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Supreme Court Hands Gay Marriage a Tacit Victory

By ADAM LIPTAK OCT. 6, 2014

WASHINGTON — In a move that may signal the inevitability of a nationwide right to same-sex marriage, the Supreme Court on Monday let stand appeals court rulings allowing such unions in five states.

The development, a major surprise, cleared the way for same-sex marriages in Indiana, Oklahoma, Utah, Virginia and Wisconsin. Officials in Virginia announced that marriages would start at 1 p.m. on Monday.

The decision to let the appeals court rulings stand, which came without explanation in a series of brief orders, will almost immediately increase the number of states allowing same-sex marriage from 19 to 24, along with the District of Columbia. The impact of the move will in short order be even broader.

Monday's orders let stand decisions from three federal appeals courts with jurisdiction over six other states that ban same-sex marriage: Colorado, Kansas, North Carolina, South Carolina, West Virginia and Wyoming. Those appeals courts will almost certainly follow their own precedents to strike down those additional bans as well, meaning the number of states with same-sex marriage should soon climb to 30.

There may then be no turning back, said Walter E. Dellinger III, who was an acting United States solicitor general in the Clinton administration.

"The more liberal justices have been reluctant to press this issue to an up-or-down vote until more of the country experiences gay marriage," he said. "Once a substantial part of the country has experienced gay marriage, then the court will be more willing to finish the job."

There is precedent for such an approach. The court waited until 1967, for instance, to strike down bans on interracial marriage, when the number of states

allowing such unions had grown to 34, though it was still opposed by a significant majority of Americans.

Popular opinion has moved much faster than the courts on same-sex marriage, however, with many Americans and large majorities of young people supporting it.

Other appeals courts are likely to rule soon on yet other marriage bans, including the United States Court of Appeals for the Ninth Circuit, in San Francisco. That court has jurisdiction over nine states. If it rules in favor of same-sex marriage, as expected, it is unlikely to enter a stay, and, given Monday's developments at the Supreme Court, there is no particular reason to think the justices will.

Defenders of traditional marriage vowed to continue their fight, noting that several federal appeals courts are yet to be heard from. "The court's decision not to take up this issue now means that the marriage battle will continue," said Byron Babione, a lawyer with Alliance Defending Freedom. "The people should decide this issue, not the courts."

Sooner or later, an appeals court may uphold a state ban, and the Supreme Court may then feel required to step in. But it may find it difficult to tell thousands of newly married same-sex couples that their marriages are invalid.

The justices had earlier acted to stop same-sex marriages in Utah and Virginia, issuing stays to block appeals court rulings allowing them. Other appeals court decisions had been stayed by the appeals courts themselves.

The all but universal consensus from observers of the Supreme Court had been that the stays issued by the justices indicated that the justices wanted the last word before federal courts transformed the landscape for same-sex marriage. But in recent remarks, Justice Ruth Bader Ginsburg said there was no urgency for the court to act until a split emerged in the federal appeals courts, all of whose recent decisions have been in favor of same-sex marriage.

She has often counseled moving slowly, a lesson she said she learned from the backlash that followed Roe v. Wade, the 1973 decision that established a constitutional right to abortion. "It's not that the judgment was wrong," she has said, "but it moved too far, too fast."

The justices last agreed to hear a constitutional challenge to a same-sex marriage ban, California's Proposition 8, in December 2012. But a majority of the

justices said in June 2013 that the case was not properly before the court. That move indicated that the Supreme Court may have wanted to stay out of the fray until the number of states allowing same-sex marriage was much higher.

If the court took pains to avoid a resolution of whether there was a constitutional right to same-sex marriage in the California case, Hollingsworth v. Perry, it set the groundwork for a definitive answer in a second decision issued the same day. That ruling, United States v. Windsor, struck down the part of the federal Defense of Marriage Act that barred federal benefits for same-sex couples married in states that allowed such unions.

The decision was based on a muddle of rationales. In dissent, Justice Antonin Scalia challenged readers of Justice Anthony M. Kennedy's majority opinion to follow its "disappearing trail" of "legalistic argle-bargle."

But lower courts seemed to have no trouble understanding what the Windsor decision had to say about a constitutional right to same-sex marriage. In a remarkable and essentially unbroken line of about 40 decisions, state and federal courts have relied on Windsor to rule in favor of same-sex marriage.

In his own dissent in the Windsor case, Chief Justice John G. Roberts Jr. cautioned that the decision was a limited one, buttressing his assertion with a quotation from the majority opinion.

"The court does not have before it, and the logic of its opinion does not decide the distinct question 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," he wrote.

"We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples," he added. "That issue, however, is not before us in this case."

But lower-court judges seemed inclined to agree with Justice Scalia's assessment of where things were heading.

"By formally declaring anyone opposed to same-sex marriage an enemy of human decency," Justice Scalia wrote, "the majority arms well every challenger to a state law restricting marriage to its traditional definition."
