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Same-Sex Marriage Legalization and the Issue of Judicial Review in the U.S.A.

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abstract

The decision made in Obergefell v. Hodges on June 26, 2016 marked a ground-breaking moment in American history, as it effectively legalized same-sex marriage throughout the country. While the decision was met with much celebration, it also produced an equally loud surge of criticism for its use of judicial review in settling such a controversial matter. This paper explores the criticisms against judicial review in relation to both Obergefell and its general use, focusing on claims that it undermines democracy and threatens the federal system inherent to the American political system. Despite such criticisms, this paper will argue in favour of judicial review, proving that it is an essential good necessary for protecting the people's rights and the political structure it is said to harm.

abstrait

La décision prise le 26 juin 2016 au cours du procès Obergefell v. Hodges a marquée un moment révolutionnaire dans l'histoire Américaine du fait qu'elle légalise le mariage entre conjoints du même sexe. Tandis que la décision était célébrée avec beaucoup d'enthousiasme, elle produira également beaucoup de critiques envers l'utilisation de la revue judiciaire dans le règlement de cette question très controversée. Cette dissertation explore et analyse les critiques en faveur et contre le sujet de la revue judiciaire en relation non seulement avec Obergefell, mais aussi son utilisation général en se concentrant particulièrement sur l'argument qu'elle abîme le procès démocratique et menace le système fédéral qui est au cœur du système politique des États-Unis. Malgré ces critiques, cette dissertation raisonnera en faveur de la revue judiciaire en montrant que son utilisation est essentielle afin de protéger les droits des citoyens et de, contrairement aux critiques, protégerlastructurepolitique.

Keywords: federalism judicial review democracy social change constitution

June 26th, 2015 marked a breakthrough moment in American history when the Supreme Court of the United States of America, in *Obergefell v Hodges*, effectively legalized same-sex marriage throughout the country. This landmark decision spawned both momentous celebrations from those excited about the proclaimed victory and a backlash of harsh criticism from others dissatisfied with the ruling. In this paper, I explore the decision made by the Court that now prevents states from disallowing same-sex marriage in its relation to controversy surrounding judicial review. I will begin by discussing exactly what the ruling meant for same-sex marriages in America as well as the reasoning the Judges employed to arrive at their decision. I will then go on to discuss the criticism the case has received because of the use of judicial review to decide on such a controversial issue, which opponents charge as being both a subjective imposition and violation of states' rights. Further, I will explain how these criticisms allude to the even larger controversy of judicial review in general, with critics claiming that it undermines both democracy and threatens the federal system inherent to the American political system. I will go on to argue that, despite such criticisms, judicial review is fundamental in order to preserve the very political structure it is said to harm as it works to protect both individual rights and, in turn, the federal system. In relation to *Obergefell,* I will also explain how judicial review was necessary to reach a final conclusion on the debate about same-sex marriage. I will conclude that judicial review is an essential good that is necessary to protect the people's individual rights as well as the very political structure America was founded upon now and into the future.

The Decision Made in *Obergefell v Hodges:*

The *Obergefell v Hodges* decision determined once and for all that same-sex couples have the right to marry in America after many years of debate. The main question the Supreme Court had to decide was whether same-sex couples did in fact have a legal right to marriage. But this question also implied they would have to answer who should decide whether same-sex couples can get married- whether this should be left to the states to decide or, if the decision was so fundamentally important, that the federal government via the Constitution should decide (Ryan, 2013, par. 3). Their decision was not just about the legal rights of same-sex couples, but was also about the relationship between the state and federal governments. The decision effectively ruled two things- that states could no longer refuse to issue marriage licenses to same-sex couples and that they also could no longer refuse to recognize any same-sex out-of- state marriage licenses (Eskridge, 2015, 111). The Court founded their decision primarily on the Equal Protection Clause of the 14 th Amendment in the Constitution. As William Eskridge explains, the Court "had long recognized the right to marry as a fundamental right protected against deprivation by the Due Process Clause" (2015, 111). The Equal Protection Clause prevents discrimination against a minority in respect to their fundamental liberty (Eskridge, 2015, 111). It limits the government's power to award benefits to only a certain group of individuals (Farabee, 1996, 263). Simply, it requires that everyone be treated equally before the law. Justice Kennedy, in his opinion for the court, explained "the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment [and] is derived, too, from that Amendment's guarantee of the equal protection of the laws" (as cited in Eskridge, 2015, 111). As marriage is regarded as a fundamental right, the fact that some states withhold this to same-sex couples constitutes discrimination against a minority- a direct violation of the Fourteenth Amendment.

Judicial Review

This decision was made through a process known as judicial review and, for that reason, has received criticism for going against the principles of the American political structure. Before we look at the criticism of *Obergefell* and judicial review in general, it is important to understand the idea of judicial review and where it came from. Simply, judicial review is the power of the courts to declare any legislation invalid if it is not consistent with the Constitution (Johnson, 2014, par. 3). Though the Constitution does not explicitly address judicial review, its power has been affirmed within the American political structure and history of the Constitution. This power was echoed throughout a number of the *Federalist Papers*. In specific, Alexander Hamilton's No. 79, in great detail, emphasized and explicated the power of the judiciary. Here he writes, "no legislative act, therefore, contrary to the Constitution, can be valid […] the legislative body are themselves the constitutional judges of their own powers and the construction they put upon them is conclusive upon the other departments" (1789, 467). The judicial system was created to act as check on the other levels of government within the federal system, with Hamilton explaining "courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority" (1789, 467). The courts were created to interpret and protect the constitution, thus the power of judicial review was explicitly implied in their creation. Moreover, the power of judicial review was later officially affirmed by the Court in the famous *Marbury v Madison* case. Chief Justice Marshall, draw-

ing on the logic of the *Federalist Papers*, explained, "the constitution of the United States confirms and strengthens the principles, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void" (as cited in Johnson, 2014, par. 3). Judicial review has always been a historic practice utilized to make sure legislation is consistent with the American principles upheld in the Constitution.

Criticisms Against *Obergefell:*

The majority of criticism against *Obergefell* has been primarily to do with the use of judicial review to legalize same-sex marriage nationwide, with many critics claiming it goes against the values of democracy. The dissenting opinions of the four of the nine judges who disagreed with the decision were harsh, criticizing that they violated the very premises of government. Their main criticism was that the Court sought to legislate instead of judge, going beyond their responsibility and power. In his dissent, Chief Justice John Roberts explains, "five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law […] stealing this issue from the people" (as cited in Pruitt, 2015, par. 2). Quoting Roberts, William Eskridge explains that the dissenters;

> [r]egretted that the majority was announcing a "dramatic social change" that "has no basis in the Constitution or this Court's precedent[s]." "[A]cross all… civilizations," the chief justice insisted, marriage has "referred to only one relationship: the union of a man and a woman." Because the Court was redefining marriage in a way that no culture had ever done (according to him) […] the dissenting justices charged the majority with legislating rather than judging and with violating the democratic premises of our system of government. (2015, 112).

In short, the dissenters felt that the judges had overstepped their duties as part of the judiciary and forced new values upon the country that had not been reached in a democratic manner. The dissenting opinions accurately reflect the disapproval many of the critics of *Obergefell* felt towards the legalization of same-sex marriage through judicial review.

There are two main criticisms of *Obergefell*, expressed by scholars and media alike after the ruling, that tie into its relation with judicial review. First, many opponents found the whole process that eventually legalized same-sex marriage undermined the democratic nature of the government. Various scholars, in response to *Obergefell,* have explained that the Courts do not have the power to impose their subjective will (Pruitt; Anderson; Farabee). As we shall later discuss, the Courts do not have legislative power to impose their will, so critics claim they cannot force states to now accept same-sex marriage. They criticize that making such a momentous decision in a closed courtroom undermined public support. Zack Pruitt, in his article "The Same-Sex Marriage Decision: Ruling by Judicial Fiat", explains "laws passed through this process engender substantial public support […] because the ultimate decision made on same-sex marriage was made in a courtroom and not in the public sphere, it will now be subject to a litany of legal challenges" (2015, par. 2). The ruling does not necessarily reflect the will of the people, as it was the imposition of the judges' own personal desire for social change. Pruitt contends that this is neither consistent with democracy nor representative government (2015, par. 4). He goes on to predict that people will be quick to challenge same-sex marriage legalization by claiming it violates their consciousness and First Amendment rights (par. 2). Secondly, critics of *Obergefell* claim that the judicial ruling violates state rights by trying to intrude on an area that falls under state jurisdiction. Marriage is a subject that falls under the power of states to regulate, so they argue that only the states have the power to define what constitutes a marriage (Farabee, 1996, 277). They explain that states have their own valid reasons for not wanting to legalize same-sex marriage, generally maintaining it goes against their traditional beliefs that marriage is a family institution meant to foster procreation and childrearing- things they claim same-sex couples cannot do (Farabee, 1996, 271). They argue that, since marriage falls under state jurisdiction, the state should have the power to decide who can get married according to their own beliefs. The judiciary has violated these rights by now forcing all states to legalize same-sex marriages. Many critics maintain that same-sex marriage legalization should have been left up to the political process, not judicial review. As Pruitt writes, "social change through 'consent of the governed' is much more powerful than forced social change by judicial edict" (2015, par. 5). Had legalization been left up to the political process, it supposedly would have both respected democratic values as well as the autonomy of the states.

Criticism Against Judicial Review

The criticisms expressed against *Obergefell* reflect the disdain many people have of judicial review in general and we now turn to discuss these. There are two primary criticisms held against judicial review. The first criticism is that it undermines democracy. It cannot be denied there has been an increase in judicial decision-making in recent decades, sometimes referred to as 'New Judicial Federalism' (Peele et al, 2010, 156). Developments in the 1980s and 1990s- often referred to as the Rehnquist Court to signify its importance- saw the courts deliver decisions that sought to expand state authority (Peele et al, 2010, 157). While there has not been a judicial revolution, many people contend the Court has become too powerful and is overstep-

ping its role. Especially with the noted increase in its activism, many believe the Court is acting more as a legislator than an interpreter. Critics point out that the Constitution does not make the Supreme Court the supreme "Law of the Land" or the final say in any and all matters (Redish, 13). It does not give them unlimited or absolute power. There is also nothing in the Constitution that gives the Courts power to legislate or make something they believe will better society legal (Pruitt, 2015, par. 1). However, there has been increasing observation that the Court is doing just this, as we discussed in relation to the *Obergefell* case. Judges are able to evaluate the constitutional validity of legislation based on their own belief and moral judgements, not based the impartial interpretation they were originally envisioned to use (Ball, 2011, 6). As Martin Redish observes, "the courts are proving to us that they are suiting as super-legislatures […] if the judiciary is always given the final say on constitutional issues, there is no one to check that power" (2004, 19). If the courts act more as legislators than mediators and interpreters, they are defying their purpose as a check on the other levels of government and denying the people a voice in legislative matters, effectively undermining the democratic process.

"Though they may enter into the political or judicial realm with the intent to impartially represent the people, we cannot assume that the moral beliefs of such actors will never influence their actions."

The second primary criticism of judicial review maintains that it threatens the federal structure, which is fundamental to the political nature of America. Critics of judicial review argue that the court is increasingly intruding on states' rights and powers. Recall how *Obergefell* intruded upon marriage regulations, which has historically been an area of jurisdiction set aside for the states. When the Court acts more like a legislator than a judge, it begins to impose a unilateral will upon the country and effectively deny the individual autonomy of the states. This threatens the structure of the federal system. When the federal system was first designed by the Fathers of Confederation, it was intended to be a federation of sovereign states, as exemplified in the drafting of the *Federalist Papers* (Redish, 10). This was done in order to reflect and better meet the diverse interests of the people who made up the expansive country of America. Explicit powers were given to the federal government and all other residual powers were supposed to be regarded as under state jurisdiction (Redish, 10). This was to prevent power from becoming too centralized in the federal government. However, many critics have contended that the judicial system has helped to gradually centralize power in Federal hands. One author writes, "judges have chipped away at the interpretation of this constitutional law [so] the federal power is gradually centralized and reaffirmed" (Biernat, 2014, par. 4). A centralized government means there is less opportunity for the voices of the people to be heard. This threatens the efficiency of the federal system that has historically proven a necessary good in the American political structure in order to properly meet the needs and reflect the desires of the people at a better level.

Why Judicial Review is Necessary

I argue, on the contrary, that these criticisms are mistaken in their claims that judicial review does more harm than good to the American political system. This paper now turns to discuss the necessity of judicial review, as it is essential for preserving the nation's political structure and protecting the rights of the people. To begin with, it must be made clear that judicial review is not simply an imposition of the Judges' subjective will, contrary to the first general criticism made against it. There are factors in place to ensure the Judges act on behalf of the Constitution and do not merely impose their own beliefs or moral judgements. The Supremacy Clause of the Constitution states "this Constitution, and the Laws of the United States which shall be made in pursuance thereof… shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (as cited in Johnson, 2014, par. 3). This clause binds the Judges of the courts to the Constitution, meaning they must adhere to its words when conducting judicial reviews. They cannot declare legislation unconstitutional merely because they believe it is harming society. Rather, the legislation must explicitly go against the written or implied word of the Constitution. While the Constitution may not explicitly address the power of judicial review, it can be said that it is implied through this passage. As we saw in the *Federalist Papers,* the courts were explicitly given the responsibility to interpret and protect the Constitution in order to preserve the federal political structure. The Constitution is to be regarded as the "Law of the Land" and, since the courts are the interpreter and protector or this, it can only be assumed their word does have finality. If the courts declare legislation invalid, then it should be taken like the word of the Constitution- final and valid.

Furthermore, during judicial review, the Judges follow a comprehensive process to determine whether legislation is unconstitutional that helps ensure they approach the matter objectively. The Supreme Court, in particular, has developed an explicit set of guidelines for determining whether legislation violates the Constitution, known as Rational Basis Review (Arana, 2014, 4). If the Judges can come up with any plausible interest the Gov-

ernment may have had in creating the legislation, the law will pass (Arana, 2014, 4). Generally, only the most ridiculous laws fail to pass the Rational Basis Review. However, legislation that targets a specific minority group or that may infringe upon a fundamental right is subjected to a harsher test. For such legislation to pass, the majority of Judges must agree that, first, the legislation is in a compelling state interest and, secondly, it is the only way possible to achieve its intended goal (Arana, 2014, 5). Considering the written word of the Constitution and also past precedents, the Judges debate whether or not the legislation meets these conditions. This is the approach the Judges took during *Obergefell* to resolve the debate concerning same-sex marriages. They decided that legislation prohibiting same-sex marriage was unconstitutional, as it violated the Equal Protection Clause, and that there was no compelling state interest providing for its lawfulness. They therefore ruled such legislation invalid.

It is important to recognize that it is highly improbable to ever completely remove someone's subjectivity upon making a decision. While such aforementioned methods are in place to help prevent the Judges' bias from affecting their decisions, it is implausible to ever expect to be able to remove all hints of their subjectivity from their rulings. Esteemed political philosopher Ronald Dworkin often spoke of the necessity of interpreting the Constitution with a moral understanding. As Carlos Ball describes Dworkin's idea, this "requires judges to 'interpret and apply the […] [Constitution's] abstract clauses [like those pertaining to equal protection and due process] on the understanding that they invoke moral principles about political decency and justice'" (2011, 14). We are moral creatures and, while the ability to judge impartially is ideal, it is an epitome that can never fully be realized. This is something we must accept of all political actors, not just Judges. Though they may enter into the political or judicial realm with the intent to impartially represent the people, we cannot assume that the moral beliefs of such actors will never influence their actions. At the same time, one's subjectivity is not necessarily a completely undesirable thing. Without some concept of morality we cannot have the idea of equality, for what we believe to be moral affects what we believe to be equal (Ball, 2011, 22). There is no single, agreed upon concept of morality so we can only assume it is up to our subjective beliefs what we believe to be moral. Our sense of morality is what propels individuals to fight for what they believe to be equal. It is what propels them to fight for what they believe to be theirs and others' fundamental rights. In the case of *Obergefell,* people believed the choice to marry whoever you want was an equal right and that is why they fought for it all the way to the Court. Ball explains;

> [t]he crucial judgement that must be made when addressing gay rights issues from a non-discrimination perspective is whether those with a same-sex sexual orientation differ in abilities, characters, or potential […] and to make that judgement, we must grapple with complicated normative questions regarding human sexuality and intimate relationships. (2011, 27).

While judgements should be made from as objective and impartial a view as possible, these types of decisions are not able to escape the influence of our underlying subjective beliefs. To criticize judicial review as defective merely because there is possibility the Judges may be influenced by their own subjectivity is not criticism enough to warrant it a useless factor in the American political system.

In response to the second criticism of judicial review, we will now look at how judicial review actually works to protect the individual rights of the nation's people as well as the federal system. Though we saw in *Obergefell* how judicial review can deny the states power in their jurisdiction, this works to protect the American political system in the long run. The expansion of judicial decision-making, which was referenced earlier in this paper, concerns a trend towards the increased protection of individual rights (Farabee, 1996, 246). Individual rights are those that are protected within the Constitution, such as the right to be treated equally under the law as stated in the Equal Protection Clause. It is unreasonable to criticize judicial review by saying it unfairly centralizes power into either the federal or state governments. Instead, the Court vests power wherever they believe the rights of the people will be best protected. The Rehnquist Court era saw more power concentrated in the state governments, while the decades previous saw more power concentrated in the federal government (Farabee, 1996, 246). In *Obergefell,* for instance, the Supreme Court believe the rights of the people would be better protected it the power to legislate marriage was vested in the federal government and not the states. This way they could ensure that the individual rights of same-sex couples to marriage were protected. The Court always has substantial reason to concentrate power into one level of government, even if that power has traditionally been reserved for the other level.

The critics of judicial review charge that this process does not allow important decisions to be determined by the majority, which they claim threatens the structure and purpose of the federal system. However, it is important to understand that, by their nature, constitutional individual rights are counter-majoritarian (Ryan, 2013, par. 11). You retain those rights regardless of what the majority thinks or agrees upon. You have the freedom to believe your religion even if your atheist neighbour believes that it is ridiculous. Likewise, you have the right to a proper trial even if the majority already be-

lieves you are guilty. Individual rights are constitutionally protected because they are believed to be essential to our well being as people and we are thus morally entitled to them. Erin Ryan writes, "the issue on the line is about protecting individual rights against unfair discrimination by the majority- then the Supreme Court has a constitutional obligation not to just leave the matter to the majoritarian political process" (2013, par. 12). The majority has proven to be wrong regarding matters of individual rights before. In the 1967 *Loving v Virginia* case, the Supreme Court found laws prohibiting interracial marriage unconstitutional. Although the majority of people at the time believed interracial marriage was wrong and should be legally prohibited, the Court recognized the fundamental individual right of people to marry who they want. Today, not many people would disagree that individuals should have the right to marry who they want regardless of race. However, had this matter been left up to the majority in 1967, people's right to marry who they want may still continue to be violated based on race. *Loving v Virginia* was used as a precedent for *Obergefell v Hodges*. Although many Americansperhaps even a majority- believe states should have the right to prohibit same-sex marriage, the Court defied this in an effort to protect individual rights. In *Loving*, the Judges found that the freedom to marry was an individual right essential to one's pursuit of happiness and restricting marriage based on racial classifications violated the Equal Protection Clause (Schaff, 2003, 140). Legislation that limits marriage to the union between one man and one woman is analogous to the legislation that was shot down in *Loving*, which restricted marriage based on race (Schaff, 2003, 140). The Judges in *Obergefell* found that restricting freedom of marriage based on sexual orientation violated the Equal Protection Clause as well and, thus, found legislation preventing same-sex marriages unconstitutional. Had such a decision been left up to the majority, states may still be violating individual rights by barring same-sex marriages. The Court had to intervene in order to ensure this right was protected.

The protection of individual rights through judicial review also serves to preserve the American federal system. The purpose of the federal structure is to act as a check and balance between federal and state power in order to protect the individual rights as protected by the Constitution (Ryan, 2013, par. 13). The extensive powers given to the states were supposed to protect the rights of the people from the authority of one overbearing national power. It was meant to allow greater representation of the people's wants and needs in the political system so the nation could serve them to the best of its ability. However, when the states act in a way that violates these rights, it is the responsibility of the judiciary to step in and re-balance power. In some instances, states do have incentives to undermine the federal structure and infringe upon individual rights (McGinnis et al, 2004, 121). This is exactly what happened in *Obergefell*. The states felt they had incentive and reason to bar same-sex marriages. However, as we have seen, this was found to be a violation of individual rights and thus provided justification for the Court to impose constitutional restraints upon the states. The states were overstepping their authority in order to try and regulate the individual rights of the people. While the prohibition from banning same-sex marriage on states may have intruded on their authority to regulate marriage, it re-balanced power within the federal system and ensured that people's individual rights were no longer put at risk. Judicial review ensured that the fundamental, individual right to marriage was protected and the power within the federal structure was maintained for the better.

Conclusion

In conclusion, we can now understand the controversy surrounding the use of judicial review in *Obergefell* and in general, yet the undeniable necessity of this process in order to protect the American political system. We can understand in-depth the ruling made by the Supreme Court concerning same-sex marriage and also the reasoning the Judges took to make their decision. We have seen the dissenting opinion given by the court as well as the general criticisms *Obergefell* received for its use of judicial review to decide on such an important matter. Furthermore, we explored the main criticisms of judicial review in general that accuse it of undermining democracy and threatening the federal structure. Finally, I argued that these criticisms were wrong in charging that judicial review does more harm than good to the political system. I explained how the general criticisms of judicial review and those pertaining to *Obergefell* are mistaken and that judicial review does, in fact, work to protect individual rights as well as the entire federal system. I maintain that judicial review is an essential practice within the political system that works to protect the individual citizens as well as political structure of America. In relation to *Obergefell,* I maintain that judicial review was a necessary process that worked to restore and protect the basic marital rights all American citizens have, which may have continued to be violated had this decision been left up to the majority. The continued use of judicial review, despite harsh criticisms against it, is essential in order to protect the rights of the people and maintain the basic workings of the American political system well into the future.

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