



Obergefell v. Hodges U.S. Supreme Court Opinion and Dissents Summary

The Supreme Court (Justice Kennedy writing for himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan) held that the right to marry is a fundamental right that is inherent in the liberty of the person. According to the Court, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of that right and liberty. The Court thus declared that state marriage laws are invalid to the extent that they prevent same-sex couples from accessing marriage on the same terms and conditions as opposite-sex couples. In finding a new fundamental right to marriage between any two people, the Court rejected the reasoning of *Glucksberg* and the proposition that rights are to be carefully defined by reference to history. According to the Court, “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”

The Court admits that “[a]fter years of litigation, legislation, referenda, and . . . discussions . . . , the States are now divided on the issue of same-sex marriage.” Despite this fact, and despite the Court’s observation that the Constitution contemplates democracy as the appropriate process for social change, the Court nonetheless proceeded to redefine marriage for the entire country.

Each of the four remaining Justices (Justices Roberts, Thomas, Scalia, and Alito) wrote a separate dissent. The principle dissent by Chief Justice Roberts is joined by Justices Scalia and Thomas. The Chief scolds the majority in strong terms for usurping legislative authority and exercising not judgment but will: “[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise ‘neither force nor will but merely judgment.’ The Federalist No. 78, p. 465.”

Chief Justice Roberts also points out that the Court’s decision will cause social division: “Five lawyers have closed the debate and enacted their own vision of marriages 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.”

Justice Scalia’s separate dissent is biting, calling out the Court for departing from sound legal reasoning and damaging American jurisprudence: “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.”