



Obergefell Decision Opens The Door For Anti-Discrimination Litigation

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On June 26, 2015, on the second anniversary of *United States v. Windsor*, the United States Supreme Court, in a 5-4 decision, held that under the Fourteenth Amendment no state could deny same-sex couples the right to marry or fail to recognize same-sex marriages granted in other states.

In the original *Obergefell* suit, James Obergefell decided to marry his longtime partner John Arthur who was dying of ALS. At the time, Obergefell was a resident of Ohio. Ohio did not recognize same-sex marriage. To obtain a marriage license, Obergefell and Arthur flew to Maryland where they were married on an airport tarmac before returning to Ohio. When Arthur died and Ohio would not list him on the death certificate, Obergefell sued, alleging that Ohio's failure to recognize his marriage in another state violated his Fourteenth Amendment Due Process and Equal Protection rights.

By the time the case reached the Supreme Court, it had been consolidated with several other similar cases where same-sex couples sued their respective state agencies alleging that state denial of same-sex marriage and/or refusal to acknowledge a same-sex marriage obtained in another state violated the Fourteenth Amendment. In all the cases, the district court found in favor of the plaintiffs and the United States Court of Appeals for the Sixth Circuit reversed.

Looking to judicial precedent, the Supreme Court reversed and found that the right to marry was fundamental liberty inherent to the concept of individual autonomy. As such, the Court asserted that marriage protects not only the most intimate association between two people but also safeguards children and families and represents a historical keystone of social order. As a fundamental liberty interest, the right to marry is protected by due process. This means that states cannot infringe on the right without substantial justification. To determine if substantial justification existed in this case, the Court compared same-sex couples to heterosexual couples. The majority found no such justification. As such, the denial of the right to marry for same-sex couples violated due process. Furthermore, the Court found that refusal to recognize same-sex marriages across states violated the Equal Protection Clause because the laws of certain states were treating similarly situated people differently. For example, Ohio recognized heterosexual marriages entered into outside of the state, but would not recognize same-sex marriages entered into outside the state. Finally, the Court also considered the First Amendment right to freedom of religion and found that, while the First Amendment guarantees the right to religious freedom, it does not allow states to deny same-sex couples the right to marry on the same terms as those for heterosexual couples.

While five justices signed onto the majority opinion, four dissented. Justice Roberts, in his dissent, argued that the majority's interpretation of the Constitution was rendered outside of the Court's judicial power. While recognizing the personal and emotional aspects of the issue, Justice Roberts nonetheless argued that the Constitution simply does not address the issue, making the ruling beyond the power of the Court. For this reason, Roberts asserted, the individual state legislatures, not the Court, should have decided the issue. Justice Samuel Alito, joined by Scalia and Thomas, in his dissent, supported this view by stating:

"Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage ... It will be used to vilify Americans who are unwilling to assent to the new orthodoxy ... 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".

As many rejoiced in front of the Court and the White House after the decision was rendered, others criticized the Court's decision. This national divide is likely to result in a series of legal challenges revolving around anti-discrimination and religious freedom. For example, regardless of the victory for same-sex couples at the Supreme Court regarding the right to marry, many employment anti-discrimination statutes, as courts currently interpret them, do not adequately protect employees that are married to someone of the same sex.

Moreover, one issue that will likely be significantly litigated is same-sex adoption. Today, same-sex couples often struggle to secure adoption rights. This was particularly true in states where same-sex marriage was not recognized. For example, Mississippi, Nebraska, and Michigan all have laws which, respectively, (a) expressly forbid adoption by same-sex couples, (b) restrict same-sex couples from becoming foster parents, and (c) enable adoption agencies to refuse to place children with same-sex couples if they have religious objections for doing so. The *Obergefell* decision essentially confirms that same-sex married couples should be able to adopt children regardless of the state in which they are domiciled. As such, the decision is likely to result in challenges to state adoption laws.

Finally, while *Obergefell* is a landmark decision for civil rights, its implications significantly alter the current landscape surrounding marriage and religious freedom in the United States. As Justice Thomas wrote in his opinion: "In our society, marriage is not simply a governmental institution; it is a religious institution as well. 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 couples."

We will continue to monitor the effects of *Obergefell* and provide updates as the case develops.

If you have any questions concerning discrimination on the basis of sexual orientation, or questions regarding related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

Thank you to Cecilia Ehresman, a law clerk at Cullen and Dykman, for her assistance with this blog post.