



Marriage Equality and the Supreme Court

A Guide to What Is at Stake in Upcoming Rulings

By Crosby Burns and Joshua Field

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This month the Supreme Court will deliver two historic rulings that will affect thousands of committed same-sex couples throughout the United States. In *Hollingsworth v. Perry*, the Court will determine the constitutionality of California's Proposition 8, which stripped same-sex couples in California of their right to marriage in 2008.¹ Approximately 109,000 same-sex couples lost the freedom to marry in California that year.² In *United States v. Windsor*, the Court will rule on the constitutionality of the Defense of Marriage Act, or DOMA, a federal law passed in 1996 that defines marriage as the union between a man and a woman for the purposes of more than 1,000 federal laws and programs.³ DOMA implicates everything from veterans' benefits to immigration to federal estate taxes, and it unfairly discriminates against legally married same-sex couples by denying them federal benefits and protections currently enjoyed by opposite-sex couples.⁴

In 2003 the Supreme Court affirmed the civil rights of gay and lesbian Americans in the landmark case *Lawrence v. Texas* by invalidating state antisodomy laws that prohibited consensual sex between people of the same gender.⁵ Ten years later the Supreme Court is poised to deliver two similarly monumental rulings that could have sweeping implications for gay and lesbian couples in the United States.

The Supreme Court has consistently and repeatedly affirmed that marriage is a fundamental right without which "neither liberty nor justice would exist."⁶ At a time when a consistent and growing majority of Americans support marriage equality for same-sex couples, the Supreme Court has the opportunity to affirm that marriage is also a fundamental legal and civil right for gay and lesbian couples, and that they should not be denied the equal rights and responsibilities of marriage.⁷

Ahead of the Supreme Court's rulings later this month, this brief examines both of these cases in turn, including the legal challenges before the Court, what the possible outcomes are, and what these outcomes would mean for same-sex couples. But first we examine the state of marriage equality in the United States today.

The current landscape of marriage equality in the United States

As the nation's High Court prepares to deliver its rulings in the *Hollingsworth* and *Windsor* cases, more and more states are beginning to recognize marriage equality between gay and lesbian couples.

Twelve states and the District of Columbia currently afford the rights and responsibilities of marriage to same-sex couples.⁸ The momentum for marriage equality is remarkable, as half of these states began recognizing the freedom to marry within the past seven months alone. This past November voters in Washington state, Maryland, and Maine approved ballot initiatives extending the freedom to marry to same-sex couples.⁹ Since then, lawmakers in Delaware, Minnesota, and, most recently, Rhode Island have enacted legislation affording the rights and responsibilities of marriage to same-sex couples.¹⁰ In addition to these six recent victories, marriage equality is on the books in Massachusetts, Vermont, New Hampshire, Iowa, Connecticut, New York, and Washington, D.C.¹¹ Eighteen percent of Americans currently live in a jurisdiction that recognizes marriage equality.¹²

The increasing number of states recognizing marriage equality is unsurprising when looking at polling data on the issue. In 1996 only 27 percent of Americans voiced support of marriage equality.¹³ Polls today consistently find that number above 50 percent.¹⁴ A recent ABC News/*Washington Post* poll, for example, found that 58 percent of Americans support marriage equality.¹⁵ In terms of federal recognition of marriage, 6 out of 10 likely voters believe that DOMA should be struck down.¹⁶ What's more, that support is not only consistent across polls but is also growing as younger Americans voice near-universal support.

The Supreme Court and the Defense of Marriage Act

In *United States v. Windsor*, the Supreme Court will consider the constitutionality of Section 3 of DOMA, which prohibits the federal government from recognizing legally married same-sex spouses for the purposes of federal programs.

DOMA places significant economic harm on same-sex couples and their families by arbitrarily denying them a host of government benefits and protections, including Social Security, health care, and tax benefits. With regard to Social Security benefits upon the death of a spouse, for example, a surviving same-sex spouse will be denied an average of \$1,184 per month, or \$14,208 per year, because of DOMA.¹⁷ Families headed by same-sex couples, including those who risk their lives serving in our nation's military, can be denied health insurance coverage and be forced either to purchase

costly plans in the private market or forgo coverage because of DOMA.¹⁸ And in the immigration context, DOMA impedes family unity by denying loving and committed binational same-sex couples—wherein one individual is a U.S. citizen and the other a foreign national—the ability to sponsor a loved one for a green card, tearing thousands of couples apart each year.¹⁹

The facts behind the *Windsor* case paint a clear picture about how DOMA discriminates against and substantially affects the lives of loving couples simply because they are gay or lesbian. The plaintiff, Edie Windsor, married her wife Thea Spyer in 2007 after a 40-year committed relationship. Thea died in 2009, when their home state of New York recognized marriage equality. Because of DOMA the federal government did not recognize their marriage, and Windsor was required to pay more than \$363,000 in federal estate taxes upon the inheritance of her wife's estate. If the federal government had accorded Windsor the same status as opposite-sex married couples that are recognized by New York—at the time New York did not offer marriage licenses to same-sex couples but recognized legally valid marriages performed elsewhere—she would not have had to pay taxes.²⁰

DOMA clearly discriminates against same-sex couples in ways that undermine family economic security. It also undermines the Constitution's promise of equal protection under the law. This is why federal district and appellate courts across the country have consistently ruled that DOMA violates the equal protection clause and therefore is unconstitutional.²¹ Below, we detail the three possible rulings that the Court could deliver.

Potential outcome: DOMA is unconstitutional

DOMA's repeal would mean that same-sex couples who received marriage licenses in the 12 states and the District of Columbia that recognize marriage equality would be subject to more than 1,000 federal laws, benefits, programs, and protections currently enjoyed by different-sex couples. The ruling would, however, likely have no direct effect on the bans on marriage equality that are law in other states.

In a DOMA-free country, legally married same-sex couples will finally be treated equally under the law with respect to a host of federal programs that they are not able to access today, including but not limited to:

- Social Security survivors' benefits when a spouse passes away
- Exemption from taxes on employer-provided health insurance
- Being able to file taxes jointly as a married couple

- Access to COBRA continuation of health insurance coverage
- Being able to deduct the value of an estate when a spouse passes away
- Family and medical leave when a spouse becomes sick
- Family-based immigration sponsorship
- Federal-employee spousal retirement and health benefits
- Benefits for service members' spouses

Under this outcome, the Obama administration could and should institute a series of executive actions to ensure that same-sex couples receive these and other benefits as swiftly and as broadly as possible.

If the Court does rule that DOMA is unconstitutional, the way in which it will do so is unclear. Moreover, how the Court rules will have important implications for same-sex couples, LGBT people more broadly, and a range of other progressive policy priorities. Broadly speaking, there are three ways that the Supreme Court could invalidate DOMA and allow LGBT families to take advantage of the same federal programs and benefits that different-sex married couples enjoy:

- A broad equal protection analysis that confers new rights to the LGBT community and triggers heightened legal scrutiny
- A more narrow equal protection analysis that does not confer new rights but holds that DOMA is not sufficiently tied to valid governmental interests
- A “federalism,” or states rights, argument holding that Congress did not have the authority to pass DOMA in the first place

First, the Supreme Court could issue a broad and sweeping ruling under the equal protection clause of the 14th Amendment to the U.S. Constitution. The courts have applied the equal protection clause to ensure that the government does not unfairly infringe on the rights of specific groups and that laws are sufficiently tied to legitimate governmental interests. The courts have also used it to ensure that certain fundamental rights such as marriage receive heightened protection.²² The Supreme Court has ruled that the Constitution should be applied with special care to certain groups that have historically faced unjustifiable discrimination and are unable to properly protect their interests in the legislative process.²³ Laws that affect racial minorities or classify based on gender or alienage, for example, have received heightened scrutiny from the courts.²⁴ Laws that single out or directly affect one group are often found to violate the equal protection clause.

If the Supreme Court were to rule that LGBT individuals make up a class that should receive heightened protections due to its history of being discriminated against, then beyond invalidating DOMA, the ruling would also have broad legal implications and would mean that any law—state or federal—that disparately affects gays or lesbians would likely be struck down. This would impact LGBT rights in a range of areas, from relationship recognition to workplace discrimination and adoption, to name a few. This broad ruling, however, is unlikely. The Supreme Court—in past opinions authored by swing-vote Justice Anthony Kennedy—has previously been reluctant to apply heightened judicial scrutiny to laws that affect gay and lesbian people.²⁵

The Court does not, however, have to put gay and lesbian people into a protected class to invalidate DOMA. A second option is to rule that because DOMA does not serve legitimate governmental interests, it is unconstitutional. Animosity toward one group and the desire to impose a set of morals on the public are not legitimate reasons for the government to pass a law.²⁶

In oral arguments, Justice Elena Kagan questioned whether DOMA's official House report was evidence that the rationale behind DOMA was illegitimate. The official House report states that the law was passed to advance “the government's interest in defending traditional notions of morality” and that the law reflects the “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”²⁷ If the Court uses the equal protection clause to invalidate DOMA, this passage will likely be cited in its opinion as evidence of the government's illegitimate reasoning behind the law.

In addition to these two means of invalidating DOMA, it is possible that some of the Court's conservative members could issue a third decision that uses a “states-rights” or “Federalism” theory to strike the law down. Some have pointed to Justice Kennedy's questioning during oral arguments as evidence that he may rule that the federal government never had the authority to define marriage in the first place because it runs in conflict with “what has always been thought to be the essence of the State police power, which is to regulate marriage, divorce, custody.”²⁸ According to this legal rationale, Congress never had the authority to pass DOMA since it is an attempt to regulate what is traditionally considered within the power and regulation of the states.

Although it is unlikely to get a majority of votes, this Federalism rationale may be used as a means for Justice Kennedy to invalidate DOMA while ensuring that the equal protection theories discussed above do not receive majority-opinion status. Beyond taking the issue of marriage equality out of the legal rationale, this theory has historically been used by conservative jurists to try to take the power away from the federal government to pass legislation that, regulates guns, helps protect women from violence, protects the environment, and provides health care, among other things.²⁹ This Federalism argument,

for example, is similar to one that conservative Tea Partiers have used to claim Medicare is unconstitutional.³⁰ While such a Federalism argument may have the positive effect of invalidating a discriminatory law in this instance, the rationale could then be used in the future to strike down laws that provide protection and support to those in need.

While one cannot argue that the federal government is limitless in its law-passing power, the Federalism argument is unlikely to get much support in the Court because DOMA is not just about marriage. DOMA is also about defining who is entitled to take advantage of federal programs and benefits that are undoubtedly within the power of Congress to create and regulate. Because of this, it is unlikely that anyone other than Justice Kennedy—or maybe Justice Clarence Thomas—will decide to invalidate DOMA in a concurring opinion using this flawed argument.

Potential outcome: DOMA is upheld

Should a majority of justices somehow determine that Section 3 of DOMA is constitutional, then legally married same-sex couples in the 12 states and Washington, D.C., with marriage equality laws will continue to be systematically denied equal protection under the law and access to federal benefits related to more than 1,000 federal laws and programs.

Upholding DOMA would perpetuate the significant economic insecurities facing same-sex couples, who on average report lower incomes and higher rates of poverty than families headed by different-sex couples.³¹ This would clearly be a loss for the LGBT community and an example of how the Court is willing to ignore the equal rights that are guaranteed to all under the law to arrive at the conservative decision it wanted. Fortunately, because the majority of the American public embraces marriage equality, it is possible that legislative fixes, including repeal of DOMA, could overturn DOMA's discriminatory reach and provide the LGBT community more equality under the law.³²

Potential outcome: The merits of the case are not reached due to lack of standing

Another potential outcome is less clear than either “DOMA is constitutional” or “DOMA is unconstitutional.” In fact, it may avoid the issue of DOMA's constitutionality altogether.

Among other procedural hurdles, the parties in a federal court case must prove that they have constitutional standing—that there is a legal injury to a party—before the court can make a substantive decision on the case. *Windsor* is a unique case because typically the federal government defends federal law, but in this situation the Obama administration agreed that DOMA was unconstitutional and would not defend it. House Republicans instead called upon the Bipartisan Legal Advisory Group, or BLAG, of the

U.S. House of Representatives to step in and defend DOMA against the claim that it is unconstitutional. Because Edie Windsor won her case at a lower level, she is no longer injured under the law. The Court must therefore decide whether BLAG's defense of DOMA is sufficient for the case to move forward.

If the Court decides that House Republicans do not have standing to defend it, Edie Windsor is, at a minimum, entitled to a tax refund of more than \$363,000. This would not, however, strike down Section 3 of DOMA, and no substantive application of equal protection law to the LGBT community would be made. To receive similar benefits as Windsor, all other same-sex married couples seeking benefits under federal law would need to bring a legal action. A legislative repeal of DOMA would alternatively end the law's discriminatory reach even if the Court rules in this way.³³

The Supreme Court and California's Proposition 8

In May 2008 tens of thousands of same-sex couples were granted the freedom to marry when the California Supreme Court ruled that denying them the recognition of marriage violated the equal protection clause of the California Constitution.³⁴ Six months later 52 percent of California voters overruled that decision when they enshrined discrimination into the state's constitution by passing Proposition 8, which defines marriage as the union between one man and one woman but does not, however, mention "civil unions."³⁵ In doing so, voters effectively stripped gay and lesbian people in California of their ability to marry the person they love.

Things have changed in California since Proposition 8 was passed. Support for marriage equality now outstrips opposition by a 2-1 margin; a recent poll found that 61 percent of Californians think gay and lesbian couples should be afforded marital rights, while only 32 percent opposed.³⁶ That means in just five years, opposition to marriage equality in California has gone down 20 percent. Should marriage equality return to the Golden State, more than 30 percent of Americans would live in a jurisdiction with marriage equality.³⁷

Five years after Proposition 8 was passed, a federal district court and a federal appeals court have both ruled that the California constitutional amendment that strips same-sex couples of their rights to marry the person they love violates the due process and equal protection clauses of the U.S. Constitution. The case that is currently before the Supreme Court, *Hollingsworth v. Perry*, shares many similar issues with *Windsor*, which we discussed above. We discuss the three potential outcomes of *Hollingsworth* below.

Potential outcome: Proposition 8 is unconstitutional

If the Supreme Court were to rule that Proposition 8 is unconstitutional, it would mean at a minimum that LGBT couples would be able to marry in California. In addition to ending marriage discrimination in the nation's most populous state, striking down Proposition 8 would serve as a monumental symbol in the marriage equality fight. Similar to *Windsor*, however, if the Court were to invalidate Proposition 8, the way in which it does so will determine how broadly the effects of the ruling are felt.

If the Court were to strike down Proposition 8 using an equal protection analysis similar to that discussed above, the rationale behind the decision would likely apply to all 50 states, meaning all laws prohibiting marriage equality would fail. A decision with such a broad application would instantly become one of the most consequential in Supreme Court history. This broad ruling is unlikely, however, due to the fact that lower courts found alternative ways to invalidate Proposition 8, and the fact that the Supreme Court generally tries to avoid making broad constitutional decisions when other legal rationales are available.³⁸

The Court could alternatively hold that California was not free to provide same-sex couples with all the benefits and burdens of marriage through civil unions while withholding the designation of “marriage.” Under this rationale, which was suggested in the Obama administration's amicus brief, bans on marriage equality in the eight states that have “everything-but-marriage” civil unions or domestic partnerships are unconstitutional.³⁹ A decision using this rationale would apply to the eight states that allow these civil unions—California, Colorado, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Wisconsin⁴⁰—but not to the entire country.

Finally, the Court could invalidate Proposition 8 by ruling that the U.S. Constitution's due process clause prohibits California from withdrawing the right to marriage for same-sex couples once that right had been established by the California Supreme Court. If adopted by the Court, this narrow application would apply only to California, meaning marriage equality bans in other states would survive.

Potential outcome: Proposition 8 is upheld

Here, a majority of U.S. Supreme Court justices would agree to reverse the Ninth Circuit decision and would rule that Proposition 8 does not violate the equal protection clause. Because of the procedural hurdles discussed below and the fact that the decision would revolve around the application of California law, it is unlikely that the Supreme Court would wade into a constitutional issue that the lower court intentionally avoided and take away the marriage equality that was conferred to Californians by the lower courts. If the Court upholds Proposition 8, amending or revising the California Constitution with voters via a ballot proposition would be required to negate its effects.⁴¹

Potential outcome: The merits of the case are not reached due to procedural issues

As in *Windsor*, the Court may not deliver a black-or-white answer with respect to Proposition 8's constitutionality. As discussed above, the parties in a federal court case must prove that they have constitutional standing before the court can make a substantive decision on a case. Also similar to *Windsor*, California government officials chose not to defend Proposition 8 because they believed that it was unconstitutional,⁴² leaving a third-party proponent of Proposition 8 to defend the case in court.⁴³

In *Hollingsworth*, the Court could decide that supporters of Proposition 8 were not a proper party to the case because they did not sustain an "injury" under federal law and lacked standing to appeal a trial court's judgment to strike it down. In this situation, the decision would only apply to California because the trial, or district, court decision declaring Proposition 8 unconstitutional would stand, and gay and lesbian people would have the right to marry in California.

The Supreme Court also has the power to effectively change its mind and decide that it should never have agreed to hear the case in the first place. The Court may, for example, feel that adjudication of the constitutional issues before it should be deferred and could rule that certiorari was improvidently granted, meaning the Court would not issue a ruling on the case because it decided that its original decision to hear the case was improper.⁴⁴ If this happens, the Ninth Circuit decision declaring Proposition 8 unconstitutional will stand and apply only to California, confirming the right of gay and lesbian people to marry in California alone.

Conclusion

There is undeniably significant momentum across the country toward extending marriage equality to same-sex couples. The most recent polling data show that a consistent majority of Americans favor extending the rights and responsibilities of marriage to same-sex couples. That majority will only grow, considering the fact that 81 percent of Americans ages 18 to 34 support the freedom to marry.

While we may continue to see marriage equality laws enacted democratically—through state legislatures and through voter-sponsored referenda—the courts have an equally important role to play in safeguarding the rights and freedoms of LGBT Americans. Same-sex couples deserve equal treatment under the law, in the workplace, in their communities, and, indeed, in marriage. The Supreme Court should rule accordingly.

Crosby Burns is a Policy Analyst for the LGBT Research and Communications Project and Joshua Field is the Deputy Director of Legal Progress at the Center for American Progress.

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