Same-sex marriage protected by the US Constitution

Jonathan Redwood reports on *Obergefell v Hodges*, 135 S.Ct. 2584; 576 U.S.____(2015).

Introduction

On 26 June 2015, the United States Supreme Court handed down its landmark ruling in *Obergefell* in which it held in a 5-4 decision that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state.

The decision is one of the most significant and controversial decisions delivered by the Supreme Court.

The petitioners were 14 same-sex couples and two men whose same-sex partners are deceased. They filed suits in the Federal District Court in their home states claiming that respondent state officials violated the Fourteenth Amendment's due process clause by denying them the right to marry or to have marriages lawfully performed in another state given full recognition. Each District Court ruled in the petitioners' favour but the Sixth Circuit reversed those decisions by a 2-1 majority. The Supreme Court granted *certiorari* and presented the following questions for determination:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex;
- Does the Fourteenth Amendment require a state to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state?

The case attracted unprecedented national (and international) attention and a record 148 *amici curiae* briefs. At the time of the decision, 36 states issued marriage licences to same-sex couples.

Majority opinion

Writing for the majority, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, Justice Anthony Kennedy held that the right to marry constituted a liberty under the Constitution that could no longer be denied to same-sex couples. He concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Justice Kennedy relied on a series of previous decisions recognising the right to marry as a fundamental right protected by the Due Process Clause of the Constitution and reasoned that 'the history of marriage is one of continuity and change' which in light of 'new insights' and 'a better informed understanding of how constitutional imperatives define a liberty' now extended to same-sex couples. Marriage constituted a key feature of the social order and it demeaned gays and lesbians to deny them access to that central societal institution. The majority viewed the right to personal choice regarding marriage as inherent in the concept of individual autonomy at the heart of the Constitution's recognition of a fundamental right to marry. That rationale applied equally to same-sex couples so excluding them from marriage conflicted with a central premise of the right to marry.

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This conclusion was buttressed by the constitutional imperatives of the Equal Protection Clause. Justice Kennedy said:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must further be acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all of the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

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It also followed that there was no lawful basis for a state to refuse to recognise a same-sex marriage lawfully performed under the laws of another state.

The dissents

Chief Justice Roberts, Justice Scalia, Justice Thomas and Justice Alito delivered scathing dissents. To them, the majority had usurped and prematurely cut off the democratic process in circumstances where the democratic process had been working to produce change after sustained and respectful debate.

According to Chief Justice Roberts, the silent language of the Constitution did not mandate any one theory of marriage and although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for *requiring* such a change were not. He then said:

> Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens – through the democratic process – to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

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In a blistering dissent Justice Scalia described the majority's opinion as a 'threat to democracy' and a 'Judicial Putsch'. He derided the majority's 'showy profundities' as 'profoundly incoherent' and said the following:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.