Obergefell v. Hodges:
Seismic Shift or Business as Usual?

by Charles E. Powers

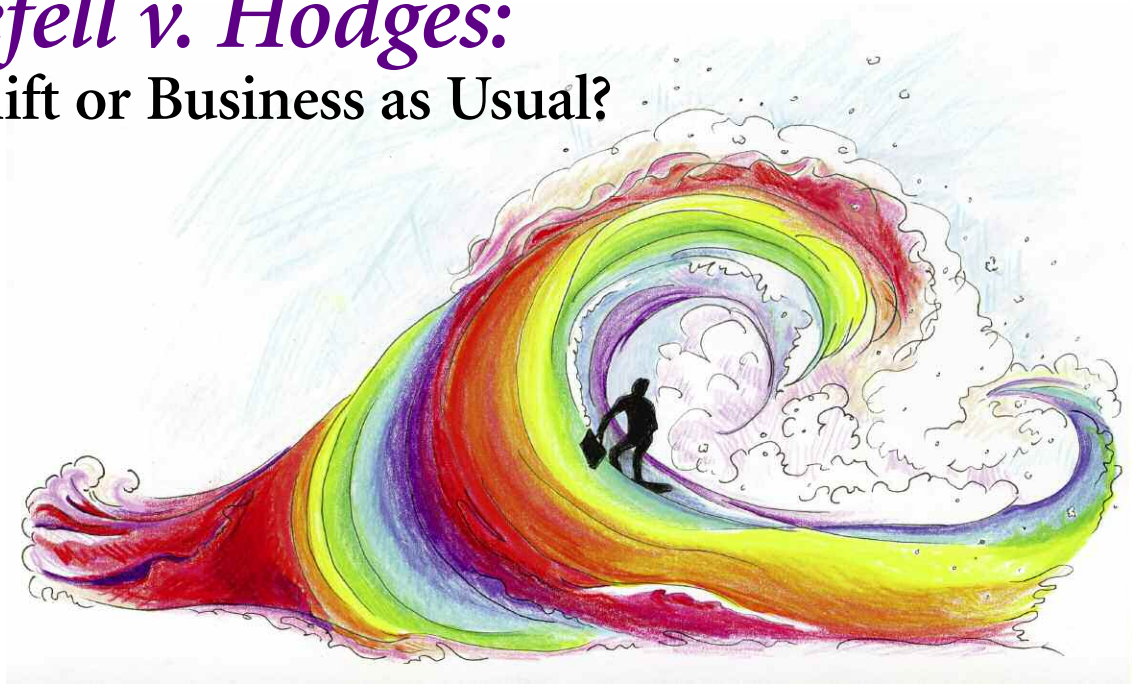

illustration by Madonna Dersch

The United States Supreme Court's decision in *Obergefell v. Hodges*[1] represents the culmination of a long struggle that will have lasting and life-changing effects on this country and its citizens. One needs to look no further than the opening paragraphs of Justice Kennedy's opinion to understand its impact. There, he outlines, with great empathy, the importance of marriage to so many people.

- After a committed relationship lasting more than two decades, James Obergefell could not be listed on the death certificate of his husband, John Arthur. "By statute, they must remain strangers even in death, a state imposed separation."
- Despite celebrating a "commitment ceremony to honor their permanent relation," April DeBoer and Jayne Rowse's three adopted children (a boy they fostered, a second premature baby boy abandoned by his mother requiring around-the-clock care, and a baby girl with special needs), could only have one woman listed as his or her adoptive parent. As a result, schools or hospitals could ignore one of their parents or leave one parent with no legal rights to her own children should tragedy befall her partner.
- Before leaving on a year-long deployment to Afghanistan, Army Reserve Sergeant First Class Ijpe DeKoe married his partner, Thomas Kostura, in New York. Upon his safe return and settlement in Tennessee (while continuing to work full time for the Army Reserve), Sgt. DeKoe and his husband were stripped of their lawful marriage whenever they resided in Tennessee, their marriage "returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden."[2]

Citing Confucius, Cicero, and Alexis de Tocqueville ("There is certainly no country in the world where the tie of marriage is so much respected as in America")[3], Justice Kennedy focused on the "enduring importance of marriage":[4]

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.

> Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.[5]

This "centrality of marriage" has prompted innumerable court cases over several decades, creating, even before the Supreme Court's decision, a "substantial body of law considering all sides of these issues,"[6] including Virginia's *Bostic v. Schaefer*[7] which, in September, 2014, found Virginia's statutes prohibiting same-sex marriages and/or civil unions,[8] as well as the Virginia Constitution's amendment recognizing only a union between one man and one woman,[9] to be unconstitutional:

> Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life.[10]

The rationale employed in *Bostic* is echoed in *Obergefell*:

> Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."
>
> The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.[11]

This high concept of marriage is long standing. As far back as 1888, the United States Supreme Court noted that marriage was "creating the most important relation in life" and "having more to do with the morals and civilization of a people than any other institution."[12] "It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[13] Marriage is deemed to have a "basic position … in this society's hierarchy of values" that "involves interests of basic importance in our society"[14] and is considered one of a person's "vital personal rights essential to the orderly pursuit of happiness by free men."[15]

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[16]

Virginia has similarly had a high respect for the institution of marriage, the Supreme Court of Virginia noting in 1951 that marriage is "more than a mere contract":

> It is rather to be deemed an institution of society founded upon the consent and contract of the parties, and in this view it has more peculiarities in its natural character, operation, and extent of obligation different from what belongs to ordinary contracts. Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society.[17]

This echoed it's view of marriage in 1923 when it noted that "[f]rom the moment of the marriage, the husband and wife assume toward each other duties in the performance of which society is vitally interested, and which it will not permit to be hampered or obstructed by the assertion of conflicting rights by others … a status has been assumed, which the public welfare requires shall not be disturbed."[18]

Recognizing the importance of marriage, Justice Kennedy points out that "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[19] As such, states have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities" which include…

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[20]

This is in accord with the Supreme Court's pronouncement in 1888:

> Marriage, as creating the most important relation in life, as having more to do with the

> morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.[21]

Based on this long-standing authority, Virginia has enacted a complex system of laws that are applicable to married couples. While constantly evolving, the laws application to husbands and wives has been well tested over the decades and there are hundreds (perhaps thousands) of lawyers dedicated to this practice in this commonwealth. Thus, when the Supreme Court, at long last, recognized that same-sex partners were simply seeking the "fulfillment" that marriage brings in hopes of not being "excluded from one of civilization's oldest institutions,"[22] there may have been a seismic shift in people's perceptions and there may now be many laws that no longer exclude a large portion of the population. However, for the practice of family law in Virginia, it is business as usual. Same sex couples are now entitled to all the privileges of, and the responsibilities of, marriage—the good and the bad. They are no different than any other married couple—simply because they are no different.[23]

Endnotes:

1 579 U.S. ___, ___ S.Ct. ___, 2015 WL2473451, 83 USLW 4592 (2015). See also the slip opinion at http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

2 *Obergefell* at pp. 4-6 (references will be made to the slip opinion issued by the Supreme Court on June 26, 2015.

3 *Obergefell* at p. 3 and 16.

4 *Obergefell* at p. 4.

5 *Obergefell* at p. 3.

6 *Obergefell* at p. 9.

7 *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) cert. denied, 135 S. Ct. 308 (2014).

8 Va. Code § 20-45.2 and § 20-45.3. As of the writing of this article, these statutes are still part of the Code of Virginia, H.B. 1288 being left in the House's Courts of Justice Committee and S.B. 682 being defeated in the Senate's Courts of Justice Committee. It is presumed this will be rectified during the next session of the General Assembly.

9 Virginia Constitution, Article 1, § 15-A. As of the writing of this article, this constitutional provision is still part of Virginia's Constitution, H.J.R. 492 being left in the House's Privileges and Elections Committee. It is presumed this will be rectified during the next session of the General Assembly also.

10 *Bostic* at 384. The circumstances of the appellants in Bostic are no less compelling than those in *Obergefell*. Timothy Bostic and Tony London, having been in a committed relationship since 1989 and having lived together for more than twenty years, wanted to marry "in order to publicly announce their commitment to one another and enjoy the rights, privileges, and protections that the State confers on married couples". Mr. Bostic and Mr. London were married in Norfolk in May, 2015 ((Newport News) *Daily Press*, May 2, 2015).

Because the California wedding of Carol Schall and Mary Townley was not recognized in Virginia, Ms. Schall could not visit her wife in the hospital for several hours after she was admitted due to pregnancy related complications, could not legally adopt her wife's child and could not be listed on the birth certificate of her wife's child. In addition, she incurred many additional costs and expenses as a result of this non-recognition.

11 *Obergefell* at p. 13, citing *Goodridge v. Department of Public Health*, 440 Mass. 309, 322, 798 N. E. 2d 941, 955 (2003).

12 *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

13 *Id*. at 211.

14 *Boddie v. Connecticut*, 401 U.S. 371, 374 and 376 (1971).

15 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

16 *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), cited in *Obergefell* at pp. 13-14.

17 *Alexander v. Kuykendall*, 192 Va. 8, 11, 63 S.E.2d 746, 747 (1951). This quote by Chief Justice Hudgins echoed his dissent of three years earlier in *Mullen v. Mullen*, 188 Va. 259, 49 S.E.2d 349 (1948), the Supreme Court case which held that a "mother is the natural custodian of her child of tender years." In claiming that Ms. Mullens should not have been awarded custody because of her actions causing the divorce, the Chief Justice wrote: "She regarded the marriage vow like a child who on being handed a box of candy, takes a piece and bites into it, puts it back, and selects another piece in an effort to find a sweet to her taste. She has a complete disregard for the dignity of marriage and all that it implies. We can only judge the future by the past. If this wife has so little conception of the dignity, obligations, and responsibilities of the marriage vows, how can a court with any degree of certainty decide that she will not regard the obligations and responsibilities of motherhood in the same light vein?" *Mullen* at 280, 49 S.E.2d at 359 (C.J. Hudgins, dissenting).

18 *Stanley v. Rasnick*, 137 Va. 415, 119 S.E. 76, 79 (1923). The "rights of others" referred to by the court was the basis of the suit itself: a father suing for the loss of services of his 16-year-old daughter

who was old enough to get married but had not sought out her father's consent.

19 *Obergefell* at p. 17.

20 *Obergefell* at p. 17-18.

21 *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

22 *Obergefell* at p. 28.

23 When originally asked to comment on the recent Supreme Court decision, it was suggested that the topic should be on its impact on practicing lawyers as much had already been said about its impact on society (which is true). In reflecting on how this changes the practice of law there may be very little practical impact other than modifying a few statutes (see footnotes 8 and 9) and some interesting interpretations of some of the statutory factors applicable to custody, equitable distribution and support (notably related to the "duration" of the marriage). Its day-to-day application, however, is unlikely to change significantly. For an excellent overview of this topic, please see M. Barton, *Will "Equal Marriage" Equate to "Equal Divorce"?*, VIRGINIA FAMILY LAW QUARTERLY, Vol. 34, No. 4 (Winter 2014).

Charles E. Powers is a founding shareholder of Batzli Stiles Butler PC in Richmond and has devoted his career to the practice of family law. He is the current chair of the Family Law Section for the Virginia State Bar and is a Fellow of the American Academy of Matrimonial Lawyers.