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Abstract

Obergefell v. Hodges decided in 2015 was a landmark case that answered two questions: (i) does the Fourteenth Amendment require a state to license a marriage between two people of the same sex, and (ii) does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state (Obergefell v. Hodges)? In a 5-4 decision, the Supreme Court answered both questions in the affirmative. Particularly relevant to the majority's reasoning in deciding this case is Ronald Dworkin's theory on judicial decisions from Hard Cases, a case not settled by precedent. Dworkin utilizes concepts such as the rights thesis and the doctrine of political responsibility to formulate his theory of adjudication. The rights thesis states that justices can make decisions that enforce existing rights. The doctrine of political responsibility ensures justices make consistent decisions. Viewing the law through principle rather than policy, Ronald Dworkin utilizes the rights thesis and the doctrine of political responsibility to assemble his theory of adjudication. Through an analysis of Dworkin's theory of adjudication, this paper will show how Dworkin's principles are found in the majority's reasoning in Obergefell v. Hodges.

1. Argument

1.1. Theory of Adjudication

Before discussing *Obergefell v. Hodges*, I will explain Dworkin's beliefs regarding adjudication, "a judicial decision or sentence"(Adjudication).

Dworkin's adjudication explanation acknowledges that "Judges should apply the law that other institutions have made; they should not make new law" (Dimock 219). The idea that judges should not make new laws follows the argument that judges are pseudo-legislators, which Dworkin contends is not the entire truth (Dimock 219). Dworkin supports the idea that judges are not pseudo-legislators when he states, "judges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading" (Dimock 219). However, Dworkin does not provide an immediate reason as to why this is the case. Instead, Dworkin states that a distinction between policy and principal arguments will clarify the issue. Policy arguments are used to support a political decision progressing society's collective goals (Dimock 2019). Principle arguments support a political decision that "respects or secures some individual or group right" (Dimock 219). The distinction between policy and principle is essential as Dworkin will soon argue that by utilizing principle, judges can be insulated from attacks of policymaking.

Additionally, Dworkin differentiates between hard and civil cases when he states that a hard case is "when no settled rule dictates a decision

either way" (Dimock 220). A discussion of hard cases is critical because those are cases that are not settled law, and the Supreme Court decides these cases. Dworkin's thesis on adjudication is that "judicial decisions in civil cases, even in hard cases...characteristically are and should be generated by principle not policy" (Dimock 220). He acknowledges that his adjudication thesis needs more explanation and does so in the next section. Dworkin's thesis on adjudication, combined with upcoming concepts such as the rights thesis and doctrine of political responsibility, apply to *Obergefell v. Hodges*.

1.2. Dworkin's Explanation

Dworkin says the judiciary should be secondary to the legislature, and there are two objections to the concept of judicial originality. Judicial originality is the idea that judicial decisions "create" new political rights/principles when making decisions.

The first objection to judicial originality is that "the law should be made by elected and responsible officials" (Dimock 220). Dworkin accommodates this objection by saying that it would be uncontroversial in the frame of law as policy (Dimock 220). Dworkin reminds the reader that law as policy is "a compromise among individual goals and purposes in search of the welfare of the community as a whole" (Dimock 220). Dworkin agrees that within our political system of representative democracy, looking at law as policy works better than a system of judges unelected to adjudicate new policies interfering with political interests. An example of the sentiment that judges interfere with political interests can be found in Senator Sessions op-ed about Supreme Court nominee Elana Kagan. Senator Sessions exhorted President Obama to pick "someone who is committed to the text of the Constitution and the vision of the Founding Fathers, or whether his nominee is an activist who will shed a judge's neutral, constitutional role to push a progressive policy agenda" (Rosdeitcher 2010). Senator Session's sentiments illuminate a preference for judicial conservatism, not activism. These two terms may be more familiar to the reader. The judicial conservatism described by Senator Session can be defined as the belief that "the constitutional text ought to be given the original public meaning that it would have had at the time that it became law" (Calabresi). In comparison, judicial activism is defined as rulings "issued by a judge that overlooks legal precedents or past constitutional interpretations in favor of protecting individual rights or serving a broader political agenda" (Spitzer 2020).

The second objection against judicial originality is "if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event" (Dimock 220). Like the first objection, Dworkin acknowledges that this objection is persuasive regarding a policy lens.Dworkin states, "it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event; it does, therefore, seem wrong to take property from one individual and hand it to another in order just to improve overall economic efficiency" (Dimock 220). Dworkin explains the persuasion by referencing the *Spartan Steel* case, where the court had to decide "whether to allow the plaintiff recovery for economic loss following negligent damage to someone else's property" (Dimock 220). Establishing the retroactivity of an argument of policy in cases such as *Spartan Steel*, Dworkin proffers an alternative to a policy justification, an argument of principle.

Dworkin claims that arguments of principle do not rest on the political concerns of a community. This claim insulates judicial opinion from attack by the first objection because an argument of principle focuses on the right 'claimed' and makes a decision irrelevant to the political interests or the accusation of policymaking (Dimock 221). Dworkin dismisses the idea of retroactivity in the second objection because the court did

not create the right; the right was already in existence (Dimock 221). The point that a court can be insulated from policy making when asserting a right already in existence will prove to be crucial to the majority opinion in *Obergefell v. Hodges*. An existing right refutes retroactive laws, otherwise known as ex post facto law, which are defined as "a criminal statute that punishes actions retroactively, thereby criminalizing conduct that was legal when originally performed" (Ex Post Facto.). If Dworkin said that courts could create new non-existing principles, that would violate retroactivity. If someone said, "What about a case where the decision is not decided by statute but by some "principle" that the court decides is applicable in the case." Dworkin responds by saying that plaintiffs have a right to the decision being made in their favor. If the decision is uncontroversial and arises based on principle and not statute, the defendant cannot claim retroactivity or feign surprise (Dimock 221).

After countering the two objections to judicial originality, Dworkin moves on to another problem of jurisprudence when he states, "Lawyers believe that when judges make new law [in hard cases] their decisions are constrained by legal traditions but are nevertheless personal and original" (Dimock 221). The idea that judges utilize legal tradition and beliefs in deciding cases is inherently contradictory. Dworkin acknowledges "the problem of explaining how these different contributions to the decision of a hard case are to be identified and reconciled" (Dimock 221). Dworkin offers the rights thesis as the answer.

1.3. The Rights Thesis

Dworkin describes the rights thesis as judicial decisions that enforce political rights already in existence (Dimock 221). The rights thesis resolves the tension between judicial originality and institutional history because utilizing existing political rights suggests that institutions act as a part of the judges' evaluation rather than a restraint (Dimock 221). Judges can use political rights that have standing in the history and morality of society to make new judgments that reflect the past decisions of society rather than be perceived as a new perversion of existing law (Dimock 221). However, Dworkin acknowledges that this can lead to judges making a judgment "that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete" (Dimock 221). Here, Dworkin acknowledges that judges weigh the existing political rights of the plaintiff and defendant to see which one wins. With the rights thesis established, Dworkin introduces the doctrine of political responsibility (Dimock 221).

1.4. The Doctrine of Political Responsibility

Dworkin defines political responsibility as political officials justifying a decision "within a political theory that also justifies the other decisions they propose to make" (Dimock 221). Essentially, the doctrine denounces decisions that can be argued in a vacuum but cannot be justified when considering a string of decisions. Dworkin states that policies do not provide the consistency demanded by the doctrine because they do not acquiesce to equal treatment (Dimock 222). Dworkin gives an example of policy inconsistency when he states, "It does not follow from the doctrine of responsibility, therefore, that if the legislature awards a subsidy to one aircraft manufacturer one month it must award a subsidy to another manufacturer the next" (Dimock 222). Principles, like policy, are given an example when Dworkin states, "If an official, for example, believes that sexual liberty of some sort is a right of individuals, then he must protect that liberty in a way that distributes the benefit reasonably equally over the class of those whom he supposes to have the right" (Dimock 222). Here, an argument based on principle provides the flexibility that allows the fulfillment of distributional consistency found within the doctrine of responsibility. Establishing an ar-

gument of principle fulfills the doctrine of responsibility; Dworkin states this about judicial decisions, "If the rights thesis holds, then the distinction just made would account, at least in a very general way, for the special concern that judges show for both precedents and hypothetical examples" (Dimock 222). This "very general way" discussed in the quote is detailed when Dworkin states, "An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted" (Dimock 222). Again, an argument of principle proves superior to an argument of policy because the consistency of principle can be applied across cases, while policy might result in inconsistencies. This point becomes important as the majority opinion in *Obergefell v. Hodges* displays the consistency desired.

The ideas established by Dworkin that have been discussed are numerous. Here are a few: Judges do not legislate when they make decisions that are so-called "beyond political decisions already made by someone else" (Dimock 220). Judicial decisions in civil or hard cases should be generated by principle and not policy (Dimock 220). Judicial decisions utilizing principle are insulated from political interests and the threat of retroactivity because judges enforce existing political rights (rights thesis) that reflect the society's past decisions (Dimock 221). The rights thesis thus fulfills the doctrine of responsibility. It allows justices to make decisions that can be equally applied across several cases (Dimock 222). Before moving into Justice Kennedy's majority opinion and how it reflects Dworkin's theory of adjudication, it is important to point out weaknesses in Dworkin's theory and other critiques.

One weakness in Dworkin's theory is that it could justify an evil policy. According to Dworkin, the rights thesis fulfills the doctrine of political responsibility. What if the principles reinforced in society's history and past decisions (rights thesis) are wicked? This could cause judges from cultures that have particularly complicated human rights pasts to affirm principles that would be particularly worrisome for human rights. Ultimately, Dworkin's theory could justify a case through principle, which could lead to harmful policy.

Additionally, one could accuse Dworkin of aiding judges being policymakers. Dworkin makes it clear that judges should justify decisions through principle. However, one's principles can be highly influenced by ideology. So, one could say that explaining a decision through "principle" is just another way for judges to shield personal political ideology to enforce their left-leaning or right-leaning ideology.

1.5. Application of *Obergefell v. Hodges*

This sub-section of the paper provides support proving the majority opinion delivered by Justice Kennedy in *Obergefell v. Hodges* reflects Dworkin's theory of adjudication (Obergefell v. Hodges.). Specifically, Justice Kennedy's third section of the majority opinion demonstrates the idea that judges should decide cases on principle rather than on policy.

In section three of the opinion, Justice Kennedy begins with the Due Process Clause (Obergefell v. Hodges). The Due Process Clause, in the 14th Amendment, states that no State shall "deprive any person of life, liberty, or property, without due process of law" (Obergefell v. Hodges). Justice Kennedy states that the liberties protected by the Clause extend to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U.S 438,453 (1972); *Griswold v. Connecticut*, 381 U.S 479 486 (1965) (Obergefell v. Hodges). Justice Kennedy states that a part of the judiciary's duty to interpret the Constitution is the identification and protection of fundamental rights (Obergefell v. Hodges). Justice Kennedy acknowledges that interpretation of the Constitu-

tion is not an exact science. Still, he does state, "History and tradition guide and discipline this inquiry but do not set its outer boundaries" (Obergefell v. Hodges). It does not set "its outer boundaries" because Justice Kennedy sees the nature of injustice as one that has evolved as our attitudes by generation have changed (Obergefell v. Hodges). These changes in attitude have created the platform for societal changes regarding marriage, gay rights, and gay marriage, as described earlier in the opinion. Utilizing the idea that with changes in societal attitude, the enforcement of claims to liberties one has been excluded from occurs, Justice Kennedy launched the principle the majority's decision is based on, the right to marriage.

He starts by noting that the Supreme Court has upheld the right to marry in cases such as *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987) (Obergefell v. Hodges). For example, In *Loving v. Virginia*, the Supreme Court "invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause" (Obergefell v. Hodges). The common component in these cases is that the Due Process Clause protects the right to marry. Justice Kennedy states that the precedents laid by using the principle of the right to marry have presumably only meant to protect marriage between a man and a woman (Obergefell v. Hodges). However, within these cases, Kennedy finds that they have expressed general constitutional principles that possess broad reach within marriage (Obergefell v. Hodges). Justice Kennedy says that an analysis of these principles, which number four in total, will prove that same-sex couples can exercise the right to marry (Obergefell v. Hodges).

The first relevant principle set by the Court is that the "right to personal choice regarding marriage is inherent in the concept of individual autonomy" (Obergefell v. Hodges). Justice Kennedy points to *Loving v. Virginia* as displaying the intrinsic connection between marriage and liberty (Obergefell v. Hodges). Justice Kennedy acknowledges that it would be hypocritical of the Court to recognize the right to privacy in some parts of family life but not when it comes to marriage (Obergefell v. Hodges). Additionally, Justice Kennedy cites the Supreme Court of Massachusetts because it affirmed the idea that marriage is a concept of autonomy and even characterized it as one of "life's momentous acts of self-definition" (Obergefell v. Hodges).

The second reason outlined is that the "right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals" ("Obergefell v. Hodges). Here, a case cited by Justice Kennedy is *Turner v. Safley* (Obergefell v. Hodges). In *Turner v. Safley*, the Court noted the importance of the union of marriage when it decided that prisoners could not be "denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right" (Obergefell v. Hodges). Another reason in support is the idea of marriage responding to the "universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live, there will be someone to care for the other" (Obergefell v. Hodges).

The third reason is that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education" (Obergefell v. Hodges). Justice Kennedy recognizes this principle when the Court states in *Zablocki* that, "[T]he right to 'marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause" (Obergefell v. Hodges). The principle is further supported by the fact that marriage provides the foundation for a stable home and consistency that is in the best interest of one's children (Obergefell v. Hodges). Justice Kennedy points out that both parties in the case agree that same-sex couples can provide "loving and nurturing homes to their children, whether biological or adopted," and have been providing that to

thousands upon thousands of kids at this very moment (Obergefell v. Hodges). In addition, several states allow gays and lesbians to adopt children either single or while in a relationship (Obergefell v. Hodges). Justice Kennedy points to the ironic nature of the idea that gays and lesbians are not allowed to get married but can fulfill a central pillar of marriage by raising children (Obergefell v. Hodges).

The fourth reason is the "Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order" (Obergefell v. Hodges). Justice Kennedy cites *Maynard v. Hill* (1888) when the Court explained that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress" (Obergefell v. Hodges). Cementing marriage as a pillar of society, Justice Kennedy cites the many benefits that society and government confer on married couples, such as "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access... workers' compensation benefits; health insurance; and child custody, support, and visitation rules" (Obergefell v. Hodges). Citing these benefits allows Justice Kennedy to state that because same-sex couples are excluded from these benefits, it burdens them to live unequally compared to their married opposite-sex peers (Obergefell v. Hodges). Following these principles, Justice Kennedy states, "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest" (Obergefell v. Hodges). Despite this statement, Justice Kennedy explains that the respondents, in this case, feel it is the wrong framing of the issue.

The respondents in *Obergefell* claim that the petitioners are attempting to assert the right to same-sex marriage and not the right to marry (Obergefell v. Hodges). This claim is substantiated by the respondents when they cite *Washington v. Glucksberg* (1997), which enumerated a "'careful description' of fundamental rights" (Obergefell v. Hodges). Justice Kennedy says that the usage of *Glucksberg* is a misplaced equivocation. In *Glucksberg*, the approach of the "careful description of fundamental rights" regarding history was appropriate for physician-assisted suicide but not for marriage (Obergefell v. Hodges). In the case of marriage, Justice Kennedy again cites *Loving, Turner*, and *Zablocki* when he states, "*Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry" (Obergefell v. Hodges). These cases prove Kennedy's point regarding the idea that the petitioners in *Obergefell v. Hodges* claim the right to marry and not the right to same-sex marriage. In disproving the respondents' framing of the constitutional question, Justice Kennedy allows the majority's opinion to speak for itself. The argument is that the principle of the right to marry through the Equal Protection Clause has been affirmed by the Supreme Court repeatedly in *Loving, Zablocki*, and *Turner*. Using the basis of principle, Justice Kennedy declares, "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. . . The Court now holds that same-sex couples may exercise the fundamental right to marry" (Obergefell v. Hodges).

By explaining Justice Kennedy's majority opinion in the case *Obergefell v. Hodges*, it has been shown to reflect several of Dworkin's beliefs on adjudication. The first is the usage of principles to justify decision-making. Justice Kennedy uses the principle of the right to marry and the precedents that support this principle to support the legalization of same-sex marriage. Some might say this decision reflects an assertion of a "new right" by pointing to the several areas in Justice Kennedy's opinion where he says "new" in reference to gay marriage. This critique is misguided because Justice Kennedy enforces an exist-

ing right, as explained by Dworkin's rights thesis, the right to marry. This idea that there is anything "new" in this case regarding rights/principles is not apparent in the majority's reasoning. Justice Kennedy also showcases Dworkin's idea that the rights thesis can fulfill the doctrine of responsibility. Justice Kennedy shows that the right to marry has been equally applied in many cases brought to the Supreme Court. Additionally, Justice Kennedy explains the principle of the right to marry, used in *Obergefell* is used in *Loving* and *Turner*, which has not been overturned, in affirming the right to marry. Thus, Justice Kennedy fulfills this qualification by Dworkin, "An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted" (Dimock 222).

2. Conclusion

This paper has proven the idea that the majority opinion in *Obergefell v. Hodges* reflects Dworkin's theory of adjudication outlined in the section titled *Hard Cases*. This was done by showcasing the majority opinion's usage of principles such as the right to marry and history/precedent from the court cases such as *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley* to prove the existing principle of the right to marry and thus fulfill the doctrine of responsibility.

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