Supreme Unanimity on Same-Sex Marriage: It's About Time

Author : Brian M. Stewart

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The issue of same-sex marriage is headed to the Supreme Court and soon the Court will rule that state same-sex marriage bans are unconstitutional. For those who believe that the Court will hold that such bans *are* constitutional, abandon hope. This article argues (1) that the Court must hold same-sex marriage bans unconstitutional to protect the federal judicial system; and (2) the Court's ability to do so unanimously is equally important.

The Case Before the Court

The Supreme Court has consolidated four cases from the Sixth Circuit and will address 2 questions:

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.[1] [1. Cert. granted in *Obergefell*, *Tanco*, *DeBoer*, and *Bourke*, 574 U.S. ____ (Jan. 16, 2015).]

For now, it may only be important to examine the first question rather than the second. As Garrett Epps at *The Atlantic* argues, it would just about be impossible to rule that states are required to recognize out-of-state marriages but allowed to refuse to marry resident couples. That opinion "'won't write.' It would, in fact, sound about as authentic as a late-night infomercial."

The Court has ducked the former question before, not only in 2013,[2] [2. Hollingsworth v. Perry, 133. S. Ct. 2652 (2013)] but also all the way back in 1972 in *Baker v. Nelson*. In *Baker*, the Minnesota Supreme Court had held that state restrictions prohibiting same-sex marriage were perfectly acceptable.[3] [3. Baker v. Nelson, 191 N.W. 2d 185 (Minn. 1971)] The Supreme Court refused to hear the merits of the case. The Court's opinion, in its entirety, read, "The appeal is dismissed for want of a substantial federal question."[4] [4. 409 U.S. 810 (1972).] That single sentence has been a major factor in the opinions upholding state same-sex marriage bans.[5] [5. *See* DeBoer v. Snyder, Nos. 14-1341, 3057, 3463, 5291, 5297, 5818 (6th Cir. Nov. 6, 2014); Conde-Vidal v. Garcia-Padilla, No. 14-1253 (PG) (D. P.R. 2014).]

Lower Court Opinions

The opinions upholding same-sex marriage bans are extreme outliers. Since *Windsor* struck down the federal same-sex marriage ban,[6] [6. 133 S. Ct. 2675 (2013).] 43 federal cases on

same-sex marriage have been decided–37 in the District Courts, 6 in the Circuit Courts. Those cases have been decided by a total of 49 judges.[7] [7. Some judges heard multiple cases; the judges are not counted twice for these calculations.] Of those 49 judges, 42 have determined that state same-sex marriage bans are unconstitutional,[8] [8. 31 Dist. Ct., 11 Cir. Ct. (1 dissent).] while only 7 have or would have upheld such bans.[9] [9. 3 Dist. Ct., 4 Cir. Ct. (2 dissents).] Of those 7 judges, 2 wrote dissenting opinions,[10] [10. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (Niemeyer, J., dissenting); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part).] 1 was reversed on appeal,[11] [11. Sevcik v. Sandoval, 911 F.Supp. 2d 966 (D. Nev. 2012), *rev'd*, Latta v. Otter, Nos. 14-35420, 14-35421, 12-17668 (9th Cir. Oct. 7, 2014).] and 1 is likely to be reversed soon;[12] [12. *Robicheaux v. Caldwell*, 2 F.Supp. 3d 910 (E.D. La. 2014).] 1 case has just been briefed at the appellate level.[13] [13. *Conde-Vidal*, No. 14-1253 (PG).] The opinion of the other two judges–comprising the majority in the 6th Circuit–was so convoluted that the dissenting judge all but accused her colleagues of abdicating their duty to faithfully uphold the Constitution:[14] [14. DeBoer v. Snyder, Nos. 14-1341, 3057, 3463, 5291, 5297, 5818, at 55 (6th Cir. Nov. 6, 2014) (Daughtrey, J., dissenting).]

> More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." *See* 28 U.S.C. § 453. If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

In addition to the federal courts, numerous state courts have struck down their state's same-sex marriage bans.[15] [15. *See, e.g.,* Griego v. Oliver, 316 P.3d 865 (N.M. 2013).] Many other states have allowed same-sex marriage by statute or referendum. Appellate courts have refused to enforce stays preventing marriages from moving forward. Right now, same-sex couples can legally get married in 36 states. Of the 14 states that still ban same-sex marriage, 11 have had a federal judge hold that the bans are unconstitutional. As BuzzFeed Legal Editor Chris Geidner points out:

> There are only 3 states in the U.S. that neither have marriage equality nor have ever had a pro-marriage/recognition ruling: GA, NE, & ND.
>
> — Chris Geidner (@chrisgeidner) January 24, 2015

The Legitimacy of the Federal Judiciary

A decision by the Court validating same-sex marriage bans at this stage would not only cause an administrative nightmare, it would call into question the legitimacy of the entire federal judiciary. The decisions coming from the lower courts have not simply found that same-sex marriage bans are unconstitutional, they have done so unequivocally. The language the courts have used in some of the strongest, most colorful language one will ever find in a judicial opinion. Consider these quotes from the federal appellate courts holding same-sex marriage bans to be unconstitutional:

The Tenth Circuit:[16] [16. Kitchen v. Herbert, 755 F.3d 1193, 1223 (10th Cir. 2014)]

> We emphatically agree with the numerous cases decided since Windsor that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples. As the district court held, "[t]here is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples." Kitchen, 961 F. Supp. 2d at 1212. This was the first

The Seventh Circuit:[17] [17. Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir. 2014)]

> To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible.

The Ninth Circuit:[18] [18. Latta v. Otter, No. 14-35421, at 34 (9th Cir. 2014).]

> The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492–95 (1954). When we opened our juries to women, our democracy became more vital. *See Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975). When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 n.11 (9th Cir. 2008). When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

The Supreme Court cannot ignore such language, nor can it ignore the mountain of similar opinions with similar language that have piled up.[19] [19. Prior posts on @LawBlarg have provided colorful excerpts from earlier state and federal court opinions and Florida court opinions.] To rule in favor of same-sex marriage bans, the Court would have to tell dozens upon dozens of state and federal judges that they have *grossly* misinterpreted the Constitution and constitutional jurisprudence. And it would have to do so based on evidence that has been laughed out of nearly every courtroom in the nation. Such a holding is inconceivable in a case of this magnitude.

Speaking in One Voice

So, assuming the Court cannot hold that same-sex marriage bans are constitutional, could the Court **unanimously** decide that such bans are unconstitutional? And why is it important? To understand that, I examine two other major civil rights cased decided unanimously: *Brown v. Board of Education*[20] [20. 347 U.S. 483 (1954) (banning school segregation)] and *Loving v. Virginia.*[21] [21. 388 U.S. 1 (1967) (holding interracial marriage bans unconstitutional)]

Brown was decided unanimously through the hard work of Chief Justice Earl Warren. After originally hearing the case in December 1952, the Court was bitterly divided. Unable to come to a solution by the end of the Term, the Court reheard the case in December 1953 before coming together to strike down the "separate but equal" doctrine in May 1954. Unanimity was "critical to popular acceptance and to counterbalance the strong feeling in many quarters that the Court had acted lawlessly."[22] [22. Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 Akron L. Rev. 185, 195 (2002).]

Less than a year after *Brown*, the Court refused to hear a case seeking to hold Alabama's interracial marriage ban unconstitutional.[23] [23. *See* Peter Wallenstein, Race, Marriage, and the Law of Freedom, 70 Chi.-Kent L. Rev. 371, 415 (1994) (discussing *Jackson v. State*).]Although the law was clearly unconstitutional, the justices deferred, fearful of further inflaming the nation in the wake of *Brown*.[24] [24. *Id.*] The next year, the court refused to hear a similar case of out Virginia, *Naim v. Naim*.[25] [25. 350 U.S. 891 (1955)] "[T]he Court was no more eager to confront the issue than it had been the year before."[26] [26. Wallenstein, *supra*, at 418.] Although notes from the time show that the Justices knew interracial marriage bans clearly violated the Fourteenth Amendment,[27] [27. *See* Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 Am. J. Legal History 119, 147-158 (1998).] they were concerned that "a further decision in a sensitive area such as marriage would have eroded the

Court's legitimacy."[28] [28. Richard Delgado, Naim v. Naim, 12 Nev. L. J. 525, 526 (2012).]

The Court would wait until 1967 before it was finally ready to hold interracial marriage bans unconstitutional in *Loving*.[29] [29. *Id.* at 529 ("The Supreme Court could now legalize marriage secure that it would evoke little protest.").] By that time, opposition to the idea of interracial marriage was nowhere near as fierce, so the Court had some political cover.[30] [30. In 1958, only 4% of Americans approved of interracial marriage, as compared to 20% in 1968. The majority of Americans would not approve of interracial marriage until the mid-1990s.] Nevertheless, the decision was contentious; the Court's unanimity spoke to the Court's commitment to eliminating invidious discrimination within the States and "signaled the beginning of a new direction [of colorblind jurisprudence]."[31] [31. Delgado, *supra*, at 529.]

Is Unanimity Possible Today?

In 1972 when the Court dismissed *Baker v. Nelson* for want of a federal question, the Court ducked the question of whether states could prohibit same-sex marriages. 43 years later, America has come a long way in combating discrimination against the LGBTQ community. The Court's upcoming decision is more than about marriage, it will define how the Constitution protects minority interests in the 21st century. If the Court splits along ideological lines as predicted by many, the Court will send the message that politics is the most important consideration when petitioning for relief. If the Justices can put their personal and ideological differences aside, they could put an end to this debate and usher in the next era of equal treatment.

The lower courts have lobbed the Supreme Court a softball. Every justification for same-sex marriage bans has been debunked. Thousands of same-sex marriages have taken place throughout the country. The Sixth Circuit urged restraint in deciding this contentious issue (i.e, the "wait-and see" approach). Judge Daughtrey responded to this by quoting Martin Luther King's Letter from Birmingham Jail:[32] [32. DeBoer v. Snyder, Nos. 14-1341, 3057, 3463, 5291, 5297, 5818, at 62 (6th Cir. Nov. 6, 2014) (Daughtrey, J., dissenting).]

> For years now I have heard the word "Wait"! . . . [But h]uman progress never rolls in on wheels of inevitability . . . [and] time itself becomes an ally of the forces of social stagnation.

There will still be some resistance to implementing same-sex marriage nationwide. Officials in Texas and Alabama have vowed to continue banning same-sex marriages regardless of federal court decisions to the contrary. A unanimous Supreme Court decision would help to prevent such obstruction. Dissents will serve to keep the door open for continued arguments into the indefinite future. If the Justices could all come together to end school segregation and interracial marriage bans in the face of massive public opposition, is it so difficult to believe these Justices could come together on an issue the majority of Americans approve of?

It is not only Justice Kennedy whose legacy is on the line. The Court's legacy is on the line, too. Will the Court encourage Americans to set aside their differences and come together on this

issue? Doubtful. But one can always hope for an opinion labeled (Scalia, J., reluctantly concurring).

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