

The Same-Sex Marriage Cases: *Obergefell v. Hodges* (and consolidated cases)

Argued: April 28, 2015

Decided: June 26, 2015

History

In 2013, the Supreme Court ruled that the federal *Defense of Marriage Act* 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. Many of the cases were appealed to intermediate appeals courts and then to the Supreme Court. In the end, the Supreme Court decided to hear four of the cases, and consolidated them into a single oral argument.

These cases raise two issues for the Court to decide: whether states must themselves license same-sex marriages, and whether states must recognize valid same-sex marriages performed in other states. These issues invoke many legal concepts—chief among them are federalism and the Fourteenth Amendment.

Background

Federalism is the principle that our national government and state governments share powers. Some powers are delegated to the national government, and some are reserved for state governments. Some powers are shared. This means that states can choose different policies about many issues—which activities are crimes, how to license drivers, what to teach in public schools, and more.

The Fourteenth Amendment was adopted in the wake of the Civil War and says that states must give people equal protection of the laws. 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 our 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:
 1. serve a *compelling* government interest;
 2. be “narrowly tailored,” meaning that achieving the compelling government interest is the main purpose of the law, and not just a side effect; and
 3. 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 is 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 is used for classifications like age and wealth. Under this standard, there must only be 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 are same-sex couples who either want to get married in their state but are prohibited from doing so by a state law or constitutional amendment, or are same-sex couples who were married lawfully in another state and now want their home state to recognize that marriage as valid. In one case, the petitioners include a married same-sex couple from New York who adopted a child from Ohio. Since Ohio will not recognize their marriage, the state will not amend the child's birth certificate to list both parents, as they would for an opposite-sex married couple. The four states defending their bans on same-sex marriage, and bans on recognizing such marriages performed in other states, are Michigan, Ohio, Kentucky, and Tennessee. In all four cases, the respondents are state government officials.

Between 1996 and 2005, these four states and many others enacted laws and constitutional amendments defining marriage as a union of one man and one woman. Each of the four states has a law, passed by their state legislature, and a state constitutional amendment, approved directly by the voters. The same-sex couples who are not allowed to marry say they are 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, tax benefits, and the ability to claim alimony or child support should a marriage break up. In these states, the government will not allow two unmarried people to adopt a child together. In cases where a same-sex couple (whether married outside the state or not) adopts a child, only one person may be that child's legal parent.

The petitioners won in the district courts in their various states, and the Sixth Circuit Court of Appeals consolidated these four cases on appeal. The Sixth Circuit ruled in favor of the states.

Issues

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

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

Constitutional Clauses and Precedents

Tenth Amendment: “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.”

Fourteenth Amendment, Equal Protection Clause: “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Article IV (“Full Faith and Credit Clause”): 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.” These crimes were punishable by one to five years in prison. The Supreme Court decided this 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. In this decision, 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.”

***Romer v. Evans* (1996)**

In 1992, the citizens of Colorado amended their state constitution to forbid any law or government action that would protect homosexual people 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 (homosexual persons), and that is not a legitimate governmental interest.

***Windsor v. United States* (2013)**

The Court ruled that the *Defense of Marriage Act* 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 the Same-Sex Couples

- 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.
- Opponents say that the decision about same-sex marriage should be left to the democratic process. As important as democracy is, we do not put people’s rights 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. Gay men and lesbian women have historically faced and continue to face severe discrimination—in more than half the states they have no protection from employment or housing discrimination. When applying 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 gay and lesbian people. 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 gay and lesbian residents to encourage voters to pass the bans. The bans were not passed for any legitimate government interest, but 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 the States

- These cases are not about hate or discrimination. They are about democracy. There are many definitions of marriage in our country, 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. Eleven states have expanded their definition of marriage through these processes, while the 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 our system permitted that.
- Once the courts step in and take the democratic process away from the voters, the people forever lose the power to publicly 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 married, any children resulting from accidental pregnancies will be raised by the married couple. This is a rational interest. Since only heterosexuals can become accidentally pregnant, it makes sense for state marriage laws to focus on them. 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, gay and lesbian Americans have substantial political power and do not need judicial protection.
- No one alive when the Fourteenth 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.

Additional Arguments specific to the Recognition Issue

For the Same-Sex Couples

- A law refusing to recognize another state's valid marriage infringes on the law-making authority of the other state.
- The principles of federalism—including the Full Faith and Credit Clause of the Constitution—require states to recognize marriages performed lawfully in other states.
- For example, Ohio recognizes out-of-state marriages of first cousins and minors, even though the state will not license those marriages itself. It even recognizes these marriages when the participants are Ohio residents who traveled elsewhere specifically to avoid the state law.

For the States

- Forcing a state that does not license same-sex marriage to recognize such marriages performed elsewhere basically obliterates the state's own definition of marriage. Couples could simply travel to another state to get around the law.
- A state should not have to sacrifice its sovereignty over these issues to the decisions of another state.
- The Full Faith and Credit Clause has never meant that states had to apply other states' laws in violation of their own legitimate public policy interests.

Decision

The Supreme Court ruled for the same-sex couples in a 5-4 decision. Justice Kennedy wrote the majority opinion, and was joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan. Chief Justice Roberts and Justices Scalia, Thomas, and Alito each wrote dissenting opinions.

Majority

The Court's decision pointed out that the Due Process Clause of the Fourteenth Amendment protects Americans' fundamental liberties from government interference. These 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 majority went on to note that the Supreme Court has long held that marriage is one of these fundamental rights that is central to individual dignity. All of these Court decisions, however, assumed that marriage was a union between a man and a woman. In the present case, the Supreme Court determined that the features of marriage which make it a fundamental right apply equally to same-sex couples as to heterosexual couples. For same-sex and opposite-sex couples alike, the justices said, 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. These 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.

The decision also said that the bans on same-sex marriage violate the central aspects of the Equal Protection Clause because the states' marriage laws were in essence unequal and served to disrespect and subordinate gay and lesbian people.

The majority recognized that people may object to same-sex marriage based on their religious beliefs, but said those objections cannot overcome the rights protected by the Constitution. The justices did reaffirm the rights of those people to speak out about their beliefs, however.

Finally, the decision addressed the states' arguments that the definition of marriage should be left up to the democratic, political process. While affirming the importance of democracy to bring about change, the Court said that fundamental rights should not be subjected to a popular vote.

Dissents

Justice Roberts wrote the principal dissent and was joined by Justices Thomas and Scalia. He said that, while the policy argument given by the petitioners and Justice Kennedy were strong, they were not constitutional or legal arguments. He said there was no basis in the Constitution for this ruling, that a long history supported the traditional definition of marriage, and that the majority had substituted their policy preferences for an analysis of the law. He said this decision should have been left to the people through the democratic process, not to five judges.

Justice Scalia's dissent argued that the Court exceeded its authority and removed an issue properly belonging to the democratic process from public debate. Justice Thomas dissented because he disagreed with the majority's application of the Fourteenth Amendment. He said that the "liberty" protected there is a right to be free from government action, not to government benefits or recognition. In his dissent, Justice Alito expressed deep concerns over the effect widespread acceptance of same-sex marriage may have on society and the how the creation of this right may infringe upon the rights of others.