

Supreme Court to decide the fate of same-sex marriage

14 March 2013, by Andrea Alexander



Protest against the passage of Proposition 8 in California banning gay marriage.

The Supreme Court will hear arguments later this month in two separate cases that could pave the way for federal recognition of same-sex marriages, while also overturning state restrictions that deny same-sex couples the right to wed. Supporters of marriage equality argue that denying same-sex couples the right to marry violates the Constitution's guarantee of equal protection under the law. The Supreme Court will hear the cases on March 26 and 27 and is expected to issue its opinions in June.

Carlos Ball, a professor at Rutgers School of Law–Newark, has written several books on LGBT issues including *The Right to Be Parents: LGBT Families and the Transformation of Parenthood* (NYU Press, 2012). Ball argues that granting same-sex couples the right to marry is an issue of equality and fairness.

Rutgers Today: What issues is the court being asked to consider?

Ball: The [Supreme Court](#) will hear two cases. The first lawsuit, *Windsor v. United States*, addresses the constitutionality of the Defense of Marriage Act of 1996 (DOMA), a statute that prohibits the federal government from recognizing same-sex marriages. The plaintiff is Edie Windsor, an 83-year-old woman living in New York City whose wife died in 2009. The federal government under DOMA does not consider Ms. Windsor to be a surviving spouse, which has cost her hundreds of thousands of dollars in estate taxes. After Ms. Windsor filed her lawsuit, the Obama administration announced that it would no longer defend DOMA's constitutionality. As a result, the statute is being defended by lawyers hired by the Republican leadership of the U.S. House of Representatives.

The second case, *Hollingsworth v. Perry*, was filed by two same-sex couples who are challenging the constitutionality of Proposition 8, a measure approved by California voters in 2008 prohibiting the recognition of same-sex marriages. Since California officials have refused to defend Proposition 8 in the courts, it is being defended by the measure's supporters.

What are some of the possible outcomes of the Supreme Court cases?

The Windsor case is the more straightforward one in terms of possible outcomes. The court will either uphold or strike down the Defense of Marriage Act. There are more possible outcomes in the Proposition 8 case. The outcome that would make the case one of the most important civil rights decisions ever issued by the court would be one stating that all same-sex couples, regardless of where they live, have a constitutionally-protected right to marry. But the Justices could also issue a more limited ruling by striking down Proposition 8 without finding that same-sex couples outside of California have a constitutional right to marry. The court might also, of course, hold that the Constitution does not recognize the right of same-

sex couples to marry. Finally, it is also possible that the court will not rule on the [constitutionality](#) of same-sex marriage bans and instead dismiss the case after finding that Proposition 8's proponents do not have standing to defend it in the courts. If the court chooses this alternative, then a prior trial court ruling striking down Proposition 8 will remain in place and same-sex couples in California will be free to marry.

Some prominent Republicans and President Obama have filed briefs in support of same-sex marriage. Do you think their support will sway the Supreme Court's decision?

The fact that a relatively large group of prominent Republicans has filed a brief in support of same-sex marriage shows how the center of gravity on this issue has shifted nationally in favor of marriage equality. As for the Obama administration, it is unusual for the executive branch to file a brief arguing that a federal statute (in this case, DOMA) is unconstitutional. There is no doubt that the government's position will be looked at closely by the court.

It is also worth noting that the administration did not have to file a brief in the challenge to Proposition 8. The fact that the administration sided with the gay plaintiffs sends an important message to the court that the president (and the Department of Justice) believes that same-sex couples have a constitutional right to marry.

Why has there been a cultural shift in the last decade in support of marriage equality? Do you think growing public support will, or should, influence the court decision?

Ball: I think the cultural shift is largely the result of the much greater visibility of lesbians, gay men and bisexuals in our society compared to 20 or 30 years ago. The fact that most Americans know a family member, co-worker or neighbor who is gay has gone a long way in demystifying and destigmatizing gay people and their relationships. The same-sex marriage lawsuits have contributed to this process by showing just how similar gay and straight Americans are when it comes to committed relationships and families.

Obviously, cases must be decided based on the law rather than on how a majority of the public feels about a particular issue. At the same time, however, lawsuits are not decided in a social vacuum. Judges read newspapers, browse the Internet and watch television, too. Cultural shifts can matter because they may encourage judges to consider certain legal claims more seriously. The public was barely paying attention 30 or 40 years ago when courts were dismissing the equality claims of LGBT individuals out-of-hand. There is no doubt that the public is paying attention now.

How do you think the court should rule and why?

Ball: The court should strike down the Defense of Marriage Act because the federal government lacks a valid reason for treating some couples who are married under the law of their states differently from other couples who are also legally married under state law. There is no logical or rational reason why the [federal government](#) should refuse to recognize Edie Windsor's marriage when it would have recognized it if she had been married to a man.

But more fundamentally, I believe that lesbians, gay men and bisexuals, like heterosexuals, have a constitutional right to marry the person of their choice. This is a matter of basic equality and fairness: In most states, gay people are being systematically excluded from an important social institution, without any valid reason. In my view, the government has the legal and moral obligation to explain why same-sex couples should not be allowed to marry. The polls tell us that a majority of the American public does not believe there is a valid justification for prohibiting same-sex couples from marrying. We now wait to see whether a majority of the justices on the Supreme Court agree.

Provided by Rutgers University

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