Is It Too Late For Marriage? - Constitutionally Striking Down Abusive Judicial Decisions

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Recently, I had someone write me the following regarding the Supreme Court's decision, in *Obergefell v. Hodges*, regarding Marriage and the Supreme Court's legally abusive decision:

"I think we're too late to have any affect on this issue, since the Supreme Court already passed law that homosexual marriage is now legal in all states."

I was thankful to be reminded from this person how pervasive the mindset has become that when the Supreme Court rules on an issue that it is somehow "settled law" and that not much can be done from a Legislative, Executive, or State position (or for that matter as a concerned citizen).

Below are portions of my response, which I hope will point out three things:

1. that the Supreme Court only makes opinions which rely on the Legislative and the Executive branches to enact;

2. that under separation of powers, each branch of the government determines Constitutionality, and particularly for their own branch; and

3. that each branch, as well as the States as a whole, have the ability to check abusive Supreme Court decisions; either by not enforcing them (which includes de-funding the enforcement of the decision), various limitations on the court through law, or through amending the U.S. Constitution.

Note: If you don't read any further: at minimum, read Robert P. George's article here:

- http://www.firstthings.com/article/2003/02/lincoln-on-judicial-despotism
  - *Robert P. George is the McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University (2003)*

Capitulation is a sure sign of, and will only lead to, defeat on this issue. Constitutionally, the Supreme Court does not pass law - although some continue to refer to their decisions wrongly as "case law" rather than the correct "case history".

There are a number of things that can be done to limit the Supreme Court's over reach in this decision (or other legally abusive decisions):

- Congress can pass a law that restricts the Federal court from hearing cases on this topic at all. This comes from Article 3 Section 2 of the U.S. Constitution which states:

"…In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

On this point ***The Federalist Papers***, written by Founding Fathers Alexander Hamilton, James Madison, as well as by the first appointed Chief Justice to the Supreme Court, John Jay, state in paper 81 :

"We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, 'with such EXCEPTIONS and under such REGULATIONS as the Congress shall make.'"

Here Congress could limit the type of appellate cases that the Supreme Court could hear, leaving the case to be determined by State Supreme Courts. This actually was proposed, for this very issue, by Congress concerning the Defense of Marriage Act in 2004:

- http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg94458/html/CHRG-108hhrg94458.htm
  - (although the formatting is a little distracting, this link is well worth reading).

Note: I would point out that much is made of Congress not being able to trespass on due process or equal protection in limiting the Supreme Court, although no branch is able to trespass on constitutional authority without being abusive, unlawful, and therefore the decision void. Here we must understand due process and equal protection in the historical constructionist sense, and resist the use of how the Supreme Court has manipulated these clauses of the U.S. Constitution into something wholly devoid of a constructionist and historical context. We must also remember that limiting or excluding the Federal Courts, including the appellate action of the Supreme Court, from hearing certain cases does not take the issue out of the jurisdiction of the judiciary, it only reassigns it to the State courts for determination within their state contexts.

- Congress can also specifically de-fund the decision from being executed.

In paper 78 of ***The Federalist Papers*** it is explained:

"… the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

- Congress, or the States through a constitutional convention, can propose a constitutional amendment to the states for ratification (this was one of the reasons why the defense of marriage amendments through the states were so important; to not only protect marriage under DOMA, but to gain support within the states toward the 3/4 needed to ratify such an amendment, and the 2/3 needed for a state constitutional convention). This authority comes from Article 5 of the U.S. Constitution.

- The President (the next one of course), can specifically acknowledge the decision as unconstitutional and refuse to enforce it – acknowledging the Supreme Court decision as abusive and therefore not binding either legally, or on the Executive branch.

Justice Joseph Story was a Supreme Court justice appointed by our fourth President, James Madison. He helped revive Harvard School of Law as the first Dane Professor of Law.
Justice Story wrote the constructionist ***Commentaries on the Constitution*** in 1833. He explained, in section 1570 footnote 2 of that work, that it is the Constitution, not judicial authority, that allows the judiciary to declare a law void – and if they have abused that authority, their decision is as void as when Congress abuses their authority and passes laws that transgress the plain meaning of the Constitution:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination, that the doctrine would imply a superiority of the judiciary to the legislative power.... It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument [the Constitution]."

Each branch determines Constitutionality within their own branch, since each branch and their members must determine constitutionality for the purpose of upholding their oath to defend the Constitution – Article 2 Section 1, and Article 6 of the U.S. Constitution.

While the Executive or Legislative branch can not change an opinion of the Court, they do have the power to declare a Court's opinion to be unconstitutional and void in its effect. This they do by adhering to their oath to protect the Constitution, and use the full power of their office to prevent execution of the judgment, de-fund the judgment from being executed, or restrict the court in other ways through law. The Executive and Legislative branches have the power to check the Judicial branch – on the same basis of Constitutionality. If the Court makes a decision that is contrary to the plain constructionist and historical meaning of the Constitution, it is the duty of the Executive and Legislative branches, as well as any officer who takes an oath to protect the Constitution (contrary to the abusive decision in *Cooper v. Aaron* in this regard), to not uphold the decision, since it is null and void due to the Supreme Court's transgressing the Constitution – even if the court used the phrase "constitutional" in their opinion while at the same time undermining the Constitution's clear intent.

There are numerous cases where Presidents have refused to enforce abusive decisions from the Court.

President Thomas Jefferson refused to enforce Marbury v. Madison. He pointed out to Justice William Johnson on June 12, 1823 (transcript) and (photographic facsimile) that:

"This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a most case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly perhaps, because it in some measure, bore on myself. among the midnight appointments of mr Adams' were commissions to some federal justices of the peace for Alexandria. these were signed and sealed by him, but not delivered. I found them on the table of the department of State, on my entry into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme court for a Mandamus [writ of mandate ordering an action of a inferior authority] to the Secretary of State (mr Madison) to deliver the commission intended for him. the court determined, at once, that, being an original process, they had no cognisance of it [no authority over the case]; and there the question before them was ended. but the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case: to wit, that they should command the delivery. the object was clearly to instruct any other court having the jurisdiction, what they should do, if Marbury should apply to them. besides, the impropriety of this gratuitous interference, could any thing exceed the perversion of law?. . . yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion [censure or critical comment against] on it's being merely an obiter [remarks made in passing] dissertation of the Chief Justice."

President Jackson refused to uphold the Supreme Court's decision regarding the National Bank which he saw as unconstitutional. The President explained in his veto message on July 10, 1832:

"The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive…"

President Lincoln, referring to President Jackson's refusal to uphold the Supreme Court decision regarding the National Bank stated:

"Do not gentlemen here remember the case of that same Supreme Court… deciding that a national bank was constitutional? [see McCulloch v. Maryland and Osborne v. United States Bank]…. [Jackson] denied the constitutionality of the bank that the Supreme Court had decided was constitutional… [saying] that the Supreme Court had no right to lay down a rule to govern a coordinate branch of the government, the members of which had sworn to support the Constitution – that each member had sworn to support that Constitution as he understood it."

Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 277: originally quoted from Holland, J.G. ,Life of Abraham Lincoln, (Springfield, MA: Gurdon Bill, 1866), 175.

President Lincoln also refused to uphold the Supreme Court's judgment in Dread Scott because he had disagreed with the constitutionality of the court's decision in regards to slavery - and chose to uphold his oath rather than the court's opinion. To follow a well written article on President Lincoln's refusal to uphold Dread Scott on the basis of his oath to protect the Constitution and Natural Law, upon which the Declaration of Independence established the legality of our government – see Robert P. George's article here:

- http://www.firstthings.com/article/2003/02/lincoln-on-judicial-despotism
- Also see: For more details on issues surrounding the Dread Scott case, as well as President Lincoln's refusal to enforce Judicial decision within what Lincoln felt was a constitutional authority of the war powers: Click here

Supreme Court Justices, Illustrated Biographies 1789 - 2012, edited by Clare Cushman, Third Edition (Thousand Oakes, CA: CQ Press, 2013), 105; section on Justice Roger Taney.

We must always remember that the Court only passes judgment in terms of opinion on law - and that is why they are the weakest of the branches in legal terms. Practically though, the Supreme Court has become strong because Congress, the President, and the States have not used their powers to check the Court.

The first course of action that individuals might consider regarding the abusive marriage decision would be:

- to p u s h h ar d fo r a c o n st it ut io n al a m e n d m e nt (m a n y le

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http://www.bcsig.org/news-reader/items/consider-asking-for-a-federal-marriage-amendment.html); and

- to push for the First Amendment Defense Act in congress - which in practical terms will take precedence over the effect of the court's decision in regards to people (including businesses) being persecuted because of their religious convictions on this issue (if you would like to contact your representatives concerning this legislation, one option is to visit FRC Action here: https://www.frcaction.org/contact-officials).

I have read quite a few opinions from appellate courts and the Supreme Court, and while you may see the dissenting justices disagree with the legal approach of the majority, it is fairly rare for them to make a united outline of the reckless lack of any judicial history or legal precedent for the majority decision. In this decision regarding marriage, all four of the dissenting justices, not lightly, but with clarity and powerfully, asserted the abuse of the majority - each stating specifically that the decision had nothing whatsoever to do with constitutionality, or for that matter, any legal precedent or judicial precedent (and in fact they pointed out a number of cases in the court's precedence that not only refuted the majorities decision, but clearly pointed out the majority's lack of legal precedence in preference for their clear declarations [as if they were declaring law]).

We are to submit to a higher law - the Law of Nature and Nature's God – above every law. The Law of Nature and Nature's God is: law that has grown up in the western world that was directly shaped by the general revelation and special revelation of God - which is the same as saying the word of God contained in the New and Old testaments of the Bible. American Jurisprudence was founded on the basis of the Natural law of God – in other words, our Founding Fathers in the Declaration of Independence appealed to the legitimacy of the founding of our Country, as well as the authority of its officials, as being directly derived from the Law of Nature and Nature's God. Samuel Adams affirmed that the authority specified in the Declaration of Independence is the legal authority on which the U.S. Constitution rests when he stated:

"Before the formation of this Constitution.... [t]his Declaration of Independence was received and ratified by all the States in the Union and has never been disannulled."

Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010) , 253: originally quoted from Adams, Samuel, The Writings of Samuel Adams, edited by Cushing, Harry Alonzo (New York: G.P. Putnam's Sons, 1908), Vol IV, 357, to the Legislature of Massachusetts, January 17 1794.

As a sample of the historical and legitimate meaning of the Law of Nature, see directly below. These are author's which our Founding Father's relied upon, as well as an example from one of the Founding Father's exposition of the Law of Nature's practical effects on human law (there are many other examples that could be quoted):

- **"Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... consequently, as man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. This will of his Maker Is called the law of nature.... This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.... The doctrines thus delivered we call the revealed or divine law and they are to be found only in the holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature.... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these"**

Blackstone, William, Commentaries On The Laws Of England. (Oxford: Clarendon Press, 1778), Vol I, 38, 41, 42

- **"What God has shown to be His will that is law"**

Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Grotius, Hugo**, Commentary on the Law of Prize and Booty, translated from the original manuscript of 1604 by Gwladys L. Williams (Oxford: Clarendon Press, 1950), Vol. 1, 8

- **"It may seem impossible or any state so long to subsist unless it were upheld by a constant particular care and by the power of a divine hand."**

Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Grotius, Hugo**, The Truth of Christian Religion (London: Richard Royston, 1780), 20

- **"Not to obey God, and not to obey the Civil Magistrate if taken asunder, are both notoriously sins; and yet… when the Magistrate commands anything contrary to the Divine Law, in this case disobedience to our earthly governors ceases to be evil because that law which binds us to conform to the will of human sovereigns is always understood with this provision and condition that they enjoin nothing repugnant to [in violation of] the laws of God."**

Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Puffendorf, Samuel**, Of the Law of Nature and Nations, Eight Books, edited by Basil Kennet (London: R. Sare, 1717), Book 1, 68.

- **"All [laws], however, may be arranged in two different classes. 1. Divine. 2. Human laws.... But it should always be remembered that this law, natural or revealed, made for men or for nations, flows from the same Divine source: it is the law of God.... Nature, or, to speak more properly, the Author of nature, has done much for us;… What we do, indeed, must be founded upon what he has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must rest its authority, ultimately, upon the authority of that law, which is Divine."**

James Wilson - Signer of the Declaration of Independence, of the U.S. Constitution, and the first appointed justice to the Supreme Court. Wilson, James, *"Of the General Principles of Law and Obligation,"* in The Works of the Honourable James Wilson, edited by Wilson, Bird. (Philadelphia: Lorenzo Press, 1804), Vol. I, 103, 104-105.

Just as Daniel and his friends, recorded in the Biblical book of Daniel, defied the king in order to adhere to a higher law, because they understood that the right to govern only went as far as God had defined it, so too it is now our turn to join in civil disobedience and suffer the consequences, and to do whatever we can to work to right the wrong the court has wrongly placed us under. It is to acknowledge with God, through Paul, in Colossians 1:15-16 that all things were created by and for Jesus Christ, whether powers or rulers or thrones or authorities, and when authorities in government step outside of that realm, they abuse their authority and position. Instead, we must adhere to the Supreme lawgiver and his higher law, as specified in the Bible.

Many Christians, and Christian organizations, recognize that this decision is a direct strike at religious liberty, as well as the freedom of speech. Unlike Roe v. Wade, they recognize that this decision will extend the silencing of Christians, and others, way beyond what was already happening in the States through sexual orientation, and gender identity and expression laws. They have already agreed that they would not recognize this opinion and would take the issue to court on First Amendment grounds, appealing to the majority's words in the *Hodges* opinion [this opinion] that somehow religious freedom and freedom of speech would be preserved before the court, and where that fails to choose the punishment over violating their conscience.

- See article: Christian Leaders Vow Civil Disobedience If Supreme Court Legalises Same Sex

Marriage

But, you must remember this - the media uses its money and influence to project a certain aspect that they portray as reality. But, marriage, according to the traditional definition, on the whole has always been supported at the polls among people when it has been put to the vote, and people when asked in polling have supported the traditional definition of marriage. As an example, Family Research Council has recently undertaken a new poll here (Feb. 2015): http://downloads.frc.org/EF/EF15B71.pdf. But, if the media, and others, can make you feel that you are the odd man out, and that it is all over with in regards to the legal definition of marriage (and its legal consequences across the board), then they can bring the opposition to this court decision to not act, because they have made them feel they are the only ones out there that recognize the moral reality that marriage is between one man and one woman alone - upon which we appeal to a higher power, to a Supreme Law Giver, and not to ourselves.

Here we must recognize that when the court supposedly redefined marriage, it affected a whole slew of legal issues and law (such as laws on marriage, insurance, adoption, divorce, discrimination, governmental interest in regards to the people bringing forward referendums, state rights, religious liberty, etc.), that were instantly changed - if this decision is allowed to stand.

Making their voice heard clearly and constantly is the exact way that America moved in the direction of the liberation movement for the past 40 years, and in the past 25 directly into the hands of the homosexual movement. They convinced Christians and others that you can not legislate morality (while they insisted on legislating a new "morality" which brings in its wake destructive realities that affect peoples' real everyday lives in an oppressive way), and that Christians and other's who would agree with what the Bible defines in terms of morality should not be involved in government - all the while taking our seats at the table to define what will be seen as good and right in society at law.

While we protect rights that God has defined as a part of Natural law for every human being, and not redefinitions of what God has defined and acknowledged as sinful and hurtful to human beings, we both grieve and work to restore the freedom that has been taken from those who find their rights to religious expression and free speech silenced. For instance, see the following where religious expression and free speech has been consistently challenged before the *Hodges* decision was even decided (see Section III and IV particularly): http://downloads.frc.org/EF/EF14G83.pdf

In the end it is determined by this one thing: who will fight harder (both in prayer and in action).

I hope this helps in seeing the importance of doing what we can to make sure our voice is heard clearly,

and that those who hear it understand that this is not an issue we will, or can, capitulate on - it is only then that action will be taken toward a Federal Marriage Amendment (or other legal protections), and that it will embolden those who have the influence and are in the correct position to act.