Same-Sex Marriage at the Supreme Court

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The Recorder

February 19, 2013

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In the late 1960s, the Warren court overturned the criminal convictions of Mildred Loving and her husband for violating Virginia's anti-miscegenation statute, holding that "the freedom to marry" is "one of the basic civil rights of man, fundamental to our very existence and survival." When the court issued its *Loving* opinion in 1967, Gallup pegged nationwide support for interracial marriage at 20 percent, with 73 percent opposed. While nearly 80 percent of Americans support the legalization of interracial marriage today, public opinion took its time: Support did not reach a plurality until 1991.

In contrast, when the U.S. Supreme Court hears arguments March 26 and 27 on the constitutionality of laws restricting state and federal recognition of same-sex marriages, it will do so with Gallup's national polling at 53 percent in support. That figure has jumped from 27 percent in 1996, half the time interracial marriage took to bridge that same gap, and the trend shows little sign of slowing. But how the justices will react to trends showing rapidly growing public approval of same-sex marriage is hard to guess. Could the Roberts court issue another *Loving*?

The Cases

The Supreme Court will review two cases raising the constitutionality of same-sex marriage laws. Edith Windsor's suit, filed in the U.S. District Court for the Southern District of New York, seeks invalidation of §3 of the Defense of Marriage Act, which permits the federal government to recognize only opposite-sex marriages, on equal protection and due process grounds. Windsor married in Canada in 2007, but when her partner of 40 years died in 2009, her tax bill was nearly $350,000 more than it would have been had her same-sex marriage been federally recognized.

Kristin Perry's suit arose after California voters passed Proposition 8 in 2008, which amended the state Constitution to apply the term "marriage" only to heterosexual couples while leaving in place the state's domestic partnership laws (which, other than in name, grant same-sex domestic partners identical substantive state law rights as married heterosexual couples). Perry, who is represented by former *Bush v. Gore* adversaries David Boies and Theodore Olson, filed suit in 2009 in the U.S. District Court for the Northern District of California seeking invalidation of Prop 8 on equal protection and due process grounds.

Windsor and Perry won their suits in both the district and appellate courts. After the district court issued its opinion in *Windsor*, the Justice Department concluded DOMA §3 is unconstitutional and announced it would no longer defend the law in court. In response, the Republican-controlled House of Representatives authorized a committee called the Bipartisan Legal Advisory Group to stand in for the Department of Justice and defend DOMA. BLAG hired former U.S. solicitor general Paul Clement for the appeal, a retention that later caused Clement to leave his law firm, King & Spalding. The U.S. Court of Appeals for the Second Circuit affirmed the law's unconstitutionality anyway, holding that legal classifications involving sexual orientation are inherently suspect and §3 fails to meet "intermediate" scrutiny under the Equal Protection Clause because it does not further an "important governmental interest" in a way that is "substantially related" to that interest.

The government's interests were also front and center in Perry's suit, where San Francisco federal Judge Vaughn Walker, a Republican appointee who later announced he is gay himself, held a trial on the purposes and effects of Prop 8. As in the *Windsor* case, California's executive branch refused to defend Prop 8, so the district court permitted the proposition's proponents to intervene and defend the measure at trial. After trial, the court held Prop 8 classifies individuals based on sexual orientation and thus must meet strict scrutiny, which it failed to do because the statute does not serve a "compelling" governmental interest — or even, based on the evidence at trial, a rational one.

On appeal, the Ninth Circuit affirmed, but not before the case detoured to the California Supreme Court to decide whether initiative proponents have standing a ballot measure under state law (the court said yes). Then, in a narrower opinion than the district court's, Ninth Circuit Judge Stephen Reinhardt held that because California has a unique history and set of laws that afford same-sex domestic partners the exact same rights as heterosexual married couples, Prop 8 does nothing more than deny same-sex couples the title "married." Given that Supreme Court precedent suggests a law which does not change substantive rights but only impresses disfavored titles on a particular class lacks a rational basis, the Ninth Circuit held Prop 8 unconstitutional.

In December the Supreme Court granted *certiorari* in both *Windsor* and *Perry*. The court agreed to consider not just whether DOMA's §3 and California's Prop 8 comply with the Constitution's due process and equal protection clauses, but also whether BLAG (in *Windsor*) and the ballot proponents (in *Perry*) had Article III standing to appeal given that the government entities which usually defend state or federal statutes agree with the plaintiffs that same-sex marriage bans are unconstitutional.

It is important the court took these cases rather than an alternate set of cases from the First Circuit, which also considered whether DOMA's federal definition of marriage intrudes on an area of law traditionally relegated to the states in violation of the 10th Amendment. Neither the *Windsor* nor *Perry* appeals raise that federalism issue, however, and the court did not grant *certiorari* on it.

High Court Review

Perry and *Windsor* come to the high court voiding laws banning same-sex marriage, but on different rationales. In *Perry*, the appellate court found Prop 8 did not have a rational basis because it made no substantive change beyond applying a disfavored term to a specific class. In that way, the Ninth Circuit consciously followed *Romer v. Evans*, an opinion written by Justice Anthony Kennedy that overturned a referendum-enacted Colorado law prohibiting state courts from recognizing homosexuals as a protected class. Kennedy wrote that the law was "inexplicable" and had no apparent motivation other than "animus to the class," which is not a rational basis for any law. In 2003 Kennedy also authored *Lawrence v. Texas*, which found state laws criminalizing private homosexual acts violated the due process clause.

In contrast, the appellate court in *Windsor* held that laws applying to homosexuals must meet "intermediate scrutiny" because they are a historically discriminated-against and politically powerless class. But the Supreme Court has refrained from reaching a similar conclusion, generally limiting suspect classifications to those targeting "discrete and insular" ethnic, racial and religious minority groups. Proponents of same-sex marriage bans have contended that homosexuals are different from those groups because they are a relatively powerful minority with growing clout, highlighting Walker's sexual orientation and President Barack Obama's endorsement of same-sex marriage during the 2012 election campaign. They have also pointed to trends showing a fast-moving political debate, such as two state referendums that legalized the rite in 2012, and urged judicial restraint in favor of democratic process and state experimentation.

This kind of restraint argument may resonate in unexpected places: In early 2012 Justice Ruth Bader Ginsburg told a Columbia symposium that *Roe v. Wade* "moved too far too fast" in rendering "even the most liberal" state abortion restrictions unconstitutional, and lamented that "things might have turned out differently" if the court had acted with more "restraint." Of course, some of the right-leaning justices have hinted at their views more bluntly, with Justice Antonin Scalia telling a Princeton student in late 2012 that laws prohibiting homosexual conduct, like laws prohibiting murder, are simply an expression of society's "moral views."

Justices Clarence Thomas and Samuel Alito may agree, but one doubts what Justices Elena Kagan and Sonia Sotomayor — whose own sexual orientations have been the subject of debate — may do. There's also fair reason for skepticism that Chief Justice John Roberts, who reportedly gave pro bono legal assistance to the *Romer* plaintiffs, does either. Roberts has also shown a particular awareness of the "Roberts court's" place in history, noting in speeches that the reputation of the otherwise able Chief Justice Roger Taney never recovered from his authorship of *Plessy v. Ferguson*. Roberts may look down the road 30 years and wonder whether history could view these decisions with equal contempt.

That said, Alabama's constitutional ban on same-sex marriage passed with 81 percent of the vote in 2006. Mississippi's passed with 86 percent approval two years earlier. Those are big numbers for the generally states-rights Roberts court to disregard by issuing a broad edict establishing the universal legality of same-sex marriage. Some members of the court may have special concern that stifling a rapidly moving political debate in either direction could engender the kind of decades-long simmering social conflict that followed the court's decision in *Roe*.

Thus, a majority of justices may wish to avoid even reaching the merits of whether the Constitution prohibits same-sex marriage bans. One way the court could dodge the primary constitutional question would be to hold that the appeals are invalid because the appellants, as intervenors, lacked standing. In *Windsor*, whether BLAG gets authority to appeal a ruling in defense of a federal statute is anyone's guess. In fact, the court has appointed a Harvard professor as *amicus curiae* to argue that BLAG, as a mere subcommittee of one-half of Congress, lacks standing to represent DOMA or the full Congress' interests.

If BLAG's nonconstitutional status means it lacks standing to properly appeal, and the government's agreement with the district court means it had no actual "dispute" with the plaintiffs as required to bring an appeal, that would effectively render the *Windsor* appeal void and the district court's decision final. If the court reaches this standing-based result, DOMA §3 would then be unconstitutional, but only as to Windsor and her co-plaintiffs in the suit — she would get her tax refund, but it would be left to Congress to change the law otherwise.

The arguments against BLAG's standing are not frivolous. While the effect of a ruling that BLAG lacks standing means the legal defense of every duly enacted law is largely at the whim of the executive, that may not be as empowering as it seems, because the courts would still need to determine independently whether a law passes constitutional muster. Also, the executive will absorb political accountability from the decision to refuse to defend a signed act of Congress, and risks Congress' ultimate sanction, impeachment. On the other hand, a standing-based dismissal here gives the court an easy way to avoid reaching the merits of the constitutionality of same-sex marriage bans, much as in 2004, it avoided deciding on standing grounds whether the phrase "under God" in the Pledge of Allegiance violates the establishment clause.

In *Perry*, however, the court could reach a different result. Unlike DOMA, Prop 8 was enacted by ballot initiative, and the California Supreme Court held that initiative proponents have standing to defend a measure under California law if the state declines to do so. While the U.S. Supreme Court has never explicitly held that a state can grant an initiative proponent standing to appeal, the circuits are split, and separate federalism rationales exist to permit standing in initiative cases if authorized by state law.

Moreover, unlike in *Windsor*, the court can find Prop 8 unconstitutional without reaching the question whether all bans on same-sex marriage violate the Constitution. The Ninth Circuit's opinion, which held the symmetry of rights granted by California's marriage and domestic partnership laws mean Prop 8 does nothing but inexplicably deny the term "marriage" to same-sex commitment ceremonies, based its ruling on the fact that Prop 8 affects only titles and thus is motivated by nothing more than animus to a class. According to Kennedy in *Romer*, animus to a class alone is not a rational basis for state action. Because a ruling under this logic is essentially constrained to California and similarly situated states, a decision that traces Reinhardt's reasoning would not ossify the national political debate by reaching the ultimate constitutionality of the bans, and may therefore raise fewer *Roe* concerns for some justices.

Not Your Parents' 'Loving'

Perhaps the narrow *Perry* Ninth Circuit opinion rooted in California history, along with the California Supreme Court's approval of ballot proponent standing under state law, will convince a majority of the court to discard Prop 8. But the dubious standing of BLAG and the long-term debate-freezing effect of a decision on the merits in *Windsor* suggest a fair chance the court could dodge the central question and leave states to ban same-sex marriage as they see fit. Ironically, the Roberts court might be better able to do so because, in juxtaposition with the Warren court in *Loving*, same-sex marriage receives substantially more political support.

Thus, while same-sex couples in California may have reason to start thinking about registries and venues, same-sex couples hoping to get married in Alabama could have a wait on their hands.

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