

1-28-2015

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Recommended Citation

Joanna L. Grossman, *The Final Showdown: The Supreme Court Agrees to Decide Whether Bans on Marriages by Same-Sex Couples are Unconstitutional* VERDICT (2015)

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Verdict

JANUARY 28, 2015

JOANNA L. GROSSMAN

The Final Showdown: The Supreme Court Agrees to Decide Whether Bans on Marriages by Same-Sex Couples are Unconstitutional

The day that proponents and opponents of same-sex marriage have variously feared and desired has come: The Supreme Court has agreed to decide once and for all whether it is unconstitutional for states to ban the celebration of marriages by same-sex couples and/or to refuse recognition to such marriages validly celebrated out of state. In this column, I'll explain the path that has led to this moment, with its many twists, turns, and obstacles.



The Writ of Certiorari

On January 16, 2015, the Supreme Court granted petitions for certiorari in four cases from the U.S. Court of Appeals for the Sixth Circuit—*Obergefell v. Hodges* (Ohio), *Tanco v. Haslam* (Tennessee), *DeBoer v. Snyder* (Michigan), and *Bourke v. Beshear* (Kentucky). In each case, a federal district court invalidated the applicable state ban on celebration of marriages by same-sex couples, a ban on recognition of those marriages, or both. All four rulings were **overturned on appeal** (<http://law.justia.com/cases/federal/appellate-courts/ca6/14-5291/14-5291-2014-11-06.html>) by the Sixth Circuit—the only federal appellate court to date to rule against the right to marry for same-sex couples. The Supreme Court consolidated the four cases and rephrased the questions they presented. It agreed to answer the following questions:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- 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?

Commentators have made much of the fact that the Court rephrased the questions presented—not its usual practice—and allotted separate oral argument time for the first question on celebration of marriages and the second question on recognition of out-of-state marriages, perhaps suggesting an inclination to stop short of recognizing the right to marry. But another reading of the tea leaves is simply that the four cases each phrased their questions differently, and two of the cases, *Tanco* and *Bourke*, raise only recognition questions. Regardless of the Court's motivation, it has agreed to do what it refused to do just two years ago—resolve for the nation whether states can continue to prohibit same-sex couples from marrying on the same terms as different-sex couples. Briefs are due this spring, oral argument will follow soon after, and the opinions will undoubtedly be issued at the end of the Court's term in June.

From *Baehr* to *Windsor*

One irony of the Court's orders is that the modern movement to gain the right to marry for same-sex couples was carefully orchestrated to preclude this very development. After an unsuccessful wave of lawsuits in the 1970s, the modern quest for marriage equality began in the early 1990s with a spate of lawsuits filed strategically around the country in states where success seemed possible. In each case, claims were brought only under the respective state constitution in order to avoid possible review by the U.S. Supreme Court (which would have final say over the meaning of the federal Constitution, but not over the meaning of any particular state constitution), which was thought less likely to recognize a right to marry for same-sex couples. Moreover, an adverse ruling from the High Court make it much less likely that state courts, interpreting parallel provisions in their own constitutions, would recognize the right.

From that round of lawsuits, the first victory to emerge was in Hawaii in *Baehr v. Lewin*. The Hawaii Supreme Court held, in 1993, that the prohibition on marriage by same-sex couples was a form of sex discrimination that merited the highest level of judicial scrutiny. The case was remanded for a trial on whether the state could satisfy the very heavy burden of justifying the use of sex classifications in Hawaii's marriage law, but while pending, the Hawaii constitution was amended to make clear that the legislature could prohibit marriages by same-sex couples.

Although Hawaii did not legalize same-sex marriages as a result of the *Baehr* ruling (it do so, only many years later, as a voluntary legislative act), the *Baehr* ruling set in motion many of the anti-same-sex-marriage developments that still stand. It spurred Congress to pass the federal Defense of Marriage Act (DOMA) in 1996 (which, as explained below,

was finally struck down in 2013), which refused federal recognition to marriages by same-sex couples, and led to more than forty states adopting constitutional and statutory provisions prohibiting both the celebration and recognition of such marriages. These developments went unanswered for many years, as there was a whole machine designed to fend off the spread of same-sex marriages, but no state that even allowed them.

The tides turned in 1999, when the Vermont Supreme Court ruled in ***Baker v. State*** (<http://law.justia.com/cases/vermont/supreme-court/1999/98-032op.html>) that the state allow same-sex couples to access the benefits of marriage, even if they were not allowed to marry. This led to the advent of the civil union, the first marriage-equivalent status in this country, which became a popular conservative alternative to marriage equality. Then, more significantly, in 2003, the Massachusetts Supreme Judicial Court held, in a similar case, that the state had to allow full access to marriage for same-sex couples. Withholding the right to marry, the majority wrote in ***Goodridge v. Dep't of Public Health*** (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>), “works a deep and scarring hardship on a very real segment of the community for no rational reason.”

From 2004 to 2008, Massachusetts was the only American state to allow the celebration of marriages by same-sex couples. Then, in a cascade of developments, marriage equality came to Connecticut, Iowa, Vermont, New Hampshire, and Maine through a combination of judicial rulings and voluntary legislative initiatives. (Similar developments were taking place internationally, with marriage equality laws passed in a variety of countries, including unlikely ones like Spain and Argentina.)

The Next Turning Point: *Windsor v. United States*

Although there were additional developments along the way, including the reversal in some states from an anti- to pro-marriage equality position (examples discussed **here** (<https://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications>) and **here** (<https://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement>)), the next big turning point was the Supreme Court’s decision in ***Windsor v. United States*** (<https://supreme.justia.com/cases/federal/us/570/12-307/>), in which it struck down the federal-law provision of DOMA. Because DOMA was a federal law, the challenges to its validity had to be brought under the federal constitution —thus making it possible for the Supreme Court to have a say.

The passage of DOMA in 1996 marked the beginning of a rapid escalation in anti-same-sex-marriage sentiment and the erection of legal obstacles to prevent same-sex marriage from taking hold in the U.S. By the time of DOMA’s death in 2013, those sentiments

hadn't disappeared, but the tides had shifted in terms of public opinion (a majority favored marriage equality for gay and lesbian couples), legislative enactments (13 states and the District of Columbia then allowed same-sex couples to marry, jurisdictions covering thirty percent of the American population), and even constitutional norms. One development that both reflected and reinforced the shift in favor of marriage equality was the Supreme Court's 2003 ruling in ***Lawrence v. Texas*** (<https://supreme.justia.com/cases/federal/us/539/558/>), in which it invalidated a ban on same-sex sodomy as a violation of the federal constitutional guarantees of due process.

The question in *Windsor* was whether Congress could constitutionally refuse federal recognition to marriages by same-sex couples that were validly celebrated at the state level. The IRS had collected over \$300,000 in estate taxes from a decedent's estate, even though it had all been left to her surviving wife. But, under DOMA, the IRS could not give effect to the couple's valid Canadian marriage and give them the benefit of the marital estate tax exemption.

In a landmark ruling, the Court said this provision of DOMA was unconstitutional. In an opinion written by Justice Kennedy, the 6-3 majority concluded that the refusal to recognize a particular type of marriage, while deferring otherwise to state law, was a discrimination of an unusual character that raised an inference of animus. The inference was justified by the fact that "by history and tradition," marriage has been "treated as being within the authority and realm of the separate states." And while Congress can "in the exercise of its proper authority" make its own determinations about the validity of a marriage (say, for example, when relevant to spousal immigration rights), it typically does not. Moreover, DOMA's broad reach—refusing recognition to valid marriages under 1000 different laws with widely varying purposes—suggests that the law was passed to harm a politically unpopular group, rather than for any constitutionally valid purpose. The majority's reasoning was drawn in part from the Court's 1996 ruling in ***Romer v. Evans*** (<https://supreme.justia.com/cases/federal/us/517/620/>), in which the Court had invalidated an anti-gay referendum in Colorado because it was motivated purely by animus—and thus did not even pass the Court's lowest level of judicial scrutiny.

Beyond invalidating the federal-law provision of DOMA, the reach of *Windsor* was not immediately obvious. Did it, as Justice Scalia warned in a scathing **dissent** (<https://supreme.justia.com/cases/federal/us/570/12-307/dissent5.html>), inevitably mean that states could not ban the celebration of marriages by same-sex couples in the first instance? The answer was not immediately clear, particularly as the Court issued a ruling the very same day in *Hollingsworth v. Perry*, in which it could have—but did not—decided that issue. But, as the discussion below reveals, *Windsor's* reach was profound.

And what was immediately clear was that the federal constitution had *something* to say about same-sex marriage.

Post-*Windsor* Developments

Almost immediately after the *Windsor* opinion was issued, it was invoked in support of challenges to the remaining bans on same-sex marriage—of which there were still many. These cases, filed almost exclusively in federal court, presented one or both of the issues that the Supreme Court has just agreed to decide—whether states can ban the celebration of marriages by same-sex couples and, if so, whether they might nonetheless be prohibited from banning the recognition of valid marriages from other states. *Windsor* proved especially helpful on the latter question about the validity of recognition bans. After all, if Congress’s decision to deny recognition to one subset of legal marriages is a constitutionally suspect “discrimination of an unusual character,” aren’t state legislative decisions similarly suspect, particularly given the longstanding tradition of giving effect to any marriage that was valid where celebrated? And although it was more of a stretch, *Windsor* also proved useful in challenging the bans on celebration as well, which had to be justified by something other than the bare desire to harm an unpopular group (*Romer*) or mere moral disapproval (*Lawrence*). And states that didn’t just throw in the towel and concede defeat at trial or on appeal had a hard time coming up with alternative justifications.

In the wake of *Windsor*, federal courts have invalidated celebration and recognition bans in dozens of states. The opinions rely heavily on *Windsor* (and *Romer* and *Lawrence*), picking up especially on Justice Kennedy’s conclusion that the “avowed purpose and practical effect” of DOMA was “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”

In all, according to the website for *Freedom to Marry*, there have been 39 such decisions since *Windsor* in federal district courts, five in federal appellate courts, and another sixteen in state courts. (An analysis of some of these developments as they happened can be found [here \(https://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights\)](https://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights), [here \(https://verdict.justia.com/2013/10/21/samesex-weddings-jersey-shore\)](https://verdict.justia.com/2013/10/21/samesex-weddings-jersey-shore), [here \(https://verdict.justia.com/2013/11/15/hawaii-comes-full-circle-sex-marriage\)](https://verdict.justia.com/2013/11/15/hawaii-comes-full-circle-sex-marriage), [here \(https://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples\)](https://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples), and [here \(https://verdict.justia.com/2014/07/08/federal-appellate-court-rules-utahs-ban-marriage-sex-couples-unconstitutional\)](https://verdict.justia.com/2014/07/08/federal-appellate-court-rules-utahs-ban-marriage-sex-couples-unconstitutional).) When added to the pre-*Windsor*

developments, these victories have brought the total number of marriage equality states to thirty-seven plus the District of Columbia. So while just two years ago, the Supreme Court faced a landscape in which two-thirds of the states did not permit same-sex couples to marry, it now faces a landscape that has exactly reversed itself. (A helpful map can be found [here \(http://www.freedomtomarry.org/states/\)](http://www.freedomtomarry.org/states/).)

The only federal appellate ruling that rejected a right of same-sex marriage is the Sixth Circuit one that the Supreme Court has agreed to review. Had the ruling gone the other way, the Supreme Court may have continued, as it had done with several other cases, to deny review. But with a square circuit split on an issue that has captured the public's attention and passion for more than two decades now, perhaps the justices (at least 4 of them anyway) felt they could no longer avoid the fray.

Conclusion

Of course we do not know how the Supreme Court will rule in these cases, but the better money seems to be on a ruling in favor of marriage equality. (My *Verdict* colleague Michael Dorf suggests [here \(https://verdict.justia.com/2015/01/26/question-whether-supreme-court-will-find-right-sex-marriage\)](https://verdict.justia.com/2015/01/26/question-whether-supreme-court-will-find-right-sex-marriage) that the outcome is not in doubt—marriage equality will win—but that the Court has different possible paths to that end.) Indeed, the majority in *Windsor* may have engineered this exact posture by dipping toes into the controversy with DOMA, but waiting to see how *Windsor* would play. The cascade of rulings in favor of marriage equality—with the Sixth Circuit's standing lonely in opposition—gives them their answer.



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