue I wish to explore in this article.
Since the initial presentation of this paper at this Symposium, the Supreme Court of the United States (SCOTUS), in Obergefell v. Hodges, 576 U.S. ___ (Consolidating Case No’s. 14-556, 14-562, 14-571, 15-574) (decided June 26, 2015), against all dictates of common sense, has ruled that all Fifty States must now allow same-sex couples the right to marry (issuing marriage licenses). Accordingly, SCOTUS has taken this decision away from the voters in every State, trampling on democracy in the process. The vote was five Justices to four, and so came down to one vote. Justice Kennedy wrote the majority opinion and is often considered the “swing vote” on this issue. The decision has boiled over into heated, angry responses not only in America, but around the world. I will discuss some of its specifics and implications below.

Issue II, on the Rights of Small Businesses (Bakers, Florists, Caterers, etc.) to Exercise Religion by Declining Invitations to Participate in Same-Sex Weddings:

This is related to the first issue, yet it should always be considered separate. The so-called right of same-sex couples to marry should not impact the equal or greater right of vendors to refrain from supporting or participating in it on First Amendment grounds. Some on the secular left simply lack enough insight to see this.

Several questions might arise on this issue: Should individuals and small business owners be allowed to run their businesses in accordance with their religious values by not supporting events they consider immoral? Suppose for instance a small cake and bakery shop is asked by a same-sex couple to design and create that special wedding cake in celebration of their same-sex wedding. The baker is a Christian, and her involvement in that wedding supports and affirms the event; it also affirms the new concept of marriage that it represents. However, this violates her cherished Scriptural teachings on what marriage is. If she politely declines should she be sued for discrimination by the gay couple, who say they feel insulted by her refusal? Can a civil rights administrative board (or court) in her State fine and imprison her for discriminating against this gay couple and apparently violating their civil rights (to what? -- a cake, I suppose)? This spawns several more questions:

Is our sweet cake baker allowed to hold on to her view of marriage in her business if SSM is legal in her State? And what if SSM isn’t just legal anymore, but has suddenly emerged as a fundamental liberty right under the U.S. Constitution (as Justice Kennedy pretends it is)?

In either case is our cake baker in fact depriving the same-sex couple of their so-called “right” to marriage by not creating and selling them a cake? Certainly not, and consider the likelihood of other cake bakers in the vicinity who do not mind celebrating the wedding and providing the cake. Shouldn’t that make a difference?

Is our cake baker a bigot for not serving the wedding cake? Is she in need of sensitivity training? To answer that with another question, is believing something is immoral (even if there is a right to it) the same as hatred and bigotry? Of course not. Is our baker’s conduct properly characterized as discrimination (and bigotry) by the board (or court) in the first instance (if so is
it an impermissible kind?)², or is she just conscientiously excusing herself from an offensive event (is anyone allowed to be offended by SSM anymore? – not according to the left).

In any view of it, should our baker have her business shut down by the authorities, and be personally fined in the hundreds of thousands of dollars to her financial ruin? Shouldn’t her religious convictions be respected and someone else can just bake the cake?

I suppose by now you have guessed this is a real case (see Sweet Cakes Bakery’s story at the end of this article). I can ask the same questions above about several Christian-run photography studios, florist shops, wedding planning services, caterers, and invitation printing companies. Should any of these be compelled to join in with their skills and talents and services and goods to be a part of a so-called wedding ceremony that violates their very beliefs about the true meaning of marriage – beliefs held according to their sincerely held religious or similar convictions?

Sadly, these are real-life situations taking place right now in America. Shocking to many, state government and civil rights agencies have been coming down hard on these merchants, fining them, scolding them, shaming them, and in some cases putting these small enterprises out of business permanently, simply because they declined the invitation to employ their services and goods for SSM wedding ceremonies. The LGBT lobby viciously attacks these vendors around the country, sending hate messages, violent threats, arranging boycotts and smearing the vendors as bigots through social media – all because they adhere to a natural view of marriage, one which has been the only accepted one from the beginning of history until ten or fifteen years ago.

LGBT groups and individuals attacking the vendors can essentially conduct their intimidation and hate campaigns virtually unchecked and unrestrained by government agencies. So far, they and the state bureaucracies protecting them, have gotten away with inflicting great pain, anguish, and humiliation on these vendors (often smearing them incorrectly as bigots). Secularly-educated state justice systems also usually side against the vendors. Situations of this bullying of vendors have sprung up all across America. The problem is, of course, the free exercise of religion is supposedly guaranteed by the First Amendment of the United States (U.S.) Constitution, by federal laws, and by State Constitutions and laws.

I conclude this introduction with an array of troubling questions: How is it staunch and angry SSM advocates can get away with severe acts of animus, bigotry, and discrimination against their opponents (shopkeepers, service providers, and similar villains), seeking their total destruction and ruin and threatening violence, in stark comparison to any insult same-sex couples may incidentally experience in having to go to another store, when virtually none of the cases in which vendors have declined their services are marked by a single shred of evidence of hate?

² Is all discrimination improper? Absolutely not. Some is required. First consider the difference between protected private actions and associations and those of the government (which one is our baker’s in this context?) In the government square, are not some laws validly, successfully, and intentionally discriminating (consider something as simple as bans on smoking in public places)? In marriage itself, restrictions on age and multiple partners (like polygamy, polyamory) also discriminate. And so what of it?
Instead the refusals are illustrated by genuine politeness. Sorry, but read the stories; hate just is not there. And why is this? Because the vendors’ refusal is not about a customer’s so-called “identity,” but the event they are asked to support, and a distorted, invented meaning of “marriage,” which in good faith, they cannot. Issue II below discusses some of these vendors’ stories and some of the constitutional issues facing them.

Very soon, the Supreme Court of the United States (SCOTUS) will have to take up this issue. Interestingly, a recent precedent allowing businesses to exercise religious rights in another context (relating to abortions) could help steer SCOTUS in the right direction on this issue. I suppose it depends who is on the Court when this issue is decided.

*Importance, Introduction to Analysis:*

I realize this clashing of values between secular and religious views (Christian specifically) may not be among the predominant religious liberty concerns in Asia, and in Indonesia, at this time, but it is certainly a significant issue, and one likely (eventually) to make its way here. Surprisingly, one of the speakers at this Symposium mentioned precisely the same issue of religious liberty facing small businesses I am writing about here, according to events he is aware of in the U.S., and that was without any information coming from me. So we know we are not that far away on this issue. In fact, this clashing on marriage views has already spread in Asia, in places like South Korea, Hong Kong, Thailand and Taiwan. I suspect Indonesia will also have to prepare itself for handling this concern very shortly.

It might help to point out some important differences between my two primary issues in this article, in setting the stage for discussing them: Issue I (States being able to keep a traditional definition of marriage) relates to what is called an “establishment of religion” concern; Issue II (business owners’ rights to decline participation in SSM) relates in some ways to what is called a “free exercise of religion” concern. Each emphasis is incorporated in the First Amendment of the U.S. Constitution (and in many State Constitutions). Indonesia and other countries incorporate similar provisions in their constitutions as well, and I spell some of this out in Appendix – 1 for Indonesia. Although these two issues are analytically, legally separate, they are also linked in culture and law, and I think more so than they should be. Resolution of the first issue, however, will inevitably impact rights under the second. I discuss this connection below.

I shall first lay out the basic Constitutional and statutory framework protecting religious liberty in America. I will then give some insight into how America has slid away from that framework (my own theory of it).

**CONSTITUTIONAL AND STATUTORY FRAMEWORK PROTECTING RELIGIOUS LIBERTY IN AMERICA, CURRENTLY**

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3 I use the term “secular” in this article a bit “tongue in cheek,” in its assumed, common use, as depicting “non-religious” stuff. The truth is any divide between “secular” and “religious” is actually just artificial, as secularism is itself a religious view. I appreciate readers keeping that in mind in going ahead with examining this article.
The First Amendment of the U.S. Constitution says in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .”

States in the U.S. have similar State Constitutional provisions. See for instance from Virginia’s original Constitution (1776):

SEC 16: That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

A closer look at the First Amendment is helpful in this discussion. The first clause of the First Amendment (up to the comma) is what we call the Establishment Clause. Its initial intent was to prevent the U.S. Congress from establishing a State Church; that is, “institutionalizing” a single national Church (i.e., one of the various Christian ones). It served to prevent Congress from establishing and institutionalizing an official state religion under that Church (such as Germany and England have had at times, and which some of the individual States at one point had). I see it as something that can loosely be characterized as a “freedom from religion” provision, but only in the strictest sense of freedom from an institutional religion imposed upon all at the national level. This was so people could practice their own religions (again contemplating this within one of the versions of Christianity).

The second clause (after the comma) clearly embodies what almost everyone calls a “freedom of religion” clause. It is for the citizens to enjoy this right. Again, the idea is they can enjoy the free exercise and practice of religion without imposition from a national or state religion.

Among the issues discussed in this article, the first one (about the right of States to keep the traditional definition of marriage) involves a complaint by some of establishing religion (their incorrect position is that a traditional view of marriage, since it is also a religious one, cannot be imposed on all the States). The second issue (about business owners’ right to carry on their business according to their religious convictions) relates to the free exercise of religion.

In terms of statutes, in 1996 the United States Congress passed the Defense of Marriage Act (DOMA), signed into law by then President Clinton after enjoying widespread, bipartisan political support. The Act preserves the traditional definition of marriage as the union of one man

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4 U.S. CONST. amend. I (1791).
5 VA. CONST., § 16 (1776).
6 See JOHN EIDSMOE, GOD AND CAESAR, BIBLICAL FAITH AND POLITICAL ACTION 19-24 (1997) (giving an excellent history, including of the First and Fourteenth Amendments (applying the religion clauses to the States)).
and one woman for purposes of federal law and government.\textsuperscript{7} It was overturned in part, in a
decision in 2013, I discuss this and its significance in greater detail below (see Issue I).

In 1993, the Congress passed the first ever national Religious Freedom Restoration Act
(RFRA).\textsuperscript{8} A subsequent Religious Land Use and Institutionalized Persons Act 2000 (RLUIPA)
expands upon RFRA and helps interpret its application in corporate settings.\textsuperscript{9} After the initial
RFRA, about twenty of the States passed similar laws. The ones that have been all over the news
this year involve those in Indiana, Arkansas, and Arizona. The purpose of RFRA laws accords
chiefly with the second clause in the First Amendment to protect the “free exercise of religion.”
The meaning of free exercise of religion is evidently, intentionally more expansive under RFRA
(via RLUIPA) than it is in the First Amendment of the Constitution.\textsuperscript{10}

At the same time, many state, local, and city governments have recently passed Sexual
Orientation, Gender Identity (SOGI) laws, which seek to prohibit discrimination on the basis of
sexual orientation or identity. One can imagine the imminent clash between RFRAs and SOGIs
(see below).\textsuperscript{11} In the wake of the recent Obergefell case, which certainly relates to Issue I but
also has implications for Issue II in this paper, several new legislative and Constitutional
responses are developing in America. I discuss these in sections below.

In addition to Constitutional provisions, RFRAs, and other statutes, an enormous body of case
law (jurisprudence) has developed interpreting and applying these provisions at the national and
state levels. Still also, there are countless local and municipal laws, rules, and ordinances dealing
with the free exercise of religion, and prohibiting government from establishing a particular
religion over everyone else. Each of these laws and cases however, is subject to final constraints
imposed by the U.S. Constitution’s First Amendment (above).

\textit{Synopsis of Issues:}

At present, the news shows a severe scourging of any Christian perspective on either of the
issues above, as touching upon both the Establishment and Free Exercise Clauses in the
Constitution. This is best interpreted as an attempt by leftists and secularists (including media,
education, and the secular legal system) to purge the Christian view of marriage (on this and
many other social issues) completely from the public square; i.e., to sanitize public debate on
laws and policy from all religious influences. It does not stop there, however. The clear trend in

\textsuperscript{7} DOMA, 110 Stat. 2419 (§ 3, containing the traditional marriage definition, was stricken)
\textsuperscript{8} 107 Stat. 1488, 42 U.S.C. § 2000bb, \textit{et. seq.}
\textsuperscript{9} 114 Stat. 803, 42 U.S.C. § 2000cc, \textit{et. seq.}
\textsuperscript{10} Id. §§ 2000cc-2(4); see also Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2761-62 (2014) (slip op. at 6-7)
(same case in pdf version is supplied, Part I.A. (majority op.), explaining). In this note and throughout, I will be
indicating parallel, pdf, slip opinion citations on several cases for ease of international readers seeking to find them.
I also provide some internet links to these versions in a links sheet in Appendix – 3.
\textsuperscript{11} Not every State or locality has both a RFRA and SOGI law; some have one or the other, or possibly neither. See
Alliance Defending Freedom (ADF), 3 Reasons SOGI Laws Are Being Defeated, April 14, 2015,
\url{http://blog.alliancedefendingfreedom.org/2015/04/14/3-reasons-sogi-laws-are-being-defeated/} (explaining SOGIs).
even the commercial sphere (i.e., non-government, private sector and businesses), and in just about everywhere else you can think of in American life, is to keep religious views completely out of the conversation.

It is as if the very limited idea of freedom from a state-imposed religion has shifted starkly and speedily to the idea of freedom from religion in every aspect of American life, save for what usually happens inside the walls of a church. It is no longer just about escaping a state-imposed religion (the intended meaning), and not even just about keeping religious views out of the public square (an incorrect view in the first place), but it goes deeper now to keeping religious views entirely to oneself (certainly an impermissible view).

The idea is you can have religion in your church (i.e., worship), but not in debate on public policy issues, not in schools, and not in public discourse in society, even in the business world and at work. It is as if the idea of a non-establishment of religion has gone so far beyond the intended scope of the First Amendment (i.e., to prevent a state-imposed religion), that it has swallowed up the second clause on free exercise of religion altogether. Freedom of religion is now being replaced with freedom from religion in virtually all aspects of American life. This was never the intent of the First Amendment and of basic justice.

How did we stray so far from the rights and protections of the First Amendment in the Constitution as originally intended? This is the slide I referred to above. I give some suggested answers for this below.

THE SLIDE TOWARD A SECULAR AMERICA
AND LOSS OF RELIGIOUS LIBERTY

How did America get to the point of saying (incorrectly) statutes supporting an historical, traditional and natural meaning of marriage are unconstitutional because they essentially reflect a Christian viewpoint, and this violates a so-called separation of church and state; i.e., the prohibition against establishing religion in the nation or in a State, at the hands of the government? Or how did we get to the point that Christian shop owners cannot exercise their religion or even their conscience when it comes to providing services to the public, even if it involves participating in an event that violates their understanding of marriage (i.e., a SSM wedding ceremony)?

In short, I believe a chief reason is a growing trend toward Statism in America. She has moved increasingly in recent decades to a view of life that sees a greater role for the state than in the past, causing way too much blending of the government and private sectors. In large part this is due to the growing regulatory apparatus of government over commercial enterprises, in turn due to the economic meltdown and recession in 2008 and 2009. In some sense, then, the business world is also largely responsible for this trend. Clearly, big banks and financial institutions helped cause the financial crisis in 2008, in significant part due to their greed and avarice in the
sham mortgage-backed-securities industry. That all led to a stunning rash of new government regulations, which in turn strengthened the intertwining of government and big business.

In addition, America is in its second term with its most socialist-inclined President to date, Barak Obama (something I surmise some voters had not really comprehended or lacked adequate information about during his election campaigns and speeches). The idea of Statism, like Socialism, is to increasingly hand over to the government many of the functions in society intended for handling in the private sector, such as by businesses, families, and even the Church. In my view, this ends in confusion in the minds of the average person, as the norms in a State, intended as applying to government, tend to get swept into the private sector as well, becoming new norms there, applicable to all. A separation of church and state, once understood to limit the reach of government, now more easily seeps slowly but ever so surely into a separation of church (and religion) from society: i.e., business, schools, culture, and just about every inch of society outside one’s family and individual life or one’s actual house of worship.

In addition and simultaneously, we have very secular media and educational systems in America which are increasingly hostile to religious viewpoints and practices. Media and educational elites have been leaders in promoting homosexuality as a normal lifestyle, which must not be criticized or even challenged; doing so amounts to religious discrimination and bigotry. In that environment, it is hard to imagine religion, specifically Christianity, getting a fair shake.

Since most of American legal education now is avowedly secular (just a product of the culture) it is not really surprising to see judicial decisions continually going against religious folks in the public square on these issues. This, of course, only exacerbates the slide away from truth, since the judicial and legal systems give legal unction to this restriction against religious liberty on questions like SSM and other social issues, reinforcing the speedy slope of this slide.

This growing secularism has resulted in a twisting of the First Amendment’s Establishment and Free Exercise Clauses. Its incorrect application of the Establishment Clause asserts that traditional definitions of marriage are discriminatory against gays and promote a view of religion improperly imposed by the State on others. Such marriage laws, they say, must be stricken under the Establishment Clause.

An incorrect application of the Free Exercise Clause is the suggestion merchants cannot abstain from participating with their services and goods in gay wedding celebrations and other gay-lifestyle-promoting events. Secularists would say this abstention is unacceptable discrimination. I will address the fallacies in both backslidden, incorrect interpretations of the First Amendment, along with summarizing the current applicable law, including important cases and legislation to date. I will also give some idea of what legal initiatives are in the works on Issue I, following on the heels of Obergefell, and give some insights on what might happen on Issue II.
ISSUE I: IS A STATE’S DEFINITION OF NATURAL (TRADITIONAL) MARRIAGE A VIOLATION OF THE CONSTITUTION?

The answer of course is no, but several scholars and jurists sincerely (or some not so sincerely) think otherwise. I suppose they are simply deceived, and some are just being dishonest. In any event, SCOTUS in the *Obergefell* case has concluded State natural marriage laws do indeed violate the Constitution. Just how remains a bit of a mystery for many scholars. Justice Kennedy appears to use a strange amalgam of various intertwined (he says) Due Process (substantive due process, “DP”) and Equal Protection (“EP”) rights in the Fourteenth Amendment. He mixes these together into a general “liberty” interest, giving to everyone a dignity/destiny right to pursue their own identities, without any stigmas attached. And for this, he says, SSM is a requirement under this rights recipe.12 It is not any one specific item in the Constitution that mandates his conclusion, but a smorgasbord of things collected together. Justice Kennedy’s SSM rights concoction also has another very important ingredient, which he says, is that it is now simply time to allow this.

Indeed, the SCOTUS decision is so chock full of errors in law, philosophy, and Constitutional interpretation, I am sure it deserves the full attention of another separate article to address it. I think it best I should reserve handling that for another time. Instead, I will try to stay within my focus on religious issues raised or implied in the case. I will also give some attention to the EP/DP analysis (as somewhat traditional in this line of cases), and raise some additional criticisms of the case in appropriate sections next. I will give just a short list of some of Justice Kennedy’s gravest mistakes in the opinion he authored in another section below:

**Incorrect Interpretations of the First and Fourteenth Amendments, with Some Corrections:**

To give some credit (I suppose), the majority Justices in *Obergefell* did not actually center their decision on claims State traditional marriage definitions violate the Establishment Clause of the First Amendment; instead, they addressed mostly the Fourteenth Amendment’s EP and DP clauses. Still, arguments on the Establishment Clause have been common in this debate, and undergird the thinking that has brought us thus far.13 I consider it a very small “bright spot” in the opinion that the majority did not use the Establishment Clause as its direct means to strike State traditional marriage laws.

To summarize it, the argument of many SSM adherents goes something like this: The traditional definition of marriage is that of the union of a man and a woman. Although many people having sincere religious beliefs hold this view (i.e., Christians, etc.), they may not assert it as the basis of legislation; this, they say, violates the separation of church and state (i.e., violates the


13 The Establishment Clause of the First Amendment is applicable to the States by the Fourteenth Amendment. As well, each State has its own constitutional version of an establishment and free exercise clause. The arguments in each are essentially the same, and I treat them as such.
Establishment Clause). As noted, the argument is typically expanded to say a traditional view of marriage discriminates against homosexuals; that it violates the Equal Protection and Due Process Clauses in the Fourteenth Amendment, as applying to the States. In short, if religious views are even allowed in the lawmaking process, they must not violate, and must succumb to the Due Process and Equal Protection Clauses of the Constitution; i.e., such religious views cannot be superimposed in society and cannot discriminate against homosexuals.

I noted those seeking to strike traditional marriage laws recently seem to center their arguments more on the Equal Protection and Due Process Clauses, and less on a violation of the Establishment Clause. Obergefell certainly follows that track. SSM activists see the traditional marriage laws as mainly conservative in viewpoint, acrimoniously targeting gays (how they get there is sometimes very strange), and they would oppose those laws even if they were not based on religion. Even Justice Kennedy acknowledged other secular (non-religious) arguments have been raised in good faith, to support traditional marriage laws. At the same time, SSM advocates, including the Court, certainly appreciate that the historical and traditional view of marriage is also a religious one, and to that extent, some still say this influence violates the Establishment Clause. Consequently, the idea of a religious underpinning of law must be addressed, as its criticism is not a view anyone can easily assume in no longer extant in this discussion. This criticism is of course where the secular liberal side really gets it wrong. I offer some illustrations:

In Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), the Supreme Court of Iowa indicated many Iowans reject same-sex marriage as a civil institution “due to sincere, deeply ingrained – even fundamental – religious belief.” The Court said that while religious institutions and individuals may continue to abide by their religious views of marriage in their own religious institutions and practices, those views are not apt for the civil and secular institution of marriage. It said incorporation of a religious view of marriage into Iowa’s state, civil institution of marriage violates the establishment clause in its own Constitution (art. I, § 3), and the entire doctrine of separation of church and state: “[O]ur task [is] to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation . . . This proposition is the essence of the separation of church and state.” (emphasis added; internal citation omitted). If so (and it isn’t), Iowa would also have to scrap its laws against murder, theft, child abuse, rape, incest, deceit, contract breaches, and so on, since religious views against these harmful things surely shaped those laws.

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14 A Due Process Clause exists in the Fifth Amendment also, but applies chiefly to actions of the federal government (some contend it also contains some equal protection elements as well).
15 Obergefell, 576 U.S. at ___ (slip op. at 4, 23).
16 763 N.W. 2d at 904.
17 Id. at 905-906.
18 Id. at 905.
I hope to get into specifics of why this italicized statement is simply incorrect, below. It suffices for now to say the Iowa Supreme Court considered adherence to a religious definition of marriage, if applied in the secular, civil realm, to be an impermissible establishment of religion (but when has marriage ever been completely irreligious; isn’t it spiritual?). The Iowa Supreme Court improperly confused the idea of religious influence in law with the idea of separation of church and state.

Similarly, theologian Wayne Grudem, in his book, *Politics According to the Bible* highlighted the statements of David Boies, a lawyer opposing the traditional definition of marriage in California’s notorious “Proposition 8” cases. Attorney Boies incorrectly stated that while many Californians have genuine religious beliefs that marriage should be between a man and a woman, “the Establishment Clause . . . says that a majority is not entitled to impose its religious beliefs on the minority.” I guess his side is entitled to impose theirs?

This view expressed above is fundamentally incorrect on several grounds:

First, it is impossible to extract out from any nation’s laws their religious and philosophical, ideological underpinnings, and erase them. Law is inherently a moral inquiry. It absorbs and then encapsulates moral and religious viewpoints and principles. (I am speaking here of course about the many valuable ethics in religion systems as valid contributors to human law, in contrast to actual rituals and ceremonies, which is a different matter.)

Human law is born of the cultural and societal norms of any people it serves, and these cultural and societal norms are influenced by the religious ideology of its people. Morals and values shape laws, and morals and values are shaped by religious ethics in some important ways too. Separating law from religion (for its ethical ideology) is not realistic, nor should it be attempted. Ideologies can replace each other, but they are never absent in crafting basic human values, and the laws that come from those values.

Both in terms of its influence in society over time (sometimes over several generations), as well as its influence on specific pieces of legislation in a society, religion plays an essential role. Sometimes it is not an obvious one. In its broader influence in society over time, religious ethics have a leavening effect on social values, like yeast in bread. Since human laws are inherently derived from morality (ultimately), it would be the height of hypocrisy to allow viewpoints to shape laws from one aspect of society, say secular humanists and atheists, while excluding the perspectives of Christians and those from other religions.

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19 See WAYNE GRUDEM, POLITICS ACCORDING TO THE BIBLE 31 (2010) (citing Prop. 8 Defenders Say Plaintiffs Attacked “Orthodox Religious Beliefs,” WALL STREET JOURNAL (Feb. 10, 2010) (internal internet citations omitted)). Proposition 8 was one of the most prolific and controversial constitutional referenda, upholding the traditional definition of marriage in California. It was stricken by the Ninth Circuit Court of Appeals in 2012, and appealed to SCOTUS. See Hollingsworth v. Perry, 570 U.S. 12 (2013) (SCOTUS declining, however, to examine the actual merits of the case).

20 GRUDEM, supra note 19, at 31.
The First Amendment was never intended to promote that kind of invidious viewpoint discrimination against Christian and similar religious perspectives in policy and legal debate. Religious values and ethics have infiltrated and deeply shaped this rather mythical creature known as “secular society.” As indicated, the Establishment Clause (including any State’s version thereof) was only designed to prevent the Congress from institutionalizing and imposing a formal state Christian religion, that is, a State Church. Instead, the proper approach in democratic, pluralistic societies, is this: we should consider all serious moral values coming to the table on a particular social issue (such as SSM, abortion, stem-cell use, cloning, and so on), coming from virtuously reliable ethical sources; then, we should consider the merits of those positions in healthy debate; next, our lawmakers, with our input, should choose among those perspectives, crafting a law they think works best. That is, they try to craft laws they think promote the greatest good, happiness and justice for the people. Sociologically speaking, we should then monitor that situation, and if what is passed as law does not promote happiness, welfare and justice as it should – something we can empirically measure over time – we have to consider changing that law.

Congress has passed laws that sounded good but did not work (Prohibition, of alcohol, was likely one of them). Then it had to repeal the law. Since repeal is difficult to do, this gives all the more reason we need the inclusion of a variety of interested and reliable (time-tested) values perspectives at the beginning of the lawmaking process. Allowing only a secular humanist ideology, as a religious viewpoint in itself, to control all the outcomes in the political landscape, while ignoring ethical ideologies born of virtuous religions such as Christianity, is blatant viewpoint discrimination that is likely itself a violation of the Constitution.

As one scholar explains it, the sources of moral influence in lawmaking can come from any variety of springs. Come they will, and we should allow those voices that mean good in a democratic society to speak. So, any individual’s ethical sources might be the inspirational poetry of Henry Wadsworth Longfellow, the lyrics of Bob Dylan, or views of Freud, or Nietzsche, or Plato, or Aristotle, or common sense, or Gandhi, or the Magna Carta, or the Humanist Manifestos, or the Universal Declaration of Human Rights, or lessons from history, or science, or Karl Marx, or Scripture, or the Ten Commandments. All of these sources make claims about ultimate reality and impact the conscience, and so are inherently religious in nature; a conscience is also something a lawmaker must use, if s/he is to do the job correctly.

Some ideas and sources we will inevitably accept as good and valid, while others we will reject as incorrect and flawed in the lawmaking process, viewed in the hindsight of history as one of our greatest teachers. To reject Christian viewpoints on social issues, however, as somehow establishing a religion, is simply incorrect. It is viewpoint discrimination and smacks of deep hypocrisy, and is also terrible interpretation of the Constitution. The First Amendment

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21 Id. at 33-34 (specifically citing Bob Dylan, Confucius, and others; tying this also to free speech rights of their adherents).
disestablishes a State Church (States’ establishment clauses do not differ); it has never meant the exclusion of moral viewpoints on social issues embodied in great religions (i.e., those containing excellence in moral values).

I have included a diagram in Appendix – 2 illustrating the above lawmaking process. It illustrates why viewpoint exclusion of Christians and other sincere religions is wrong. Instead, we should be considering their ethical and moral values as real sources and contributions to law, and not do so simply as an accommodation, but because it is inevitably so. Let the best system of moral sources win in the end.

Second, if the views of the Iowa Supreme Court, attorney Boies, and similar views on the establishment of religion are correct (which they are not) then most of the good laws in society would not even survive. As I already stated, States would have to strike their good statutes criminalizing murder, homicide, grand larceny (stealing), adultery, and rape, among so many others, since these all have religious sources supporting them. Notably, all such laws have supporting structures in religion including something as common as the Ten Commandments and similar Scriptures. Such laws are not merely somehow coincidentally similar with ancient religious values, they were shaped by them in history, and such laws are easily supported by other religious ethics as well. And yet we do not strike such laws because of their supporting religious underpinnings and connections, as somehow impermissibly establishing a religion. This is why cases like Varnum are so deeply incorrect.

Lastly, this exclusion of Christian viewpoints on morality from lawmaking cannot be the intended meaning of the Establishment Clause since it would simply be too easy to get around. All that proponents of traditional marriage would have to do is articulate secular reasons in support of traditional marriage and other social issues. Such an approach, which is not really necessary and slightly saddening to see, is exactly what many Christian advocates are trying to do. They do this in order to avoid the threat of confusion with religious issues their simple minded opponents cannot seem to avoid. I suggest their approach still has some merit, but should work alongside ethical (and religious) values, instead of replacing them. After all, valid social science and valid religious ethics should affirm each other in the long run. Examples of such more “secular-sounding” arguments include historical, cultural, traditional, and very importantly, simple biological reasons for supporting marriage as the union of a man and a woman. Sociologically and scientifically speaking, for instance, it is simply good secular policy to have laws steering sexual intercourse among individuals in society into an enduring male-female parenting relationship for the security of children and all involved, including the mates. This social arrangement is ideal for building strong families, which in turn builds strong societies, and this has been shown historically as truly optimal, especially when families have both a mother and father in a low-conflict setting.22

22 Arguments such as these have been raised in Obergefell and the cases preceding it. See Obergefell, 576 U.S. at ___ (Kennedy, J.) (slip op. at 23), (Roberts, J., dissenting) (slip op. at 6-7) (citing Noah Webster’s first American
Legislation and SSM in the Courts:

As I am sure many in Indonesia already know, the United States has both a federal (national) system of law with a national Constitution, as well as separate State law systems, with their own State Constitutions, statutes, and court systems. However, state law cannot violate the Federal Constitution as it is the final law of the land. Interaction between the two systems is complex, and SCOTUS has the final say on what is and is not constitutional in each system.

Prior to June 2013, the United States had a federal definition of marriage in the Defense of Marriage Act (DOMA). Individual States passed similar laws or constitutional amendments or already had them for some time (about thirty-seven States still had enactments existing as of 2013; all States had the traditional, natural definition in some form prior to 2003). Each of these laws defined marriage traditionally as a male-female union. DOMA had been a part of federal legislation since 1996. It was virtually unanimously passed by both Houses of Congress, it enjoyed widespread bipartisan support, and was signed into law by President Clinton. It also defined marriage traditionally as “the legal union between one man and one woman as husband and wife.” It was overturned however in June 2013, as unconstitutional by SCOTUS in a very close 5-4 vote in the case of United States v. Windsor, 133 S.Ct. 2675 (2013). Justice Anthony Kennedy wrote the lead and I think decisive opinion of the Court.

In Windsor, Edith Windsor and Thea Spyer were long time domestic partners in a relationship dating back to the 1960s, and living in New York. When Spyer became ill, the couple sought to wed, and did so in Canada in 2007. New York recognized their same-sex marriage as of that date, but the federal government (including the IRS) did not, on account of the federal definition of marriage in DOMA as the legal union of only a man and a woman. This meant that after Spyer died, Windsor had a very large tax burden to pay on her inherited income, since technically, she was not the spouse of Spyer under federal law, but was under N.Y. State law. She claimed this violated equal protection, and due process under the Fifth Amendment of the Constitution.

The SCOTUS majority held DOMA’s traditional view of marriage was unconstitutional as violating the Fifth Amendment of the U.S. Constitution. The rationale of Justice Kennedy’s majority opinion was that DOMA conflicted with the New York State definition of marriage,

Dictionary and others); id. (Alito, J., dissenting) (slip op. at 4, 6); DeBoer v Snyder, 772 F.3d 388, 404-405, 408 (6th Cir. 2014) (see slip op. at 19-20, 23) (see link in Appendix – 3). Social science studies are now a very important factor in the SSM cases. I suggest its underdeveloped data on the impact of children in same-sex parent households is another reason SCOTUS should have decided to wait this out, allowing the States to sort out the data and decide. See Obergefell, 576 U.S. at ___ (majority opinion) (slip op. at 23-24) (noting but dismissing the point).

23 See DeBoer, 772 F.3d at 396 (slip op. at 7) (giving a breakdown of recent changes); Robert Barnes, Supreme Court Agrees to Hear Gay Marriage Issue, WASHINGTON POST, Jan. 16, 2015, available at http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/ (showing changes in gay marriage States between 2012 and 2015 as a result of Windsor and providing a handy geographical map of these changes).


26 See Windsor, 133 S.Ct. at 2683, 2693 (slip op. at, 3, 20, Parts I, IV).
which by this time had changed, allowing Windsor and Spyer to be married. And this, said Justice Kennedy, improperly trounced on a valid N.Y. State marital status conferred on the couple, by depriving them of marriage benefits at the federal level (i.e., as to inheritance tax exemption rights). SCOTUS said this disparity between a valid State definition and the different federal one had worked an injustice for the lesbian couple that traditional married couples would not have experienced. Central to Justice Kennedy’s rationale was the highest value he placed on the separate States being able to determine the definition of marriage as they saw fit. That is, there should not be a uniform definition of marriage (traditional or newfangled) at the federal level: the States can each decide who can and who cannot marry, and what a marriage is.27 Strangely, and prophetically Justice Kennedy added some language to the opinion seemingly supporting the New York definition as a fair and reasonable one, suggesting perhaps it is the one all States should adopt.28

However, the centerpiece of his decision was clearly that the definition of marriage is a State law issue, not a federal one, and a national definition would not be allowed. In Obergefell, Justice Kennedy then proceeded to ignore his own holding, imposing a national definition of marriage on all the States (the one allowing same-sex couples to marry instead of the traditional one), showing himself irresistibly incapable of honoring his own holding in Windsor. Seeing a Supreme Court Justice engage in such blatant self-contradiction in this important line of cases was surprising to many, but not to some.29

In the majority opinion, Justice Kennedy also stated the purpose of DOMA was to injure a class of individuals (homosexual couples wishing to marry), but he cited no support for this. Essentially he and the majority failed to acknowledge solid, rational arguments in support of the traditional definition of marriage (as indicated above) – ones that are not based on hate or animus against homosexuals, but on the best interests of society and its children.

An important practical purpose of DOMA was to preserve the status quo of a uniform, historical, and time-honored definition of marriage, so that thousands of items of federal laws and

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27 I do not wish to imply by anything I say in this article that a national definition of marriage is inappropriate, or that Windsor was correctly decided. A sovereign nation indeed has the right to set a uniform marriage law and policy (especially if it is godly), and most nations of the world (including Indonesia), have one. So did the U.S. in DOMA. Sovereigns can also legitimately adopt a traditional view of marriage as their national standard and most do (nothing in the Cosmos prevents it). So, a different holding in Windsor, affirming DOMA, would have been entirely legitimate in theory, albeit a bit confusing in application within our federalism system, since States are allowed to define marriage separately. If uniformity is the goal, a correct national standard should apply and abide.

28 Id. 133 S.Ct. at 2693. Setting a requirement for all the States to allow SSM is really the same as creating a federal definition, as it requires striking the traditional ones and making new SSM-agreeable ones. Windsor did not go this far, but Obergefell did. I am again not saying Windsor was correct in all respects. It did support States’ rights on this issue, however.

29 See concerns of Judge Martin Feldman in a Federal District Court case after Windsor, Robicheaux v. Caldwell, 2 F. Supp. 3d, 910, 917, n. 7 (E.D. La. 2014) (slip op. at 9, n.7) (noting an “amorphous but alluring” redefinition of equality in Windsor, citing 133 S.Ct. at 2693) (see link in Appendix – 3); see also Windsor, 133 S.Ct. at 2705, 2708-10 (Scalia, J., dissenting) (slip op. at 16, Part II.A., 22, Part II.B.) (Justice Scalia calling this right from the start, and seeing Kennedy’s hypocrisy in advance).
regulations, such as tax and inheritance laws, would have a single uniform definition of marriage (and “married” persons and “spouses”) applicable to them. DOMA’s intent was not to injure, as seen in its wide support (and Justice Kennedy was incorrect in saying it was). Still, in a Christian-rooted country, it would hardly seem necessary to codify a traditional view of marriage. In all likelihood, DOMA’s supporters initiated the law anticipating strong challenges from LGBT activists to redefine marriage so that it could be changed into something entirely new: a gender-irrelevant institution suiting their interests.\(^{30}\) Interestingly, many of the supporters of DOMA and similar laws included prominent liberals like Bill and Hillary Clinton, and Barak Obama (signing a similar Illinois State law). Such supporters suddenly changed their views immediately prior to the Windsor decision, saying they were wrong in opposing SSM initially.\(^{31}\) Such changes are hypocritical, and betray any principled and honest approach in these so-called leaders on this issue.

Windsor’s after effects were dramatic, and also confusing. After Windsor, there was no longer a federal definition of marriage and this threw into confusion the definition not only of that term, but such other terms as “married,” “marital,” and “spouse” contained in over a thousand federal laws and regulations. After Windsor, the meaning of the term “marriage” (and similar words) in federal law would likely have to fluctuate with the States – not an ideal situation.\(^{32}\) I suppose it can be said now, via Obergefell, Justice Kennedy has virtually single-handedly solved the confusion of various State marriage definitions by making SSM part of a new uniform definition imposed on all the States. And he was not even elected. Still, this hardly justifies the Obergefell decision (in fact, Justice Kennedy never mentioned uniformity as a rationale, but I would not be surprised if he had it well in mind).

In addition, immediately after Windsor, LGBT activists and activist judges began claiming a major victory. In a rash of irrational opinions by sympathetic judges in various States, state laws with traditional marriage definitions were overturned almost overnight. In a swift stampede spanning less than two years, twenty-two States had their traditional marriage definitions swept away by anxious judges supportive of the homosexual and secularist agenda. It was like watching falling dominoes. Homosexual couples flocked in droves to civil magistrates to immediately get their marriage licenses.

\(^{30}\) See Windsor, 133 S.Ct. at 2693-94 (slip op. at 21); see also id. at 2708 (Scalia, J., dissenting) (slip op. at 20) (explaining Congress’ rationale to preserve definitions, and not injure).


\(^{32}\) Justice Scalia raised such concerns in Windsor. 133 S.Ct. at 2708-10 (Scalia, J., dissenting) (slip op. at 19-21).
However, none of this was a consequence intended or authorized by *Windsor*. The case only overturned the federal definition of DOMA, saying emphatically our Constitution leaves the determination of marriage rights and restrictions up to the individual States. It is a matter of State law. In the U.S., we moved from a slight number in 2013 of about thirteen States incorporating the genderless definition of marriage (and thirty-seven staying in favor of traditional marriage), to about thirty-eight (including D.C.) adopting the genderless definition in that short time span.\(^\text{33}\) Just prior to *Obergefell* in 2015, only a handful of States were still left standing for traditional marriage. It was a complete turn of events. But this was done illegitimately, not according to any real voting by citizens either in constitutional referenda or through the statutory process, and primarily by activist judges and attorney generals indoctrinated in their secularist ideology (since this is the choice fare served up at almost all law schools in America in the last several decades).

After *Windsor*, only a handful of courts kept the sane view that each State should be entitled to craft its own marital laws though the democratic process (as *Windsor* said). Some went on to give cogent and sound analysis, showing how keeping a traditional view of marriage is *rationally based in furtherance of a legitimate state interest*. This is because it has the most proven capacity in building strong families and societies. And this is an important constitutional analysis, which most courts seemed to overlook, even though this rational basis conclusion is something most people instinctively know is true. The Sixth Circuit Court of Appeals, was the first and only federal appeals court (since *Windsor*) to issue a smartly articulated decision to this effect, in *DeBoer v Snyder*, 772 F.3d 388 (6th Cir. 2014).\(^\text{34}\) *DeBoer* involved an issue of whether four States, Ohio, Michigan, Tennessee, and Kentucky, could keep their traditional definitions of marriage, or whether the Constitution of the United States required them to abandon them.\(^\text{35}\) An earlier Eighth Circuit appellate decision, *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 864–868 (8th Cir. 2006) also contained some initial valuable insights, showing a rational basis for traditional marriage, in stabilizing homes.\(^\text{36}\)

Because these cases affirmed each State’s traditional marriage definitions, this created a conflict with some other federal appellate courts which struck down traditional marriage (these are the Fourth, Seventh, Ninth, and Tenth Circuits, and we have eleven main ones in the U.S. plus two special Circuit Courts). This “split in the Circuits” required SCOTUS to address this issue, by

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\(^\text{33}\) See Robert Barnes, *supra* note 23 (showing maps and comparisons between 2012 and 2015); see *DeBoer v. Snyder*, 772 F.3d at 396, 405, 416 (slip op. at 7, 20, 35) (claiming 19 States actually in favor of SSM, and 31 against, according to actual State-based determinations, and excluding recent federal judicial interference). In only 11 States and the District of Columbia, however, have the citizens of the State actually voted in some way for SSM. *See Obergefell*, 576 U.S. at ___ (Roberts, J., dissenting) (slip op. at 9)

\(^\text{34}\) Id., cert. granted, 83 U.S.L.W. 3315 (Jan. 16, 2015).


\(^\text{36}\) 455 F. 3d at 864–868 (noting the constitutionally rational basis of a State’s legitimate interest in channeling procreative human sexual intercourse into stable family relationships, through the historical concept of marriage).
hearing an appeal from DeBoer, and this appeal is the Obergefell case we now have handed down to us from SCOTUS.37

In two of the four Federal Circuit Courts of Appeal just noted (the Fourth and Tenth Circuit Courts), there were split decisions. In each case one justice stood out and wrote a sound and well-reasoned opinion explaining why those States’ statutes or Constitutional Amendments, keeping a traditional view of marriage, should not be stricken.38

In the Federal District Court level (which is the one immediately below the Appellate Circuit Courts I have mentioned above), a couple of sound, post-Windsor opinions also existed, and I mention them only for their sound articulation of what SCOTUS should have reasoned, but ignored in Obergefell. Specifically, a particularly good opinion came from Judge Feldman in Robicheaux v. Caldwell from the Eastern District of Louisiana in 2014.39 Robicheaux soundly indicated the States have legitimate interests in keeping a traditional view of marriage, including the importance of channeling sexual activities of individuals into the confines of a traditional marriage to raise children; this helps reduce illegitimacy and strengthens families and society. Similarly, each State has a legitimate interest in linking children to intact and thriving families formed by their own biological parents, as the ideal.40 Said traditional marriage definitions are of course rationally related to those legitimate government interests I have just mentioned (more on this wording immediately below).

What SCOTUS Should Have Decided, in a Real EP, DP Clause Analysis:

In a thoroughly principled approach, SCOTUS should not have voted to impose SSM on all Fifty States. It should have allowed each State to determine the issue itself, as it has historically, and as mandated again in Windsor. This is because the Equal Protection (EP) and Due Process (DP) Clauses in the U.S. Constitution do not require SSM. DP Clause arguments had been virtually abandoned by advocates in recent SSM cases, until Justice Kennedy sought to resurrect them in

37 The four Federal Circuit Courts examining the issue, and agreeing with lower courts in overturning State traditional marriage definitions are: Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Latta v. Otter, 771 F.3d 496 (9th Cir. 2014), rehearing en banc denied, 771 F.3d 496; Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014). The Sixth Circuit alone sought to preserve four States’ traditional definitions in DeBoer. The Fifth, Eleventh and other Circuits seemed to be awaiting the SCOTUS decision. I already mentioned the Eighth Circuit above.

38 See Bostic, 760 F.3d at 385-98 (Niemeyer, J., dissenting); Kitchen, 755 F.3d at 1230-40 (Kelly, J., concurring in part and dissenting in part).

39 2 F. Supp. 3d 910 (E.D. La. 2014); see supra note 29 (information and cases).

40 Robicheaux, 2 F. Supp. 3d at 916, 920 (slip op. at 8, 15) (see link in Appendix – 3). Only three other Federal District Courts issued similar opinions, with good and sound reasoning, including the importance of States’ rights in support of traditional marriage: Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 156 (D.P.R. 2014); Merritt v. Attorney Gen., No. 13-215, 2013 WL 6044329 (M.D. La. Nov. 14, 2013); Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) (a case decided actually before Windsor). However, the vast majority of Federal District Courts addressing the issue could not act quickly enough to overturn States’ traditional marriage definitions in their hot pursuit to change culture after Windsor, probably illegally at the time. See Robicheaux, 2 F. Supp. 3d at 916 (slip op. at 7-8 n.6) (citing cases).
**Obergefell.** Although EP Clause arguments are considered by some to have greater significance, I (with the dissenters in Obergefell) do not believe that Clause should have afforded the homosexual community a right to SSM. I will address the typical EP and DP Clause arguments especially for the sake of informing my Indonesian audience.

The Equal Protection Clause in the U.S. deals with classifications of people (individuals or groups) to see if they are being deprived of a *fundamental right* or being treated unequally in the law. In short, the EP Clause will strike down a law if it deprives someone of a *fundamental right* or *equal protection of the laws*. It states in relevant part: “nor shall any State . . . deny to any person equal protection of the laws.” It requires that similarly situated persons be treated similarly in the law, and not differently. It employs three levels of scrutiny to determine if a law violates equal protection, according to the classification of the individuals impacted by the law. In outline form, these are:

a) **Heightened, or strict scrutiny:** If a law burdens (negatively affects) either:
   (i) someone’s fundamental rights (like a right to educate one’s own children, or voting), or
   (ii) a suspect (protected) class of people (i.e., African Americans or other ethnic groups);
   then the classification singled out in the law must be *narrowly tailored to achieve a compelling state interest* (i.e., the law must have a compelling state interest to justify and single out a certain class of people or to impact one of their fundamental rights). If the law does not meet that standard of strict scrutiny, it is unconstitutional and will be stricken (few laws that are examined under strict scrutiny survive).

b) **Intermediate scrutiny** (used typically only in gender classifications): if a law burdens a quasi-suspect class (i.e., it uses a gender-based classification) then the classification in the law must be *substantially related to an important government interest* (these laws are easier to pass muster).

c) **Rational basis review or scrutiny:** If a law does not burden someone’s *fundamental right*, or a suspect class, then the classification in the law need only be *rationally related to a legitimate*

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41 Obergefell, 576 U.S. at ___, (slip op. at 10, 18-20); see id. (Roberts, J., dissenting) (slip op. at 9) (noting the Solicitor General basically dropped any DP arguments in oral argument).

42 See, e.g., Conde-Vidal, 54 F. Supp. 3d, at 167-68 (citing and explaining Baker v. Nelson, 409 U.S. 810 (1972) (SCOTUS dismissing an appeal from the Minnesota Supreme Court’s holding that marriage is between a man and a woman, having been so since the time of Genesis)). While Baker v. Nelson is not a full merits opinion, it clearly affirmed the Minn. Supreme Court’s indications there is no such thing as a constitutional right to same-sex marriage, and indicated an alleged right to same-sex marriage is not even a federal question. See Baker, 409 U.S. at 810 (overruled in Obergefell, 576 U.S. at ___ (slip op. at 23))

43 Resort to “fundamental rights” verbiage (and the meaning of this) in the EP test is itself suspect since it tends to confuse any intended line between the DP and EP Clauses, which Justice Scalia has warned about, and I tend to agree with. See Obergefell, 576 U.S. at ___ (Scalia, J., dissenting) (slip op. at 8-9). Since SCOTUS has in fact used this fundamental rights prong in EP Clause analysis (sometimes), I include it here as part of this analytical framework, like it or not. I also note Justice Alito, in Windsor separates this prong, saying nothing about it, in his EP analysis. See 133 S.Ct. at 2716-18, (Alito, J., dissenting) (slip op. at 10-13). Some of the Justices have also criticized the use and span of implied “fundamental rights” championed under the vague idea of “substantive due process” in the DP Clause. See id. at 2706, (Scalia, J., dissenting) (slip op. at 17); id. at 2714 (Alito, J., dissenting) (slip op. at 7) (expressing caution about substantive due process).

44 Note again the concern I have with the exact meaning of this prong and its inclusion in equal protection analysis.
state interest to be valid; i.e., generally, a specific law that does not single out a suspect or protected class of people, nor threaten a fundamental right, will survive if there is a rational basis for its existence, serving a legitimate government interest (these laws are the easiest to survive).\textsuperscript{45}

If a law is not subject to strict scrutiny, it is usually then reviewed under the easier, rational basis standard. SSM was never a fundamental right (until Obergefell supposed so) and actually still lacks that quality of right, nor have the traditional marriage laws targeted a “suspect class.” Homosexuals have never been found to constitute a suspect class, and even Justice Kennedy in Obergefell did not say they were. First, a fundamental right is only one that is deeply embedded in the nation’s history and traditions; it is a right so valuable and essential to the concept of ordered liberty that justice and fairness could not exist without it.\textsuperscript{46} Marriage (like also raising a family, educating one’s children, and several others) is considered a fundamental right, but same-sex marriage is not. It is new.\textsuperscript{47}

Second, sexual identity/orientation has never been accepted by the SCOTUS as a suspect and specially protected class, in contrast to race, etc. In order to qualify as a suspect class, sexual identity or orientation would have to characterize a group which “exhibits obvious, immutable, or distinguishable characteristics that define them as a discreet group.”\textsuperscript{48} Those with alternative sexual identities lack these attributes. As the American Psychiatric Association (APA) explained, sexual orientation covers a wide range of sexual desires and is not an immutable characteristic (like one’s race or skin color).\textsuperscript{49} Sexual orientation can and does change and no evidence exists to show that people are born gay. Sexual identity consists of a mixture and range of various sexual preferences on a wide spectrum (i.e., it is not a discreet group); it is a behavioral characteristic.\textsuperscript{50}

\textsuperscript{45} See Windsor, 133 S.Ct. at 2716-18, (slip op. at 10-13) (Alito, J., dissenting) (laying out this analytical structure).
\textsuperscript{46} See Washington v. Glucksberg, 117 S.Ct. 2558, 2267, 2275 (1997) (no right to suicide; listing traditional rights of marriage, procreation, etc.).
\textsuperscript{47} It would also be circular and improper to attempt to construct a new definition of marriage by incorporating SSM into it, and then saying it is a fundamental right, but that did not stop Justice Kennedy and the majority in Obergefell from trying. See 576 U.S. at ___ (slip. op. at 17, 22-23).
\textsuperscript{48} Bowen v. Gilliard, 483 U.S. 587, 603 (1987) (internal citations omitted)
\textsuperscript{49} Nevertheless, J. Kennedy twice claimed sexual orientation is immutable in Obergefell, 576 U.S. at ___ (slip op. at 4, 8). His lack of support, except for a smack of agendized, biased “science” does not count for anything. For a good discussion of the legal analysis, see Gene Schaerr and Ryan T. Anderson, Legal Memorandum, Memo to Supreme Court: State Marriage Laws Are Constitutional (no. 148), HERITAGE FOUNDATION, March 10, 2015, at 6-7, http://www.heritage.org/research/reports/2015/03/memo-to-supreme-court-state-marriage-laws-are-constitutional.
\textsuperscript{50} Schaerr, supra note 49. Some SSM advocates, like the Justices in Obergefell, say SSM should be allowed under Loving v. Virginia, 388 U.S. 1 (1967). In that case, SCOTUS struck down a Virginia marriage law forbidding interracial marriages. But the Court still considered marriage to be the union of a man and woman, never questioning it. Also, gender is intrinsic to marriage and defines it; race does not. See Ryan T. Anderson, 7 Reasons Why the Current Marriage Debate Is Nothing Like the Debate on Interracial Marriage, THE DAILY SIGNAL, August 27, 2014, http://dailysignal.com/2014/08/27/7-reasons-current-marriage-debate-nothing-like-debate-interracial-marriage/.

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Properly, marriage laws supporting the traditional definition of marriage should not be subject to strict scrutiny (i.e., for targeting a suspect class or fundamental right), but should only be analyzed under a rational basis for their support. Such an articulated, rational basis exists: it is to channel heterosexual intercourse into a structure that supports child rearing, and so building strong traditional families in society (and other supporting rationales exist). Since traditional marriage is perfectly rational, state laws supporting it should have been allowed to stand.

As indicated, the Due Process Clause of the Fourteenth Amendment had not been getting much air time lately as a spoken argument in support of SSM (the Solicitor General did not rely on it in oral arguments in *Obergefell*). Since Justice Kennedy decided to revitalize it, combine it with equal protection, and extract out of it new, fundamental, liberty interests in sexual identity and in the dignity or realizing that through SSM, it is a good idea to shed some light on it.

Essentially, in order to constitute a DP Clause violation,

1) the right claimed as being violated must be *articulated with particularity*, and

2) the right must be *fundamental*, in the order of magnitude discussed above (i.e., deeply rooted in the nation’s history and traditions, etc.)

Supporters of SSM cannot simply argue marriage is a fundamental right (it is, we all know), and so gay couples should have it. Instead, they must show SSM itself is a fundamental right. It would be incorrect to try to establish the point this way: (a) start by simply reiterating marriage is a fundamental right (as all the cases say it is), (b) then inject that same-sex couples should also have it, and (c) voilà, we can now safely conclude marriage is a fundamental right for same-sex couples too. This is sheer legal “bootstrapping” (insufficient circular reasoning). It leaves open the question still to be answered; it assumes what has yet to be shown: why should same-sex couples, or anyone apart from complementary-sex couples, be allowed to marry in the first place? Answer (says the case): because they want to, and have said so in no uncertain terms, and are also generally good people entitled to it. Is that indicative of a fundamental right, however? It is not. But this circularity of argument is precisely what SSM advocates say all the time, and it is the very *essence* of Justice Kennedy’s and the majority’s opinion in *Obergefell*; the entire holding is grounded in circular reasoning (sheer judicial bootstrapping). It casts aside all definitions of what a marriage *is* (meaning the essence of a “thing” in itself), and is a reflection

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51 See DeBoer, 772 F.3d at 404 (slip op. at 19) (marriage constructively directs sexual intercourse in society); Robichaux, 2 F. Supp.3d at 916, 920 (slip op. at 8, 15) (marriage channels sexual intercourse into stable male-female relationships and ideally links children with their biological parents, a mom and a dad).


53 The term “opposite-sex couples” (juxtaposed against “same-sex couples”) can sound a bit ignoble. I think a better term in conveying the truth of it is “complementary-sex couples.”

54 *Obergefell*, 576 U.S. at ___ (slip op. at 5, 15).

55 *Id.* (slip op. at 6, 10, 12-18, 22-33) (saying, in sum, it is time to confer on same-sex couples the same dignifying and economic-State benefits that have been enjoyed by traditional couples in marriage).
again of simple Court politics; one view of morality is simply substituted for another according to who is in charge; change the Court’s composition and you change the result; but a genuine fundamental right to SSM was not shown.

The very best the majority could offer was a sort of individual right of self-autonomy, to pursue one’s “identity,” yet meaning this only in a very limited, sexual and romantic sense; but even this would not necessitate a right to “marriage.” Still Kennedy insists SSM is necessary (a right even), so individuals can dignify their searched-for, self-identities; and this right of “dignification” of one’s sexual identity, with suitable companionship, shall be given.

I should ask: does the Constitution equally give anyone a right to a career of his/her choosing, one that best suits their self-identity and expresses who they are, and dignifies that identity, since careers, skills and talents, and social roles, may shape a person’s sense of identity as much or more than his sexual identity? I wonder.

In summary, Justice Kennedy and the majority in Obergefell could not ground their decision on a straightforward analysis of either the DP or EP Clause. Instead Kennedy resorted to a creative mixture of ideas in both clauses, inter-mingling them, to shape a new liberty interest in seeking out one’s sexual identity, as a kind of fundamental right to individual autonomy and self-expression (to be all you are); and it requires yet an additional fundamental right to give expression and dignity to that individual interest, through marriage (something Justice Kennedy could not see had already been exclusively defined in nature).

This is shaky ground to rest a new right upon, given its sweeping implications in every State across the nation. It’s also not one likely to be embraced very widely internationally, including in Indonesia. As evidence of this weak foundation, note that Justice Kennedy’s critics are not only the case dissenters, nor only the millions of Americans with similar views, but even liberal scholars have expressed serious concerns about the basis of this decision. They question things like “dignity rights,” the absence of a straightforward EP Clause analysis, and implications of all this to our nation.

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56 Obergefell, 576 U.S. at ___ (slip op. at 2, 10, 13).
57 Id. (slip op. at 10, 13-14).
58 The results in Western Europe (EC, etc.) are a little bit mixed. States like the UK and Ireland (summer 2015) have voted to allow SSM, and Norway has approved it since 2000. But the European Court of Human Rights has made it abundantly clear (in several cases) that SSM is not a fundamental, human right, under Article 12 of the European Convention on Human Rights (examining other provisions too). It has said so again more recently in regard to Finland and a transgender marriage case there. See information in, Stefano Gennarini, European Court: Gay marriage is not a human right, LIFESITE, July 25, 2014, https://www.lifesitenews.com/news/european-court-gay-marriage-is-not-a-human-right. The European Court has decided this is essentially a matter left up to the each country. Since Justice Kennedy is notorious for trying to apply international law in important cases, he should have at least followed that same reasoning before ignoring States’ rights in Obergefell. Information on laws supporting Indonesia’s traditional marriage structure is in Appendix – 1.
59 See Obergefell, 576 U.S. at ___ (Scalia, J. dissenting) (slip op. at 8-9); id. (Alito, J. dissenting) (slip op. at 2-8); see Jeffrey Rosen, The Dangers of a Constitutional “Right to Dignity,” THE ATLANTIC, April 29, 2015 (after oral
A Short, Top 10 List of Glaring Errors in Kennedy’s Obergefell Opinion, and in His Worldview:

As I mentioned earlier, an entire article should be devoted to this subject. I just intend here to give a short list of summary points of Justice Kennedy’s most glaring mistakes, in the majority opinion, which he wrote. I state these in the third-person singular for convenience sake:

1) Kennedy has failed to comprehend that inherent in the definition of marriage is a male-female union. It is essential; it cannot be marriage without that; it is simple etymology. It is as if a circle asked to be a square. We can give it that label, and even give it equal status, but it will always be a circle.\(^{60}\)

2) Kennedy consistently confuses the incidents and benefits of marriage (as an institution), with the thing itself. It is as if he and the majority actually define marriage as a status given to a couple by the State, attaching to it a series of benefits and civil rights the recipients of the status are intended to enjoy. I see no clear definition of marriage, and what this “right to marry” is according to Justice Kennedy, apart from his idea it is a status given by the State with an attached set of benefits, rights, and recognitions same-sex couples should also enjoy. Surely, if marriage is a fundamental right, it should be carefully defined by this Court (slip op. at 15, 17).

3) He confuses sameness with equal treatment, and the latter can be achieved, if society so chooses, without trying to redefine what something is to make it the same as something it is not (see 1), above).\(^{61}\)

4) In several places Kennedy says marriage is only for “couples” (of any sex). In fact, he only assumes two people in marriage, but actually gives no rational basis for limiting it to couples (since it is all about an individual’s “sexual identity” and some want many, and you can marry whoever you want). If he intended marriage to exist only for couples, he should not have ruled as he did, since his rationale does not support his assumption of couples.\(^{62}\)

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\(^{60}\) Several internet sites are available showing this simple etymology of the word marriage.

\(^{61}\) It is strange in the extreme Justice Kennedy never even considered the value of “civil unions” for gay couples and giving them the same rights and equal treatment as traditional, married couples, since it is the purpose of marriage he is after; this was the solution initially reached by the California Supreme Court in the Proposition 8 cases, and by the European Court of Human Rights in its jurisprudence. It is as if he cannot see giving the benefits of marriage is not the same as marriage (see point 2)).

\(^{62}\) The case has scores of references to couples or two people. See id. (slip op. at 2, 3, 12-19, 22, 23, and so on).
5) In some places, Kennedy says homosexuality is “immutable.” Scientifically, this is sheer nonsense. Sexual identity is not even clear-cut, but can and often does reflect a wide and varying range in a spectrum of sexual attractions, sometimes fluctuating in an individual’s life experiences (see text supra, and notes 48-50).

6) His holding is that gender is irrelevant to marriage (it is a genderless institution). If gender makes no difference in marriage, when does it ever make a difference? Although J. Kennedy claims his ruling in no way harms “opposite-sex couples,” it is an insult to gendered people everywhere whose identity as a male or a female is actually important.\(^{63}\) I still think human existence could require gender; and it seems as if everyone actually has one.

7) Justice Kennedy, the majority, and countless SSM advocates have had the hardest time grasping an important distinction: asserting conduct is immoral is not equivalent of hating the people doing it (it should be so easy to get). I can call my friend’s callous lifestyle immoral, and this is not hating him. But force me to accept it as moral and good when I think it is not, then we have a problem. Animus, however, lies in the hearts of those who encounter others who will not accept their conduct. So, who hates who in this discussion? It is the LGBT advocates and their sympathizers who hate those who will not agree with them.\(^{64}\)

8) Kennedy’s insistence on avoiding stigma for children of same-sex-couple households (by now giving the parents a dignified status of marriage), is hollow, ineffectual (it can’t actually achieve this), and is insulting to single-parent and similar families which have children but no marriage. Stigma is not the issue for any of these children; sympathy is.\(^{65}\)

9) The case is a severe self-contradiction. In \textit{Windsor}, Kennedy clearly stated the definition of marriage is a \textit{matter left to the States}. And so he struck down a single, federal definition of marriage (DOMA) in that case. In an act of supreme judicial hypocrisy, he, and the majority, have now instituted a single federal definition of marriage (it is the one in California, or Massachusetts, or New York mandating SSM). I have indicated this above. But this is the very

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\(^{63}\) So now there are efforts to eliminate male and female toilets and locker rooms, ban terms like Mr. and Mrs., man and woman in some college campuses in the U.S., and even some court documents in child cases are being changed to “Parent 1” and “Parent 2” (instead of the terms Mother and Father), infuriating many parents.

\(^{64}\) I can give some credit to Justice Kennedy in \textit{Obergefell} for seeming to graduate from the idea that opponents of SSM are homophobic bigots, and acknowledging sincere, good faith arguments in favor of traditional marriage (slip op. at 4). But vestiges of this sentiment still sadly remain (see slip op. at 19).

\(^{65}\) Several related issues surround Kennedy’s stigma argument and show its insufficiency: What about cohabitating couples with children, straight and gay, who do not want to get married? Can SCOTUS just “deem” them “married,” with some swipe of its judicial wand, to solve the stigma their children might face? Isn’t that what it has attempted in this case? And what about single gay parents, who do not want to marry, but do want to live an active gay lifestyle? How do we solve that child’s stigma; how can the Court solve any such stigmas?
thing he said he and the Congress could not do: impose a national definition. He did it, and he knows it.66

10) The decision is not true. It sends a wrong message to our children now and in future generations, saying it is alright to have legal fictions, based on actual fictions, so long as we get the intended result. This has bad implications for all sorts of legal structures in society, and does not inspire any hope toward a good and just society.

What Happens Next After Obergefell? Counter-initiatives:

It is likely Obergefell will remain the law of the land for a very long time. Few, if any, solutions exist to reverse the case. Some have suggested impeachment proceedings to remove errant Justices, including Kennedy.67 It would probably not be successful (it happened only once in 1805), but it could send an important message in principle. Initiating impeachment could also show the public that something is very wrong. I do not know of anyone seriously pursuing this at the moment. Senator Ted Cruz is suggesting a Constitutional Amendment limiting the terms of SCOTUS Justices so they cannot rule this way (seeking eight year term limits).68 This initiative has supporters and opponents. It remains to be seen what momentum it has.

A couple other Constitutional Amendments have been proposed. One type seeks to restore to the States their right to define marriage traditionally through the state legislative apparatus.69 In a second variety, a Constitutional Amendment seeks once again to make the traditional marriage definition (male-female) the supreme law of the land. This second kind faces much greater challenges than the first one mentioned.70 A Constitutional Amendment carries much greater weight than a statute (like DOMA) but is also much harder to achieve (two-thirds of both houses of Congress must approve it, or two-thirds of the State legislatures may establish a Constitutional Convention to propose Amendments).71

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66 I intend nothing about the importance of this violation by placing it ninth on this list (it is only a matter of sequence). Its severity is unimaginably profound and the dissenters have rightly taken Justice Kennedy to task for his switch.
67 See Interview by Megan Kelly of Senator Ted Cruz, in REAL CLEAR POLITICS, July 5, 2015, available at http://www.realclearpolitics.com/video/2015/07/01/cruz_senate_should_be_able_to_impeach_supremeCourt_justices.html.
68 Id.; see also Ted Cruz, Constitutional Remedies to a Lawless Supreme Court, NATIONAL REVIEW, June 26, 2015, http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment.
69 See id. (another Cruz initiative). Scott Walker (Governor of Wisconsin) supports this initiative, see Daniel Strauss, Walker calls for Constitutional amendment to let states define marriage, POLITICO, June 26, 2015, http://www.politico.com/story/2015/06/scott-walker-ban-gay-marriage-constitutional-amendment-119470. Since Cruz and Walker are both running for President, it should be interesting to see how far this idea goes.
71 U.S. CONST. art. V.
State responses to Obergefell have been mixed so far. Some States are pursuing interesting and innovative strategies to fight against the case; some of course will choose to abide by it.\textsuperscript{72} For instance, North Carolina is allowing civil magistrates and court clerks to excuse themselves from getting involved in same-sex marriages (including abstaining from performing marriages, or issuing licenses), according to their sincere religious convictions.\textsuperscript{73} This is a model some States seem interested in pursuing.

Alabama and Oklahoma introduced laws in the Spring (just prior to the Obergefell decision) to stop issuing state marriage licenses altogether, and relieving justices from having to perform any marriages (seeking to get out of the “marriage business,” so to speak, although late modifications to both bills allow judges to continue officiating “secular” civil weddings, including for same-sex couples).\textsuperscript{74} The idea of these bills is to allow such States to simply record marriages that have occurred elsewhere in the private sector, with notaries (as marriage “contracts”), or in churches. Some judges and civil servants are very much in favor of this idea, since it would allow them to avoid the stickiness of the issue, by not having to perform, solemnize, or officially sanction and be involved in any gay marriages if they did not want to.\textsuperscript{75}

It is not clear how this strategy could alter in any significant way the SCOTUS decision, so as to restore only a traditional definition of marriage, but it does seek to shift off of the State’s shoulders the burden of carrying a new definition of marriage repugnant to its citizens, and places the meaning of marriage on someone else’s shoulders (the private sector). Symbolically and significantly, this seeks to avoid the State having to legislate a repugnant new definition of marriage, without really “injuring” gay couples in the process.\textsuperscript{76} I imagine married straight and gay couples would still receive equal treatment under State law after this shift. Since SCOTUS’ holding in Obergefell actually only requires States to issue marriage licenses to same-sex couples “on the same terms and conditions” as traditional couples, and only assumes, without actually requiring, that they issue marriage licenses in the first place, such a strategy could have some

\begin{thebibliography}{99}
\bibitem{McLaughlin} Eliot C. McLaughlin, \textit{Most States to abide by Supreme Court’s same-sex marriage ruling, but . . .,} CNN, June 30, 2015 (updated), \url{http://edition.cnn.com/2015/06/29/us/same-sex-marriage-state-by-state/} (with video links showing States pushing back).
\end{thebibliography}
traction. As noted, civil servants and judges seem very interested in it, since it allows them to avoid the stickiness of compelling their involvement in activities violating their consciences.

I suppose it is also conceivable Obergefell could be overturned one day, by another Supreme Court, given its shaky ground, and if our legal understanding eventually evolves with “new insights” into a better understanding of justice (to borrow Justice Kennedy’s own thinking).

**ISSUE II: CAN INDIVIDUALS AND SMALL BUSINESSES RUN THEIR BUSINESSES IN ACCORDANCE WITH THE DICTATES OF THEIR FAITH?**

The answer here is yes, and no, but mostly yes. This free exercise of religion issue is a bit more straightforward than the establishment of religion discussed above. As explained above, the free exercise of religion is guaranteed by the second clause of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (emphasis added). It is also expressed in all the State Constitutions (in various wordings), as well also in many statutes and ordinances. I have already noted the Federal RFRA’s enactment first at the national level about twenty-two years ago, and since then similar RFRA’s enacted in about twenty States. I also explained, poised against these are several local SOGIs (Sexual Orientation, Gender Identity laws), aimed at getting all Americans to honor those categories, no matter what (I discuss these more below).

**Obergefell’s Slight Contribution to this Issue:**

Although Obergefell deals chiefly with Issue I, above (the right of States to continue to define marriage as they always have), what guidance, if any, does the case give on Issue II? In the very end of the opinion, Justice Kennedy, anticipating his holding has implications for free exercise of religion (for those against SSM), had this to say:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar

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77 *Obergefell*, 576 U.S. at ___ (slip op. at 2, 23, 27). Is this something Kennedy intended as a source of compromise; or is it an exploitable slip? I do not know.

78 *Id.* (slip op. at 4, 6, 7, 11, 20) (claiming several times “new insights” on inequalities in our basic institutions that “once passed unnoticed”); *id.* (Roberts, J., dissenting) (slip op. at 3) (challenging this idea).
same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.\footnote{Obergefell, 576 U.S. at ___ (slip op. at 27).}

Some view these words as a ray of hope, as at least acknowledging some protection of religious liberty. I suppose that could be a fair view. It could also be too optimistic, especially for those less initiated with Justice Kennedy’s interesting style of jurisprudence.\footnote{If Windsor is any indication, and it is, consider Kennedy’s sleight of hand on States’ rights, hidden behind some innocuous-sounding words on how the N.Y. law has some merits to it, in his ineffectual view. See 133 S.Ct. at 2693-95.} Others view these words with greater suspicion, seeing them as a very thin shield. Notice the operative words for those who are opposed to SSM, that they can \textit{advocate}, and \textit{teach} their views, and even \textit{debate} the other side, but this passage ignores words clearly allowing dissenters to \textit{exercise}, and \textit{live out} their religious convictions on this issue, in everyday culture and commerce, as required by the First Amendment. This insufficiency in wording was highly suspicious to Justice Roberts, along with others in dissent, and he was particularly acute in his criticism of this section of the case.\footnote{Obergefell, 576 U.S. at ___ (Roberts, J., dissenting) (slip op. at 27-28); \textit{Id.} (Alito, J., dissenting) (slip op. at 6-7).}

\textit{Strategies on Both Sides After Obergefell:}

In the wake of Obergefell, several conservatives have proposed a new federal statute, the First Amendment Defense Act (FADA), to ensure the Constitution’s free exercise of religion will stay afloat, allowing dissenters of the Obergefell decision to live according to their convictions.\footnote{See Kelsey Harkness, \textit{Here’s How Religious Business Owners Could Protect Themselves Against Gay Marriage Decision}, THE DAILY SIGNAL, June 30, 2015, \url{http://dailysignal.com/2015/06/30/heres-how-religious-business-owners-could-protect-themselves-against-gay-marriage-decision/} (providing a link to FADA (H.R. 2802, 114th Cong. (2015-2016), and indicating it is likely insufficient for local vendor protections but also recommending State RFRAs, and providing a good map showing States having both State RFRAs and local SOGIs).} But it is extremely odd that we should need a federal law to keep what the Constitution already gives. In an era of unbridled, liberal Supreme Court activism, it has sadly come to this.

The LGBT political action army is not sitting idly by either, but is moving swift to the kill with a new federal law in its arsenal, the misleadingly labeled, Equality Act (EA).\footnote{Matthew Kacsmaryk, \textit{The Inequality Act: Weaponizing Same-Sex Marriage}, THE WITHERSPOON INSTITUTE, Sept. 4, 2015, \url{http://www.thepublicdiscourse.com/2015/09/15612/} (citing H.R. 3185, S. 1858 as the House and Senate versions of the EA).} It would seek to finish what Justice Kennedy only started, rendering sexual orientation and gender identity as protected classes.\footnote{Id. (citing another, earlier controversial bill, the Employment Non-Discrimination Act (ENDA) (S. 185, 113th Cong. (2013); evidently defunct), which at least allowed hiring exemptions for religious institutions and groups).} It apparently would forbid religious institutions (educational ones included) any exceptions for hiring, housing, and even showering practices based on those classifications; it also could gut a major part of RFRA including exemptions for religious businesses, and expands the meaning of “public accommodations,” including for religious service providers.\footnote{Id.} As one commentator noted, the EA seeks to turn Obergefell into an assault weapon against those
who oppose SSM on religious grounds. Its thin cover is to stop discrimination, but what it really does is violate the religious liberty rights of small businesses and individuals. 86

FADA and EA are imminently heading for a collision over the First Amendment’s interpretation. The skirmish is no less intense at the state and local levels with State RFRAs and local SOGIs colliding. SCOTUS, again, will ultimately have to decide this issue. It should help first to set out the history on correct and incorrect ideas leading to this imminent clash on this issue, in the States and in the whole nation.

Incorrect Interpretations and Corrections:

With the increasingly hostile attitude toward religion in America, especially against Christianity, secular efforts to silence religion, garnered by the power of the state, are also increasing significantly. A move is underway allowing Christians, and other people of faith, to have freedom of worship, but not freedom of religion or the working out of their faith in the practice of daily living in society and in their businesses. This is a violation of the First Amendment.

To be sure, the free exercise of religion is never entirely absolute. For instance, one may not exercise religious practices that violate sensible laws of general applicability. For instance, if someone’s religion requires child sacrifices to appease an ancient deity, it cannot be done, as that violates laws against killing, applicable to all of society. The same is so with religions that may require immoral sexual practices, as these may involve crimes of child molestation and rape.

Although these may be extreme examples, the principle still is valid. A closer example is: what about some religions (Native American Indian ones, for instance) that involve smoking or ingesting certain hallucinogens (peyote for instance) as part of religious rituals? In Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990), SCOTUS ruled against Native American Indians who took peyote precisely for religious reasons, saying this violated criminal drug laws applicable to everyone. 87

In so holding in Smith, SCOTUS developed a new rule, and abolished an older balancing test to determine if government infringement of religion was improper. The original test required the government to demonstrate a compelling state interest to infringe on someone’s religious activities (even if not part of a recognized, formal religion), and the government had to use the least restrictive means of achieving that interest. Smith changed that, allowing rules of general applicability (i.e., neutral ones that do not directly target specific religions or religious groups), to be applied against religious activities, even in the absence of a compelling state interest. As a

86 Id. (Note: the comments I reiterate here on the proposed law come from the analysis of the commentator, who states them as potential dangers in the legislation in its current version.)
87 Similar concerns of religious vendors violating generally applicable laws are simply absent in the SSM situation. This is so even though SSM was legalized: Laws protecting vendors form participating in certain events do not criminalize those events and do not prevent them from happening. Such vendors are not stopping such events, but they cannot be compelled to join them either. This is why analogy to Loving v. Virginia is so inapt in this situation.
reaction to Smith, Congress passed the Federal RFRA to restore, and actually exceed the original and stricter test above.  

According to RFRA’s test now, a government law or regulation cannot infringe upon individuals’ religious practices, even if the law or regulation is one of “general applicability” (i.e., one for all citizens to follow), unless it serves a compelling state interest, and is the least restrictive means of achieving that interest.  

Despite the almost universal appeal and value of such a law to balance and safeguard religious activities with the government’s important interests, LGBT groups, supported again in large part by secular media, educational, and big business elites have attacked such laws as discriminating against homosexuals. This is where they get it so wrong.  

Everything seemed fine and comprehensible until gay activists sounded the battle cry to adopt SSM all across America. Gay rights have since gone on a stampede, and have only been emboldened by Obergefell. In the Spring of 2015, LGBT groups, with the sympathy of secular media pundits, succeeded in spawning a public outcry against RFRAs in Arizona, Indiana and Arkansas, claiming these laws can be used to target gays and withhold services from them; i.e., to discriminate against them (and this, they say, is intentional). This is entirely incorrect, but the misinformation campaign and threats of businesses to boycott those States caused governors in these States to cave in to the pressure and amend, or water-down their State RFRAs. Secular advocates are seeking to pass SOGIs anywhere they can to counterbalance State RFRAs, and building off of momentum from Obergefell.  

In actuality, if a vendor was going to deny service to a gay person or same-sex couple in their store, such as at a restaurant or flower shop or any kind of retail store, they would attempt to do so in any case (I think improperly), with or without a RFRA law. Such a law would not enable the vendor’s conduct either one way or the other.  

In contrast, State RFRA laws would allow a Christian vendor, for instance, to abstain from participating and joining in activities or events, through selling their services and goods to support those events, when said events violate their religious beliefs. Such an example would be having a Christian baker join in the celebration of a same-sex wedding ceremony by providing the spouses’ special wedding cake, ideally custom designed for their special occasion. It supports and celebrates the wedding. If an individual or small business owner felt that the State was improperly infringing her religious rights by a specific law, the only thing the RFRA could do in that situation is allow the seller to try to make her case in court to stop that infringement. It can do nothing more.  

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88 See Burwell v. Hobby Lobby, 134 S.Ct. at 2761-62 (explaining the relevant tests and history).  
89 Id.
Even a year ago it would have been unthinkable to force the baker to have to participate in the wedding by selling her skills and special cake for that occasion. Even students I have taught, who favor SSM, still strongly oppose the idea of forcing merchants to participate in such events if they do not want to. But in the last year, in case after case, the State’s administrative apparatus is fining and criminalizing such vendors who sincerely do not wish to violate their consciences. Christian business owners are being fined by States’ attorney generals and civil rights boards, and are given this choice: either support the celebration or face the fines or jail. Many of the vendors have been forced to close their businesses as a result (see cases below).

Critics of RFRAs have completely failed to draw a very important distinction between a vendor not serving homosexuals food, say at restaurant, or flowers in a store, or produce in a grocery store, and (by contrast), being forced to support events or ceremonies which violate the vendor’s conscience. In the first instance, sexual orientation has nothing to do with simply selling someone flowers, or serving food in a restaurant, or selling a birthday cake (a different sort of celebration having nothing to do with anyone’s sexual identity). Vendors withholding goods and services in those instances would likely be considered to have engaged in unlawful discrimination.

In the second instance, however, such as in a same-sex wedding event and reception, sexual identity and complementarity have everything to do with the event and a vendor’s concept of marriage and its spiritual significance. In those situations, sellers are not just being asked to provide “stuff” (raw materials or incidental services) for the events, but to join in with their craft, creativity, and skills to celebrate it. In short, to support it. LGBT groups incorrectly expect all sellers to joyously celebrate and embrace the wedding through their services, as if it could not be an event against their religion. If the vendors do not do this, and fail to support the event through vending it, they are called bigots and will be sued and persecuted either until they change their minds, or their business is shut down. I think it is probably time for LGBT advocates and sympathizers to realize not everyone is going to accept and embrace their new civil right, and they just have to get over it (such is life in all sorts of contexts in America). Violent, angry use of law as a billy stick is also a poor strategy for changing any hearts, minds and consciences on this issue.

In my view, either the critics of RFRAs are sincerely ignorant of that important distinction above (between serving the general public in a general way, versus participating in an offensive event), or they already know this difference but would rather see these small vendors suffer, to send a message. This highlights even more the need for RFRAs in every State, and the need to seriously educate the general public as to what these laws actually achieve. It may also now harken the need for the FADA on a national level, now that Obergefell has been decided contrary to reason.

Solution, Correcting Bad Information, Issuing Good Laws:

Since the incorrect views above are coming from secular smear and misinformation campaigns (protected by social media, educational and business elites, and most of the government), the best solutions are i) to correct bad information disseminated to an easily misled and largely uninformed American public and its lawmakers and judges, ii) improving advocacy results by getting courts and civil rights boards to apply the law as it actually is, and iii) adopting even more State RFRAs, and iv) support new laws and Constitutional Amendments again at the federal level, as discussed above (FADA, etc.). Importantly, since the Federal RFRA has never been challenged (it was almost universally adopted), so also State RFRAs should enjoy the same Constitutional support. That simple syllogism, however, is again under attack through LGBT supporters’ increasing legislative efforts, including new SOGIs, and the EA.

Some of the State RFRA critics, in some fairness, have attempted to distinguish the Federal RFRA by saying the Federal RFRA only allows individuals to have this free exercise protection from conscience-violating activities. They argue that extending this to businesses, or small business owners is not acceptable because businesses cannot have religious protections, only individuals can. In addition, they say, businesses are open to the public and so they cannot discriminate against anyone in the public customer base, including homosexuals (again, notice the same blatant failure to distinguish between a seller selling his wares and services to the general public in his store (as a public accommodation), and having to participate in events clearly violating his religious views, like same-sex wedding ceremonies).

Small business owners, however, are also people. They are surely allowed to operate their small businesses as corporations or partnerships, and as simple business entities, but the overall vision and daily decision-making of the business is about the people who run it, and their values and consciences are at stake. This should not be ignored. However, due to a recent ruling of SCOTUS on small business owners’ rights to religious exercise (see Hobby Lobby Stores, Inc.),91 I consider the argument that RFRAs can only be used to protect individuals, and not businesses, is largely incorrect. I discuss Hobby Lobby further below, but before doing so, it should be helpful to see some examples of mistreatment experienced by a sampling of religiously-based small businesses.

I could cite so many examples of abuse (ranging from military chaplains being told they cannot share their faith in counseling on same-sex situations, to churches being told they cannot preach homosexuality is a sin, to Christian colleges and universities being threatened with sanctions if they fail to provide housing to gay couples, to county clerks being jailed for not issuing SSM licenses out of sincere religious beliefs (see Issue I, supra). However, I am choosing to focus mainly on mistreatment of Christian vendors in wedding (and similar) businesses, and who wish

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91 Supra note 10.
to refrain from providing services for same-sex wedding ceremonies (or similar gay-celebrating events).

It is my hope this problem can be avoided in Indonesia. The strict nature of Indonesian law on marriage and family (see Appendix – 1) makes this a very unlikely concern for a very long time.

Court Trends: Several Examples of Abuses Against Christian Businesses in America on SSM:

1) Arlene’s Flowers: This is the case of Baronelle Stutzman, a highly skilled, 70 year-old grandmother and well known florist, and an active, respected member of her community in Washington State. She owns Arlene’s Flowers and has served gay people in her flower shop for years, and reaches out to them. One, in particular, (Robert Ingersoll), came into her shop in 2013 (he is a repeat customer) and asked her to do the flower arrangement for his “wedding” to his gay partner. Baronelle kindly explained she would not be able to do that in honor to her God. She wished him well, and she gave him a hug. Interestingly, she did offer to provide him flowers, but not to put her talents as an arranger into a ceremony she could not agree with.

In a week’s time, Ingersoll and his partner sued her. She has since been fined thousands of dollars by a so-called civil rights group (ACLU), and the Washington State Attorney General. The State AG has sought to take her house and personal assets if she cannot pay the fine and her legal fees. Baronelle says she did not decline to serve the event because her long-time customer and his partner are homosexuals, but because she did not want to participate in an event that violates her view on marriage. The Alliance Defending Freedom (ADF) appealed her free exercise case to Washington State Supreme Court on April 27, 2015.93

2) Sweet Cake’s Bakery, Aaron and Melissa Klein (Oregon): In this case, the Kleins ran a small family bakery as a Christian couple. The Kleins have five children. Melissa puts her heart and soul into making cakes, including wedding cakes, similar to the way any artist does with her work. In January 2013, a lesbian couple asked the Kleins to make them a specialty wedding cake. Based on the Klein’s religious convictions on marriage, Melissa Klein respectfully and politely declined. This created a furor with the two lesbian women (Rachel Cryer and Laurel Bowman) who acted antagonistically by reporting the Klein’s to the Oregon Bureau of Labor and Industries. The Kleins were found to have violated anti-discrimination laws in a place of public accommodation by an Administrative Judge. On April 24, 2015 a new fine was suggested against them in the amount of $135,000. It has since been approved by a court. Since the Kleins received

92 See the story in her own words in, Baronelle Stutzman, I’m a Florist but I Refused to do Flowers for My Gay Friend’s Wedding, WASHINGTON POST, May 12, 2015, available at http://www.washingtonpost.com/posteverything/wp/2015/05/12/im-a-florist-but-i-refused-to-do-flowers-for-my-gay-friends-wedding/.
threats and were vandalized, they were already forced to close their business in September 2013 (there are no business assets). So, the Administrative Judge is essentially trying to destroy the Kleins by going after their personal assets. The Kleins hope to appeal the vicious rulings against them. A video story of their ordeal is in the link noted below.\footnote{See Tony Perkins, \textit{Sue Chef: Court Fines Bakers $135,000}, \textit{WASHINGTON UPDATE}, April 24, 2015, \url{http://www.frc.org/washingtonupdate/20150424/sue-chef}; see also \textit{The Klein’s Story: Forced to Close Sweet Cakes Bakery}, YouTube, October 1, 2014, \url{https://www.youtube.com/watch?v=t0X_bFXtyte}.

3) \textit{Simply Elegant Wedding Planning}: Here we meet Lana Rusev, who fled the Ukraine for religious persecution about twenty years ago, only to find it in Jacksonville, Florida, as the owner of this business. Lana was approached recently by a lesbian woman (Melissa McCord) to plan her same-sex wedding. She declined in a politely written letter. The lesbian woman went on a rage and started a social media campaign to harm Lana’s business. Lana says simply, she is sorry if she hurt anyone’s feelings, but this is her personal belief, and she is entitled to it. She is a strong woman, and says the customer can go elsewhere for her planning needs.\footnote{Her amazing story can be found at, Tony Perkins, \textit{Wedding Planner Groomed for Marriage Fight}, \textit{WASHINGTON UPDATE}, Jan. 20, 2015, \url{http://www.frc.org/updatearticle/20150120/wedding-planner-groomed-for-marriage-fight}.} (Interestingly, I note she did not necessarily base this on a religious conviction, but a personal one she cherishes.)

4) \textit{Elane Photography (New Mexico, Elaine Huguenen & husband) and Urloved Photography (San Francisco, CA, Nang and Chris Mai)}: Here we have a couple of tragic wedding photography cases in which both businesses were forced to close due to hate mail coming from LGBT groups. In each case, the photography studios politely and rationally refused to be the wedding photographers for lesbian weddings. In a stunning surprise even to liberals, SCOTUS refused to hear the case of Elane Photography (it was on appeal from an unsympathetic State Supreme Court in New Mexico), and in the shrill news, the business was shut down. It was a travesty of justice SCOTUS should never repeat.\footnote{Stories for each can be found at: Tony Perkins, \textit{Photography Case Another Snapshot of Intolerance}, \textit{WASHINGTON UPDATE}, April 7, 2014 (weblink unavailable currently, see Family Research Council: \url{www.frc.org}), and Kristine Marsh, \textit{Gays Force San Francisco Wedding Photographers to Close Shop}, MRC NEWS BUSTERS, Nov. 21, 2014, \url{http://newsbusters.org/blogs/kristine-marsh/2014/11/21/gays-force-san-francisco-wedding-photographers-close-shop}.}

5) \textit{The Hitching Post}: This is a wedding venue run by a Christian minister and his wife, Donald and Evelyn Knapp. The Hitching Post is a scenic wedding chapel in Idaho where many couples choose to get married. If anyone should be allowed to decline involvement in a gay wedding, it should be Christian ministers. But not so according to the small city in Idaho where the chapel is located. A city ordinance, which includes an anti-discrimination law based on sexual orientation, threatened the Knapps with jail time of up to 180 days and fines against the Hitching Post of up to $1,000 per day. City officials said they would impose the same fines and jail penalties on any minister who refuses to perform a same-sex wedding. It is strange and vicious.\footnote{See Cheryl K. Chumley, \textit{Idaho City Ordinance Tells Pastors to Marry Gays or Go to Jail}, \textit{WASHINGTON TIMES}, Oct. 20, 2014, \url{available at http://www.washingtontimes.com/news/2014/oct/20/idafo-citys-ordination-tells-pastors-}}
And Yet, One good case in the midst of it all: Hands On Originals, co-owned by Blaine Adamson (Kentucky): In contrast to the several bad cases above, amongst which there are dozens of others, I can at least offer this one ray of hope coming out in a Kentucky case on April 27, 2015. A Kentucky Circuit Court has just ruled that this small Christian-owned custom-designed T-shirt maker is not compelled to make T-shirts supporting Gay Pride events. The customer initially seeking out and then suing the T-shirt maker was the Gay & Lesbian Service Organization (GLSO) of Lexington, KY. A State Human Rights Commission initially ruled against Hands on Originals in 2012, and this court decision overturns that. Adamson said it was the message for the Gay Pride event on the shirts he objected to, not the sexual orientation of the customer. It is the only case I am aware of where a Christian company so far has won in the courts.98

It should be evident by now that the SCOTUS decision in Obergefell, concerning mainly Issue I above (on States’ rights to keep the natural, historical definition of marriage) seriously impacts Issue II (individuals’ and small businesses’ free exercise rights). In reality, the issues have become highly and overly intertwined. They should be handled as analytically and legally distinct: legalization of SSM can exist without compelling sincere religious dissenters from participating in it. But LGBT activists do not seem to care about that, as many seem intent on using their legal right to SSM to injure anyone who disagrees with them and who acts according to their sincere religious convictions, improperly calling any abstention from participation in this new right an act of illegal discrimination. I wonder if that side will ever grow up and get past this.

Justice Scalia noticed this excessive and illegitimate intertwining of issues early in oral arguments in the Obergefell case in the April 28 hearing, and he and other in dissent continue to sound the alarm.99 Until something changes in SCOTUS, SOGIs will likely continue to be commonly misapplied against Christians, so that any vendor’s (or even a pastor’s) unwillingness to participate in same-sex weddings and similar events will criminalize them, intending to shut them down in ruin. SOGIs and RFRAs are already in collisions in many States. Since Obergefell imposed SSM on the States, even betraying Justice Kennedy’s own words (in Windsor) that the prerogative of defining and limiting marriage is left to the States, and since it has taken this issue away from voters, the situation in America should only get worse. If SSM was going to sweep into law all across America (debatable), I think this would have to be the worst imaginable means of achieving that goal. Resentment is brooding (support for SSM is also declining in some polls). Tensions are increasing, and we now have a major cultural and constitutional crisis at hand. It is going to get uglier.

99 See Transcript of Oral Argument at 24-26, Obergefell v. Hodges, 576 U.S. at ___ (April 28, 2015); see id. (Roberts, J., dissenting) (slip op. at 14); id. (Alito, J., dissenting) (slip op. at 6-8)
Some jurists may already be seeing this problem of gay “rights” going too far, as intruding on religious and conscience rights of Americans. This could be seen in one of the few bright spots for Christian businesses so far on this issue, the Hands on Originals case above.

As I noted, one of the problems these small businesses have faced is the claim that as businesses, they do not have free exercise of religion; some say this is only a right for individuals (not companies, even small ones). I believe SCOTUS’ recent decision in Burwell, Sec’y of Health and Human Services v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) should shut down that argument. In that case, SCOTUS said that smaller private businesses (close held corporations) are not compelled to provide abortifacients (abortion-inducing birth control medicines) to employees as part of their insurance packages under the mandates of the Affordable Care Act (“Obama Care”), if to do so would violate their sincere religious beliefs.100

The case actually involved three family-run businesses, each of which has vision and/or mission statements indicating the businesses would be run in accordance with their religious faith values. Hobby Lobby is a craft store retailer with five-hundred stores and 13,000 employees, run by the Green family. Mardel is a business started by one of the Green’s sons operating thirty-five Christian Bookstores with five-hundred employees. Both businesses are based in Oklahoma. Conestoga Wood Specialties Corp. was started by the Hahn family (Mennonites) in Pennsylvania as a woodworking business. None is a publicly traded company with shares sold on a public stock exchange. They are privately owned and operated. Still, some of the businesses have grown very large (Hobby Lobby certainly has). Yet, they all remain family run and operated, according to the faith principles and values of those families. All three businesses were facing fines in the millions of dollars for refusing to provide abortifacient insurance coverage for employees prior to the Court’s decision.101

SCOTUS said the owners, in accordance with their reasons for even starting the businesses, were allowed to run them in accordance with those religious values. So just like churches or Christian ministries and schools, those values could not be violated by the health care laws compelling them to provide abortifacients to employees. And, there are less restrictive means to achieve supplying birth control medications to employees really needing them (that is a legal test): the State or insurance companies could seek to pay for those medications instead of forcing the family businesses to do so by contributing to insurance.102

I submit Hobby Lobby’s analysis should equally apply to the free exercise rights of small businesses in the SSM context. If small businesses have religious rights to abstain from certain government health insurance mandates (providing employees with certain forms of birth

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100 *Hobby Lobby*, 134 S.Ct. at 2775, slip op. at 31-32 (Part IV.A.).
101 *Id.* at 2775-76 (slip op. at 32) (noting hundreds of millions in total annual fines, $475 million/year for Hobby Lobby).
102 *Id.* at 2780-83 (slip op. at 40-45).
control), they should be allowed to abstain from same-sex weddings and similar events, even if those are State authorized by new SSM definitions. Religious vendors declining to sell their goods and services are not stopping or even inhibiting same-sex wedding ceremonies. They would simply be seeking to abstain from participating in such events violating religious conscience. Several other vending options also usually exist for same-sex couples seeking to wed. The Free Exercise Clause of the First Amendment and RFRAs properly protect this abstention.

SUMMARY AND CONCLUSION

In summary, America (U.S.) is now a nation where secular humanist ideology is rampant in our culture, education, media, entertainment, commercial, and legal systems. This is strikingly evident in social issues like same-sex marriage (SSM). A serious cultural and legal battle is afoot in the U.S. on this issue. In two key sub-issues the battle has been intense, and I have divided and named them as such in this article: Issue I, on the rights of each State to define marriage in the traditional sense as the union of a man and wife – even if that is religiously sourced; and Issue II, on the right of small businesses to abstain from having to participate in same-sex wedding ceremonies (and similar events) which they find to be objectionable and against their free exercise of religion.

SCOTUS decided Issue I in Obergefell (June 26, 2015), at least it did so, this far. But it decided incorrectly. The case is not supported by a clear and cogent analysis coming under either the Equal Protection or Due Process Clause of the Fourteenth Amendment. It rests instead in a vaporous mixture of self-interest-identity rights concocted from somewhere in those Clauses. I have given a short list (top 10) of worldview misses and incorrect assumptions embodied in Justice Kennedy’s and the majority’s opinion which highlight its shaky foundation. I am hoping this list is still helpful to the reader, since it is intentionally brief. As a prime example, the case missed the fundamental point that marriage is already defined, and inherently requires the union of a man and a woman; its definition starts there; it is also not a set of collectible benefits and status recognitions conferred by the State on loving couples. The incidents and benefits of marriage must be distinguished from the thing itself, in its essence.

Yet the most distressing aspect of the case may be Justice Kennedy’s stark betrayal of his own integrity in the predecessor case, Windsor, holding in that case it is the prerogative of the States to define and restrict marriage, but then taking this away and imposing his singular definition on all the States. I have noted the reactions to this, including legislative and Constitutional responses, which likely will not change anything soon, but will heighten the intensity of the strife in America. I have also noted some incorrect assumptions of LGBT supporters on both Issues I and II. I suggest one of the most significant of these is the strange intermingling of these two primarily separate issues in the first place.
Specifically in Issue II, this ties to the strange idea that somehow, legalization of SSM (Issue I), must impose mandatory legal restrictions against the exercise of someone’s religious liberty. I am sure this is actually what is happening in America, intentionally (hence the several examples above), but it should not be so. It is absurd to seriously suggest the legalization of anything controversial (like SSM) requires everyone’s support of it, including religious individuals and businesses whose sincere religious convictions will be violated by their active support. Conscientious objection is part of our Constitutional structure, even for things now made legal. It always has been.

A second strange idea, also in Issue II, is that religious vendors declining to sell their wares and services for same-sex weddings and similar gay-celebrating events that violate their sincere religious convictions are discriminating against people on the basis of their sexual orientation. Shallow confusion exists here between discrimination against individual members of the general public, and a legitimate right to live according to one’s religious convictions. Ignorance about this, and in some cases vitriol of those who do know, is hurting America, indeed the world.

I have discussed the numerous statutory and Constitutional initiatives spearheaded by both sides now in this ongoing, legal-cultural war, coming before and after Obergefell, with each side trying to seize upon it in some way. These include SOGIs and the so-called Equality Act (EA) on one side, and RFRAs (State and Federal), and the First Amendment Defense Act (FADA) on the conservative side. I also noted some suggested Constitutional Amendments to restore the traditional marriage definition or curb judicial activism. I have said if country-wide support of SSM was someone’s goal, I believe doing it the way this Court has is probably the least effective and legitimate means of accomplishing that goal. The effort could unravel upon its own lack of legitimacy. A serious pushback is just starting.

If Obergefell has any silver lining to it, I would say it is the absence of any real arguments based on the Establishment Clause to overturn State historical marriage definitions. I was surprised and gratified by that. But vestiges of this faulty refrain of an argument still linger in some peoples’ minds, so I thought this article should address it.

I have accordingly argued at a more fundamental level that a bad interpretation of “separation of church and state” (an establishment issue) is one that opens the floodgates to secular humanistic, genderless ideas of marriage, while improperly shutting the door on historical Christian (and shared religious) views. Both traditional and gay worldviews on marriage are ideological and religious in nature. It is incorrect to consider one and not the other (the Christian view). To include secular humanistic ideological views on social issues like SSM and to exclude Christian and other religious viewpoints, smacks of ignorance, deception, and is truly the height of hypocrisy, since all values shape laws, and secular humanism is itself ideologically a type of religion.
I conclude on these issues as so: I) SCOTUS should have left the definition of marriage up to the States and its voting citizens; and the historical vision of marriage is a superiorly rational one. II) Small, religiously-based businesses should be allowed to conduct their businesses in accordance with their sincere religious convictions; and SCOTUS should allow Christian vendors to abstain from conscience-violating events like same-sex wedding celebrations.
APPENDIX – 1: INDONESIA’S CONSTITUTIONAL PROTECTIONS OF RELIGION, AND ITS MARRIAGE LAWS

Indonesia of course follows the principle of Pancasila (a kind of pluralism), incorporated into the Preamble of the 1945 Constitution. It embodies similar principles in regard to religious diversity, but declares an official belief in an Almighty God (incorporating monotheism): “By the grace of God Almighty and motivated by the noble desire to live a free national life, the people of Indonesia hereby declare their independence.” (Preamble)

Likewise, according to Pancasila, Indonesia, as a sovereign State, shall be built and “based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia.” (The five core principles.)

Article 28 (Ch. XA, Human Rights, and mirroring many of those in the Universal Declaration of Human Rights) has several relevant provisions: Article 28B (1) says: “Every person shall have the right to establish a family and to procreate based on lawful marriage.” Article 28E includes in relevant part: “(1) Every person shall be free to choose and to practice the religion of his/her choice . . . . (2) Every person shall have the right of the freedom to believe his/her faith (kepercayaan), and to express his/her views and thoughts, in accordance with his conscience” (emphasis added). Article 28H (1) denotes a right to live in “spiritual prosperity.” And 28I preserves specifically the rights of freedom of thought, conscience, and religion.

Article 29 (Ch. XI, Religion), relates specifically to religious exercise, saying: (1) The State shall be based upon the belief in the One and Only God. (2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

In Indonesia, the principle of Pancasila, as well as others legal principles noted above, indicate against the establishment of a single State religion that all must adhere to, except possibly for the overarching identity of the One True God (an expression of monotheism, yet its seeming under-inclusiveness remains a debated issue). Indonesians may still exercise their religions, including Hindus and Buddhists, neither of which is actually monotheistic (or even actually theistic, as in Buddhism). Six officially recognized religions are Catholicism, Protestantism, Islam, Hinduism, Buddhism and Confucianism (the latest). Atheism is not listed as such, and can carry criminal punishments, but is somewhat common. Several minority religions are also theoretically protected, but not always so in practice (see comments of others in this Symposium giving specific details).

In terms of marriage, it seems also a traditional view of marriage and family, based on male-female couples, is established or at least implied in Article 28B (tying marriage and family together through procreation).
In the Civil Code (KUHD Pertama), Chapter IV, Concerning Matrimony, Article 27 clearly indicates only heterosexual marriage: a man can only be united with a woman, and a woman with a man, and each only to the other at one time (see also Art. 29). It appears this definition is not contradicted by other subsequent provisions of the Civil Code (see Ch. V et. seq.).

Additional marriage laws and restrictions, including legality based on religious contracting, are covered specifically by several others in the Symposium (see, e.g., Law No. 1/1974 on religious contracting for legality; see also the specific contributions of Suhadi Cholil in his Symposium article).

It seems clear that traditional and religious definitions of marriage are deeply engrained in Indonesian law and social culture, and there is no suggestion this should change anytime soon.
APPENDIX – 2: RELIGIOUS VALUES AND ETHICS SHARING IN THE LAWMAKING PROCESS

Cultural SOURCES of Morals, Ethics, and Values:
- Scriptures
- Confucianism
- Songs
- Movies
- Poems, Poets
- Marx, Engle
- Aristotle, Plato
- Cicero
- Socrates
- LAW ITSELF*

Law Influences and is a Source of Social Values*

Shaping Values, Morals & Policy

LAW MAKING PROCESS (State Apparatus)

LAW
I. CASES AND COURT MATERIALS WITH LINKS TO PDF SEARCHABLE VERSIONS (SLIP OPINIONS, TRANSCRIPT, ETC.)


II. OTHER CASES:


Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014)

Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014)

Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014)


Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (8th Cir. 2006)

Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 156 (D.P.R. 2014)


Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014)


Loving v. Virginia, 388 U.S. 1 (1967)
APPENDIX – 3: BIBLIOGRAPHY, SOURCES, and LINKS


Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)


III. STATUTES AND REGULATIONS:

A. Generally:

INDONESIA CONST. (1945) and Statutory Laws (see in brief relevant citations in APPENDIX – 1).

U.S. CONST. amend I (1791)

U.S. CONST. art. V.

VA. CONST., § 16 (1776)


B. Defense of Marriage Act (DOMA):

Defense of Marriage Act, 110 STAT. 2419 § 3 (1996).

C. Religious Freedom Restoration Act (RFRA):


D. After Obergefell, Proposed National Legislation (FADA; EA):


E. Around Obergefell, State Proposed Legislation, Laws:


Oklahoma: HB 1125, Reg. Sess. (Ok. 2015)

IV. BOOKS:


Wayne Grudem, Politics According to the Bible. Grand Rapids, Zondervan, 2010

V. ARTICLES, INTERNET:

A. General, Secular Religion, International:


B. DOMA, SSM (Pre-Obergefell):


C. **Clintons, Obama Inconsistent on SSM:**

Juliet Eilperin & Robert Barnes, *Obama’s Words in Same-Sex Marriage Filing to Court is a Major Shift for Him*, WASHINGTON POST (March 6, 2015),

Ali Elkin, *Hillary Clinton’s Evolution on Same-Sex Marriage: Sounds a Lot Like Some Republicans*, BLOOMBERG POLITICS (April 28, 2015),


D. **RFRAs, Why They are Valuable, vs. SOGIs:**


*3 Reasons SOGI Laws Are Being Defeated*, ALLIANCE DEFENDING FREEDOM (April 14, 2015),
http://blog.alliancedefendingfreedom.org/2015/04/14/3-reasons-sogi-laws-are-being-defeated/.

E. **Several Bad Cases Against Wedding, Similar Vendors:**

i. **Arlene’s Flowers:**


Barronelle Stutzman, *I’m a Florist but I Refused to do Flowers for My Gay Friend’s Wedding*, WASHINGTON POST (May 12, 2015),


ii. **Arlene’s Flowers and Klein’s Sweet Cakes:**


iii. **Sweet Cakes’ $135,000 Recent Fine:**


*The Klein’s Story: Forced to Close Sweet Cakes Bakery*, YouTube, October 1, 2014, https://www.youtube.com/watch?v=t0X_bEXtytc

iv. **Wedding Planner:**


v. **Wedding Photographers:**

*Photography Case Another Snapshot of Intolerance*, WASHINGTON UPDATE (April 7, 2014), (weblink unavailable currently, see Family Research Council: www.frc.org).


vi. **Ministers: The Hitching Post:**

Cheryl K. Chumley, *Idaho city’s ordinance tells pastors to marry gays or go to jail*, THE WASHINGTON TIMES (Oct. 20, 2014),

vii. Hands On Originals (Christian Printer, success):


viii. Memories Pizza:


_F. After Obergefell, Responses, Reactions and Initiatives:_

i. Liberal Side Cautions:


ii. National Responses:

Interview by Megan Kelly of Senator Ted Cruz, in REAL CLEAR POLITICS, July 5, 2015, http://www.realclearpolitics.com/video/2015/07/01/cruz_senate_should_be_able_to_impeach_supreme_court_justices.html.


iii. **State Responses:**


