

***Pavan v. Smith*: Equality for Gays and Lesbians in Being Married, Not Just in Getting Married**

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Did the United States Supreme Court’s landmark 2015 marriage equality decision, *Obergefell v. Hodges*,¹ provide only a narrow and specific right of same-sex couples to obtain state-issued marriage licenses and to have their extant marriages recognized in a new state? Or, was the decision intended to go further—to vindicate the equality and dignity of gays and lesbians at a deeper level—by affirming not only their capacity to enter into marital relationships, but also their capacity to fully participate in the social institution of marriage as it is regulated by American law and understood by contemporary American society?

The Court answered that question, at least partially, in one of its last decisions of the October Term 2016, *Pavan v. Smith*.² Yet the Court may not have been clear and definitive enough in *Pavan* to prevent continued efforts in some states to deny gays and lesbians the full meaning of marriage equality.

I. *Obergefell*: “Equal Dignity in the Eyes of the Law”

The movement for marriage equality for gays and lesbians

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¹ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

² *Pavan v. Smith*, 137 S.Ct. 2075 (2017).

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began, at least embryonically, in the 1970s but did not become a subject of national controversy and debate until the mid-1990s. In 2004, Massachusetts, as the result of a decision by its state high court,³ became the first state to license same-sex marriages. The first decision by a federal court applying the federal Constitution to strike down a state anti-gay marriage law came in 2010 in *Perry v. Schwarzenegger*,⁴ which invalidated California's Proposition 8. *Perry* emboldened the marriage equality movement, and more federal lawsuits were filed around the country. In 2013 the Supreme Court in *United States v. Windsor*⁵ struck down the federal Defense of Marriage Act, which had prohibited federal recognition of legal same-sex marriages. In the wake of *Windsor*, federal courts in a number of states began striking down laws that prohibited same-sex marriage. *Windsor* was widely perceived as a major step toward an inevitable eventual decision by the justices to invalidate any remaining state-law gay marriage bans that had not already been struck down by lower courts. That decision would come two years later in *Obergefell*.

The *Obergefell* Court anchored its decision in the substantive due process right to marry,⁶ though it said that the right also was derived from the Equal Protection Clause.⁷ “As the State itself makes marriage all the more precious by the significance it attaches to it,” the Court said, “exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”⁸ Marriage

³ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁴ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Calif. 2010).

⁵ *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

⁶ *Obergefell*, 135 S.Ct. at 2600-01.

⁷ *Id.* at 2602.

⁸ *Id.* at 2601-02.

equality, the Court said, was nothing less than a matter of “equal dignity in the eyes of the law.”⁹

II. *Pavan v. Smith: Obergefell* as Applied to Parenthood

A. State court decision

In recent years, increasing numbers of out, self-identified gays and lesbians—often, though not always, in couples—began parenting, leading commentators to remark about a “gayby boom.”¹⁰ This phenomenon has presented challenging new issues for family law, because parenthood for gays and lesbians often involves not only traditional adoption, but also assisted reproductive technologies such as donor insemination, *in vitro* fertilization, or gestational surrogacy. Because persons in same-sex relationships “frequently establish parental relationships in the absence of gestational or genetic connections to their children,”¹¹ their legal relationships to their children may be less predictable, as “law fails to value parenthood’s social dimensions adequately and consistently.”¹² As a result, gay men and lesbians who form same-sex relationships often have found “their parent-child relationships discounted” by the law.¹³ Not surprisingly, scholars have sought to understand *Obergefell*’s implications for parenting by gay and lesbian couples.¹⁴

⁹ *Id.* at 2608.

¹⁰ *SEE, E.G.*, LUCAS GRINDLEY, *GAYBY BOOM? CENSUS SHOWS RISE IN ADOPTIONS*, *The Advocate* (June 14, 2011, 10:10 AM), <https://www.advocate.com/news/daily-news/2011/06/14/gayby-boom-found-us-census-figures>.

¹¹ Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2264 (2017).

¹² *Id.*

¹³ *Id.* at 2265-66.

¹⁴ *See, e.g.*, *id.* at 2265 (stating that *Obergefell* “sought to protect not only romantic bonds, but also parent-child relationships, formed by gays and lesbians”); Leslie Joan Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 *CHL.-KENT L. REV.* 55, 58 (2017) (concluding that *Obergefell* has had a “limited” effect on same-sex parenting cases and that “legislative solutions are still needed”). *See generally* Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 *OHIO ST. L.J.* 919 (2016) (exploring the relationship between constitutional law and family law that the Supreme Court’s liberty rulings, including *Obergefell*, have created).

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Against this backdrop, the Arkansas Supreme Court decided *Smith v. Pavan*,¹⁵ a case brought by three married female couples, all of whom had used anonymously donated sperm and artificial insemination to bring children into their families. The couples brought suit after the Arkansas Department of Health (“ADH”) refused to issue birth certificates to the couples listing both spouses as parents.

The ADH’s action appeared on its face to be a straightforward example of discrimination that disadvantaged persons in same-sex relationships. Arkansas law provides that “[f]or the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child.”¹⁶ Arkansas law also incorporates a presumption of paternity, specifying that “[i]f the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child.”¹⁷ In other words, the state grants a legal presumption in favor of the husband in an opposite-sex marriage that he is the child’s legal parent, even without any proof of biological paternity.¹⁸

Significantly, the presumption applies even in cases where a woman conceives by means of an anonymous sperm donor and the husband consents to the procedure.¹⁹ In other words, even when a member of an opposite-sex marriage plainly has no biological tie to the child, Arkansas law treats him as a legal parent by allowing his name to be placed on the birth certificate. Yet, Arkansas did not afford the same privilege to spouses in same-sex marriages who

¹⁵ *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016).

¹⁶ ARK. CODE ANN. § 20-18-401(e) (2016).

¹⁷ ARK. CODE ANN. § 20-18-401(f)(1).

¹⁸ The presumption may be overcome if paternity is determined by court order or by affidavits from the mother, her husband, and a putative father. ARK. CODE ANN. § 20-18-401(f)(1)(A)-(B).

¹⁹ ARK. CODE ANN. § 9-10-201(a) (2016).

had shared in childbirth decisions and parenting responsibilities but lacked biological ties to their children.

Despite this obvious disparate treatment, the Arkansas Supreme Court ruled against the plaintiff same-sex couples, and did so by attempting to narrow the reach of *Obergefell*. First, the court observed that “*Obergefell* did not address Arkansas’s statutory framework regarding birth certificates, either expressly or impliedly.”²⁰ But this statement, while true in the most literal sense, was disingenuous. *Obergefell* did not, of course, consider the particulars of Arkansas birth certificate law, because the case did not involve any plaintiffs from that state. But the *Obergefell* court did list “birth and death certificates” among the important incidents that customarily are attached to marital status.²¹ And in the course of explaining why “[t]here is no difference between same- and opposite-sex couples” in their capacities to participate in an institution that is at “the center of so many facets of the legal and social order,” the Court observed that same-sex couples were “denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable in their own lives.”²² *Obergefell* plainly drew connections between the right to marry, and state policies which are designed to nurture and protect marriages and which privilege marriage over other relationships.

The Arkansas court attempted to skirt these principles from *Obergefell* by denying that birth certificates are a benefit or incident of marriage. Relying on the fact that the presumption of paternity may be overcome by court order or by affidavits recognizing a biological father who is not the mother’s husband,

²⁰ *Pavan*, 505 S.W.3d at 176.

²¹ *Obergefell*, 135 S.Ct. at 2601.

²² *Id.*

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the court maintained that the state’s birth registration scheme actually “centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.”²³ The main purpose of birth certificates, the court said, is biological record keeping to facilitate “tracing public-health trends and providing critical assistance to an individual’s identification of personal health issues and genetic conditions.”²⁴ Thus, the court said, it is important that “the mother and father on the birth certificate . . . be biologically related to the child.”²⁵ The court insisted that “marriage, parental rights, and vital records” must be considered “distinct categories” of legal analysis.²⁶

The state court’s majority opinion never squarely confronted the question of how these points could be reconciled with the presumption in Arkansas law—rebuttable, but still a presumption—that a husband should be listed on the birth certificate as the parent of any child born into a marriage.²⁷ Nor did it explain why a supposedly biology-based birth registration scheme that was concerned with “public health trends” and “genetic conditions” would afford this presumption even where it is known that a donor’s sperm, not the husband’s, was used to conceive the child.²⁸

The Arkansas court also considered whether “naming the nonbiological spouse on the birth certificate of the child is an

²³ *Pavan*, 505 S.W.3d at 178.

²⁴ *Id.* at 181.

²⁵ *Id.*

²⁶ *Id.* at 180.

²⁷ See *supra* notes 17-19 and accompanying text.

²⁸ At some point in the state appellate litigation, the Alaska Registrar of Vital Records changed its interpretation of state law and conceded that children born of artificial insemination to a married couple should have both spouses listed as parents, regardless of whether they were same or opposite sex. *Pavan*, 505 S.W.3d at 187 (Wood, J., concurring in part and dissenting in part). This development arguably could have mooted the case as to two of the three plaintiff couples (the third couple was not yet married at the time their child was born). But the state supreme court’s majority opinion did not discuss this development, nor did the U.S. Supreme Court’s *per curiam* opinion.

interest of the person so fundamental that the State must accord the interest its respect,” and concluded that it was not.²⁹ But that was not the proper question. Despite the court’s effort to make *Pavan* a case about a parent’s rights in relationship to children rather than the right to be treated equally in marriage, the proper question was why Arkansas law should give disparate treatment to same-sex and opposite-sex couples in a context—recognition of legal parentage for children who are born into a marriage with the help of assisted reproduction—where they are otherwise similarly situated. A dissent by Justice Paul E. Danielson stated the matter plainly and candidly:

Arkansas [law] provides that the name of the “husband” of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother—specifically, if he is married to the mother at the time of either conception or birth or between conception and birth. The obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist. Thus, there can be no reasonable dispute that the inclusion of a parent’s name on a child’s birth certificate is a benefit associated with and flowing from marriage. *Obergefell* requires that this benefit be accorded to same-sex spouses and opposite-sex spouses with equal force.³⁰

B. U.S. Supreme Court Decision

The U.S. Supreme Court essentially agreed with Justice Danielson’s framing of the issue. A majority of the Court (with

²⁹ *Pavan*, 505 S.W.3d at 180.

³⁰ *Id.* at 190 (Danielson, J., dissenting).

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three justices dissenting) apparently saw the question as an easy one, summarily reversing the Arkansas Supreme Court in a relatively short per *curiam* opinion without oral argument or additional briefing beyond the written arguments presented in the petition and opposition to certiorari.

After recounting the background of the case and the Arkansas rules governing birth certificates, the Court held that “*Obergefell* proscribes” the “disparate treatment” that had been given to the plaintiffs.³¹ In Arkansas, the Court said, birth certificates are “more than a mere marker of biological relationships,” because “[t]he State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents.”³² Thus, “[h]aving made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.”³³ The Court noted that birth certificates often are “used for important transactions like making medical decisions for a child or enrolling a child in school.”³⁴

When *Obergefell* declared that “a State may not ‘exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples,’” the Court intended, it said in *Pavan*, that those “terms and conditions” refer not merely to the requirements for a marriage license, but to the “rights, benefits and responsibilities” that accompany marital status.³⁵ The Court observed that *Obergefell* had “expressly identified ‘birth and death certificates’” among these rights and benefits, and noted that “[s]everal of the plaintiffs in *Obergefell* challenged a State’s refusal to recognize their same-sex spouses on their children’s birth

³¹ *Pavan*, 137 S.Ct. at 2078.

³² *Id.* at 2078-79.

³³ *Id.* at 2079.

³⁴ *Id.* at 2078.

³⁵ *Id.* (quoting *Obergefell*, 135 S.Ct. at 2605, 2601).

certificates.”³⁶

Indeed, the Court could have added that the decision’s namesake, James Obergefell, did not file his federal lawsuit seeking a right to get married. Rather, his objective was to have his home state of Ohio recognize his marriage to his terminally ill husband John, which had been performed in Maryland, so that James could be listed as the legal spouse on John’s Ohio death certificate.³⁷ Being listed on a death certificate—whose primary purpose is the record the date and cause of someone’s death—probably is not very high on anyone’s list of the important rights and benefits of marriage. Yet James Obergefell’s quest for simple equal treatment on this matter took him from being an unknown Cincinnati real estate agent to someone whose name will forever be linked to a landmark U.S. Supreme Court decision for gay and lesbian rights.

The Court’s *per curiam* opinion drew a dissent from summary disposition by newly seated Justice Neil Gorsuch, joined by justices Clarence Thomas and Samuel Alito. Justice Gorsuch’s dissent argued that the Court’s summary treatment of the matter was inappropriate because, in his view, it was unclear why *Obergefell* should necessarily be offended by “a birth registration regime based on biology.”³⁸ As explained above, however, this is not really an accurate or even honest description of the Arkansas birth certificate scheme, in which, for married heterosexual couples, biological fact is subordinated to the presumption of paternity.³⁹

³⁶ *Id.* (quoting *Obergefell*, 135 S.Ct. at 2601).

³⁷ *Obergefell*, 135 S.Ct. at 2594-95.

³⁸ *Pavan*, 137 S.Ct. at 2079 (Gorsuch, J., dissenting).

³⁹ See *supra* notes 17-19, 30 and accompanying text.

III. Discussion

Although opposite-sex marriage had always been assumed in all states, no state expressly defined marriage as a union between a man and a woman until Maryland did so in 1973 “in an apparent response to attempts by same-sex couples to obtain marriage licenses.”⁴⁰ The bans on same-sex marriage enacted by a majority of the states from the 1970s to 2012 did not arise from a careful, well-informed, deliberative process in each state in which the pros and cons of marriage equality were fairly and carefully considered. Rather, these express bans were the products of political backlash against an emerging movement for LGBT rights generally and marriage equality specifically.⁴¹ Most of the bans were hastily enacted by legislatures or through ballot measures in response to political campaigns by social and religious conservatives who argued that gays and lesbians presented a threat to the institution of marriage and to the very idea of the family itself.

This historical and social context may help to explain why the Court in *Obergefell* did not merely decide that the Constitution protects a right of gays and lesbians to marry. The Court framed its decision in the language of “equal dignity.”⁴² It noted that in the courts (perhaps as opposed, implicitly, to the political process), the question of marriage equality could be considered “without scornful or disparaging commentary.”⁴³ And so while its subject

⁴⁰ Kevin Rector, *Md. Attorney General Says Supreme Court Must Overturn Same-Sex Marriage Bans Nationwide*, THE BALTIMORE SUN (Mar. 9, 2015, 4:00 PM), <http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-attorney-general-issues-report-calling-samesex-marriage-bans-20150309-story.html>.

⁴¹ For treatments of this history, see Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 674-683 (2017) (arguing that the history, context, and effects of the marriage bans yield considerable evidence from which animus could be inferred); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

⁴² *Obergefell*, 135 S.Ct. at 2608.

⁴³ *Id.* at 2597.

was the right to marry, *Obergefell* also represented something larger. Against the backdrop of several decades of political abuse and backlash against claims for gay and lesbian rights, the Court was bringing this group into full and equal citizenship under the Constitution.

The *Obergefell* opinion reflected a broad understanding of contemporary American marriage as “a keystone of our social order”⁴⁴ and an institution that “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁴⁵ Indeed, the Court observed that “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”⁴⁶ Denying their parents equal marriage rights, the Court said, inflicted on the children of same-sex couples “harm,” “humiliat[ion],” and “a more difficult and uncertain family life.”⁴⁷ Among the “profound” advantages of legal marriage is that it “allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”⁴⁸

One cannot separate the Court’s discussion of the right of gays and lesbians to marry from its discussion of the legally conferred benefits and responsibilities of marriage. The Court explained that it was time to decide the question of marriage equality because “slower, case-by-case determination of the required availability of specific public benefits to same-sex couples . . . would deny gays and lesbians many rights and responsibilities intertwined

⁴⁴ *Id.* at 2601.

⁴⁵ *Id.* at 2600 (emphasis added).

⁴⁶ *Id.* at 2600.

⁴⁷ *Id.* at 2600-01.

⁴⁸ *Id.* at 2600 (quoting *Windsor*, 133 S.Ct. at 2694–95).

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with marriage.”⁴⁹ Unsurprisingly, the Court listed birth certificates among the familiar incidents of marriage; most Americans understand that marriage typically affects whose names are listed on a newborn’s birth record.

To be sure, much of the reasoning in *Obergefell* is opaque, and understanding its full meaning may require the reader to draw some inferences or read between the lines.⁵⁰ Justice Anthony Kennedy, the author of *Obergefell*, is famous in his substantive due process and equal protection jurisprudence for painting in broad, bold, and often blurry strokes; he is not famous for precise legal formalism. This has led to criticisms of the *Obergefell* opinion, even among those who agreed with the result. For example, Professor Andrew Koppelman, a longtime advocate for marriage equality, has criticized the opinion’s “remarkably weak reasoning” and “leaps of logic.”⁵¹

Still, it is difficult to see how a jurist could read *Obergefell* and conclude that Justice Kennedy or the other members of the majority intended to allow Arkansas or any other state to subject same-sex couples to legal regimes in which marriage and parenting are treated as separate and distinct undertakings. To be sure, many children are raised by parents who are not married, and law regulates many issues in the parent-child relationship in ways that are independent of marriage. But an honest reading of *Obergefell* makes clear that the Court was addressing the dignity of gay and lesbian couples in *being* married as well as *getting* married, and

⁴⁹ *Id.* at 2606.

⁵⁰ One commentator has suggested that *Obergefell* “left unresolved important ambiguities” and that “future interpreters” will need to look to “nontextual tools, such as adjudicative context, contemporary reception, and subsequent applications.” Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 389 (2016).

⁵¹ Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality — but They Did It the Wrong Way*, SALON (June 29, 2015, 11:15 AM), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94but_they_did_it_the_wrong_way/.

being married often includes raising children.

The members of the Arkansas Supreme Court are not the only jurists who have wrestled with the meaning and scope of *Obergefell*. A similar birth certificate case involving lesbian couples in Indiana who had used artificial insemination remains pending, as of this writing, in the Seventh Circuit U.S. Court of Appeals.⁵² In Kansas, a federal district court rejected that state's arguments that *Obergefell* should be read narrowly and should not apply to parental rights:⁵³ "*Obergefell* requires every state to treat same-sex married couples the same way it treats opposite-sex married couples," the court said, and "[t]his includes the marital benefits of raising children together, with the same certainty and stability given opposite-sex couples."⁵⁴ Another federal district court in Mississippi preliminarily enjoined a pre-*Obergefell* state law that functionally prohibited adoptions by married same-sex couples. While the district court acknowledged that *Obergefell*'s "approach could cause confusion,"⁵⁵ it nonetheless read the decision as "extend[ing] its holding to marriage-related benefits—which includes the right to adopt."⁵⁶ The district court noted that "the majority opinion foreclosed litigation over laws interfering with the right to marry" as well as "rights and responsibilities intertwined with marriage."⁵⁷ And in a post-Pavan decision, the Arizona Supreme Court also rejected the argument that *Obergefell* should be read narrowly as governing only the right to marry, and it invalidated a parentage presumption that applied to males in opposite-sex marriages but not to the female spouse of a birth

⁵² Henderson v. Adams, No. 17-01141 (7th Cir. filed Jan. 23, 2017).

⁵³ Marie v. Mosier, 196 F. Supp. 3d 1202, 1218-1219 (D. Kan. 2016).

⁵⁴ *Id.* at 1219.

⁵⁵ Campaign for S. Equal. vs. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 709 (S.D. Miss. 2016).

⁵⁶ *Id.* at 710.

⁵⁷ *Id.* (internal citation and quotation marks omitted).

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mother who had used an anonymous sperm donor.⁵⁸

It is perhaps understandable that some lower courts have commented about the difficulty of divining *Obergefell*'s full meaning. The Supreme Court did not include a sentence like the following: "Aside from holding that marriage licenses and recognition must be made available on equal terms, we further hold that persons in all marriages, whether same-sex or opposite-sex, must be treated equally and must receive the same rights, benefits, incidents, presumptions, and responsibilities—including those associated with the parent-child relationship—that the federal government, the states, or their agencies and political subdivisions have chosen to provide by law." One might have hoped that the Court in *Pavan* would have realized its error and taken the opportunity to preclude further litigation on similar matters by including some clear and unequivocal language such as I have suggested. But it did not. (Perhaps this small-bore approach was necessary to keep the vote of Chief Justice John Roberts, who had dissented in *Obergefell* but did not join the dissenters in *Pavan*.) Aside from rejecting Arkansas's "disparate treatment" of birth certificates, the Court did not clarify or add doctrinal coherence to the equal protection principles that *Obergefell* invoked, along with substantive due process, as a basis for its decision. Consequently, *Pavan* did not erect a firm or clear barrier to new and imaginative schemes in other states intended to treat gays and lesbians as second-class citizens.

Take, for example, Texas. Four days after the U.S. Supreme Court issued *Pavan*, the Texas Supreme Court, in an interlocutory appeal, allowed a case to go forward in which two private citizens plan to argue to a Texas trial court that, *Obergefell* notwithstanding,

⁵⁸ *McLaughlin v. Jones*, 401 P.3d 492, 496 (Ariz. 2017).

the City of Houston may deny same-sex couples the benefits it provides to opposite-sex couples.⁵⁹ According to the Texas justices, this argument was not precluded because the Supreme Court in *Obergefell* “did not address and resolve” the question of “whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples.”⁶⁰ *Obergefell*, they argued, held only that “the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons.”⁶¹ Incredibly, the Texas court said its analysis was not affected by *Pavan*, remarking that “neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*’s holdings raise but *Obergefell* itself did not address.”⁶²

Such an underreading of *Obergefell* is wrong both doctrinally and morally. To maintain that the decision was only about the right to obtain a marriage license, and not about the right to fully participate on equal terms in the status of marriage as contemporary American law and society understand it, requires an almost deliberate obtuseness.⁶³

It should be noted that the citizen plaintiffs in *Pidgeon* have no serious constitutional or public policy theory about why disparate treatment between gay and straight married couples should be

⁵⁹ *Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017).

⁶⁰ *Id.* at *10.

⁶¹ *Id.*

⁶² *Id.* at *12 n.21.

⁶³ Or perhaps the Texas court, which had originally declined to hear the case, simply caved under pressure from Texas Republican elected officials. See Doyin Oyeniyi, *Here’s What You Need To Know About Pidgeon v. Turner*, TEXAS MONTHLY, (Mar. 1, 2017), <https://www.texasmonthly.com/the-daily-post/heres-need-know-pidgeon-v-turner/> (noting that “pressure” on the court to hear the case “reached its peak when Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Texas Attorney General Ken Paxton filed an amicus brief urging the court to reopen the case”).

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permissible after *Obergefell*. They simply oppose the idea of “taxpayer-funded benefits to same-sex couples”⁶⁴ and resent the idea that federal courts can tell a Texas city how to behave. Their lawyer has said he would like to use the case as a vehicle for eventually asking the U.S. Supreme Court to overturn *Obergefell*.⁶⁵

One difference between the Arkansas and Texas cases is that the Arkansas birth registration scheme at issue in *Pavan* predated *Obergefell*. It was not enacted with the intent to disadvantage families headed by gay men and lesbians. Arkansas family law statutes, like those in many states, still contain gendered language—words like “husband” and “wife”—and have not been updated to reflect the post-*Obergefell* reality of legal same-sex marriage. This made it perhaps understandable that the state health department might question whether it had the authority to issue birth certificates to same-sex couples on the same terms under which they were issued to heterosexual couples. By contrast, in *Pidgeon*, the resistance apparently is driven by anti-marriage equality backlash, mixed with traditional Southern resentment of the authority of the U.S. Supreme Court.

Of course, the sensible thing for all states to do would be to update their marriage and parentage laws to conform to the contemporary realities of same-sex marriage and families. But change comes hard to states like Arkansas, Indiana, Kansas, Mississippi, and Texas, which resisted marriage equality at the ballot box and in the courts. And so for the foreseeable future we are likely to see, at best, a passive-aggressive neglect of important family law questions in America’s red states by the conservative Republicans who control the governments in those states. These

⁶⁴ *Pidgeon*, 2017 WL 2829350, at *5.

⁶⁵ Oyeniyi, *supra* note 63.

elected officials will feel no particular incentive to modernize their codes, and same-sex couples may need to continue engaging in costly and wasteful litigation to fully vindicate the “equal dignity” they were promised in *Obergefell*.