Clay Pigeon or Trojan Horse: *Pigeon v. Turner* and the Intersection of Gay Rights and Judicial Ethics in Texas

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INTRODUCTION

The saga of the City of Houston's attempt to extend spousal benefits to employees in same-sex marriages could be described as a tale of unforeseen consequences. This article examines how *Pidgeon v. Turner*, the case challenging the City's extension of benefits, carries larger implications that neither party to the lawsuit probably ever imagined.[1] A mayor's decision simply to do the "fair thing"[2] has spawned litigation that, initially conceived by some as a mere nuisance, now threatens to unravel *Obergefell v. Hodges*, the landmark U.S. Supreme Court case, which granted nation-wide recognition of same-sex marriages.[3] The same litigation also has called into question whether the alignment of the Texas Supreme Court with the Republican Party of Texas has compromised the appearance of the court's independence and impartiality with respect to issues affecting gay rights and illustrates the ineffectiveness of the Texas Code of Judicial Ethics as a safeguard against political influence upon the judiciary.

Part I describes the City of Houston's decision to extend spousal benefits to employees who entered into legally performed same-sex marriages. Part II explains the first stage of *Pidgeon v. Turner*, challenging Houston's action. This resulted in a state trial court's preliminary injunction of the extension of benefits to Houston's married same-sex employees, which the City appealed to the Fourteenth District Court of Appeals.[4]

Part III discusses the United States Supreme Court's intervening decision in *Obergefell v. Hodges*, which established same-sex marriage as a fundamental right under the United States Constitution. Part IV recounts the second stage of *Pidgeon v. Turner*, wherein the Plaintiffs asked the Texas Supreme Court to consider on appeal the decision of the Fourteenth Court of Appeals calling upon the trial court, in light of *Obergefell*, to reexamine its injunction against Houston's provision of same-sex marital benefits. It

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[1] Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350 (Tex. June 20, 2017).

[2] Mike Morris, *Houston to Offer Same-Sex Spousal Benefits*, HOUS. CHRON (Nov. 20, 2013), http://www.chron.com/news/houston-texas/article/Houston-to-offer-same-sex-spousal-benefits-4996173.php.

[3] Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

[4] *See Pidgeon*, 2017 WL 2829350, at *4.

discusses the Texas Supreme Court's refusal to take the appeal, accompanied by an analysis of the strong dissenting opinion written by Justice Devine. Part IV concludes by noting the weakness this dissent reveals in the United States Supreme Court's *Obergefell* analysis.

Part V examines the third stage of *Pidgeon v. Turner*, in which the Plaintiffs successfully sought the Texas Supreme Court to reverse itself and hear the appeal. They did so with the support of amicus briefs filed by Republican Party lawmakers. These included, among other arguments, a warning to the elected Justices of the Texas Supreme Court that a refusal to hear the case could adversely affect their retention in subsequent judicial primary contests.[5] Part VI discusses the Texas Supreme Court's decision to rehear the case and explains the Court's uneasy coexistence with politics, exemplified by the decisive impact of the Texas Republican Party on the election of state judges.[6] Part VII discusses the United States Supreme Court's intervening decision in *Pavan v. Smith*, which determined that *Obergefell*'s constitutional mandate requires states to provide gay couples the same marital benefits they provide to heterosexual couples.[7] Part VIII analyzes the Texas Supreme Court's unanimous decision in *Pidgeon*, handed down four days after *Pavan v. Smith*.[8] In it, the Justices of the Texas Supreme Court attempted to balance their judicial obligations with the political demands attendant to their positions as elected officials whose tenure in office depends on the continued goodwill of the Republican Party of Texas. Thus, the Court split the baby, sending the case back to the trial court for consideration on the merits in light of subsequent case law while mischaracterizing and minimizing the clear holding of *Pavan* to suggest the issue of spousal benefits remains not only questionable but also undecided.[9]

Part IX discusses the implications of *Pidgeon v. Turner*. In terms of the future of gay rights, it argues that *Pidgeon* presents a cautionary tale, which demonstrates that *Obergefell* is by no means the last word in issues involving gay equality. Part IX also argues that *Pidgeon v. Turner* reveals a critical fault line in the Texas Code of Judicial Ethics that weakens its effectiveness in curbing political influence upon the judiciary. This has occurred through the alignment of the Code's admonishments to preserve the appearance of impartiality with the status-quo of judicial electioneering in Texas. The

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[5] Lauren McGaughy, *At GOP Leaders' Urging, Texas Supreme Court Will Consider Undoing Gay Spousal Rights*, DALLAS NEWS (Jan. 20, 2017), https://www.dallasnews.com/news/lgbt/2017/01/20/gop-pressure-texas-supreme-court-will-consider-undoing-gay-spousal-rights.

[6] *See id.*

[7] Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

[8] *See id.* (decided on June 30, 2017); *See Pidgeon*, 2017 WL 2829350 (decided on June 26, 2017).

[9] *Pidgeon,* 2017 WL 2829350 at *11 ("Both [parties] are entitled to a full and fair opportunity litigate their positions on remand"); *id.* at *12 n. 21 (asserting the U.S. Supreme Court's decision on the day it issued *Pavan* to hear a case involving whether a baker can refuse to provide a wedding cake to a gay couple on religious grounds "illustrates that neither *Pavan* nor *Obergefell* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address.").

Code as so interpreted inadequately shields judges innocent of undue political influence and may even lend credence to allegations of such inappropriate conduct.

I. HOUSTON EXTENDS SPOUSAL BENEFITS TO EMPLOYEES WED IN LEGALLY PERFORMED SAME-SEX MARRIAGES

On November 20, 2013, Houston Mayor, Annise Parker, announced the City would begin extending health and life insurance benefits to the spouses of employees wed in legally performed same-sex marriages.[10] Parker, the nation's first openly lesbian big city mayor,[11] cited the United States Supreme Court's decision in *Windsor v. United States* as the catalyst for her decision.[12] In *Windsor*, the Court had struck down the provision of the Defense of Marriage Act,[13] which barred the federal government and its departments and agencies from recognizing same-sex marriages legal in the states in which they had been performed.[14] This prohibition had made legally wed same-sex couples ineligible for the wide range of benefits, which the federal government routinely provided to their opposite-sex married counterparts.[15] Parker explained: "Based on the right to equal protection under the law, it is unconstitutional for the city to deny benefits to same-sex spouses of our employees who are legally married. This change is not only the legal thing to do, it is the right, just, and fair thing to do."[16]

That Mayor Parker could award benefits to same-sex couples by mayoral fiat hinged on an ironic sleight of hand. The provision of the Houston Charter on which she relied had resulted from a 2001 City Referendum that had posed the question whether the same-sex domestic partners of city employees should be eligible for benefits. In light of the voters' negative response, the City Charter had been amended to state, "Except as required by State or Federal Law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, their legal spouses and dependent children."[17] In 2001, the "legal spouses" stipulation had excluded same-sex couples from participation. Twelve years later, Mayor Parker turned what had been a lemon into lemonade. Citing that same stipulation, she asserted the Charter

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[10] Morris, *supra* note 2.

[11] Molly Hennesy-Fiske, *Nondiscrimination Ordinance Puts Houston at the Center of the Latest LGBT Rights Battle*, L.A. TIMES (Nov. 2, 2015), http://www.latimes.com/nation/la-na-houston-mayor-20151102-story.html.

[12] *Lambda Legal Files Lawsuit Against City of Houston Over Spousal Benefits*, DALLAS VOICE (Dec. 26, 2013), http://www.dallasvoice.com/lambda-legal-files-lawsuit-city-houston-spousal-benefits-10164367.html.

[13] 1 U.S.C. § 7 (2012).

[14] United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

[15] *Id.* at 2694.

[16] Morris, *supra* note 2.

[17] *Id.*

plainly covered legal marriages, including same-sex marriages entered into in the seventeen states and the District of Columbia that permitted gay unions.[18] The Mayor candidly added, however, that "[she] could only assume that it was contemplated that there would never be a time when same-sex couples were in legally sanctioned relationships."[19]

II. THE LEGAL CHALLENGE TO HOUSTON'S EXTENSION OF EMPLOYEE BENEFITS TO SAME-SEX MARRIED COUPLES: ROUND 1

It did not, of course, escape attention that the State of Texas neither permitted same-sex marriages nor recognized same-sex marriages performed legally elsewhere.[20] Jared Woodfill, an attorney and Chairman of the Harris County Republican Party, blasted Mayor Parker's extension of benefits to same-sex spouses of city employees as "one of the most egregious acts by an official I've ever seen," asserting "[t]hey just decided to unilaterally … thumb their nose at the will of the people and just spit on the U.S. Constitution."[21] At Woodfill's urging, two Houston citizens, Jack Pidgeon and Larry Hicks, filed in December 2013 in state court a lawsuit against Mayor Parker and the City of Houston. Their petition charged that Mayor Parker's order not only flouted the intent of the City Charter Amendment but also violated the State's Defense of Marriage Act and its constitutional prohibition of same-sex marriage.[22] In a further legal move, the petitioners sought a temporary restraining order and temporary injunction against the implementation of the new benefits policy. On December 17, 2013, State District Judge Lisa Millard signed the order, citing Texas' constitutional and statutory prohibition of the recognition of same-sex marriage. The injunction brought the inclusion of same-sex spouses in the City's benefits package to a halt.[23] At that time, only three Houston city employees had signed up for the extended benefits.[24]

A series of legal maneuvers by both sides followed. By removing the action to federal district court, the City prevented the state trial court from ruling on the temporary injunction. Nine months later, the plaintiffs successfully had the case remanded back to state court. By that time, however, the state court had dismissed the case for want of prosecution,

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[18] *Id.*

[19] *Id.*

[20] TEX. CONST. ART. 1, §32 (2005) and TEX. FAM. CODE ANN. § 6.204(b), (c)(2) (2003) (both prohibit the State from effectuating same-sex marriage or recognizing the legal status of same-sex marriages performed elsewhere).

[21] *Lambda Legal*, *supra* note 12.

[22] Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350, *3 (Tex. June 20, 2017).

[23] *See id*. at *4.

[24] *Republican Houston Judge Blocks City's Partner Benefits Until Jan. Hearing*, DALLAS VOICE (Dec. 18, 2013), http://www.dallasvoice.com/republican-houston-judge-blocks-citys-dp-benefits-jan-hearing-10163754.html.

requiring Pidgeon and Hicks to file a second petition substantially similar to their first. The trial court again enjoined the City from moving forward and the City appealed the ruling to the State's Fourteenth District Court of Appeals sitting in Houston.[25] While the Fourteenth District Court of Appeals deliberated, the United States Supreme Court on June 26, 2015 handed down *Obergefell v. Hodges*, making same-sex marriage the law of the land.[26]

III. THE UNITED STATES SUPREME COURT SPEAKS: *OBERGEFELL V. HODGES*

Obergefell v. Hodges stands as the culmination of four gay rights opinions authored by Associate Justice Anthony Kennedy, each of which built upon the other.[27] It answered affirmatively the question whether same-sex couples had a constitutional right to marry under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[28]

Obergefell consolidated sixteen cases involving same-sex couples whose home states either prevented them from marrying or refused to recognize marriages legally performed in other states. [29] The petitioners in *Obergefell* included a widower who had been denied inclusion on his husband's death certificate as the surviving spouse, a lesbian couple whose state had prevented them from adopting their children jointly, and a member of the armed forces, the legality of whose marriage depended on where he was transferred across state lines.[30] The Court specifically noted that, in each case, the petitioners sought marriage out of respect for the institution and their desire to share in the bond and associated privileges and responsibilities that marriage creates.[31]

Having premised its analysis on the petitioners' desire for inclusion in every aspect of the institution of marriage, the Court advanced four reasons for granting them the right to marry. First, it asserted the ability to decide whether or not to marry is inherent in the constitutional right to individual autonomy. That decision, the Court noted, not only "shape[s] an individual's destiny," but also frames one's very definition of self. [32] Second, the Court found that same-sex couples shared with their heterosexual counterparts a fundamental liberty interest in the dignity, which marriage conveys to a couple's commitment and relationship to each

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[25] Parker v. Pidgeon, 477 S.W.3d 353 (Tex. App. 2015).

[26] Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

[27] *Id.*; *see also* Romer v. Evans, 517 U.S. 620 (1996), Lawrence v. Tex., 539 U.S. 558 (2003), and United States. v. Windsor, 133 S. Ct. 2675 (2013).

[28] *Obergefell*, 135 S. Ct. at 2599 (holding "same-sex couples may exercise the right to marry").

[29] *Id.* at 2593.

[30] *Id.* at 2594-95.

[31] *Id.* at 2594.

[32] *Id.* at 2599.

other. [33] Third, the Court observed that marriage protects children because states often single out the children of married couples for special benefits and children of any couple benefit from the stability and permanency of the legal and familial structure, which marriage provides.[34] The Court posited that denying benefits to children of gay couples not only exposes them to a greater risk of harm but also affirmatively imposes harm by subjecting them to humiliation and inequality.[35]

Finally, the Court discussed the fundamental place of marriage in the social order. Society, it noted, accords married couples a privileged status. It also reserves for married couples a host of rights, benefits, and obligations, specifically in regard to "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules."[36] The Court observed that granting status and rights to opposite-sex couples but not to same-sex couples is not tenable when the motivations and aspirations of both for entering into marriage are the same and marriage is "the keystone of our social order."[37]

Based on these four reasons, the Court proclaimed marriage a liberty right to which people of same-sex orientation were equally entitled under the guarantees resulting from the intersection of the Due Process and Equal Protection Clauses. Notably, the Court emphasized that the grant of privileges to an exclusive group in the past had no bearing on the determination of the eligibility of others to those same privileges in the present.[38] The Court acknowledged the denial of marriage benefits to same-sex couples patently disadvantaged them materially.[39] However, the Court asserted that this denial more insidiously stigmatized the committed relationships of same-sex couples as unworthy of the respect society customarily accords to those entering into the marital state. In so doing, it denigrated not only the individuals' relationships but also the individuals themselves. The Court believed that when states treat gay and lesbian people unequally, they send a message to all that gay and lesbian people are unequal in the eyes of the law.[40] "The limitation of marriage to opposite-sex couples may long have seemed natural and just," the Court stated, "but its

[33] *Id.* at 2599-600.
[34] *Obergefell*, 135 S. Ct. at 2600.
[35] *Id.*
[36] *Id.* at 2601.
[37] *Id.*
[38] *Id.* at 2602.
[39] *Id.* at 2601.
[40] *Obergefell*, 135 S. Ct. at 2601-02.

inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[41]

IV. THE LEGAL CHALLENGE TO HOUSTON'S EXTENSION OF EMPLOYEE BENEFITS TO SAME-SEX MARRIED COUPLES: ROUND 2

Prior to the *Obergefell* decision, the constitutionality of the prohibition of same-sex marriage had come up for oral argument before a three-judge panel of the United States Fifth Circuit Court of Appeals in a case out of Texas styled *De Leon v. Abbott*.[42] The appeal arose after a federal district court had found Texas's ban on same-sex marriage unconstitutional and preliminarily enjoined the State from enforcing it.[43] However, the Fifth Circuit had yet to issue its opinion when *Obergefell* came down. Citing the *Obergefell* decision, the Fifth Circuit affirmed the preliminary injunction and instructed the federal district court to issue a final order making it permanent.[44]

The *Obergefell* decision through the Fifth Circuit's *De Leon* decision now came into play in Texas's Fourteenth District Court of Appeals, where the City's appeal of the temporary injunction restraining the extension of its benefits policy also remained under review. In a per curium opinion, the Fourteenth District Court of Appeals reversed the injunction and remanded the issue back to the state trial court for a determination consistent with *Obergefell* and the Fifth Circuit's ruling in *De Leon*.[45]

A. Pidgeon and Hicks Appeal to the Texas Supreme Court

On September 10, 2015, Pidgeon and Hicks petitioned the Texas Supreme Court to review the decision of the Fourteenth District Court of Appeals.[46] First they argued the Fourteenth District Court of Appeals had made a procedural error. They asserted that, because a state court cannot be bound by a decision of a lower federal court, the Fourteenth District Court of Appeals had improperly ordered the trial court to follow the holding in *De Leon*.[47]

Second, Pidgeon and Hicks sought relief from Mayor Parker's allegedly unlawful extension of benefits during the period between her announcement of them on November 20, 2013 and the *Obergefell* ruling on June 26, 2015

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[41] *Id.* at 2602.
[42] De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015).
[43] De Leon v. Perry, 975 F. Supp. 632 (W.D. Tex. 2014), *aff'd De Leon*, 791 F.3d 619.
[44] *De Leon*, 791 F.3d at 625.
[45] Parker v. Pidgeon, 477 S.W.3d 353, 355 (Tex. App. 2015) (pet. denied, then granted).
[46] Petition for Review, Pidgeon v. Parker, 2015 WL 5333532 (Tex. 2015) (No. 15-0688).
[47] *Id.* at 6-7.

when neither Texas nor federal law recognized a right to same-sex marriage.[48] As taxpayers, they claimed entitlement to "claw back" any illegal expenditures made pursuant to the extended benefits policy during this interim period.[49]

Third, Pidgeon and Hicks argued that, even though *Obergefell* legalized same-sex marriage, it was "poorly reasoned" and departed so from the constitution's text as to mandate its narrow construction.[50] They asserted the provision of marriage to same-sex couples did not create a constituent fundamental right to marital benefits, particularly when such benefits advanced a State interest – procreation – to which same-sex couples could not contribute.[51] Noting *Obergefell*'s "living constitution [and anti-textual] mindset,"[52] Pidgeon and Hicks argued the impliedly better established constitutional principle of federalism "protects the sovereignty of Texas over its spending decisions, and public officials must comply with state law in making expenditures."[53]

B. Houston's Response

In response, the City offered no comment on Pidgeon and Hicks' disparagement of the constitutional analysis in *Obergefell* and its purported negative effect on the validity of extending government benefits to same-sex married couples. Rather, the City argued the Texas Supreme Court lacked jurisdiction because the underlying appeal to the Fourteenth District Court of Appeals was interlocutory in nature.[54] The City noted its appeal had merely contested the preliminary injunction, not a final ruling by the trial court on the merits of the case. [55] Added to that, the decision of the Fourteenth Court of Appeals had merely instructed the trial court to reexamine the issues in light of the new law established by *Obergefell* and *De Leon*; it had not told the trial court what the outcome of that reexamination should be. In the absence of any final finding by the trial court, the appellate process had been purely interlocutory and, therefore, outside the statutory jurisdiction of the Texas Supreme Court.[56]

The City further argued Mayor Parker and the City could not be held liable for conduct that might have been illegal under state law prior to the holding in *Obergefell* because findings of constitutional law are retroactive

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[48] *Id.* at 7-8.

[49] *Id.*

[50] *Id.* at 9-10.

[51] *Petition for Review, Pidgeon*, 2015 WL 5333532 at 10-11.

[52] *Id.* at 9.

[53] *Id.* at 5-6.

[54] Response in Opposition to Petition for Review at 6, Pidgeon v. Parker, 2016 WL 4938006 (Tex. 2016) (No. 15-0688), 2015 WL 8180521.

[55] *Id.*

[56] *Id.*

in application.[57] The City also justified the appellate court's instruction to the trial court to consider the holding of *De Leon.* It noted the trial court had based its restraining order on Texas law prohibiting same-sex marriage, which *Obergefell* and *De Leon* had found unconstitutional. [58] Although the holding in *De Leon* admittedly was only persuasive authority in a state court, the City noted *De Leon* had relied on *Obergefell*, which unequivocally bound the Fourteenth District Court of Appeals.[59] The City observed that, after *Obergefell* and *De Leon*, even the State of Texas had acknowledged it could not continue to ban same-sex marriage. [60] In a final jab, the City noted that Pidgeon and Hicks' "complaint that the court of appeals should not have instructed the trial court to follow *Obergefell* and *De Leon* on remand puts Petitioners at odds not only with the United States Supreme Court but also with the position of this State in acknowledging the effect of *Obergefell*."[61]

C. The Texas Supreme Court Denies Review over Justice Devine's Dissent

On September 2, 2016, the Texas Supreme Court denied Pidgeon and Hicks' petition for review.[62] The majority issued its decision without opinion. Justice John P. Devine, however, wrote a dissenting opinion that expanded upon the rather cursory constitutional arguments Pidgeon and Hicks had advanced in their petition for review.[63] This dissent would provide a roadmap for the petitioners' argument going forward.

Justice Devine's dissent presented a classic equal protection argument firmly based on the textbook standards of equal protection review. Equal protection analysis, he noted, involved two different analytical methodologies:

1. Strict scrutiny, reserved for questions involving fundamental rights or protected classes, where the court must determine whether restrictive legislation is "narrowly tailored to serve a compelling government interest"[64] *and* whether the legislation fits closely with the state's goals;[65] and
2. "Substantial deference,"[66] or rational basis scrutiny, employed in cases not implicating fundamental rights or protected classes, where the court presumes the constitutionality of restrictive legislation so long as

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[57] *Id.* at 5.

[58] *Id.* at 15.

[59] *Id.* at 14.

[60] Response in Opposition to Petition for Review at 15, Pidgeon v. Parker, 2016 WL 4938006 (Tex. 2016) (No. 15-0688), 2015 WL 8180521.

[61] *Id*.

[62] Pidgeon v. Turner, No. 15-0688, 2016 Tex. LEXIS 799 (Tex. Sept. 2, 2016).

[63] *Id.* at *1.

[64] *Id.* at *4 (quoting Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1672 (2015)).

[65] *Id.* (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)).

[66] *Id.*

it is "rationally related to a legitimate state interest."[67]

By framing equal protection analysis in these traditional terms, Justice Devine could present the issue before the court as one involving two different kinds of rights, each implicating a different methodology of judicial review.

On the one hand, the issue touched at least tangentially upon the right of same-same sex couples to marry, which the Supreme Court in *Obergefell* had declared a fundamental right, making it subject to strict scrutiny. Justice Devine conceded same-sex marriage now enjoyed this status.[68] Although one might reasonably believe Justice Devine personally rejected the Court's assessment, *stare decisis* restricted his options to dissent from the principal holding in *Obergefell* at least to this extent.[69]

However, Justice Devine explained that marital benefits, on the other hand, held no such lofty status. Accordingly, the federal constitution permitted the State legislature to provide such benefits to some married couples and not to others so long as it had a rational state interest for doing so.[70] Indeed, in *Bowen v. Owens*, 476 U.S. 340, 341-42 (1985), the Supreme Court had granted Congress the right to do just that. It had found constitutional a provision of the social security law that granted survivor's benefits to widowed spouses who remarried after age 60 and denied such benefits to divorced spouses who remarried after the same age.[71]

Justice Devine shared the view of Pidgeon and Hicks that the State's interest in encouraging procreation provided the rational interest that made the differentiation of benefits to opposite-sex and same-sex married couples constitutional.[72] He supported this interest on the premise that "[a]n opposite sex marriage is the only marital relationship where children are raised by their biological parents," whereas "[i]n any other relationship, the child must be removed from at least one natural parent, perhaps two, before being adopted by her new parent(s)."[73] That some opposite-sex married couples could not bear children did not weaken the State's rationale. Justice Devine noted that rational basis analysis did not require the State to draw distinctions with "razor-like precision."[74] Moreover, he asserted the State could substitute another characteristic – that of the couple being opposite in

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[67] *Id.* at *5 (quoting *City of Cleburne*, 473 U.S. at 440).

[68] Pidgeon v. Turner, No. 15-0688, 2016 Tex. LEXIS 799, *6 (Tex. Sept. 2, 2016).

[69] Angela Washek, *Why This GOP Nominee for the Texas Supreme Court Matters*, TEX. MONTHLY (Jan. 21, 2013) http://www.texasmonthly.com/politics/why-this-gop-nominee-for-the-texas-supreme-court-matters/ (noting the support of the Eagle Forum, Concerned Women of Texas, and the Liberty Institute in his campaign for a seat on the Texas Supreme Court "help[ed] to cement his identity as a hyper-conservative of the Tea Party variety").

[70] *Pidgeon*, 2016 Tex. LEXIS 799, at *6-7.

[71] *Id.*

[72] *Id.* at *10.

[73] *Id.*

[74] *Id.* at *11 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83-84 (2000)).

sex – as the justification for its interest because "it is enough that there is "a rational reason for the difference" in treatment."[75]

Anticipating the counter argument that Justice Kennedy in *Obergefell* had assumed the provision of equal benefits would accompany the right to marry, Justice Devine retorted that states had no obligation to follow mere assumptions.[76] Although *Obergefell* had catalogued the benefits that opposite-sex married couples received, it did not require states to offer marital benefits to same-sex couples or to any couples at all.[77]

Justice Devine also responded to the potential argument that animus towards homosexual people motivated the State's decision to deprive marital benefits to same-sex married couples. He distinguished this case from *Romer v. Evans*, 517 U.S. at 620, where the United States Supreme Court had found unconstitutional a statute disadvantaging homosexual people's ability to secure gay rights legislation. In *Romer*, Justice Devine explained, the statute failed to pass constitutional muster because animus had been deemed the only possible reason for its passage. The same could not be said, however, of the State's determination to provide marital benefits only to opposite-sex married couples because it reasonably related to the State's interest in procreation.[78]

Accordingly, Justice Devine believed the Fourteenth District Court of Appeals had erred in two respects when it overturned the temporary injunction preventing the City of Houston from providing marital benefits to the same-sex spouses of its employees. First, it had improperly classified the provision of benefits as a fundamental right. Secondly, building upon the first error, the appeals court had failed to recognize the distinction the State drew between opposite-sex and same-sex married couples was reasonably supported by the State's interest in procreation and its related policy to "foster [through birth] the opportunity for meaningful parent-child bonds to develop."[79]

The chief defect in Justice Devine's dissent lies in a critical misrepresentation of Justice Kennedy's opinion in *Obergefell*. Justice Devine correctly stated *Obergefell* holds the right to marry a person of one's choice constitutes a fundamental right. However, what Justice Devine ignored is that, to Justice Kennedy's thinking, the right to marry is secondary to an even more fundamental right, namely the right to personal dignity. Indeed, in each of Justice Kennedy's gay rights opinions, an affront to the personal dignity of homosexual people constitutes the constitutional violation. In *Romer v. Evans*, the affront to dignity came in the form of a

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[75] *Id.* at *11 (citation omitted)

[76] *Pidgeon*, 2016 Tex. LEXIS 799, at *8-9.

[76] *Pidgeon*, 2016 Tex. LEXIS 799, at *8-9.

[77] *Id.*

[78] *Id.* at *13.

[79] *Id.* at *14.

ballot measure that made it harder for gay rights legislation to be passed than other legislation.[80] In *Lawrence v. Texas*, a Texas statute criminalizing homosexual relations demeaned the dignity of gay persons by making one of life's most personal forms of self-expression a criminal act.[81] In *Windsor v. United States*, the denial of federal benefits to same-sex married couples denied dignity to gay couples and gay people generally by sending a message that homosexual relationships are less than those of heterosexual people.[82] Finally, *Obergefell* holds that the denial of marriage *and* the denial of the marital benefits routinely accorded to opposite-sex married couples are symptomatic of an improper desire to strip gay people of the human dignity, which is their fundamental constitutional right.[83] Although *Obergefell* identifies marriage as a fundamental right, it and the provision of marital benefits are pieces of a greater fundamental right that, at the very least, precludes government from affirmatively seeking to degrade a group's sense of personal dignity. Justice Devine, therefore, wrongly treated marital benefits as an interest separate from the right to marry because he failed to recognize both rights are part and parcel of the fundamental right to human dignity. Accordingly, Justice Devine, not the Fourteenth Court of Appeals, missed the mark through a misidentification of the nature of the right to which *Obergefell* speaks.

It must be said, however, that Justice Devine's dissent illuminates a fundamental weakness, which pervades all of Justice Kennedy's gay rights opinions. While paying lip service in these cases to tenets of equal protection and due process, Justice Kennedy largely substitutes his personal dignity analysis in their place. *Obergefell* provides a case in point. Justice Kennedy's invocation of "the intersection" of the equal protection and due process clauses from which the right to human dignity derives provides a rhetorical flourish but ultimately is legally empty.[84] The phrase does not explain where the purported intersection occurs, what precisely it is, or how it creates the right asserted. Nor does it bear any resemblance to the standard equal protection analysis exemplified in Justice Devine's dissent.

Thus, although Justice Devine got the point of *Obergefell* wrong, it is not inconceivable that his brand of accepted equal protection methodology, buttressed by citation to United States Supreme Court precedent employing it, might ultimately prevail. So long as Justice Kennedy remains the swing vote on a Supreme Court otherwise divided four to four between liberal and conservative justices, *Obergefell* is likely to remain secure. However, Justice Devine's dissent illustrates how vulnerable *Obergefell,* its gay rights predecessors, and its progeny could be in a Supreme Court influenced more

[80] Romer v. Evans, 517 U.S. 620, 631 (1996).
[81] Lawrence v. Tex., 539 U.S. 558, 578 (2003).
[82] United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013).
[83] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2601-02 (2015).
[84] *Id.* at 2602.

by routine equal protection analysis than by Justice Kennedy's well-meaning, but highly individual, jurisprudence of human dignity.

V. THE LEGAL CHALLENGE TO HOUSTON'S EXTENSION OF EMPLOYEE BENEFITS TO SAME-SEX MARRIED COUPLES: ROUND 3

A. Pigeon and Hicks Ask the Texas Supreme Court to Reconsider Review

Likely encouraged by Justice Devine's dissent, Pidgeon and Hicks petitioned the Texas Supreme Court to reconsider its refusal to hear their case. In several respects, they repeated arguments advanced previously in their initial petition. Citing Justice Devine's dissent, Pidgeon and Hicks asserted *Obergefell* did not create a fundamental right to spousal benefits along with the right to marry.[85] They also reargued their point that "*Obergefell* imposes a 'right' that cannot be found anywhere in the Constitution" and for that reason should be narrowly construed.[86] However, their second petition also included a new argument urging narrow construction of *Obergefell* to avert the threat it posed to "the religious freedom of those who oppose homosexual behavior."[87] Pidgeon and Hicks based this argument on two points: 1) that the "homosexual-rights movement" seeks to use *Obergefell* to "coerce people of faith who oppose homosexual behavior into participating in same-sex marriage ceremonies"[88] and 2) that Obergefell " has emboldened federal judges to go a step beyond even that, by holding that it is unconstitutional for a state to enact a religious-freedom law that would shield Christians and others who oppose same-sex marriage from government penalties for refusing to participate in same-sex marriage ceremonies."[89] This new argument aside, still another factor figured into Pidgeon and Hicks' efforts to convince the Texas Supreme Court to review their case. They now were joined by a powerful new ally – the Republican Party of Texas.[90]

B. The Republican Party of Texas Exerts its Muscle

Texas always has been a deeply conservative state.[91] However, not until

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[85] Motion for Rehearing at 5, Pidgeon v. Turner, No. 15-0688, 2016 Tex. LEXIS 799 (Tex. Sept. 2, 2016) http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a1d82a26-3738-4002-8c86-ca25db26f6c1&coa=cossup&DT=REHEARING&MediaID=f208927a-5873-468a-bb99-4da661751b6c.

[86] *Id.* at 7.

[87] *Id.* at 9.

[88] *Id.*

[89] *Id.* at 9-10 (citing Barber v. Bryant, 2016 WL 3562647 (D. Miss. June 30, 2016)).

[90] *See generally* Brief of State Senators, State Representatives, and numerous Conservatives [sic] Leaders throughout Texas as Amici Curiae for Appellants, Pidgeon v. Turner, 2016 WL 4938006 (No.: 15-0688), 2016 WL 6298733 (Tex. 2016).

[91] Ben Philpott, *Why Is Texas So Red, And How Did It Get That Way?*, KUT (Oct. 24, 2016) http://kut.org/post/why-texas-so-red-and-how-did-it-get-way.

the mid- to late 1990s did the Republican Party of Texas wrest control from the Democratic Party to become the dominant political force in Texas.[92] Correspondingly, the Republican Party assumed the mantle of the guardians of conservatism in the state. The advent and rapid growth of the Tea Party movement in Texas in the second decade of the twenty-first century moved Texas Republicanism even further to the right on the conservative political spectrum, resulting in the displacement from office and party leadership of more moderate Republicans.[93]

The Republican Party of Texas takes a hostile view to gay rights. For many years, the party platform has stated the following:

> Homosexuality is a chosen behavior that is contrary to the fundamental unchanging truths that has [*sic.*] been ordained by God in the Bible, recognized by our nation's founders, and shared by the majority of Texans. Homosexuality must not be presented as an acceptable alternative lifestyle, in public policy, nor should family be redefined to include homosexual couples. We oppose the granting of special legal entitlements or creation of special status for homosexual behavior, regardless of state of origin. We oppose any criminal or civil penalties against those who oppose homosexuality out of faith, conviction, or belief in traditional values.[94]

The reaction of Texas' top Republican office-holders to the *Obergefell* decision remained consistent with the party platform. Governor Greg Abbott issued a memo to state agency heads titled "Preserving Religious Liberties for All Texans."[95] It emphasized that "in light of *Obergefell* ... [t]he government must never pressure a person to abandon or violate his or her sincerely held religious beliefs regarding a topic such as marriage." [96] Governor Abbott directed that no state employee motivated by such beliefs be penalized for acting or refusing to act [ostensibly when

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[92] *Id.*

[93] Jim Vertuno, *Tea Party Candidates Prevail in Texas Runoff Elections*, SW JOURNALIST (June 1, 2017), http://www.swjournalist.com/2014/05/27/dan-patrick-ousts-dewhurst-in-runoff-election/ (noting "Republican voters appeared ready to push Texas even further to the right Tuesday by backing tea party favorites over establishment candidates").

[94] Republican Party of Texas, Report of the Permanent Committee on Platform and Resolutions as Amended and Adopted by the 2016 State Convention of the Republican Party of Texas, at 11, https://www.texasgop.org/wp-content/uploads/2016/01/PERM-PLATFORM.pdf (last visited Feb. 4, 2018).

[95] Office of the Governor Greg Abbott, *Governor Abbott Issues Memo Directing State Agencies To Protect Religious Liberty*, OFFICE OF THE TEXAS GOVERNOR (June 26, 2015), http://gov.texas.gov/news/press-release/21133.

[96] *Id.*

called upon to effectuate a same-sex marriage].[97] In a similar vein, Texas Attorney General Ken Paxton issued an official attorney general opinion at the behest of Lieutenant Governor Dan Patrick. It counseled county clerks, justices of the peace, and judges that they "may claim" that the government cannot compel them to issue licenses for or perform same-sex marriages in violation of their religious beliefs, particularly if willing substitutes are available.[98] It also suggested that, in the event everyone in a clerk's office objected on religious grounds to issuing marriage licenses to same-sex couples, the office might avert a claim of unequal treatment by not issuing marriage licenses to any couples at all.[99]

Republican Party support for Pidgeon and Hicks came first in the form of an amicus brief filed by the Texas Railroad Commissioner, Republican state senators and representatives, and "numerous Conservative Leaders throughout Texas."[100] It reiterated the arguments that *Obergefell* created a right to marriage only and did not obligate states to provide spousal benefits to same-sex married couples.[101] Indeed, it asserted *Obergefell* did not even apply to statutes not contested by the petitioners in the case. Pressing this point further, the amici stated the State could not be required to pay benefits to same-sex spouses until the State legislature or the Texas Supreme Court invalidated Section 6.024 of the Texas Family Code. [102] That statute pronounces same-sex marriages void as a matter of State public policy, a proposition presumably overridden by *Obergefell.* However, Section 6.024 also prohibits the State and its agents from effectuating a "right or claim to any legal protection, benefit, or responsibility asserted as a result of" a same-sex marriage.[103] The ban on same-sex benefits, the amici asserted, had survived *Obergefell* intact and prevented Houston from offering such benefits to its employees.[104]

In the final section of the brief, the amici drove home their argument for Texas Supreme Court review by pointing a blunderbuss to the Justices' prospects for reelection. The court, they asserted, had ducked comment on the *Obergefell* opinion one time too many.[105] Indeed, the public had a right "to hear what their highest civil court has to say on the subject of same-sex

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[97] *Id.*

[98] Tex. Att'y Gen. Op. No. KP-0025 (2015), *available at* https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf.

[99] Tex. Att'y Gen., *supra* note 98.

[100] Brief for State Senators,et al. as Amici Curiae Supporting Petitioners, Pidgeon v. Turner, 2017 WL 2829350, (Tex. 2017) (15-0688) 2016 WL 7638349; Brief of Governor Greg Abbott, et al. as Amicus Curiae Supporting Petitioners, Pidgeon v. Turner, 2017 WL 2829350, (Tex. 2017) (15-0688) 2016 WL 6465938.

[101] Brief for State Senators, *Pidgeon v. Turner*, 2017 WL 2829350, at 12 (Tex. 2017) (15-0688).

[102] *See Id.* at 19.

[103] TEX. FAM. CODE ANN. § 6.024 (West 2006).

[104] Brief for State Senators, *Pidgeon v. Turner*, 2017 WL 2829350, at 12 (Tex. 2017) (15-0688).

[105] *Id.* at *21.

marriage."[106] In case they had not made their point sufficiently clear, the amici reminded the court: "Judicial candidates, especially those in a party primary, campaign on the issues. They give their opinions on the political concerns of the day and pledge allegiance to their party platform. As we will soon see on November 8th – elections have consequences."[107] About two weeks later, the Republican Governor, Lieutenant Governor, and Attorney General jointly filed a separate amicus brief.[108] It too argued *Obergefell* had left undecided collateral issues relating to the recognition of same-sex marriages, such as the extension of benefits.[109] The amici asserted only the judgment of *Obergefell* warranted legal recognition.[110] In their view, Justice Kennedy's opinion, itself, constituted mere exposition, had no force of law, and, accordingly, should be disregarded by lower courts examining issues distinct from the single question *Obergefell* had considered.[111]

The second argument of the Governor, Lieutenant Governor, and Attorney General reiterated the point that, because the judgments of lower federal courts cannot bind state courts, the Fourteenth District Court of Appeals had wrongly ordered the trial court on remand to proceed "consistent with" the holding of the Fifth Circuit in *De Leon* enjoining the state from enforcing its ban on same-sex marriage.[112] The amici believed this command all the more egregious because, whereas federal courts can enjoin state officials, they cannot enjoin state courts.[113] Although state courts "should generally follow the U.S. Supreme Court's judgments regarding the federal constitution," state courts, they argued, had a duty to consider independently the ramifications of a decision like *Obergefell* on different situations.[114] Indeed, the reliance by a state court on federal decisions expanding substantive due process rights was particularly problematic. A state court compounded the problem when it did not carefully describe the liberty interest asserted, as the Fourteenth District Court of Appeals had failed to do in its order to the trial court.[115] Accordingly, the amici urged the Texas Supreme Court to instruct the trial court that the injunction ordered by *De Leon* did not prevent it from applying, consistent with the limited holding in *Obergefell,* the provisions of the Texas Constitution and Family Code, which limited state action in

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[106] *Id.*

[107] *Id.* at *22.

[108] Brief of Governor Greg Abbott, et al. as Amicus Curiae Supporting Petitioners, Pidgeon v. Turner, 2017 WL 2829350, (Tex. 2017) (15-0688) 2016 WL 6465938.

[109] *Id.* at *7.

[110] *Id.* at *9-10.

[111] *See id.*

[112] *Id.* at *12.

[113] *Id.*

[114] Brief of Governor Greg Abbott, et al. as Amicus Curiae Supporting Petitioners, Pidgeon v. Turner, 2017 WL 2829350, (Tex. 2017) (15-0688) 2016 WL 6465938 *12-13.

[115] *Id.* at *13-14.

reference to same-sex marriages.[116]

C. The City of Houston Responds

The City of Houston, responding under a new Mayor, Sylvester Turner, reprised the standing argument it had made previously[117] and swatted away Pidgeon and Hicks' Motion for Rehearing as empty rhetoric with no relation to the case.[118] The issue, the City asserted, had nothing to do with whether employee benefits constituted a "fundamental right" because neither the trial court nor the Fourteenth Court of Appeals had ruled they did. The court of appeals had simply ordered the trial court to consider the implications of *Obergefell* and *De Leon* on the case without expressing any opinion of its own.[119] Nor had the question of *Obergefell*'s effect on the religious freedom of opponents of same-sex marriage been raised at any point in the proceedings below.[120] What Pidgeon and Hicks, in fact, sought was an advisory opinion from the Texas Supreme Court on the meaning of *Obergefell,* a kind of opinion, which Article II, Section I of the Texas Constitution prohibited the court from issuing.[121]

The City dismissed the amicus briefs of the Republican Legislators and Governor and executive branch officials with equal distain. It called "silly" the legislators' assertion that *Obergefell* implicated the constitutionality of only the statutes challenged in that case.[122] It noted the irony that the Governor and other officials, who now pronounced *De Leon* inapplicable to whether Houston could offer same sex spousal benefits, had themselves expressly acquiesced to the holding of *De Leon*, resulting in the State extending those same benefits to its own employees.[123] It derided their assertion that a state court, by contrast, could freely reject the holding of *De Leon* that *Obergefell* had made the prohibitions of same-sex marriage in the Texas Constitution and Defense of Marriage Act unconstitutional. [124] The notion advanced by the Governor and other officials that a state court must follow U.S. Supreme Court precedent only "generally" had, the City noted, been decisively rejected by the Supreme Court when the State of Arkansas had advanced a similar argument questioning the authority of *Brown vs.*

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[116] *Id.* at *14.

[117] Resp. to Mot. for Reh'g at 1, Pidgeon v. Turner, 2017 WL2829350 (Tex. 2017) (15-0688).

[118] *See id.* (asserting Petitioners "attempt to fashion this case as raising issues of great importance in interpreting . . . Obergefell . . . [but] ignore the reality of the record before this Court, which does not present the issues Petitioners argue as a basis for rehearing.")

[119] *Id.* at *3.

[120] *See id.*

[121] *Id.* at *1-2.

[122] *See id.* at *13 (stating that Alabama Supreme Court Judge Shaw's comments on the same point in *Ex parte State of Alabama ex. rel Ala. Policy Inst., et al*., No. 1140460 (Ala. Mar. 4, 2016) "apply equally here.")

[123] *Id.* at *5.

[124] *Id.* at **9-10.

Board of Education to prohibit school segregation.[125] Thus, the City implicitly drew a parallel between the efforts in the case at bar to single out same-sex married couples for different treatment and the efforts of states in the fifties to retain segregation, each in defiance of a Supreme Court mandate.

VI. THE TEXAS SUPREME COURT GRANTS REVIEW

On January 20, 2017, the Texas Supreme Court reversed itself and decided to hear *Pidgeon v. Turner*.[126] Although the court advanced no reason for its change of heart, a number of news outlets credited the pressure exerted by Republican State Legislators and the Governor and other executive branch officials.[127] A number of factors buttress this notion: The points of argument presented by the parties themselves remained substantially the same on reconsideration. The addendum by Pidgeon and Hicks – the religious freedom argument – was, as the City correctly noted, not only irrelevant but also had not been introduced in the proceedings below. The Legislators' assertion that *Obergefell* did not apply beyond the statutes specifically challenged had been refuted by actions of the State, itself, evidenced by the subsequent licensure of gay marriages and provision of state benefits to spouses of gay state employees. The Governor's distinction between the judgment and the opinion in *Obergefell* and assertion the latter had no legal authority ignored longstanding principles of jurisprudence. His point that the Fourteenth District Court of Appeals had erred by failing to explain its purported expansion of substantive due process contradicted his point that only judgments, not opinions, have legal authority. Although Justice Devine's dissent provided the best argument for differentiating between the benefits accorded same-sex and opposite-sex married couples, a majority of the Justices of the Texas Supreme Court had plainly disregarded it the first time around. Indeed, after all of the foregoing points are discounted, the argument left standing is that offered up by the Republican legislators – hear the case or suffer the consequences at the polls.

This would not be the first time the Texas Supreme Court's judicial independence has been questioned. As early as 1987, the CBS news program 60 Minutes presented a feature on the Texas Supreme Court titled

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[125] *Id.* at *10-11.

[126] Alex Ura, *Texas Supreme Court to reconsider same-sex marriage case after GOP appeal*, FORT WORTH STAR-TELEGRAM (Jan. 20, 2017), http://www.star-telegram.com/news/state/texas/article127720969.html.

[127] *Id.*; Lauren McGaughy, *At GOP Leaders' Urging, Texas Supreme Court Will Consider Undoing Gay Spousal Rights*, DALLAS NEWS (Jan. 20, 2017), https://www.dallasnews.com/news/lgbt/2017/01/20/gop-pressure-texas-supreme-court-will-consider-undoing-gay-spousal-rights.

"Justice for Sale."[128] It and other reports that followed noted the prevalence of large corporations, major law firms, and special interest groups donating large sums of money to campaign war chests of Supreme Court justices who might later hear cases involving these parties.[129] Judicial candidates from both parties benefited from these donors' largesse to such an extent that, in 2005, the Texas Legislature passed the Judicial Fairness Act, limiting campaign contributions to $5,000 for individuals and $30,000 for law firms.[130]

With the rise of the Republican Party's hegemony in Texas politics and its sweep of all the seats on the Texas Supreme Court, the political influence of the Republican Party, itself, on judicial decision-making has come into focus.[131] The Republican Party of Texas steadfastly endorses electoral judicial selection.[132] Since Texas requires candidates for judicial office to run under party affiliation[133] and Democrats have not garnered a contested seat on the Texas Supreme Court since 1994,[134] electoral selection effectively occurs in the Republican Party primary.[135] In 2016, all three Republican incumbents on the Texas Supreme Court faced a primary challenger.[136] Although the issues debated varied from race to race, in each the debate centered on which candidate best represented conservative values.[137] This dynamic of Republican Party judicial primaries in Texas demonstrates that real teeth lay behind the warning the Republican Legislators issued in their amicus brief to the Texas Supreme Court Justices reconsidering *Pidgeon v. Turner*. The Justices' determination to reopen the case raises, in turn, the inevitable question whether they, in fact, caved under the pressure and accorded greater weight to electoral politics than judicial independence and impartiality.

VII. THE UNITED STATES SUPREME COURT SPEAKS AGAIN: *PAVAN V. SMITH*

On June 26, 2017, the United States Supreme Court handed down *Pavan v. Smith*, a case that grappled with the same issue as before the Texas

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[128] Maurice Chammah, *Judicial Donations Raise Questions of Partiality*, TEX. TRIB. (Mar. 26, 2013), https://www.texastribune.org/2013/03/26/donations-judicial-campaigns-spur-ethics-worries/.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades*, 43 CT. REV. 68, 77 (2006) *available at* http://aja.ncsc.dni.us/courtrv/cr43-2/CR43-2Champagne.pdf ("the greatest opposition to judicial reform in Texas has been the Texas Republican Party").

[133] *Id.* at 68.

[134] *Id.* at 78.

[135] Jordan Rudner, *Three Supreme Court Justices Face Challenges*, TEX. TRIB. (Feb. 9, 2016) https://www.texastribune.org/2016/02/09/supreme-court-races-incumbents-face-unusual-challe/.

[136] *Id.*

[137] *See id.*

Supreme Court in *Pidgeon*: whether, after *Obergefell,* a state can withhold from same-sex married couples benefits it provides to married couples of the opposite-sex.[138] The Court answered unequivocally that the Constitution forbids such discrimination.[139]

Pavan examined an Arkansas statute that automatically provided for the inclusion of a married father's name on a child's birth certificate.[140] The Arkansas Code allowed this to occur even when the wife had conceived the child through artificial insemination of the sperm of a third party.[141] The case arose after the Arkansas Department of State refused in two separate instances to permit the inclusion of the name of the non-birth mother on the birth certificate of a child conceived through the third-party artificial insemination of one of the partners to a legally performed lesbian marriage.[142] The couples sued, asserting a constitutional violation of the equal treatment of same-sex married couples guaranteed by *Obergefell*. [143] The Arkansas Supreme Court ruled that the statute did not violate *Obergefell* because it "center[ed] on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife."[144] It held thus despite the fact that the absence of such a biological relationship between a husband and a child conceived through the third-party artificial insemination of the husband's wife did not preclude the inclusion of the husband's name on that child's birth certificate.[145]

Siding with the lesbian couples, the United States Supreme Court clarified that *Obergefell* does more than create the right to same-sex marriage alone. It also guarantees that whatever benefits the state chooses to provide to heterosexual spouses shall be provided to same-sex spouses as well. [146] The Court noted that certain of the *Obergefell* plaintiffs, like the Arkansas couples in *Pavan*, had faced state resistance to the inclusion of both partners' names on their children's birth certificates.[147] Thus, the Court had referenced just such inclusion when, in *Obergefell,* it had recited the list of marital benefits commonly accorded to opposite-sex couples to which same-sex couples were equally entitled.[148]

Pavan's importance lies in the roadblock it has placed to the argument, advanced, for example, by the Plaintiffs in *Pidgeon*, that every point in *Obergefell* other than the allowance of same-sex marriage is dicta that lower

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[138] Pavan v. Smith, 137 S. Ct. 2075, 2076-77 (2017).
[139] *Id.* at 2078.
[140] *Id.* at 2077 (referencing Ark. Code §20-18-401(2014)).
[141] *Id.* (referencing Ark. Code §9-10-201(a)(2015)).
[142] *Id.*
[143] *Id.* at 2077.
[144] Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).
[145] *Id.*
[146] *Id.* at 2078.
[147] *Id.*
[148] *Id.*

courts should feel free to ignore. *Pavan* clarifies that the right to marry cannot be separated from the right to marriage's benefits. Indeed, these rights are not only inseparable but also symbiotic: while the marriage activates the benefits, the benefits, in turn, enrich and dignify the marriage. Thus, *Pavan* reaffirms *Obergefell*'s wider message that the right to same-sex marriage is but a component of a greater right of homosexual people to be treated with dignity and common respect.

VIII. THE TEXAS SUPREME COURT PUNTS IN DECIDING *PIDGEON V. TURNER*

On June 30, 2017, four days after the United States Supreme Court issued its opinion in *Pavan v. Smith*, the Texas Supreme Court handed down a unanimous decision in *Pidgeon v. Turner*. It settled nothing of substance aside from determining it had jurisdiction to review the case and finding the Fourteenth Court of Appeals had erred in instructing the trial court to follow the federal district court's determination in *De Leon* that Texas's defense of marriage laws violated the United States Constitution.[149] In essence, the Texas Supreme Court punted. While the Justices sent the case back to the trial court, ostensibly to figure on its own whether *Obergefell* entitled the gay spouses of Houston's employees to marital benefits,[150] the Justices nevertheless construed *Obergefell*'s holding as narrowly limited to the licensure of same-sex marriages alone.[151] Accordingly, they walked a fine line between assuming an aura of judicial impartiality and political pandering. The result is a decision that is neither fish nor fowl, occupying a queasy middle ground between neutral jurisprudence and a political position paper.

The Texas Supreme Court dodged most of the issues before it on two grounds. First, it noted that the litigation in the trial court had never advanced to a degree sufficient for the parties to build an evidentiary record.[152] Thus, the court held it would be premature to determine the issues relating to the Plaintiffs' standing to sue the City[153] or whether *Obergefell* had any retroactive effect upon the legality of the actions taken by the Mayor and City during the period before *Obergefell* had come down.[154] Secondly,

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[149] Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350, at *7 (Tex. 2017).

[150] *Id.* at *11.

[151] *See id.* at *12 n.20 (asserting Texas DOMAs remain in place notwithstanding); *see id.* at *12 n.21 (asserting 'neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address.") Although a true statement in a general sense, *Pavan* does provide the final word insofar as it plainly holds the provision of marital benefits is part of the constitutional package of marriage itself, an inconvenient holding the Texas Supreme Court chose to ignore.

[152] *Id.* at *11.

[153] *Id.*

[154] Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350, at *11 (Tex. 2017).

the court noted that the path of the litigation to date, in tandem with the shifting legal landscape, had deprived the parties of any opportunity to fully argue their claims and defenses before the lower courts.[155] Therefore, the court believed it should defer pronouncing upon the important issues relating to the reach and scope of *Obergefell* until both the parties and the lower courts had more extensively engaged with them.[156] For this reason, the court remanded the case back to the trial court so these issues could receive the fullest possible treatment and consideration.[157]

In deciding the foregoing, the Justices operated in their jurisprudential mode. Other parts of the opinion show them playing political defense. For example, the court chose to portray a non-issue as a victory for the Plaintiffs. In one of its few definitive pronouncements, the court held that the Fourteenth Court of Appealed had erred by instructing the trial court on remand to act "consistent with" the Fifth Circuit Court of Appeals' decision in *De Leon*, which had invalidated Texas' Defense of Marriage Act provisions.[158] The court expressed concern that the term "consistent with" could have been construed as meaning "binding."[159] Notably, no party to the litigation, least of all the City of Houston, had ever suggested *De Leon* bound the trial court in any respect.[160] One can reasonably assume, however, that the Justices, as candidates for reelection, felt obliged to cede something to their political Republican base, even as, back in judicial mode, they split hairs, conceding "[t]he trial court should certainly proceed on remand 'in light of' *De Leon*."[161]

Republican Party politics manifests its influence even more strongly in the Texas Supreme Court's blatant misrepresentation of the implications of the United States Supreme Court's decision in *Pavan v. Smith*, which had come down two days earlier. Writing as though *Pavan* did not exist, the Texas Supreme Court opined: "The Supreme Court held in *Obergefell* 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 and – unlike the Fifth Circuit in *De Leon* – it did not hold that the Texas DOMAs are unconstitutional."[162] Thus, on the one hand, the Texas Supreme Court ignored *Pavan*'s mandate that the benefits incident to marriage constitute an inseparable part of the constitutional right to marry

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[155] *Id.*
[156] *Id.*
[157] *Id.* at *12.
[158] *Id.* at *7.
[159] *Id.*
[160] Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350, at *6 (Tex. 2017).
[161] *Id.* at *7.
[162] *Id.* at *10.

granted same-sex couples by the Supreme Court in *Obergefell*. [163] On the other hand, and even more egregiously, it affirmatively mischaracterized the constitutional status of same-sex marital benefits as an undecided issue for the trial court to grapple with on remand.[164] Rather than acknowledge reality, the Court chose instead to create a legal fiction where answered questions remain unanswered and the unconstitutional Texas DOMAs stand unbowed.[165] Consequently, as an assessment of the legal landscape post-*Obergefell*, the Texas Supreme Court's decision in *Pidgeon v. Turner*, while arguably representing savvy Texas Republican Party politics, constitutes unquestionably bad law.

IX. THE IMPLICATIONS OF *PIDGEON V. TURNER*

Pidgeon v. Turner could be called "the little case that roared" in the sense that it has given rise to implications far beyond its apparent importance at the time the litigation started. On the one hand, from a gay rights perspective, a legal challenge that, post-*Windsor* and even more post-*Obergefell*, seemed akin to a clay pigeon, which easily could be shot out of the sky, was revealed to be a potential Trojan horse with the capacity to bring down *Obergefell*, itself. On the other hand, from a judicial ethics perspective, this same case, which the Texas Supreme Court, too, initially perceived as a clay pigeon it summarily could dismiss, effectively became the court's own Trojan horse, subjecting it to such intense political pressure as to call into question both the court's impartiality and the effectiveness of the Texas Code of Judicial Ethics.

A. Pidgeon v. Turner *and Gay Rights*

The saga of *Pidgeon v. Turner* demonstrates, at the very least, the hubris of assuming reform follows inexorably and unimpeded after a landmark Supreme Court civil rights decision. That was not the case for African American social and political equality following *Brown v. Board of Education*, 347 U.S 483 (1954), and *Pidgeon* suggests the road to full acceptance of same-sex marriage equality may be similarly protracted.[166]

Moreover, as noted above, the judicial response in opposition to the provision of marital benefits to same-sex married couples, particularly Justice Devine's dissenting opinion to the Texas Supreme Court's initial order, demonstrates the vulnerability of *Obergefell* to routine due process analysis. Had the Court's decision in *Obergefell* also been framed in line

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[163] *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

[164] *Pidgeon*, 2017 WL 2829350, at *10.

[165] *See id.* at *10, *12 n.21.

[166] *See generally* Phillip B. Kurland, "Brown v. Board of Education *Was Just The Beginning": The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 179 WASH. U.L. Rev. 309 (1979) (discussing the long road to school desegregation following the *Brown* decision).

with standard due process jurisprudence, challenges to it based on that same methodology would have been harder to make and easier to refute. Yet, the decision in *Obergefell* to largely shun "due process talk" in favor of "dignity platitudes" leaves the opinion fully exposed to due process attack with little in the way of legally substantive rejoinder. Standard due process analysis can, of course, always be employed subsequently to defend *Obergefell* and its progeny but that case will be harder to make after the fact. The absence of due process analysis in *Obergefell* proper raises the dual question whether it was even possible to make a compelling due process argument for marriage equality in the first place and whether such an argument can possibly be made now. Thus, its absence actively encourages opponents of marriage equality, like Pidgeon and Hicks, to mount their attacks.

Finally, *Pidgeon v. Turner* demonstrates the susceptibility of marriage equality to "death by a thousand cuts." Again, Justice Devine's dissent provides both the example and the template: acknowledge the constitutionality of same sex marriage proper but distinguish the auxiliary factor as separate from it and rationally related to a state interest favoring opposite-sex couples but inapplicable to their same-sex counterparts. Whereas *Pavan v. Smith* may now impede such an approach to a degree, *Pavan* is no less susceptible to narrow construction than *Obergefell* itself. In any case, the list of marital benefits in *Obergefell* referenced by *Pavan* is not exhaustive, leaving outliers subject to due process challenge.

Ultimately, after *Pidgeon v. Turner* works its way again through the Texas judicial system, *Pavan v. Smith* should provide the impetus for Houston's gay employees to receive the city benefits they were awarded five years ago. And *Pavan* almost certainly has scotched the *Pidgeon* Plaintiffs' hope of seeing their case come before the United States Supreme Court as the catalyst for the reversal of same-sex marriage. Nevertheless, the *Pidgeon* Plaintiffs have demonstrated that the status of same-sex marriage is not entirely secure and their case presents a cautionary tale that advocates of same-sex marriage cannot afford to ignore.

B. Pidgeon *and Judicial Ethics in Texas*

Unquestionably, *Pidgeon v. Turner* is a case the Texas Supreme Court would have preferred to ignore. It would have taken considerable courage for the Justices to have pushed back against the pressure applied against them by the Republican Party of Texas. From an optical perspective at least, the Republican stalwarts' threat of political retribution in their amicus brief succeeded in bullying the court to hear the case. The tortured opinion the Justices finally wrote lends further credence that this occurred. The opinion gives the impression of honorable and well-meaning men and women struggling to maintain a semblance of judicial integrity while assuaging the political forces that put them on the bench. It is both depressing and painful

to read. Speaking out of the judicial side of their mouths, the Justices preached fairness, sending the case back to the trial court for a more studied assessment based on intervening case law and more fully developed arguments by both parties.[167] At the same time, speaking out of the political side of their mouths, the Justices placated the Republican Party line on homosexuality by framing the United States Supreme Court's decisive holding on marital benefits in *Pavan v. Smith* as an inconclusive step toward an issue that not only remained to be decided but which well *could be decided* adversely to gay couples.[168] Thus, although substantively the opinion left the case in relatively the same position it was prior to the motion for consideration, the opinion demonstrates the danger an elected judiciary poses to judicial independence and the inefficacy of the Texas Code of Judicial Ethics to ameliorate it.

The Texas Supreme Court adopted the Texas Code of Judicial Ethics as the ethical standard governing the state's judges and subscribes to its tenets as well.[169] Canon 1 stipulates the importance of "[a]n independent and honorable judiciary" as "indispensable to justice in our society."[170] Canon 2A counsels that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[171] Most pertinently, Canon 3B(2) admonishes, among other things, that "[a] judge shall not be swayed by partisan interests, public clamor, or fear of criticism."[172]

Although the foregoing provisions of the Texas Code of Judicial Ethics appear to discourage strongly the intermingling of judicial and political concerns, Texas courts, bowing to the reality of an elected judiciary, have interpreted these provisions to remove their teeth in this critical respect. For example, Texas judges need not recuse themselves when lawyers who have contributed to the judges' campaigns appear in their courts because "it is necessary, unfortunately, that candidates for judicial office seek contributions for the purpose of defraying all or part of the expense of what is, in reality, a political campaign."[173] A simple judicial denial of political motivation, moreover, generally suffices to end a bias challenge based on

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[167] *Pidgeon*, 2017 WL 2829350, at *7.

[168] *Id.* at *12 n.21.

[169] *Texas Code of Judicial Conduct*, TEXASCOURTS.GOV, http://www.txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf (last visited on Jan. 30, 2018). The Texas Code of Judicial Ethics is one of the few governing documents in Texas law that prohibits bias against sexual orientation. Canon 3(B)(7) stipulates that a judge shall not demonstrate prejudice on the basis of a party's sexual orientation. However, it notes "this requirement does not preclude legitimate advocacy when [sexual orientation] is an issue in a proceeding."; *Id.* at Cannon(B)(7).

[170] *Id.* at Canon 1.

[171] *Id.* at Canon 2(A).

[172] *Id.* at Canon 3(B)(2).

[173] Rocha v. Amad, 662 S.W.2d 77, 78 (Tex. Ct. App. 1983).

circumstantial evidence.[174] For that reason, disciplinary actions based on Canon 3(B)(2) historically have occurred only in those rare instances where the judges in question have admitted to basing their actions on partisan concerns or fear of public criticism.[175]

One can, therefore, plausibly argue that the Texas Code of Judicial Ethics, itself, has been subverted by the political undercurrents of judicial selection in Texas. So long as the aspirations expressed in the Code remain tempered by the acceptance (or resignation) that Texas judges function as politicians, first, who must perforce act politically in order to judge at all, the notion of a judiciary that "at all times acts in a manner … that promotes public confidence in [its] integrity and impartiality" sounds a hollow ring.[176]

Adding to the concerns occasioned by an interpretation of the Code of Judicial Ethics, which countenances judicial politicking, Texas courts have strongly warned that legal action imputing political bias to the judiciary is taken at the alleger's peril. In *Sears v. Olivarez* for example, the Corpus Christi Court of Appeals not only dismissed an allegation of judicial political bias, but also reported the attorney to the State Bar for making it.[177] The court stated:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.[178]

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[174] *See* Sears v. Olivarez, 28 S.W.3d 611 (Tex. Ct. App. 2000) (where impartiality of entire court challenged on grounds of political hostility to lawyer of opposing party running for a court seat, it was appropriate for judges to affirm each other's impartiality based on certification by each judge of no reason to recuse himself or herself). Although the standard for recusal is "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial," *id.* at 615. The judge whose impartiality is challenged makes this determination initially and his or her decision is accorded substantial deference on appeal.

[175] *See Public Admonition, Hon. Gary Geick CJC No. 07-0384-JP,* TEX. COMM'N ON JUDICIAL CONDUCT (May 5, 2008) http://www.scjc.texas.gov/media/8140/geick-07-0374-jp-pubadm-_final_.pdf (judge who admitted to not scheduling eviction actions in the weeks before Christmas to avoid public criticism); See *Public Admonition Hon. Jeff Cox CJC No. 10-1018-JP*, TEX. COMM'N ON JUDICIAL CONDUCT, (Sept. 8, 2011) http:///www.scjc.texas.gov/media/8103/cox-10-1018-jp-public-admonition-final-signed-by-chair-9-9-11revised2.pdf (judicial admission on secretly recorded tape that dismissal of case based on desire to avoid a potential official oppression lawsuit).

[176] *Texas Code of Judicial Ethics*, *supra* note 169, at Canon 2(A).

[177] *Sears*, 28 S.W.3d at 616.

[178] *Id.* at 616, quoting *In re* Maloney, 949 S.W.2d 385, 388 (Tex. Ct. App. 1997),(en banc, per curium)(condemning counsel's allegation that political motivations influenced a court's decision).

In this circular argument, a legal allegation of an appearance of judicial impropriety, arguably made to right a wrong and sustain public confidence in the judiciary, is worthy of sanction because the allegation, itself, undermines the public's faith in its judges. Put differently, it apparently is preferable for the public to have confidence in the judiciary, even unjustifiably, than to examine seriously purported judicial wrongdoing. The knee-jerk dismissal of such allegations as "insults" to the courts[179] further underscores the unlikelihood in Texas of any serious examination of, let alone action against, the undue influence of politics in judicial decision making.

The prevailing assumption in Texas that judicial politics and the Code of Judicial Ethics can be reconciled plays into the *Pidgeon v. Turner* saga in an interesting way. It is unlikely it will ever be known for certain whether the political pressure exerted by the Texas Republican Party actually influenced the Texas Supreme Court's decision to reverse itself and hear *Pidgeon*. The Justices, themselves, would be the last to admit it, and their silence effectively guarantees no official inquiry will take place. Yet, as the newspaper coverage of the decision to rehear the case indicates, the circumstances suggest at least the appearance of improper political influence.[180] And, notably, the Justices, themselves, have not spoken out against the Republican officials' threat as having been in any sense improper.

Let us give the Justices the benefit of the doubt, however, and assume they did not cave to Republican pressure in deciding to hear *Pidgeon v. Turner*. The threats made by the Republican office holders plainly put these judges between a rock and a hard place. The circumstantial evidence of inappropriate political influence was there and it looked bad. Nor could the Code of Judicial Ethics provide an effective shield for the Justices in their defense. The Code, after all, has been interpreted to acknowledge and accommodate the reality that judicial candidates and sitting judges are political animals who must act like politicians to secure and maintain their places on the bench.[181] Far from offering protection to truly impartial judges, the Code so interpreted only makes more credible the notion that judging with an eye cocked to politics constitutes business as usual in Texas. Thus, if the judges here truly did not bow under the political pressure exerted by the Republican Party, they too can be counted among *Pidgeon v.* Turner's victims, tainted by the very electoral system that gave them their judicial status.

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[179] *See* Merrell Dow Pharmaceuticals v. Havner, 953 S.W.2d 706, 732 (Tex. 1997) (Spector, J., concurring).

[180] *See* McGaughy*, supra* note 5.

[181] *See* Rocha v. Amad, 662 S.W.2d 77, 78 (Tex. Ct. App. 1983) (acknowledging reality that Texas judges are, in part, politicians).