The Supreme Court’s Same-Sex “Marriage” Decision: Grave Implications and Needed Responses

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This was one of SCSS President Stephen M. Krason’s “Neither Left nor Right, but Catholic” columns that appeared during 2015 in Crisismagazine.com and The Wanderer and at his blog site (skrason.wordpress.com). It discusses the U.S. Supreme Court’s landmark 2015 decision on same-sex “marriage,” Obergefell v. Hodges, and its likely implications for religious liberty, true marriage, and children. He says it is the latest expression of concocted rights under the Court’s “substantive-due-process” doctrine. He suggests ways to respond to the decision politically and legally—by citizens, organizations, and the use of executive power by a sound president in the near future, and by the Church.

The U.S. Supreme Court has just engaged in its latest unconstitutional exercise of raw judicial power and surely its most extravagant attempt to forcibly remake American culture since the 1973 Roe v. Wade/Doe v. Bolton abortion cases. The Obergefell v. Hodges decision on same-sex “marriage” was based on the notion of “substantive due process”—which essentially has meant rights that the Court, following the thinking of elite opinion-makers and organized interest groups, has read into the Constitution. While the first expression of substantive due process concerned a convoluted absolutist notion of property rights in the nineteenth and early twentieth centuries, its later expressions—beginning with the 1965 Griswold v. Connecticut decision—have involved concocted sexual and reproductive rights. The difference from the previous cases since Griswold, in my judgment, is that the Obergefell decision may bring on an era of the suppression of legitimate, traditional rights of those who refuse to accept it and the reconfiguration of morality that it represents.

The decision is certain to trigger heightened attacks on traditional Christian believers, churches, and affiliated religious organizations that refuse to accept the validity of same-sex “marriage” or the morality of homosexual behavior in general. Christian florists, wedding planners, photographers, et al. already have been feeling the heavy hand of the state. Very soon, we are likely to see clergy who preach the traditional, true Christian teaching about homosexuality and marriage from the pulpit or...
write about it brought up before state and local “human-rights” commissions as happens in Canada. The totalitarian-inclined homosexualist organizations can be expected to send spies to traditional churches to listen for such sermons so they can file complaints with the commissions. It is virtually certain that these organizations will move to challenge the tax exemptions of churches that refuse to carry out same-sex “marriages.” The IRS may be ready to accommodate them. Religiously-affiliated colleges and universities that won’t allow student groups that promote the homosexualist ideology are likely to face the same, as well as threats from the U.S. Education Department to cut off their students’ eligibility for federal loans and Pell grants. The ones that have teacher-licensing or certification programs may find themselves having to commit to accepting active homosexuals or persons in same-sex relationships as a condition for retaining them. Secular-accrediting agencies—general and in professional fields—are likely to move to set as a condition for accreditation (including for religiously-affiliated schools) institutional policies against “sexual orientation” discrimination—which for all practical purposes means acceptance of homosexual behavior. The American Association of Law Schools has done that for some time. Catholic and other religious adoption agencies that refused to place children with same-sex couples are already out of business in Massachusetts and Washington, D.C. We can expect this to happen nationwide. Social halls owned by organizations like the Knights of Columbus will have to rent their facilities for same-sex “weddings,” and we can expect homosexualist organizations to set them up for human-rights-commission complaints and civil-rights lawsuits by approaching such facilities to see if they will accommodate them. There will likely be a strong push to ban psychological therapy to correct same-sex attraction—even for adults who desperately seek it. California and New Jersey have already barred parents from seeking it for their minor children. John-Henry Westen writes about just how far totalitarian-oriented homosexualists are prepared to go: They threatened his Life-Site News with a lawsuit for using male pronouns when referring to a “transgendered” male. These are only a small number of the likely threats to religious and free speech rights in the aftermath of Obergefell.

Even if the homosexualist movement would not likely prevail in court on some of these matters, they almost certainly will be emboldened to intensify their use of such legal pressure tactics to silence opponents and drain them financially.

The track record on matters like these in states that up to now have allowed same-sex “marriage” is not encouraging, and I take little solace from the statement in the Obergefell opinion that the First Amendment
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protects “religious organizations and persons.” After all, this is a Court that thought nothing about turning the millennia-old belief about marriage on its head and just the day before, in the Obamacare subsidy case, went out of its way to change the meaning of the statute’s language in order to uphold it. It was also a Court that barely upheld conscience rights in the Hobby Lobby case a year ago. Moreover, as it spoke about religious rights in Obergefell, it specifically mentioned “advocacy” and “teaching”—not action pursuant to belief. This is consistent with the new tendency of the left to narrow the reach of religious liberty by not including in it the freedom to put one’s beliefs into practice or bring them into the social arena.

The greatest tragedy following from Obergefell, however, will be the suffering of those children whom adoption agencies—which will no longer be permitted to “discriminate”—will be placing with same-sex couples.

It has been frequently commented that the legitimation of same-sex “marriage” would only further weaken true marriage. One way this will happen is that—in light of the fact that the law is a teacher—the Court’s view of marriage as depending merely on a fleeting, vague, almost wispish notion of “love” and feelings instead of a deeply-held life-long commitment reflecting an act of the will cannot help but to further intensify the attitude of some people that it is something they can just undertake and depart from as they wish. Also, now that same-sex “marriage” has been legally anointed, there is little doubt that—over time, probably sooner than we might expect—polygamy, incestuous “marriage,” group “marriage,” and perhaps even man-beast “marriage” loom ahead. The logic of this is indisputable.

If people want to dismiss such concerns as Cassandra-like, I suggest they read about how so many early claims of where trends of recent decades would lead were outright dismissed only to prove correct in the end. Indeed, almost no one believed in their wildest imaginations that the push to decriminalize sodomy starting in the 1970s would one day lead to a constitutional right to something called same-sex “marriage.” For that matter, when the Supreme Court said that privacy rights precluded legally proscribing contraceptive use by married couples in 1965 hardly anybody thought that it would lead to constitutionally-protected abortion rights just eight years later. Obergefell was an outgrowth of the leftist worldview, and what that might go on to embrace in the future is anybody’s guess. As Paul Kengor says in his recent book Takedown (about the left’s long-time assault on marriage and the family), “what is seemingly inconceivable to all of us right now, including to progressives themselves, may become the dogmatic position of progressives in a generation” (p. 62).
That underscores an unhappy irony. Justice Anthony Kennedy has been the Court’s point man in a number of these key decisions. In *Obergefell*, as in others, he joined the Court’s leftist bloc to fashion a 5-4 majority. President Reagan appointed Kennedy. In my judgment, Reagan’s Supreme Court appointments were easily the greatest—and most avoidable—failure of his presidency. In fact, such appointments are usually the bane of Republican presidents. Democratic appointees dependably carry on their political ideology once on the Court, but Republican appointees often end up helping the left carry out their cultural revolution.

What’s to be done? The response to the Court’s decision and to the broader issues of the homosexualist assault on religious liberty and the leftist attack on marriage and family must take place at different levels. The main virtue needed now is one that is in such short supply these days—courage—and the main strategy—education (about the truths concerning marriage, sexual morality, and homosexuality)—coupled with a constant, confrontation-inclined (but intelligent) activism. The homosexualist groups must be publicly, persistently exposed and denounced for their totalitarian mindset and intimidation. We shouldn’t worry about the mainstream-media blackout; many other avenues are available to get out the message. A key part of this has to be regular, fully legal rallies in big cities, state capitals, and Washington—in the manner of the early Tea Party (maybe using a renewed Tea Party as one vehicle). When the people take to the streets persistently, media attention or not, the politicians will eventually have to listen. That may have the further value of strengthening politicians with the right sensibilities but who either still don’t see the civilizational-level issues at stake or are themselves “courage-challenged.”

In the legal realm, not only are enhanced legal-defense efforts for those conscientiously resisting the homosexualist onslaught needed, but so are offensive efforts. For example, homosexualist organizations must be regularly sued for abuse of process, defamation, and the like when they use their legal intimidation tactics. A persistent barrage of such suits, even with their large war chests, could financially disable them.

About the Court, conservatives have to reevaluate their usual pattern of criticizing its decisions but ultimately bowing to its authority. There now needs to be a national debate on the basic question of why the Court’s decrees should even be followed when they are, frankly, unconstitutional and have the effect of undercutting the American democratic republic. The dissenting justices in *Obergefell* indicted the Court on both points. Is it possible that by certain comments in his trenchant dissent Justice Scalia was inviting just such a debate? This debate might just prod the justices to be more responsible for fear that otherwise the Court’s authority could be
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damaged. Let’s remember that authority, ultimately, is all that the Court has. At bottom line, its decisions stand only because the executive agrees to enforce them.

This gets us to the most reliable political response to the Court’s abuse of power and the homosexualist movement’s repression. As we evaluate presidential candidates for 2016—of course, this comes down to the Republican candidates—there is one important question to ask: Which of them is willing to confront the Court and use executive power to stop the repression? In other words, who can be trusted to do things like tell the states that “Obergefell is invalid and I will block its enforcement if you want to ban same-sex ‘marriage’” and to interpose federal power to stop any state or local agency from forcing any person to cooperate with same-sex “weddings” and the like? As Federalist 78 said, the courts have only judgment and the executive has the sword. If federalized National Guard units were used to end the racial repression of Jim Crow at the state level in earlier decades, they may now have to be used to stop religious repression at that level. The notion of state nullification proposed by some is a pipe dream without historical justification and would hardly help the cause of religious liberty in states that are repressing it at the behest of the homosexualist movement. I also don’t think the proposal by Senator Ted Cruz for a constitutional convention to rein in the Court will go anywhere. If there had been such a plan to produce a constitutional amendment specifically to protect true marriage a decade ago it might have had a chance, but not today. In short, I hear nothing from any quarter that makes me think that anything other than the use of presidential power as I propose—by a very different kind of President than Obama, of course—offers a solution. Even if dissenting states balk about carrying out Obergefell—as may be the case with Texas—they will ultimately succeed only with the help of a supportive President.

While he’s at it, this “new American Cincinnatus” could unilaterally wipe away a lot of repressive federal regulatory law on this and other subjects and begin to dislodge the administrative state and restore our democratic republic. By the way, I find it curious that people fear the strong exertion of national power by one man for the good. We essentially have it being done now by one man on the Supreme Court, Justice Kennedy—and often not for the good.

In the Church in the U.S., bishops and clergy need also to rediscover courage, to start vigorously and consistently teaching and emphasizing the Church’s tradition about marriage, sexual morality, homosexual behavior, and contraception (whose cultural acceptance led in a straight line to the “normalization” of homosexuality and same-sex “marriage”). Extending
themselves even further, they need to think anew—in the manner of the late John Cardinal O’Connor and contrary to the views of a few leading prelates recently—about excommunicating public officials who push legal abortion and same-sex “marriage,” opposition to which is an irreducible moral minimum in the public arena. This would include Catholic justices like the Kennedys and the Sotomayors. A newly activist and better-organized laity (a long-time, noted Catholic lay leader recently stressed to me the need for a “lay congress” of orthodox Catholic organizations) is necessary to prod many in the hierarchy who are lethargic, reluctant, and sometimes seemingly timorous. The bishops should understand, however, that their taking such strong stands is for the same reason that the new American Cincinnatus is needed: to beat back a truly threatening adversary now so the serious persecution the late Cardinal George foresaw is avoided in the future.

These proposals are to save our liberties in the short run. What needs to be done in the long run is to rebuild the culture that made possible the American constitutional order, both of which as I wrote in The Transformation of the American Democratic Republic were exemplary. Archbishop Chaput is correct that the most basic response of Christians to “the debris” of Obergefell must be to “rebuild a healthy marriage culture, one marriage at a time.” This parallels what I said in The Transformation of the American Democratic Republic about how individual and family efforts are the main way to work to restore that earlier morally sound and seriously Christian American culture.

The danger is upon us. Christians have no choice but to wake up quickly and see it if they don’t already, to put on their new armor of courage, and to heed the call to action. The action needed must consistently follow the tripartite standard of confrontation and education with charity.