

5 Marriage Arguments to Watch as the Supreme Court Considers Gay Marriage

State bans on same-sex marriage have been justified based on judicial precedent, states' rights, regulating procreation, optimal child-rearing and centuries-old tradition. Those reasons also have been loudly debunked.

When it convenes on April 28 for one of the most historic oral arguments in its 226-year history, the Supreme Court will hear all of those arguments and more from five lawyers representing gays and lesbians on one side, and the states of Kentucky, Michigan, Ohio and Tennessee on the other. But the justices also will have read what dozens of federal trial and appeals court judges have written.

Here's a look at five major arguments cited by those appeals court judges in their rulings. In addition to the four Midwest states whose bans were upheld, the circuit courts struck down similar bans in Idaho, Indiana, Nevada, Oklahoma, Utah, Virginia and Wisconsin.

1. JUDICIAL PRECEDENT

The first hurdle in the gay marriage debate facing lower court judges has been what to make of a 1972 Supreme Court ruling that denied marriage rights to a gay couple in Minnesota.

The one-line summary decision in *Baker v. Nelson* upheld the state's ban on same-sex marriage "for want of a substantial federal question." At the time, marriage was seen as the exclusive purview of the states.

Because of the wealth of judicial rulings that have come in the following four decades, most federal judges have reasoned

that Baker does not tie their hands.

“Since Baker, the court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens,” the U.S. Court of Appeals for the 4th Circuit ruled in the Virginia case, *Bostic v. Schaefer*. The panel’s majority noted that the justices did not even mention the 1972 case when they struck down a key section of the federal Defense of Marriage Act in 2013.

In the case of *Obergefell v. Hodges* now before the Supreme Court, however, Judge Jeffrey Sutton of the U.S. Court of Appeals for the 6th Circuit differed with all the previous rulings. “This type of summary decision, it is true, does not bind the Supreme Court in later cases,” he wrote for his panel’s 2-1 majority. “But it does confine lower federal courts in later cases.”

2. STATES’ RIGHTS

At the heart of the case is a tug of war between the 14th Amendment’s guarantees of due process and equal protection, and the rights of states – and, by extension, voters – to make their own laws.

A majority of federal district and appeals courts have said the Constitution is paramount and have ruled for gay and lesbian plaintiffs. But the Cincinnati-based 6th Circuit disagreed. And even the Supreme Court’s 2013 decision in *United States v. Windsor*, which forced the federal government to honor legal same-sex marriages, was rendered in part as a defense of states’ rights.

“Not one of the plaintiffs’ theories ... makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters,” Sutton wrote.

While the democratic process might be a worthy goal, however,

all other appeals courts to review same-sex marriage bans have relegated it to secondary status when compared to the rights of gays and lesbians to marry. They note the Supreme Court denied states the right to prevent mixed-race couples, prison inmates and people owing child support from marrying.

"We may not deny (gays and lesbians) relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so central to personal autonomy," the U.S. Court of Appeals for the 10th Circuit ruled in *Kitchen v. Herbert*. "The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box."

3. REGULATING PROCREATION

Why did states authorize and regulate marriages in the first place? Many say it was to channel men and women into matrimony so that children would be raised by two parents. Since gays and lesbians cannot get pregnant by accident, the argument goes, they do not merit the same consideration.

"Governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse," Sutton wrote for the 6th Circuit. "By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the states created an incentive for two people who procreate together to stay together for purposes of rearing offspring."

That argument has been ridiculed by other judges as a way to penalize same-sex couples for carefully considering whether to have children, while offering financial incentives to opposite-sex couples for having children out of wedlock.

"Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry,' Judge

Richard Posner wrote for a unanimous panel of the U.S. Court of Appeals for the 7th Circuit, which struck down bans in Indiana and Wisconsin. "Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."

What's more, Posner noted that allowing gays and lesbians to marry increases the pool of married couples seeking to adopt children. And "the more willing adopters there are, not only the fewer children there will be in foster care or being raised by single mothers, but also the fewer abortions there will be."

4. RAISING CHILDREN

Opponents of same-sex marriage argue that children should be raised with a mother and father. Proponents say evidence shows that gays and lesbians do an equally good job. It's an issue that has been raised in several lawsuits, without resolution.

To date, no reputable studies have shown that same-sex parents do an inferior job raising children. Briefs have been submitted to the Supreme Court on behalf of children arguing both sides of the question, but judges mostly have agreed that the results aren't in yet.

"A state might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries," Sutton wrote for the Denver-based 6th Circuit. "A state still assessing how this has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere."

The 10th Circuit majority reasoned, however, that opposite-sex couples can be bad parents, too – making it wrong to discriminate against gays and lesbians only. Similarly, the San Francisco-based 9th U.S. Circuit Court of Appeals ruled in cases from Idaho and Nevada that same-sex marriage bans

penalized some potential parents while rewarding others who did not deserve it.

"A man and a woman who have been convicted of abusing their children are allowed to marry; same-sex partners who have been adjudicated to be fit parents in an adoption proceeding are not," the unanimous panel said.

5. HISTORY AND TRADITION

In the legal profession, great weight often is given to the argument: It has always been thus.

That was a major reason why the Supreme Court last year upheld an upstate New York town's practice of allowing mostly Christian clergy to deliver opening prayers at government meetings. Lawmakers had been praying, the justices reasoned, since the founding of the republic.

Thus did Sutton base part of his reasoning in the 6th Circuit gay marriage case on tradition. "From the founding of the republic to 2003, every state defined marriage as a relationship between a man and a woman," he wrote.

But other appeals court judges reasoned that if history and tradition were a guide, the Supreme Court would not have reversed common practice in 1967 and struck down state bans on interracial marriage in the landmark case *Loving v. Virginia*.

"To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so," the 10th Circuit majority wrote in the Utah case. "One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage."

Posner, in the unanimous 7th Circuit case, said tradition cannot be grounds for discrimination no matter how long a practice has been in effect.

"If no social benefit is conferred by a tradition, and it is written into law, and it discriminates against a number of people and does them harm beyond just offending them, it is not just a harmless anachronism," he wrote. "It is a violation of the equal protection clause."