Roberts at 10:

John Roberts and LGBT Rights – The Jury is Still Out

By Judith E. Schaeffer

I. Overview

Like most of the "snapshots" that are part of CAC's yearlong "Roberts at 10" project examining Chief Justice Roberts's first decade on the Court, this one focuses on a substantive area of the law – LGBT rights. In January, the Court agreed to review the decision by the United States Court of Appeals for the Sixth Circuit upholding state laws and constitutional amendments denying marriage equality to same-sex couples (hereafter "*Obergefell*"),[1] virtually guaranteeing that this Term will be one of the most momentous in Roberts's tenure, if not Court history. Notably, the Sixth Circuit's decision was at odds with that of every other appellate court that has ruled on marriage equality since the Supreme Court's 2013 decision in *United States v. Windsor* striking down the provision of the "Defense of Marriage Act" ("DOMA") excluding lawfully married same-sex couples from the definition of marriage for all purposes under federal law.[2] Given the pendency of *Obergefell*, this snapshot focuses on marriage equality; as it happens, this is also the one area directly involving the rights of members of the LGBT community in which the Roberts Court has already decided other cases. This snapshot will also touch on the next big issue involving LGBT rights the Roberts Court is likely to confront – the claims by opponents of equality that they have a religious liberty right to deny business, commercial or other services to same-sex couples and other members of the LGBT community, or to otherwise discriminate against them.

As discussed in greater detail below, the Roberts Court has decided two cases related to marriage equality: *Windsor* and *Hollingsworth v. Perry*,[3] which involved a challenge to California's Proposition 8, a state constitutional amendment that barred same-sex couples from marriage. The Court's decision in *Windsor* striking down a key part of DOMA was 5-4, with Chief Justice Roberts among the dissenters. *Perry* was another 5-4 ruling, this time with Roberts writing the Court's opinion. The Court decided *Perry* on standing grounds, leaving in place a District Court decision invalidating Proposition 8 and thus effectively paving the way for marriage equality in California.

Both *Perry* and *Windsor* have been hugely important in the efforts to achieve marriage equality nationwide. *Windsor* in particular has been the catalyst over the past two years for a

[1] *DeBoer v. Snyder*, *Obergefell v. Hodges, Tanco v. Haslam,* and *Bourke v. Beshear,* 772 F.3d 388 (6th Cir. 2014), *cert. granted* (respectively), 135 S. Ct. 1040, 135 S. Ct. 1039, 135 S. Ct. 1040, 135 S. Ct. 1041 (2015).
[2] 133 S. Ct. 2675 (2013).
[3] 133 S. Ct. 2652 (2013).

series of decisions by lower courts across the country striking down state laws that prohibit same-sex couples from marrying. As a result, same-sex couples now enjoy the freedom to marry in nearly 40 states and the District of Columbia. This enormous progress, however, has been achieved in large measure over the dissent of Chief Justice Roberts. Had Roberts had his way in *Windsor*, DOMA would still be good law, same-sex couples legally married under state law would still be denied federal rights and benefits, and the recent explosion of marriage equality rulings in the lower courts would not likely have occurred, certainly not this quickly.

As important as *Windsor* has been, however, the Court did not decide the ultimate question of whether the Fourteenth Amendment prohibits states from denying same-sex couples the freedom to marry, a question now before the Court in *Obergefell*. Chief Justice Roberts took great pains in his *Windsor* dissent to underscore that the Court had left that question open, and signaled to the lower courts – largely unsuccessfully as it turns out – how not to take *Windsor* to its logical next step. Whether the cramped view of equal protection displayed in Roberts's *Windsor* dissent or a more fulsome recognition of the fundamental right to marry that Roberts displayed in his confirmation hearing (discussed below) will determine his vote in *Obergefell* is of course unknown. Also unknown is the significance of the fact that Roberts has not dissented, at least not publicly, from the Court's decisions this Term not to review or stay a number of lower court rulings invalidating discriminatory state marriage laws, allowing marriage equality to flourish in additional states. What is known is that *Obergefell* will be a defining moment – good or bad – for the Roberts Court and its application of the Fourteenth Amendment's guarantees of liberty and equality to all persons. And if the Court rules that states may not bar same-sex couples from marriage, the decision will be one of the Roberts Court's greatest legacies. Which side of that legacy John Roberts himself will be on remains to be seen.

II. Confirmation Hearing

At then-Judge Roberts's Supreme Court confirmation hearing before the Senate Judiciary Committee in September 2005, LGBT rights as such was not a topic of significant questioning, although then-Senator Russ Feingold (D-Wis.) did specifically ask Roberts, "Do you believe that the Congress has the power under the Constitution to prohibit discrimination against gays and lesbians in employment?"[4] Roberts declined to answer, stating that "I think personally I believe that everybody should be treated with dignity in this area, and respect. The legal question of Congress's authority to address that though is one that could come before the courts, and so I should be –." Senator Feingold interjected, "Can you imagine an argument that would be contrary to that view?" Roberts replied, "Well, I don't know what arguments people

[4] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 360 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html (hereafter *Confirmation Hearing*).

would make. I just know that I shouldn't be expressing an opinion on an issue that could come before the Court."[5]

There was, however, a very interesting colloquy that Roberts had during his hearing with then-Senator Joe Biden (D-Del.) concerning the protection of liberty interests – fundamental rights – by the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has explained, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[6] A key issue in cases in which a person claims a violation of her fundamental rights is how the right is defined – is it a right defined so narrowly by the facts of the case that it can only be considered a new right (not one "deeply rooted" – in history or tradition), or does it fall within the scope of a more longstanding and recognized right?

Senator Biden's questions focused on how a court goes about identifying the right at stake, and Roberts's answers may shed some light on how he will analyze the arguments in *Obergefell* that state laws prohibiting same-sex couples from marrying impermissibly violate the couples' fundamental right to marry. As the hearing transcript quoted below shows, Roberts interestingly built his reply around the Supreme Court's 1967 decision in *Loving v. Virginia*, in which the Court struck down the laws of the 16 states that still prohibited interracial couples from marrying.[7] The Court's ruling had two independent bases in the Fourteenth Amendment: that the laws were racially discriminatory in violation of the Equal Protection Clause, and that they denied interracial couples the fundamental right to marry, impermissibly infringing on the liberty interest protected by the Due Process Clause.[8] It was the second basis for the Court's holding that Roberts addressed.

---

[5] *Id.* The late Senator Arlen Specter (R-Pa.), then Chairman of the Judiciary Committee, asked Roberts about assistance he had given while at Hogan & Hartson (where he had been a partner and noted Supreme Court advocate) to those challenging Colorado's Amendment 2 in *Romer v. Evans*, 517 U.S. 620 (1996), a state constitutional amendment that barred any governmental entity in Colorado from prohibiting discrimination against gay men, lesbians, or bisexuals. (In a 6-3 ruling, the Court held that Amendment 2 violated the Equal Protection Clause.) Senator Specter referenced statements made by the firm's former *pro bono* director asserting that Roberts must not have found anything that had "so personally offend[ed] [him]" that he would not assist in the matter. *Id.* at 148. Roberts's reply to Senator Specter made clear that nothing should be gleaned from his assistance on *Romer.* According to Roberts, "I was asked frequently by other partners to help out particularly in my area of expertise, often involving moot courting, *and I never turned down a request*. I think it's right that if it had been something morally objectionable, I suppose I would have, but it was my view that lawyers don't stand in the shoes of their clients, and that good lawyers can give advice and argue any side of a case. And as I said, I was asked frequently to participate in that type of assistance for other partners at the firm, *and I never turned anyone down*." *Id.* at 149 (emphasis added).

[6] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation omitted).

[7] 388 U.S. 1 (1967).

[8] In the past two years, *Loving* has been relied on by numerous lower courts in decisions invalidating state laws prohibiting same-sex couples from marrying. *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1209-11 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *Searcy v. Strange*, 2015 WL 328728, at *4 (S.D. Ala., Jan. 23, 2015); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014).

Senator Biden introduced his questions with a reference to a case called *Michael H. v. Gerald D.*,[9] in which Justice Scalia had authored a plurality opinion arguing that asserted fundamental rights had to be defined at the most specific level of generality (an assertion rejected by a majority of the Justices), and then proceeded more generally:

> Sen. Biden: So, Judge, how do you – I am not asking you about a case. How do you – do you look at the narrowest reading of whether or not such an asserted right has ever been protected, or do you look at it more broadly? What is the methodology you use?
>
> Judge Roberts: I mean, I think you're quite right that that is quite often the critical question in these cases, the degree of generality at which you define what the tradition, the history, and the practice you're looking at. *The example, I think, that I've always found it easiest to grasp was* Loving v. Virginia*. Do you look at the history of miscegenation statutes, or do you look at the history of marriage?*
>
> * * *
>
> Judge Roberts: [T]he Court has precedents on precisely that question, about how you should phrase the level of generality. And you look at –
>
> Sen. Biden: But which precedent do you agree with? There are competing precedents.
>
> Judge Roberts: *Well, you do not look at the level of generality that is the issue that's being challenged. So, for example, in* Loving v. Virginia*, if the challenge is, it seems to me – and this is what the Court's precedents say. If the challenge is to miscegenation statutes, that's not the level of generality because you're going to answer it's completely circular.*
>
> Sen. Biden: But that is specific, Judge. The generality was the right to marry. That is the generality.
>
> Judge Roberts: Well, that's what I'm saying. The dispute is do you look at it at that level of specificity or broader. And I'm saying *you do not look at the narrowest level of generality, which is the statute that's being challenged, because obviously that's completely circular.* You are saying there is obviously that statute that's part of the history. So you look at it at a broader level of generality.[10]

It is significant that Roberts volunteered *Loving* as exemplifying not only the nature of the issue confronting a court dealing with an asserted fundamental right, but the correct methodology the court should use in identifying the right. Roberts's analysis tracked an important concurring opinion in *Michael H.*, authored by Justice O'Connor and joined by Justice

[9] 491 U.S. 110 (1989). In *Michael H.*, the biological father of a girl born when her mother was married to another man claimed that a state law presuming the girl was a child of the marriage violated his fundamental rights. In a 5-4 ruling, the Court rejected that claim.

[10] *Confirmation Hearing*, *supra* note 4, at 329-30 (emphasis added).

Kennedy, which asserted that Justice Scalia's "level of generality" argument could not be squared with *Loving*. As Roberts explained, it would have been completely circular for the Court in *Loving*, confronted with laws prohibiting interracial couples from marrying, to look only at the "history of miscegenation statutes." After all, the very existence of those laws suggests that there was no "deeply rooted" tradition of "interracial marriage." The correct inquiry, as Roberts further explained (and as is evident from the Court's decision), was to focus on the more general "right to marry." This should be pertinent in *Obergefell*, as opponents of marriage equality for same-sex couples have argued that gay men and lesbians are seeking a *new* right – a right to marry a person of the same sex – that is different from the "right to marry" and not "deeply rooted in this Nation's history and tradition."[11] If Chief Justice Roberts is true to his confirmation hearing testimony, he will reject that approach as too narrow.

III. LGBT Rights During John Roberts's First Decade on the Court

In the nearly ten years that John Roberts has served as Chief Justice, the Court has decided a handful of cases that involved issues of particular interest or importance to members of the LGBT community (and to others as well), but that did not directly involve LGBT rights and did not shed meaningful light on how Roberts would apply the Constitution to cases directly involving the rights of LGBT people.[12] However, as noted above, the Roberts Court has decided two major cases that directly raised issues pertaining to marriage equality, *Hollingsworth v. Perry* and *United States v. Windsor*. Both were argued during the same week in March 2013, and both were decided on June 26, 2013, the last day of the Court's October 2012 Term.

Chief Justice Roberts's preferred outcome in both *Perry* and *Windsor* was to have the Court avoid deciding the marriage equality issues presented. In each case, Roberts voted that the Court lacked jurisdiction and could not properly rule on the merits; he was successful in commanding a majority in *Perry*, but not in *Windsor.*

Perry was a challenge to California's Proposition 8 ("Prop 8"), a ballot measure that had amended the state Constitution to define marriage as between a man and a woman,

[11] Brief for Respondent at 36-37, *Obergefell v. Hodges*, No. 14-556 (U.S. Mar. 27, 2015).

[12] *See, e.g.*, *Doe v. Reed*, 561 U.S. 186 (2010) (in a case arising out of a state Public Records Act request for disclosure of petitions to place a referendum on the ballot putting to a popular vote a state law expanding "the rights and responsibilities" of same-sex domestic partners, Roberts wrote the Court's opinion holding that disclosure of referendum petitions in general does not violate the First Amendment); *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam) (5-4 ruling [with Roberts in the majority] staying the broadcast of the trial in the Proposition 8 case because it appeared that the lower courts had not followed appropriate procedures before changing their rules to allow the broadcast); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (Roberts wrote the Court's 8-0 opinion [Justice Alito took no part in the case] holding that the "Solomon Amendment" – which conditioned a university's receipt of federal funds on a school's provision of equal access to military recruiters – did not violate the First Amendment rights of law schools that sought to bar military recruiters because of the military's then-anti-gay policies). Another case decided by the Roberts Court, *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010), is discussed below in connection with future disputes involving LGBT rights likely to come before the Court.

overturning a state Supreme Court ruling that had struck down state statutory law limiting marriage to opposite-sex couples.[13] State officials declined to defend Prop 8 in *Perry*, and the official proponents of the ballot measure intervened to do so. After a 12-day bench trial, District Judge Vaughn Walker ruled in *Perry* that Prop 8 violated the Fourteenth Amendment, and enjoined the state from enforcing it.[14] The state did not appeal, but the Prop 8 proponents did. The Ninth Circuit held that the proponents had standing to appeal, and affirmed the District Court's judgment on the basis of the Supreme Court's ruling in *Romer v. Evans*.[15] The Prop 8 proponents successfully petitioned the Supreme Court to hear the case.

In a 5-4 ruling, with Chief Justice Roberts writing the Court's opinion, the Court held that the Prop 8 proponents lacked standing to appeal Judge Walker's ruling that Prop 8 was unconstitutional. The division among the Justices crossed ideological lines; Roberts was joined in his majority opinion by Justices Ginsburg, Breyer and Kagan, as well as by Justice Scalia, while Justices Thomas, Alito, and Sotomayor joined a dissent by Justice Kennedy. According to Roberts, the Prop 8 proponents lacked the requisite "'direct stake' in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law."[16] This "'generalized grievance,' no matter how sincere, [was] insufficient to confer standing."[17] The Supreme Court's decision vacated the Ninth Circuit's ruling, leaving the District Court's order invalidating Prop 8 intact. While this effectively restored marriage equality to California – a huge victory for gay men and lesbians in that state – this result occurred without a Supreme Court ruling on the merits that was the ultimate goal of the Prop 8 challengers.

Windsor, an equal protection challenge to Section 3 of DOMA, which prohibited federal recognition of the marriages of same-sex couples legally married under state law, also presented jurisdictional questions, as the United States, the defendant in the case, agreed with the plaintiff, Edie Windsor, that Section 3 was unconstitutional and declined to defend it. In response, the Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives intervened in *Windsor* to defend DOMA. The District Court ruled that Section 3 was unconstitutional, and the Second Circuit affirmed that ruling.[18] In agreeing to review the case, the Supreme Court requested argument not only on the merits but also on whether "the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case."[19]

---

[13] *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
[14] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).
[15] *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). As noted in footnote 5 above, the Court in *Romer* struck down a Colorado state constitutional amendment that barred any governmental entity in the state from prohibiting discrimination against gay men, lesbians, or bisexuals based on their sexual orientation, withdrawing legal protections that members of the LGBT community had enjoyed in various municipalities in the state.
[16] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).
[17] *Id.*
[18] *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd,* 699 F.3d 169 (2d Cir. 2012).
[19] *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

As he had in *Perry*, Chief Justice Roberts voted in *Windsor* that "this Court lacks jurisdiction to review the decisions of the courts below."[20] This time, however, only two other Justices (Scalia and Thomas) agreed with him, and the Court proceeded to rule on the merits. In a blockbuster 5-4 decision, the Supreme Court affirmed the lower courts, holding that DOMA's exclusion of legally married same-sex couples from the definition of marriage for purposes of federal law violated their equal protection rights. Justice Kennedy wrote the Court's opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. As Justice Kennedy explained, Section 3 of DOMA had placed married same-sex couples "in an unstable position of being in a second-tier marriage."[21] Citing *Lawrence v. Texas*,[22] one of the Court's seminal gay rights decisions,[23] Justice Kennedy observed that this "differentiation demeans the couple, whose moral and sexual choices the Constitution protects,"[24] and detailed the significant ways in which DOMA burdened the lives of married same-sex couples and harmed their children.

The ruling in *Windsor* prompted three separate dissents, including a solo dissent by Chief Justice Roberts. Roberts's dissent was not limited to an expression of his disagreement with the majority on jurisdiction. Instead, Roberts proceeded immediately to state his opinion that Section 3 of DOMA was constitutional. According to Roberts, however, the purpose of his dissent was to underscore that the Court was not deciding the ultimate question of marriage equality – that is, it was not deciding the constitutionality of state laws barring same-sex couples from marriage. In Roberts's words, he had written his dissent "only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve . . . a question that all agree, and the Court explicitly acknowledges, is not at issue."[25]

In his dissent, Roberts explained why the majority's analysis did not lead in his view any further than it did (to a ruling on DOMA), asserting that the "logic of its opinion does not decide" whether "the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."[26] In particular, Roberts claimed it "undeniable" that the majority's "judgment is based on federalism,"[27] even though the majority opinion held Section 3 of DOMA unconstitutional as a violation of the right to equal protection implicit in the Fifth Amendment's Due Process

[20] *Id.* at 2696 (Roberts, C.J., dissenting).
[21] *Id.* at 2694 (majority opinion).
[22] 539 U.S. 558 (2003).
[23] In *Lawrence*, the Court overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), and invalidated state laws prohibiting sexual intimacy between adults of the same sex as a violation of their liberty interests protected by the Fourteenth Amendment. In an angry dissent, Justice Scalia predicted that the Court's constitutional analysis would invalidate state laws prohibiting same-sex couples from marrying. According to Justice Scalia, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution,'?" *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (citation omitted).
[24] *Windsor*, 133 S. Ct. at 2694.
[25] *Id.* at 2697 (Roberts, C.J., dissenting).
[26] *Id.* at 2696 (Roberts, C.J., dissenting) (citation omitted).
[27] *Id.* at 2697 (Roberts, C.J., dissenting).

Clause.[28] To the extent Roberts's dissent was intended as a roadmap for lower court judges as to why *Windsor* was not the penultimate step toward resolution of the ultimate marriage equality question, it was an abject failure, as court after court has relied on *Windsor* in striking down state bans on same-sex marriage (a reading of *Windsor* that Justice Scalia had predicted in his own dissent).[29]

Nonetheless, it is certainly possible to view Roberts's dissent as more than an exercise in recounting what was not decided in *Windsor*; quite possibly Roberts was carving out space for himself to decide the ultimate question however he might want, whenever the issue was squarely presented to the Court in a future case. By writing separately to emphasize that *Windsor* was not a decision on that ultimate question, and by carefully taking no position on that question, Roberts preserved a clean slate for himself for that future case. (In sharp contrast, the other dissenters – Justices Scalia, Thomas, and Alito – made it quite clear where they stand when it comes to marriage equality.[30])

To be sure, in *Windsor*, Roberts said he agreed with Justice Scalia that "Congress acted constitutionally" in passing DOMA, citing "[i]nterests in uniformity and stability" as amply justifying "Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."[31] However, while Roberts joined the portion of Justice Scalia's dissent dealing with the jurisdictional issue, he *did not join* the portion of Scalia's dissent addressing the merits. Perhaps this was merely Roberts, as Chief Justice, distancing himself only from the vitriol that has become a hallmark of a Scalia dissent whenever the rights of gay people are involved, while still making it clear that he viewed DOMA to be constitutional. If that's the case, then as far as the rights of gay men and lesbians are concerned, John Roberts may well just be a kinder, gentler Antonin Scalia.

But perhaps it was not that. Perhaps Roberts's decision not to join the merits portion of Justice Scalia's dissent was Roberts doing as little as possible to associate himself with particular views about the legitimacy of marriage discrimination, again keeping his options open for the

---

[28] Justice Kennedy could not have been more explicit: "What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *Id.* at 2695 (majority opinion). Even Justice Scalia acknowledged that the Court's ruling was not based on federalism, writing in his dissent that "the opinion starts with seven full pages about the traditional power of States to define domestic relations – initially fooling many readers, I am sure, into thinking that this is a federalism opinion." *Id.* at 2705 (Scalia, J., dissenting).

[29] *Id.* at 2709 (Scalia, J., dissenting).

[30] *See id.* at 2714 (Alito, J., dissenting, joined by Thomas, J.) ("Same-sex marriage presents a highly emotional and important question of public policy – but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage."); *id.* at 2707 (Scalia, J., dissenting) ("It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.").

[31] *Id.* at 2696 (Roberts, C.J., dissenting).

next case. Moreover, and as noted above, it was Roberts who wrote the opinion in *Perry* concluding that the Court had no authority to decide the case. Although that opinion thus did not decide whether Prop 8 was constitutional, it did allow the District Court decision holding Prop 8 to be unconstitutional to remain in place, thereby permitting same-sex marriages to go forward in California.

Since then, a great deal has happened. Relying on *Windsor*, lower court after lower court has concluded that state bans on same-sex marriage are unconstitutional. And last fall, at the start of its new Term, the Supreme Court, to the surprise of many Court watchers, denied seven separate requests to review appellate court rulings from three different Circuits striking down discriminatory state marriage laws, clearing the way for marriages of gay and lesbian couples to proceed in all of the states within the jurisdiction of those courts.[32] While there is no way to know of course how Chief Justice Roberts voted on those petitions for review (since those votes are not public), there is at least some reason to believe that he might have voted not to hear the cases. Since it takes the votes of only four Justices for review to be granted, the four dissenters in *Windsor* could have ensured review of those appellate rulings. Justices Scalia, Thomas, and Alito all made clear in *Windsor* their view that state laws denying same-sex couples the freedom to marry are constitutional; it is thus not unreasonable to assume that they would have wanted to review lower court decisions invalidating such laws. If that assumption is correct (and again, this is not publicly knowable), then Chief Justice Roberts voted not to review those cases and thus effectively to allow same-sex couples to marry in additional states around the country – an act that commentators at the time widely recognized would make it much more difficult for the Court to uphold state marriage bans in the future.[33]

In addition, the Court has since denied requests to stay rulings striking down discriminatory marriage laws in other states, allowing same-sex marriages to go forward in additional parts of the country.[34] Justices Scalia and Thomas have both dissented from those denials – noting that the Court's "acquiescence may well be seen as a signal of the Court's intended resolution" of the question[35] – but Chief Justice Roberts has not.[36] He has either

[32] *Bostic v. Schaefer*, *Bostic v. Rainey*, and *Bostic v. McQuigg*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* (respectively), 135 S. Ct. 308, 135 S. Ct. 286, 135 S. Ct. 314 (2014); *Baskin v. Bogan* and *Wolfe v. Walker*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

[33] As University of Michigan law professor Samuel Bagenstos put it: "'If and when [another Circuit] goes the other way, the Court will grant [review] then,' . . . . 'But it seems to me unthinkable that the Court will rule against a right to marriage equality after allowing the decisions to go into effect in the Fourth, Seventh, and Tenth Circuits in the face of an active defense of the state laws forbidding same-sex marriage.'" Paul Waldman, *Legal argument over gay marriage is all but over*, Wash. Post, Oct. 6, 2014, http://www.washingtonpost.com/blogs/plum-line/wp/2014/10/06/legal-argument-over-gay-marriage-is-all-but-over/.

[34] *See Searcy v. Strange,* No. 14-0208-CG-N, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015), *stay denied,* 135 S. Ct. 940 (2015); *Brenner v. Scott,* 999 F. Supp. 2d 1278 (N.D. Fla. 2014), *stay denied sub nom. Armstrong v. Brenner,* 135 S. Ct. 890 (2014).

[35] *Strange v. Searcy*, 135 S. Ct. 940, 941 (2015) (Thomas, J., dissenting from denial of stay application, joined by Scalia, J.).

voted not to block those rulings and thus to let same-sex marriages proceed, or at least chosen not to have any dissent publicly noted. To be sure, Justice Alito has not publicly dissented either, and, given *Windsor*, it's far more difficult to imagine him ruling in favor of marriage equality, but still this provides some reason to think that Chief Justice Roberts's vote in *Obergefell* might not be a foregone conclusion.

Of course, that Roberts could not see his way to joining the majority in *Windsor* makes it difficult to understand how he might conclude that state prohibitions on same-sex marriage are unconstitutional, particularly under the Equal Protection Clause. Still, Roberts issued a separate dissent in *Windsor* to assert that the question remained an open one, and his confirmation hearing testimony about *Loving* certainly gives him jurisprudential space to find that the state laws at issue in *Obergefell* impermissibly restrict the fundamental right to marry. In *Loving*, the Court described marriage as "one of the 'basic civil rights of man,'" and noted that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[37] From these premises, it followed that "[t]o deny this fundamental freedom" on racial grounds violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[38] As numerous lower courts have recognized, same-sex marriage bans are simply the modern analogue of interracial marriage bans, and they violate the Constitution for the same reason. As Seventh Circuit Judge Richard Posner, for example, wrote in an opinion striking down same-sex marriage bans in Wisconsin and Indiana, the argument that tradition supported the bans "runs head on into *Loving*."[39] Particularly given his confirmation hearing testimony, Chief Justice Roberts should conclude the same thing in *Obergefell*.

IV. A Brief Look Ahead

However the Court ultimately rules in *Obergefell*, opponents of marriage equality have already opened up a second front, claiming a religious liberty right to discriminate against same-sex couples in ordinary commerce and the delivery of business and government services. In addition to reported instances in which commercial businesses have refused to provide their services to same-sex couples,[40] conservative legislators in states around the country have begun introducing bills that would authorize religious objectors (including government officials)

---

[36] *See Searcy,* 2015 WL 328728, *stay denied,* 135 S. Ct. 940 (2015); *Brenner,* 999 F. Supp. 2d 1278, *stay denied sub nom. Armstrong v. Brenner,* 135 S. Ct. 890 (2014).

[37] 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

[38] *Id.* at 12.

[39] *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

[40] *See, e.g.*, Zack Ford, *Oregon Bakery Found Culpable for Anti-Gay Discrimination, Could Face $150,000 Fine*, Think Progress (Feb. 3, 2015), http://thinkprogress.org/lgbt/2015/02/03/3618433/sweet-cakes-discrimination/; Sam Levine, *Washington Florist Illegally Refused to Provide Flowers for Same-Sex Wedding, Judge Rules*, Huffington Post (Feb. 18, 2015), http://www.huffingtonpost.com/2015/02/18/florist-gay-wedding-discrimination_n_6709808.html.

to deny services to or otherwise discriminate against LGBT people.[41] In the chilling words of one state legislator in Oklahoma, "They [referring to gay people] don't have a right to be served in every single store."[42] As summarized by a report in the *Washington Post*, "the fight over gay rights continues in conservative corners of the country, where legislators are advancing laws that would, intentionally or not, ensure that gay people can be refused service, fired or evicted simply for being gay."[43] Most recently, a huge public controversy erupted when Indiana Governor Mike Pence signed into law a so-called "Religious Freedom Restoration Act" that many feared would allow private businesses to discriminate against members of the LGBT community.[44] The backlash resulted in the enactment of additional legislative language prohibiting businesses from relying on the law as a defense in court for refusing to provide services based on a number of factors, including "sex, sexual orientation, [and] gender identity."[45]

Lower courts have only begun to grapple with these issues; thus far, the Supreme Court has not gotten involved, denying review last year in a highly-publicized denial-of-service case, *Elane Photograpy, LLC v. Willock*,[46] which involved the refusal by a photography business to photograph a commitment ceremony between two women. The owner of the business was "personally opposed to same-sex marriage and [would] not photograph any image or event that violates her religious beliefs."[47] The New Mexico Supreme Court held that the refusal by the business to photograph a same-sex commitment ceremony or wedding violated the state's Human Rights Act, which prohibits "public accommodations" (including a business that offers its services to the public) from discriminating on a number of bases, including sexual

[41] In Oklahoma, for example, a proposed "Oklahoma Religious Freedom Restoration Act of 2015," S.B. 440, would prohibit any governmental entity from requiring any individual or "religious entity" (defined to include "a privately-held business operating consistently with its sincerely held religious beliefs") to, among other things, "[p]rovide any services, accommodations, advantages, facilities, goods or privileges;" "[p]rovide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement;" or "[t]reat any marriage, domestic partnership, civil union or similar arrangement as valid," if it would be contrary to the person or entity's "sincerely held religious beliefs . . . regarding sex, gender or sexual orientation." In South Carolina, S. 116 would amend state law to allow any person "employed by a judge of probate or clerk of court or any other officer authorized by law to issue a marriage license" to refuse "based upon a sincerely held religious belief" to "take any action related to the issuance of a marriage license to a same sex couple." The bill would also prohibit any adverse employment action against the objecting government employee.

[42] Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. Times, Mar. 5, 2015, http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html?_r=0.

[43] Jeff Guo, *Everything you need to know about the gay discrimination wars in 2015*, Wash. Post, Feb. 25, 2015, http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/25/these-states-are-marching-ahead-with-laws-that-would-allow-gay-discrimination/.

[44] *See*, *e.g.*, Terrence McCoy, *How Hobby Lobby paved the way for Indiana's 'religious freedom' bill*, Wash. Post, Mar. 27, 2015, http://www.washingtonpost.com/news/morning-mix/wp/2015/03/27/indianas-religious-freedom-bill-and-the-ghost-of-hobby-lobby/?tid=hp_mm&hpid=z5.

[45] Eric Bradner, *Pence signs 'fix' for religion freedom law*, CNN.com (Apr. 2, 2015, 9:54 PM), http://www.cnn.com/2015/04/02/politics/indiana-religious-freedom-law-fix.

[46] 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[47] *Id.* at 59-60.

orientation. The court also rejected Elane Photography's claim that the state's Human Rights Act violated its free speech and (assuming it had any) its free exercise rights.

Although the U.S. Supreme Court chose not to hear *Elane Photography*, it seems quite likely, given the backlash against marriage equality already under way, that a case raising some aspect of these issues will ultimately be accepted for review by the Court, probably in the not too distant future. If and when the Court does hear such a case, there is good reason to be concerned about Chief Justice Roberts's vote, as Roberts has already shown great solicitude to the religious liberty objections of business owners to complying with generally applicable laws protecting others.

Last Term, in the ideologically divided 5-4 ruling in *Burwell v. Hobby Lobby*,[48] Roberts joined the Court's other conservatives in a controversial and unprecedented holding that a private, for-profit, closely held corporation is a "person" under the federal Religious Freedom Restoration Act ("RFRA") and thus has religious free exercise rights allowing it to claim an exemption from the requirement of federal law that its group health insurance plans provide its female employees with coverage for contraceptives.[49] As Justice Ginsburg explained in a powerful dissent, the Court not only had endowed for-profit corporations – non-human, artificial entities – with the religious liberty rights of human beings, but it also had allowed the religious liberty objections of those corporations to trump the federal rights of their employees, opening the door to corporate religious objections to all manner of legal requirements. The possible ramifications for LGBT people are obvious. Indeed, Justice Ginsburg's dissent cited *Elane Photography* as one of several examples of cases in which "commercial enterprises [sought] exemptions from generally applicable laws on the basis of their religious beliefs," and wondered whether RFRA would "require exemptions in cases of this ilk," "[a]nd if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not?"[50]

Also worth noting is *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of Law v. Martinez*,[51] in which Chief Justice Roberts was among the dissenters in a 5-4 ruling rejecting a First Amendment challenge to the "all comers" policy of a public law school requiring officially recognized student groups to accept as a member any student who desired to join. The lawsuit was brought by a student Christian organization that had sought to bar students based on religion and sexual orientation. The dissent (written by Justice Alito) viewed the school's policy as one of viewpoint discrimination, claimed the decision rested on the principle that there is "no freedom for expression that offends prevailing standards of political

[48] 134 S. Ct. 2751 (2014).

[49] *Hobby Lobby* is also discussed in our Roberts at 10 snapshot entitled "Roberts's Quiet, But Critical, Votes to Limit Women's Rights," available at: http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Roberts-Quiet-But-Critical-Votes-To-Limit-Womens-Rights.pdf.

[50] *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2804-05 (Ginsburg, J., dissenting).

[51] 561 U.S. 661 (2010).

correctness in our country's institutions of higher learning," and described the Court's ruling as "a serious setback for freedom of expression in this country."[52]

Hobby Lobby and *Martinez* suggest that businesses and other entities and individuals seeking to deny services to married same-sex couples or to any other members of the LGBT community on the grounds of an asserted religious objection may find a sympathetic ear in John Roberts. This is certainly something that will bear watching in the coming years of Roberts's tenure on the Court, and may well form an important aspect of his legacy in terms of the rights of LGBT people.

V. Conclusion

In the most important case involving the rights of gay men and lesbians decided to date by the Roberts Court – *United States v. Windsor* – Chief Justice Roberts dissented from a ruling that vindicated the equal protection rights of same-sex couples and that has helped bring marriage equality to a substantial majority of states. While Roberts's narrow view of equal protection in *Windsor* does not generate optimism that he will vote to protect marriage equality in *Obergefell*, his jurisprudence still leaves that possibility open. Additionally, Roberts certainly has seen what a watershed decision *Windsor* has been – a decision that is already a great legacy of his Court and one of the most rights-affirming rulings it has issued. If the *Windsor* majority takes the final step to recognize full marriage equality, will Chief Justice Roberts, undoubtedly concerned about his own legacy as well as the Court's institutional legitimacy, again be content to have such a momentous ruling issued over his dissent? Chief Justice Roberts's legacy on marriage equality is still to be fully written.

[52] *Id.* at 706, 741 (Alito, J., dissenting).