

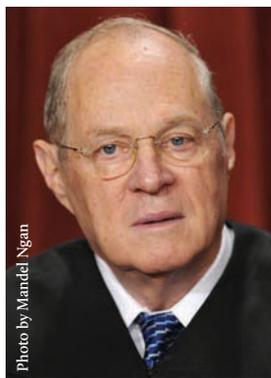
# Same-Sex Marriage, Conscientious Objection and an Ambushed Pope

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On June 26, 2015, the United States Supreme Court answered the question many Americans had been asking: How is Justice Anthony Kennedy going to vote in the same-sex marriage case?

Most of my liberal friends were certain that he would vote to strike down laws prohibiting same-sex marriage. But I thought that was mostly their natural wishful thinking. Most of my conservative friends thought the same. But I thought that was mostly their natural pessimism.

In my mind, Justice Kennedy is a libertarian on liberty issues and a conservative on economic issues. Still, I could not predict anything, except that Kennedy — the Court's swing vote — would write the opinion. Indeed, he did: *Obergefell v. Hodges*.



Justice Anthony Kennedy

His opinion concludes that due process and equal protection protect a right to same-sex marriage. He finds the right in the word “liberty.” No state shall “deprive any person of life, liberty, or property without due process of law.” He was joined by the four who make up the majority when Kennedy is wearing his libertarian robe. The dissenters were the four who join when he is wearing his conservative robe.

The vote count allowed Chief Justice Roberts to write in dissent. “Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens — through the democratic process — to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”

## Obergefell v. Hodges

In his decision, Kennedy writes about prior cases banning interracial marriage and remarriage for fathers behind on child support, barring prison inmates from marrying while incarcerated, and making it a crime for married couples to use contraceptives — those and many other cases that protect rights associated with marriage.

The dissenting justices point out one thing those cases have in common: They involved opposite-sex couples.

Kennedy answers that these cases “presumed a relationship involving opposite-sex couples ... [because] [t]he Court, like many institutions, has made assumptions defined by the world and time of which it is a part.” In other words, Kennedy is saying that ours is a living Constitution and its ambiguities — “liberty,” for example — will be interpreted “by the world and time of which [the interpreter] is a part.”

Marriage, Kennedy writes, shapes an individual’s destiny; choosing whether and whom to marry are among life’s momentous acts of self-definition; marriage responds to the universal fear that a lonely person might call out only to find no one there. But, you can say the same about many things. The obvious analogue is polygamy. Surely it shapes your destiny, is a momentous act of self-definition and diminishes that universal fear that you will one day call out and find no one there. In fact, if you fear no one will be there, polygamy is clearly the *better* choice.

Kennedy says that laws that treat same-sex couples differently “diminish their personhood.” And, “The marriage laws at issue here harm and humiliate the [thousands of] children of same-sex couples.” The dissenters ask what this has to do with the Constitution. Isn’t this a policy choice?

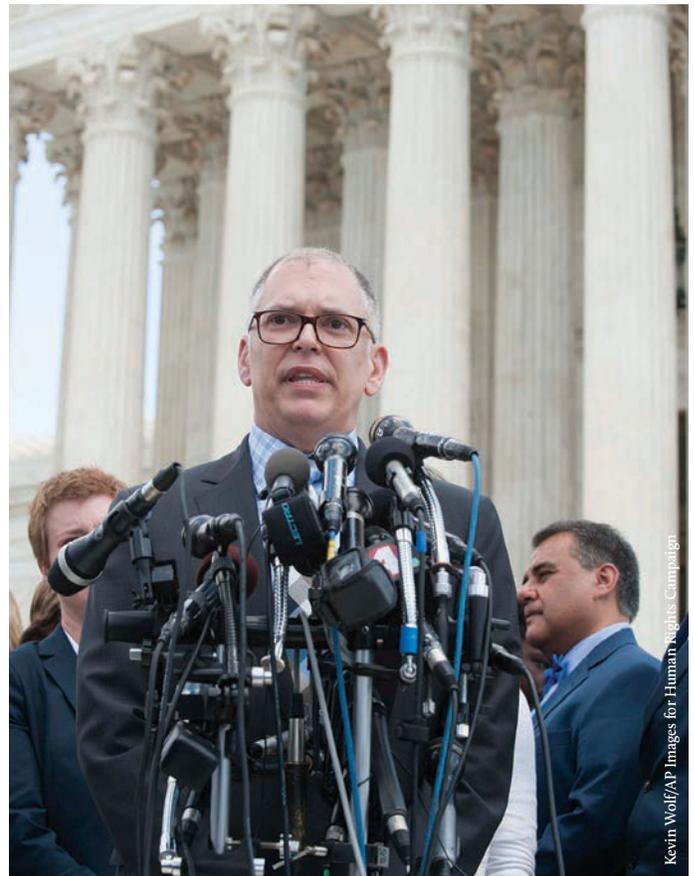
The dissenters say that when the court has to define “liberty” it looks to history and tradition. The history and tradition of Anglo-Saxon law are very much opposed to homosexuality: barred from public jobs, military service and immigration into the U.S.; targeted by the police; listed as mentally ill; imprisoned; chemically castrated; and preached against.

Kennedy counters that history and tradition are just the starting point. If constitutional rights are defined by past practice, then history serves as its own continued justification. New groups could never invoke rights that had been denied to them in the past. Never!

“The nature of justice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the 14th 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.*”

And here, Kennedy’s opinion talks about women’s rights. He refers to a long list of rights once denied to women. A married woman did not have a separate legal existence from her husband. Once married, the husband and wife became one person, and the “one” was the husband. She was not able to sue, own property or sign a contract in her own name. She faced a lack of educational and economic opportunities, and the absence of a voice in political debates.

And the Constitution is just as silent about women as it is about gays and lesbians. And history and tradition were not on



Lead plaintiff Jim Obergefell speaks to the media in front of the Supreme Court following oral arguments on April 28, 2015, in Washington, D.C.

the side of either.

I know there are problems with the “living-document” argument. What keeps unelected judges from imposing their own morals, their own view of good economic policy, their own personal bigotry? Originalism has its problems, as well: Too often, how can we tell what the Framers of the Constitution would say?

Personally, I am torn. I see both sides. I guess I am a living Constitution guy who is not completely comfortable with that position. But Seth Meyers is not of two minds. On *Saturday Night Live’s* Weekend Update, he said this about originalism.

*This week America’s love affair with guns was a hot topic of debate ... and of course when you talk about guns you always hear a lot about the Second Amendment and the founding fathers and what they would say if they were here. Well, I, for one, think if the Founding Fathers were here today they would be super freaked out by cars.*

*You can talk to them all you want about the Second Amendment and they would just yell, “What are all these metal beasts doing rolling down the thoroughfare?” And you could tell them those are cars. And when you try to talk about militia they would scream, “How can you speak about militia when these steel dragons fly through the sky?”*

*And you say those are airplanes and even if they could wrap their heads around that, they would eventually ask, “Why are all the slaves out?”*

## Resistance is Futile

Civil rights for African-Americans came with a huge and dangerous backlash. Federal court orders requiring desegregation triggered angry outbursts among white Americans. They pelted and screamed hatred at school busses carrying African-American children to an integrated school. There were lynchings, fire bombings and snarling police dogs. In Montgomery, Ala., Federal District Court Judge Frank Johnson issued a lot of desegregation opinions. He received mountains of hate mail, crosses were burned in his yard, his *mother's* home was firebombed. He had round-the-clock protection by U.S. marshals.

Why haven't we seen that kind of reaction to *Obergefell*? Here's my opinion. We all knew someone who was gay or lesbian, *before we knew they were gay or lesbian*. One of my best friends from the farthest back — high school on — was gay. I say "was" because he has died ... of AIDS. I knew him and loved him before I knew — or even he knew — that he was gay. I'd like to think that we'd have become good friends anyway, but that was a different time and I was a stupid high school kid just trying hard to fit in.

I have a gay nephew. The son of two good friends is gay. I knew and loved them long before I knew they were gay. It is impossible for me to think less of my friend, my brother's son or the son of good friends, just as it is impossible for Dick Cheney not to love his daughter, who happens to be a lesbian. We cannot turn our backs on those we have long known and loved.

So there has not been that much resistance. And then there is Kim Davis.

## Conscientious Objection

Kim Davis is the county clerk of Rowan County, Ky., who refused to issue same-sex marriage licenses and follow the supreme law of the land as established in *Obergefell*. Same-sex couples sued her in federal court. The district court judge followed his judicial oath and ordered her to issue the licenses. She refused, the judge held her in contempt and she went to jail.

Davis is a government employee. She doesn't have to leave her conscience at the courthouse door. She can conscientiously object. On the other hand, she took an oath to uphold the Constitution. She has to follow the law. The court can't order Davis to violate her faith, but it can order her to perform her job as a government employee.

She has three choices: resign, go to jail or follow the law. Consider these examples.

- > Judge Joseph Moylan had been a state court judge in Nebraska for 20 years when he resigned from the bench as a matter of conscience — rather than follow a Supreme Court judgment regarding abortion. *Resignation is an option.*
- > The Rev. Martin Luther King violated many laws as a matter of conscience and went to jail. *Jail is an option.*
- > In some counties, an objecting clerk has allowed a willing deputy clerk to issue the licenses. *Following the law is an option.*

Davis first took option two and went to jail. After some time in jail, she switched to option three and allowed a deputy clerk to issue licenses.

Mike Huckabee joined in. He said that exercising religious liberty should never be a crime. And of course it shouldn't. But

Davis was not jailed for exercising religious liberty. She was jailed for refusing to comply with a court order that she perform her sworn duty as a county official.

And besides, it was civil contempt. Nobody said she was a criminal — nobody but Huckabee.

## The Bible

But, you say, the Bible says that homosexual acts are a sin. Maybe, but interpretations can be influenced by human prejudice — consider that the Bible was used to justify slavery and then, after the 13th Amendment outlawed slavery, segregation.

But you say that God's law supersedes the court's. Well, I say that is actually a very strong argument ... in Saudi Arabia. But I guess Huckabee and Davis would say that the difference is that the Saudis' religion is not *the true* religion.

During a gay rights debate in Springfield, Mo., a preacher addressed the city council: "I worry about the future of our city. Any accurate reading of the Bible should make it clear that gay rights goes against the plain truth of the word of God. ... This step of gay rights is but another stepping-stone toward immorality and lawlessness that'll be characteristic of the last days. ... Our rights will be taken away, and un-Christian views will be forced on us and our children. We'll be forced to go against our personal morals." He paused and concluded: "Sorry, I brought the wrong notes. What I've been reading to you are quotes from white preachers from the 1950s and 1960s, all in support of racial segregation. All I have done is ... substituted with the phrase gay rights."

In 1959, Virginia and Richard Loving were convicted of the crime of interracial marriage. The judge wrote this: "Almighty God created the races white, black, yellow, Malay and red, and He placed them on separate continents. And but for the interference with His arrangement, there would be no cause for such marriages. The fact that He separated the races shows that He did not intend for the races to mix."

And there is the Curse of Ham. You've got Noah, his son Ham, and Ham's son Canaan. Noah got mad at Ham, so he put a curse on Ham's apparently innocent son Canaan and all of his descendants. Some (but not the Bible) say that the curse turned them black. This interpretation of the Bible was pulled out as needed to provide biblical justification for slavery.

I'm not a biblical scholar, but I am a lawyer. And I know something about finding evidence and making arguments for either side of an issue. And I know that over a couple of hundred decades the Bible has been re-transcribed and re-translated from one language to another ... over and over again.

But my primary problem with originalism is I don't believe a just and merciful God would command that "a man [who] lie[s] with mankind ... both of them ... shall surely be put to death." (Leviticus 20:13) That passage raises the question: Must we reinstate the death penalty, or do these words mean something other than what they say? And under a literal interpretation, does the passage "man who lies with mankind" support allowing a woman lying with womankind. It's a familiar rule of interpretation: The expression of the one thing is the exclusion of the other. Or, following Justice Kennedy's logic, perhaps that biblical wording is just a product of its times.

In the end, as we come to know more gays and lesbians, as we learn that good friends, close relatives and valued co-workers



AP Photo/Timothy D. Easley

Rowan County Clerk Kim Davis, right, talks with David Moore following her office's refusal to issue marriage licenses at the Rowan County Courthouse in Morehead, Ky., on Sept. 1, 2015.

are gay and lesbian, as we see them lovingly raise their children, care for aging parents and share a devotion toward their partner, it becomes harder and harder for me to believe that a just and merciful God is going to condemn them to hell for, as Justice Kennedy put it, who they immutably are.

**Pope Francis**

And then there is Pope Francis. This man is preaching tolerance for all, including, of course, sinners. "Who am I," he said, "to judge?" The Church, he said, should help parents stand by their gay children.

At the very end of his trip to the United States, the pope received visitors at the Vatican Embassy in Washington, D.C. He met privately with a friend — a former student of his and his friend's same-sex partner. There is a video of the friend and the pope hugging at the meeting. It is very moving.

A day later, at a Vatican Embassy reception, Francis was ambushed by the apostolic nuncio — the Vatican ambassador to the U.S. This archbishop was in charge of deciding who

should be in the receiving line to greet the pope. It was mostly important Catholics. The archbishop invited Kim Davis and her husband, non-Catholics. I know of no other reason than that the archbishop wanted to send a message of support for Davis and her refusal to follow the law — the United States Constitution.

The Vatican felt compelled to issue a statement that, contrary to what her attorney implied, if not outright said, the pope's meeting with Davis "should not be considered a form of support of her position." The only real audience granted by the pope at the embassy, said the Vatican, was with one of his former students and that man's same-sex partner and family. Davis was just someone in line.

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My word limit is up. Let me close with a favorite lyric from a favorite song.

"I have reason to believe that we all will be received in Graceland."



**About the author:** G. Michael Fenner is the James L. Koley '54 Professor of Constitutional Law. He is past president of the Nebraska State Bar Association. Fenner is a member of the Nebraska Supreme Court Committee on Practice and Procedure and the House of Delegates of the Nebraska Bar Association, and past chairperson of the Evidence section of the Association of American Law Schools. Fenner received the Nebraska State Bar Foundation's 1992 Shining Light award. He is a frequent speaker at continuing education programs for lawyers, judges and their support staffs. In addition to the authoring of numerous legal articles, he has also published a number of pieces of "editorial whimsy" in a variety of popular papers and magazines. He is the author of a well-received book, *The Hearsay Rule*, and the principal author of NJI2d Civ., the pattern jury instructions for civil cases in Nebraska.