Obergefell v. Hodges **Analysis**

In *Obergefell v. Hodges*, in a 5-4 majority opinion, the United States Supreme Court held that a State may not prohibit same-sex couples the right to marry, and that States must recognize lawful same-sex marriages in other States. The analysis of the decision is best understood within the broad parameters of constitutional law.

As a general rule, constitutional law analysis differs depending upon the nature of the right being asserted. Certain rights are enumerated in the Constitution (i.e. freedom of speech, freedom of religion, etc.). Other rights are not enumerated in the Constitution but are arguably implied within its language. Most rights rising by implication derive from the word "liberty" which is found in both the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment. Under the Due Process Clauses, both the federal government and the state governments are prohibited from enacting laws that "deprive any person of life, *liberty,* or property without due process of law." In *Obergefell*, no one argued that an enumerated right existed. Instead, the argument was that the "liberty" afforded under the Due Process Clause of the Fourteenth Amendment includes the implied right of same-sex couples to marry, and that the States' actions were depriving them of this liberty interest without due process of law.

Obviously, the first issue of analysis is whether the Constitution affords same-sex couples a liberty interest to marry. The majority opinion concluded that the right to marry is a fundamental right inherent in the liberty of a person protected by the Constitution. This within itself is not new law. The Court has long afforded the right to marry constitutional protection. However, the majority opinion went further to find that the liberties implied within the Fourteenth Amendment Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." Using this logic, the majority opinion concluded that the liberty interest to marry extends to same-sex couples.

The next issue for analysis is whether these same-sex couples were deprived of that interest without due process of law. The processes by which these couples were deprived of any interest were the democratic processes of legislation and constitutional amendments. The majority opinion agreed that the Constitution contemplates that democracy is the appropriate process for change. However, democratic processes may not abridge fundamental rights. Because these democratic processes abridged fundamental rights, they were unconstitutional.

Four Justices dissented, producing four dissenting opinions. The dissent disagreed with the majority that same-sex couples enjoy a fundamental right to marry. All dissenters agreed that the Constitution itself does not say anything about marriage. This means that marriage is not an enumerated right. In fact, Justice Alito specifically said, "The Constitution says nothing about a right to same-sex marriage." Because the right for same-sex couples to marry is not an enumerated right, the only way for it to be afforded constitutional protection is for it to be implied. The dissenters noted that normally the Court will only imply fundamental rights when they are "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." The dissent concluded that same-sex marriage does not meet this standard.

The dissent also disagreed that due process was deprived. All dissenters agreed that because the Constitution does not specifically speak of marriage, the area of marriage and domestic relations was entrusted to the States. Here, the States, by democratic processes, exercised their authority to define marriage as between one man and one woman. The dissenters admit that the Court has previously acknowledged marriage as a fundamental right. However, they took the position that the fundamental right to marry does not include a right to make a State change its definition of marriage, and that the previous cases dealing with the fundamental right to marry did not provide that "anyone who wants to get married has a constitutional right to do so." The dissent was concerned that the majority opinion was "an act of will, not of legal judgment." "Under the Constitution, judges have the power to say what

the law is, not what it should be." The dissenters opined that the majority opinion was the substitution of the social beliefs of five unelected members of the judiciary for the judgment of elected legislative bodies.

Both the majority opinion and the dissenting opinions contain some language of interest concerning those who disagree with the legal conclusion based upon religious beliefs. While this language is contained within the opinions, it is what is called in the law "dicta" because it has no real legal effect. The majority opinion makes this statement: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." The majority opinion then further states: "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure that they have long revered." Chief Justice Roberts, in his dissent, said, "Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." He said so because the Solicitor General of the United States admitted in its brief that the tax exemption of some religious institutions would be in question if they oppose same-sex marriage. He also noted that while the majority opinion uses the words "advocate" and "teach" as it relates to religion, the Constitution uses the word "exercise." Justice Thomas was more pointed in his dissent. He said the majority opinion threatened the religious liberty our nation has sought to protect. He pointed out that marriage is both a governmental institution and a religious institution. He notes, "Today's decision may change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex marriages."