Unmarked Opinions Activity

Obergefell v. Hodges (and consolidated cases) (2015)

After reading the **history, background, facts, issues, constitutional provisions, Supreme Court precedents, and arguments,** read Opinion A and Opinion B below. Choose which opinion you agree with and think should be the majority (winning) opinion and circle "Majority." Choose which you disagree with and think should be the dissenting opinion and circle "Dissent." Explain the reasons for your choices. After you have made your decision, compare your answers to those of the Supreme Court by reading the case summary.

Opinion A

However strong the policy arguments made by the petitioners might be, they are not constitutional or legal arguments. There is no basis in the Constitution for striking down the state laws. A long history supports the traditional definition of marriage. The decision about whether to have a state law defining marriage as between a man and a woman should be left to the people through the democratic process, not to Supreme Court justices.

Majority

The 14th Amendment protects "liberty" which is a right to be free from government action, not to government benefits or recognition. For most of human history, marriage has been linked to the ability to procreate. There is also a risk of demeaning those who sincerely oppose same-sex marriage as "bigoted."

Dissent

Opinion B

The Due Process Clause of the 14th Amendment protects Americans' fundamental liberties from government interference. Those fundamental liberties include most of the rights in the Bill of Rights, as well as some rights not described explicitly, including certain personal choices central to individual dignity and autonomy. The Supreme Court has long held that marriage is one of these fundamental rights that are central to individual dignity.

All of those decisions, however, assumed that marriage was a union between a man and a woman. In the present case, we have determined that the features of marriage that make it a fundamental right apply equally to same-sex couples as to opposite-sex couples. For same-sex and opposite-sex couples alike, marriage is an intimate, personal decision, a union that is unlike any other, which safeguards children and families and forms the basis of our society. Those features taken together make marriage a fundamental right and excluding same-sex couples from that right harms them and is inconsistent with the meaning of the right.

Majority

Dissent

People may object to same-sex marriage based on their "decent and honorable religious or philosophical" beliefs but a state may not enact that "personal opposition" into law and thereby demean those who wish to marry. We reaffirm the rights of those people to speak out about their beliefs, however.

Obergefell v. Hodges (and consolidated cases) (2015)

Argued: April 28, 2015

Decided: June 26, 2015

History

In 2013, the Supreme Court ruled that the federal Defense of Marriage Act, which had defined marriage as being only between a man and woman, was unconstitutional. The justices said that the federal government must recognize, for purposes of federal law, same-sex marriages from the states where they were legal. In the wake of that decision, same-sex couples all over the country filed lawsuits in states where same-sex marriage was banned. Many district courts ruled that state laws and constitutional amendments that prohibit same-sex marriage violate the U.S. Constitution—often citing the Supreme Court's 2013 decision. Other judges ruled exactly the opposite. They said that these bans, imposed through democratic processes, were valid.

The U.S. Supreme Court decided to hear four of the cases and consolidated them into a single oral argument. The cases raised two issues for the Court to decide: 1) whether states must themselves license same-sex marriages and 2) whether states must recognize valid same-sex marriages performed in other states. Those issues invoke many legal concepts—chief among them are federalism and the 14th Amendment.

Background

Federalism is the principle that the national government and state governments share powers. Some powers are delegated to the national government, some are reserved for state governments, and some powers are shared. This means that states generally can choose different policies about many issues, such as which activities are crimes, how to license drivers, what to teach in public schools, and more provided they are within the limits of the Constitution and federal statutes.

The 14th Amendment to the U.S. Constitution was adopted in the wake of the Civil War and says that states must give people equal protection under law. This means that state laws must apply equally to all people who are in similar situations, unless the state has a reason for making the distinction. When deciding whether or not a law violates the guarantee of equal protection, courts must examine who is affected by that law. Due to the United States' history of discrimination, the courts are more suspicious of laws that affect people based on their race or gender than laws that discriminate based on certain other classifications, like wealth or age.

The Supreme Court has described three categories for reviewing laws that treat people unequally:

- **Strict scrutiny**

  This standard is used primarily for laws that classify people based on race, national origin, or citizenship status. The Court has placed these classifications together because they are based on characteristics that people cannot change, and because America has a long history of

discriminating against people based on these traits. Laws that treat people differently based on these classifications must:

a. serve a compelling government interest;

b. be "narrowly tailored," meaning that achieving the compelling government interest is the main purpose of the law, and not just a side effect; and

c. be the least restrictive way to serve the government's interest, meaning that it meets the goal in a way that limits peoples' rights the least.

- **Intermediate scrutiny**

  This standard has been used for laws that treat people differently based on their gender. For these laws, the government must show that having the law is closely connected to an important government interest.

- **Rational basis**

  This standard has been used for classifications like age and wealth. Under this standard, all that is required is a rational relationship between the law and a *legitimate* government interest. Most laws are upheld under this standard.

Facts

In all four cases, the petitioners were same-sex couples who either wanted to get married in their state but were prohibited from doing so by a state law or constitutional amendment, or they were same-sex couples who were married lawfully in another state and wanted their home state to recognize that marriage as valid. In one case, the petitioners included a married same-sex couple from New York who adopted a child from Ohio. Since Ohio would not recognize their marriage, the state refused to amend the child's birth certificate to list both parents, as it would for a married opposite-sex couple.

Kentucky, Michigan, Ohio, and Tennessee were the four states defending their bans on same-sex marriage and bans on recognizing same-sex marriages performed in other states. Between 1996 and 2005, those states and many others enacted laws and passed constitutional amendments defining marriage as a union of one man and one woman. Each of the four states had a law passed by its state legislature and a state constitutional amendment approved directly by the voters. The same-sex couples who were not allowed to marry argued that they were prevented from receiving state benefits for married couples (and their children), including access to a spouse or parent's health insurance; the power to make decisions for each other or visit each other in a medical emergency; eligibility for social security benefits, survivor benefits, and tax benefits; and the ability to claim alimony or child support should a marriage end.

The petitioners won in the district courts in their various states. On appeal, however, the U.S. Court of Appeals for the Sixth Circuit reversed and upheld the state laws. The petitioners asked the Supreme Court of the United States to hear the case, and the Court agreed.

Issues

Does the 14th Amendment require a state to license same-sex marriages?

Does the 14th Amendment require a state to recognize a same-sex marriage that was lawfully licensed out-of-state?

Constitutional Provisions and Supreme Court Precedents

- **10th Amendment to the U.S. Constitution**

  "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

- **Equal Protection Clause, 14th Amendment to the U.S. Constitution**

  "No state shall … deny to any person within its jurisdiction the equal protection of the laws."

- **Due Process Clause, 14th Amendment to the U.S. Constitution**

  "nor shall any state deprive any person of life, liberty, or property, without due process of law"

- **Full Faith and Credit Clause, Article IV of the U.S. Constitution**

  "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may…prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

- *Loving v. Virginia* (1967)

  Virginia had a law that made it a crime for any "white person [to] intermarry with a colored person." Violating that law was punishable by one to five years in prison. The Supreme Court decided that the law violated the Equal Protection Clause. The Court said any law that contains racial classifications must be subjected to strict scrutiny. The Court decided that this law was not trying to achieve an important or reasonable objective, as its only purpose was to divide people by race and maintain white supremacy. The Court also said that marriage is a "fundamental right."

- *Baker v. Nelson* (1972)

  A gay couple was denied a marriage license by a Minneapolis town clerk. The Minnesota Supreme Court ruled that the Constitution does not protect a fundamental right to same-sex marriage. The U.S. Supreme Court upheld the decision with a one-line ruling: "dismissed for want of a substantial federal question," meaning that the Court at that time did not think

that there was even a serious argument to be made that the 14th Amendment protects same-sex marriage.

- *Romer v. Evans* (1996)

  In 1992, the citizens of Colorado amended their state constitution to forbid any law or government action that would protect people who are gay and lesbian from discrimination. The Supreme Court decided that this amendment violated the Equal Protection Clause. They said that the law failed even the lowest of standards—the rational basis test—because it did not have a rational relationship to a legitimate state interest. The Court decided that the only interest in passing this amendment was a desire to harm an unpopular group, and that is not a legitimate governmental interest.

- *Windsor v. United States* (2013)

  The Court ruled that the Defense of Marriage Act (DOMA) was unconstitutional because it discriminated against same-sex couples by preventing the federal government from recognizing their marriages, even though some states had expressly chosen to license those marriages. Moreover, the basic intent of DOMA was to express disapproval of state sanctioned same-sex marriage. This was not a legitimate purpose. The Court did not decide which level of scrutiny should be used to evaluate laws that discriminate based on sexual orientation.

Arguments for Obergefell / the Same-Sex Couples (petitioner)

- These families—including their children—are deprived of the status, dignity, and material and legal protections that marriage brings, solely because of their sexual orientation.
- As important as democracy is, people's rights should not be put up to a vote. Rights are inherent and protected, and the majority cannot vote to take them away.
- Bans on same-sex marriage should be subject to heightened scrutiny (either strict or intermediate scrutiny) because sexual orientation is a classification like gender or race. Sexual orientation is an unchangeable characteristic that does not affect an individual's ability to contribute to society. People who are gay and lesbian have historically faced and continue to face severe discrimination—in more than half the states they have no protection from employment or housing discrimination. Under heightened scrutiny, the marriage bans are unconstitutional: the states have no important or compelling interest in preventing same-sex couples from marrying.
- Even if the rational basis standard were applied, the marriage bans are still unconstitutional. The only purpose of these laws and state constitutional amendments is to disadvantage people who are gay and lesbian. As stated in *Romer,* if the sole purpose of a law is to harm an unpopular minority group, it is unconstitutional.

- The sponsors and proponents of these laws and amendments relied on negative and inaccurate representations of people who are gay and lesbian to encourage voters to pass the bans. The bans were not passed for any legitimate government interest; rather, they were passed out of fear and disapproval.
- The states say their marriage laws exist in order to encourage heterosexual couples, who can accidentally have children, to get married. But preventing same-sex couples from getting married does not help the state's interest in encouraging more opposite-sex couples to marry.
- Banning same-sex marriage does not support procreation or the raising of children. Many opposite-sex couples are unwilling or unable to have children, but these states still allow those people to get married. If married parents are better for children, same-sex couples' children should get this benefit.
- Opponents say that marriage has excluded same-sex couples for hundreds of years. But these laws and constitutional amendments are no more than 20 years old. Even more, a long history of discrimination and popular support for discriminatory laws are not sufficient reasons to continue discriminating.

Arguments for Hodges / the States (respondent)

- These cases are not about hate or discrimination. They are about democracy. There are many definitions of marriage in the United States, and reasonable people disagree about which one should prevail. The democratic process exists to sort these very issues out. More than 70 million votes have been cast to decide this issue in the states. While 11 states have expanded their definition of marriage through these processes, 39 others have not.
- A major principle of federalism is that many decisions are left to the states—including the regulation of marriage. One benefit of this system is that it provides "laboratories of democracy," meaning that states can experiment with different policies and other states can learn from those experiments. Allowing states to choose for themselves is, in fact, the only way we would have obtained same-sex marriage anywhere in the country. A decade ago a few states began to allow same-sex marriage, and the system permitted that.
- Once the courts step in and take the democratic process away from the voters, the people forever lose the power to debate and decide the issue for themselves.
- Petitioners say that the intent of the bans is discrimination or hate—but it is impossible to know what millions of people thought when they voted for these measures. Rational voters could have worried about unintended consequences of changing such a historic definition. It does them a disservice to assume they are acting from hate.
- The government's valid interest in regulating marriage is to encourage heterosexual couples to marry. Once the parents are married, any children resulting from accidental pregnancies

will be raised by the married couple. This is a rational interest. Since only heterosexual sex can result in accidental pregnancy, it makes sense for state marriage laws to focus on that group. Providing special recognition to one group of people does not demean others.

- The laws and constitutional amendments banning same-sex marriage were not a sudden or new policy—they merely codified longstanding and widely held social norms about what constituted marriage.
- The Supreme Court has never held that sexual orientation triggers heightened scrutiny and is very reluctant to create new suspect classes. Moreover, Americans who are gay and lesbian should have substantial political power and do not need judicial protection.
- No one alive when the 14th Amendment was ratified would have understood it to prohibit discrimination on the basis of sexual orientation. It would be a radical departure for the Court to rule that it now requires states to license same-sex marriage.