Diana Richmond on

Hollingsworth v. Perry and U.S. v. Windsor: After Jubilation, What?

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The United States Supreme Court removed two major barriers to marriage equality with its decisions in *Hollingsworth v. Perry* and *U.S. v. Windsor* on June 26, and the Ninth Circuit closed the last barrier to marriage for same-sex partners in California on June 28, when it lifted its stay on enforcement of the U.S. District Court's opinion that Proposition 8 is unconstitutional. The Perry marriage ceremony was celebrated immediately afterward, and many more marriages will follow in California.

The Rulings

The *Hollingsworth* decision rests solely on standing. No analysis of the underlying issues or the justices' views on them are to be found in this decision, authored by the Chief Justice. That analysis and those views – for at least some of the justices – are revealed in detail in the companion *Windsor* case, and one must read them together to get a full understanding of what the Court would and would not do. In *Hollingsworth*, the Court ruled that the Proponents of Proposition 8, who wanted to limit marriage to opposite-sex couples, lacked standing to appeal from the District Court decision. That decision effectively limits its effect to California. *Windsor*, by contrast, affects the whole country. In *Windsor*, the Supreme Court struck down the provision of the Defense of Marriage Act (DOMA) that limited marriage for purposes of federal benefits to marriages between a man and a woman. Thus, under *Windsor*, same-sex couples whose marriages are recognized as legal will be entitled to the full panoply of more than 1,000 federal benefits that apply to married couples. Justice Kennedy, writing for the majority in *Windsor*, described DOMA: "This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple ... and it humiliates tens of thousands of children now being raised by same-sex couples." He elaborated further on the harms to children of DOMA, a concern foretold by his question at oral argument about the effect of DOMA on some 40,000 children of same-sex married couples across the nation.

Neither decision recognizes marriage for same-sex couples as a right protected by the U.S. Constitution. *Hollingsworth* was originally brought for this purpose, and its devolution into a decision on standing appears to have been a strategic 'safe harbor' created when the plaintiffs' trial court victory was appealed by the Proponents of Proposition 8. Though the original plaintiffs argued at both the Ninth Circuit and Supreme Court level that the fundamental right of marriage cannot constitutionally be denied to same-sex couples, they also asserted that the Proponents lacked standing to appeal. Much of the argument at both appellate levels was devoted to standing. When *Hollingsworth* (then known as *Perry v. Schwarzenegger*) was first filed, many supporters of marriage equality worried (justifiably) that taking this issue to this Supreme Court was highly risky. As discussed below, some of the dissenting opinions in *Windsor* reveal the reality of this risk. However, what most people did not anticipate was the groundswell of public support across the

nation for the cause of marriage equality. That forward momentum may be the real accomplishment of the *Hollingsworth* case, but it remains to be seen how durable it will be as campaigns are waged across the country to carry marriage equality to other states. California now joins Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia in granting marriage rights to same-sex spouses.

Had the Court found standing and upheld the Ninth Circuit decision that marriage could not be denied where a state had already granted significant marriage benefits to registered domestic partners, the decision would have affected those states in the Ninth Circuit where domestic partnership is already recognized. Had the Court found standing and ruled on the merits, it could have found any of the following: that denial of marriage to same-sex partners violates the U.S. Constitution (it was apparent from both the oral argument and the dissenters in Windsor that a majority was not to be found on this decision); that denial of marriage to same-sex partners is a province of the several states and not a denial of the federal Constitution (this would have had repercussions for the decision in Windsor); or that the limited ruling of the Ninth Circuit would be upheld. The justices faced somewhat of a dilemma in ruling consistently in both cases, which brings us to a consideration of standing.

Standing

Standing for purposes of justiciability under Article III of the federal Constitution was a major issue in both cases. In *Hollingsworth*, where the issue arose on an attack of a state law, the issue is closely related but not identical to that in *Windsor*, arising from an attack of a federal law. In *Hollingsworth*, appellants were the proponents of the constitutional amendment at stake. In *Windsor*, appellants were a committee of Congress appointed to defend DOMA. In both instances, the executive branch (the governor/the President) had declined to defend the legislation at stake. If there were no standing, the executive who believed the legislation to be unconstitutional could in effect unilaterally bar it and prevent recourse to appellate courts. The High Court went so far as to appoint a Harvard law professor as special amicus to argue in *Windsor* that the Congressional committee did not have standing to defend DOMA. The legal differences between the two cases ostensibly justified the Court's coming to opposite conclusions in them, and I leave it to experts on the issue to opine on the Court's consistency. Justice Alito, dissenting in *Windsor*, found it "remarkable" that the Court came to different conclusions in the two cases; he would have granted standing in both.

To me, the ominous undercurrent of these two decisions is the threat to the system of checks and balances built into our Constitutional system of Separation of Powers from the inception of this country. The manner in which some justices of this Court would limit standing – and their criticisms of the executive branch – cause me serious concern for future decisions of this Court. This is a core issue of jurisprudence, not a political issue. That is why the line-up of justices on either side of this question defies their liberal or conservative labels.

In *Hollingsworth*, Justice Kennedy, in a dissenting opinion joined by Justices Thomas, Alito and Sotomayor, criticized the majority for undercutting the state's initiative system, designed to bypass

elected officials. If there is no standing to appeal, the proponents (as the people most informed about and committed to the initiative at stake) and their initiative can be undermined by the governor and attorney general in a kind of 'de facto veto' if, as here, they decline to defend the law. The dissenters would have relied on the California Supreme Court's declaratory opinion that the Proponents had standing, rather than the agency relationship notion of the majority.

In *Windsor*, the President and Attorney General declined to defend DOMA, but continued to enforce it pending a ruling from the U.S. Supreme Court. In doing so, the Executive properly deferred to the Supreme Court to resolve a difference between the Legislative and Executive branches of government. When the Attorney General notified the Speaker of the House that the Department of Justice would not defend DOMA, the Bipartisan Legal Advisory Group (BLAG) of the House voted to intervene to defend it. In a 5/4 decision, the majority granted standing to BLAG and proceeded to rule on the merits. Justices Roberts, Scalia and Alito filed separate dissents. Justice Scalia's opinion on standing, in which the Chief Justice joined, was that this matter ought to have been left "to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Is not recourse to the High Court the ultimate in Constitutional deferral to the body who has the last word on the subject? He rebukes the majority's reliance on *Marbury v. Madison*, 1 Cranch 137 (1803).

Practical Issues Ahead

Proponents of marriage equality for the 37 states in which it is not permitted will continue to press for legislative change or strategic attacks in the courts (such as was done successfully in Iowa and Massachusetts) that may lead to decisions from state high courts that their marriage prohibitions are unconstitutional. If a future case is brought to the U.S. Supreme Court where standing is not an impediment, it is fairly predictable from *Windsor* what reception they will face from some of the justices. Justice Kennedy is a probable ally, given his reasoning in this case. Justice Scalia is an almost-certain negative vote, as is Justice Alito, who elaborated in his dissent on two different views of marriage: traditional marriage, "which is deeply rooted in this Nation's history and tradition" and linked to procreation and biological kinship, and "consent-based" marriage, relying on solemnization of mutual commitment and marked by strong emotional attachment and sexual attraction between two persons. Justice Alito stated he would not "presume to enshrine either vision of marriage in our constitutional jurisprudence." Chief Justice Roberts essentially warned that the reliance on deferring to states in defining marriage in these cases will come back to haunt future advocates of marriage equality. "So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case, " he wrote. The *Windsor* decision did not affect the remaining clause of DOMA that allows each state to deny recognition of marriages from other states; this clause was not challenged in the lawsuit.

The fall of DOMA is not the end of litigation over whether federal benefits are available to any particular same-sex married couple. One issue is retroactivity: if a couple wishes to amend their tax returns for the past three years, are spousal tax privileges available prior to June 26, 2013? If they were validly married in another state but reside in a state that does not recognize their marriage, which state's law obtains? President Obama has stated he will support the broadest recognition

possible under federal law. Green card applications are already available to same-sex spouses of U.S. citizens. Under many if not most federal benefit determinations, it is residence that controls. Legislation has been introduced to render a marriage valid for federal purposes if it was valid where the couple married, but its viability in this Congress is uncertain.

In California, what is the future of registered domestic partnership? There is a good theoretical argument that this institution, with its lesser status, should wither and die or be abolished. But wait: until marriage equality is recognized across this nation, many same-sex married couples have prudently opted to be *both* spouses and registered domestic partners, so as to protect their parentage or other rights recognized in states that have civil unions or domestic partnerships but not marriages.

In pending California dissolutions, same-sex spouses can now seek Qualified Domestic Relations Orders to divide their community property retirement interests; they can deduct spousal support; they can make nontaxable property divisions like other married couples.

The ramifications of these decisions will unfold over time. Already, multi-state employers face the question of relocations by married gay or lesbian employees; should they be forced to relocate to jurisdictions that do not recognize their marriage? Large companies could conceivably become allies in the effort to expand marriage equality on the ground that it is good for business. Whatever transpires, there is no doubt whatsoever that marriage equality has taken a giant step forward with the fall of DOMA.

See Diana Richmond's Emerging Issues Analysis on Marriage for Same-Sex Couples on lexis.com at 2010 Emerging Issues 5459

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