Stato, Chiese e pluralismo confessionale
Rivista telematica (*www.statoechiese.it*) n. 25/2015
13 luglio 2015 ISSN 1971- 8543

"A CHIARE LETTERE" - TRANSIZIONI

Obewrgfell v. Hodges: il diritto al matrimonio tra persone dello stesso sesso nella pronuncia della Corte Suprema degli Stati Uniti (g. c.)

Il passaggio da "l'età dei diritti" alla "età del nuovi diritti" ha ricevuto forza propulsiva da "il riconoscimento della dignità della singola persona umana come centro dell'ordine sociale"[1]. L'apertura delle frontiere nazionali, il fenomeno della globalizzazione dei mercati, i cambiamenti dei costumi, per non dire d'altro, hanno indotto ad aggiungere l'aggettivo "nuovo" a molteplici forme di tutela degli interessi emergenti, divenuti col passare del tempo giuridicamente rilevanti: nuovi contratti, nuove forme proprietarie, nuove strutture associative, nuovi delitti, nuove pene, nuove economie, nuovi strumenti finanziari, etc., etc. Il riconoscimento giuridico delle innovazioni che si affermano nella società avviene con maggiori resistenze, invece, in materia di matrimonio e di famiglia, negli Stati-membri dell'UE e specie nel nostro Paese. Le strutture giuridiche dell'uno e dell'altra sono rivestite da una corazza fatta oggetto solo di marginali accomodamenti, che appaiono ben poca cosa a ogni osservatore distaccato dei fatti sociali, dei comportamenti diffusi e dei bisogni della gente comune.

L'operatività della Carta dei diritti fondamentali dell'Europa, assistita ora dall'attribuzione di effetti giuridici vincolanti, l'accresciuto rilievo sia del diritto al rispetto di una vita privata e familiare libera da ingerenze dell'autorità pubblica (art. 8 Convenzione EDU) – un rispetto inteso "non come mera non interferenza nelle cose private, ma come libertà positiva o diritto all'autodeterminazione individuale"[2] - sia del diritto alla non discriminazione (anche fondata sul sesso) nel suo combinarsi con i diritti autonomamente garantiti (art. 14), appaiono elementi destinati a disfare non poche maglie di quella corazza, al fine di salvaguardare a soggetti dello stesso sesso (almeno) il nucleo essenziale del diritto a relazioni familiari stabili e garantite. Per intanto, non sono molti gli Stati europei che hanno riconosciuto e disciplinato il diritto delle coppie omosessuali al matrimonio: in ordine inverso di

[1] Così, per tutti, **M. CARTABIA**, *I nuovi diritti*, in questa *Rivista*, febbraio 2011, p. 2.
[2] Cfr. **M. CARTABIA**, *I nuovi diritti*, cit., p. 12.

tempo, la Francia, la Danimarca, l'Islanda, il Portogallo, la Svezia, la Spagna, il Belgio e i Paesi Bassi[3].

In ben altro contesto giuridico qualcosa di analogo è avvenuto con la sentenza della Corte Suprema degli Stati Uniti nel caso *Obergfell e altri v. Hodges, Direttore del' Dipartimento della Sanità dell'Ohio, e altri* (di cui di seguito è riportato il Syllabus) che ha segnato un cambiamento di indirizzo di speciale rilievo per l'accento posto al rapporto tra diritti di libertà e principio di uguaglianza, pur senza giungere al riconoscimento che l'orientamento sessuale costituisca di per sé un illegittimo fattore di discriminazione. Tuttavia, l'affermazione che il diritto al matrimonio tra persone dello stesso sesso ha natura costituzionale è per di più rafforzata dalla recisa negazione che la sua tutela concreta possa dipendere dalla discrezionalità del legislatore, dalla magnanimità delle maggioranze politiche, dall'allentarsi delle rigidità alimentate dalle ideologie e/o dalle fedi.

Non è poco, di sicuro, e nella globalizzazione del dialogo tra le Corti sarà opportuno tenerne conto.

* * * * * *

(Slip Opinion) OCTOBER TERM, 2014

Syllabus[4]

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337

[3] Il 22 maggio 2015 si è svolto in Irlanda il referendum popolare per includere nella Carta costituzionale il disposto che consente a due persone di contrarre matrimonio «without distinction as to their sex»: si veda **A. CESERANI**, *Il recente caso del Same-sex marriage irlandese e alcune riflessioni sulla situazione italiana* (che può leggersi in *http://www.olir.it/newsletter/archivio/2015_06_30.html*).

[4] Il testo nella versione integrale può leggersi, di seguito al Syllabus, sul sito ufficiale della Corte Suprema (*http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf*) e di Olir (*http://www.olir.it/ricerca/getdocumentopdf.php?lang=ita&Form_object_id=6550*).

Per un primo commento si veda **A. SPERTI**, *La Corte Suprema riconosce il diritto costituzionale al matrimonio delle persone gay e lesbiche*, in *Articolo 29* (*http://www.articolo29.it/2015/pronuncia-storica-corte-suprema-riconosce-diritto-matrimonio-same-sex-in-tutti-gli-dellunione-2/#more-10468*).

Stato, Chiese e pluralismo confessionale
Rivista telematica (*www.statoechiese.it*) n. 235/2015
13 luglio 2015 ISSN 1971- 8543

SUPREME COURT OF THE UNITED STATES

Syllabus

OBERGEFELL ET AL. v. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015[5]

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

[5] Together with No. 14–562, Tanco et al. v. Haslam, Governor of Tennessee, et al., No. 14–571, DeBoer et al. v. Snyder, Governor of Michigan, et al., and No. 14–574, Bourke et al. v. Beshear, Governor of Kentucky, also on certiorari to the same court.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U. S. ___. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6– 10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g.*, *Eisenstadt v. Baird*, 405 U. S. 438, 453; *Griswold v. Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g.*, *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.

See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g.*, *Pierce v. Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issuethus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at ___. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause;and in *Zablocki v. Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from

marrying. Indeed, recognizing that new insights and societal under-standings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g.*, *Kirchberg v. Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e.g.*, *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuriesno doubt lingered long after *Bowers* was overruled. A ruling against same-ex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on acounterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis

for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.