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A Tale of Two Cases

Paul J. Larkin, Jr.*

“It was the best of times, it was the worst of times” So began Charles Dickens’s *A Tale of Two Cities*. Public interest lawyers might use the same line to open a discussion of two decisions rendered on the same day in the summer of 2015.

One case was *Obergefell v. Hodges*,¹ a five-to-four ruling by the Supreme Court of the United States that the Fourteenth Amendment Due Process Clause entitles same-sex couples to equal treatment with opposite-sex couples for purposes of “marriage.”² The Court acknowledged that Anglo-American law had historically limited marriage to heterosexual couples, but did not find itself bound by that tradition.³ Instead, the Court recognized a constitutional right to gay marriage on several policy-oriented grounds: civilization has always valued the institution of marriage, that union serves noble purposes that gay couples can also promote, gay marriages cannot injure the

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1. 135 S. Ct. 2584 (2015). *Obergefell* was the fourth in a series of cases dealing with constitutional protection for gays. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding unconstitutional a state constitutional provision foreclosing local regulation of sexual orientation-based discrimination); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding unconstitutional a statute making it a crime for members of the same sex to engage in in-home sexual conduct); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding unconstitutional a federal statute limiting the definition of “marriage” to heterosexual couples).

2. See *Obergefell*, 135 S. Ct. at 2608 (noting that the Constitution guarantees same-sex couples “equal dignity in the eyes of the law” for the purposes of marriage).

3. See *id.* at 2606 (discussing the Court’s previous holdings limiting this definition and reasoning that, because those holdings violated the Fourteenth Amendment and were overturned, a contrary finding in this instance would lead to unconstitutional injury to same-sex couples).

institution of marriage or infringe on the rights of individual heterosexual couples, and a law excepting gay marriages from official legal recognition “demeans” and “stigma[tizes]” gays and lesbians.⁴ The Court left undecided how the law should treat those groups in other settings.⁵

The second case is *Patel v. Texas Department of Licensing and Regulation*.⁶ Not surprisingly, *Patel* has received far less attention than *Obergefell*. *Patel*, a narrowly-divided ruling by the Supreme Court of Texas, involved the constitutionality of a state law imposing a hefty educational requirement on “commercial eyebrow threaders”—people who use cotton twine wrapped around two fingers to remove loose eyebrow hair.⁷ Texas law licenses threading as a form of “cosmetology” and requires a minimum of 750 hours of instruction in various topics, many of which—such as “anatomy and physiology”; “electricity, machines, and related equipment”; “chemistry”; “nutrition”; and “color psychology”—seem irrelevant to any health or safety concern with threading itself.⁸ Nonetheless, if precedent were the guide, *Patel*’s claim that the licensing scheme was irrational would have gone down in flames. Historically, parties challenging occupational licensing schemes have not fared well in court.⁹ The *Patel* case, however, turned out differently than most. Also refusing to be bound by history and relying on a provision in the Texas constitution analogous to the Due Process Clause,¹⁰ the

4. See *id.* at 2597–605 (discussing the Court’s policy arguments justifying the right of same-sex couples to marry on several grounds and asserting that such a law excepting that privilege would “demean” and “stigmatize” them).

5. See *id.* at 2606 (“It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.”).

6. 469 S.W.3d 69 (Tex. 2015).

7. See *id.* at 91–92 (holding that provisions relating to the 750 hour training requirement imposed on commercial eyebrow threaders in order to receive state licensing violated the Texas state constitution).

8. *Id.* at 87–88. In fact, the state conceded that more than 40% of the required instructional hours were unrelated to threading. *Id.* at 89.

9. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL’Y 209, 277–80 (2016) (discussing the history of unfavorable dispositions of various occupational licensing statutes).

10. TEX. CONST. art I, § 19.

Texas Supreme Court held that the 750-hour licensing requirement was “oppressive”¹¹ and therefore unconstitutional.¹²

A wag might say that *Obergefell* and *Patel* are evil twins, and the cases do share some obvious similarities. Each case involved a disputed issue of contemporary public policy;¹³ each outcome was decided by a one-vote margin; each decision relied on one of the more open-ended provisions in the respective federal and state constitutions; each court did not feel itself bound by history; and each court intervened when it concluded that legislation went too far and became either demeaning (*Obergefell*) or oppressive (*Patel*).¹⁴ But there is one common aspect to the decisions that is far more important than any of the others, and it concerns what each court did *not* say: Where do we go from here?

The late Professor John Ely began his trenchant criticism of *Roe v. Wade*¹⁵ by pointing out that abortion was a curious place for the Supreme Court to take on the burden of reconciling

11. See *Patel*, 469 S.W.3d at 91 (holding that the occupational licensing statute at issue was unconstitutional). The principal dissent complained that the term “oppressive” is “a brand-new entrant in the substantive due process lexicon.” *Id.* at 125–26 (Hecht, C.J., dissenting). That criticism is not persuasive. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (adopting an “undue burden” test to evaluate state restrictions on abortion).

12. See *Patel v. Tex. Dep’t of Licensing and Regulation*, 469 S.W.3d 69, 89 (Tex. 2015) (relying on Article I, § 19 of the Texas Constitution, the “Due Course of Law” provision, which states “no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land”). States may afford individuals greater rights under their state constitutions than they have under the federal Constitution. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

13. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–606 (2015) (analyzing various public policy arguments and justifications for and against the incorporation of same-sex unions into the definition of marriage); *Patel*, 469 S.W.3d 69, 74 (discussing the benefits and burdens of maintaining occupational licensing statutes as a matter of public policy).

14. See *Obergefell*, 135 S. Ct. at 2590 (“It is demeaning to lock same-sex couples out of a central institution of the Nation’s society, for they too may aspire to the transcendent purposes of marriage.”); *Patel*, 469 S.W.3d at 90–91 (“[T]he Threaders have met their high burden of proving that . . . the requirement of 750 hours of training to become licensed is . . . so oppressive that it violates Article 1, § 19 of the Texas Constitution.”).

15. 410 U.S. 113 (1973).

constitutional law with social mores.¹⁶ Unlike the constitutionality of laws prohibiting homosexual acts between consenting adults, he explained, the abortion issue involves more than simply a woman's interests in bodily integrity or personal freedom.¹⁷ "Abortion ends (or if it makes a difference, prevents) the life of the human being other than the one making the choice," and the Court's response to the state's interest in protecting that life, Ely concluded, "is simply not adequate."¹⁸ *Roe's* sterile conclusion that historically speaking "the unborn have never been recognized in the law as persons in the whole sense"¹⁹ had never been a requirement for government to prohibit conduct it deemed harmful or immoral. "Dogs are not 'persons in the whole sense' nor have they constitutional rights, but that does not mean the state cannot prohibit killing them."²⁰ Ely concluded that the moral issue involved in abortion was a difficult one to resolve, but that the constitutional issue was not, because the document was entirely silent on that subject.²¹ The result was that, to him, the Justices had crossed the divide separating ethicists from jurists.²²

16. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923 (1973) ("But even assuming it would be a good idea for the Court to assume this function [to 'second-guess legislative balances'], *Roe* seems a curious place to have begun.").

17. See *id.* at 924 (arguing that the risks presented by the abortion issue are greater than the "stunting" of affected lifestyles that is at stake in legislation such as the anti-homosexual prohibitions).

18. *Id.*

19. *Roe*, 410 U.S. at 162; see *id.* at 156–62 (discussing the Court's reasons for concluding that the unborn have not traditionally been recognized as whole persons in a legal sense).

20. Ely, *supra* note 16, at 925.

21. See *id.* at 935 ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution . . . never before has [the Court's] sense of an obligation to draw [a value from the Constitution] been so obviously lacking.").

22. See *id.* at 926 (asserting that it is not the Court's business to second-guess legislative balances, and even if it was, *Roe* would have been "a strange case with which to begin"). And that conclusion came from someone who would have voted for the Court's trimester system were he a legislator. See *id.* ("Were I a legislator I would vote for a statute very much like the one the Court ends up drafting.").

Given *Roe*, *Obergefell* should have been as easy to resolve as Ely assumed. *Roe* held that a state's interest in protecting a specific human life is not sufficient to outweigh a woman's liberty interest in ending her pregnancy.²³ The state's interest in *Obergefell*—protecting public morality—was more diffuse and less weighty than the one found insufficient in *Roe*. Atop that, the Supreme Court had previously required people to ignore perceived immoral conduct that did not personally injure them.²⁴ Accordingly, if the liberty issue at stake in *Obergefell* was anything more than trivial, the balance should have readily swung in favor of gay marriage. Same sex marriage may offend public sensibilities, but it does not terminate anyone's life. The *Roe* balancing approach²⁵ therefore should have made deciding *Obergefell* a snap.

But it was not—and for a good reason. To many, the Court's analysis in *Roe v. Wade* was precisely the type of interest-balancing approach²⁶ that the Court had previously invoked in cases such as *Lochner v. New York*²⁷ to strike down social and economic legislation that the Court found unreasonable. Since the New Deal Era, however, the Court had largely treated *Lochner* like the plague. The Court had either strolled²⁸ or sprinted²⁹ away from constitutional

23. See *Roe v. Wade*, 410 U.S. 113, 162–64 (1973) (noting that while a state has a legitimate state interest in protecting potential life that grows in importance with the length of the pregnancy, “the ‘compelling’ point is at viability,” and as such, that interest does not outweigh a woman's liberty interest before that point).

24. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 (1975) (holding that a town may not prohibit a drive-in theater from showing a movie involving nudity simply to avoid offending the sensibilities of passers-by because viewers can “avert[] their eyes” (citations and internal punctuation omitted)); see generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. See *Roe*, 410 U.S. at 152, 154 (“It is with these interests . . . that this case is concerned . . . We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

26. See *id.* (describing the *Roe* balancing approach).

27. 198 U.S. 45 (1905).

28. See generally, *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding 5-4 a state order setting milk prices); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding 5-4 a state minimum wage law).

29. See generally *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding 8–0 a state law prohibiting non-optometrists from filling eyeglass prescriptions); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding 9–0 a state

interest-balancing, making clear that legislature is the proper forum for any balancing that must be done. Yet, *Roe v. Wade* boldly signaled that the Court had returned to its old ways, and therefore raised a serious question to what extent substantive due process had been reborn.

What followed was a sophisticated, intense, heated, and still ongoing debate in the courts, the academy, and the legal profession over the issues whether the Due Process Clause should guarantee substantive rights as well as procedural fairness and, if so, how those rights should be defined. Forests the size of Oregon were felled as journals turned out scores of articles proposing answers to those questions, with no end in sight.³⁰ The Supreme Court, however, must decide cases, so it could not avoid answering them forever. Ultimately, the Court endorsed a limited form of substantive due process review, but confined it to specific, narrowly defined interests that Anglo-American history has always protected by law. The Court used that approach in *Washington v. Glucksberg*³¹ to reject the claim that a terminal patient has a due process right to a physician's assistance to end his life on his own terms.³² *Glucksberg* appeared to settle the dispute over the legitimacy of substantive due process (at least for those Justices) and to provide a standard to resolve future claims, a standard that relied on history and tradition.³³ That compromise outcome fully satisfied neither side of the debate, but at least it gave the courts a relatively objective test that was an improvement over *Roe's* unguided interest-balancing.³⁴

law limiting debt adjustment to lawyers).

30. See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

31. 521 U.S. 702, 724–25 (1997).

32. See *id.* (noting that the law was subject to rational basis scrutiny and passed the test on grounds that multiple asserted state interests were “unquestionably important and legitimate”).

33. See *id.* at 722–723 (discussing the limitations of the applicability of the “substantive due-process” line of cases and offering a standard of analysis mirroring the rational basis tests used in equal protection cases).

34. See *id.* (discussing the objective application of the rational basis standard).

If the courts had followed the *Glucksberg* approach in *Obergefell* and *Patel*, deciding those cases might have been as easy as Ely surmised—although the results would not have been entirely what he expected. Neither English common law, nor its American descendant, nor, until recently, the judgments of state legislatures had treated same-sex and opposite-sex couples as equals for purposes of marriage, as the *Obergefell* majority readily admitted.³⁵ If history were dispositive, or even just presumptively so, any constitutional right to gay marriage would have been doomed. By contrast, the common law—and even the Constitution itself—says a great deal about property. Anglo-American common law displayed a strong concern for the protection of private property and the right to pursue a lawful occupation.³⁶ Indeed, because the Framers’ generation saw “property” and “liberty” as one inseparable concept,³⁷ it is not surprising that the Constitution and Bill of Rights contain several specific property rights protections.³⁸ Thus, if history

35. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“Marriage, in [the respondents’] view, is by its nature a gender-differentiated union of man and woman. This view has long been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”).

36. See Larkin, *supra* note 9, at 66–68 (discussing cases that have protected the rights of private property and pursuit of lawful occupations).

37. See, e.g., EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 55 (1978) (“Property and liberty were one and inseparable.”); JOHN PHILIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 32–33 (1988) (discussing the defining line between “liberty” and “licentiousness” in the discussion of liberty and property); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 219 (1998) (discussing the historical tradition of combining the property and liberty concepts); Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 129 (1990) (“[P]roperty included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being.”). That attitude was still vibrant when the Fourteenth Amendment became law. See, e.g., Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 *STAN. L. REV.* 379, 393 (1988) (discussing the development of the substantive due process doctrine within the Fourteenth Amendment, and its foundation in historic American ideals of liberty and property rights, and the process they are afforded).

38. See, e.g., Larkin, *supra* note 9, at 256–76 (exploring various constitutional protections for property rights). Even the Supreme Court agreed. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the

carried the weight for substantive due process decision-making, *Patel* would have been another easy case. Yet, the majority did not classify economic opportunity as a “fundamental right” under the Texas Constitution,³⁹ and the four-to-three vote indicates that the judges found the correct outcome a very close call.

Where do those cases leave us? How far does substantive due process reach? If history and tradition are not the guidepost for answering that question, what is? The unfortunate truth is that we do not yet know. There are some alternatives. I will discuss only two.

A traditional justification for heightened judicial scrutiny is that the political branches are biased against a particular group. The Supreme Court first adumbrated that theory in the famous *Carolene Products* footnote four⁴⁰ and appeared to endorse it decades later.⁴¹ If the Supreme Court were to adopt that approach now, rulings like *Patel* would become far more common. Public Choice Theory⁴² explains how and why politicians can and will generate economic rents for particular interest groups at the expense of the general welfare, a criticism that has always been leveled against occupational licensing requirements.⁴³ As Robert McCloskey once put it, there is no more impotent a minority than an assortment of “scattered individuals who are denied access to

individual to contract, to engage in any of the common occupations of life . . .”).

39. See *Patel v. Tex. Dep’t of Licensing and Regulation*, 469 S.W.3d 69, 87–88 (2015) (concluding that the rational basis and legitimate state interest tests for evaluation would control challenges to economic regulations on the grounds of a denial of due process, precluding higher scrutiny for a “fundamental right”).

40. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “prejudice against discrete and insular minorities may be a special condition” justifying heightened judicial review).

41. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (the “traditional indicia of suspectness” are that a class is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

42. See, e.g., Larkin, *supra* note 9, at 19–28 (explaining the origin and definition of Public Choice Theory and its role in political discussions).

43. See, e.g., Larkin, *supra* note 9, at 213–15, 235–44 (discussing the tendency of occupational licensing statutes to promote the economic aspirations of political interest groups, often to the detriment of the public or general welfare).

an occupation by State-enforced barriers.”⁴⁴ Ironically, however, under that approach, rulings like *Obergefell* would become far *less* common. The legislative victories recently won by gays and lesbians prove that they are no longer a politically powerless group, and therefore are no longer in need of special protection by the courts.⁴⁵

An alternative approach would focus on the relative importance of an interest to the affected individuals. Before *Obergefell*, the Supreme Court had rejected that theory,⁴⁶ but the lower courts might read *Obergefell* as making the importance of an alleged right the critical factor in deciding whether substantive due process protects it. If that were to become the approach, there certainly will be more decisions like *Patel*. It would be elitist to claim that “liberty” rights are more important than “property” rights on the ground that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴⁷ After all, life has little meaning for someone who cannot afford its basic necessities. Without protection for the right to earn the money necessary to enjoy the rights that the Court has created, those rights are not worth much; just ask an unemployed and homeless gay couple. As a simple matter of biology, therefore, it is difficult to see how any interest could be more important than pursuing a line of work that enables someone to feed, clothe, and shelter himself and his family.⁴⁸ Yet, here, too, if the importance of a

44. Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50.

45. See *supra* note 1 and accompanying text (discussing the chain of recent Supreme Court rulings granting increased rights to gay and lesbian citizens).

46. See *San Antonio*, 411 U.S. at 33 (discounting the notion that discovering whether education was a “fundamental” right should be considered based on “comparisons of the relative societal significance of education as opposed to subsistence or housing”).

47. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). The additional belief that “[m]arriage responds to the universal fear that a lonely person might call out only to find no one there,” *Obergefell*, 135 S. Ct. at 2600, is also not a weighty factor. It’s just a Motown song. The Four Tops, *Reach Out I’ll Be There*, YOUTUBE (1966), <https://www.youtube.com/watch?v=KnDm3qr1Knk>.

48. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings.”); Leonard W. Levy, *Property as*

right is what determines whether due process grants it, there would be fewer cases like *Obergefell*. Given the paeans that the Supreme Court wrote about the importance of marriage,⁴⁹ the Court would be hard pressed to find another interest equally as weighty without abandoning any pretense of judicial objectivity.

In sum, *Obergefell* and *Patel* each held that substantive due process is a legitimate ground for upsetting a considered legislative judgment, whether that judgment has deep roots in Anglo-American legal, political, and social history, or is a child of the New Deal. Both decisions refused to rely on history and tradition as the measure of substantive due process in favor of using the very sort of interest-balancing that the Supreme Court used in *Lochner* and *Roe* and later abandoned. And neither that court nor the Texas Supreme Court explained what would be an unconstitutional restriction in other circumstances. The bottom line is this: Unless those courts intended their decisions to serve only as “a restricted railroad ticket, good for this day and train only,”⁵⁰ they owed us an answer to where we go from here, and we did not get it in those opinions.

Who knows, maybe *Lochner* will turn out to be more phoenix than corpse.

a Human Right, 5 CONST. COMMENTARY 169, 183 (1988) (“Making a living is fundamental to one's personhood and stake in society. Free speech is of little value to a propertyless person. With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.”).

49. See *supra* note 2 and accompanying text (describing the Supreme Court's discussion of the importance of marriage in its *Obergefell* holding).

50. *Smith v. Albright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).