

MARRIAGE EQUALITY AND THE THIRD NAIL IN THE “PROCEED WITH CAUTION” COFFIN

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“We must proceed with caution” remains a clarion call of marriage equality opponents. Courts have previously rejected this argument on two grounds: First, states cannot save an otherwise unconstitutional law by raising the specter of theoretical harms that may run rampant if the law were struck down. And second, such harms are inapplicable in the context of same-sex marriage bans because there is no harm caused by allowing same-sex couples to wed. A number of jurists, most notably Justices Alito and Thomas, nonetheless embrace the “proceed with caution” argument.

To that end, this Essay explains a third reason why the “proceed with caution” argument should fail when the Supreme Court takes up the issue of marriage equality this spring; specifically, a state should not be allowed to proceed with caution unless it explains how it plans on doing so. The states defending their same-sex marriage bans before the Court this spring—Kentucky, Michigan, Ohio, and Tennessee—have failed to identify how they plan to proceed with caution. They offer no plans, timetables, or rubrics by which they intend on analyzing the effects of same-sex marriage elsewhere, extrapolating those effects to their states, and taking action as warranted. As these states have presented no such evidence, the Court should reject the “proceed with caution” argument they advance.

INTRODUCTION	17
I. THE “PROCEED WITH CAUTION” ARGUMENT.....	18
II. WHY “PROCEED WITH CAUTION” FAILS IN <i>OBERGEFELL</i>	21
CONCLUSION	23

INTRODUCTION

In defending their decision to restrict marriage to opposite-sex couples, states have occasionally expressed the need to proceed with caution in light of the potentially harmful effects of same-sex marriage. Judges have often dismissed this argument as legally flawed or factually implausible: States may not act unconstitutionally out of a fear of theoretical future harms. And even if they could, the argument fails as applied to same-sex marriage bans because permitting same-sex marriage has no harmful effects. These two deficiencies in the “proceed with caution” argument should render it moot when the

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Supreme Court considers the marriage equality cases consolidated as *Obergefell v. Hodges*.¹

However, we know from Justice Alito's dissent in *United States v. Windsor* that he and Justice Thomas disagree.² In Part II of that dissent, both Justices espoused their belief that the United States acted rationally in refusing to recognize same-sex marriage so as to avoid its potential harms because "[t]he long-term consequences of [same-sex marriage] are not now known and are unlikely to be ascertainable for some time to come."³

Given that Justices Alito and Thomas stand poised to accept the "proceed with caution" argument despite its dual deficiencies, this Essay identifies what ought to be the third nail in the coffin. As this Essay will show, the Supreme Court should also reject the argument because the *Obergefell* states (Kentucky, Michigan, Ohio, and Tennessee) have not shown that they actually intend to proceed with caution. Indeed, they offer no plans, timetables, or rubrics that they intend to use in analyzing the effects of same-sex marriage elsewhere, extrapolating those effects to their states, and taking action as warranted. This dearth of evidence belies their contention that they intend to proceed with caution in deciding whether to allow same-sex couples to marry.

I

THE "PROCEED WITH CAUTION" ARGUMENT

Several states have argued that limiting marriage to opposite-sex couples does not violate the Constitution because states must be permitted to proceed cautiously, on the theory that the long-term ramifications of same-sex marriage in their state are unknown and may be deleterious.⁴ This argument has been somewhat persuasive: A

¹ The cases under review challenge same-sex marriage bans in four states. *Bourke v. Beshear*, 135 S. Ct. 1041 (2015) (Kentucky); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (Michigan); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (Ohio); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (Tennessee).

² *United States v. Windsor*, 133 S. Ct. 2675, 2711, 2715–16 (2013) (Alito, J., dissenting).

³ *Id.* at 2715.

⁴ *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1236 (10th Cir. 2014) (Utah), *cert. denied*, 135 S. Ct. 265 (2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1025 (W.D. Wis. 2014) (Wisconsin), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 772 (E.D. Mich. 2014) (Michigan), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012) (Hawaii), *vacated*, 585 F. App'x 413, 414 (9th Cir. 2014) (vacating the case as moot because plaintiffs "subsequently married their same-sex partners" under Hawaii's Marriage Equality Act of 2013, which was enacted while the case was pending on appeal). The "official proponents" of California's ballot initiative banning same-sex marriage (Proposition 8) made the same

handful of federal judges have relied (at least in part) on it when dismissing challenges to state bans on same-sex marriage,⁵ and several jurists across the country—most notably Justices Alito and Thomas—have accepted it in dissents.⁶ The Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives endorsed the theory,⁷ as have amici in the lower federal courts.⁸ But the argument truly came to prominence following Judge Sutton's opinion for the Sixth Circuit panel in *DeBoer v. Snyder*:

[T]he only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know. A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems.⁹

By contrast, most courts explicitly addressing the "proceed with caution" argument in the context of limiting marriage to opposite-sex couples have rejected its legal or factual underpinnings. For example, the Ninth Circuit¹⁰ and federal district courts in Arkansas,¹¹

argument on behalf of California when state officials refused to defend the ban. *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁵ See, e.g., *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 926–27 (E.D. La. 2014); *Jackson*, 884 F. Supp. 2d at 1116–19.

⁶ See, e.g., *Windsor*, 133 S. Ct. at 2715–16 (Alito, J., dissenting); *Kitchen*, 755 F.3d at 1239 (Kelly, J., concurring in part and dissenting in part); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 981–82 (Mass. 2003) (Sosman, J., dissenting).

⁷ Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Its Motion to Dismiss at 35, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) (No. 3:10-cv-01750 (VLB)), 2011 WL 3627043 ("As an empirical matter, the long-term social consequences of granting legal recognition to same-sex relationships remain unknown. In these circumstances, Congress was justified in waiting for evidence spanning a longer term before engaging in what it reasonably could regard as a major redefinition of a foundational social institution.").

⁸ See, e.g., Brief of Amicus Curiae, The Family Trust Foundation of Kentucky, Inc., in Opposition to Timothy Love Plaintiffs' Motion for Summary Judgment at 20–24, *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014) (No. 3:13-CV-750-H), 2014 WL 2216195 (noting the uncertain and adverse effects of permitting same-sex marriage in Kentucky).

⁹ *DeBoer*, 772 F.3d at 406.

¹⁰ *Latta v. Otter*, 771 F.3d 456, 474 n.16 (9th Cir. 2014) ("[S]tates may not 'go slow' in extending to same-sex couples the right to marry.") (citing *Baskin v. Bogan*, 766 F.3d 648, 668–69 (7th Cir. 2014)); *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012) ("[T]here could be no rational connection between the asserted purpose of 'proceeding with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution."), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹¹ *Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 WL 6685391, at *18 (E.D. Ark. Nov. 25, 2014).

Connecticut,¹² Michigan,¹³ and Wisconsin¹⁴ rejected this argument as legally unsound. The District of Utah also rejected this argument on legal grounds, but went on to note that it was factually flawed given that the proffered fears (e.g., an increase in divorce rates) were unsupported by evidence.¹⁵ Likewise, the Seventh Circuit¹⁶ and the Northern District of California¹⁷ rejected this argument because the justifications for proceeding with caution were factually unsound. Finally, the Southern District of Mississippi sidestepped the legal and factual infirmities by simply noting that the assertion that the state's ban on same-sex marriage was an exercise in proceeding with caution was "profoundly ahistorical."¹⁸

Only one of the *Obergefell* states, Michigan, raised the "proceed with caution" argument at the district court level (where it was rejected).¹⁹ However, Judge Sutton resuscitated and highlighted it in his Sixth Circuit opinion.²⁰ Three of the four *Obergefell* states have now advanced it in their merits briefs as a rational basis for banning same-sex marriage.²¹ Finally, given its persuasive history with some of the Justices, the Supreme Court is bound to consider it.

¹² *Pedersen*, 881 F. Supp. 2d at 345–46 ("[The Defense of Marriage Act's] exclusion of same-sex marriages from receipt of federal marital benefits bears no rational relationship to the goal of 'proceeding with caution' in an area of proposed social change.").

¹³ *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 772 (E.D. Mich. 2014) (refusing to defer to a state's desire to "proceed[] with caution" where constitutional rights are concerned (citing *Watson v. City of Memphis*, 373 U.S. 526, 532–33 (1963))), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

¹⁴ *Wolf v. Walker*, 986 F. Supp. 2d 982, 1025 (W.D. Wis. 2014) ("[A] desire to make a class of people wait to exercise constitutional rights is not a legitimate interest." (citing *Watson*, 373 U.S. at 532–33)), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014).

¹⁵ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1213 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

¹⁶ *Baskin*, 766 F.3d at 668–69.

¹⁷ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹⁸ Campaign for S. Equal v. Bryant, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *30 (S.D. Miss. Nov. 25, 2014).

¹⁹ *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 772 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

²⁰ *DeBoer*, 772 F.3d at 406.

²¹ Brief for Respondent at 57, *Obergefell v. Hodges*, 135 S. Ct. 1039 (Mar. 27, 2015) (No. 14-556) (Ohio); Brief of Respondents at 39 n.17, *Tanco v. Haslam*, 135 S. Ct. 1040 (Mar. 27, 2015) (No. 14-562) (Tennessee); Brief for the Respondents at 41–42, *DeBoer v. Snyder*, 135 S. Ct. 1040 (Mar. 27, 2015) (No. 14-571) (Michigan).

II

WHY “PROCEED WITH CAUTION” FAILS IN *OBERGEFELL*

Even if one grants the premise of Justice Alito’s dissent in *Windsor*, there is another fatal flaw with this argument. Assume that any legal or factual deficiencies of “proceed with caution” do not exist. In other words, accept for the sake of argument that proceeding with caution can be a rational basis for a state to limit marriage to opposite-sex couples, and the long-term ramifications of same-sex marriage are unknown but may indeed be deleterious.

The government’s own actions can undermine the assertion that its rational basis is proceeding with caution, as at least two federal courts have found. In *Baskin v. Bogan*, the Seventh Circuit rejected appellants’ argument that Wisconsin should be allowed “to act deliberately and with prudence—or, at the very least, to gather sufficient information—before transforming this cornerstone of civilization and society” because they failed to offer evidence that the state “has any interest in gathering [such] information.”²² In *Pedersen v. OPM*, the District of Connecticut referenced a similar defect when rejecting the argument that the federal government should be allowed to exclude same-sex couples from the definition of marriage “until long-term evidence is available to establish that such a group will not have a harmful effect upon society,” on the grounds that this would “permit[] discrimination until equal treatment is proven, *by some unknown metric*, to be warranted.”²³ No doubt questioning the sincerity of the argument, these courts required the government to prove its intent to proceed with caution; the Supreme Court should adopt the same requirement in *Obergefell*.

It is axiomatic, of course, that the government “has no obligation to produce evidence to sustain the rationality of a statutory classification” to survive rational basis review.²⁴ Yet, evidence of the rationality of the desire to proceed with caution itself is not what the *Baskin* and *Pedersen* courts demanded. Rather, they merely found it implausible that the government, in fact, wanted to proceed with caution.

After all, if a state may proceed with caution while it waits to see whether same-sex marriage causes harmful effects in other jurisdictions, it follows that there will come a time when that state will actually know whether same-sex marriage is harmful. If no harmful

²² 766 F.3d 648, 668 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

²³ 881 F. Supp. 2d 294, 346 (D. Conn. 2012) (emphasis added).

²⁴ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

effects of same-sex marriage are apparent when that time comes—and proceeding with caution had previously been the only constitutional justification for delay—it would then be incumbent upon the state to allow same-sex marriage. However, unless the state indicates how it plans on assessing the potential harmful effects of same-sex marriage, there is no way to hold the state to its word. Thus, if the “proceed with caution” argument is indeed viable, one of its elements must be reasonable evidence of how the state intends to assess the harmful effects of same-sex marriage. In other words, if a state wants to proceed with caution, it must at least show that it actually plans on doing so.

The *Obergefell* states fail this test because they have given no indication of how they intend to assess the effects of same-sex marriage. For example, they have not proposed any plan to allow same-sex couples to enter into civil unions or domestic partnerships to “test the waters” and see what happens, despite the fact that such incremental steps have convinced some judges that a state intends on proceeding with caution.²⁵ In fact, all four states enshrine permanent bans on civil unions and domestic partnerships in their constitutions.²⁶

Indeed, the *Obergefell* states have left the Court to guess how they intend to proceed with caution. They have produced no timetables that they plan to follow in assessing the effects of same-sex marriage in other jurisdictions and, if there are no deleterious effects, eventually

²⁵ *E.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1118 (D. Haw. 2012) (“Hawaii could rationally conclude that by enacting the reciprocal beneficiaries act, followed years later by the civil unions law, and retaining the definition of marriage as a union between a man and woman, it is addressing a highly-debated social issue cautiously.”), *vacated*, 585 F. App’x 413, 414 (9th Cir. 2014) (finding the appeal moot in light of Hawaii’s Marriage Equality Act of 2013, enacted while the case was pending on appeal, which permitted plaintiffs to “marr[y] their same-sex partners”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 514 (Conn. 2008) (Borden, J., dissenting) (arguing that, by enacting a civil union law and then allowing support for a gay marriage bill to percolate, the state legislature demonstrated that it was acting rationally “to address the issue of gay marriage step-by-step, rather than all at once”).

²⁶ See KY. CONST. § 233A (“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); MICH. CONST. art. I, § 25 (banning same-sex marriage and “similar union[s]”); OHIO CONST. art. 15, § 11 (“This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”); TENN. CONST. art. XI, § 18 (“The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state.”). Moreover, the Tennessee Attorney General has concluded that, “to the extent that the civil union or domestic partnership is intended to be a contract providing the rights and privileges of marriage, current state law precludes legal recognition.” *Constitutionality of HB 2627 Regarding Recognition of Same-Sex Civil Unions or Domestic Partnerships*, Tenn. Att’y Gen. Op. No. 04-066, 1–2 (Apr. 19, 2004), available at <http://www.tn.gov/attorneygeneral/op/2004/op/op66.pdf>.

lifting their own bans. Kentucky, Ohio, and Tennessee did not raise the "proceed with caution" argument before their respective district courts and have not even presented evidence concerning what effects—such as opposite-sex marriage rates, divorce rates, or non-marital birth rates—they would examine.²⁷ Nor have any of the respondents identified the rubrics or metrics they intend to use to analyze the long-term ramifications of same-sex marriage in those jurisdictions that permit it and extrapolate their analysis to Kentucky, Michigan, Ohio, and Tennessee. For example, if respondents are interested in examining the effect of legalizing same-sex marriage on opposite-sex marriage rates in a state where same-sex marriage becomes legal, would an incremental, one-percent decrease in opposite-sex marriage rates over a period of five years be deemed unacceptable?

Moreover, respondents have never commissioned or even requested a study to project the long-term ramifications of same-sex marriage in their states. So, while such studies exist for other jurisdictions,²⁸ there are none for the *Obergefell* states. Strikingly, Michigan—the only state to raise the "proceed with caution" argument before the district court—seemed to see no need to reassess the long-term ramifications of same-sex marriage at some time down the road because it purported to already know that same-sex marriage causes harmful effects,²⁹ which further calls into question the sincerity of the argument.

In sum, the *Obergefell* states have introduced no evidence that they intend to proceed at all—with caution or otherwise. Absent such evidence, the Supreme Court should not give them the benefit of the doubt and assume they will assess the potential harms of same-sex marriage at some undisclosed time in the future by reference to unidentified metrics and unspecified standards.

CONCLUSION

Even if a desire to proceed with caution can be a rational basis for

²⁷ By contrast, Michigan introduced expert testimony at trial concerning several potential long-term ramifications of same-sex marriage. See Tresa Baldas, *Dueling Experts Debate Data in Michigan Gay Marriage Trial*, USA TODAY (Mar. 4, 2014, 7:32 PM), <http://www.usatoday.com/story/news/nation/2014/03/04/michigan-same-sex-trial/6037851/>.

²⁸ See, e.g., M.V. LEE BADGETT & JENNIFER SMITH, THE WILLIAMS INST., THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN AUSTRALIA (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Smith-Econ-Impact-Marriage-Feb-2012.pdf> (projecting how the legalization of same-sex marriage would affect the Australian economy).

²⁹ Baldas, *supra* note 27.

limiting marriage to opposite-sex couples, it is unavailable to the *Obergefell* states because they have failed to show that they intend to proceed at all. Put plainly, if a state wants to take things step-by-step, it needs to introduce evidence showing what those steps will be. Absent such evidence, the Supreme Court should reject any argument that the bans on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee advance a rational desire to proceed with caution.