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The Promise of Liberty to All – The Long March to Marriage Equality

A. From *Baker* to *Windsor*, via Anthony Kennedy

In June 2015, the United States of America became the eighteenth country where same-sex marriage could be performed.¹ In the judgment of *Obergefell v Hodges*,² a bare 5-4 majority of the United States Supreme Court held that there was a constitutional right to same-sex marriage, and that individual States must recognise lawful same-sex marriages performed in other States.³ The decision is the culmination of a more than forty year judicial story, clearly illustrates the power of one judge to influence and shape the interpretation of the Constitution, and the direction the law takes.

Justice Anthony Kennedy, a conservative jurist from California appointed by President Ronald Reagan in 1988, is our protagonist here. There is, amongst watchers of the Supreme Court in the USA, interest in determining which of the nine justices is the ‘swing vote’.⁴ This justice often gets paid the most attention, as they often cast the deciding vote in the contentious 5-4 decisions.⁵ Kennedy has become the swing vote in recent years,⁶ and he was the swing vote here as he authored the majority opinion in *Obergefell*. *Obergefell* stands as the culmination of twenty years of decisions by Anthony Kennedy relating to establishing rights for gay, lesbian and bisexual individuals. He was joined by the ‘liberal wing’ of the court, four justices all appointed by Democratic Presidents – Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan. The four other conservative justices, all appointed by Republican Presidents – Chief Justice John Roberts, and Justices Antonin Scalia, Clarence Thomas and Samuel Alito – issued separate dissents.

Until this decision, marriage equality had developed on a State by State level, in line with the principles of federalism which underpin the United States Constitution. The American system of government is based on a National Government of limited enumerated powers, with the remaining political power retained by the States and the People.⁷ The right to define marriage has always been seen as an unenumerated power, meaning that individual States retained the power to define marriage in the way that they saw fit, rather than the Federal Government.

Over the past twenty years, this is exactly what States have done. Starting with Massachusetts in 2003, more and more American States have legalised same-sex marriage through popular vote or judicial ruling.⁸ The story in the United States goes back much further. In 1993, the Hawaii Supreme Court ruled that the State Constitution, which denied marriage

¹ Finland, Ireland and Slovenia have all passed laws which allow for same-sex marriage, but these were not in force as of the end of June 2015.

² *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.*, 576 U.S. (2015).

³ 576 U.S. (2015), slip op. at 28 (Kennedy J).

⁴ Kevin M Quinn and Lee Epstein, “The Median Justice on the United States Supreme Court,” *North Carolina Law Review* 83 (2005):pp.1275-1322.

⁵ Janet L. Blasecki, “Justice Lewis F. Powell: Swing Voter or Staunch Conservative?,” *The Journal of Politics* 52 (1990): pp 530-547.

⁶ Patrick D Schmidt and David A Yalof, “The “Swing Voter” Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech,” *Political Research Quarterly* 57 (2004): pp.209-217.

⁷ See *National Federation of Independent Business et al v Sebelius, Secretary of Health and Human Services, et al.*, 567 U.S. (2012), slip. op. at 2 (Roberts CJ).

⁸ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

licences to same-sex couples, could be in violation of the Federal Constitution's guarantees of equal protection under the law.⁹ This guarantee is found in Section 1 of the Fourteenth Amendment to the Constitution, which also contains the guarantees of due process:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws* (emphasis added).¹⁰

In response to the Hawaiian decision, the United States Congress enacted the Defense of Marriage Act (DOMA), which defined marriage as between one man and one woman for the purposes of the federal government.¹¹ This meant, for all intents and purposes, that same-sex marriages would be recognised at State level, but not recognised at the national level. What followed over the next decade were State based initiatives to define marriage in the same way as DOMA. No fewer than fifteen States had defined marriage as being between one man and one woman by 2005, trying to pre-empt the growing global acceptance of same-sex relationships and partnerships.

Yet the judicial history of same-sex marriage can be traced back to 1970, when two student activists, Richard Baker and James Michael McConnell, applied for a marriage licence in Minnesota. The request was denied and the couple sued in State court, claiming that to deny the marriage licence would violate their Constitutional rights. The Minnesota Supreme Court heard the arguments in *Baker v Nelson* in September 1971.¹² As the couple's attorney addressed the court, one of the judges rotated his chair to face the wall, turning his back on the arguments made for equal treatment under the law. None of the seven judges asked a single question of any lawyer.¹³ Two months later in their judgment, the Minnesota Supreme Court made clear that the right to marry was a fundamental right, but made the point that:

The institution of marriage as a vision of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis.¹⁴

Baker and McConnell appealed to the Supreme Court, who issued a one-line dismissal of the case, declaring that the issue "did not raise a substantive federal question".¹⁵ This may not have been a surprise. Homosexuality was considered as a mental disorder by the American Psychiatric Association until 1973.¹⁶ Yet even here voices could be heard expressing the view that the Constitution could protect same-sex marriage. An article in 1973 (unsigned due to the controversial nature of the topic at the time), published in the *Yale Law Journal*, contended that the Constitution's article could be interpreted to provide a fundamental right to marriage,

⁹ *Baehr v Miike*, 74 Haw. 530, 852 P.2d 44 (S Ct Haw 1993).

¹⁰ U.S. Constitution, Amnd 14, §1. This section contains guarantees of due process and equal protection under the law.

¹¹ The Defense of Marriage Act (DOMA) (Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

¹² *Baker v Nelson*, 181 N.W. 2d 185 (S Ct Minn 1971).

¹³ William N. Eskridge, Darren R. Spedale, *Gay Marriage: for Better Or for Worse?: What We've Learned from the Evidence* (New York: OUP, 2006), p.22.

¹⁴ 181 N.W. 2d 185, 186, quoting *Skinner v Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

¹⁵ *Baker v Nelson*, 409 U.S. 810 (1972).

¹⁶ 576 U.S. (2015), slip op. at 7 (Kennedy J).

regardless of the sex of the individuals involved.¹⁷ Despite this, over the next two decades, the Supreme Court was not a friend to the gay-rights movement, culminating in the 1986 decision of *Bowers v Hardwick*, which upheld a Georgia law criminalising homosexual oral and anal sex in private.¹⁸ At this point in the narrative, the Supreme Court can be seen as deferential to the States and their powers to define and regulate same-sex relationships.

The sea change in the Court's approach was the nomination and confirmation of Anthony Kennedy. It has been Kennedy's judgments which helped move the Supreme Court from *Bowers* to a constitutional right to same-sex marriage. In the 1996 case of *Romer v Evans*, Justice Kennedy wrote the 6-3 majority opinion striking down an amendment of the Colorado Constitution which did not allow for protected status to be given to homosexuals and bisexuals – a provision which in effect legalised discrimination against them.¹⁹ Kennedy found that such measures violated the Equal Protection Clause of the U.S. Constitution. Then, in the 2003 decision of *Lawrence v Texas*, again a 6-3 majority authored by Kennedy, the Court overruled *Bowers*, holding that criminalising same-sex sexual activity was unconstitutional under the Due Process Clause of the Fourteenth Amendment.²⁰ Kennedy found that the Fourteenth Amendment protects “personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing”, and that this list of activities must also include same-sex sexual activity.²¹

Justice Kennedy built on these opinions in 2013. Joining the same four justices which made up the majority in *Obergefell* two years later, Kennedy authored a 5-4 majority opinion in *United States v Windsor*,²² which declared that DOMA, passed in 1996, was unconstitutional. *Windsor* involved a challenge to the section of DOMA which determined that marriage was defined as between one man and one woman. In Justice Kennedy's words, “DOMA's principal effect [was] to identify a subset of State-sanctioned marriages and to make them unequal”.²³ As a result of this aim, Kennedy saw no other option than to hold that DOMA was invalid, as:

The Constitution's guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group.²⁴

As a result, after *Windsor*, same-sex marriages recognised by individual States would also be recognised by the federal government. This meant that all married couples could take advantage of the large amount of benefits available to them, especially in relation to the tax code, adoption, and succession.

Justice Antonin Scalia (a long-time critique of Kennedy's judgements in *Romer* and *Lawrence*), in his dissent in *Windsor*, made it clear that Justice Kennedy's judgment would inevitably lead to a constitutional right to same-sex marriage. He stated:

¹⁷ “The Legality of Homosexual Marriage,” *The Yale Law Journal* 82 (1973): pp.573-589.

¹⁸ *Bowers v Hardwick*, 478 U.S. 786 (1986).

¹⁹ *Romer v Evans*, 517 U.S. 620 (1996).

²⁰ *Lawrence v Texas*, 539 U.S. 558 (2003).

²¹ 539 U.S. 558 (2003), at 574 (Kennedy J).

²² *United States v Windsor*, 570 U.S. (2013).

²³ 570 U.S. (2013), slip. op. at 22 (Kennedy J).

²⁴ 570 U.S. (2013), slip. op. at 20 (Kennedy J).

[T]he view that *this* Court will take of State prohibition of same-sex marriage is indicated beyond mistaking by today's opinion ... [T]he real rationale of today's opinion ... is that DOMA is motivated by bare desire to harm couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.²⁵

In this regard, Justice Scalia was correct. *Windsor* was subsequently relied upon by lower courts to overturn State level bans on same-sex marriage, being cited as justification for overturning bans in Ohio,²⁶ Oklahoma,²⁷ Utah,²⁸ Kentucky,²⁹ Virginia,³⁰ Pennsylvania,³¹ and Wisconsin,³² amongst others. Justice Kennedy's judgments and views had helped shape American jurisprudence and views towards same-sex couples, relationships and marriages. When the Supreme Court made clear in 2014 that it would not 'duck' the same-sex marriage question, and decide once and for all on the matter, it appeared that the Court would uphold a Constitutional right to same-sex marriage, 44 years after a judge in the Minnesota Supreme Court literally turned his back on the idea.³³

B. The majority decision in *Obergefell*

And so it was. Justice Kennedy's opinion declared that the Fourteenth Amendment, and its guarantees of Due Process and Equal Protection, provided for a right to same-sex marriage throughout the country. *Obergefell* was the natural culmination of Kennedy's long held view that the Equal Protection Clause necessitated equal treatment of people, regardless of their sexuality. Justice Kennedy made clear that whilst there may be an initial inclination to "proceed with caution" and wait for further debate in general society, adopting such a cautious approach would "harm gay and lesbian people in the interim".³⁴ For Kennedy, "dignitary wounds cannot always be healed with the stroke of a pen".³⁵

Justice Kennedy's judgments are verbose and full of very poetic language and descriptions of rights and duties. For oratory, Anthony Kennedy's style cannot be matched. A cursory glance at his writing in *Romer*, *Lawrence*, *Windsor* and *Obergefell* can show this. However, there is an inherent danger with taking such an approach in judicial opinions. Whilst sweeping rhetoric may be appropriate in politics, it is less suitable for a system based on binding precedent, and especially in a system which requires lower courts to determine and apply the binding holding of each decision.³⁶ The majority decision in *Obergefell* is heavy on

²⁵ 570 U.S. (2013), slip. op. at 23-24 (Scalia J).

²⁶ *Obergefell v Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013).

²⁷ *Bishop v US ex. Rel. Holder*, 962 F. Sup. 2d 1252, 1278 (N.D. Okla. 2013).

²⁸ *Kitchen v Herbert*, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013).

²⁹ *Bourke v Beshear*, F. Supp. 2d 2014.

³⁰ *Bostic v Raney*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014).

³¹ *Whitewood v Wolf*, 992 F. Supp. 2d 410, 425-26 (M.D. Pa. 2014).

³² *Wolf v Walker*, 986 F. Supp. 2d 982, 1010, 1017 (W.D. Wisc 2014).

³³ Mark Sherman, Associated Press, "Justice Ginsburg: Supreme Court Won't "Duck" Gay Marriage", *Seattle Times*, 31 July 2014, available at http://seattletimes.com/html/nationworld/2024212965_ginsburgduckxml.html.

³⁴ 576 U.S. (2015), slip op. at 23, 24 (Kennedy J).

³⁵ 576 U.S. (2015), slip op. at 25 (Kennedy J).

³⁶ Mark Alan Thurmon, "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions," *Duke Law Journal* 42 (1992): pp.419-468.

rhetoric, and few would be unmoved by its almost poetical syntax. For instance, Kennedy closes the majority opinion with this powerful paragraph:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.³⁷

Despite this rhetorical strength, Kennedy's reasoning and depth of analysis is not as strong as it could be. For instance, what is striking about Kennedy's decision is what it does not say. In civil liberties cases, the Supreme Court decides first what constitutional right is at issue, and then decides how to evaluate that law. Just like British courts when undertaking judicial review recognised the idea of a 'sliding scale' of rationality review depending on the nature and gravity of the case,³⁸ so to do American courts when deciding civil liberties cases. For the most important rights, American courts impose a 'strict scrutiny' standard, meaning there must be a compelling governmental interest for a law to limit a right, to an 'intermediate scrutiny' standard, down to a 'rational basis review', which only requires laws to have a 'rational' reason for their actions. None of this is present in the judgment, which is disappointing, as it leaves lower courts rudderless when deciding questions of whether same-sex couples have been discriminated against.³⁹ Nevertheless, Justice Kennedy was commended by commentators as reaching a correct decision, even if the reasoning should have been different.⁴⁰

It was clear from the outset that Justice Kennedy viewed marriage as not just an important institution, but also a crucial way in which people express their personalities and give meaning to their lives. This is in line with his fundamental belief in individual liberty, which underpins his judicial thought.⁴¹ To him, "the annals of human history reveal the transcendent importance of marriage", which rises "from the most basic human needs", and is "essential to our most profound hopes and aspirations".⁴² The petitioners here, in Kennedy's eyes, were not trying to devalue marriage, but sought to get married precisely because it was so important.⁴³ Justice Kennedy did accept that the untold references to marriage over

³⁷ 576 U.S. (2015), slip op. at 28 (Kennedy J).

³⁸ *R v Department of Education ex p Begbie* [2000] 1 WLR 111, 1130 per Laws LJ. See also Lord Carnwath, "From Rationality to Proportionality in the Modern Law", *Judicial Review in a changing society*, Hong King University, 14 April 2014, available at <https://www.supremecourt.uk/docs/speech-140414.pdf>.

³⁹ Helen J Knowles, "The Kennedy Stamp," *Politico Magazine* (27 June 2015), available at <http://www.politico.com/magazine/story/2015/06/anthony-kennedy-gay-marriage-119491.html>.

⁴⁰ Akhil Reed Amar, "What the Same-Sex Marriage Opinion Should Have Said (and Almost Did)," *Slate* (10 July 2015) available at http://www.slate.com/blogs/outward/2015/07/10/supreme_court_gay_marriage_what_kennedy_s_opinion_should_have_said.html.

⁴¹ Frank J Colucci, *Justice Kennedy's jurisprudence: the full and necessary meaning of liberty*, (Lawrence, KS: University Press of Kansas, 2009).

⁴² 576 U.S. (2015), slip op. at 3 (Kennedy J).

⁴³ 576 U.S. (2015), slip op. at 4 (Kennedy J).

millennia have referred to a union between two persons of the opposite sex,⁴⁴ but cautioned that the history of marriage is one of an evolving institution.⁴⁵ Originally an arrangement by parents, marriage evolved under the doctrine of coverture to be a male-dominated entity. It evolved from there into an equal partnership based on love between two people of the opposite sex, and there is no reason to think it cannot evolve again. For Justice Kennedy, the changing nature of marriage is:

[C]haracteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.⁴⁶

After tracing the history of the changing rights of gays and lesbians throughout American history, Justice Kennedy moved on to justify his view that the Constitution provided a right to same-sex marriage. He concluded that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.⁴⁷ This liberty could be asserted now, in Kennedy's words, because:

The nature of injustice is that we may not always see it in our own times. The generations that wrote ... the Bill of Rights ... did not presume to know the extent of freedom in all of its dimensions ... When new insights reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.⁴⁸

Justice Kennedy's first contention was the Amendment's guarantee that no State shall deprive "life, liberty, or property" without due process meant that the Constitution's guarantee of liberty encompasses a right to same-sex marriage. The liberties of the due process clause include most 'enumerated' rights under the Constitution,⁴⁹ but also personal choices central to individual dignity and autonomy, including intimate choices which define personal identity,⁵⁰ which are not named specifically under the Constitution, but are still protected by it.⁵¹ One such unenumerated yet protected right has been the right to marry.⁵²

Dismissing *Baker v Nelson* as an "uninstructive precedent", Justice Kennedy explained the decision on the basis that the Court made an assumption which was defined and shaped by the world of which it was a part – a world which has since changed.⁵³ Justice Kennedy found it more instructive to look at cases concerning marriage generally and the essential attributes of the right to marriage, and then asked whether the rationales of those arguments apply to same-sex couples. Justice Kennedy made four main arguments in support of the view that the right to marry applies with equal force to same-sex couples.⁵⁴ Kennedy made clear that:

⁴⁴ 576 U.S. (2015), slip op. at 3-4 (Kennedy J).

⁴⁵ 576 U.S. (2015), slip op. at 6 (Kennedy J).

⁴⁶ 576 U.S. (2015), slip op. at 7 (Kennedy J).

⁴⁷ 576 U.S. (2015), slip op. at 22 (Kennedy J).

⁴⁸ 576 U.S. (2015), slip op. at 11 (Kennedy J).

⁴⁹ *Duncan v Louisiana*, 391 U.S. 145, 147-149 (1968).

⁵⁰ *Griswold v Connecticut*, 381 U.S. 479, 484-486 (1965).

⁵¹ *Poe v Ullman*, 367 U.S. 497, 542 (1961) (Harlan J, dissenting).

⁵² *Loving v Virginia*, 388 U.S. 1, 12 (1967).

⁵³ 576 U.S. (2015), slip op. at 11-12 (Kennedy J).

⁵⁴ 576 U.S. (2015), slip op. at 12 (Kennedy J).

If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.⁵⁵

First, the right to personal choice regarding marriage is inherent in the concept of individual autonomy.⁵⁶ To choose to marry is an intimate one, which shapes an individual's life – for Kennedy, there is dignity in that bond which holds for all persons, whatever their sexual orientation.⁵⁷ Second, marriage is a two-person union unlike any other, offering hope of companionship. Kennedy drew on his judgment in *Lawrence*, noting that in that case the Court held that same-sex couples had the same right as opposite-sex couples to enjoy intimate association. Whilst *Lawrence* confirmed “a dimension of freedom” for individuals to engage in intimate association, it did not follow that freedom stopped there:

Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.⁵⁸

Third, by protecting the right to marry for all, children and families are safeguarded, affording stability important to children's best interests.⁵⁹ Finally, Kennedy saw marriage as a building block of the national community. Marriage is the basis of an expanding list of rights, benefits and responsibilities, and it is now no longer just to exclude same-sex couples from those benefits.⁶⁰

After making these contentions, Kennedy explained that the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived from the Amendment's guarantee of equal protection of the laws. He explained that rights implicit in liberty and rights secured by equal protection may rest on different precepts, but each leads to a ‘stronger understanding’ of the other.⁶¹ For Kennedy, the Equal Protection Clause is able to identify and correct inequalities in the institution of marriage, allowing the Constitution's guarantee of liberty to be vindicated.⁶² To deny a right to same-sex marriage would deny equal protection of the laws to same-sex couples, which in Kennedy's eyes would “disparage their choices and diminish their personhood”.⁶³ Again, Justice Kennedy turned to his judgment in *Lawrence*, which held that the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime”.⁶⁴ This dynamic, Justice Kennedy claimed, also applies to same-sex marriage:

[T]he Court has recognised that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.⁶⁵

⁵⁵ 576 U.S. (2015), slip op. at 18 (Kennedy J).

⁵⁶ 576 U.S. (2015), slip op. at 12 (Kennedy J).

⁵⁷ 576 U.S. (2015), slip op. at 13 (Kennedy J).

⁵⁸ 576 U.S. (2015), slip op. at 13 (Kennedy J).

⁵⁹ 576 U.S. (2015), slip op. at 14-15 (Kennedy J).

⁶⁰ 576 U.S. (2015), slip op. at 16-17 (Kennedy J).

⁶¹ 576 U.S. (2015), slip op. at 19 (Kennedy J); *Zablocki v Redhail*, 434 U.S. 374 (1978).

⁶² 576 U.S. (2015), slip op. at 21 (Kennedy J).

⁶³ 576 U.S. (2015), slip op. at 19 (Kennedy J).

⁶⁴ 539 U.S. 558 (2003), at 578 (Kennedy J).

⁶⁵ 576 U.S. (2015), slip op. at 20 (Kennedy J).

As a result, laws preventing same-sex couples from marrying were declared invalid.⁶⁶ More than this, *Baker v Nelson* had to be overruled. Forty three years later, the press tracked down Jack Baker and Michael McConnell. Still together, they spoke about how they were sure when they got married that same-sex marriage would become legal throughout the United States. They just did not think it would take so long. In Jack Baker's words, "I was off by a few decades".⁶⁷

C. The dissents – exploring the 'proper role of the Court'

Obergefell was unusual for Supreme Court standards as it involved four dissenting judgments. Within these dissenting judgments, critiques of Kennedy's majority decision were raised. The Chief Justice's dissent focused upon the proper role of the judiciary in deciding what he saw as issues best left to the political process. Justice Scalia questioned the logical coherence of Justice Kennedy's contentions. Justice Thomas challenged the majority's definition of 'liberty', and Justice Alito's dissent accused the majority of overriding received moral norms and of leading to a situation where persons who oppose same-sex marriage would feel persecuted.

Some points raised in the dissent have more weight than others. Justice Alito's contentions that this decision will be "used to vilify Americans who are unwilling to assent to the new orthodoxy" seems hyperbolic.⁶⁸ Similarly to *Obergefell*, the decision of the Supreme Court in *Loving v Virginia*,⁶⁹ which held that bans on interracial marriage were unconstitutional, reflected changing public opinion, rather than pre-empted it. Attitudes towards same-sex marriage in the United States have made a remarkable shift over the past thirty years. According to national opinion polling, seventy-five per cent of the population opposed same-sex marriage in the mid-1980s; today, almost sixty per cent of Americans now support same-sex marriage.⁷⁰

Justice Thomas challenged the conclusion that guarantees of liberty can lead to the extension of rights under the Constitution. He argued that the Constitution conceives of liberty in a negative sense, referring to freedom from governmental action.⁷¹ This idea of liberty has a lot in common with that espoused by John Locke,⁷² or Isaiah Berlin's notion of 'negative liberty'.⁷³ Justice Thomas argued that the liberty protections in the Constitution mean nothing more than freedom from physical restraint, and as such laws preventing same-sex marriage do not infringe on this right.⁷⁴ It can be contended here that Justice Kennedy conceives of liberty in precisely this same negative sense, but has a more expansive notion of what forms of liberty the Constitution protects, and therefore concluded that prohibiting same-sex marriage infringes upon this liberty.

⁶⁶ 576 U.S. (2015), slip op. at 23 (Kennedy J).

⁶⁷ Jenna Ross, "43 years later, Minneapolis couple's fight for marriage vindicated," *Star Tribune* (5 July 2015), available at <http://www.startribune.com/43-years-later-fight-for-marriage-vindicated/311653191/>.

⁶⁸ 576 U.S. (2015), slip op. at 6 (Alito J).

⁶⁹ 388 U.S. 1 (1967).

⁷⁰ Nate Silver, "Change Doesn't Usually Come This Fast," *FiveThirtyEight* (26 June 2015), available at <http://fivethirtyeight.com/datalab/change-doesnt-usually-come-this-fast/>.

⁷¹ 576 U.S. (2015), slip op. at 1 (Thomas J).

⁷² John Locke, *Two Treatises of Government* (Cambridge: CUP, 1988).

⁷³ Isaiah Berlin, "Two Concepts of Liberty" in Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (Oxford: OUP 2002).

⁷⁴ 576 U.S. (2015), slip op. at 6 (Thomas J).

Weightier criticisms were made by Justice Scalia and Chief Justice Roberts. Both questioned whether this was a decision the Supreme Court should make. Justice Scalia's language was far more headline grabbing, accused the majority of a "judicial Putsch"⁷⁵ which was "pretentious" and "egoistic".⁷⁶ What Justice Scalia diagnosed was a decision based on policy – the majority identified a difference in treatment they really disliked, and they acted as legislators in overturning it.⁷⁷ Likewise, the Chief Justice declared that "this Court is not a legislature".⁷⁸ He rightfully stated that the Court's legitimacy rests on its judgments being granted respect. In 'dismissing' the public debate on same-sex marriage, the Chief Justice accused the majority of being neither humble nor restrained, and of threatening the legitimacy of the institution.⁷⁹ He saw that the policy arguments for same-sex marriage as compelling, but crucially, the legal arguments were not.

The Court could not hold laws unconstitutional simply because they find them "unwise, improvident, or out of harmony with a particular school of thought".⁸⁰ As a result, the case was not made from removing the definition of marriage from the hands of the State voters, into the hands of the Court.⁸¹ Instead, the majority engaged in "unprincipled policymaking",⁸² with the decision resting on "nothing more than [their] own conviction that same-sex couples should be allowed to marry".⁸³ To emphasise his point further, the Chief Justice used Justice Kennedy's own words supporting judicial restraint against him, from a 1986 lecture Kennedy gave at Stanford University:

One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.⁸⁴

The Chief Justice found no authority cited by the majority which could support the contention that there must be a right to same-sex marriage.⁸⁵ Kennedy failed to provide "even a single sentence" explaining how the equal protection guarantees in the Constitution would support the conclusions drawn.⁸⁶ In fact, he made a criticism of the paucity of the content of Kennedy's reasoning, making the point that the majority's reasoning would also apply to upholding a fundamental right to plural marriage.⁸⁷ Whilst this conclusion of course does not follow from Kennedy's reasoning, Chief Justice Roberts was correct to point out the fact that the opinion issued was not as detailed in its reasoning as it should have been. Justice Kennedy made no

⁷⁵ 576 U.S. (2015), slip op. at 6 (Scalia J).

⁷⁶ 576 U.S. (2015), slip op. at 7 (Scalia J).

⁷⁷ 576 U.S. (2015), slip op. at 8-9 (Scalia J).

⁷⁸ 576 U.S. (2015), slip op. at 2 (Roberts CJ).

⁷⁹ 576 U.S. (2015), slip op. at 25 (Roberts CJ).

⁸⁰ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

⁸¹ 576 U.S. (2015), slip op. at 9 (Roberts CJ).

⁸² 576 U.S. (2015), slip op. at 10 (Roberts CJ).

⁸³ 576 U.S. (2015), slip op. at 19 (Roberts CJ).

⁸⁴ Anthony Kennedy, "Unenumerated Rights and the Dictates of Judicial Restraint," Lecture delivered to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, Stanford University (24 July – 1 August 1986), available at <http://joshblackman.com/blog/wp-content/uploads/2013/09/Kennedy.-Unenumerated-Rights-speech-1986-1.pdf>.

⁸⁵ 576 U.S. (2015), slip op. at 19 (Roberts CJ).

⁸⁶ 576 U.S. (2015), slip op. at 23-24 (Roberts CJ).

⁸⁷ 576 U.S. (2015), slip op. at 20-21 (Roberts CJ).

mention of how his opinion was limited to monogamous, rather than polygamous, marriage.⁸⁸ Nor did the majority opinion explain how the right to same-sex marriage would impact, or be reconciled with, religious freedoms.⁸⁹ How this plays out is to be determined by lower courts over the coming years.

D. Conclusion – acceptance or resistance?

Justice Scalia's and the Chief Justice's concerns regarding the proper role of the court should not be dismissed lightly. They are animated by the public debate over abortion, which was curtailed by the Court in its 1973 decision of *Roe v Wade*.⁹⁰ This led to political conflict, which has lasted until the present day, about judicial overreach and an illegitimate decision. As the Chief Justice explained, 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 a court should decide.⁹¹ In turning to the Court, rather than the People, supporters of same-sex marriage have "lost forever" the "the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause".⁹² In the words of Justice Ginsburg, writing about the law on abortion extra-judicially before she was appointed to the Supreme Court:

The political process was moving ... not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.⁹³

Only time will tell whether these concerns are prescient.

What can be said with certainty is that the road to marriage equality has been a long one. When this story is told, Anthony Kennedy will take a central role. One justice of the Supreme Court, over twenty years, crafted decisions and persuaded colleagues not only to decriminalise homosexual activity nationwide, but to prohibit discrimination at both State and Federal level, and finally to guarantee the right to marry to all. This story stands as testimony to the impact and change a single individual can make in a legal system.

⁸⁸ James Taranto, "After Obergefell: The troubling implications of today's Supreme Court ruling," *The Wall Street Journal* (26 June 2015), available at <http://www.wsj.com/articles/after-obergefell-1435341928>.

⁸⁹ "Obergefell v. Hodges: The Ruling and Its Implications for Religious Freedom," *Religious Freedom Project*, Berkley Center for Religion, Peace & World Affairs, available at <http://berkleycenter.georgetown.edu/cornerstone/obergefell-v-hodges-the-ruling-and-its-implications-for-religious-freedom>.

⁹⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹¹ 576 U.S. (2015), slip op. at 27 (Roberts CJ).

⁹² 576 U.S. (2015), slip op. at 27 (Roberts CJ).

⁹³ Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade*" *North Carolina Law Review* 63: (1985) pp.375-386, 385-386.