

ESSAY

OBERGEFELL'S EXPRESSIVE PROMISE

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*“The statement made by law may be different from the statement heard by the audience”*¹

*“Marriage’s political, cultural, and social significance should not be mistaken for its legal centrality.”*²

I. INTRODUCTION

The U.S. Supreme Court made history when it held in *Obergefell v. Hodges* that same-sex couples share in the fundamental right to marry.³ The decision was lauded by much of the LGBT community. Ordinary citizens, politicians, and pundits alike commented that the opinion marked a wide-reaching, game-changing advance in the doctrinal framework vis-à-vis the LGBT community.⁴

I agree that *Obergefell* is a landmark opinion but disagree that it will mark a sea-change in the legal landscape. The opinion is doctrinally narrow and holds little opportunity, based strictly

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1. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996).

2. Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1 (2015), <http://yalelawjournal.org/forum/obergefell-and-the-unfinished-business-of-formal-equality>.

3. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

4. See, e.g., *Attorneys Rally Around High Court’s Gay Marriage Decision*, LAW360 (June 26, 2015, 7:18 PM), <http://law360.com/articles/672972/attorneys-rally-around-high-court-s-gay-marriage-decision> (last visited Nov. 13, 2015) (“Today’s decision is one of the biggest decisions of our generation and will have far-reaching effects beyond what we even recognize today. . . . The court’s opinion should set the stage for expanding coverage under Title VII and state anti-discrimination laws to acknowledge sexual orientation as a protected class. . . . [T]he *Obergefell* opinion will have effects far beyond marriage.”).

on its doctrinal precedent, for an expansion of protections of LGBT individuals against discrimination in employment, public accommodations, or even in some family law matters.⁵ In short, although *Obergefell* had the opportunity to make formal equality for LGBT people part of its constitutional canon, it did not.⁶ Its doctrinal reach is thus limited, leaving LGBT people without legal protections in many facets of life. Being able to marry on Sunday, but being lawfully fired on Monday is a far cry from formal equality.

If the case is not the doctrinal panacea that it's been made out to be, what exactly is *Obergefell's* legacy? I contend *Obergefell's* promise is not in the law it made, but in its expressive function—the impact of its normative message, rather than its legal holding. That expressive function has potential to lead to wide-reaching legal protections for LGBT people, protections currently lacking in a majority of jurisdictions and which *Obergefell's* legal doctrine itself cannot remedy. Thus, *Obergefell's* promise lies in its expressive impact in normative and political arenas; its transformative potential can lead to broad legislative protections for LGBT individuals in all facets of society, not just the institution of marriage.

II. OBERGEFELL'S NARROW HOLDING

Obergefell presented the questions of whether the Fourteenth Amendment requires a State to (1) license a same-sex marriage, and (2) recognize a same-sex marriage licensed in another State.⁷ This framing of issues gave the Court doctrinal room to reach a decision on broad grounds or narrow grounds: on Equal Protection Grounds, Due Process grounds, or both. For example, the Court could have held that sexual orientation is a protected class under the Equal Protection Clause, which would have triggered heightened scrutiny and resulted in the marriage bans and nonrecognition statutes being stricken. This would have resulted in formal equality for LGBT persons, and the

5. See, e.g., Steve Rothaus, *Married Same-Sex Couples Sue Florida for Moms to Be Listed on Babies' Birth Certificates*, MIAMI HERALD (Aug. 13, 2015), <http://miamiherald.com/news/local/community/gay-south-florida/article31008162.html> (noting Florida refused to list the non-birth mother on the birth certificates of twins born to a married lesbian couple).

6. In a pre-decision essay, Katie Eyer predicted this outcome: “[T]he Court seems likely to frame its holding in . . . terms that fail to clearly implement a legal regime of formal equality for the L/G/B community.” Eyer, *supra* note 2, at 2. I adopt Eyer’s definition of formal equality: “[A] legal regime in which invidious use of a particular classification is deemed presumptively unlawful.” *Id.* at 2 n.3. Had *Obergefell* established formal equality, the result would have been that sexual orientation is a suspect- or quasi-suspect classification.

7. *Obergefell*, 135 S. Ct. at 2593.

opinion would have been wide-reaching and applicable beyond marriage.⁸ This is the outcome for which the United States argued before the Court.⁹

The Court, however, chose the narrowest ground by holding same-sex couples are entitled to participate in the already-existing fundamental right to marry.¹⁰ This result required neither the creation of a new fundamental right nor an analysis that would have required the Court to decide if sexual orientation is a suspect class. While not surprising,¹¹ the opinion's narrowness makes its precedential value low outside of marriage; its doctrinal reach beyond marriage is short, if it has any doctrinal reach at all.¹²

In twenty-eight states, it is still legal to fire someone for being LGBT because sexual orientation or gender identity is not a protected class.¹³ Seventeen states require either burdensome proof of clinical treatment, such as proof of sex reassignment surgery, court order, or an amended birth certificate, to change the gender marker on a transgender person's driver's license.¹⁴

8. For example, this outcome would have resulted in heightened scrutiny for discriminating on the basis of sexual orientation in circumstances outside of marriage, such as employment and public accommodations, thus protecting against discrimination by public actors.

9. See Brief for the United States as Amicus Curiae Supporting Petitioners at 2, 11–13, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

10. *Obergefell*, 135 S. Ct. at 2599.

11. "It has long been [the Court's] considered practice not . . . to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

12. An example of this short doctrinal reach, at least from the perspective of arguments asserted by litigants, recently arose in Mississippi, which is the last state with a ban on same-sex couples adopting children. Soon after *Obergefell* was decided, a group of same-sex couples filed suit, arguing that *Obergefell* rendered the adoption ban unconstitutional. See Complaint for Declaratory & Injunctive Relief, Campaign for S. Equality v. Miss. Dep't of Human Servs., No. 3:15cv578-DPJ-FKB (S.D. Miss. Aug. 12, 2015), <http://southernequality.org/wp-content/uploads/2015/08/15-08-12-COMPLAINT.pdf>. In its response to the complaint, the defendants (the State of Mississippi and state agencies and officials involved in adoptions) argued: "While the Supreme Court's decisions in *Obergefell* and *Windsor* recently established that the federal and state governments must recognize valid same sex marriage, and states must license them, *over-extending those decisions to purportedly invalidate [the adoption ban] through a preliminary injunction would be entirely inappropriate.*" Memorandum of Authorities Supporting Defendants' Response to Motion for Preliminary Injunction at 15–16, Campaign for S. Equality v. Miss. Dep't of Human Servs., No. 3:15cv578-DPJ-FKB (S.D. Miss. Sept. 11, 2015), <https://assets.documentcloud.org/documents/2413148/ms-opp-topi.pdf> (emphasis added).

13. See *Equality Maps: Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 13, 2015).

14. See *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, http://lgbtmap.org/equality-maps/identity_document_laws (last visited Nov. 13, 2015).

Only three states and the District of Columbia ban harmful “conversion therapy” for minors.¹⁵ There is no federal antidiscrimination statute that explicitly includes sexual orientation or gender identity as protected classes.¹⁶ Thus, formal equality is still out of reach for LGBT people. *Obergefell’s* narrow precedent does not bring formal equality closer.¹⁷

III. THE LAW’S EXPRESSIVE FUNCTION

Legal scholars have long recognized the expressive power of the law.¹⁸ By “expressive power,” I refer to the power of the law to influence norms and behavior independent of any substantive component of the law itself. We thus can separate the law’s expressive content from its substantive content; often, public discourse about law is more about its expressive content than its substantive content.¹⁹ What a law “says” about our society—what a law “means” at a normative level—often is more important than the actual consequences of the application of the substantive law.²⁰

When courts engage in their doctrinal function, they regulate and directly control behavior.²¹ In contrast, when courts engage in their expressive function, they “go beyond telling specific parties how they must behave and make statements about social or political issues.”²² Some contend that law’s

15. See *Equality Maps: Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, http://lgbtmap.org/equality-maps/conversion_therapy (last visited Nov. 13, 2015).

16. See James Lockhart, Annotation, *Discrimination on Basis of Person’s Transgender or Transsexual Status as Violation of Federal Law*, 84 A.L.R. Fed. 2d 1, 2 (2014) (describing courts’ ambivalence as to whether Title VII of the Civil Rights Act grants protected class status on the basis of gender identity); Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII and an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 186 (2009) (expressing the need for clarity in federal antidiscrimination law with respect to sexual orientation and gender identity); *A History of Federal Non-Discrimination Legislation*, HUM. RTS. CAMPAIGN, <http://hrc.org/resources/entry/a-history-of-federal-non-discrimination-legislation> (last visited Nov. 13, 2015).

17. In fact, one court expressly stated that *Obergefell* “do[es] not establish a broad right to be free from sexual orientation discrimination in all contexts.” *Dew v. Edmunds*, No. 1:15-cv-00149-CWD, 2015 WL 5886184, at *10 (D. Idaho Oct. 8, 2015).

18. See, e.g., Sunstein, *supra* note 1.

19. *Id.* at 2022–23. Sunstein uses capital punishment to illustrate this point: “Many people who oppose capital punishment would be unlikely to shift their position even if evidence were to show that capital punishment does have a deterrent effect. They are concerned about the expressive content of capital punishment, not about its ineffectiveness as a deterrent . . .” *Id.* at 2022.

20. *Id.* at 2024.

21. Jason Mazzone, *When Courts Speak: Social Capital and Law’s Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–40 (1999).

22. *Id.* at 1040.

expressive function is the “most significant one that courts perform.”²³

The expressive function of U.S. Supreme Court opinions is particularly powerful because most Americans take note of the decisions. The Court's opinions take on a symbolic character because they are seen as “speaking on behalf of the nation's basic principles and commitments.”²⁴

Because *Obergefell's* holding—“[t]he nugget that will have binding precedential effect”²⁵—is narrow, it will not regulate behavior outside of marriage. It will not prohibit discrimination against LGBT individuals in other contexts.²⁶ Thus, the promise that *Obergefell* holds to effect broad, positive change—to propel the law toward formal equality—is in its expressive power. There is much promise in that expressive function, including its ability to inspire legal protections for LGBT people through the political process far beyond what *Obergefell* compels.

One way in which the law's expressive function exercises its power is “to reconstruct existing norms and to change the social meaning of action through a legal expression . . . about appropriate behavior.”²⁷ Law “sends a message” that transcends its doctrine. *Obergefell* made a *doctrinal* statement about a very specific legal status—marriage—but the *expressive* impact of that narrow holding is a broad “statement about appropriate behavior.” *Obergefell's* “message” is a powerful tool for seeking broader formal equality because “[i]f discriminators are ashamed of themselves, there is likely to be less discrimination. . . . A large point of the law may be to shift social norms and social meaning.”²⁸

23. *Id.* at 1041 (citing GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991)).

24. Sunstein, *supra* note 1, at 2028.

25. See Nan D. Hunter, *The Undetermined Legacy of Obergefell v. Hodges*, *THE NATION* (June 29, 2015), <http://thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>.

26. *But see* Susannah Pollvogt, *Obergefell v. Hodges: Framing Fundamental Rights* (unpublished manuscript) (on file with author) (contending *Obergefell* revived the “similarly situated” regime of equal protection, which may lead to significant protections for LGBT individuals under the Equal Protection Clause); Kenji Yoshino, *Obergefell v. Hodges Links Liberty and Equality*, *SLATE* (June 26, 2015), http://slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_obergefell_v_hodges_links_liberty_and_equality.html (arguing *Obergefell* mounted a “wholesale attack on Glucksberg's formulation” of liberty under the Due Process clause; thus, the “great jurisprudential advance” of *Obergefell* may be the recognition of additional fundamental rights in the future).

27. Sunstein, *supra* note 1, at 2031.

28. *Id.* at 2043–44 (“Consider in this connection the fact that many restaurant owners and inn-keepers actually supported the Civil Rights Act of 1964, which would have prevented them from discriminating. Why would people want the state to act against them? The answer lies in the fact that the law helped shift social norms and the

Analyzing a law's expressive role is a powerful tool to explain changes in social and political norms that far exceed any reasonable analysis of the law's doctrinal basis. *Obergefell* will be a salient example of this phenomenon.

IV. *OBERGEFELL'S* PROMISE: EXPANSIVE EXPRESSIVE POWER

Obergefell uses sweeping language on three themes that are central to our national identity and comprise our social norms: change, dignity, and liberty. Justice Kennedy connects these themes to LGBT people and in doing so, "sends a message" about what is "appropriate behavior" toward LGBT people. His expressions on these themes should make "discriminators . . . ashamed of themselves."²⁹ From the specific message (if it is not appropriate to deny same-sex couples marriage licenses, it is not appropriate to deny them services or fire them) to the broad one (our shared, core values demand formal equality), these themes comprise the powerful expressive voice of *Obergefell*.

A. *Change*

A central theme in the opinion is that our collective ideas about freedom, liberty, and dignity have not been, and should not be, stagnant. To support this theme, Justice Kennedy summarizes the many changes to marriage over the centuries. He makes the broad statement:

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. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.³⁰

His separation of "gays and lesbians" from the marriage right sends a strong message that LGBT people can, and should, "invoke rights once denied" such as inclusion in antidiscrimination laws. He sends the broad message that constitutional change is expected, proper, and necessary to preserve our shared values of liberty, equality, and dignity. His message is that change is strength; change represents freedom

social meaning of nondiscrimination. Whereas nondiscrimination would formerly signal a willingness to act on a race-neutral basis—and hence would trigger social norms that call for discrimination against blacks—it would henceforth signal a willingness to obey the law, and hence fail to trigger adverse social norms.”)

29. *Id.* at 2043.

30. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

and stagnation deprives freedom.³¹ He notes that history and tradition are a framework, but not a roadblock, to equality; looking at equality from this perspective “respects our history and learns from it without allowing the past alone to rule the present.”³² In his penultimate passage about change, Justice Kennedy sends this strong message:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.³³

He then states that “in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”³⁴

These passages send a message that transcends *Obergefell*'s narrow precedent. LGBT people should harness this message to lobby for formal equality through the legislative process. The fact that *Obergefell* found a right to marry, even though based on narrow legal reasoning, should bolster its expressive power: if LGBT people can marry, and if the Court’s message is that the meaning of equality and liberty changes as we gain new insights, it is a natural progression for our national consciousness to see *all* discrimination against LGBT people as wrong, even un-American.

B. Dignity

Dignity and harm are two sides of the same coin; when LGBT people are denied dignity under the law, they are harmed. Justice Kennedy writes about both sides of the coin in the context of marriage, but his message has broader expressive power.

31. *Id.* at 2596 (“These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic 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.”).

32. *Id.* at 2598.

33. *Id.*

34. *Id.* at 2603.

Justice Kennedy declares that “gays and lesbians can create loving, supportive families.”³⁵ The expressive significance of this short, simple statement cannot be overstated. It normalizes LGBT people and their families; normalization is key to building social and political capital needed to enact protective legislation. He proclaims that the denial of marriage “works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”³⁶ He recognizes that the marriage bans “harm and humiliate” children of same-sex couples.³⁷ Finally, Justice Kennedy proclaims that exclusion “teach[es] that gays and lesbians are unequal in important respects.”³⁸

These statements send an authoritative and profound message that transcends *Obergefell*'s doctrinal holding: LGBT people have innate dignity that should be recognized and protected by force of law; failure to do so results in impermissible harm.

The basis of the deserved dignity is that LGBT individuals have intrinsic value—as people, parents, and Americans; this is an important message given that Justice Kennedy states that sexual orientation is “immutable.”³⁹ The extension of these messages beyond marriage is easy and persuasive: because same-sex *relationships* have value deserving of constitutional protection, LGBT *individuals* have value deserving of formal equality. Justice Kennedy's message that exclusion teaches “that gays and lesbians are unequal”⁴⁰ has noteworthy expressive power and should be used to persuade lawmakers and the public that *all* discrimination against LGBT individuals is harmful, denies the dignity that our Constitution protects, and contravenes our shared commitment to equality. *Obergefell*'s message that dignitary harm to fundamentally valuable individuals contradicts our shared normative ideals of equality is a powerful one that should be leveraged to seek formal equality.

35. *Id.* at 2600.

36. *Id.* at 2604. Justice Kennedy's use of “subordinate” might indicate that some members of the Court desire to reverse the trend of moving away from an antisubordination approach to equal protection under the Fourteenth Amendment.

37. *Id.* at 2601.

38. *Id.* at 2602.

39. *Id.* at 2596. Justice Kennedy's recognition of the immutability of sexual orientation holds potential for the future expansion of protections for LGBT people under the Equal Protection Clause.

40. *Id.* at 2602.

C. Liberty

The concept of liberty embodies freedom, autonomy, and the right to intimate association.⁴¹ These concepts apply outside of marriage, as Justice Kennedy noted in his nod to *Lawrence v. Texas*: “[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, *it does not follow that freedom stops there*. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”⁴² He further wrote that “rights 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 own era.”⁴³ He recognized that LGBT people share these core beliefs about liberty and dignity, and that LGBT individuals actively defend those core beliefs outside of our borders.⁴⁴

These passages mark the most powerful expressive sentiments of *Obergefell*. They send the message that liberty, dignity, and freedom don’t end with marriage. Because LGBT people are still “outcasts” in the majority of states where they can be fired from their jobs or refused services, our Constitution’s guarantee of liberty and dignity has not been realized. This exclusion of LGBT people from our legal and normative promise of equality is, simply, wrong.

D. Early Evidence of Obergefell’s Expressive Impact

Although only several weeks have passed since *Obergefell* was decided, there is early evidence of its expressive impact. Less than a month after the opinion, the Equality Act was introduced in Congress.⁴⁵ The Act would add sexual orientation and gender identity to the protections afforded by the Civil Rights Act of 1964.⁴⁶ In addition, it would create or expand protections for LGBT people in employment, housing, public accommodations, public education, federal funding, credit, and jury service.⁴⁷ The Act’s introduction was a direct result of *Obergefell*,

41. *Id.* at 2598.

42. *Id.* at 2600 (emphasis added).

43. *Id.* at 2602.

44. *Id.* at 2595 (noting plaintiff DeKoe “served this Nation to preserve the freedom the Constitution protects”).

45. See *LGBT Equality Act Introduced in Congress*, PROGRESS ILL. (July 23, 2015, 5:27 PM), <http://progressillinois.com/news/content/2015/07/23/lgbt-equality-act-introduced-congress>.

46. See Zack Ford, *The Equality Act Could End Legal LGBT Discrimination for Good*, THINK PROGRESS (July 23, 2015 10:35 AM), <http://thinkprogress.org/lgbt/2015/07/23/3683728/equality-act-introduction/>.

47. *Id.*

notwithstanding that nothing in *Obergefell*'s doctrinal holding compelled it.⁴⁸

As our nation continues to digest the expressive messages of *Obergefell*—as we continue anew our national conversation about the place of LGBT people in our society framed by *Obergefell*'s messages—I expect to see more positive legislative protections for LGBT people.

IV. CONCLUSION

Obergefell certainly can be seen as a missed doctrinal opportunity to achieve formal equality. But it can also be seen as a powerful expressive directive. Justice Kennedy noted that “it is most often through democracy that liberty is preserved and protected in our lives.”⁴⁹ The LGBT community and its allies should act on this axiomatic statement by leveraging *Obergefell*'s expressive power in the court of public opinion, state legislatures, and Congress. They can do so by embracing *Obergefell*'s expressive decree, commandeering its expressive power, and harnessing its transformative potential to wage the next battles for LGBT civil rights, equality, and dignity.

48. See Brandon Lorenz, *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUM. RTS. CAMPAIGN: HRC BLOG (July 7, 2015), <http://hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina>. In fact, on October 1, 2015, Jim Obergefell himself lobbied members of Congress in support of the Equality Act. See Steve Lee, *Jim Obergefell Heads to Capitol Hill to Lead Lobbying Effort for the Equality Act*, LGBT WEEKLY (Oct. 1, 2015), <http://lgbtweekly.com/2015/10/01/jim-obergefell-heads-to-capitol-hill-to-lead-lobbying-effort-for-the-equality-act/>.

49. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).