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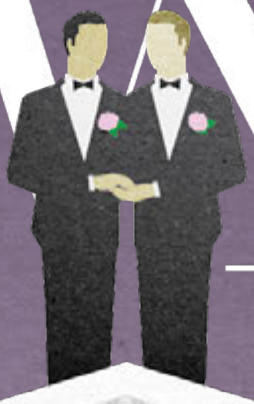

CHEMERINSKY ON *OBERGEFELL V. HODGES*

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A TRIUMPH FOR LIBERTY AND EQUALITY

by ERWIN CHEMERINSKY

In the spring of 2004, in a speech at Southwestern Law School, I said that I believed that in my lifetime gays and lesbians would have the right to marry everywhere in the United States. I uttered this in the wake of the decision of the Massachusetts Supreme Judicial Court that interpreted the Massachusetts state constitution to create a right of marriage equality for gays and lesbians. A mere dozen years later my prophecy has come true, and gays and lesbians have the right to marry everywhere in the United States.

This, of course, is the result of the Court's decision on June 26, 2015, in *Obergefell v. Hodges*,[1] where the Court declared unconstitutional state laws in Kentucky, Michigan, Ohio, and Tennessee that prohibited same-sex marriage. Justice Kennedy wrote the opinion for the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

Although controversial, the Court's decision is in accord with public opinion, as polls show that a substantial majority of Americans favor allowing marriage equality for gays and lesbians. It also is in accord with the practice of over twenty countries in the world, including most recently Ireland, where voters in May overwhelmingly passed an initiative to allow same-sex couples to marry.

The Path to *Obergefell v. Hodges*

Few were really surprised by the outcome in this case. The decision is the culmination of almost twenty years of decisions by the Supreme Court expanding rights for gays, lesbians, and bisexuals, with all of the majority opinions authored by Anthony Kennedy.

In 1996, in *Romer v. Evans*,[2] the Court declared unconstitutional a Colorado initiative that repealed all laws in the state protecting gays and lesbians from discrimination, and that prevented the enactment of any new such laws. Justice Anthony Kennedy, writing the opinion for the Court in a 6-3 decision, explained that the Colorado initiative was based on animus against gays and lesbians and that such animus is never a legitimate government purpose to justify discrimination.

In 2003, in *Lawrence v. Texas*,[3] the Court declared unconstitutional a Texas law that made it a crime to engage in homosexual activity. Again, Justice Kennedy wrote for the Court and concluded that, if privacy means anything, it is what consenting adults do in their own bedrooms. The Court expressly rejected the argument that a state could base a law on its making a moral judgment to condemn homosexual activity.

A decade later, in *United States v. Windsor*,[4] the Court struck down a key provision of the federal Defense of Marriage Act, which stated for purposes of federal law and federal benefits, marriage had to be between a man and a woman. The Court explained that DOMA is unconstitutional because it was based on an impermissible desire to disadvantage gays and lesbians. Justice Kennedy quoted the House Report on DOMA, which said the Act was based on "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[5] The Court stressed that no legitimate government purpose was served by the federal government's refusing to recognize the legitimacy of same-sex marriages.

After *Windsor*, courts across the country declared unconstitutional state and local laws prohibiting same-sex marriage. The United States Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits came to this conclusion. The Supreme Court, on October 6, denied review in several of these cases. But soon after, the United States Court of Appeals for the Sixth Circuit came to the opposite conclusion, upholding the laws in Kentucky, Michigan, Ohio, and Tennessee that prohibited same-sex marriage. There was then a split among the circuits, and the Supreme Court, as expected, granted review.

The Court explained that there is no difference between same-sex and opposite-sex couples when it comes to the importance of marriage for couples, for their children, and for society.

The Decision

The cases were argued on Tuesday, April 28, and decided on Friday, June 26. The Court held that the Fourteenth Amendment requires each state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Justice Kennedy explained that the Court long has protected the right to marry as a fundamental right. It is safeguarded under both the due process and equal protection clauses. The Court noted that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." The Court examined the precedents concerning the right to marry and concluded that "[t]his analysis compels the conclusion that same-sex couples may exercise the right to marry."

The Court explained that there is no difference between same-sex and opposite-sex couples when it comes to the importance of marriage for couples, for their children, and for society. The Court thus declared: "These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry."

Each of the four dissenting justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—wrote dissenting opinions. Each of the dissenting justices accused the majority of undue judicial activism. Each of the dissenting justices argued that the issue of marriage equality should be left to the political process to resolve. Each emphasized the long tradition of marriage being only for opposite-sex couples. Each claimed that the Court was imposing its own values on society. Chief Justice Roberts concluded his dissent by declaring: "If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."

Appraising the Decision

Chief Justice Roberts was wrong in saying that the Constitution had nothing to do with the decision. First, laws that prohibit same-sex marriage unquestionably treat gays and lesbians unequally and keep them from marrying. That does not resolve whether the laws are constitutional, but it does mean that undeniably there is a constitutional issue that

the courts needed to resolve as to whether the state laws denied equal protection or violated due process. The dissenting justices, and some of the critical commentators, have said that the Court's decision was purely politics and not based on law. But all must agree that there were legal issues presented: do laws that allow opposite-sex couples, but not same sex-couples, to marry deny the latter equal protection? Do such laws violate the right to marry, which the Court has said in prior cases constitutes a fundamental right?

The dissents, especially Chief Justice Roberts's, oppose protecting fundamental rights that are not in the text of the Constitution. But that would be a radical change in constitutional law. The Supreme Court long has protected rights that are not mentioned in the text of the Constitution, including liberties such as freedom of association, the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual adult homosexual activity, and the right to refuse medical treatment. Justice Kennedy described, at length, the many Supreme Court cases that have established aspects of the right to marry as a fundamental right.

Thus second, the question the Court had to resolve—like in all cases where people claim to be denied equal protection or assert a violation of a right—is whether the government had an adequate justification for its actions. The majority was correct in striking down the state laws prohibiting same-sex marriage because no legitimate government interest is served—let alone a compelling one, which is needed for infringement of a fundamental right—by denying gays and lesbians the right to marry.

The primary argument made by the dissents is the long tradition of marriage being limited to opposite-sex couples. But a tradition of discrimination is never a sufficient reason to continue to discriminate. When the Court declared unconstitutional state laws prohibiting interracial marriage in *Loving v. Virginia*,[6] it rightly gave no weight to the existence of such statutes throughout American history. There is required to be some other reason to discriminate against gays and lesbians besides that they long have been discriminated against, especially when it concerns a right that the Court has recognized as fundamental.

Justice Scalia's dissent focused on the ability of a state to express its moral condemnation and disapproval of homosexuality. But that argument was rejected in *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*. The Court has made clear that such animus against gays and lesbians is not sufficient to justify discrimination against them.

The central argument made by opponents of same-sex marriage, in the briefs and at oral argument, is that marriage primarily exists for procreation. But this argument is both false and irrelevant. It is false because never has any state limited marriage to those who can or will procreate.

The argument is irrelevant because same-sex couples will procreate whether or not they can marry, by artificial insemination, surrogacy, and adoption. It is estimated that 200,000 children in the United States are being raised by same-sex parents. Marriage always has been thought to be good for family stability and for children. As Justice Kennedy noted in his majority opinion, children of same-sex couples should have these benefits as much as children of opposite-sex couples.

I have debated the issue of marriage equality countless times and I still don't understand what government interest is served by keeping gays and lesbians from being able to express love and commitment through marriage and obtain all of the legal benefits that the government accords only to married couples. In the absence of a legitimate—let alone a compelling purpose as is necessary for infringements of a fundamental right—constitutional law commands that the Court strike the laws down as unconstitutional.

It was not surprising that the four dissenting opinions all accuse the majority of undue judicial activism and usurping the democratic process. This is always the dissent's charge when the majority strikes down a law.

Of course, none of the four dissenters seemed concerned with deference to the political process or avoiding judicial activism when two years ago they all were part of the majority in striking down key provisions of the Voting Rights Act that had been passed almost unanimously by Congress and signed into law by President George W. Bush. In that case, *Shelby County, Alabama v. Holder*,[7] it was not even possible to tell what constitutional provision the majority thought was violated by the Voting Rights Act. Likewise, the four dissenters were not the least bit concerned with deferring to the political process when they declared unconstitutional key provisions of the Bipartisan Campaign Finance Reform Act in *Citizens United*.[8]

The rights of minorities, especially fundamental rights, are not left to the political process for protection. The Supreme Court performed exactly its proper role in the constitutional system when it struck down the laws prohibiting same-sex marriage.

Obergefell v. Hodges, of course, does not end the fight for equality for gays and lesbians. For example, there is still no federal law prohibiting employment discrimination based on sexual orientation. Most states still do not have laws protecting gays and lesbians from discrimination. But *Obergefell* is a huge step forward in according gays and lesbians equal dignity under the law.

June 26, 2015 thus will be remembered, like dates such as May 17, 1954 when the Court decided *Brown v. Board of Education*, as the Court's taking an historic step forward in advancing liberty and equality. And I have no doubt that history will regard *Obergefell*, like *Brown*, as a decision that was clearly right and that was an important advance to creating a more equal society.

ENDNOTES

(1) *Obergefell v. Hodges*, 576 U.S. __ (June 26, 2015) (Docket Nos. 14-556, 14-562, 14-571, 14-574).

(2) *Romer v. Evans*, 517 U.S. 620 (1996).

(3) *Lawrence v. Texas*, 539 U.S. 558 (2003).

(4) *United States v. Windsor*, 570 U.S. __ (2013) (Docket No. 12-307).

(5) *See Defense of Marriage Act, Report*, United States House of Representatives (July 9, 1996), http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf.

(6) *Loving v. Virginia*, 388 U.S. 1 (1967).

(7) *Shelby County v. Holder*, 570 U.S. __ (2013) (Docket No. 12-96).

(8) *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Erwin Chemerinsky *is Dean and Distinguished Professor of Law and Raymond Pryke Professor of First Amendment Law at University of California, Irvine School of Law.*

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