Same-Sex Marriage and the Law
Michael C. Dorf

Obergefell v. Hodges

• Not whether but how
• Possibilities included:
  • Conventional Equal Protection
  • Fundamental Right to Marriage
  • Animus Theory
  • Sex Discrimination

From the Oral Argument

CHIEF JUSTICE ROBERTS: Counsel . . . I’m not sure it’s necessary to get into sexual orientation to resolve the case. I mean if Sue loves Joe and Tom loves Joe, Sue can marry him but Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?

Meanwhile: EEOC ruling in mid-July that sexual orientation discrimination is sex discrimination under Title VII of the 1964 Civil Rights Act.

The Ruling: Fundamental Right to Marry . . . with a soupcon of equality

Justice Kennedy for the Court: “If 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. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”
Dissenters (Roberts, Scalia, Thomas, and Alito) Worry the Sky is Falling

- Scalia: If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [as the majority opinion begins] 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.

The Dissenters’ Other Issue

- How to distinguish polygamy and incest?
- Less serious burden on liberty
- No immutable characteristic
- Administrative issues (at least with polygamy)
- Most important from the external perspective: No social movements . . . yet
- Compare Guns and Second Amendment

Law and Social Movements

Autopoieisis (Luhmann)

Hollow Hope (Rosenberg)

Conventional View (Feedback)
Triangular Relations (Dorf & Tarrow)