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Marriage Equality, the Supreme Court, and What's Next (with transcript)

Tobias Barrington Wolff

University of Pennsylvania Carey Law School, twolff@law.upenn.edu

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University of Pennsylvania Law School

Case in Point: *Marriage equality, the Supreme Court, and what's next*

June 30, 2015

Prof. Tobias Barrington Wolff examines the historic ruling by a divided 5-to-4 Supreme Court that same-sex couples nationwide have the Constitutional right to marry, and its consequences.

EXPERT

Tobias Barrington Wolff

Professor of Law, University of Pennsylvania Law School

HOST

Eleanor Barrett

Host, Editor-in-Chief, Case in Point

Eleanor Barrett: Welcome to Case in Point, produced by the University of Pennsylvania Law School. I am your host, Eleanor Barrett.

In this episode, we will discuss the historic ruling by a divided five to four Supreme Court that same-sex couples nationwide have a Constitutional right to marry no matter where they live. Joining us today to discuss the opinion and its consequences is Professor Tobias Barrington Wolff.

Professor Wolff is a Professor of Law at the University of Pennsylvania Law School, and an expert on Constitutional Law, LGBT rights, and civil litigation. He also served as the Chair of LGBT Policy for President Barack Obama's 2008 campaign.

Tobias, thank you for joining us. Let's get started. This is obviously a momentous decision for American life and society. What was the case in front of the Court? And what's the legal reasoning behind the majority opinion?

Tobias Barrington Wolff: Well, let me just start by saying I think it's a momentous decision for a set of shared principles that define the community that we all live in. And one of the things that I have been really very touched by in the wake of the decision is how powerfully it's affected a lot of straight people who have said either I have a personal history with this issue because of friends or family members. Or, simply this has changed the way that I feel about the community that I live in because I feel like my community is living up to its ideals in some very important ways. And, so, in that respect, I think it is correct to say that it is a momentous decision in broad terms.

In very sort of concrete terms, it is not going to have much of an impact on straight couples. It's same-sex couple who are going to be immediately benefitted from it. And I mention that simply because a lot of the opposition to marriage equality has involved discussion over the years about the harm that it would do to straight couples and to their relationships, or to their marriages if same-sex couple were allowed to have equal treatment under law. And I think those arguments have been debunked over time. And, in fact, I think the debunking of those arguments, which Justice Kennedy quite explicitly repudiated in his opinion is really one of the movements forward that allowed us to be ready for the marriage equality ruling that we got from the court.

Eleanor Barrett: Well, speaking of the impact that this is going to have on same-sex couples, what are the specific legal consequences or outcomes that will occur now as a result of the opinion?

Tobias Barrington Wolff: Well, there are a whole lot of states that had, or have on the books laws that explicitly excluded same-sex couples from marrying. And those laws are not unenforceable because of the Supreme Court's decision. And what that means is that couples have access to a legal framework. And it's a legal framework that has meaning both symbolically, but also in very practical terms.

Symbolically, it is a framework that acknowledges a relationship as being worthy of respect from public authorities. And a lot of what Justice Kennedy talks about in his opinion is the equal dignity and the equal capacity for commitment and for the creation of the family that same-sex

couples exhibit. And, so, on a very – on the level of the definition of citizenship, I think this decision helps LGBT people and same-sex couples feel like they are more fully equal citizens of the United States. I mean, I will say in very personal terms, I am gay, and I feel that way in the wake of this decision.

In practical terms, what it means is that couples are going to be able to provide for each other, to provide for their kids, to have the protections that come from being a legally recognized family in the event of catastrophe, in the event of trauma, in the event of having to provide for a family member in the hospital, for example. And, also, the protections that come from marriage when – from the legal institution of marriage when a relationship ends. You know, sadly, it is the case that not all marriages are for life, even though that’s what many of us aspire towards. And part of what the legal framework of marriage does is to ensure that when a relationship ends that all of the people in the relationship are protected, and their interests are safeguarded.

Eleanor Barrett: You have referenced a couple of times, so far in our discussion, the majority opinion of Justice Kennedy. Can you just describe that in a little bit more detail for us? What was the basis, or the legal rationale for the Court’s decision?

Tobias Barrington Wolff: So, Justice Kennedy discussed two principles in his opinion. And he actually talked about them as interlocking principles. The first, as a formal matter, is what we describe as a substantive due process, or a substantive liberty principle. And colloquially, this is often referred to as the fundamental right to marry. And then the second is an equality principle. And, of course, the laws that excluded same-sex couples from marriage raised serious questions under the equal protection clause because they treated people differently depending upon their sexual orientation, or depending upon the sex of the people involved in the relationship. That’s a classification of the type that the equal protection clause is designed to scrutinize.

And, Justice Kennedy referenced both of those principles in his opinion. And it’s a very interesting fact about his opinion, I think it is fair to say that a fair amount of the opinion is dedicated to advancing the idea that the law cannot treat gay people and gay couples in a way

which deprives them of equal dignity. And in a way which denies their capacity to form family and form relationships in comparison to their straight fellow citizens.

And there are ways, I think it is fair to say in which the opinion is not as analytically rigorous as some people might like to see. But, the basic principle underlying the opinion, which Justice Kennedy says informs both the fundamental rights analysis and the equality analysis, is really this principle – it's an equal humanity principle, I think it's fair to say. And I think Justice Kennedy probably believed that a lot of the project of this opinion was to convey that basic idea that LGBT people have equal humanity and equal dignity, and I think he believed, and probably a lot of people believe that equal treatment under law flows from that basic principle.

Eleanor Barrett: It's a very powerful and moving sentiment, but as we mentioned at the outset, not every Justice on the Court fully subscribes to that principle. Can you talk a little bit about the four, I believe, dissents in the case and what their views were? What the Justices who wrote against the decision – how they came out in that way?

Tobias Barrington Wolff: Sure. So, the four Justices who dissented, the Chief Justice and Justices Scalia, Thomas, and Alito, each wrote his own opinion. And what I found most striking about those opinions is that none of them made even an attempt to talk about the real lives of real gay and lesbian people and real same-sex couples. To talk about the harm that is inflicted upon them when they are excluded from equal treatment under law. And, which, once again, doesn't just mean the symbolic status of being married under law, but also it means the entire legal framework of protections that most couples and most families take for granted and that allow them to structure a stable life together. That is what was at stake in this case. And I found it quite striking that none of the dissenters even made an attempt to talk in a serious way about how it could be justified to impose that kind of harm on an entire class of people, by conservative estimates, maybe ten million Americans. So, that's one feature of the dissenting opinions.

I will say a couple of words about each in turn. The Chief Justice's opinion was; I think in many ways, a rather patronizing opinion. There is a much remarked upon passage, which I think the Chief might come to regret in which he invokes a bunch of cultures from different parts of the

worlds in different periods in history that, to be perfectly honest, I don't think he particularly knows very much about by way of trying to say you know, who do we think we are to say that same-sex couples have a right to get married when the Han Chinese and the Kalahari Bushmen would have blanched at that idea. And that was just, I think, a little bit of a silly way to frame an argument.

But, you know, the Chief Justice talks about political legitimacy. He talks about what kinds of questions should be reserved for judges and what kinds of questions should be reserved for the legislatures. That's a perfectly valid question to ask. I don't think he does a very good job of making his case that this individual rights and equal treatment case was one that judges you know, had no role in answering.

Justice Thomas writes an opinion that represents a real repudiation of the whole idea of privacy and substantive liberty under the Constitution as an enforceable value. And that's a position he's held quite consistently, so that was no surprise. And it's a position that quite explicitly takes aim at, for example, reproductive rights and reproductive freedom for women as well as equal marriage rights for same-sex couples. So, that was no surprise.

Justice Alito talked about different conceptions of marriage and different definitions of marriage, in some sense echoing the opinion that he had written in his dissent in the Windsor decision, which was the Defense of Marriage Act case. So, once again that was no surprise.

And, finally, Justice Scalia, I don't have a lot to say about his opinion. I think it was a political document, not really a judicial document. Really, in some ways, quite unworthy of the office that he holds, to be perfectly blunt. And he was writing for the cameras, I think, much more than writing for a legal audience.

Eleanor Barrett: You mentioned Windsor, which was the last major Supreme Court case on this topic. But there are many other cases over the years that have led up to this development. I wondered if you could just give us sort of a brief overview of the history of this movement,

which was both political, but also, really, very much a legal one. And some of the court cases that have gotten us to where we are today.

Tobias Barrington Wolff: I'd be happy to, and I would be remiss if I didn't start by mentioning that the National Constitution Center in Philadelphia has a spectacular exhibit that is currently on display talking about the history of the debate and the history of the Civil Rights Movement around LGBT equality, which brings us right up to the moment of the marriage equality ruling. And, so, anyone who is in Philly, or has plans to visit Philadelphia, you should not miss the National Constitution Center.

The Court's jurisprudence around equal treatment of LGBT people, the cases that explicitly address and recognize the rights of LGBT people, there are four of those.

A case called *Romer vs. Evans* in 1996, which dealt with a state constitutional amendment in Colorado that tried to basically carve gay people out of the state constitution altogether.

The *Lawrence vs. Texas* case in 2003, which was about overruling an earlier decision in saying that you can't make use the criminal law to basically make gay people presumed felons under the law.

And, then, the *Windsor* case two years ago, which struck down the Defense of Marriage Act. And, now, the marriage case.

And those decisions built upon two lines of cases that really go back to the earlier part of the twentieth century in the Court's jurisprudence. One line of cases that deals with the idea of liberty, and that finds a substantive component to the due process clauses, protection of liberty. And those have been controversial cases. There are cases that have involved the rights of parents to direct the upbringing of their children. Cases that have involved access to contraceptives. Cases that have involved access to abortion for women. And cases that have involved marriage – marriage – restrictions on marriage that were placed on people who were in arrears in child

support. Restrictions on marriage that were placed on people who were incarcerated, and so forth.

The second line of cases are equal protection equality cases. And these are cases that once again go back to the early part of the twentieth century and recognize that arbitrary imposition of unequal treatment is what the equal protection clause was designed to scrutinize. And cases involving race discrimination, cases involving sex and gender discrimination, very much some of the lineal antecedents of the Marriage Equality ruling.

And, then, there is a ruling that a lot of people know about from 1967, the Loving vs. Virginia case, which was the case in which the Court struck down interracial marriage restrictions. And that's a case that actually brings together both of these lines of reasoning. It's a case that was based in large part on the equal protection clause and the idea that white supremacist ideology is not a proper basis for any kind of state regulation, which, of course, is what these interracial marriage restrictions were all about.

But, it about the fundamental right to marry, and it talked about the interrelationship between substantive liberty rights and equal treatment. And that actually is a lot of what Justice Kennedy winds up discussing in his opinion is the interrelationship between those two principles.

Eleanor Barrett: Well, speaking of the development in the law, and you brought us up to the present very nicely with this historical discussion. Let's talk for a minute about the future going forward. As you know, I am sure, some state officials have expressed resistance to the Court's ruling. What's happening and how do you see this playing out over the next weeks and months?

Tobias Barrington Wolff: There is going to be a small period, a short period of implementation of the Supreme Court's decision. And some states, a handful of states, I think not many, are going to try to delay the implementation of the actual holding of the Court.

What we are seeing, and we have been seeing this since long before the Court's ruling, is attempts to use religion as a basis for authorizing people to engage in various forms of

discrimination. And one of the most striking examples which came out of the State of Texas just yesterday was an opinion that was issued by the Attorney General of Texas saying that state officials, state employees – county clerks, justices of the peace – are allowed to single out same-sex couples and basically tell them to go to another window because particular county clerks or particular justices of the peace have religious objections to service them equally at state offices.

And that's really quite a shocking proposition that people coming to the offices of their government that they pay with, with their tax dollars, can tell them we don't serve – I'm not going to serve people like you because I have religious objections to people like you. That's quite striking. And if Texas really sticks to the idea that they are allowed to authorize that kind of discrimination, I think that is one of the areas that we are going to see a lot of intense focus.

Eleanor Barrett: Is there anything – you know, you described the state objection, which I think quite properly is a pretty broad and surprising objection. But is there anything to this religious liberty objection more broadly? We've heard it argued, not just from sitting state officials, but also from politicians, including prominent politicians who are running for office. Is there any merit to any of the discussions about religious liberty? And what role does that have to play in the legal debate going forward?

Tobias Barrington Wolff: Well, it is certainly the case that there is an established principle of religious liberty that says that churches and pastors and other ministers can never be forced to perform religious ceremonies in violation of their belief system. And, it's actually an unfortunate fact that a lot of judges and political figures who oppose equal treatment for same-sex couples muddy the waters on this a little bit and create uncertainty among people about whether a marriage equality ruling means that suddenly ministers are going to be forced to perform religious wedding ceremonies.

And it is very well established that that cannot happen. Of all people, Justice Scalia, during the oral argument of the Obergefell case, the marriage equality case, he, himself muddied the waters on this question, and he knows very well that there is no merit to it. Once again, I think he was

playing to the cameras a bit. But that's a core of religious liberty that simply can't be intruded upon.

The other question, which has been debated a lot particularly in the wake of the proposed legislation in Indiana that we saw a big response to some months ago. The other question is what about in the public marketplace? What about when you have businesses that serve the general public and that are subject, at least sometimes, to anti-discrimination laws saying you can't turn away customers based upon their race or based upon their sex? Can a business owner say oh, but if my reason for wanting to turn away people of color or to turn away customers is that I have religious objections to providing goods and services to those people, does that then give them a special prerogative to violate anti-discrimination laws where otherwise they wouldn't be able to?

And I think the answer to that question should be no. I think that the public marketplace is a place where we should all approach each other as equals. And that the kinds of exclusionary policies that people have said they want to defend are the prerogative of religious institutions, that is to say, churches and other private religious institutions. But that when you make yourself a participant in public commerce, you have to be subject to certain rules. And one of those rules is not turning people away based upon impermissible reasons.

Eleanor Barrett: With this ruling, what are the other sort of major LGBT issues that are out there that have to do with equality? There must be many, I am sure. And what do you expect the follow-up or the fallout from this decision to be in the fight towards greater equality?

Tobias Barrington Wolff: Yeah, there is a lot more work to be done. And the first area, appropriately, that we can talk about is, in fact, anti-discrimination laws. You know many people assume, understandably that it is illegal to discriminate in the workplace or in the public marketplace against gay, lesbian, bisexual, or transgender people. In many, many places that turns out not to be true. We don't have any federal law that prohibits discrimination in public accommodations in the marketplace against LGBT people. And we don't have laws like that in most states either, including Pennsylvania, by the way. Pennsylvania, where you and I live and

work, is a state where, as far as state law is concerned, any business or any workplace can fire or turn away people based upon being gay, lesbian, bisexual, or transgender.

And this is kind of shocking because what it means is, say you are a gay couple in Texas, and you take advantage of the ruling of the Supreme Court last week, and you get married. And you show up at work the next day, and you let the HR department know that you just got married because you want to include your spouse on your benefits package, for example. You can be fired. You can be fired for being gay in Texas unless you happen to live in one of the cities that has a local city ordinance that prohibits that kind of discrimination. So, that's going to be a very big issue.

And then when we address the issue of discrimination in the workplace and the marketplace that will go a long way towards helping to – helping to solidify the equal status of LGBT citizens. But you know we've had laws barring discrimination in the workplace and the marketplace on the basis of race for over 50 years. And we have had workplace discrimination laws that bar gender and sex discrimination for over 50 years. And nobody thinks that those issues are done. I think we are always going to have to be talking about the actual lived experience of people and whether they are being treated equally in fact and not just in theory.

Eleanor Barrett: Tobias, thank you so much for your insight. Is there anything else that you would like to tell us about the case or about your experience since the decision came down?

Tobias Barrington Wolff: I guess the only thing I will say that we haven't already covered is, and I think I mentioned this earlier, I have been just blown away by the breadth and the enthusiasm of the response to this ruling, not just in LGBT quarters, or LGBT households, but in the general population. I mean obviously, there is still some disagreement about this issue, but lots and lots of people reacted to last Friday's ruling by saying this is what my country is all about. And we saw public monuments and buildings lit up with garish rainbow-colored lights in celebration of the ruling. And that, I must say I have been doing this work for a long time, and that was really the first time in the wake of the decision that it started really hitting me on an emotional level. It's been very touching.

Eleanor Barrett: Well, that's wonderful. Thank you so much for sharing your experience and your expertise with us.

Tobias Barrington Wolff: My pleasure, thank you.

Eleanor Barrett: And thank you for joining us on Case in Point.

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