The Use and Abuse of Definitions in Constitutional Law: A Critique of Justice Roberts's Dissent in Obergefell v. Hodges

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A Critique of Justice Roberts's Dissent in *Obergefell v Hodges*

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Abstract: Justice Roberts's dissent in *Obergefell v Hodges* – the case in which the US Supreme Court found a constitutional right for same sex couples to marry – rested on the premise the Court cannot invoke the right to marry as a basis for changing the definition of marriage. But his argument works only if the Court has no obligation to find a constitutional meaning for the term. I argue here that it has such an obligation. I argue further that an analogy with the concept of 'person' throws light on how that obligation should work. And finally, I argue that the most plausible constitutional definition would include same sex couples.

Keywords: same sex marriage, constitutional law, definitions of concepts

Introduction

In June 2015, in a case called *Obergefell v Hodges*,[1] the US Supreme Court held that same sex couples have a constitutional right to marry.[2] The majority opinion, written by Justice Kennedy and joined by four other justices, started with the premise that 'the right to marry is fundamental under the Due Process Clause'[3] of the Fourteenth Amendment.[4] It then investigated 'the basic reasons why the right to marry has been long protected,' and concluded that they 'apply with equal force to same-sex couples.'[5] On the basis of

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1 135 SCt 2584 (2015).

2 In so holding, the Court brought the United States in line with a number of other countries. Only one other country has extended marriage to same sex couples by order of a constitutional court: South Africa (2005) (the South African Parliament complied with the ruling in 2006). Most other countries have embraced same sex marriage legislatively. They include: the Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006, acting on an order from the Constitutional Court), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), France (2013), Uruguay (2013), New Zealand (2013), England and Wales (2014), Scotland (2014), Luxembourg (2014), and Finland (2014). Ireland gave same sex couples the right to marry by referendum (2015). And Brazil's Supreme Federal Court gave same sex couples the right to form a 'stable union,' giving them many of the legal rights of marriage (2011), and couples so joined can petition judges to convert their unions into marriages. *See Freedom to Marry* <http://www.freedomtomarry.org/landscape/entry/c/international> accessed 16 November 2015.

3 135 SCt at 2598.

4 The Due Process Clause states 'No state shall make or enforce any law which shall […] deprive any person of life, liberty, or property, without due process of law.' US Const amend XIV, § 1.

5 135 SCt at 2599.

this conclusion, it held that 'same-sex couples may exercise the fundamental right to marry in all States.'[6]

My interest here is not in examining the soundness of the majority opinion – though I do think it is fundamentally sound – but in examining the soundness of the leading dissenting opinion, written by Chief Justice Roberts.[7] Justice Roberts did not challenge the premise that the Constitution recognizes a 'fundamental right to marry.' Instead, he argued that 'The fundamental right to marry does not include a right to make a State change its definition of marriage.'[8] Concern with the 'definition of marriage' was at the heart of Robert's dissent. He used the phrase 'the definition of marriage' (or some variation on that theme) twenty times.[9] In fact, just about every part of Roberts's argument turned on rejecting Justice Kennedy's assumption that same-sex couples can lay claim to the fundamental right to marry.

Roberts did not argue that the concept of marriage cannot be *changed* to allow same-sex couples to marry. He argued that the concept used by most states implies that they *can't* marry. His objection to the majority opinion was that asserting that they have a fundamental right to marry presupposes that the Court can change the definition of marriage. He insisted, however, that the 'Constitution leaves no doubt' that what counts as a marriage 'should rest with the people acting through their elected representatives,'[10] not the Court.

Remarkably, in the flurry of discussion about this case that followed its announcement, little to no attention has been paid to Roberts's focus on 'the definition of marriage.' I aim to rectify that here. One might think that this is a purely academic concern; the right to same sex marriage has been recognized and it is time to move on. And it is true, given the reliance interest of same sex couples that marry under this decision, it would be difficult for the Court to reverse its opinion on the matter.[11] But the decision was close; only one vote needs to switch for the Court to reverse itself and restore to states the right to define marriage as a union of a man and a woman. The politics of presidential elections and judicial appointments could lead the Court to revisit this opinion in coming years. Moreover, even if this matter is water under the bridge, the style of argument is likely to come up again in some future case, and it is therefore important to point out the fundamental flaw in it.

I argue that Roberts was flatly wrong in three regards. First, the idea that same sex couples can marry is not in tension with the broad concept of marriage; it is at most in tension with a culturally and historically dominant conception of marriage. Second, using

6 ibid at 2607. The Court also recognized an argument for same sex marriage under the Equal Protection Clause of the Fourteenth Amendment (ibid at 2602-2605), but this was clearly a secondary argument for the Court.

7 Roberts's opinion was joined by Justices Scalia and Thomas, each of whom also wrote their own dissenting opinions. Justice Alito also dissented, but did not join Justice Roberts's dissent.

8 135 SCt at 2611.

9 Contrast Justice Kennedy, writing for the majority, who used it twice, once in response to Roberts's opinion. A number of commentators have pointed out that Justice Roberts made reference sixteen times to the constitutional bogey-case, *Lochner v New York*, 198 US 45 (1905) (holding that laws regulating baker hours violated Due Process), but none noticed that he made *more* mention of the 'definition of marriage.'

10 135 SCt at 2612.

11 *See Planned Parenthood v Casey*, 505 US 833, 854 (describing reasons to respect stare decisis, including reliance).

the analogy of the 'definition of a person,' one can see that courts should defer neither to culturally and historically dominant conceptions, nor to state legislative choices regarding the legal definition of a concept, if the concept is constitutionally significant. Third, the only reasonable approach to a contested concept with constitutional significance is to look to the function of the concept in the constitutional scheme – exactly what Justice Kennedy did well, and what Justice Roberts did badly.

I. Conceptions of Marriage

Justice Roberts starts his argument with an extended discussion aiming to show that '"marriage" referred to only one relationship: the union of a man and a woman.'[12] He claims that this is a 'universal definition of marriage.'[13]

In response, I want to insist that the 'definition' of marriage is not so simple and univocal. It may be that the root definition, and the most common definition by a huge margin, involves a relationship between a man and a woman. But the Oxford English Dictionary lists as its fourth sense of the term 'marriage': 'intimate union.'[14] This broader use is consistent with understanding marriage as the intimate union of persons of whatever their sex.

The idea that the concept of marriage has room for marriages between people of the same sex is also made clear by the speed with which same-sex marriage has gained political support in the United States and elsewhere. Oxymorons do not gain political traction like that. A precondition for that political change is that most people recognize that the concept of marriage can include the commitment two people, of any gender, who pledge to be life-partners, to love, honor and cherish each other, and to seek to make a family together, for as long as they both shall live.

One may concede this much and still insist that the law itself is not as broad as the concepts it uses at their broadest. The law has to define its terms, and in many instances states have made it perfectly clear that they define marriage as a union between a man and a woman.

The problem with this neat retort is that the Constitution has long been taken to protect marriage as a fundamental right,[15] and as such the Court cannot let states define the term in *any way they want*. That would allow them to undo the protections that the Court has found over the years.

To see this, imagine that some state decided to take the argument the conservatives have pressed in the same-sex marriage litigation seriously. That is, imagine that a state decided to change 'the definition of marriage' to include the goal of cabining 'sexual rela-

12 135 SCt at 2612.

13 ibid at 2613. He claims this despite the fact – one that he discusses later in his opinion, ibid at 2621 – that marriage has historically often referred to the union of one man and one or more women. Regarding the worry that the *Obergefell* decision will license polygamy, it is worth keeping in mind that even if polygamists have a fundamental right to plural marriage, the states might have a compelling reason not to recognize it, one based in the avoidance of real social harms. *See* Stephen Macedo, 'John Roberts' Gay Marriage Dissent Is Wrong About Polygamy – and the Constitution' (*Slate*, 30 June 2015) <http://www.slate.com/blogs/outward/2015/06/30/supreme_court_gay_marriage_john_roberts_dissent_is_wrong_about_polygamy.html> accessed 16 November 2015.

14 *The Compact Oxford English Dictionary* (2nd ed, Oxford University Press 1989) 1039 [hereinafter OED].

15 *See Obergefell*, 135 SCt at 2598 (citing cases).

tions that can lead to procreation' so that they 'occur only between a man and a woman committed to a lasting bond.'[16] No couple that could not procreate would be permitted to marry as it might undermine the goal of using marriage to control the conditions of procreation. Clearly, this definition would be inconsistent with the broad fundamental right to marry that the Court has found in numerous cases.[17] This shows that the Court has committed itself to the existence of a constitutional conception of marriage that constrains how states can define the term. The only question is how much content that constitutional conception should have, and how much leeway states should have.

II. An Analogy: Conceptions of a Person

Introducing an analogy can help provide some perspective on a discussion. So consider the concept of a person. The Fourteenth Amendment declares that no 'State [shall] deprive any person of life, liberty, or property, without due process of law.' What is a person? Clearly, the traditional and by far the most common definition involves membership in the biological species 'human.' Referring again to the *Oxford English Dictionary*, the original meaning, the one connected to the Latin root meaning of 'mask,' is '[a] character sustained or assumed in a drama or the like […].'[18] But this meaning is now linked to the idea of a *dramatis personae*. As such, it borders on the obsolete. The first meaning after that root meaning is '[an] individual human being; a man, woman, or child.'[19] One finds the connection to a human being in every other sense of the word, except the legal sense of an artificial person, a corporation, and the theological sense of God as a kind of person.

Now consider this thought experiment. Suppose aliens from another planet came to Earth and said: 'We come in peace.' And suppose that the 'men in black' then swooped in and locked them up in some secret government holding tank. And finally suppose that a lawyer got wind of this and brought suit under the 14th Amendment for deprivation of liberty without due process of law. Could the government win its case simply by arguing that these aliens are not human beings? Or would the aliens have a right that the courts ensure that they are locked up only insofar as doing so is justified in ways it would be justified for any other 'alien' (ie, non-citizen) person?

I think it perfectly clear that the Court would be obliged to treat these aliens as persons with constitutional rights. Yes, the traditional definitions of person do not include rational space aliens. But that's because most people were not thinking about rational space aliens when coming up with these definitions. If confronted with them, it would be stupidly pedantic to insist that it would simply be a mistake to call these aliens persons, a mistake on a par with calling a dog a person. And it would be a ridiculous legalistic mistake to insist that the legal definition concerns only human beings. Given the moral importance of the protection of the life, liberty and property of persons, the Court should take the Constitution to protect these 'persons' like any other persons (talk about a discrete and insular minority in need of protection!).

16 This language is all found in Roberts's dissent, 135 SCt at 2613.
17 This would include *Griswold v Connecticut,* 381 US 479 (1965) (holding that married couples have a constitutional right to use contraception).
18 OED (n 14) at 1315.
19 ibid.

III. A Constitutional Conception of Marriage

This brings me to my third point. The only responsible way for a Court to act when confronted with a contested concept with constitutional significance is to look to the function of the concept in the constitutional scheme. I will start with the constitutional conception of a person, and then work back to the constitutional conception of marriage.

The protection of the life, liberty, and property of persons is meant to protect persons from the worst sorts of deprivations that a state is likely to inflict on them. The word 'person,' as used in the Fourteenth Amendment, is surely used, in contrast with citizen (used in the prior clause), to avoid a parochial approach to the rights in question, allowing only favored sorts of persons to enjoy the protection. Moreover, that surely reflects a deeper moral insight, that any being who has a moral claim to be respected as a person must also be legally respected as a person. Given the history of the Fourteenth Amendment – that it aims to rein in states that deprived persons of their life liberty and property without due process of law – it is certainly *not* up to states to define that term.[20]

Taking the analogy back to the case of marriage, one has to look into why marriages have been protected to determine what the concept includes. Justice Roberts picks one reason – ensuring that 'sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond'[21] – as *the* reason with constitutional significance. I do not deny that it has *some* role in why the Court has recognized marriage as a fundamental right. But as Justice Kennedy points out, there are at least four other reasons why marriage has been taken, as a matter of constitutional law, to be a fundamental right: 'choice regarding marriage is inherent in the concept of individual autonomy';[22] 'it supports a two-person union unlike any other in its importance to the committed individuals';[23] 'it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education';[24] and it 'is a keystone of our social order.'[25] The first three of these, and arguably the fourth, support extending the right to marry to same-sex couples.

Justice Roberts treats these other reasons as appealing only to 'social policy and considerations of fairness,'[26] implying that they have no constitutional significance. Nothing could be further from the truth. They are not *mere* policy reasons; they explain why the right is constitutionally protected as fundamental. These considerations show that the Court has good and sufficient reason to pick a broad meaning of marriage when assessing who benefits from the constitutional right to marry. Declaring otherwise is an abuse of the idea of 'the definition of marriage,' and – ironically, given Robert's use of this phrase to criticize the majority – an abdication of the Court's constitutional obligation to 'say what the law is.'[27]

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20 *But see Roe v Wade*, 410 US 113, 157 n 54 (1973) (looking to state practice to help determine that fetuses did not count as persons).
21 135 SCt at 2613.
22 ibid at 2559.
23 ibid.
24 ibid at 2600.
25 ibid at 2601.
26 ibid at 2611.
27 ibid at 2611 (quoting *Marbury v Madison*, 5 US 137, 177 [1803]).