



Both sides say Kennedy opinion on gay marriage could doom state laws

By: Sam Baker - June 30, 2013

Legal experts say the Supreme Court's rulings this week on same-sex marriage send the clear signal the justices are likely to strike down state marriage laws that reach the High Court.

Justice Antonin Scalia drew the same conclusion in his dissent to the court's 5-4 decision rejecting the part of the Defense of Marriage Act that prohibited same-sex couples from receiving federal benefits.

Justice Anthony Kennedy, writing for the majority, said his decision applied only to the federal government, leaving it to the states to set their own definitions of marriage.

But Scalia dismissed Kennedy's assertion, saying the court clearly indicated that it would strike down state marriage laws soon enough. And legal experts say Scalia was probably right.

"It's hard to read Kennedy's opinion and not see that quoted word-for-word in every appellate brief challenging a state ban on gay marriage in the future," said Ilya Shapiro, a senior legal fellow at the libertarian Cato Institute.

Kennedy made a point of avoiding that conclusion in his majority opinion. He wrote near its conclusion that "this opinion and its holding are confined to" marriages recognized by state law.

Yet people on both sides of the issue say his rhetoric sent clear signals that state marriage laws might not fare any better than DOMA if and when they reach the Supreme Court — — unless the court's makeup changes.

"There's language, I think, in the DOMA case that might lead in that direction," said Carl Tobias, a law professor at the University of Richmond.

Kennedy's ruling did not establish a constitutional right to same-sex marriage, but it described DOMA as an affront to basic principles of liberty and equality. The law was passed for no reason other than "interference with the equal dignity of same-sex marriages," Kennedy wrote.

"The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify," Kennedy wrote. "And it humiliates tens of thousands of children now being raised by same-sex couples."

By framing the issue in such fundamental terms, Kennedy sent a clear signal about state laws, even if they weren't technically covered by this week's decision, legal scholars said.

“It’s hard to see Kennedy making an about-face and saying it’s not demeaning when a state does it,” Shapiro said.

Scalia saw the same clues in Kennedy’s decision. He wrote a scathing dissent excoriating Kennedy’s reasoning and dismissing the court’s claim that its decision was limited to federal law.

“By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition,” Scalia wrote.

Scalia pointed to a case 10 years ago in which the court struck down an anti-sodomy law in Texas. Kennedy wrote the majority opinion in that case, too, and Scalia dissented. And he argued in his dissent that the ruling would eventually lead to recognition of same-sex marriages.

Scalia said this week that his prediction has come true, and that striking down DOMA was another step toward marriage equality in every state.

“As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe,” Scalia said.

Even legal experts who agreed with Kennedy’s ruling said Scalia probably wasn’t wrong about its implications.

“I think for all practical purposes you’re going to have the same type of reasoning eventually prevail,” Shapiro said.

The court didn’t base its DOMA decision on a precedent set in the Texas sodomy case, and a future decision on state marriage laws won’t be based directly on DOMA. But the two cases reflect and help advance a broader cultural shift toward more rights for same-sex couples, said Steve Sanders, a law professor at Indiana University.

“Some federal judges will point to what the court said and will say, ‘The Supreme Court is sending me a message,’” he said.

The dynamic could shift if Kennedy is no longer on the bench by the time a state marriage law reaches the Supreme Court. But experts said that’s unlikely.

It’s impossible to predict the timing of legal challenges that haven’t even begun yet. But the DOMA ruling will likely embolden advocates, and it should be easy to find cases that don’t come with the messy procedural baggage the court used to avoid California’s Proposition 8.

The issue could be back before the court in two to three years, Shapiro said.

Furthermore, while it takes five votes to win a case, it only takes four votes to hear one. The court will almost surely have a solid bloc of four liberals for the foreseeable future, so they could easily put the issue back before Kennedy once they feel he’s ready to go further.

“I’m assuming that, as presently constituted, there are four votes — perhaps on the merits — in a case that’s procedurally sound,” Tobias said.