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Preview on same-sex marriage — Part II, The states' views

This is the second post in a four-part series on the written arguments that have been filed in the same-sex marriage cases at the Supreme Court. This post covers the briefs of the four states in defense of their state bans. At the oral argument on April 28, John J. Bursch of Lansing, Michigan, a special assistant attorney general and the state's former solicitor general, will argue for the states on their power to forbid same-sex couples to marry. He will have forty-five minutes of time. Joseph F. Whalen of Nashville, an associate state solicitor general, will argue for the states on their power to refuse to recognize existing same-sex marriages. He will have thirty minutes. The first post in this series, discussing the couples' views, can be read [here](#). Later posts in the series will review the filings of the amici on both sides — including the brief of the federal government, supporting the couples' challenge to the bans.

America's state governments have never seen anything like this: one of their most cherished traditions, going to the very core of their power as states, overwhelmed by a cultural revolution that swept the nation in less than two years. On June 26, 2013, when the Supreme Court decided the case of *United States v. Windsor*, same-sex couples could legally marry in nine states plus Washington, D.C. In the twenty-two months since then, they have gained that right in twenty-seven more states — by court decision in twenty-two, and by passage of new state laws in five.

When the Supreme Court next week takes up what could be the decisive chapter in this constitutional saga, four states will urge the Justices to restore traditional state control over marriage laws, and begin the process of undoing at least some of the court rulings since *Windsor*.

Although the campaign to extend marriage rights to gays and lesbians has actually gone on for at least a quarter of a century, the *Windsor* decision marked the major turning point. The Court struck down a key part of the federal Defense of Marriage Act, and in the process extended federal marital benefits to same-sex couples who were by then already married under state laws.

The Court did not offer any view on extending the marriage right itself to such couples, but the sweeping language of the main opinion by Justice Anthony M. Kennedy set off the wave of lower court rulings nullifying state bans, one after the other.

The outcome of the Court's four new cases that will go down in history under the title *Obergefell v. Hodges* is not inevitable, precisely because the decision will have such momentous implications for the nation, and for the state governments under the Constitution's Fourteenth Amendment.

The result could complete the marriage revolution, or it could stall it and open a new era of deep controversy in legislatures and at the ballot box. Not the least uncertainty would be the legal fate of many thousands of same-sex marriages that were performed as a result of court rulings.

The Court is facing only constitutional questions; there is no doubt about the meaning of the state laws and state constitutional amendments that categorically reserved marriage only for one man and one woman.

The four states before the Court — [Kentucky](#), [Michigan](#), Ohio and [Tennessee](#) — won the constitutional dispute in the U.S. Court of Appeals for the Sixth Circuit, which upheld each of their bans. That is the only court of appeals ruling so far in the round of new decisions to go in favor of state prohibitions. Six other appeals courts have nullified state bans, and the issue remains open in four others.

Kentucky is defending both a ban on same-sex marriages and a separate ban on the official recognition of existing same-sex marriages. Michigan is defending only a marriage ban, and Ohio and Tennessee are supporting only recognition bans.

Common to the four briefs are these main points:

- ** The Constitution's Fourteenth Amendment does not settle the definition of marriage, so that definition is left to the states.
- ** The people of the states are engaging in a robust debate about the issue, so the Court should not step in and give marriage a uniform national definition, abruptly ending that debate.
- ** No state has a duty to imitate what another state has chosen to do, but there is a determined effort in these briefs not to criticize other states' choices.
- ** What is at stake in these cases is nothing less than the right of self-government in the political communities of the several states, exercising sovereign powers.

** State bans, either on marriage or recognition, were not passed to engage in discrimination, but simply to codify the traditional notion that marriage should be restricted to opposite-sex couples.

** States are entitled to define marriage in that traditional way, to promote child-bearing within a natural biological partnership, and same-sex couples can be excluded from marriage because they are not similarly capable of procreation as a couple.

** The Court should treat the pleas of same-sex couples as a request to create a new constitutional right to marry a same-sex partner, and there is no history justifying any such right.

** There is no basis for imposing on states a more rigorous test of the constitutionality of their marriage laws. They need only have a rational public policy behind them, and promoting procreation is such a policy, as is preserving traditional marriage.

The states' briefs on the marriage question

Michigan, a state that last year persuaded the Supreme Court to leave it to the state's voters to choose to ban the use of race in public university admissions (*Schuette v. Coalition to Defend Affirmative Action*), quotes extensively from that ruling in seeking the same permission to define marriage and limit who can enter it.

That is, basically, a states' rights argument, but it has two rationales in the Michigan brief that seek to give it a loftier tone: leaving the marriage choice to the states allows citizens to shape "the course of their own times," and doing so respects the proper division of government powers between two sovereign entities, the national and state governments. Not coincidentally, those are two prominent themes in the constitutional writings of Justice Anthony M. Kennedy, who may hold the deciding vote on same-sex marriage.

Along the way, Michigan cautions the Court that a constitutional ruling in favor of same-sex marriage would be "a radical change in the Court's jurisprudence." That is based on an argument that recognizing same-sex marriage as a right would have "no constitutional tether," and so would represent simply the policy choices of the judiciary.

"When courts override the democratic process with such insubstantial constitutional underpinnings, it is hard to imagine what social or political question might not be the subject of the next litigation campaign," that brief said.

Michigan's brief is careful to include in its argument the choices that have been made by eleven states to change their laws, by state legislation or by voter-approved ballot measures, to allow same-sex marriage. That, too, it argues, deserves respect and also validates the state's core argument about where the choice should lie.

This brief tends to stress that core argument, but also does recite its basic social science point that the fundamental value of marriage is to "reinforce the benefit of every child being connected to his biological mother and father." Keeping marriage as "child-centered," the brief said, "increases the likelihood that biological parents stay together even when their emotions fade, and reducing the risk that any child will be born out of wedlock."

Kentucky's brief, in defending its marriage ban, closely tracks the Michigan arguments about democratic process and the perceived need to confine marriage to a child-centered unit. But it also seeks to refute any interpretation of the Supreme Court's decision in *United States v. Windsor* as even hinting that the Constitution requires states to allow same-sex couples to marry. Indeed, the brief argues that the *Windsor* ruling is a reaffirmation of states' prerogative to define marriage as they see fit, without intrusion by the federal government to impose another choice.

It is difficult to separate Kentucky's defenses of the marriage ban with its defenses of its recognition ban but, on that separate point, it does add a claim based on the Constitution's Full Faith and Credit Clause, which argues that the clause does not require it to accept a marriage performed in another state if that would violate Kentucky's own recognition ban.

The other states' briefs on the recognition question

Ohio's brief on the recognition issue contains a close analysis of the *Windsor* decision, to keep that ruling focused on the Fifth Amendment's guarantee of equal protection, in contrast to a state's right under the Full Faith and Credit Clause to pass its own laws without having to imitate other states' choices. That clause, the brief argued, has always left considerable leeway for states to enact their own public policy into law, without having to defer to other states' laws.

Thus, Ohio asserted, if an Ohio couple made a quick trip outside the state to get married in a state that allowed same-sex marriage, the clause would shield Ohio from having to officially recognize such a marriage.

Ohio also sought to distance its non-recognition law from the "animus" argument that Justice Kennedy had applied in the *Windsor* opinion to find a desire to harm married same-sex couples. Animus will be found, the state contended, when a state departed from a traditional principle and when it targeted a specific group for special burdens. It had done neither, it argued.

As other states have done in arguing that same-sex couples were seeking a special right for gays and lesbians to marry, Ohio contended that the same-sex couples in its case were claiming "a fundamental right to recognition of out-of-state same-sex marriages." There is nothing among the states, it added, to suggest that such a new right represents a consensus view today. Most states, it asserted, would adhere to a traditional definition of marriage "absent federal judicial mandates."

Tennessee embraced that argument, too, contending that the only fundamental right that the Supreme Court has recognized regarding marriage is the union of one man and one woman. That provides no basis for giving same-sex couples who have married elsewhere a right to Tennessee's acceptance of their marriage as valid, it contended. And, it added, because there is no fundamental right to same-sex marriage, there is also no right to "remain married" by gaining recognition of an existing marriage performed elsewhere.

That brief also argued that the ban on non-recognition plays no role in denying a right to travel. Migration into Tennessee is not harmed, the state said, merely because the rights that one has in one state are not matched by the same rights in another.

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