digital divide. We house the common wealth of our civilization. We provide for free what patrons cannot buy for themselves. We open the door to larger worlds for everyone, regardless of class or background. Along with the public schools, we hold a place at the very heart of American democracy. We stand as a beacon of opportunity for all who would see its light, a gateway to riches for all who would enter in.

That is an exalted mission. It's one MPL has been pursuing for nearly 140 years now, and it's one we'll continue to pursue into a future whose technologies we can't begin to imagine, but whose needs for information, inspiration, and connection will be identical to our own. ■

Judge Diarmuid F. O'Scannlain

The Supreme Court and the Future of Religion in the Public Square

On October 8, 2015, the Hon. Diarmuid F. O'Scannlain, judge of the U.S. Court of Appeals for the Ninth Circuit, delivered the keynote address at the annual Red Mass Dinner of the St. Thomas More Lawyers Society of Wisconsin at the Milwaukee Athletic Club.

Judge Diarmuid F. O'Scannlain

The Red Mass, as we in this room know, is an annual tradition in which the Church marks the beginning of the judicial term by invoking God's blessing on the judiciary and on members of the legal profession. For those of us within the profession, it is a time to reflect on the connection between our private faith as Catholics and our public work as lawyers. As we are well reminded by the Church, to live fully and truly—to flourish as God commands—that connection must be robust. Shortly after his appointment to the papacy, Pope Francis instructed that religion should not be "relegated to the inner sanctum of personal life, without influence on societal and national life, without concern for the soundness of civil institutions, without a right to offer an opinion on events affecting society."

But, for many of us, our public lives often do exist with a certain degree of detachment from our private faith. As legal professionals, we feel this detachment acutely. In the law, we are called to read, to interpret, to argue, and to shape civil rules and regulations, an enterprise conducted through the force of logic, intellectual rigor, and rhetoric, but typically not through appeal to religious values. In my particular work as a federal judge, even where such values may be implicated, their influence must be sharply constrained.

While law and religion are often apart in this way, thankfully the two are not usually at odds. I want to focus my remarks, however, on a Supreme Court opinion that recently has driven a wedge between the two and brought to our nation's consciousness the underlying tension between our ever-secular society and traditional religious values.

I

A

I am speaking, of course, of the United States Supreme Court's decision this past June in *Obergefell v. Hodges*. As I am sure many gathered here well know, in that case, a five-Justice majority of the Court held that the United States Constitution includes a fundamental right to same-sex marriage. For those, like me, who subscribe to an originalist understanding of our Constitution, this was a ▸▸

> *As quickly as people of faith mourned the demise of religious values in the public square, opponents of such values celebrated the same.*

startling proclamation of an unenumerated—and previously unheard of—right. Even more, it was a bold assertion of power for a federal court to step into and to decide such a hotly contested political issue for the nation at large. Indeed, through their decision, five Justices of the Supreme Court directly nullified the democratic will of four states that had each chosen to define marriage traditionally—as a union between one man and one woman, the nearly universal understanding since our founding more than 225 years ago.

But I do not mean to focus my remarks on the *result* of the case, which I know will be welcomed by many, including possibly some in this room, as a matter of public policy. Aside from the specific outcome of the case, what was especially striking was the majority's treatment of the conflict between the newly asserted right to same-sex marriage and the First Amendment rights of those who oppose such a practice on the basis of religion. The majority opinion acknowledged that marriage is "sacred to those who live by their religions," and that same-sex marriage clashes with many religious beliefs. But the majority held that no state may *itself* adopt such "sincere, personal opposition" to same-sex marriage. The majority explained (with a notable degree of circularity) that it did not mean to "disparage" individual religious beliefs, but only to ensure that such beliefs not be invoked by a state to "demean[ ] or stigmatize[ ] those whose own liberty is then denied." The Court emphasized that the First Amendment continues to protect believers' rights to "teach the principles" of their faith and to "engage those who disagree with their view in an open and searching debate."

Critically, the Court left unspoken what remaining freedoms people of faith may have left to object to the institution of same-sex marriage beyond simply teaching against it. The widespread and immediate response was: What does *Obergefell* prescribe for the future of religious liberty in America?

B

That question resounded throughout the Court's four dissenting opinions. The Chief Justice wrote that the majority's focus on "teaching" and "advocating" religion left "[o]minously" silent the First Amendment's guarantee of the "freedom to *'exercise'* religion." He warned that "[h]ard questions" will now be asked when believers "exercise religion in ways that may seem to conflict with the new right to same-sex marriage," and bemoaned that "people of faith can take no comfort in the treatment they receive from the majority today." Echoing concern over the "all but inevitable" conflict between religious exercise and the right to same-sex marriage, Justice Thomas warned that "the majority's decision threatens the religious liberty our Nation has long sought to protect." Justice Alito was even more pointed. He warned that the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy," and "will be exploited by those who are determined to stamp out every vestige of dissent." He evoked a lonely fate for those who subscribe to traditional religious values: "[T]hose who cling to old beliefs," he said, "will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." Justice Scalia, who focused his own writing on other facets of the case, joined in each dissent and called the majority's opinion a "threat to American democracy."

These are powerful words from our nation's highest court, and they were echoed immediately

in the public. The day the opinion came down, Rod Dreher, senior editor at *The American Conservative*, wrote that "[i]t is hard to overstate . . . the seriousness of the challenges [the decision] presents to orthodox Christians." He opined that "[t]he fundamental norms Christians have long been able to depend on no longer exist." The next day, Notre Dame Law Professor Gerard Bradley wrote that the Court's decision would "inaugurate the greatest crisis of religious liberty in American history." University of St. Thomas Law Professor Michael Stokes Paulsen suggested that *Obergefell* will "become the paradigm case of our age," and may frame debates over "judicial power[ ] and over religious freedom" for decades to come. And many expressed fear for the fates of specific faith-based institutions, such as our country's tens-of-thousands of religiously affiliated schools.

These concerns were well placed. As quickly as people of faith mourned the demise of religious values in the public square, opponents of such values celebrated the same. Most famously, two days after the *Obergefell* decision was announced, *Time* published an online column by Mark Oppenheimer, its title declaring, "Now's the time to end tax exemptions for religious institutions." Oppenheimer wrote that "the logic of gay-marriage rights could lead to a reexamination of conservative churches' tax exemptions," a measure he considered a "radical step," but one "long overdue." In the *Wall Street Journal*, William McGurn collected a laundry list of individuals and corporations that had already suffered similarly from their opposition to same-sex marriage—including Brendan Eich, who was forced to resign his position as CEO of Mozilla because of a $1,000 donation to Proposition 8, the successful California ballot measure retaining the traditional definition of marriage; Catholic Charities, which has been forced to shut down adoption services in numerous states; and even local bakers, photographers, florists, and pizza-parlor owners who faced public scorn and civil prosecution for their refusal to assist in same-sex weddings.

II

From these early reactions, the future for religious liberty following *Obergefell* looks bleak. But on this day of prayer and expectation for the legal community, I do not mean to leave you in despair. *Obergefell* represents, in many ways, a dramatic blow to religious exercise in our country. But it is not yet a fatal one. And as we look forward to life after *Obergefell*, we must keep in mind several critical limitations to the decision.

First, as a matter of black-letter law, the holding in *Obergefell* was actually rather narrow. In its own words, the Court held that "same-sex couples may exercise the fundamental right to marry in all States" and "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." To be certain, Justice Kennedy, writing for the majority, discussed in sweeping terms the "liberty . . . to define and express [one's] identity," and cases exploring the limits of that concept will undoubtedly arise. But for the moment, the Court has interpreted such liberty only to require state recognition of same-sex marriage. For those who would seek to engage in public discourse and to shape public policy, as Notre Dame Law Professor Rick Garnett explained, the *Obergefell* decision should not be seen as the end of *all* religious or moral justifications in lawmaking, ▸▸

but instead only as "the defeat, with respect to a particular issue, of *some*" religious arguments.

Second, in whatever future cases do arise—in the marriage context or otherwise—the First Amendment of our Constitution continues explicitly to protect the right to the "free exercise" of religion. That guarantee is among the most enduring and fundamental rights upon which our nation was built. Through it, the Supreme Court has long and consistently recognized that the Constitution requires not only acceptance but, in fact, public accommodation of religious belief and practice. As suggested by then-Justice Sandra Day O'Connor more than a decade ago, that right embodies a sphere of freedom that is needed to allow religion not merely to exist but also to flourish.

Obergefell, at least by its own terms, did not change this fundamental landscape of our Constitution, and we should not expect that judges in future cases will suddenly turn a blind eye to the guarantees of the First Amendment. It is telling that, in its own limited way, even the majority felt the need to acknowledge the continuing vitality of this right to religious liberty. Cases will—as always—continue to test the limits of this right as it runs headlong into other asserted constitutional rights. But we must remember that this critical constitutional backstop still serves to protect those of faith—like those of us in this room—just as it did before this June.

Third, and perhaps most important, the Supreme Court simply is not able—it has neither the authority nor the capability—to opine on the fundamental sanctity of marriage. The Court has announced that states as civil bodies must recognize and allow same-sex marriages. But the Court cannot define for religious individuals the true nature and meaning of the institution of marriage. This, of course, leaves the Church and its believers free to disagree with the Court's conception of marriage, as many have already done. But even more, the Court's decision can say nothing of the dignity or worth of those individuals who do disagree with the notion of same-sex marriage. Justice Thomas expressed this point well in his dissent:

> The government cannot bestow dignity, and it cannot take it away. The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. . . . Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

In short, the Court foreclosed one area of fierce political debate, but its decision cannot deny the worth of those who would disagree, and the Court did not drive their voices from the public arena.

III

With awareness of these critical limitations, as much as people of faith may disagree with the *Obergefell* decision, they should not resign themselves to defeat in its wake. The day after the decision, Professor Rick Garnett wrote that the looming question is "whether the majority's reasoning is heard as a call for compromise with those who hold the view that lost, or instead as a catalyst to marginalize and discourage that view to the extent possible." As

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we all await the answer to that question, people of faith should not marginalize their own voices. *Obergefell* is a setback for religious values in the public square, but it will stamp out such values only if those who adhere to them allow it to do so. The pro-life movement following *Roe v. Wade* is an instructive parallel: despite an unfortunate—in my opinion, wrong, yet binding in my work as a judge—ruling from the Supreme Court, the *Roe* decision did not end the abortion debate in our country. It changed the terms of that debate certainly, but if the past 40 years of the pro-life movement demonstrate anything, it is that people of faith may continue to have their voices heard and even to achieve policy victories in such a changed landscape.

I therefore urge those who believe deeply, faithfully that the decision is wrong: do not shrink from this moment. Resist the inclination, as has been advocated by some, to retreat from mainstream public life into smaller insular communities of shared values. In spite of *Obergefell*, there is still a welcome and needed place for religious values in our public square. And, as demonstrated following *Roe*, and has been suggested by my good friends, prominent natural law scholars Robert George and Hadley Arkes, due respect for the Supreme Court's interpretation of law does not prevent people of faith from working publicly toward a different end. As Professors George and Arkes encourage, people of faith may still demand greater protection for their religious freedoms from our political leaders. They may still participate in debate to shape public policy, and they may still seek to build a civil society that protects and cherishes those fundamental truths they have learned through religion.

We live in an increasingly secular culture, and the public celebration of a decision such as *Obergefell* is a sure sign that traditional religious values do not carry the same weight they once did. Even more, we must beware the expanding presence of secular bigots intolerant of religion, who would attack the rights of the faithful. In his recent visit to the United States, Pope Francis instructed (as reported in the *Washington Post*) that in this "world where various forms of modern tyranny seek to suppress religious freedom, or to try to reduce it to a subculture without right to a voice in the public square, . . . it is imperative that the followers of the various religions join their voices in calling for peace, tolerance, and respect for the dignity and rights of others." That collective action will require courage in the face of the significant new adversity presented by *Obergefell*. But there is much to be lost if the faithful yield. Pope Francis has reminded us that religious freedom is not only a constitutional right but also, indeed, a human right. If that right is to have enduring force, people of faith must continue to engage politically and must continue to fight for respect and acceptance of religious traditions.

People of faith should therefore see this moment not as a cancellation of their values but instead as a catalyst for action. Professor George has asked bluntly: Who among "ordinary people—Protestants, Catholics, Jews, Mormons, Muslims, others—inspired by their faith [will] stand firm" against the "mob" that will attack their religious traditions? All people of faith—and Catholics in particular—should see the Supreme Court's decision as a call to renew and to reinvigorate the connection between our personal religion and our outward, public lives. Previously, the Vatican's Congregation for the Doctrine of the Faith has exhorted Christians not to "relinquish their participation" in the political spheres but instead "to seek the truth with sincerity and to promote and defend, by legitimate means, ▸▸

moral truths concerning society, justice, freedom, [and] respect for human life." To do so, we cannot retreat to isolated enclaves. Our Catholic conception of the human good represents not only a *legitimate* contribution to public life but also a *necessary* one.

We must of course be mindful of the limitations that our constitutional system places on the particular force that religious values may carry within our various roles in the law. As a federal judge, I know these limitations well. But the Congregation for the Doctrine of the Faith reminds us that there remains "a diversity of complementary forms, levels, tasks, and responsibilities" for faithful action in public life. In short, we must each contribute in our own way, according to our own abilities and to our own place in the profession. Within that profession, the Supreme Court answers difficult questions of our Constitution, and in so doing, shapes many of those roles for us. But the Court cannot alter our underlying calling as Catholics to participate meaningfully, deeply, and faithfully in the public sphere. I humbly suggest, therefore, that we take a decision like *Obergefell* as a wake-up call to reignite that mission in each of our lives.

Thank you, and God bless America. ■

Henry E. Smith

Nies Lecture: "Semicommons in Fluid Resources"

Henry E. Smith is the Fessenden Professor and director of the Project on the Foundations of Private Law at Harvard Law School. Professor Smith delivered Marquette Law School's 2015 Helen Wilson Nies Lecture in Intellectual Property: "Semicommons in Fluid Resources." The essay version will appear in the summer 2016 issue of the *Marquette Intellectual Property Law Review*. This excerpt is from the section titled "Managing Water."

Henry E. Smith

Water law has occupied an important and yet ambivalent place in property theory. Water law is sometimes viewed as a challenge to conventional notions of property, especially those based around exclusion. Ironically, it is also used as support for such theories, at least when it comes to the emergence of prior appropriation in the western United States.

Seeing property as the elaboration of separation and modularization in a system of complex interactions allows a different and more realistic account of water law.

Water is a fluid resource. It is a literal fluid, and this is reflected in water law. Water is notoriously hard to delineate. In the formative period of water law, very rough measurement in terms of type and length of use was the best that could be done. Typically, measurement happens upon transfer (if allowed), in order to protect those with the right to return flow.

Let's start with riparianism, which is the system obtaining in most of the United States and in England. Riparianism is based on reasonable use and thus can be analogized to nuisance. It is, therefore, clearly a governance regime. And, if anything, riparianism is moving further in that direction, as it is being subjected to a regulatory overlay.

Yet there is more to riparianism than pure governance. First, riparian rights are not open-ended. They are appurtenant to adjacent land. This gives them an exclusive character even beyond the closed community that has access. By being appurtenant to land, they become part of the modular package of rights in land and thus rest on the foundation of exclusion in land law. Under riparianism, water rights cannot be severed from riparian land, and