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SAME-SEX MARRIAGE 05.18.14 5:45 AM ET

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Even Conservative Judges Can't Deny the Constitutional Logic of Same-Sex Marriage

What's up with even red state judges backing same-sex marriage? The Constitution and Anthony Kennedy, basically. But watch those appeals.

Who would have thought, just a few years ago, that the states on the vanguard of marriage equality would be the deepest red states? But here we are: From December's decision in Utah to the past two weeks in Arkansas and now Idaho, we've seen a string of a dozen decisions, largely in red and purple states, each declaring bans of same-sex marriage to be unconstitutional.

How can this be happening? What was in recent memory one of the most hotly contested political and legal issues—an issue that continues to divide the parties at the state and national levels—has become a rare island of consensus in the courts. To be sure, cracks are likely to appear as the cases progress through the appellate process. But the degree to which liberal and conservative judges in red, blue, and purple states alike have agreed on this issue is stunning. What explains this turnabout?

Start with the legal reasons. Courts are implementing Justice Anthony

Kennedy's majority opinion in last year's *Windsor v. United States*, striking down the Defense of Marriage Act. Many legal commentators were frustrated that Justice Kennedy avoided the doctrinal apparatus of "tiers of scrutiny" and "levels of review." But these commentators were missing the point. Rather than hiding behind esoteric doctrinal tests, Kennedy focused directly on the core principle enforced by the constitutional guarantees of equality in the Fifth and Fourteenth Amendments—the principle of equal membership in the community.

In decades-old precedent (about a law designed to keep hippies from receiving food stamps, of all things), the Supreme Court held that "a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. Justice Kennedy's *Windsor* opinion broadened this language, equating a "bare desire to harm" with the less vindictive "purpose and effect of disapproval," or the "purpose... to impose inequality." These, he explained, are hallmarks of unconstitutional governmental action.

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Measured honestly against this standard, bans on same-sex marriage cannot stand. Although opponents of marriage equality have sought, post hoc, to layer a veneer of respectability over this purpose, everyone knows that the goal of banning same-sex marriage is precisely to express disapproval for gay and lesbian unions—and the romantic and sexual love of members of the same sex that drives them. Indeed, opponents of same-sex marriage were quite open about that goal not so long ago. Judges of many stripes rightly see that goal as flatly inconsistent with *Windsor's* understanding of equal protection.

And other arguments the states might offer are vulnerable under other legal doctrines. For example, a state could argue that marriage needs to be reserved for one man and one woman in order to facilitate or promote proper gender roles within families. But that would render the same-sex marriage ban susceptible to attack as sex discrimination—the case law is clear that states may not legitimately act on particular preferences about gender roles.

Equally or even more important are the facts on the ground. Three circumstances loom particularly large:

With so many children visibly being raised by same-sex couples (in part because below-the-radar advocacy has obtained parenting rights for one or both members of such couples), normalization of those couples' relationships

has become the “pro-child” position.

And the marriage equality movement has itself effectively broadcast a deeply non-threatening vision of same-sex marriage. The PTA moms next door, the nice men down the street—they populate thousands of wedding photos splashed across newspapers and websites since 2003’s Massachusetts Supreme Court decision striking down that state’s same-sex-marriage ban. Unlike the more transgressive—more explicitly sexual, more gender-bending—images that often accompany pride marches, say, these photos carry a palpable message of wholesomeness.

Finally, the current momentum has its own effect on judges. Nobody wants to be on the wrong side of history.

Make no mistake, though—the currently resounding judicial unanimity for marriage equality will likely be broken soon, whether in majority opinions or in dissents, as cases are heard in the federal appellate courts and remaining district courts.

Justice Scalia described the majority opinion’s justification in *Windsor* as “rootless and shifting,” because Justice Kennedy’s ideas about equality shared time with his paean to the traditional autonomy of states over family law. That leaves plenty of doctrinal room in which a judge can claim allegiance to the *Windsor* precedent but uphold a state’s same-sex marriage ban.

The final success of the marriage equality litigation campaign depends, like so many other issues in the federal courts, on Justice Kennedy. His recent plurality opinion in the Michigan affirmative action case included more than a little language praising voter initiatives, those “basic exercise[s] of... democratic power.” There are those who read this language as a subtle hint of Kennedy’s views about the same-sex marriage cases heading his way. I disagree: Kennedy seems to me far more likely to take seriously his own words in *Windsor*—more likely to extend than contract his expressed commitment to gay and lesbian equality.

In the end, marriage equality will be a constitutional requirement. The road ahead may not be as smooth as it has been these last few months. But the destination is clear—and close.

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