

8/24/15

Statement Calling for Constitutional Resistance
to *Obergefell v. Hodges*

We are scholars and informed citizens deeply concerned by the edict of the Supreme Court of the United States in *Obergefell v. Hodges* wherein the Court decreed, by the narrowest of margins, that every state in the country must redefine marriage to include same-sex relationships.

The Court's majority opinion eschewed reliance on the text, logic, structure, or original understanding of the Constitution, as well as the Court's own interpretative doctrines and precedents, and supplied no compelling reasoning to show why it is unjustified for the laws of the states to sustain marriage as it has been understood for millennia as the union of husband and wife.

The opinion for the Court substituted for traditional—and sound—methods of constitutional interpretation a new and ill-defined jurisprudence of identity—one that abused the moral concept of human dignity.

The four dissenting justices are right to reject the majority opinion in unsparing terms.

Justice Scalia refers to it as “a naked judicial claim to legislative...power; a claim fundamentally at odds with our system of government.”

Justice Thomas says the opinion “exalts judges at the expense of the People from whom they derive their authority” as it perverts the meaning of liberty into an entitlement to government action.

Justice Alito calls attention to the well-established doctrine that the “liberty” guaranteed by the due process clause protects only those rights “that are deeply rooted in this Nation's history and tradition,” and that it is “beyond dispute that the right to same-sex marriage is not among those rights.” He further points to the opinion's tendency to reduce the purpose of marriage to “the happiness of persons who choose to marry.” He warns it will be used to “vilify Americans who are unwilling to assent to the new orthodoxy” and is yet another example of the “Court's abuse of its authority.”

Chief Justice Roberts says “the Constitution leaves no doubt” that the majority's “pretentious” opinion is incorrect. It even attempts to “sully those on the other side of the debate” in an “entirely gratuitous” manner.

If *Obergefell* is accepted as binding law, the consequences will be grave. Of the results that can be predicted with confidence, four stand out:

First, society will be harmed by being denied the right to hold out as normative, and particularly desirable, the only type of human relationship that every society must cultivate for its perpetuation. This compelling interest is strengthened by the fact that there is strong evidence to support what common sense suggests, namely, that children fare best when raised by their

8/24/15

married mother and father who are both responsible for bringing them into the world and who provide maternal and paternal influences and care.

Second, individuals and organizations holding to the historic and natural understanding of marriage as a conjugal union—the covenantal partnership of one man and one woman—will be vilified, legally targeted, and denied constitutional rights in order to pressure them to conform to the new orthodoxy.

Third, the new jurisprudence of dignity is unlimited in principle and will encourage additional claims to redefine marriage and other long-established institutions.

Fourth, the right of all Americans to engage in democratic deliberation, and ultimately self-government, will be decisively undermined.

Any decision that brings about such evils would be questionable. One lacking anything remotely resembling a warrant in the text, logic, structure, or original understanding of the Constitution must be judged anti-constitutional and illegitimate. *Obergefell* should be declared to be such, and treated as such, by the other branches of government and by citizens of the United States.

In 1788, James Madison wrote “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”

In 1857, Abraham Lincoln said “Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.” If a decision “had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.” If, however, a decision is “wanting in all these claims to the public confidence,” it is “not factious” to resist it.

Obergefell is wanting in all these claims to the public confidence. It cannot therefore be taken to have settled the law of the United States.

Therefore:

We stand with James Madison and Abraham Lincoln in recognizing that the Constitution is not whatever a majority of Supreme Court justices say it is.

We remind all officeholders in the United States that they are pledged to uphold the Constitution of the United States, not the will of five members of the Supreme Court.

We call on all federal and state officeholders:

8/24/15

- To refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case.
- To recognize the authority of states to define marriage, and the right of federal and state officeholders to act in accordance with those definitions.
- To pledge full and mutual legal and political assistance to anyone who refuses to follow *Obergefell* for constitutionally protected reasons.
- To open forthwith a broad and honest conversation on the means by which Americans may constitutionally resist and overturn the judicial usurpations evident in *Obergefell*.

We emphasize that the course of action we are here advocating is neither extreme nor disrespectful of the rule of law. Lincoln regarded the claim of supremacy for the Supreme Court in matters of constitutional interpretation as incompatible with the republican principles of the Constitution. Our position is summed up in Lincoln's First Inaugural Address:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

The proper understanding and definition of marriage is self-evidently a vital question affecting the whole people. To treat as "settled" and "the law of the land" the decision of five Supreme Court justices who, by their own admission, can find no warrant for their ruling in the text, logic, structure, or original understanding of the Constitution, would indeed be to resign our government into the hands of that eminent tribunal. That is something that no citizen or statesman who wishes to sustain the great experiment in ordered liberty bequeathed to us by our Founding Fathers should be willing to do.

8/24/15

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8/24/15

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8/24/15

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