

Next Steps for Marriage Equality

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The Supreme Court's landmark decisions in the gay marriage cases are an important victory in the fight for marriage equality. States are moving with surprising and inspiring speed to legalize gay marriage via the democratic process, and the Court's opinions will only add to that momentum.

But gay marriage could be back to the Court sooner than you think. Supporters of marriage equality must continue the fight to legalize same-sex marriage in the states.

The big question in the gay marriage cases was whether the Court would find a broad right to same-sex marriage in the Constitution. Many people are asking whether these decisions mean that every state will have to legalize gay marriage.

Strictly speaking, the answer is no. But it is still a somewhat open question, and it will be some time before it is answered completely.

The major decision is *United States v. Windsor*, which struck down Section 3 of the Defense of Marriage Act (DOMA). Signed by President Clinton in 1996, Section 3 of DOMA defined marriage as a union between a man and a woman for the purposes of federal law. Legally married, same-sex couples in states that allow same-sex marriage did not get recognition from the federal government, including -- to name a few -- tax benefits, inheritance benefits, as well as less well-known benefits, such as being buried next to a spouse in a veteran's cemetery.

As expected, the majority opinion came from Justice Anthony Kennedy, the Court's swing vote on whom so much depends. As is his tendency, Justice Kennedy's opinion is deeply rooted in federalism. Our constitutional system contains "dual sovereigns" -- the states and the federal government -- that have jurisdiction over different areas. It is unquestioned that states traditionally have jurisdiction over matters of family law.

Because of the traditional role of the states in family law, the federal government encroaches upon that role when it passes laws like DOMA. DOMA takes couples that some states have decided to treat with equal dignity and treats them unequally, thus making it unconstitutional.

But that argument was only part of Justice Kennedy's opinion. He could have stopped there, keeping the decision confined to federalism and making it clear that, while the Constitution doesn't require recognition of same-sex marriage, it does require the federal government to respect state definitions of marriage.

But Kennedy went further, saying that DOMA's distinction between gay couples and straight couples "demeans the couple," "humiliates" their children, and "imposes a disability on the class."

Such language raises the question of whether state prohibitions on gay marriage are on the imminent chopping block.

Kennedy's decision is a hodge-podge of federalism rationales and equal protection rationales. The federalism rationales apply only to the federal government, such as laws like DOMA. The equal protection rationales--particularly Kennedy's argument that denying gay marriage is a form of unconstitutional bigotry--apply to the states.

Starting immediately, cases will be filed by plaintiffs in all the states that still prohibit gay marriage. They will argue that Kennedy's equal protection arguments in *United States v. Windsor* apply to their state legislators, who only are denying marriage equality out of a bare desire to harm a politically unpopular group. Some judges will agree; others will disagree, and the Court will have to rectify the disagreement..

If and when that day comes, the best thing supporters of marriage equality can do is push to legalize gay marriage in their states through the democratic process. The Court gets understandably nervous when it is asked to produce a "50 state solution," that is, a decision that strikes down laws in every state. The justices are less nervous, however, when a decision applies to fewer noncompliant states. When the Supreme Court ruled that prohibitions on interracial marriage were unconstitutional, in the 1967 case of *Loving v. Virginia*, only 16 states remained that prohibited interracial marriage. It is generally better if the Court is at the tail end of a trend rather than leading the parade. Marriage equality brings dignity and respect to a class of citizens that has too long been exempted from one of life's hallmark events. Yet, all things being equal, it is better and more legitimate to establish marriage equality through the democratic process than through the courts. The Court gave marriage equality a push, but the fight is far from over.