There were some surprises after all in today’s Obergefell v. Hodges decision. It was entirely predictable that the Supreme Court would hold, by a vote of 5-4, that the 14th Amendment guarantees same-sex couples the right to marry, and that the decision would be written by Justice Anthony Kennedy, author of every high court decision involving gay rights since he joined the court in 1988 (unless you count 2000’s Boy Scouts of America v. Dale, written by Chief Justice William Rehnquist).

One surprise was that the decision came down today rather than next Monday, the last day of the court’s term. Someone on Twitter the other day (sorry, we forget who) speculated that might happen because it is the anniversary of both of the last two big gay-rights cases, Lawrence v. Texas (2003, invalidating state
sodomy laws) and *U.S. v. Windsor* (2013, requiring federal recognition of same-sex marriages licensed under state law). Whether or not that’s coincidence, look for June 26 to become something of an unofficial holiday for gay Americans.

Another surprise was that chief Justice John Roberts read his dissent from the bench—the first time he has done so in his decade on the high court, according to ScotusBlog’s Lyle Denniston. (There were five opinions in all, the majority and four dissents. Justices Antonin Scalia and Clarence Thomas joined all four, while Roberts and Justice Samuel Alito each signed only his own.)

The big surprise, though, was doctrinal. The court’s majority rested its opinion mostly on the Due Process Clause of the 14th Amendment, which protects “liberty,” rather than the Equal Protection Clause. As Justice Thomas accurately observes in a footnote (citations omitted here and hereafter):

> The majority states that the right it believes is “part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” Despite the “synergy” it finds “between th[ese] two protections,” the majority clearly uses equal protection only to shore up its substantive due process analysis.

This column argued in April that the logic of already settled equal-protection law, and the widely accepted though relatively novel cultural assumptions it embodies, leads inexorably toward the conclusion the court reached today: “If the Constitution prohibits almost all sex discrimination, and if that prohibition applies to family law, then husbands and wives are, for legal purposes, already interchangeable. If that is the case, then why can’t a marriage consist of two husbands or two wives instead of one of each?”

The majority echoes our analysis of how the institution of marriage has already changed:

> Marriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and
woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage.

We must dissent, however, from that last assertion. Probably some of those changes strengthened the institution, some weakened it, and some both strengthened and weakened it. The most recent changes—those wrought in the past half-century or so—surely weakened it on balance, as Justice Alito observes:

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. This development undoubtedly is both a cause and a result of changes in our society’s understanding of marriage.

That is the answer to those who will despair of Obergefell’s destructive effect on the institution of marriage. The toothpaste came out of that tube decades ago. Maggie Gallagher, a leading opponent of same-sex marriage, wrote a book called “The Abolition of Marriage: How We Destroy Lasting Love.” The Amazon blurb sums up the argument: “Marriage is disappearing as a cultural norm in America, with disastrous consequences for the social and economic stability that depend on it.” The book was published in 1996, the same year Congress passed the Defense of Marriage Act with overwhelming bipartisan majorities.

The majority’s reliance on liberty rather than equal protection, however, does raise a troubling question: “whether States may retain the definition of marriage as a union of two people,” as the chief justice puts it in his dissent:

Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of
marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

In his \textit{Lawrence} dissent, Justice Scalia also raised the polygamy question as part of a parade of horribles. (Interestingly, his dissent today neither mentions it nor includes such a parade.)

We had been inclined to view it as an empty reductio ad absurdum: It’s easy to find a “rational basis” (the standard the \textit{Lawrence} court employed) for antipolygamy laws and difficult to conceive of an equal-protection challenge that would require the court to apply a stricter standard.

But there is no obvious principle that would limit the application of “substantive due process” and “liberty” to monogamous marriages; and as Roberts notes, the majority makes no effort to articulate one. In fact, Kennedy omits any explicit mention of polygamy, not only in his legal argument but in his account of the history of marriage.

The polygamy question is mostly theoretical. A federal district judge did strike
down Utah’s “criminal cohabitation” statute in 2011 (the state is appealing), but he validated the state’s refusal to license multiple marriage licenses. There is no chance the high court will “discover” a right to polygamy anytime soon. Then again, the same was true of same-sex marriage in 1972, when the justices dismissed a gay couple’s lawsuit for want of “a substantial federal question.”

A more immediate concern—which the majority does seek to allay—is that today’s ruling may heighten the threat to religious liberty. Justice Kennedy writes:

> It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.

Roberts finds such assurances wanting:

> Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses.

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place
children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

They can take some comfort in the composition of the current court. Justice Kennedy, after all, joined Chief Justice’s Rehnquist’s decision in the *Boy Scouts* case, which vindicated the Scouts’ right of “expressive association” against discrimination laws. Kennedy also joined the majority in *Burwell v. Hobby Lobby* (2014), which ruled that closely held corporations could assert their free-exercise rights under the Religious Freedom Restoration Act.

But those were both 5-4 rulings. Does anyone imagine religious freedom will be safe if Hillary Clinton gets to appoint the successor to Justice Kennedy or any of today’s dissenters?

That question, one should note, would have been pertinent even if *Obergefell* had gone the other way. Some of the cases in which government agencies have attempted to force religious business owners to participate in same-sex unions on antidiscrimination grounds occurred in states that did not yet recognize same-sex marriage.

We’ll close with a quote from Justice Scalia’s dissent, which includes a parenthetical that made us laugh out loud:

> Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant
of any denomination. The strikingly unrepresentative character of the body voting on today’s social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today’s majority are not voting on that basis; they say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

“Without representation” is something of an overstatement. It is almost certainly the case that the court, in deciding this question now rather than in 1972 or even 2013—when it demurred in the case of Hollingsworth v. Perry (and after all, “California does not count”)—is responding to changes in public opinion.

Of course that is problematic in its own right. And whatever one thinks of same-sex marriage, Justice Scalia has a point that democratic decisions should be made by democratic institutions, which are a lot more diverse than the high court.

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