
Law Professors See ‘Tremendous Historical Import’ of Ruling

Karen Sloan, The National Law Journal

June 26, 2015

Law schools are out of session for the summer, but faculty members spent Friday parsing the U.S. Supreme Court’s majority decision in *Obergefell v. Hodges* and the three dissenting opinions. The case had generated a near record number of amicus briefs, many written or signed by law professors.

Thomas Nachbar, a professor of constitutional law at the University of Virginia School of Law, said he wasn’t surprised by the 5-4 ruling against state bans on same-sex marriages. But he’d expected the justices to apply the stringent rational-basis scrutiny to those bans, as it did in striking down the Defense of Marriage Act in *United States v. Windsor*.

“I think this is a case of tremendous historical import, but it’s not a case of huge constitutional development,” he said. “I think it’s more the culmination of a line of cases [dealing with same-sex marriage]. There are not a lot of new constitutional arguments.”

Emory University School of Law dean Robert Schapiro, however, said constitutional law classes will still be studying *Obergefell* 50 years from now. “It’s a decision of tremendous significance,” he said. “The right to same-sex marriage is a tremendous change in the landscape. The court’s method of recognizing that right signifies an openness to recognizing other constitutional rights.”

Barbara Cox, a vice dean at California Western School of Law and chairwoman of the national same-sex marriage advocacy organization Freedom To Marry, echoed Schapiro.

“There is a likelihood that this could become a seminal case—especially seeing the court finally settled on the fundamental right to marry,” Cox said. “This is the most significant case we’ve had with same-sex couples having the fundamental right to marry.”

The court’s decision is less a game-changer for 14th Amendment jurisprudence, Cox said, although she applauded the justices for standing up for equal protection, due process and the rights of the children of same-sex couples.

“I think this is the opinion that will be looked back on as the one that really incorporated gay and lesbian people into our national institutions,” she said.

Carlos Ball, a professor at Rutgers School of Law–Newark who has written a book about same-sex marriage and children, wrote an amicus brief in *Obergefell* that focused on the history of using child-based arguments to justify marriage restrictions, including bans on interracial marriage.

Defenders of same-sex marriage bans again relied on child-based arguments in *Obergefell*, but that line of thinking didn't go far with Justice Anthony Kennedy, Ball said. The benefit of legal same-sex marriage to children in those families was one the majority's justifications for its ruling.

"Justice Kennedy has four main points to make about why marriage is so important, and children were one of the four," Ball said.

He doesn't expect major changes in family law to result, but said some legal questions will crop up. For example, will nonbiological parents in same-sex marriages be the child's presumptive legal parent, as is the case in heterosexual marriages?

By contrast, Martha Ertman, a professor at the University of Maryland Francis King Carey School of Law, expects big changes to the day-to-day lives of people in same-sex marriages. "We've been at a place where there is immense complexity because the law was state-by-state, and now we have immense clarity," she said.

She offered the example of a same-sex couple from Texas who were barred from marrying in their home state and so wed in Washington. The federal government treated them like a married couple for some purposes but not others. Had they decided to split up, Texas now is obliged to grant that divorce. (The Texas Supreme Court ruled in just such a case on June 19 that the state must recognize a couple's divorce.)

The ruling will make it easier for same-sex parents to legally adopt children, and will clarify the tax picture for same-sex married couples. Depending on where they live, some couples previously could file federal taxes jointly but had to file state taxes separately, Ertman said.

"It's about the ongoing relationship between the law and the people who are governed by it," she said. "It's a big moment of change for the court to say the states can't play favorites between gays and heterosexuals."

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