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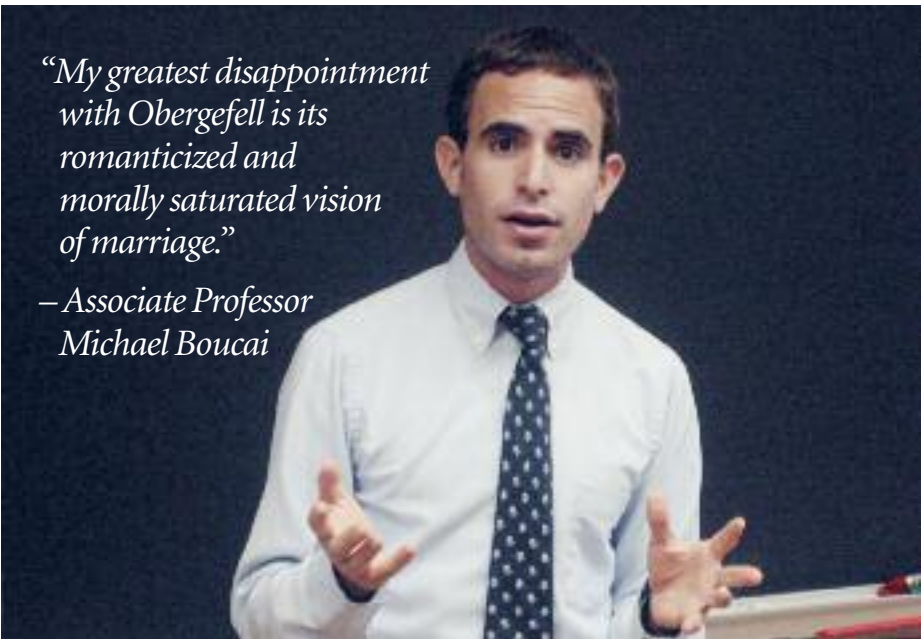

The marriage equality decision: Surprises and disappointments

By Associate Professor Michael Boucai

On June 26, 2003, the Supreme Court held in *Lawrence v. Texas* that criminal sodomy laws are unconstitutional, in part because, as Justice Anthony Kennedy explained, they intrude upon "conduct that can be but one element in a bond that is more enduring." Exactly 10 years later, in *U.S. v. Windsor*, Kennedy announced for a bare majority of the Court that a key provision of the federal Defense of Marriage Act "interfere[d] with the equal dignity of same-sex marriages" and so violated the Fifth Amendment's Due Process Clause. Finally, on June 26 of this year, the Court held in *Obergefell v. Hodges* that states are constitutionally compelled to issue same-sex marriage licenses. Again speaking for a majority of five, Kennedy wrote that this new dimension of the freedom to marry "is part of the liberty promised by the Fourteenth Amendment [and] is derived, too, from that amendment's guarantee of equal protection of the laws."

In light of Lawrence and Windsor, to say nothing of the profound cultural shifts those cases represented, the result in Obergefell came as no surprise. This is not to call the decision unimportant. To the contrary, Obergefell eliminates what were in some states the only remaining instances of explicit governmental discrimination based on sexual orientation – and the only remaining instances of explicit sex-based discrimination in the law of marriage. Thanks to Obergefell, the gay rights movement can focus on securing federal, state and local protections against discrimination in employment, housing, education and public accommodations. And, of course, the decision allows thousands more families to reap the tangible and intangible benefits of a privileged legal status.

The Court's predictable ruling also contained a few surprises. The most striking was doctrinal. Kennedy's opinions in Lawrence and Windsor augured an analysis that would weave together principles of both liberty and equality, but few observers expected an opinion so overwhelmingly focused on "the fundamental right to marry." Because I doubt the existence of such a right – as if the government were obliged to issue marriage licenses! – I would have preferred a decision grounded exclusively in equal protection.

Another unfortunate surprise was the Court's endorsement of the theory that sexual orientation is immutable. This affirmation was gratuitous given the majority's failure to raise, let alone answer, the question of whether sexual orientation is a "suspect classification." More importantly, the immutability theory is debatable as a matter of fact; it holds true for many people but by no means all. And as I and many others have argued, a characteristic's mutability should be irrelevant to our constitutional calculus.

My greatest disappointment with Obergefell is its romanticized and morally saturated vision of marriage. Justice Kennedy calls marriage a "transcendent" institution whose "centrality to the human condition" rests largely on the "nobility and dignity" it bestows upon spouses. On this score I stand with Justice Clarence Thomas: "The decision to [marry] does not make one person more 'noble' than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious."

Finally, I wish that one of the four liberal justices who signed on to Kennedy's paean to marriage had bothered to write a concurrence. I would have liked to see Justices Sonia Sotomayor and Elena Kagan, both unwed, distance themselves from the notion that one who does not marry is "condemned to live in loneliness." And I would have liked to see Justice Ruth Bader Ginsburg explain why, the so-called "fundamental right to marry" notwithstanding, same-sex marriage bans embody gender stereotypes and therefore invidiously discriminate on the basis of sex.

We can take heart that the meanings of this legal, political and cultural milestone are not limited to what a majority of the Supreme Court says they are. In a recent article on the first gay marriage cases, which arose in the heyday of gay liberation, I suggest that the fight for this right once was and still can be understood as part of a larger movement for sexual freedom, gender dissent and alternative family forms. Time will tell whether Obergefell enhances or undercuts those radical possibilities.

Michael Boucai teaches Criminal Law and Family Law at SUNY Buffalo Law School, where he has also offered courses on Law & Sexuality and Law & Procreation.