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# AFTER OBERGEFELL: DIGNITY FOR THE SECOND AMENDMENT

Marc A. Greendorfer\*

## I. INTRODUCTION

On June 26, 2015, a sharply divided United States Supreme Court issued its ruling in *Obergefell v. Hodges*,<sup>1</sup> commonly known as the “same-sex marriage” case. Writing for the majority opinion, Justice Anthony Kennedy introduced the rationale for striking down state laws that did not recognize a right to same-sex marriage: a theretofore unrecognized and unenumerated “dignity” right that took legal precedence over longstanding principles of federalism and the bedrock American legal tradition of allowing states to experiment with solutions to a wide range of social issues.

Justice Kennedy did not explicitly consign federalism to the ash heap of history, but to put the Court’s ruling into effect (that is, to force each of the 50 states to recognize a right to same-sex marriage), the basic premise of federalism—that each state has the right to make its own laws, other than to the extent there is federal preemption for a limited universe of topics—has to be disemboweled. This description of the fate of federalism is particularly true in light of the fact that prior to *Obergefell*, there was no question that the regulation of marriage was a matter strictly consigned to state control.<sup>2</sup>

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The author dedicates this article to the memory of Justice Antonin Scalia. Justice Scalia’s dissent in *Obergefell v. Hodges*, one of his last published opinions, was the inspiration for this article. A short time before his death, Justice Scalia joined Justice Clarence Thomas in dissenting to a denial of certiorari in *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7<sup>th</sup> Cir. 2015), *cert denied*, 136 S. Ct. 447, 449 (2015) (577 U.S. \_\_\_ (2015)), a case dealing with the status of Second Amendment rights. In their dissent, Justices Scalia and Thomas excoriated lower courts for undermining the robust Second Amendment rights that were set forth in Justice Scalia’s opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and urged the Supreme Court to take action to implement the protections afforded by *Heller*. It is the author’s hope that this article will be used to effect what Justice Scalia called for in *Friedman*: ending the second class treatment of the rights protected by the Second Amendment and restoring them to the sacrosanct status of all other fundamental rights. *Requiem aeternam dona ei, Domine, et lux perpetua luceat ei. Requiescat in pace, Nino. Amen.*

1. 135 S. Ct. 2584 (2015).

2. While some would argue that *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), is an example of the Court finding that the federal government had the power to regulate marriage, the opposite is the case. In *Windsor*, the Court ruled that the federal government could not deny federal benefits available only to married persons in a situation where a state already recognized same-sex marriage. The *Windsor* Court explicitly affirmed that its decision was based on the fact that states are the sole arbiter of marriage recognition and federalism required the federal government to provide benefits in accord with the definition of marriage adopted by the state in which the parties were married.

What does *Obergefell* mean for other state and local laws that purport to regulate other matters that have been found to be protected by the Constitution? In particular, can any state laws that regulate the right to keep and bear arms, a right protected by the Second Amendment, survive in a post-*Obergefell* world?

## II. THE *OBERGEFELL* RULING

### A. Before *Obergefell*—*Regulation of Marriage as the Exclusive Province of the States*

Prior to the *Obergefell* ruling, a supermajority of the 50 states did not issue marriage licenses to same-sex couples.<sup>3</sup> Indeed, at that point, only three states had affirmatively acted through a direct vote of their citizens to authorize the issuance of marriage licenses to same-sex couples.<sup>4</sup> In *U.S. v. Windsor*, a case decided a mere two years before *Obergefell*, Justice Kennedy wrote for the majority and acknowledged that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations” and went so far as to affirm that “[t]he definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations” and “regulation of domestic relations is an area that has long been regarded as a virtually *exclusive* province of the States.”<sup>5</sup>

While the *Windsor* court noted that the right of states to define marriage was subject to certain overriding protections that the Constitution provided for individual rights, it declined to find that same-sex marriage was such a protected right.<sup>6</sup> Instead, the *Windsor* Court chose to make a ruling that respected and affirmed federalism and the sovereign right of states to regulate marriage. This is shown both in the majority opinion, where Justice Kennedy excoriated Congress for trying to use federal law regulating marriage benefits as a way to “influence or interfere with state sovereign choices about who may be married,”<sup>7</sup> and in Justice Roberts’ dissent, where he took pains to remind us that the majority’s opinion was “based on federalism.”<sup>8</sup>

3. Brief of Tri Valley Law, *infra* note 29, at 7-8 (amicus brief in *Obergefell* arguing, *inter alia*, that the Court should not find a fundamental right to exist where voters in 30 of the 50 states had rejected same-sex marriage). In some of the 30 states, courts subsequently overruled the voter/legislator enacted prohibitions. For purposes of federalism, however, the acts of the citizens of the states and their representatives, rather than the acts of the judiciary, are what count.

4. *Id.* at 8. For purposes of this paper, I will use the phrases “recognizing same sex marriage” and “authorizing the issuance of marriage licenses to same sex couples” interchangeably. There is obviously a substantive difference between a state issuing a marriage license and a state recognizing a marriage, but a discussion of the differences is outside the scope of this paper.

5. *Windsor*, *supra* note 2, at 2691 (emphasis added).

6. *Id.* at 2697 (Roberts, C.J., dissenting) (“We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case . . . . I write only to highlight the limits of the majority’s holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA’s constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.”).

7. *Id.* at 2693.

8. *Id.* at 2697 (Roberts, C.J., dissenting). *See also*, Justice Scalia’s separate dissent, where he decries the “rootless and shifting” nature of the majority opinion, which Scalia said frequently invoked principles of federalism and the exclusive power of states to regulate marriage while, at the same time, disclaiming reliance upon those very principles. *Id.* at 2705 (Scalia, J., dissenting).

*B. Justice Kennedy's Majority Opinion in Obergefell: the Death of Federalism*

Two years after *Windsor's* affirmation of the inherent right of states to regulate marriage, in *Obergefell*, Justice Kennedy did an about-face on federalism and blithely terminated states' rights in one of the more convoluted and conclusory opinions in the history of the Supreme Court. Reciting, ad nauseam, the uncontradicted and irrelevant (for purposes of the questions asked) constitutional principle of a fundamental right to traditional (that is, opposite-sex) marriage, Justice Kennedy effectively ignored the legal issues surrounding the relevant question of whether the union of a same-sex couple has the same legal status of traditional marriage for purposes of rights protected by the Constitution.<sup>9</sup> Justice Kennedy acknowledged that historically, marriage has referred exclusively to the union of opposite-sex couples.<sup>10</sup> Justice Kennedy further recognized, as he did in *Windsor*, that states have traditionally and exclusively defined marriage.<sup>11</sup> Moreover, Justice Kennedy noted that some states had changed their laws to recognize same-sex marriage (while conveniently ignoring the fact that most states had chosen to not do so) and that the "democratic" process was still unfolding with regard to changing the definition of marriage in various states.<sup>12</sup>

As a legal matter, this should have been the end of the discussion.

Rather than follow precedent and established principles of federalism, Justice Kennedy veered into a "better-informed-than-thou" tangent to conclude that the people's judgment in the supermajority of states that had not recognized same-sex marriage through democratic processes was faulty and, pursuant to the superior moral judgment of the five Justices making up the Court's majority, the fundamental right of marriage should encompass same-sex couples as well, to protect the previously unrecognized fundamental dignity rights of everyone other than opposite sex couples.<sup>13</sup>

What is telling about the extreme nature of this ruling can be shown through two facts of note. First, there was not a single concurring opinion. Second, Justice Kennedy could cite no authority for the principle that the Supreme Court has the power to create new, amorphous fundamental rights in contravention of the clear, democratically expressed will of the people in a supermajority of states in the union.<sup>14</sup> In fact, as Chief Justice Roberts observed, Justice Kennedy had to implicitly overrule binding 14<sup>th</sup> Amendment precedent to reach his desired result in *Obergefell*.<sup>15</sup>

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9. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) ("But the Court ends this debate, in an opinion lacking even a thin veneer of law.")

10. *Id.* at 2598 ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners.")

11. *Id.* at 2628 (Scalia, J. dissenting) (citing to Justice Kennedy's opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2691(2013)).

12. *Id.* at 2605.

13. *Id.* at 2598-2608.

14. Brief of Tri Valley Law, *infra* note 29, at 8 ("voters in 30 of the 50 states have affirmatively rejected the licensing of same sex marriage. This isn't just majoritarianism, it is supermajoritarianism.")

15. *Obergefell*, 135 S. Ct. at 2620-21 (Roberts, C.J., dissenting) ("Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority's position

In a case representing one of the broadest expansions of the legal rights of homosexual persons, there is much to be seen in the refusal of even one of the liberal, activist Justices to file a concurring opinion.

In his majority opinion, Justice Kennedy cited directly to *Loving v. Virginia*<sup>16</sup> eight separate times, *Zablocki v. Redhail*<sup>17</sup> ten separate times, and *Lawrence v. Texas*<sup>18</sup> twelve separate times. Though Chief Justice Roberts and Justice Scalia each deftly dispatched Justice Kennedy's contortion of the holdings in these three cases as being without any legal basis, the concurring opinions in these three cases demonstrate something quite illustrative about the absence of concurring opinions in *Obergefell*. In *Loving*, a unanimous Court struck down anti-miscegenation statutes, yet even with unanimity, Justice Potter Stewart filed a concurring opinion to reiterate the unconstitutional nature of any law that discriminated based on race.<sup>19</sup> In *Zablocki*, where, like *Obergefell*, only five justices constituted the majority for a deeply divided Court, there were four concurring opinions (and one dissenting opinion).<sup>20</sup> In *Lawrence*, where six justices found that anti-sodomy statutes effected an unconstitutional discrimination against same-sex couples, Justice Sandra O'Connor filed a concurring opinion to support the effect of the majority's ruling.<sup>21</sup>

While a concurring or dissenting opinion is not precedential, nor is it binding, it serves as persuasive authority that can be used by future courts to properly deal with questions unanswered from the original opinion, especially in cases, like *Obergefell*, where the point of law has no other binding precedent.<sup>22</sup> Furthermore, as none other than Justice Ruth Bader Ginsburg wrote in 2010, there are several layers of demonstrated utility in dissenting (and, by extension, concurring) opinions. First, concurring and dissenting opinions are used internally at the Court to "lead the author of the majority opinion to refine and clarify" that opinion.<sup>23</sup> Second, concurring and dissenting opinions are published by the Court's justices to "appeal to the intelligence of a future day" so that a case that was decided on a precarious legal foundation can be corrected by future decisions.<sup>24</sup>

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requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.").

16. 388 U.S. 1 (1967) (finding state level bans on interracial marriages to be violative of the 14<sup>th</sup> Amendment's Due Process and Equal Protection Clauses).

17. 434 U.S. 374 (1978) (finding state level regulations that required a non-custodial parent to pay child support in arrears prior to being issued a marriage license to be violative of the 14<sup>th</sup> Amendment's Equal Protection Clause).

18. 539 U.S. 558 (2003) (finding anti-sodomy laws to violate the 14<sup>th</sup> Amendment's Due Process Clause).

19. *Loving*, 388 U.S. at 13 (Stewart, J. concurring).

20. *Zablocki*, 434 U.S. at 391 (Burger, C.J., concurring), 392 (Stewart, J., concurring), 396 (Powell, J., concurring), 403 (Stevens, J., concurring), and 407 (Rhenquist, J., dissenting).

21. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

22. See generally Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55 (2009).

23. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

24. *Id.* at 4. Tellingly, Justice Ginsburg cites the dissents of Justices Stevens and Breyer in *District of Columbia v. Heller*, 554 U.S. 570 (2008), as examples of persuasive authority that serve as "intelligence for a future day."

How can it be that Justice Kennedy relied upon three cases as support for his redefinition of the fundamental right to marriage, an act that is as revolutionary as it is unprecedented, three cases where even when there was unanimity at least one justice spoke through a concurring opinion to emphasize the justification for the rulings, yet not one of the most activist justices in the Court's history could write a single word of support for Justice Kennedy's opinion?

As the *Obergefell* dissenting opinions note, emphatically, Justice Kennedy's majority opinion was a rambling morass, representing an "act of will, not legal judgment" with "no basis in the Constitution or this Court's precedent"<sup>25</sup> and "indefensible as a matter of constitutional law."<sup>26</sup> Justice Scalia observed that the majority opinion was "incoherent" and went on to analyze the opinion as being "couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so."<sup>27</sup>

Why did not one of the more outspoken liberal justices take pen to hand to defend his or her support for a decision that was described by other justices as, in effect, lawless and incoherent? If there are to be limits to the newly created legal system in which the democratic process of discerning fundamental rights has been superseded by judicial fiat, shouldn't at least one of the concurring justices have provided the contours of any limitations (or affirmation of the breadth) on the power of the Court to sweep aside the democratic process?

The obvious answer is that the majority's decision was indeed lawless, and that any attempt to bolster or defend it would have simply exposed the fact that it was incoherent as a legal opinion and simply a matter of the judiciary assuming the powers of the legislative branch. Even with Chief Justice Roberts begging for a concurring opinion that could explain the legal basis for the majority's decision, and Justice Scalia taunting the majority to provide such an opinion, the majority fell silent. We are left with no choice but to conclude that the elimination of the democratic process in shaping fundamental rights is as all encompassing and groundless as the dissenting opinions describe.

That is a reflection of the fact that Justice Kennedy could cite to no precedent for his opinion. Though Justice Kennedy's opinion was littered with references to other Supreme Court cases on traditional marriage and homosexual rights, none of those cases provided legal support for the Court's decision in *Obergefell*. Chief Justice Roberts, Justice Scalia, and Justice Thomas expressed disbelief that after all of the marriage case dicta in Justice Kennedy's decision, he ended up redefining marriage to include same-sex couplings based purely on his claim that the Supreme Court trumps the will and voice of the people and the states due to the Court's "better informed understanding of how constitutional imperatives define . . . liberty."<sup>28</sup> This type of baseless, conclusory legal

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25. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

26. *Id.* at 2616.

27. *Id.* at 2630. (Scalia, J., dissenting).

28. *Id.* at 2637 (Thomas, J., dissenting). See also, *id.* at 2621 (Roberts, C.J., dissenting) ("To be fair,

reasoning is the type of work usually found in a coffeehouse packed with first-year law students grappling with initial drafts of moot court briefs.

What should be taken from this is that the majority's *Obergefell* opinion creates a new, broad right that is seemingly without limitation. The silence of concurring justices leaves us with only the dissenting opinions as intelligence for a future day with which we can discern the contours of the interplay between fundamental rights and state regulations that affect those rights. This is the role of persuasive authority when the majority opinion contains ambiguous legal reasoning on a point of law that has no other precedent.

As in nature, where birth and death are interrelated, in this case, the birth of a new and amorphous fundamental right to same-sex marriage was possible only as a consequence of the Court thrusting a judicial dagger into the heart of federalism. If an unenumerated and previously unrecognized right can be used to suppress traditional rights of the states, how can any state regulation of fundamental rights, especially constitutionally enumerated fundamental rights, be allowed to stand?

### III. *OBERGEFELL* AND THE FUTURE OF STATES' RIGHTS

In the amicus curiae brief I filed in support of the respondents in *Obergefell*, I cautioned the Court of the unintended consequences of a decision that broadly undermined federalism. Specifically, I asked the Court to consider the following point, assuming that the Court would create a new fundamental right to same-sex marriage:

This Court will be in a position of having to explain how voter approved state prohibitions on one unenumerated, unrecognized right (same-sex marriage) constitute a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, yet enumerated [c]onstitutional rights are not befitting the same protections and, in fact, state or local regulations on such rights can be so pervasive as to prohibit the right from being exercised in a meaningful way. The most obvious example is the Second Amendment right to keep and bear arms. One day, this Court will have to explain how sweeping restrictions on every aspect of firearms ownership and use can be upheld yet traditional and long-standing regulations on marriage cannot be tolerated in any form or in any

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the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its 'new insight' into the 'nature of injustice,' which was invisible to all who came before but has become clear 'as we learn [the] meaning' of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that 'it would disparage their choices and diminish their personhood to deny them this right.' Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*." and *id.* at 2630 (Scalia, J., dissenting) ("Rights, we are told, can 'rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.' (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?)" ).

jurisdiction. In the wake of this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (finding an individual right to keep and bear arms), a number of state and local governments imposed draconian restrictions on firearms, claiming that the restrictions were reasonable and common sense and did not infringe the core right protected by the Second Amendment . . . Much of the justification for recognizing a right to same sex marriage in the instant case rests on the claim that same sex couples have children that are harmed by the denial of marriage licenses. If this Court rules in favor of Petitioners, will it subsequently allow "reasonable, common sense" regulation of same-sex marriage that restricts it to only those same-sex couples that have children, since the core right protected by the decision in this case revolves around children?  
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One preliminary point needs to be addressed up front. Justice Kennedy's decision did not allow for any type of restriction or limitation on the newly created right to same-sex marriage.<sup>30</sup>

The final sentence of the section of Justice Kennedy's opinion that was devoted to answering the first question posed in the case (whether a state is required to issue a marriage license to same-sex couples under the 14th Amendment) contained the only hint at a limitation on the right to same-sex marriage: "The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."<sup>31</sup> As a matter of guidance, this conclusory statement is of no value since Justice Kennedy previously proclaimed that a state could not abridge a fundamental right. Furthermore, same-sex couples were not barred from traditional marriage—they were free to marry members of the opposite sex under pre-existing and traditional definitions of marriage.

This may seem to be a trite manipulation of Justice Kennedy's statement, but since neither he nor his fellow concurring justices bothered to flesh out the

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29. Brief of Tri Valley Law in support of Respondents, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), (Nos. 14-556, 14-562, 14-571 and 14-574), at 15-16 (April 2, 2015). (citing Brief of Scholars of the Constitutional Rights of Children in support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), (Nos. 14-556, 14-562, 14-571 & 14-574) (Mar. 5, 2015) (alteration to original) (citation omitted). Justice Kennedy responded to the question I posed in the last sentence of this passage from my amicus brief, stating, that while the interests of children and family were one of four rationales for finding a fundamental right to same-sex marriage, it would be wrong to use the rationale as a condition for exercising the new right. In other words, Justice Kennedy refuses to limit the exercise of fundamental rights to the core meanings of the right. *Obergefell*, 135 S. Ct. at 2601 ("That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one."). This should be taken as guidance for Second Amendment cases, demonstrating that the right to keep and bear arms has "many aspects"; all of which must be absolutely protected from abridgement.

30. *Obergefell*, 135 S. Ct. at 2608.

31. *Id.* at 2607.



contours of a state's residual right to regulate the unique nature of same-sex marriage, or any other fundamental right, we have to rely on the rest of his opinion for guidance. The rest of the opinion dismantles federalism and the states' traditional role as the sole authority in regulating marriage and further states that there is an absolute prohibition on any state from abridging fundamental rights, including the new right to same-sex marriage. This is incompatible with Justice Kennedy's dicta, above. It is also incompatible with the effect of the first post-decision challenge to the Court's *Obergefell* ruling. In response to *Obergefell*, a county clerk in Kentucky chose to suspend the issuance of all marriage licenses, without regard to the makeup of the parties seeking the license. After same-sex and opposite-sex couples in that county filed suit, alleging a violation of 14<sup>th</sup> Amendment rights,<sup>32</sup> both the district court and the Sixth Circuit enjoined the county clerk from implementing the policy of issuing no marriage licenses, finding that under, *inter alia*, *Obergefell*, the fundamental right to marriage could not be infringed. The Supreme Court denied the clerk's application for a stay on August 31, 2015. What we have to take from this is that states no longer have any discretion in licensing marriage, and, contrary to Justice Kennedy's statement in *Obergefell*, the Court's opinion memorialized this federal usurpation of traditional state power.<sup>33</sup>

Justice Kennedy's pronouncement was an absolute diktat to the states, ordering them to license same-sex marriages without qualification. Justice Kennedy removed all discretion from the states, the traditional arbiter of marriage licensing matters, lest they infringe upon the unenumerated dignity rights purportedly protected by the 14<sup>th</sup> Amendment. As Justice Kennedy proclaimed, the democratic process embedded in federalism may not "abridge fundamental rights."<sup>34</sup>

The only way to understand this in plain English is through the following summary of Justice Kennedy's new 14<sup>th</sup> Amendment calculus: A fundamental right may not be infringed in any manner or to any extent by state or local regulation. Justice Kennedy's new approach to the protection of fundamental rights from government interference appears to establish a level of review in excess of strict scrutiny, something closer to absolute compliance.

#### A. What are Fundamental Rights?

In his majority opinion, Justice Kennedy chronicles some of the theretofore-identified fundamental rights (liberty and rights being used interchangeably in Justice Kennedy's opinion). On the one hand, Justice Kennedy properly identifies "most of the rights enumerated in the Bill of Rights" as being fundamental rights.<sup>35</sup> He also notes that there are litanies of unenumerated fundamental rights. Of particular importance for the purpose of this paper,

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32. *Miller v. Davis*, No. 0:15-cv-00044, at \*3 (E.D. Ky, Aug 12, 2015).

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618-19 (2015) (Roberts, C.J., dissenting) ("The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.").

34. *Id.* at 2605.

35. *Id.* at 2597.

though, is the Second Amendment's protection of the right to keep and bear arms, and whether it is one of the rights enumerated in the Bill of Rights that is considered to be a fundamental right.

In short, the answer is an unequivocal yes.

In 2010, the Court heard a challenge to a municipal law that restricted firearms ownership in the *City of Chicago*.<sup>36</sup> Chicago argued that while the 2008 *Heller* decision may have found that there was an individual right to keep and bear arms under the Second Amendment, that right only protected individuals from federal laws.<sup>37</sup> The Court struck down Chicago's firearms ban, declaring that the Second Amendment was incorporated against the states under the Fourteenth Amendment.<sup>38</sup>

To put a point on the issue, the Court unambiguously found that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."<sup>39</sup> Not only is the right protected by the Second Amendment a fundamental right, it is, as the *Heller* Court pronounced and the *McDonald* Court reminded us, a fundamental right that is not "subject to 'interest balancing.'"<sup>40</sup> That is, the rights protected by the Second Amendment can't be eroded by legislatures or courts that seek to balance the right, on the one hand, against purported state interests that could be furthered by imposing limitations on that right, on the other hand.<sup>41</sup>

Though the *Heller* Court noted in dicta certain existing regulations on the right to keep and bear arms, such as limitations on the right for felons or the mentally ill, those words remain dicta.<sup>42</sup> The question presented in *Heller* was

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36. *McDonald v. Chicago*, 561 U.S. 742, 748 (2010).

37. *Id.* at 750 ("Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States.").

38. *Id.* at 791 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

39. *Id.* at 778.

40. *Id.* at 785.

41. *See* *District of Columbia v. Heller*, 554 U.S. 570, 634-635 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. *See* *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people . . .")

42. *Heller*, 554 U.S. at 627. Since *Heller*, the Supreme Court has not upheld any laws that expand existing limitations on Second Amendment rights and, in fact, in late 2015, Justices Thomas and Scalia urged the Court to grant certiorari to provide the Court with an opportunity to re-assert the unconstitutionality of state and local bans on classes of weapons, including so-called "assault weapons." *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7<sup>th</sup> Cir. 2015), *cert denied*, 136 S. Ct. 447, 449 (2015) ("The question under *Heller* is not whether citizens have adequate alternatives available for self-defense. Rather, *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist.").

whether the Second Amendment protected individual rights to keep and bear arms, and the answer was that such a right was protected. And *McDonald* further enshrined the right as being fundamental for purposes of the 14<sup>th</sup> Amendment.

*B. What did the Majority Opinion Really Say in Obergefell?*

As noted *infra*, and as criticized by the dissent, Justice Kennedy's majority opinion in *Obergefell* was bereft of a discussion of applicable precedent or, for that matter, any semblance of legal reasoning. Justice Kennedy was generous with his discussion of the history of traditional marriage and its status as a fundamental right, but he utterly failed to explain how same-sex marriage, an institution with virtually no history in the United States or elsewhere and one that was demonstrably different from opposite-sex marriage under existing law, deserved the legal status of a fundamental right.

In *Obergefell's* lower court proceedings, the Sixth Circuit noted the import of this point. As the Sixth Circuit studiously explained, "[t]he upshot of fundamental-rights status, keep in mind, is strict-scrutiny status, subjecting all state eligibility rules for marriage to *rigorous, usually unforgiving, review*."<sup>43</sup>

What Justice Kennedy had to do to prove that same-sex marriage was a fundamental right was not to simply say that it was subsumed within traditional (i.e., opposite-sex) marriage. This it clearly was not, at least in a supermajority of states before *Obergefell*. Rather, Justice Kennedy needed to show that same-sex marriage is a right that is "deeply rooted in this Nation's history and tradition [and] implicit in the concept of ordered liberty [such that] neither liberty nor justice would exist if they were sacrificed."<sup>44</sup> Because there was no way for Kennedy to contort the non-existent history of same-sex marriage into satisfying this test, he simply disregarded the traditional test and concluded that liberty required the recognition of this new type of union calling itself marriage, even if such recognition required the Court to fundamentally transform existing precedent.

Chief Justice Roberts called out Justice Kennedy's abandonment of precedent on fundamental rights jurisprudence, explaining that:

recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.<sup>45</sup>

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43. *DeBoer v. Snyder*, 772 F.3d 388, 412 (6th Cir. 2014) (emphasis added).

44. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

45. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (Roberts, C.J., dissenting) (internal citations omitted). See also, Justice Alito's dissent for another take on the conclusory reasoning employed by the majority. *Id.* at

Chief Justice Roberts concluded that the only scrap of precedent the majority found for its decision was in *Lochner v. New York*,<sup>46</sup> a case dealing with the right of an employee to choose how many hours in a week he would work, where the Court found a promise of “individual autonomy.”

Looking at the substance of Justice Kennedy’s opinion, we find the core logic behind the majority’s determination that foundational principles such as federalism give way to the “better-informed” determinations of the unelected judiciary:

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last [t]erm, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Id.* at 1636. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” *Id.* Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. *Id.* at 1637. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.<sup>47</sup>

One has to assume that when the majority speaks of democracy, it is speaking of both the direct democracy represented by voter initiatives and referenda, on the one hand, and the indirect democracy of voters electing state and local representatives, who then act on the behalf of the citizens of a state to enact laws, on the other hand.

What the *Obergefell* majority did, in effect, was to amend the Fourteenth Amendment and abandon core Fourteenth-Amendment precedent. Before *Obergefell*, fundamental rights had to have one of two specific origins--either as an explicitly enumerated right in the Bill of Rights or, as *Glucksberg* set out, as an implied right so ingrained in our history as to be inseparable from ordered liberty that all people expect when they agree to form a civil society.<sup>48</sup> Now,

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2640 (Alito, J., dissenting) (“For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.”).

46. *Lochner v. New York*, 198 U.S. 45, 52 (1905).

47. *Obergefell*, 135 S. Ct. at 2605 (citing *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623 (2014)) (alteration to original).

48. *DeBoer*, 772 F. 3d. at 410-11.

according to Justice Kennedy, a right can be fundamental even if it is neither enumerated in the Bill of Rights nor implied from our historical traditions. Rather, fundamental rights are whatever a majority of the Court, acting in an extra-constitutional role as the prognosticator of social mores, decides they are.

Of course, there's no authority for the Court to amend the Constitution under any situation or for any reason. The Constitution, in Article V, establishes the allowable procedures for Constitutional amendments.<sup>49</sup> The power to amend the Constitution rests exclusively with Congress, the states and the people, not the federal judiciary.<sup>50</sup> Not only is the *Obergefell* majority's action without legal authority, as a matter of precedent, it will become the Fourteenth Amendment's analog to *Wickard v. Filburn*,<sup>51</sup> the infamous Commerce Clause case that ushered in a massive expansion of government power in an area that the Constitution never intended for the federal government to act.

As an example of the extreme upheaval that will result from Justice Kennedy's *Obergefell* opinion, consider the following hypothetical. In response to *Obergefell*, in compliance with Article V of the Constitution, the requisite number of states adopts a new amendment to the Constitution. This Twenty-Eighth Amendment is drafted to re-establish the traditional definition of marriage. It does not repeal the Fourteenth Amendment, so the principles that the *Obergefell* Court relied upon remain intact.

In effect, though, this hypothetical Twenty-Eighth Amendment overturns that aspect of *Obergefell* that required states to issue same-sex marriage licenses. Yet in *Obergefell*, the majority held that where a democratic process undermines an element of liberty that the "better-informed" judgment of the Court finds to be necessary for the dignity of people, that process is invalid under the Fourteenth Amendment and the laws that result from it cannot be enforced. As a result, *Obergefell* compels future courts to not enforce the hypothetical Twenty-Eighth Amendment, an amendment borne of democratic processes that nonetheless infringes the fundamental right to same-sex marriage that Justice Kennedy said was, by virtue of being recognized by the better-informed judgment of the Judiciary, immune from abridgement by the people. If the Court can ignore precedent and constitutional limitations to undermine the foundational principle of federalism by striking down duly adopted state laws on marriage, why could it also not do the same to undermine a constitutional amendment that it finds to violate its newfound fundamental right to dignity?

Some will say, in response to this hypothetical, that institutional limits on the Court's power would prevent the Court from invalidating a constitutional

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49. U.S. CONST. art. V.

50. *Id.*

51. *Wickard v. Filburn*, 317 U.S. 111, 113 (1942). *Wickard* is a World War II-era decision on the power of Congress to regulate a farmer's activities in growing crops for his own consumption. The *Wickard* court found that even crops grown for a farmer's own consumption could be regulated as part of Congress' power to regulate interstate commerce, as the farmer's actions removed him from the national market for the crop and thus removed him from the demand component of the national economy, which had an effect on interstate commerce. *Wickard* dramatically expanded the powers of Congress to act in excess of any enumerated Constitutional power, based on a reading of the Commerce Clause that was as tortured and baseless as Justice Kennedy's reading of the 14th Amendment in *Obergefell*. In other words, it also was an exercise of will, not legal judgment.

amendment. As Chief Justice Roberts explained in *Obergefell*, “this Court is not a legislature . . . . Under the Constitution, judges have power to say what the law is, not what it should be.”<sup>52</sup> If the institutional limits on the Court failed in *Obergefell*, they will fail in future cases as well, including a case resembling the hypothetical.

Reduced to its essence, then, under *Obergefell*, state or local laws that infringe fundamental rights in any manner, especially fundamental individual rights, cannot hide behind principles of federalism that, until *Obergefell*, allowed states to be laboratories to experiment with ways to bring about social change.<sup>53</sup> In a post-*Obergefell* world, there are no exceptions or limitations on this new level of protection against state regulations that abridge rights.

#### IV. AFTER *OBERGEFELL*, CAN STATES ABRIDGE RIGHTS PROTECTED BY THE SECOND AMENDMENT?

In *Heller*, the Court held that the individual rights protected by the Second Amendment may not be infringed by state or local regulations, even if the regulations were designed to engage in interest balancing.<sup>54</sup> At the time *Heller* was decided, this may have been best understood as guidance for future courts as to the level of review that may be employed in the context of state regulations on the right to keep and bear arms. Under *Obergefell*, however, the ability of states to regulate fundamental rights, including Second Amendment rights, has been dramatically narrowed. As Justice Kennedy’s *Obergefell* opinion stated, the democratic process that plays out in the states through initiatives and legislation cannot “abridge fundamental rights,” and as he implied in allowing for no exceptions to this rule, the level of review that any government regulation of fundamental rights would have to survive is now absolute compliance (that is, any abridgement would be impermissible).<sup>55</sup>

Most troubling, from the perspective of federalism, there were no limits placed on Kennedy’s rule that democratic processes could not abridge fundamental rights. He did not say that this rule only applied in the context of marriage rights, or homosexual rights, or any other set of facts or circumstances. It is an exceedingly broad rule, one that steamrolls existing precedent, including that aspect of *Windsor* that is based on a respect for federalism, to eviscerate all powers of states to independently promulgate restrictive regulations in the arena of fundamental rights.

There is no question that the rights protected by the Second Amendment are fundamental rights. The only way to understand *Heller* and *McDonald* through the prism of *Obergefell* is that any state or local regulation that negatively impacts the right to keep and bear arms, even if those regulations are

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52. *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting). With all due humility, it does appear that the Chief Justice borrowed the language in the second part of this quote, nearly verbatim, from my amicus brief. See Brief of Tri Valley Law, *supra* note 29, at note 3 (“[t]he difference between saying what the law is, and saying what the law should be, is one that amicus Bay Area Lawyers For Individual Freedom want this Court to ignore. It is the exclusive duty of the Legislative branch to say what the law should be.”).

53. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J., Brandeis, dissenting).

54. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

55. *Obergefell*, 135 S. Ct. at 2605.

longstanding and directed at less-frequently seen expressions of the right (as was the limitation on the issuance of marriage licenses to opposite-sex couples only in *Obergefell*), violates 14th Amendment Equal Protection and Due Process rights. This must be especially true of any state or local regulation that is more restrictive than regulations promulgated by other states or the federal government, as allowing more restrictive laws in one jurisdiction would constitute the type of geographic discrimination that was found to be unconstitutional in *Obergefell*.<sup>56</sup>

If this sounds a lot like the “occupy-the-field” analysis involved in discerning instances of federal preemption,<sup>57</sup> it is because that is exactly what Justice Kennedy mandated with regard to state and local laws that affect fundamental rights. As opposed to federal preemption, which is indicated by Congress’ actions in signaling that it intends to be the sole source of authority, this newly created form of judicial preemption exists whenever a state or locality attempts to regulate a fundamental right in a manner that abridges any exercise of that right.

In fact, when it comes to the interplay of state and federal law on a particular fundamental right, the best reading of *Obergefell* (as it relates to the Second Amendment) is that if a state regulation is more restrictive than any federal regulation on the right to keep and bear arms, it is unconstitutional. As a corollary to this, if the federal government has not promulgated regulations on a specific aspect of the right to keep and bear arms, any state regulation would *a fortiori* be an abridgement of the fundamental right enshrined in the Second Amendment.

Consequently, since there is no federal law on any number of aspects of the rights protected of the Second Amendment, such as magazine capacity, concealed carry of firearms or possession of categories of weapons often (and incorrectly) referred to as “assault weapons,” any state or local regulations that infringe those rights must be violations of the Fourteenth Amendment.

While *Heller* confirmed that the Second Amendment protects the right of individuals to keep and bear arms, some state and local regulators have attempted to narrow the right, arguing that there is a “core” Second Amendment right that is protected but also an expansive non-core element to the right that can be regulated with relative impunity, under a rational-basis or intermediate-scrutiny standard.<sup>58</sup> This clearly flies in the face of the explicit language of *Heller* that forbade the infringement of the Second-Amendment right as part of state or local interest balancing.

#### *A. An Example of Now-Impermissible Local Abridgement of Fundamental Rights: Fyock v. City of Sunnyvale under Obergefell*

By way of example, consider the case of local regulation of ammunition

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56. *Id.* at 2606 (“Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry.”).

57. *See, e.g.*, *Altria Group v. Good*, 555 U.S. 70, 76 (2008).

58. *See, e.g.*, *Fyock v. City of Sunnyvale*, 25 F. Supp. 1267, 1274 (N.D. Cal. 2014).

magazines. In 2013, the people of the City of Sunnyvale, California voted to approve, and the city enacted, a law that prohibited the possession of firearms magazines capable of holding in excess of ten rounds of ammunition.<sup>59</sup> The law was challenged as an infringement of the rights protected by the Second Amendment, and in a 2015 decision, the Ninth Circuit upheld a denial of a preliminary injunction against the law.<sup>60</sup> The Ninth Circuit deferred to the lower court's use of an interest-balancing approach to examining the local magazine ban, asserting that "large-capacity" magazines, which the lower court acknowledged were "arms" under the Second Amendment, were not part of the core right protected by the Second Amendment, and the local regulation was a permissible means of enhancing public safety.<sup>61</sup>

Notwithstanding the fact that the lower court's interpretation of *Heller* was utterly at odds with what the Supreme Court said in *Heller*,<sup>62</sup> *Obergefell* would now require the Ninth Circuit to reach a different result, granting the preliminary injunction against the local ban on magazines.

This is because under *Heller* and *McDonald*, the right to keep and bear arms is a fundamental right, and there is no federal law that prohibits the possession of so-called "large capacity magazines." In fact, a federal law that banned so-called "assault weapons" and "large capacity magazines" lapsed by its terms in 2004, and no subsequent ban was enacted.<sup>63</sup> The fact that Congress chose not to renew the prior ban, and that any new ban would likely not survive a review under *Heller*, demonstrates that the fundamental right to keep and bear arms, including "large-capacity magazines" and "assault weapons," is one that cannot be infringed by any state or local regulation. This is so because pursuant to *Obergefell*, any "geographic variation" of laws affecting fundamental rights cannot be tolerated and any democratic process that infringes a fundamental

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59. See also MARC GREENDORFER, AND THE BAN PLAYED ONE: THE "PUBLIC SAFETY" THREAT TO INDIVIDUAL RIGHTS 4 (2014) (providing a detailed analysis of *Fyock* and other state / local attempts to infringe on fundamental, individual rights based on an interest balancing "public safety" rational.). This book is also available for download as a scholarly paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2426704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426704).

60. *Fyock v. City of Sunnyvale*, 779 F. 3d 991, 994 (9th Cir. 2015).

61. *Id.*

62. The *Heller* Court did not establish any distinction between "core" elements of the Second Amendment right versus non-core elements, let alone allow for the infringement of non-core elements. *Heller* also expressly disallowed any form of interest balancing tests for Second Amendment rights, which is exactly what the *Fyock* court engaged in by reviewing the local regulation under intermediate scrutiny. The only thing *Heller* allowed in terms of regulation was to provide that under then-existing precedent, under principles of federalism, some long-standing regulations of the right to keep and bear arms, such as laws that prohibited felons from possessing firearms or laws that prohibited the possession of firearms that were not traditionally used for legitimate purposes (e.g., military grade automatic weapons) or that had individually been altered to make them dangerous, could be upheld. When a firearm is possessed for its traditional and legitimate use under the Second Amendment, whether it is sporting use, hunting, or self-defense, *Heller* does not allow the government to enact bans on classes or types of firearms, or parts used in those firearms. See Marc Greendorfer, *People v. Zondorak: California's Attack on the Second Amendment*, 17 CHAPMAN L. REV. ONLINE 1, 2-3 (2014) (demonstrating that under *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010), any ban on classes of arms (or their components) is unconstitutional under *Heller*).

63. A federal ban on so-called "assault weapons" and "high capacity magazines" was enacted in 1994 as P.L. 103-322, Title XI (1994). The ban had a 10 year sunset clause and since its expiration in 2004 no similar ban has been enacted at the federal level. See generally, Chu, Vivian S., *Federal Assault Weapons Ban: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE 7-5700, R42957 (Feb. 14, 2013).



individual right cannot survive Fourteenth-Amendment scrutiny.<sup>64</sup> The lower court in *Fyock* acknowledged that under *Heller*, ammunition magazines were arms protected by the Second Amendment.<sup>65</sup> Therefore, a local magazine ban constitutes both an impermissible geographic variation of law and a now-unconstitutional expression of federalism's process of local experiments that are geared towards effecting social change.

It is interesting to note that in *Fyock*, the lower court relied upon testimony that roughly forty-seven percent of handgun magazines in circulation had a capacity in excess of ten rounds of ammunition, and found that since this did not represent a majority of handgun magazines, those magazines, while "arms" under the Second Amendment, were not a core element of the rights protected by the Second Amendment, and interest balancing regulations could thus be employed.<sup>66</sup> If a court were to apply the same logic to marriage licensing, same-sex marriage would not be subject to the same protections as traditional marriage due to the fact that far less than fifty percent of all marriage licenses are issued to same-sex couples.<sup>67</sup>

In point of fact, though, the *Heller* Court and *McDonald* also found that the core right protected by the Second Amendment was not a right to own a limited range of firearms.<sup>68</sup> Rather, the core right was individual ownership and use of firearms for self-defense (as well as hunting and sporting purposes).<sup>69</sup> This is a much broader right than lower courts have acknowledged in post-*Heller* challenges to local regulations that infringe the Second Amendment. If the Court ever takes up a challenge to such regulations, it will surely find that the interest-balancing tests<sup>70</sup> and the focus on certain classes of arms<sup>71</sup> not being at

64. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015).

65. *Fyock v. City of Sunnyvale*, 25 F. Supp. 1267, 1276-77 (N.D. Cal. 2014).

66. *Id.* at 1278.

67. Using Massachusetts as an example, where same-sex marriage has been legal since 2004, only 22,406 marriage licenses were issued to same-sex couples between 2004 and 2012. Drew Desilver, *How Many Same-Sex Marriages in the U.S.? At Least 71,165, Probably More*, PEW RESEARCH CENTER (June 26, 2013), <http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more/>. Prior to the legalization of same-sex marriage in that state, approximately 36,000 traditional marriages were licensed in an average year. See CENTERS FOR DISEASE CONTROL, *Births, Divorces, and Deaths: Provisional Data for 2009, National Vital Statistics Report*, vol. 58, no. 25 Table 2, at 7 (Aug. 27, 2010), [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_25.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf). Thus, in the eight year period in which approximately 22,000 same-sex marriage licenses were issued, approximately 288,000 opposite sex marriage licenses would have been issued, making same-sex marriage license rates approximately one-tenth that of traditional marriage license rates. This is obviously far less than the forty-seven percent threshold that the *Fyock* court set for finding that a variation of a fundamental right fell outside of the bounds of its core protections.

68. See *Friedman v. City of Highland Park, Ill.*, 784 F. 3d 406 (7<sup>th</sup> Cir. 2015), *cert denied*, 136 S. Ct. 447, 449 (2015) (citing *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)) ("But that ignores Heller's fundamental premise: The right to keep and bear arms is an independent, individual right. Its scope is defined not by what the militia needs, but by what private citizens commonly possess.").

69. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.").

70. *Id.* at 634-35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis

the “core” of the Second Amendment, each of which was explicitly determined to be violative of Second-Amendment rights in *Heller*,<sup>72</sup> are as unconstitutional as they are illogical.

A state (or any political subdivision of it) can no more ban the possession of “large-capacity magazines” or refuse to recognize a permit issued in another state allowing a person to carry a concealed firearm than it can refuse to issue a marriage license to a same-sex couple or to recognize such a license issued by another jurisdiction. Both the right to keep and bear arms and the right to same-sex marriage are fundamental rights, immune to local regulations that limit those rights. A fundamental right recognized in one state, be it marriage or self defense, cannot be abridged by other states, and variations of such a right that may not constitute the predominant means of exercising the right (be it same-sex marriage as a subset of all marriage or “large-capacity magazines” as a subset of all arms) must receive the same absolute protections as the all other means of exercising the right.

All of this, though, is an aside, because once we had determined that a right is fundamental (and *McDonald* conclusively affirms this in respect of the rights under the Second Amendment,<sup>73</sup> which include, but are not limited to, the possession and use of arms for self defense), *Obergefell* requires the Court to strike down any state or local abridgement of that right.

If *Obergefell* stands for anything, it stands for two propositions: first, the democratic process cannot narrow fundamental rights. Second, to the extent there is “geographic variation” in the terms of a law affecting fundamental rights

whether the right is *really* worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an ‘interest-balancing’ approach to the prohibition of a peaceful neo-Nazi march through Skokie (citing *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 (1977) (*per curiam*)). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”)

71. *Id.* at 628 (“The handgun ban amounts to a *prohibition of an entire class of ‘arms’* that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (2007)) (emphasis added).

This is a critical point, as it indicates that using arms (a term not limited to a specific type or configuration of arm) for self defense is an irreducible right and the idea that a court could ban a class of weapon as a prophylactic measure is as ludicrous and unsupportable as the idea that the government could engage in prior restraint to protect a person from being libeled. Laws that criminalize misuse of arms are certainly sure to pass constitutional muster, but the enforcement of those types of restrictions on the use of arms is predicated on the condition that it is only an unlawful use that can be punished, rather than the entire lawful use infringed upon en masse.

72. The Supreme Court has not revisited the issues raised in *Heller* since the *McDonald* decision, but the dissenting opinion of Justices Scalia and Thomas in denial of the petition for certiorari in *Friedman* strongly support this conclusion. *Friedman v. City of Highland Park, Il.*, 784 F. 3d 406 (7th Cir. 2015), *cert denied*, 136 S. Ct. 447, 449 (2015).

73. *McDonald v. Chicago*, 561 U.S. 742, 778 (2010).

protected through the Fourteenth Amendment (including, presumably, under the incorporation doctrine), such variation is constitutionally impermissible, and the underlying circuit court rulings and the state and local regulations must yield to a uniform federal law.<sup>74</sup>

#### V. THE END OF STATE AND LOCAL REGULATION OF SECOND AMENDMENT RIGHTS

Consequently, all state or local firearms regulations that infringe on the rights protected by the Second Amendment and exceed any level of existing and constitutional federal regulation must be seen as violating *Obergefell*. Because there is no federal ban on, for example, concealed carry of firearms or the possession of “large-capacity magazines” or “assault weapons,” unless and until the Court hears a case that finds these three forms of expressing the right to keep and bear arms are not protected by the Second Amendment, or until the Constitution is amended explicitly to remove them from the rights protected by the Second Amendment, any state or local prohibition on them would fail under *Obergefell*.

This is in keeping with permissible arms regulations described by Justice Scalia in *Heller*. In *Heller*, certain types of arms regulations were deemed not to violate the Second Amendment.<sup>75</sup> The list of permissible regulations consisted of existing laws relating to (i) firearms possession by felons and those suffering from mental illness, (ii) firearms possession at government buildings or schools, and (iii) conditions and qualifications for the commercial sale of arms.<sup>76</sup> Though a footnote purported to indicate that the list was not exhaustive, the listing must be understood to provide general categories of permissible regulation. Any type of regulation that is not within the general contours of the three categories would have to be seen as violative of *Heller*.

The only other type of regulation limiting the right to keep or bear arms permitted under *Heller* related to the rule set out in *U.S. v. Miller*,<sup>77</sup> which was clarified in *Heller*. Under *Heller*, *Miller* stands for the proposition that existing federal law prohibiting the possession or sale of certain dangerous arms, consisting of short barreled shotguns or arms that have been tampered with to remove serial numbers, is compatible with the Second Amendment.<sup>78</sup>

So we can see that the three types of regulations that were deemed permissible under *Heller*, and the regulations under *Miller* that *Heller* found to be permissible, share one key characteristic: they are all existing federal laws

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74. Justice Kennedy’s opinion explicitly provided for this when it set forth the reason the Court was rendering a decision in this case. Pointing out that there was a split among courts of appeals on whether the 14th Amendment required states to license same-sex marriage, Justice Kennedy stated “Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2706 (2015).

75. *Heller*, 554 U.S. at 626-27.

76. *Id.*

77. *United States v. Miller*, 307 U.S. 174, 178 (1939).

78. *Id.* at 182-83.

that do not regulate entire classes or categories of arms.<sup>79</sup>

So it becomes clear that there is an obvious synergy between the permissible regulation that may be imposed on the right to keep and bear arms under *Heller* (that is, existing *federal* regulation is the only type of regulation that passes Constitutional muster) and the new conception of the sanctity of Fourteenth-Amendment fundamental rights under *Obergefell* (state and local regulations, even if enacted through the democratic process, may not abridge any fundamental right, and they may not result in geographic variations in the substance of the exercise of the right).

#### VI. CONCLUSION: STATE AND LOCAL LAWS ABRIDGING FUNDAMENTAL RIGHTS, INCLUDING ALL REGULATION OF ARMS, ARE UNCONSTITUTIONAL.

After *Obergefell*, any state or local law that is more restrictive than existing federal law on the rights protected by the Second Amendment would necessarily violate Fourteenth-Amendment protections under *Obergefell*. For example, state or local laws that ban the possession of classes of arms or types of arms (including components of those arms, such as ammunition magazines) or that limit the bearing of those arms (such as concealed-carry limitations) can be upheld if the limitations are promulgated at the federal level and survive a level of review at the Supreme Court that does not involve any interest balancing (i.e., strict compliance). A state ban on altering serial numbers on firearms or a state ban on concealed carry in school zones could be upheld, since there are existing federal laws with those specific prohibitions, but a state or local ban on magazines holding more than ten rounds of ammunition or on classes of arms such as “assault weapons,” or a state or local restriction on concealed carry generally, would be unconstitutional since those regulations are more restrictive than any existing federal regulations.<sup>80</sup>

It may be that the Court never expected that by stripping the states (and the people) of their traditional role in regulating marriage, they would also be stripping states and localities of their traditional powers to regulate all fundamental rights, but such is the nature of breaching the institutional protections that the framers of the Constitution developed to protect our rights. The *Obergefell* Court spoke at length about the need to respect the dignity and nobility of the individual, to the point that democratic processes embedded in federalism had to be abandoned. One can think of no other expression of dignity

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79. See 18 U.S.C. §§ 921-931 (2012); 26 U.S.C. § 5861.

80. This conclusion is supported by the dissenting opinion of Justices Thomas and Scalia in the denial of certiorari in *Friedman*. *Friedman v. City of Highland Park, IL*, 784 F. 3d 406 (7th Cir. 2015), *cert denied*, 136 S. Ct. 447, 449 (2015). In *Friedman*, Justice Scalia, the author of the *Heller* opinion, joined with Justice Thomas, who concurred in the *Heller* decision, to provide the most authoritative explanation to date regarding the meaning of *Heller* with regard to Second Amendment protections for “assault weapons”: “*Heller* draws a distinction between [arms commonly used for lawful purposes, such as “assault weapons”] and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns. The City’s ban [on assault weapons] is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons.” *Id.* at 449 (citations omitted).

and nobility than the inherent, fundamental right to self defense. Any state or locality that abridges this right, for example, by banning types of arms such as large-capacity ammunition magazines or by refusing to recognize concealed-carry permits from other jurisdictions, necessarily insults the nobility and dignity of individuals seeking the means to exercise the right to self defense. The floodgates are now open to roll back all state and local regulations that abridge Second Amendment rights in any manner.