

BOOK REVIEW: A SECOND BITE AT THE APPLE: WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID

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I. INTRODUCTION

“Everything has been said before, but since nobody listens we must always go back and begin again.”¹

This is a review of Jack M. Balkin’s new book, *What Obergefell v. Hodges Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Same-Sex Marriage Decision*. The book, edited by Balkin, presents alternative decisions to the *Obergefell v. Hodges*² Supreme Court case, written by Balkin and other legal scholars. This format is thoroughly engaging and well-rounded due to the inclusion of dissents.

II. OVERVIEW

The only rule for contributions was that only legal materials available on June 26, 2015—the day of the *Obergefell* decision—could be used.³ Invited authors could contribute either a majority opinion, a concurrence, or a dissent. Balkin did a phenomenal job of not only collecting diverse perspectives in that the contributors disagree on the ultimate outcome of the case, but also by collecting diversity within those who agree and those who disagree with the *Obergefell* outcome. Before the various decisions are presented, Balkin first provides a brief history of the marriage-equality movement, followed by an explanation of the key issues in the *Obergefell* case.

While all of the majority opinions and concurrences were in some way based on equal protection grounds,⁴ there was still great diversity in exactly how the authors developed these equal protection arguments. Douglas NeJaime and Reva B. Siegel ground their opinion in the liberty protection

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¹ JACK M. BALKIN, WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S SAME-SEX MARRIAGE DECISION 309 (2020) (quoting ANDRÉ GIDE, *LE TRAITÉ DU NARCISSE* 104 (Editions de l’Université d’Ottawa 1978)).

² 135 S. Ct. 2584 (2015).

³ BALKIN, *supra* note 1, at x.

⁴ *Id.* at 74.

found in the Fourteenth Amendment's Due Process Clause, similar to Justice Kennedy's majority opinion.⁵ Andrew Koppelman grounds the right to same-sex marriage in gender equality.⁶ Namely, the reason Jack can marry Jill but not John is because of his gender, and therefore same-sex marriage bans unjustifiably discriminate on the basis of gender.⁷ William N. Eskridge, Jr. implements an originalist approach, positing that the intent of the Fourteenth Amendment was to prevent the very type of "class legislation" that is in question in *Obergefell*.⁸ Catherine Smith focuses on the harm and the equality interests not of the same-sex couples denied marriages but of their children.⁹ She argues that denying same-sex couples the right to marry results in discrimination against their children, compared to the children of married couples.¹⁰

Other majority opinions take a unique approach. Melissa Murray makes an interesting case focusing on the inequalities, not of gays and lesbians, but the unmarried. She intentionally diminishes aspects of Kennedy's opinion that read like "a love letter to marriage,"¹¹ because this perpetuates the harmful notion that life outside of marriage is somehow less profound and fulfilling.¹² Balkin himself contributes a majority opinion that is based on the creation of a new suspect classification for sexual orientation, thus requiring heightened scrutiny review.¹³ This more expansive holding could be applied to more than just issues of marriage.¹⁴

The dissents primarily focus on four theories to defend the legal status quo. These include looking to existing precedents, the original meaning of the Constitution, state justifications for banning same-sex marriage, and the restrained role of courts in a democracy.¹⁵ The dissent written by Sherif Girgis and Robert P. George focuses on issues involving the lack of limiting principles in Kennedy's majority decision. For example, they ask under what legal principle does the logic in Kennedy's majority decision not equally apply to those seeking multiple-partner marriage?¹⁶ Helen M. Alvaré's dissent focuses primarily on the family law argument. Namely, her

⁵ *Id.* at 72.

⁶ *Id.* at 75.

⁷ *Id.*

⁸ *Id.* at 79. He defines "class legislation" as "legislation that created special privileges for political insiders or targeted 'odious individuals or corporate bodies' with special legal burdens." *Id.*

⁹ BALKIN, *supra* note 1, at 81.

¹⁰ *Id.* at 82.

¹¹ *Id.* at 318.

¹² *Id.*

¹³ *Id.* at 76.

¹⁴ *Id.* at 78.

¹⁵ BALKIN, *supra* note 1, at 83–88.

¹⁶ *Id.* at 321.

view that marriage recognition laws are a legal tool for “managing the consequences of heterosexual romantic pairings.”¹⁷

The book concludes with thoughtful comments from each of the contributors. These include insights into the strategic considerations that resulted in the specific language implemented by each author. Here, the authors also openly and honestly interact with the likely criticism their opinions would receive.

III. ANALYSIS

The structure of this book—in which author rationales accompany alternative opinions for *Obergefell*—is a brilliant format. The reader is educated regarding the actual Kennedy decision, the competing interests involved in the case, and how various strategies would have affected future outcomes. By including dissents, this format also exposes the reader to the best arguments for and against the plaintiffs in *Obergefell*. It is unfortunate that such a well-rounded book is a rarity.

While many authors genuinely attempt to present both sides to a controversial issue in the best light possible, slight indications as to the author’s true preferences inevitably arise. These intimations may be subtle and ultimately irrelevant to the factual matters at hand, but nevertheless still demonstrate bias. For example, the issue in *Obergefell* can be defined as one of marriage equality, same-sex marriage, or the redefinition of marriage. All three of these renditions are technically correct, but they each demonstrate a preference for certain outcomes.¹⁸

The method of providing a compilation that includes authors making the strongest case for what they personally believe is superior to when an author attempts to present both sides impartially. Some authors are better than others at genuinely attempting to present opposing sides of an issue in the strongest way possible. For example, Balkin excels at this challenging task, explicitly listing arguments against his personal preference for the *Obergefell* decision to great effect.¹⁹ But regardless, there is no substitute for allowing the proponents of a position to present the arguments in favor of it themselves. After reading a book like this, one is forced to wonder why more authors do not follow suit when covering a controversial topic.

¹⁷ *Id.* at 323.

¹⁸ For example, if the issue is defined as “marriage equality,” people will be more hesitant to oppose it, as it is not desirable to be against “equality.” Conversely, if the issue is defined as “the redefinition of marriage,” people will naturally be more hesitant to support it. *See, e.g.*, Michael Quinlan, *The Meaning of Marriage and Australia’s Postal Poll*, E-INT’L RELS. (2017), <https://www.e-ir.info/2017/09/28/the-meaning-of-marriage-and-australias-postal-poll/>.

¹⁹ BALKIN, *supra* note 1, at 78–79.

While many legal topics would benefit from this format, *Obergefell* is uniquely situated for such treatment. The rate of change that has accompanied issues involving LGBTQ rights means that the five years since the *Obergefell* opinion have seen rapid change both in the law and in society. The landmark nature of *Obergefell* has also resulted in many tangentially related issues, such as public accommodations discrimination, multiple-partner marriage, LGBTQ workplace discrimination, and transgender rights. It is interesting to see different views on these issues with the benefit of hindsight. Relatedly, since the holding in *Obergefell* will likely evolve over time, rewriting the decision involves the aspirational practice of considering what it should become.²⁰

Obergefell is also ideal for the consideration of different opinions because there are a number of potential remedies available for same-sex marriage proponents to promote. For example, the plaintiffs in *Obergefell* could have gained marriage equality by either the Court granting access to same-sex couples or getting rid of state-sanctioned civil marriage altogether.²¹ Broadening the remedy to cover not just marriage interests but protection against discrimination for “sexual orientation minorities” would include more far-reaching rights, such as public employment, education, insurance, jury service, etc.²²

IV. CONCLUSION

Whether the reader agrees or disagrees with the end result in *Obergefell*, the alternative decisions contained in this book will provide a more robust understanding of the nuanced issues involved. This book is highly recommended to anyone with an interest in LGBTQ issues. Hopefully, the practice of compiling hypothetical opinions from diverse authors will be implemented in other books about Supreme Court cases.

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²⁰ *Id.* at xiv.

²¹ *Id.* at 82–83.

²² *Id.* at 303–04. Although, it is interesting to note that “sexual orientation minorities” might not be interpreted to cover transgender rights. After all, a transgender male who is attracted to females is heterosexual and therefore not a sexual orientation minority. To say otherwise would imply that this person is not fully male.