The Supreme Court To Address Marriage Equality Litigation

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Historic, unprecedented, monumental… no single word fully encapsulates the magnitude and impact the past three years have had on marriage rights for gay and lesbian Americans. By the end of next month, the Supreme Court will decide whether gay and lesbians have a constitutional right to marry and whether states can permissibly deny them of that right by refusing to issue them marriage licenses and/or denying them recognition of out-of-state marriages. How did we get to this point? What is left for the Supreme Court to decide? What will be the impacts of the Supreme Court's pending decision? To answer these questions, let's reflect on the legal history related to marriage and gay rights that brings us to where we stand today, and may give us insight into where we're headed next.

Background

In 1967, the Supreme Court decided Loving v. Virginia, 388 U.S. 1, a case in which police conducted a nighttime raid of the home of Mildred and Richard Loving. The Lovings, an interracial couple married in Washington D.C. in 1958, were arrested for living together as husband and wife—violating Virginia's anti-miscegenation law. The Supreme Court unanimously struck down the law, writing that marriage is a fundamental civil right and that depriving that right on the basis

of a race was not permissible. Id. at 12.

In 1970, a gay couple from the University of Minnesota—Richard Baker and James McConnell—applied for a marriage license in Hennepin County. After being denied, they sued for violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Among their claims, the plaintiffs argued that the law impermissibly classified on the basis of gender. The trial court dismissed their case, which the Minnesota Supreme Court upheld in 1971. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The couple then appealed to the U.S. Supreme Court. Until 1988, it was mandatory for the Court to accept such appeals from state supreme courts. Thus, although a denial of certiorari is not usually an endorsement of a lower court's decision, in the case of Baker, the Supreme Court's one sentence opinion that, "[t]he appeal is dismissed for want of a substantial federal question[,]" Baker v. Nelson, 409 U.S. 810 (1972), was—at least at that time—considered to be a binding decision on the merits.

Just one year after Baker was decided, in 1973, the Supreme Court elevated the level of constitutional scrutiny for laws that classify based on gender, concluding that such laws must, like race and national origin, be subjected to heightened judicial scrutiny. Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

In 1974, the State of Wisconsin denied Roger Redhail a marriage license because he was in arrears on court ordered child support after having a child while in high school. Redhail filed a class action suit against a Milwaukee County

official, which found its way to a Supreme Court opinion in 1978. Justice Marshall cited and reiterated the Court's position in Loving, writing that marriage is a fundamental right, the deprivation of which requires strict scrutiny. Zablocki v. Redhail, 434 U.S. 374 (1978). Nine years later, the Supreme Court again recognized the fundamental right to marry in Turner v. Safley, 482 U.S. 78 (1987) (striking down a law barring prison inmates from marrying).

In 1986, the Supreme Court upheld a Georgia law that criminalized gay sex. Chief Justice Warren Burger wrote in concurrence that ancient roots prohibited homosexual sex, calling it an infamous crime against nature that is worse than rape. He argued that framing such laws as fundamental rights violations would be to "cast aside millennia of moral teaching." Bowers v. Hardwick, 478 U.S. 186 (1986).

In 1992, a 53% majority of Colorado voters approved a ballot measure that amended the Colorado Constitution. The amendment prohibited every county, city, and town within Colorado from protecting gay and lesbian individuals from discrimination. In 1996, the Supreme Court reviewed the amendment in Romer v. Evans, 517 U.S. 620 (1996). In the Court's opinion, Justice Kennedy did not explicitly state which level of constitutional scrutiny the Court was applying, but wrote that, "laws of the kind… raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and concluded that the ballot measure was born of a "bare… desire to harm a politically unpopular group." Id. at 634. The Court added, "[i]f the constitutional conception

of equal protection of the laws means anything, it must at the very least mean that a bare… desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." Id. (emphasis in original) (internal citations omitted).

Then, in the mid-1990's, following a Hawaii Supreme Court decision that raised the prospect of same-sex couples being allowed to marry,[1] both the federal government and states across the country began enacting statutory bans explicitly excluding same-sex couples from marrying and/or recognizing those marriages. Like the myriad state laws passed at that time, the federal Defense of Marriage Act, passed by Congress in 1996, was also motivated by a desire to specifically avoid recognizing marriages of same-sex couples. This represented a stark departure from both the federal government's and most states' longstanding practice of recognizing valid marriages from any of the states. This rule—known as the "place of celebration rule"—is recognized in nearly every state and is a defining element of our federal system and American family law.[2] For example, some states will allow cousins to marry while many will not; yet, even in states that don't grant such marriages, those states will usually recognize out-of-state

[1] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[2] Garcia v. Garcia, 127 N.W. 586, 589 (S.D. 1910). Indeed, the "policy of the civilized world[] is to sustain marriages, not to upset them." Madewell v. United States, 84 F. Supp. 329, 332 (E.D. Tenn. 1949); see also In re Lenherr's Estate, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

marriages as long as they are valid in the conferring state.[3] That rule usually applies even when a couple leaves a state to marry in order to avoid a prohibition under their home-state marriage laws.[4]

In 1998, Alaska became the first state in the union to go beyond a statutory ban on marriage for same-sex couples, also passing a ballot measure that constitutionally restricted marriage to one man and one woman. Despite—and perhaps because of—the Supreme Court's decision in Romer, gay and lesbian Americans were being targeted for disparate governmental treatment like never before. That same year, officials in Texas criminally prosecuted a gay male couple for having sex in the confines of a private bedroom. Texas' sodomy laws, like those in 13 other states, explicitly prohibited homosexual acts, effectively making homosexuality illegal. See generally Lawrence v. Texas, 539 U.S. 558 (2003).

In 2003, the Supreme Court struck down those laws—and overruled its Bowers decision in Lawrence, concluding that the two Texans, like all individuals, were free under the Constitution to engage in intimate sexual conduct "in the confines of their homes and their own private lives and still retain their dignity as free persons." 539 U.S. at 567. The Court found that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the

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[3] e.g., Garcia, 127 N.W at. 587-589 (recognizing a marriage between first cousins that would have been prohibited and void if the parties had attempted to marry in South Dakota).

[4] Id.

Constitution allows homosexual persons the right to make this choice." Id. Further, while the Court held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" Id. at 577.

Also in 2003, the Massachusetts Supreme Court became the first court in the country to strike down a state's marriage ban and require the state to marry same-sex couples. Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003). The backlash was swift and widespread. Dozens of states began following Alaska's lead and incorporating marriage bans into their constitutions in an effort to block state courts from overruling their statutory bans. By 2008, 29 states passed measures similar to Alaska at the polls, many barring not only marriages, but also prohibiting state recognition of any type of same-sex relationship. Nebraska was one such state. It was also the first to state to have its ban struck down in federal court.

Before he was overturned by the Eighth Circuit, U.S. District Court Judge Joseph Bataillon struck down Nebraska's ban in a Romer-style equal protection case called Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006). The plaintiffs argued that Nebraska's constitutional amendment impermissibly "raise[d] an insurmountable political barrier to same-sex couples," but they did not seek the right to marry. Id. at 865. The Eighth Circuit wrote that, in order to determine the appropriate level of scrutiny for classifications based on sexual orientation, "*the most relevant precedents [were] murky*," Id. at 865–66 (emphasis

added). Accordingly, the court tested Nebraska's ban against the lowest level of constitutional scrutiny—the rational-basis test. Under that deferential standard, the Eighth Circuit upheld the amendment, writing that "laws limiting the state-recognized institution of marriage to heterosexual couples . . . do not violate the Constitution of the United States." Id.

The Eighth Circuit wasn't the only appellate court to struggle with the Supreme Court's "murky" precedent on constitutional scrutiny for sexual orientation classifications. For example, in 2008, the Ninth Circuit reached a similar conclusion to the Bruning court in Witt v. Dep't of Air Force, 527 F.3d 806, 821 (9th Cir. 2008), concluding that barring further pronouncement by the Supreme Court, it would apply rational basis review to equal protection claims involving classifications based on sexual orientation. Nevertheless, gay rights advocates doubled their efforts, focusing on engaging the public and winning hearts and minds by having conversations about love and fairness.

Recent Developments

Three years ago, in May 2012, President Obama declared his support for marriage equality. At the time, only six states allowed same-sex couples to marry, and the federal government refused to recognize those nuptials. In Minnesota, voters were debating what became the most expensive ballot initiative in our history, a measure that—had it been successful—would've made Minnesota the 31st state to constitutionally ban marriage for gay and lesbian couples. Minnesota became the first state in the nation to successfully block such an amendment at the

ballot box.

Two years ago today, marriage equality advocates were anxiously awaiting decisions from the Supreme Court in United States v. Windsor, 133 S. Ct. 2675 (2013), a case challenging the constitutionality of the federal Defense of Marriage Act ("DOMA"), and Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), a California case challenging the constitutionality of one of those state-level ballot measures ("Proposition 8"). Pundits heralded the lawsuits as two of the most important civil rights cases of our time, each having the potential to become landmark precedent.

As it turned out, Perry was mostly forgotten after the Supreme Court's standing-based decision didn't address whether states may deny marriage based on sexual orientation or gender.[5] The Court's failure to reach the merits of the case was a disappointment for millions of gay Americans, including same-sex couples in the 37 states that, following the decision, still suffered marriage discrimination by their government and the resulting stigma that they were less equal than their neighbors.

Yet, despite Perry's narrow results, the Supreme Court's 2013 term was a win—a win for the same-sex couples in those 13 states that did have marriage equality, a win for gay and lesbians in general, a win for civil rights, and a win for the principles of equality, morality, and human dignity. This is because the Court's decision in Windsor struck at the heart of DOMA, declaring—in no uncertain

[5] Although the Perry decision didn't reach the merits, it did add to the Supreme Court's evolving standing doctrine and effectively brought marriage equality to California.

terms—that gay and lesbian relationships deserve dignity, due process, and equal protection. Justice Kennedy, writing for the Court, repeatedly emphasized that although states may generally define and regulate marriage, that such regulation, "of course, must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691. Thus, although Windsor didn't explicitly decide whether states may block same-sex couples from marrying, it prompted marriage equality advocates to use its conspicuous tea leaves to light a fire.

Within one year of the decision, advocates challenged every state marriage ban and anti-recognition law in the country with at least one lawsuit. Since then, nearly every court to rule has held that Windsor's logic requires invalidation of such laws. In numbers, that is 60+ rulings in over 40 different courts in every corner of the country, including the United States Courts of Appeals for the Tenth, Ninth, Seventh, and Fourth Circuits. In contrast, only one federal appellate court—the Sixth Circuit—and a handful of trial courts have upheld such bans.

When the Fourth, Seventh, Ninth, and Tenth Circuits struck down marriage bans and anti-recognition laws, most legal experts expected that the United States Supreme Court would review some or all of those decisions—particularly in light of the fact that all parties asked the Court to do so. But in September 2014, while visiting the University of Minnesota Law School, Justice Ginsburg hinted that the Court likely wouldn't take the cases unless there was a circuit split. She reasoned that there was "no urgency" since the there wasn't any disagreement. Sure enough,

less than one month later, the Supreme Court denied cert. in the 10th, 7th, and 4th Circuit cases.

Pending Supreme Court Decision

Then, in November 2014, in DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), the Sixth Circuit Court of Appeals overturned lower federal court decisions in Michigan, Kentucky, Tennessee, and Ohio, becoming the first and only federal appellate court, after Windsor, to uphold marriage bans and anti-recognition laws. This created the circuit split Justice Ginsburg was talking about, which explains why the Court granted cert. in the Sixth Circuit cases in January of this year.

Today, after less time has elapsed than it takes to complete law school, 31 more states have marriage equality than did in May 2012. As of the publishing of this article, the total stands at 37—a complete reversal in numbers from only two years ago. Although Minnesota is among the few states added to that tally by legislation, the majority were put there pursuant to judicial decree, and mostly within the past year. By the end of next month—most likely on June 29, the last day of the term—the Supreme Court will decide whether those courts have gotten it right.

Unlike Perry, there are no standing issues that may prevent the Court from reaching a decision on the merits. Among the matters the Court will decide, look for the majority opinion to discuss: 1) whether its summary dismissal in Baker is still valid precedent; 2) whether same-sex couples share in the fundamental right to marry that the Court discussed in Loving, Zablocki, Turner, and other cases; 3)

whether the Court considers the contested marriage laws to classify on the basis of gender—meaning that they must be subject to heightened constitutional scrutiny; 4) whether laws classifying on the basis of sexual orientation must be subject to heightened scrutiny; 5) whether principles of federalism (such as the Tenth Amendment and the domestic relations exception to federal jurisdiction) can legitimate the contested marriage laws; 6) whether a stated intent to maintain marriage as between a man and a woman can be considered animus evidence sufficient to strike down the ban; and 7) whether any rationale offered by the States, such as promoting procreation or deferring to the political process, can legitimate the challenged marriage laws.

In deciding question 1—whether its summary dismissal in Baker is still valid precedent—look to see if the Court also addresses question 3—whether the contested marriage laws classify on the basis of gender and are thus subject to heightened constitutional scrutiny. During oral arguments in Perry, Justice Kennedy stated that it was an interesting question, one that he had been wrestling with. Justice Ginsburg also indicated that Baker was from a different era, one that preceded heightened scrutiny for gender classifications.

On question 2—whether same-sex couples share in the fundamental right to marry—look for the Court to discuss its historical treatment of marriage and to also discuss question 5—whether principles of federalism can legitimate the contested marriage laws. The Supreme Court has articulated the right to marry no less than 14 times, describing it as a right associated with other fundamental

rights, including privacy and association. While the Windsor opinion discusses the States' historical regulation of marriage at length, principles of federalism have not previously stopped the Court from striking down state marriage laws that violate the Constitution. Thus, if the Court answers question 2 affirmatively, simultaneously doing so with question 5 would be difficult.

Regarding question 7—whether any rationale offered by the States, such as promoting procreation or deferring to the political process, can legitimate the challenged marriage laws—look for the Supreme Court to specifically address the Sixth Circuit's assertion that deference to the political process constitutes a rational basis to uphold the contested marriage bans. The Supreme Court already dismissed the other rationales in Windsor.

While the Court's precedent on marriage and gay rights may offer some strong clues into its likely opinion on the issue of marriage for gay and lesbian couples, perhaps the most anticipated answers for those now anxiously awaiting the Supreme Court's pending decision is with regard to questions 4 and 6. With regard to 4—whether laws classifying on the basis of sexual orientation must be subject to heightened scrutiny, although the Eighth and Ninth Circuits have both previously ruled that the Supreme Court's precedent only requires rational basis level review for laws that target gay and lesbians, the Supreme Court's opinion in Windsor suggests otherwise. Indeed, the Ninth Circuit recently reversed its 2008 Witt opinion, concluding that Windsor was "dispositive of the question of the appropriate level of scrutiny" for sexual orientation classifications and

requires heightened scrutiny. SmithKline v. Abbott Labs, 740 F.3d 471, 480–481 (9th Cir. 2014).

With regard to question 6—whether a stated interest in maintaining the "traditional" heterosexual definition of marriage is evidence of animus sufficient to strike down the laws—there is some thought that the Court could answer this affirmatively and avoid answering questions 4 and 7 altogether. The Court's developing animus doctrine is something that University of Minnesota Law Professor Dale Carpenter has written about at length.[6] Essentially, the Court's precedent seems to indicate that although a finding of animus toward a particular class of people is not *necessary* to strike down a law, a finding of animus is in fact *sufficient* to render the law unconstitutional. This doctrine is not part of the Court's traditional equal protection analysis.

The significance of the answers from the Supreme Court on questions 4 and 6 extends beyond the issue of marriage equality. Across the country—most recently and most significantly in Indiana—states are passing laws meant to chip away at the rights of gay and lesbian citizens. In some cases, the laws don't explicitly classify on the basis of sexual orientation but are nonetheless rooted in allowing discrimination on the basis of sexual orientation. Such laws, much like DOMA and the 13 remaining state marriage bans, inflict serious harms on gay and lesbian persons and their

[6] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424743

children, depriving them of hundreds of rights and protections, and stigmatizing them as inferior and unworthy of respect. Allowing the laws to stand would burden the lives of gay and lesbians persons "by reason of government decree, in visible and public ways . . . from the mundane to the profound." Windsor, 133 S. Ct. at 2694.

Like the Supreme Court's previous cases involving gay and lesbian persons, its pending decision will have long-term implications. To the extent that the Court answers the above-posited questions, with the above-discussed history in mind, come June 29, 2015, we may likely have some insight into the next legal steps for the gay civil rights movement.