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U.S. Supreme Court: Same-Sex Marriage Is a Right

26 Jun 2015

Photo Credit: US Rep. Mark Pocan Twitter[/caption]

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Coincidentally timed on the anniversary of the decisions in *Lawrence v. Texas* and *U.S. v. Windsor*, two prior gay-rights cases, Justice Kennedy announced the majority opinion in *Obergefell v. Hodges*, in which the five-person majority held that the Fourteenth Amendment requires all states to license marriages between same-sex couples, and to recognize same-sex marriages of other states. The majority opinion found that "the nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

The Court then analyzed the principles the Court had used to define the right to marry, and found that they applied "with equal force to same-sex couples." While recognizing the ongoing democratic debate regarding same-sex marriage, the majority determined that enforcement of the fundamental right of marriage was needed now to prevent harm to same-sex couples.

Chief Justice Roberts, joined by Justices Scalia and Thomas, filed a dissent, arguing that while "many people will rejoice at this decision, and I begrudge none of their celebration," the majority's holding "is an act of will, not legal judgment," that "will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept." In his view, the "Constitution does not enact any one theory of marriage," and the states should have been left to decide the issue. Justice Scalia, joined by Justice Thomas, penned a separate dissent arguing that the majority's pronouncement was a "threat to American democracy," as it permitted "a majority of the nine lawyers on the Supreme Court," in a "naked judicial claim to legislative—indeed, *super*-legislative—power," to shut down the public debate over same-sex marriage that was "American democracy at its best." Justice Thomas, joined by Justice Scalia, expressed his concern that the Due Process Clause be used as "a font of substantive rights" as the Court's whims saw fit, and arguing that there was no cognizable liberty interest in forcing the states to recognize same-sex marriage. Justice Alito, joined by Justices Scalia and Thomas, filed the final dissent, arguing that since the Due Process Clause only protects fundamental rights deeply rooted in the nation's history, the majority's holding is based on present-day belief, not evidence, worrying that "if a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate." A link to the opinion is here.

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It should be noted here that the District of Columbia and Maryland have already enacted statutes providing for same-sex marriage. Prior to that, Roy Kaufmann, of our firm, wrote the legislation enacted by the District of Columbia that provided tenancy by the entirety status to domestic partners who co-owned real property in the District of Columbia - one of the first such statutes in the country.

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TAGGED: Supreme Court, gay marriage, marriage equality