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CAVEAT

CERTIORARI AND THE MARRIAGE EQUALITY CASES

Carl Tobias*

Marriage equality has come to much of the nation. Over 2014, many district court rulings invalidated state proscriptions on same-sex marriage, while four appeals courts upheld these decisions. However, the Sixth Circuit reversed district judgments which struck down bans in Kentucky, Michigan, Ohio, and Tennessee. Because that appellate opinion created a patchwork of differing legal regimes across the country, this Paper urges the Supreme Court to clarify marriage equality by reviewing that determination this Term.

I. THE NEW CASES

*United States v. Windsor*¹ provoked the recent suits,² which plaintiffs filed in every state that prohibits same-sex marriage.³ *Windsor* ruled that the Defense of Marriage Act (DOMA) contravened the Fourteenth Amendment⁴ by harming the dignity and financial and related interests of same-sex couples and their children.⁵ The majority invoked federalism without evaluating state

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1. 133 S. Ct. 2675 (2013); see Ernest Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39 (2013).

2. Numerous courts invoke *Windsor*. For evaluations of marriage equality, see generally MICHAEL KLARMAN, *FROM THE CLOSET TO THE ALTAR* (2013) and MARK SOLOMON, *WINNING MARRIAGE* (2014).

3. The ACLU has pursued a number, as have local counsel. See ACLU, *The ACLU's Freedom to Marry Cases* (Jan. 13, 2015), <https://www.aclu.org/lgbt-rights/aclus-freedom-marry-cases>.

4. *Windsor*, 133 S. Ct. at 2695–96; see also Michael Klarman, *Windsor and Brown*, 127 HARV. L. REV. 127, 140 (2013).

5. The Court seemingly used elevated scrutiny. *Windsor*, 133 S. Ct. at 2693–96; see also Young, *supra* note 2, at 40–41.

bans,⁶ which left unclear how *Windsor* affects them. When dissenting, Chief Justice John Roberts claimed that the majority did not address bans' constitutionality,⁷ but Justice Antonin Scalia contended that the notions used to invalidate DOMA might similarly cover them.⁸

Following *Windsor*, two dozen district judges found that bans are unconstitutional; only the Eastern District of Louisiana and District of Puerto Rico held that bans are constitutional.⁹ The Fourth, Seventh, Ninth, and Tenth Circuits affirmed invalidations by deciding that bans violated the Fourteenth Amendment.¹⁰ In early October, the Justices denied each Fourth, Seventh, and Tenth Circuit certiorari petition, but they have yet to review the Sixth and Ninth Circuit appeals.¹¹

However, last November, a Sixth Circuit panel, comprised of Judges Jeffrey Sutton, Deborah Cook, and Martha Craig Daughtrey, upheld bans in Michigan, Kentucky, Ohio, and Tennessee, essentially based on federalism.¹² Judge Sutton proposed numerous ways to envision the issue—"Originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning"—but deemed convincing no theory plaintiffs enunciated for constitutionalizing the question and removing the prerogative to define marriage from state voters, where it has remained since the country's outset.¹³ More specifically, the jurist argued that the Constitution assigns states primary responsibility for marriage regulation and neither the Due Process Clause nor the Equal Protection Clause grants same-sex

6. *Windsor*, 133 S. Ct. at 2694–95; see *infra* notes 11, 21, 24 and accompanying text.

7. *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

8. *Id.* at 2709–10 (Scalia, J., dissenting).

9. ALLIANCE FOR JUSTICE, FEDERAL CHALLENGES TO STATE SAME-SEX MARRIAGE BANS 22 (2015), available at <http://www.afj.org/reports/latest-updates-love-and-the-law>; see also Lyle Denniston, *Court Denies One Same-Sex Marriage Case*, SCOTUSBLOG (Jan. 12, 2015), <http://www.scotusblog.com>.

10. *Latta v. Otter*, 771 F.3d 456, 464–65, 467–68 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 654–72 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 360, 375–78, 384 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1208–24 (10th Cir. 2014).

11. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Bostic v. Schaefer*, 760 F.3d 360 (4th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); see Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 7, 2014, at A1; ALLIANCE FOR JUSTICE, *supra* note 9, at 22.

12. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

13. *Id.* at 402–03.

couples a fundamental right to marry; these couples are not a suspect class, so he applied the rational basis test, which the “responsible procreation” and “wait-and-see” rationales easily satisfied.

Judge Daughtrey, who dissented, criticized Sutton’s “original meaning” notion that the Fourteenth Amendment left marriage the same, by arguing that revision was not intended to desegregate public schools or permit interracial marriage.¹⁴ She found the rational basis evaluation—asserting that the ban is rational because gay couples do not have unintended children—so weak that it could not “be taken seriously.”¹⁵ To “let the people decide,” her foils were state constitutional amendment’s complexity and the U.S. Constitution’s mandate that judges determine “individual rights under the Fourteenth Amendment,” notwithstanding public opinion.¹⁶ To the “wait and see” argument, Daughtrey responded that, absent hard data the skies have fallen, the “states as laboratories of democracy” trope and its restraint plea do not resonate in the quickly-evolving marriage debate.¹⁷

All plaintiffs rapidly appealed.¹⁸ Each state but Tennessee filed before the deadline to expedite consideration and did not oppose review, given the issue’s significance.¹⁹ That timing permitted the Justices to initially examine the certiorari petitions at their January 9 conference and decide the question this Term.²⁰

14. Racial discrimination remained following a civil war, slavery’s termination and 14th Amendment ratification, so myriad cases and judicial decrees were necessary to achieve “even a modicum of constitutional protection.” *DeBoer*, 772 F.3d at 431.

15. *Id.* at 434 (citing *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014)).

16. The Justices held the people cannot order states to contravene equal protection. *DeBoer*, 772 F.3d at 435.

17. *Id.* Judge Daughtrey lamented that her colleagues seemingly fell “prey to the misguided” idea that they could only honor the framers’ intent by cleaving to legislative will and demonizing independent courts. *Id.* at 436.

18. *E.g.*, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *petition for cert. filed*, 2014 WL 6449712 (Nov. 18, 2014) (No. 14-571).

19. Respondent’s Brief in Support of a Petition for a Writ of Certiorari at 3–4, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *petition for cert. filed*, 2014 WL 6449712 (Nov. 18, 2014) (No. 14-571); Respondent’s Brief in Opposition to a Petition for a Writ of Certiorari, *Tanco v. Haslam*, 7 F. Supp. 3d 759 (6th Cir. 2014), *petition for cert. filed*, 2014 U.S. S. Ct. Briefs LEXIS 4393 (Nov. 14, 2014) (No. 14-562).

20. Lyle Denniston, *Same-Sex Marriage: A Simple Appeal*, SCOTUSBLOG (Nov. 17, 2014), <http://www.scotusblog.com>.

II. RECOMMENDATIONS FOR THE FUTURE

Denying the Fourth, Seventh, and Tenth Circuit appeals indicates that the Justices might have been waiting for a decision that finds bans constitutional, which the Sixth Circuit affords.²¹ Nevertheless, the Court may reject certiorari. It could favor federal appellate court, state legislative, and public resolution of the issue jurisdiction-by-jurisdiction and, thus, respect federalism, like the *Windsor* and *DeBoer* majorities admonished,²² or defer to state lawmakers and the people, as Sutton's citation to *Schuette v. Coalition to Defend Affirmative Action* urged.²³ The Justices might correspondingly want to avoid the controversy that ostensibly results from the Court's countrywide disposition of contested social issues.²⁴

However, in light of marriage equality's unclear status across the U.S., the Justices should deem ideas which favor certiorari more convincing. Several are responsive to the above contentions. For instance, *Windsor* seemingly finds that pursuit of individual rights may override federalism;²⁵ *Schuette* deserves little deference, as it relates to affirmative action, which is a strikingly different constituent of equal protection law;²⁶ and the Constitution assigns federal judges responsibility to determine whether bans violate the Fourteenth Amendment.²⁷

Perhaps more significantly, the Court should accept a case to resolve a circuit split which allows diverse legal systems in the Sixth Circuit jurisdictions and much of the nation, and which fosters

21. *Id.*; see Robert Barnes, *Gay Couples Wed in Miami, as Justices Meet on Issue*, WASH. POST, Jan. 6, 2015, at A1; Denniston, *supra* note 9; *supra* text accompanying note 11 (denying appeals and suggesting the Court may accept new petitions).

22. *Bostic v. Schaefer*, 760 F.3d 352, 398 (4th Cir. 2014) (Niemeyer, J., dissenting); *Kitchen v. Herbert*, 755 F.3d 1193, 1231 (10th Cir. 2014) (Kelly, J., dissenting); *supra* text accompanying notes 5, 12.

23. "Debate on sensitive issues [may] shade into rancor [but] does not justify removing [them] from voters. Democracy does not presume [some subjects are] too divisive or too profound for public debate." He said "real" people favored and opposed both initiatives, while gay persons and states should not be treated as abstractions. *DeBoer*, 772 F.3d at 409 (citing *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014)).

24. Abortion is the classic example. Klarman, *supra* note 4, at 146–48. Strategic factors respecting how Justices might vote on the merits may, but ought not, influence decisions regarding certiorari.

25. *Bostic*, 760 F.3d at 379; *Kitchen*, 755 F.3d at 1228; see *supra* notes 5, 8, 22. *But see supra* text accompanying notes 6, 23.

26. *Bostic*, 760 F.3d at 379; *supra* text accompanying notes 16, 25. *But see supra* note 23. More Justices recently appear opposed to affirmative action. *Fisher v. Texas*, 133 S. Ct. 2411 (2013).

27. See *supra* text accompanying note 16.

uncertainty for 21 million Kentucky, Michigan, Ohio, and Tennessee citizens and even larger numbers elsewhere throughout the increasingly mobile U.S.²⁸ The patchwork, which makes marriages that are legal in some states invalid in others, has an enormous impact on the day-to-day lives of “real” persons for whom Sutton voices great concern.²⁹ The several hundred same-sex couples who married after Eastern District of Michigan Judge Bernard Friedman invalidated the ban and before his decision was stayed furnish cogent examples, because the Sixth Circuit reversal rendered their marital status unclear.³⁰ Rejecting the Fourth, Seventh and Tenth Circuit appeals and the Justices’ denial of stays in jurisdictions, which include Alaska, Florida, and South Carolina, concomitantly mean that thousands of same-sex couples who have married since October or who may wed in the future could confront legal uncertainty should the Court reject certiorari now or later find that bans are constitutional.³¹ Denying appeals would also make residents of the four Sixth Circuit states resort to the burdensome, prolonged state constitutional amendment process.³² Put simply, the many affected people warrant final resolution of their marital status.³³

CONCLUSION

Marriage equality is the law of 37 states, but not 14. Accordingly, the Supreme Court must expeditiously grant certiorari, determine whether the bans contravene the Fourteenth Amendment, and clarify the marital status of thousands of individuals.

28. See, e.g., *DeBoer v. Snyder*, Petition for a Writ of Certiorari, 2014 WL 6449712 (2014); *Henry v. Hodges*, Petition for a Writ of Certiorari, 2014 WL 5907570 (2014).

29. See *supra* text accompanying note 23 (Sutton’s concern).

30. Some filed a recognition suit. *Caspar v. Snyder*, 2:14-CV-11499 (E.D. Mich. 2014); Tresa Baldas, *Gay Marriage Showdown heads to Cincinnati*, DETROIT FREE PRESS, Aug. 6, 2014, at A1. Indiana and Utah couples faced that issue, but the 7th and 10th Circuit certiorari denials vitiated it. See *supra* text accompanying note 11; see also Michael Auslen, *Counties Issuing Same-Sex Marriage Licenses*, INDIANAPOLIS STAR, June 27, 2014, <http://www.indystar.com/story/news/politics/2014/06/26/interactive-counties-same-sex-marriage-licenses/11425011/>; *Evans v. Utah*, 2014 WL 2048343 (D. Utah 2014) (recognizing same-sex marriages).

31. See *supra* text accompanying note 11.

32. E.g., KY. CONST. § 256; TENN. CONST. art. 11, § 3; see *supra* text accompanying note 16.

33. Chaos in Florida, Indiana, Michigan, Utah and elsewhere evokes the concern about political chaos that justified deciding *Bush v. Gore*, 531 U.S. 98 (2000). Barnes, *supra* note 21; see *supra* text accompanying notes 30–31.