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Obergefell v. Hodges: Legal Bases, Clashing Views, Open Questions

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In 2003, the Supreme Judicial Court of Massachusetts became the first state high court to hold that denial of a marriage license to a same-sex couple violates the equal protection guarantee of the state constitution in its opinion in *Goodridge v. Department of Public Health*. [1] In the following 12 years, what was revolutionary, unprecedented, to some perverse, has become the law of the land. In its opinion in *Obergefell v. Hodges* [2] the United States Supreme Court has made a state's refusal to issue marriage licenses to same-sex couples a violation of the Constitution:

> [1] 798 N.E.2d 941 (Mass. 2003).
>
> [2] No. 14-556, 2015 BL 204916 (U.S. June 26, 2015).

The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that 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. [3]

> [3] 2015 BL 204916, at *21 (slip op. at 28).

The route to that holding set forth in Justice Kennedy's opinion is not couched in terms usually found in opinions applying the equal protection and due process guarantees — and that reason is subject to harsh criticism and even ridicule in the dissenting opinions, especially by Justice Scalia. In Justice Kennedy's opinion for the majority, the right of same-sex couples to marry "is part of the liberty promised by the Fourteenth Amendment" and is connected "in a profound way" to the equal protection clause. [4] Nevertheless, it is difficult to dismiss Chief Justice Robert's criticism of the majority's reasoning as partaking of the most dangerous aspects of the idea of substantive due process, although the Chief Justice is equally critical of what he seems as the majority's usurpation of the role of the legislature. [5]

> [4] *Id.* at *15 (slip op. at 19).
>
> [5] *Id.* at *23-40 (Roberts, C.J., dissenting).

This profound disagreement over the basis for a holding that the denial of marriage to same-sex couples contrasts with the five opinions from four of the Circuit Courts of Appeal that overturned statutes and constitutional provisions prohibiting same-sex marriage. [6] For example, the opinion in *Baskin v. Bogan*, written by Judge Posner, is an equal protection analysis which finds homosexuals to be a protected class and finds not even a rational basis

for denying same-sex couples the right to marry. A fair example of the tenor of the opinion's equal protection analysis is Judge Posner's dismissal of one of the arguments made by the lawyer for the state of Indiana:

[6] *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

At oral argument the state's lawyer was asked whether "Indiana's law is about successfully raising children," and since "you agree same-sex couples can successfully raise children, why shouldn't the ban be lifted as to them?" The lawyer answered that "the assumption is that with opposite-sex couples there is very little thought given during the sexual act, sometimes, to whether babies may be a consequence." In other words, Indiana's government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure. [7]

[7] *Baskin v. Bogan*, 766 F.3d at 662 (7th Cir. 2014).

One profound result of the difference between the bases of these circuit court opinions and the opinion in *Obergefell* is just this equal protection analysis. The circuit court opinions take varying positions on the status of homosexual persons as constituting a "protected class" and therefore on the "level of scrutiny" to which laws applying to them must be subjected in order to determine if those laws violate the equal protection guarantee, but they all find equal protection implications in such laws. The *Obergefell* opinion is quite different — its significance for further litigation on equal protection grounds and for enacting legislation designed to protect the civil rights of LGBT Americans is not certain.

The dissents by the Chief Justice and Justices Scalia, Thomas and Alito sound a variety of themes, the most common being criticism of judicial activism in usurping legislative functions, defining marriage as a union between one man and one woman, and criticizing the majority's reliance on substantive due process. [8] While it is certain that the *Obergefell* decision will not end the controversy over same-sex marriage, those opposed to the majority's conclusions will no doubt use the reasoning in the dissents to bolster their opposition.

[8] It must be noted that while Justices Scalia and Thomas joined in the Chief Justice's dissent, the Chief Justice did not join in any of the other three dissents. Justices Scalia and Thomas joined in each other's dissents and both joined in Justice Alito's.

Whatever the strength and appeal of the dissents, the majority decision is the law of the land and while delays and even attempts at evasion may be expected, same-sex couples will much sooner rather than later be able to marry and have their marriages recognized throughout the United States. There are many questions left unanswered by the opinion, and the most pressing is the question of when those states that have not recognized same-sex marriages must begin to treat as married those validly married same-sex couples living within their borders. [9] For example, two residents of Texas travel to a state where they may marry and then return home where they have lived ever since. Texas must now recognize their marriage, but for state law purposes, was the couple married from the date of their valid out-of-state marriage or from the date of the *Obergefell* opinion, June 26, 2015? This is not a question of only theoretical importance. One very practical reason for answering the question: when did the couple begin to accumulate community property? If the answer is from the date of the marriage, was the sale by one of the spouses of property that has been community property all along defective? Is the conveyance by one spouse of real property to which he or she held sole title but which was bought with what would now be considered community funds defective because the other spouse did not agree to the conveyance?

[9] In fact, this is an issue for every state except Massachusetts, the first state to allow same-sex couples to marry.

There are analogous problems in common law title states. When did the accumulation of marital property begin for purposes of equitable distribution on divorce? In some states, the computation of the value of the property subject to a surviving spouse's elective share rights depends on whether transactions with respect to property occurred before or after the marriage. If a validly married same-sex couple took title to property as "spouses" in a state that at the time of the conveyance did not recognize their marriage, does the couple hold the property as tenants by the entirety from the date of the conveyance, from the later date of recognition of the marriage or not at all?

The majority opinion does not clearly answer the retroactivity question. As a jurisprudential matter, the opinion overrules *Baker v. Nelson*, [10] in which the court dismissed for lack of a federal question an appeal of a decision of the Supreme Court of Minnesota holding that a same-sex couple did not have a constitutional right to marry. It may be enough to decide that recognition in those states that did not recognize same-sex marriage before *Obergefell* began on June 26.

[10] 409 U.S. 810 (1972).

The federal government's response to *United States v. Windsor*, [11] in which the court invalidated the statute limiting federal recognition of marriage to those contracted between one man and one woman, is instructive. The Social Security Administration recognizes the existence of a same-sex marriage from the date when it was validly entered into and specifically states that the date of the *Windsor* decision is irrelevant. [12] The Department of the Treasury also decided that for income and transfer tax purposes validly married same-sex couples are married from the date of the marriage, but the retroactive effect of that recognition is limited by the established time limits on amending already filed returns, generally three years (absent a protective election). [13] Qualified plans, however, must reflect "the outcome of *Windsor* as of June 26, 2013." [14] The practical difficulties of requiring recognition from the date of the marriage in the context of qualified plans can be daunting. Consider an employee who travelled with his or her same-sex partner to Massachusetts as soon as the Commonwealth allowed out-of-state residents to contract same-sex marriages and did indeed marry. The couple returned to the state of their domicile, which did not recognize their marriage before the *Obergefell* decision, well before the decision in *Windsor*. The employee retired shortly after the marriage, but did not take the retirement benefit under the plan as a qualified joint and survivor annuity because as far as the state of residence and the federal government were concerned, the employee was not married. Retroactively turning that benefit into a Qualified Joint and Survivor Annuity (QJSA) would probably require a retroactive adjustment in benefits paid that might be all but impossible to accomplish, at least without hardship to the employee.

[11] 570 U.S. 12 (2013).

[12] SSA POMS GN 00210.400 ("Do not consider the date of the *Windsor* decision in determining the duration of marriage. Rather, rely on the date the couple was married."), available at http://policy.ssa.gov/poms.nsf/lnx/0200210400.

[13] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[14] IRS Notice 2014-19, 2014-47 I.R.B. 979.

If these federal examples mean anything, they illustrate an approach of giving same-sex married couples the rights, responsibilities and entitlements of marriage in the most beneficial way possible tempered by a respect for the practicalities of administration. It is possible that the states will take the same approach to the sorts of questions described above. Eventually, and especially because title to property is involved, statutory solutions will have to be crafted, but given the hostility of some state legislatures to same-sex marriage, those solutions may be a long time coming.

From the moment it was announced, the decision in *Obergefell* took its place as one of the most significant cases ever decided by the United States Supreme Court. Like so many decisions of great significance, its effect on the law of the nation will take many years to fully work out.

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