

31-12-2015

## Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v Hodges 556 US (2015) - The US Supreme Court Same-Sex Marriage Case

Augusto Zimmermann

A.Zimmermann@murdoch.edu.au

Follow this and additional works at: <https://researchonline.nd.edu.au/undalr>



Part of the Law Commons

### Recommended Citation

Zimmermann, Augusto (2015) "Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v Hodges 556 US (2015) - The US Supreme Court Same-Sex Marriage Case," *The University of Notre Dame Australia Law Review*. Vol. 17 , Article 4.

DOI: 10.32613/undalr/2015.17.1.4

Available at: <https://researchonline.nd.edu.au/undalr/vol17/iss1/4>

This Article is brought to you by ResearchOnline@ND. It has been accepted for inclusion in The University of Notre Dame Australia Law Review by an authorized administrator of ResearchOnline@ND. For more information, please contact [researchonline@nd.edu.au](mailto:researchonline@nd.edu.au).



# JUDICIAL ACTIVISM AND ARBITRARY CONTROL: A CRITICAL ANALYSIS OF *OBERGEFELL V HODGES* 566 US (2015) – THE US SUPREME COURT SAME-SEX MARRIAGE CASE

AUGUSTO ZIMMERMANN\*

## Abstract

This article critically analyses the recent US Supreme Court decision in *Obergefell v Hodges*, the same-sex marriage case. The court in *Obergefell* put a stop to the democratic process by removing an important issue from the realm of democratic deliberation. These unelected judges held that their nation's federal constitution should 'evolve' in a way that is supported by neither the document's language, nor its history or authority. In short, they have imposed their worldview on the people at the expense of federalism and the democratic process. This is why Justice Alito was so correct to state that such an exercise of raw judicial power 'usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage', adding that it evinces 'the deep and perhaps irremediable corruption of [the American] legal culture's conception of constitutional interpretation'.

## I INTRODUCTION

The recent ruling in *Obergefell v Hodges* ('*Obergefell*'),<sup>1</sup> the United States (US) Supreme Court same-sex marriage case, is undoubtedly one of the worst decisions ever made by the US Supreme Court in all its history. Since it has no basis in principle or tradition, such decision is comparable to other controversial decisions of this Court that were based on policymaking rather than on the faithful application of the law – namely, *Dred Scott*,<sup>2</sup> *Roe v Wade*<sup>3</sup> and *Lochner v New York*.<sup>4</sup>

Under the constitutional model, which the American framers created, the role of judges is to apply the law but not to make law; they are appointed to administer justice according to the law and not to change it or undermine it. As one might say, a judge who dislikes the constraints of the judicial role because it prevents the fulfilment of a specific policy or agenda should 'leave that group, join or start a political party, and seek to enter a legislature'.<sup>5</sup>

In every constitutional democracy there are three branches of government: the legislative, the executive and the judicial. By virtue of the first, the state creates laws and amends or abrogates those that have been already enacted. By the second, the state administers the existing laws and establishes public security by protecting against possible invasions. By the third, the state punishes criminals or determines the legal disputes that arise either between individuals, or between the state and individuals, or between the federal government and a provincial state.

---

\* LLB, LLM, PhD (Mon); Professor of Law (Adjunct), University of Notre Dame Australia (Sydney campus); Senior Lecturer Murdoch Law School; Law Reform Commissioner, Law Reform Commission of Western Australia; President, Western Australian Legal Theory Association (WALTA). This article is based on a paper presented at the 2015 National Marriage Day - Witness to Marriage, at Victory Life Centre, Perth, WA, on 1<sup>st</sup> August 2015.

<sup>1</sup> 566 US \_\_ (2015).

<sup>2</sup> 60 US 393 (1857).

<sup>3</sup> 410 US 113 (1973)

<sup>4</sup> 198 US 45 (1905)

<sup>5</sup> Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (Speech delivered at a Quadrant dinner, Sydney, 30 October 2003).

Although the separation of powers doctrine has a long history that can be traced back to Aristotle, it is more evident in Montesquieu's *The Spirit of the Laws*. First published in 1748 this great classic soon received widespread acclamation, with its first English translation in 1750. This book became particularly popular in America during debates over the ratification of the *US Constitution*. Both those who supported ratification and those who opposed it relied quite heavily on this book to justify their positions. As Fareed Zakaria reminds, 'during the founding of the American Republic "Montesquieu was an oracle". James Madison, Thomas Jefferson, John Adams, and other American Founders consciously tried to apply his principles in creating a new political system. He was quoted by them more than any modern author (only the Bible trumped him)'.<sup>6</sup>

In *The Spirit of the Laws* one finds the remark that 'political liberty is to be found ... only where there is no abuse of power'.<sup>7</sup> And yet, as its author reminds, 'constant experience shows us that every [person] invested with power is apt to abuse it, and to carry [his/her] authority as far as it will go'.<sup>8</sup> To prevent the abuse of power, Montesquieu asserted, 'it is necessary from the very nature of things that power should be a check to power'.<sup>9</sup>

The premise is the same as Lord Acton's celebrated aphorism that 'power tends to corrupt, and absolute power corrupts absolutely'.<sup>10</sup> Hence, as Montesquieu himself concluded, there will be no liberty if the courts are not separated from the legislative and executive:

Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>11</sup>

It is sometimes argued that judicial activism may be justified if the legislature is uninterested in reforming certain aspects of the law when the existing rules appear defective. There is today a tendency to suggest that those charged with interpreting the constitution should do so in such a manner as to produce results that accord with the prevailing notions of the day, as if it were the duty of judges to resolve controversial matters that are in reality political-ideological conflicts. If so, the goal would be to liberate these judges from the constraints of the legal method so that their personal values can be imposed on the rest of us. The final result, however, would be the abnegation of law and gradual replacement of the rule of judges for the rule of law. According to the late American constitutionalist, Thomas M Cooley:

The property or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgement for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion.<sup>12</sup>

---

<sup>6</sup> Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (WW Norton & Co, 2003) 45.

<sup>7</sup> Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Colonial Press, c1900) 150.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Written in a letter to Bishop Mandell Creighton in 1887.

<sup>11</sup> Montesquieu, above n 7, 152.

<sup>12</sup> Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* (Little, Brown and Co, 1898) 158.

## II UNDERMINING DEMOCRACY

The basic premise of the majority in *Obergefell* is that the right to personal choice is inherent to the concept of individual liberty.<sup>13</sup> The majority ironically acknowledged, however, that ‘the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights’.<sup>14</sup> But, it went on to postulate, in rather postmodernist fashion, that fundamental rights actually evolve and ‘come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our era’.<sup>15</sup>

The majority thus candidly concluded that same-sex couples who are harmed for not being allowed to marry need not await legislative action before asserting a fundamental right.<sup>16</sup> As the majority put it, ‘[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right’.<sup>17</sup> As such, the majority decided that same-sex couples cannot be denied all the benefits afforded to opposite-sex couples because they may not be deprived of a ‘fundamental right’ that is inherent to the liberty of the person under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>18</sup>

In his dissent Justice Alito reminded that the majority has given to the *Constitution* a distinctively postmodern meaning. As Alito J noted, ‘[t]he Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right.’<sup>19</sup> For this reason, according to the majority, any State law that denies same-sex couples this ‘fundamental right’ must be held invalid to the extent of excluding them from civil marriage on the same terms and conditions as opposite-sex couples.<sup>20</sup>

The majority’s view subverts and invalidates laws due to matters of personal opinion. In his dissent Chief Justice Roberts stated that ‘[w]hether same-sex marriage is a good idea should be of no concern to’ his colleagues on the bench.<sup>21</sup> As he pointed out, ‘a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history’ can hardly be considered a violation of fundamental right.<sup>22</sup> The right of same-sex couples to marry is declared ‘a fundamental right’ inherent to the liberty of the person simply because five unelected members of the Supreme Court wishes it to be so. This exercise in raw judicial activism confounds the distinction between legislative and judicial functions. As Justice Scalia explained:

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed

---

<sup>13</sup> 566 US \_\_ (2015) 13 (majority opinion).

<sup>14</sup> Ibid 24 (majority opinion).

<sup>15</sup> Ibid 18-19 (majority opinion).

<sup>16</sup> See, *ibid* 24 (majority opinion).

<sup>17</sup> Ibid (majority opinion).

<sup>18</sup> Ibid 22 (majority opinion).

<sup>19</sup> Ibid 2 (Alito J, dissenting).

<sup>20</sup> Ibid 23 (majority opinion).

<sup>21</sup> Ibid 2 (Roberts CJ, dissenting).

<sup>22</sup> Ibid 2 (Roberts CJ, dissenting).

Justices' 'reasoned judgement.' A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.<sup>23</sup>

The American founding generation viewed rights as pre-existing the state. In the founding era, 'it was generally believed that rights were God-given, existing separate and apart from any human grant of power and authority'.<sup>24</sup> As Professor Barnett points out, '[n]atural or inherent rights were the rights persons have independent of those they are granted by government and by which the justice or property of governmental commands are to be judged'.<sup>25</sup> According to Professor Suzanna Sherry:

Fundamental rights were God-given, and were rights 'which no creature can *give*, or hath a right to take away'. They were, in the language of the Declaration of Independence 'inalienable'. Legislators could no more rewrite these laws of nature than they could the laws of physics.<sup>26</sup>

Based on this principle, the enactment of a bill of rights was a matter of declaring rights already in existence. These God-given rights were deemed more important than any legal right which ought not to be inconsistent with them. Thomas Jefferson, the author of the United States *Declaration of Independence*, asked rhetorically: 'Can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?'<sup>27</sup>

By contrast, the artifice of the US Supreme Court to create new 'fundamental rights', rather than enforcing the structural limits of the American *Constitution*, indicates that rights and liberties are not necessarily being protected. Indeed, when an unelected body of nine lawyers effectively becomes a 'god' unto itself, such court is enthroned as the all-powerful ruler over the life, liberty and property of the people, deciding which rights are fundamental and which are not. It is really the case of saying: 'The Supreme Court gives, the Supreme Court takes away; blessed be the name of the Supreme Court!'

Although the 'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted in this Nation's history and tradition',<sup>28</sup> in *Obergefell* the majority felt entitled to redefine 'out-dated' notions of liberty. In his dissent Chief Roberts convincingly asserted that '[t]he majority's decision is an act of will, not legal judgement. The right it announces has no basis in the Constitution or this Court's precedent'.<sup>29</sup> Since this approach offers no objective standard for the expanded latitude of how rights might 'evolve', once it is well-ingrained the swings of the ideological pendulum must allow the judicial elite an

---

<sup>23</sup> Ibid 5 (Scalia J, dissenting). Justice Scalia also stated (at 2): 'Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This practice of constitutional revision by an unelected committee of nine, always accompanied ... by extravagant praises of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.'

<sup>24</sup> Lael Daniel Weinberger, 'Enforcing the Bill of Rights in the United States', in S Ratnapala and G A Moens, *Jurisprudence of Liberty* (LexisNexis, 2<sup>nd</sup> ed, 2011) 105.

<sup>25</sup> Randy E Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2004) 54.

<sup>26</sup> Suzanna Sherry, 'The Founders' Unwritten Constitution' (1987) 54 *University of Chicago Law Review* 1127, 1132, quoting Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1786).

<sup>27</sup> Quoted in Rousas John Rushdoony, *The Politics of Guilt and Pity* (Fairfax Thoburn Press, 1978) 135.

<sup>28</sup> *Obergefell v Hodges*, 566 US \_ (2015) 2 (Alito J, dissenting). See also, Roberts CJ, dissenting (at 22): 'The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks out country's entire history and tradition but actively repudiates it ... [T]o blind yourself to history is both prideful and unwise'.

<sup>29</sup> Ibid 3 (Roberts CJ, dissenting).

opportunity to go in any direction according to personal predilections.<sup>30</sup> By arguing that their special training in the law somehow deems them worthy of expanding the interpretation of ‘fundamental rights’, the following words of Professor William Wagner should be noted:

[J]udges gaze into jurisprudential penumbras to subjectively fashion fundamental liberty interests they personally believe require judicial protection from politically accountable expressions of the people’s will (eg, the right to contraception, abortion, etc). Proponents of this approach opine that unelected judges are entitled to personally evaluate whether evolving societal customs justify the judge deeming an interest implicit in the concept of ordered liberty. When the judge concludes in the affirmative, the judge judicially anoints the interest with ‘fundamental’ status.<sup>31</sup>

In his dissent Chief Justice Roberts explains that ‘[e]xpanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of “discipline” in identifying fundamental rights ... does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering’, whether or not he is fully aware of it, are his own values”’.<sup>32</sup> Hence, whether a right receives constitutional designation as ‘fundamental’ now depends on the personal values of a majority of lawyers sitting on the bench and how they ‘evolve’ the constitution according to the so-called ‘changing needs’ of society.<sup>33</sup> And yet, as the late Sir Harry Gibbs, a former Chief Justice of the High Court of Australia, pointed out:

[T]he suggestion that the court should formulate a new rule in the light of contemporary values is open to the objection that there is usually a diversity of opinion as to what those values are ... In any case to regard social attitudes as a source of law tends to undermine confidence in the courts, when it is thought that the judges have based their decision on their own notions rather than on the law, and it also renders the development of the law unpredictable since the values which the court recognises are in effect those in the minds of the judges themselves.<sup>34</sup>

Furthermore, as the late judge Robert Bork properly stated:

The values a revisionist judge enforces do not, of course, come from the law. If they did, he would not be revising. The question, then, is where such a judge finds the values he implements. Academic theorists try to provide various philosophical apparatuses to give the judge the proper values ... A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, however, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite with which he identifies ... An elite moral or political view may never be able to win an election or command the votes of a majority of a legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority’s sentiment. The judge is free to reflect the ‘better’ opinion because he needs not to stand for re-election and because he can deflect the majority’s anger by claiming merely to have been enforcing the Constitution. Constitutional jurisprudence is mysterious terrain for most people, who have more pressing things to think about. And a very handy fact that is for revisionists.<sup>35</sup>

<sup>30</sup> Thomas Sowell, *Intellectuals and Society* (Basic Books, 2009) 167.

<sup>31</sup> William Wagner, ‘The Jurisprudential Battle over the Character of a Nation: Understanding the Emerging Threats to Unalienable Liberty in America’ in Suri Ratnapala and Gabriel A Moens, *Jurisprudence of Liberty* (LexisNexis, 2<sup>nd</sup> ed, 2011) 305.

<sup>32</sup> *Obergefell v Hodges*, 566 US\_ (2015) 14–5 (Roberts CJ, dissenting).

<sup>33</sup> Wagner, above n 31, 302.

<sup>34</sup> Sir Harry Gibbs, ‘Judicial Activism and Judicial Restraint’ (Paper presented at the Constitutional Law Conference, UNSW, 20 February 2004) 7.

<sup>35</sup> Robert H Bork, *The Tempting of America* (Touchstone, 1991) 16–7.

Take, for example, the present composition of the Supreme Court. As Justice Scalia points out in his dissent:

[T]his Court ... consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. ... Not a single Southwesterner ... Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges ... But of course the judges in today's majority ... *say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.<sup>36</sup>

Naturally, the unrepresentative character of the Supreme Court would be irrelevant if the judges were simply deciding a matter according to the law. Interpreting the law is the beginning and end of judicial function. In a constitutional democracy the courts are forbidden to strike down laws unless they are clearly invalid on constitutional grounds. The courts do not control the legislature when judges interpret legislation. The term 'judicial control' is misleading for it implies that unelected judges can somehow exert discretionary power over the elected members of legislature. And yet, judges have no such power; rather, all they have to do is to discover from the enactments before them what the lawmaker intend to convey. Of course, the more general and abstract the language of the law, the more difficult the task of interpretation and so much greater the need for ability and integrity in the judges.

It is therefore a breach of duty for the judges to express their personal opinion on the merits of policy except so far as this policy does explicitly violate the written constitution. Judges may deem a specific policy pernicious to society but, if there is no sound constitutional provision preventing the elected legislature from upholding a different opinion, the courts must enforce the law accordingly. And if it be suggested that members of the judicial branch 'may overstep their duty, and may, seeking to make themselves not the exponents but the masters of the Constitution, twist and pervert it to suit their own political views', as Lord Bryce famously stated, 'the answer is that such an exercise of judicial will would rouse the distrust and displeasure of the nation, and might, if persisted in, provoke resistance to the law as laid down by the court, possibly an onslaught upon the court itself'.<sup>37</sup>

Precisely for this reason, Chief Justice Roberts commented in *Obergefell*:

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system of empowering judges to override policy judgments so long as they do so after "a quite extensive discussion" ... In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will.<sup>38</sup>

Also, as Chief Justice Roberts stated, '[t]he majority's decision is an act of will, not legal judgement. The right it announces has no basis in the Constitution or this Court's precedent'.<sup>39</sup> By closing the debate and imposing their own vision of marriage as a matter of fundamental

---

<sup>36</sup> *Obergefell v Hodges*, 566 US\_ (2015) 6 (Scalia J, dissenting).

<sup>37</sup> James Bryce, *The American Commonwealth* (1888) (Liberty Fund, 1995) 225.

<sup>38</sup> *Obergefell v Hodges*, 566 US \_ (2015) 25 (Roberts CJ, dissenting).

<sup>39</sup> *Ibid* 3 (Roberts CJ, dissenting).

right, the court, Chief Justice Roberts continued, ‘[is] stealing this issue from the people’,<sup>40</sup> thus making a ‘dramatic social change ... much more difficult to accept’.<sup>41</sup> According to him,

[t]here will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.<sup>42</sup>

Therefore, the decision in *Obergefell* has one particularly disturbing consequence. Resolving highly contested issues on the basis of judicial decree only increases conflicts that could be prevented if the democratic process were allowed to provide for compromise and adjustment. While courts must enforce legal rules and principles, legislatures are in a much better position to find the possible compromises and gather the full range of policy considerations, because they can craft exemptions and protections that optimise respect for all the interests concerned.<sup>43</sup> Above all, ‘respectful deliberation is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues’.<sup>44</sup> By arbitrarily declaring same-sex marriage to be ‘fundamental right’, this decision, according to Justice Alito,

will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women ... The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.<sup>45</sup>

I am convinced that history will prove him right.

### III UNDERMINING FEDERALISM

Another disturbing aspect of the ruling is its impact on the federal nature of the constitution. Federalism emphasises a decentralising principle that stimulates a ‘participatory structure of government’,<sup>46</sup> buttressing individual liberty and eschewing political elitism. According to Robert Bork, federalism is an important protector of fundamental rights because,

if another state allows the liberty you value, you can move there, and the choice of what freedom you value is yours alone, not dependent on those who made the Constitution. In this sense, federalism is the constitutional guarantee most protective of the individual’s freedom to make his own choices.<sup>47</sup>

In drafting the American *Constitution* its framers sought to maintain a balance in the distribution of powers between the states and federal government. They designed the *Constitution* to be an instrument of government intended to distribute and limit governmental powers. By dividing political power, fundamental rights are protected through, as James Madison described, a ‘double security’:

<sup>40</sup> Ibid 2 (Roberts CJ, dissenting).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 27 (Roberts CJ, dissenting).

<sup>43</sup> Lynn D Wardle et al, ‘Brief for 54 International and Comparative Law Experts from 27 countries and the Marriage and Family Law Research Project as Amici Curiae in Support of the Respondent’, at 32, *Obergefell v Hodges* 566 U.S.\_ (2015).

<sup>44</sup> *Schuette v Bamm*, 572 US\_ (2014) 27.

<sup>45</sup> *Obergefell v Hodges*, 566 US \_ (2015) 6 (Alito J, dissenting).

<sup>46</sup> Augusto Zimmermann, ‘Subsidiarity, Democracy and Individual Liberty in Brazil’, in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer Netherland, 2014) 85, 88.

<sup>47</sup> Bork, above n 35, 53.

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each [is] subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself'.<sup>48</sup>

One of the basic characteristics of the American *Constitution* is therefore its express limitation on federal powers. Under the Tenth Amendment to the *US Constitution*, any powers that are not the exclusive powers of the federal government, or that are not specifically denied to state governments by the *Constitution*, are the powers of the states, or of the people. Some examples of state powers include passing laws concerning marriage, divorce, contract and inheritances.

As can be seen, the drafters intended to provide the states with reserved powers of local self-government, which they specifically insisted would continue under the *Constitution*, subject only to the carefully defined and limited powers specifically conferred upon the federal government. 'State reserved powers' thus ensure that the legislative powers of the states must not be undermined by an expansive reading of federal powers. The doctrine protects the powers belonging to the states when the constitution was formed - powers which, as Thomas Cooley reminded, 'have not by that instrument been granted to the Federal government, or prohibited to the States'.<sup>49</sup>

The judicial act of arbitrarily creating a 'fundamental right' to same-sex marriage dramatically increases the power of centrally appointed federal judges.<sup>50</sup> This federal court simply imposes uniformity and coast-to-coast dispositions on an important area of law that the drafters had actually reserved to the states, thus making a legal issue to mean exactly the same thing in every state. So, in this sense, the decision in *Obergefell* engenders a highly centralising effect that not only erodes the country's federal system but also increases social conflict and polarisation. As Justice Alito points out:

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection of conscience rights. The majority makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas ... But if that sentiment prevails, the Nation will experience bitter and lasting wounds.<sup>51</sup>

## IV CONCLUSION

To conclude, in *Obergefell* a majority of five unelected lawyers put a stop to the democratic process by removing an important issue from the realm of democratic deliberation. These unelected, unaccountable lawyers held that their nation's federal constitution should 'evolve' in a way that is supported by neither the document's language, nor its history or its authority.<sup>52</sup>

---

<sup>48</sup> James Madison, *Federalist Paper No 51* (6 February 1788).

<sup>49</sup> Cooley, above n 12, 35–6.

<sup>50</sup> James Allan, 'Bills of Rights as Centralising Instruments', Samuel Griffith Society, Vol18, 2006 <<http://www.samuelgriffith.org.au/papers/html/volume18/v18chap5.html>>.

<sup>51</sup> *Obergefell v Hodges*, 566 US\_ (2015) 7 (Alito J, dissenting).

<sup>52</sup> Curiously, Chief Justice Roberts explains how such an approach may lead to further legalisation of polygamy: 'Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one': *ibid* 20 (Roberts CJ, dissenting).

In short, they have simply imposed their own worldview on the people at the expense of federalism and the democratic process. Justice Alito was therefore right to state that such an exercise of raw judicial power ‘usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage’ and that this evinces ‘the deep and perhaps irremediable corruption of [the American] legal culture’s conception of constitutional interpretation’.<sup>53</sup>

---

<sup>53</sup> Ibid 8 (Alito J, dissenting).