

**Reconsidering the U.S. Supreme Court's Authority to
Mandate Same-Sex Marriage**
(Part one of a series)

By William J. Olson and Herbert W. Titus

On April 28, 2015, nine unelected lawyers drawn from three elite law schools (Harvard, Yale, and Columbia) listened to 90-minutes of [oral argument](#) about same-sex marriage and then retreated behind a wall of red velvet drapes to confer secretly about whether the U.S. Constitution requires that the U.S. Supreme Court impose same-sex marriage on the entire nation.

Consider for a moment the process by which that decision will be reached. When the Court decided to hear the [Obergefell](#) consolidated cases from the Sixth Circuit, that decision was reached in secret. The Justices consult only with their colleagues and their law clerks, also drawn from elite law schools. When a decision in the case is issued, presumably before the end of the current term toward the end of June, the Court will address only those issues argued by parties and the *amici curiae* that it cares to address. Its opinion will contain only those reasons for its decision that the Court chooses to reveal. The majority decision may be agreed to by as few as five of these nine justices unaccountable to no one but themselves. And then, the Court will expect the American people to set aside their individual and collective judgment and passively abide by whatever decision is reached -- based on a doctrine nowhere found in the U.S. Constitution -- "judicial supremacy."

Although the Supreme Court's only constitutional responsibility is to resolve "cases" and "controversies" brought before it, the High Court often acts as if it has been entrusted with the raw power to decide for us the most important public policy issues facing the nation. While the Court would have us believe that those decisions are mandated by faithful adherence to the constitutional text, the truth lies elsewhere. In his autobiography, Justice William O. Douglas provided a glimpse behind the curtain as to how the Supreme Court really works. In his autobiography, he explained that Chief Justice Charles Evans Hughes had once explained to him: "[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."

We have been working in the judicial vineyard in support of traditional marriage for many years. When one of the cases now being decided by the U.S. Supreme Court ([DeBoer v. Snyder](#)) was before the Sixth Circuit, we filed an [amicus curiae brief](#). In the U.S. Supreme Court, we filed another [amicus brief](#). When the Supreme Court decided the Defense of Marriage Act ("DOMA") case ([U.S. v. Windsor](#)) in 2013, we filed three briefs, one at [the petition stage](#), one on [the merits](#), and one on [the jurisdictional question](#), and in the Proposition 8 case ([Hollingsworth v. Perry](#)), we filed briefs at [the petition stage](#) and one on [the merits](#). Even before that, we filed [a brief](#) in 2003 in [Lawrence v. Texas](#) when the U.S. Supreme Court began down this short road to Same-Sex Marriage while denying that it was doing so. In total, working with groups like U.S. Justice Foundation and Public Advocate of the United States,

we have now filed a dozen appellate briefs over the past 15 years addressing the issue of homosexual rights in one context or another.

Although the judicial trend to embrace “homosexual rights” is undeniable, we certainly have not given up hope about the Court’s decision. In fact, it is our belief that the case for same-sex marriage is so pathetically weak, that the Court may understand that it would suffer a crippling embarrassment once the People come to really understand that in no way does the U.S. Constitution command same-sex marriage.

But our role now, while hoping for the best, is to prepare for the worst -- and that worst could be terrible indeed. Part of our last Supreme Court brief was published by The American Vision under the name “[12 Reasons homosexual marriage will wreck the nation.](#)” If you need additional reasons to give your concentrated attention to this issue in the coming days, you will find those reasons in that article.

The American people need to use the short days remaining before that momentous decision is reached to determine how to respond to an adverse decision. Will they yield to a U.S. Supreme Court that claims the power to override state constitutional and statutory provisions governing domestic relations -- an area of law which has historically belonged exclusively to the states. Will they sit back while unelected judges decide for them one of the most important public policy issues of our lifetime? Or will they resist -- and, if so, what tools do are available to stand against this judicial tyranny?

If you have not yet signed the “[Pledge in Solidarity to Defend Marriage,](#)” supported by Dr. James Dobson, Pastor Rick Scarborough, attorney Matthew Staver, Deacon Keith Fournier, and others, we urge you to do so. That pledge was an excellent first step.

To continue the battle, and to think through these many issues involved, a small group of lawyers and public policy experts experienced in this area have resolved to publish a series of a dozen or more articles to help inform their countrymen. You will not read these articles in the Establishment Media. However, thankfully, a number of publications, blogs, and organizations have agreed to publish this series of articles, as they are written. And, when we see other important articles, such as Robert Reilly’s piece “[The New Gnosticism of the Homosexual Movement](#)” we will bring these articles to your attention.

We know that some of you have grown weary of reading articles about homosexual issues. Yet, these issues cannot be ignored. Please look for these articles as they are published. These articles will be structured to inform about the issues which each American must think through to develop his own position, including:

- Does the Fourteenth Amendment Really Mandate Homosexual Marriage?
- Must a Decision of the U.S. Supreme Court be Obeyed as the Supreme Law of the Land?

- Does Romans 13 Require that Christians Yield to a Decision Mandating Same-Sex Marriage?
- Why Were Biblical, Moral, and Religious Arguments Ignored By the Parties Arguing to the U.S. Supreme Court?
- Have the Federal Judges Deciding in Favor of a Constitutional Right to Same-Sex Marriage Cases Truly Behaved Judicially?
- What Would Be the Consequences of Mandating Same-Sex Marriage for the Church and Christian Organizations?
- What Would Be the Consequences of Mandating Same-Sex Marriage for the Traditional Family?
- How Should Governors, Attorneys General, State Legislatures, and Other State Officers Respond to a Decision to Mandate Same-Sex Marriage?
- Could Congress Respond to a Decision Mandating Same-Sex Marriage by use of the U.S. Constitution's "Good Behavior" Clause?
- Could Congress Respond to a Decision Mandating Same-Sex Marriage by Using its Power to Limit the Jurisdiction of the Federal Courts?
- How Could Congress Respond to a Decision Mandating Same-Sex Marriage using its Appropriation Power to Prohibit the Expenditure of Funds to Implement the Decision at the National Level?
- How Should U.S. Citizens Respond to a Decision Mandating Same-Sex Marriage in their various roles as members of grand juries, members of petit juries, taxpayers, and voters?

Although many of us find it increasingly difficult to recognize the nation that we grew up in, we can draw strength from the fact that we still live in a Constitutional Republic, and that our government still operates largely by the "consent of the governed." And, as Americans, we have the right to determine to withhold our consent from the actions of government officials --- if we believe those actions to be lawless. Whatever the U.S. Supreme Court will do, we are each accountable for how we respond. Voltaire counseled "It is dangerous to be right when the government is wrong." Therefore, there could be personal consequences to each person who chooses the route of resistance, but ultimately each of us is responsible to God, not just to man.

We invite each of you to consider the arguments made in these articles, and then decide for yourself exactly what you believe, and even more importantly, how you will respond.

Should you want to help support this important work, contributions may be made to the [U.S. Justice Foundation](#).

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