AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Ermold v. Davis, \_\_\_ S. Ct. \_\_\_** (2020)

*David Ermold and David Moore were a same-sex couple that sought to obtain a marriage license in Rowan County, Kentucky, after the Supreme Court in* Obergefell v. Hodges(2015) *ruled that the same-sex couples had a constitutional right to be married. Kim Davis, the local country clerk, refused to issue any marriage licenses on the ground that she believed same-sex marriage was immoral. Ermold and Moore initially sought an injunction compelling Davis to issue a marriage license. Shortly after the filed their lawsuit, a federal district court in a different case issued a injunction mandating that Davis issue marriage licenses to all constitutionally eligible couples. Ermold and Moore nevertheless persisted in their lawsuit, claiming monetary damages for the past deprivation of a right to marry. A lower district court ruled that Davis could not be sued in her official capacity because as a representative of Kentucky she enjoyed sovereign immunity, but could be sued in her individual capacity. That decision was affirmed by the Court of Appeals for the Sixth Circuit. Davis appealed to the Supreme Court.*

*The Supreme Court refused to issue a writ of certiorari. Justice Clarence Thomas, while not disputing that denial insisted that the lawsuit highlighted how judicially mandated same-sex marriage threatened religious liberty. Why does Thomas see this and related lawsuits as a threat to religious liberty? Why does he think those threats would be diminished if legislatures adopted same-sex marriage? Thomas insists people who oppose same-sex marriage are not bigots. Would he think the same of people who opposed mixed race marriages? What is the difference between the two?*

The petition for a writ of certiorari is denied.

Statement of Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ia7cfd24c071311ebbea4f0dc9fb69570), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ia7cfd24c071311ebbea4f0dc9fb69570) joins, respecting the denial of certiorari.

In *Obergefell v. Hodges* (2015), the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text. Several Members of the Court noted that the Court's decision would threaten the religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman. If the States had been allowed to resolve this question through legislation, they could have included accommodations for those who hold these religious beliefs.  The Court, however, bypassed that democratic process. Worse still, though it briefly acknowledged that those with sincerely held religious objections to same-sex marriage are often “decent and honorable,” the Court went on to suggest that those beliefs espoused a bigoted worldview. The dissenting Justices predicted that “[t]hese ... assaults on the character of fairminded people will have an effect, in society and in court,” allowing “governments, employers, and schools” to “vilify” those with these religious beliefs “as bigots.” Those predictions did not take long to become reality.

Kim Davis, a former county clerk in the Commonwealth of Kentucky, was responsible for authorizing marriage licenses. Davis is also a devout Christian. When she began her tenure as clerk, Davis’ sincerely held religious beliefs—that marriage exists between one man and one woman—corresponded with the definition of marriage under Kentucky law. Within weeks of this Court granting certiorari in [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Davis began lobbying for amendments to Kentucky law that would protect the free exercise rights of those who had religious objections to same-sex marriage. But those efforts were cut short by this Court's decision in [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

As a result of this Court's alteration of the Constitution, Davis found herself faced with a choice between her religious beliefs and her job. When she chose to follow her faith, and without any statutory protection of her religious beliefs, she was sued almost immediately for violating the constitutional rights of same-sex couples.

Davis may have been one of the first victims of this Court's cavalier treatment of religion in its [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) decision, but she will not be the last. Due to [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoul of [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and its effect on other antidiscrimination laws. It would be one thing if recognition for same-sex marriage had been debated and adopted through the democratic process, with the people deciding not to provide statutory protections for religious liberty under state law. But it is quite another when the Court forces that choice upon society through its creation of atextual constitutional rights and its ungenerous interpretation of the Free Exercise Clause, leaving those with religious objections in the lurch.

Moreover, [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss. For example, relying on [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), one member of the Sixth Circuit panel in this case described Davis’ sincerely held religious beliefs as “anti-homosexual animus.”  In other words, [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was read to suggest that being a public official with traditional Christian values was legally tantamount to invidious discrimination toward homosexuals. This assessment flows directly from [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s language, which characterized such views as “disparag[ing]” homosexuals and “diminish[ing] their personhood” through “[d]ignitary [wounds](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=Iff1648e16c7111e18b05fdf15589d8e8&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).” Since [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), parties have continually attempted to label people of good will as bigots merely for refusing to alter their religious beliefs in the wake of prevailing orthodoxy.

This petition implicates important questions about the scope of our decision in [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), but it does not cleanly present them. For that reason, I concur in the denial of certiorari. Nevertheless, this petition provides a stark reminder of the consequences of [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix. Until then, [*Obergefell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000780&originatingDoc=Ia7cfd24c071311ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) will continue to have “ruinous consequences for religious liberty.”