MEDIA KIT

Hollingsworth v. Perry
and
United States v. Windsor

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HI-RES PHOTOS: A dropbox with downloadable home photos of the Plaintiffs is available here: https://www.dropbox.com/sh/8bo3iojgd408uy4/edPRyiSTBm

CONTACT FOR MEDIA INQUIRIES OR INTERVIEWS:
Respect For Marriage Coalition Press Office: 202-567-5720, press@respectformarriage.org
Case Summary: Hollingsworth v. Perry

Who is this case about?
This case is about two loving couples who, like millions of other gay and lesbian Americans, have been together for decades, caring for each other and their children, and want to be married. Some loving couples have waited a lifetime to get married; some have died waiting. These couples are not asking for a “special right” to gay marriage—they are asking for the government to honor their fundamental right to marry and to treat them with equal dignity and respect under the law.

What can you tell us about the Plaintiffs in this case?
Kris Perry and Sandy Stier have been together for more than 13 years. Together, they have raised four boys—the youngest, twins, are about to graduate from high school and head to college. They live in Berkeley, California.

Paul Katami and Jeff Zarrillo have been together for over 12 years and have always seen marriage as the first step to starting a family. They want what their parents have—a long-lasting commitment to each other. They live in Burbank, California.

How should the Supreme Court rule in Hollingsworth v. Perry?
The Supreme Court should rule that California’s Proposition 8 and similar laws banning gay and lesbian couples from marrying in other states violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and are therefore unconstitutional.

Why does Proposition 8 violate the Due Process Clause?
Proposition 8 denies gay and lesbian couples their fundamental right to marry without a legitimate, much less compelling, state interest. The right to liberty under the Due Process Clause guarantees all Americans the freedom to marry the person they love.

Why does Proposition 8 violate the Equal Protection Clause?
Proposition 8 excludes gay and lesbian Americans from the institution of marriage without a legitimate, much less compelling, state interest. Separate is never equal, yet California’s Proposition 8 singles out gay and lesbian couples for separate and unequal treatment, thus violating their constitutional right to equal protection of the laws.

Why should the Court issue a ruling that could affect the laws of 38 states?
Fourteen times over the last century, the Supreme Court has repeatedly declared that the right to marry is a fundamental right—if not the most fundamental right—of all individuals. Restrictions on the right of gay and lesbian Americans to marry are antithetical to the nation’s commitment to equality. These laws create a permanent underclass of millions of gay and lesbian Americans, who are denied the right to marry simply because voters or elected officials deem gay and lesbian relationships inferior, religiously unacceptable, or simply not “okay.” These laws are incompatible with settled constitutional authority. A law that violates the Constitution cannot stand.
Are you asking the Court to create a new right to same-sex marriage?
No. The Court has defined marriage as a right of liberty, privacy, intimate choice, and association, and has recognized that marriage is of fundamental importance for all individuals. Just as striking down Virginia’s prohibition on marriage between persons of different races in the landmark 1967 case of Loving v. Virginia did not require recognition of a new constitutional right to interracial marriage,invalidating California’s Proposition 8 and similar laws in other states would vindicate the longstanding right of all persons—regardless of race, gender, or sexual orientation—to exercise autonomy in making personal decisions relating to marriage. There is no legitimate, much less compelling, justification for any state to deny gay and lesbian Americans the freedom to marry.

The Solicitor General’s brief seems to advocate what’s being called the “Nine State Solution.” What are your thoughts on that?
The Solicitor General’s brief is an unprecedented call to action, saying that it is time to recognize gay and lesbian Americans as full and equal citizens under the law. We are thrilled to have the voice and authority of the United States Government behind the movement toward marriage equality.

In its brief, the Government argues that California’s Proposition 8 violates the Equal Protection Clause of the Constitution, and should be subject to heightened judicial scrutiny because it discriminates on the basis of sexual orientation. If the Court agrees with the United States Government that heightened scrutiny applies, that is a clear path to equality in all states across the country, not just in the nine states that recognize domestic partnerships and civil unions, because marriage bans in other states cannot satisfy that standard either.

Questions before the Supreme Court:
• Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment permit the State to exclude gay men and lesbians from the institution of marriage.

• Whether the Proponents of Proposition 8 have standing under Article III, § 2 of the Constitution in this case.
**Case Summary: United States v. Windsor**

**What can you tell us about the Plaintiff in this case?**
United States v. Windsor involves the marriage of Edith (Edie) Windsor and Thea Spyer, who met in the early 1960s and lived together in New York City for more than four decades. They became engaged in 1967 and were finally married in May 2007. Two years after their wedding, Thea passed away after a 30-year struggle with multiple sclerosis. Their life together is chronicled in the award-winning documentary film, *Edie and Thea: A Very Long Engagement*.

**What is the case about?**
Upon her death, Thea left all of her possessions to Edie as her spouse. However, due to Section 3 of the so-called Defense of Marriage Act (DOMA), Edie was required to pay a $363,000 federal estate tax, which she would not have had to pay had she been married to a man.

Under DOMA, gay and lesbian couples married under state law have their marriages nullified for all purposes of federal law. This broad, sweeping exclusion denies gay and lesbian couples access to more than 1,100 federal benefits, burdens, and protections.

When Edie sued the United States for a federal tax refund, President Obama and Attorney General Holder concluded that Section 3 of DOMA is unconstitutional and directed the Department of Justice to cease defending the law in court. The Bipartisan Legal Advisory Group of the United States House of Representatives was allowed to intervene to defend DOMA.

**Why does DOMA violate the Fifth Amendment’s guarantee of equal protection of the laws?**
Section 3 of DOMA violates the equal protection guarantee contained in the Fifth Amendment because its exclusion of married gay and lesbian couples from federal marital benefits serves no legitimate or compelling government interest.

**How should the Supreme Court rule in United States v. Windsor?**
The Supreme Court should rule that Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws and is therefore unconstitutional.

**Questions before the Supreme Court:**
- Whether Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.
- Whether the Executive Branch’s agreement with the court below that DOMA is unconstitutional deprives the Court of jurisdiction to decide this case.
- Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.
Common Information for *Perry* and *Windsor*

**Must the Court apply heightened scrutiny to strike down Proposition 8 and Section 3 of DOMA?**

No. Proposition 8 and Section 3 of DOMA cannot pass rational-basis review, the lowest standard of constitutional scrutiny. The district court and the court of appeals in *Perry* both held that Proposition 8 is not rationally related to a legitimate state interest. The district court in *Windsor* held that Section 3 of DOMA is not rationally related to a legitimate federal interest.

**Does marriage equality harm religious liberty?**

No. The Plaintiffs challenging Proposition 8 and Section 3 of DOMA are not asking for any religion to be forced to accept their marriage. They are merely asking for the government to treat them with equal dignity and respect under the law.
Recent Polling on the Freedom to Marry

NATIONAL REGISTERED VOTERS

- A *Washington Post/ABC News* poll conducted from March 7-10, 2013 found that 58% of registered voters support legal marriage for same-sex couples. [http://wapo.st/ZnDCzJ](http://wapo.st/ZnDCzJ)
  - By a 2-to-1 margin (64-33%), Americans believe the question of same-sex marriage should be decided based on the Constitution.
  - 52% of Republicans under 50 years old support the freedom to marry.
  - 81% of Americans between 18 and 29 support the freedom to marry.
- In an audit of polling done by the Williams Institute, support for the freedom to marry increased in all 50 states over the past eight years, with an average increase of 13.6%. [http://goo.gl/3BxKZ](http://goo.gl/3BxKZ)
  - Twelve states and the District of Columbia had support for the freedom to marry at or above 50% by the end of 2012.
  - If these trends continue, Williams projects that another eight states will be above 50% support by the end of 2014.

NATIONAL FAITH SUPPORT

- An analysis by Republican pollster Alex Lundry shows that 64% of Evangelical Millennials support allowing same-sex couples to marry. [http://goo.gl/YxEZ6](http://goo.gl/YxEZ6)
- The Pew Forum on Religion & Public Life tracks support for same-sex marriage, which has steadily increased for every religious group since 2001. The 2013 Survey was taken March 13-17, 2013. [http://bit.ly/IgTgGi](http://bit.ly/IgTgGi)

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<tr>
<td>White evangelical Protestants</td>
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</tr>
</tbody>
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SUPPORT AMONG AFRICAN-AMERICAN VOTERS

- A national Gallup poll conducted from November 26-29, 2012 found 53% of African Americans thought marriages between same-sex couples should be recognized officially and should have the same rights as straight married couples. [http://bit.ly/TKu0Lp](http://bit.ly/TKu0Lp)
- A November 6, 2012 Edison Research national exit poll showed that 51% of black voters supported recognizing same-sex marriage. [http://nyti.ms/127AF7](http://nyti.ms/127AF7)

SUPPORT AMONG HISPANIC VOTERS
• A Quinnipiac Polling Institute poll conducted from February 27 to March 4 found that 63% of Hispanic voters support same-sex marriage. [http://goo.gl/Nz9vA]

• ABC News exit polling on November 6, 2012 showed 59% of Latino voters “said their state should legally recognize same-sex marriage.” [http://abcn.ws/VACBoB]
Briefs of Amici Curiae Filed in Perry

Unless otherwise noted, briefs can be found at the following link:

http://www.americanbar.org/publications/preview_home/12-144.html

1. GLMA: Health Professionals Advancing LGBT Equality (Gay Lesbian Medical Association)
2. Utah Pride Center, Campaign for Southern Equality, Equality Federation and Twenty-Five State-Wide Equality Organizations
3. American Humanist Association and American Atheists, Inc., American Ethical Union, the Center for Inquiry, Military Association of Atheists and Freethinkers, Secular Coalition for America, Secular Student Alliance, and Society for Humanistic Judaism
4. Columbia Law School Sexuality & Gender Law Clinic and the Society of American Law Teachers
6. Marriage Equality USA
8. Edward D. Stein, Joanna L. Grossman, Kerry Abrams, Holning Lau, Katharine B. Silbaugh and 32 Other Professors of Family Law and Constitutional Law
9. The State of California
10. National Center for Lesbian Rights
11. American Academy of Matrimonial Lawyers, the Northern California Chapter of the American Academy of Matrimonial Lawyers, and the Association of Certified Family Law Specialists
12. Jonathan Wallace, Meri Wallace, and Duncan Pfister: Currently not available online
13. International Human Rights Advocates
15. Parents, Families and Friends of Lesbians and Gays, Inc.
16. Walter Dellinger
18. Leadership Conference on Civil and Human Rights, Bar Associations and Public Interest and Legal Service Organizations
19. American Psychological Association, the American Medical Association, the American Academy of Pediatrics, the California Medical Association, the American Psychiatric Association, the American Psychoanalytic Association, the American Association for Marriage And Family Therapy, the National Association of Social Workers and its California Chapter, and the California Psychological Association
20. Dr. Maria Nieto
21. Cato Institute and Constitutional Accountability Center
22. United States
24. Political Science Professors
27. Gary J. Gates
28. Organization of American Historians and the American Studies Association:
29. Equality California
31. Southern Poverty Law Center
32. Foreign and Comparative Law Experts Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer, and Ryan Goodman
33. Constitutional Law and Civil Procedure
   Professors Erwin Chemerinsky and Arthur Miller
34. Massachusetts, Connecticut, Delaware, District Of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont and Washington
35. Survivors of Sexual Orientation Change Therapies
36. Howard University School of Law Civil Rights Clinic
37. William N. Eskridge, Jr., Rebecca L. Brown, Daniel A. Farber, and Andrew Koppelman
38. California Professors of Family Law
39. Chris Kluwe and Brendon Ayanbadejo
40. Women's Equal Rights Legal Defense and Education Fund
41. Bishops of the Episcopal Church in the State of California, et al.
42. California Assembly Speaker John A. Perez, and Law Professors
44. American Federation of Labor and Congress of Industrial Organizations and Congress of Industrial Organizations
45. American Companies
46. California Teachers Association and the National Education Association
48. American Sociological Association:
   http://www.asanet.org/documents/ASA/pdfs/12-144_307_Amicus-%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%
Briefs of Amici Curiae Filed in Windsor

Unless otherwise noted, briefs can be found at the following link:


1. Citizens for Responsibility and Ethics in Washington
2. GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association)
3. 278 Employers and Organizations Representing Employers
4. Utah Pride Center, Campaign for Southern Equality, Equality Federation and Twenty-Five State-Wide Equality Organizations
5. American Humanist Association and American Atheists, Inc., American Ethical Union, the Center for Inquiry, Military Association of Atheists and Freethinkers, Secular Coalition for America, Secular Student Alliance, and Society for Humanistic Judaism
6. Professors Nan D. Hunter, Suzanne B. Goldberg, Kathryn Abrams, Katherine M. Franke, Burt Neuborne, and Angela P. Harris
7. Leadership Conference on Civil and Human Rights, Bar Associations and Public Interest and Legal Service Organizations
8. Political Science Professors
10. American Sociological Association:

   http://www.aclu.org/lgbt-rights/united-states-v-windsor-amicus-brief-american-sociological-association-windsor

12. Family Equality Council; Colage; Our Family Coalition; Gay, Lesbian, and Straight Education Network; the Center on Children and Families; the Child Rights Project; and Sarah Gogin
13. Organization of American Historians and the American Studies Association
15. American Jewish Committee
16. Former Federal Intelligence Officer
17. NAACP Legal Defense & Educational Fund, Inc.
18. OutServe-SLDN Inc.
19. Center for Constitutional Jurisprudence
20. Cato Institute and Constitutional Accountability Center
21. National Women's Law Center, Williams Institute Scholars of Sexual Orientation and Gender Law, and Women's Legal Groups
22. Family and Child Welfare Law Professors
24. Family Law Professors and the American Academy of Matrimonial Lawyers
26. Gary J. Gates
27. Dr. Donna E. Shalala, Dr. Louis W. Sullivan, Togo D. West Jr., Kenneth S. Apfel, Sheldon S. Cohen, Rudy F. Deleon, Jamie S. Gorelick, Michael J. Graetz, Dr. John J. Hamre, Benjamin W. Heineman Jr., Kathryn O. Higgins, Constance Berry Newman, and Harriet S. Rabb
28. Former Senior Justice Department Officials, and Former Counsels to the President
29. Former Senators Bill Bradley, Tom Daschle, Christopher J. Dodd, and Alan K. Simpson
31. Survivors of Sexual Orientation Change Therapies
32. 172 Members of the U.S. House of Representatives and 40 U.S. Senators
33. Los Angeles County Bar Association, and Armed Forces Committee of the Los Angeles County Bar Association
34. Honorable John K. Olson
36. Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, (SAGE), the National Senior Citizens Law Center, the American Society on Aging, the National Hispanic Council on Aging, the Southeast Asia Resource Action Center, and the National Organization of Social Security Claimants’
37. Scholars of the Constitutional Rights of Children
38. Historians, American Historical Association, et al.
39. Institute for Justice
40. Honorable John K. Olson
41. American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Change to Win, and the National Education Association
42. Constitutional Law Scholars
43. Federalism Scholars
45. American Bar Association
46. Fair Administration of Taxes
47. American Psychological Association, the American Academy of Pediatrics, the American Medical Association, the American Psychiatric Association, the American Psychoanalytic Association, the California Medical Association, the National Association of Social Workers And its New York City and State Chapters, And the New York State Psychological Association
48. Former Federal Election Commission Officials
Marriage Laws: State-by-State

States issuing marriage licenses to same-sex couples (12 and the District of Columbia):

States recognizing civil unions or comprehensive domestic partnerships for same-sex couples (7):
California (domestic partnerships, 1999), Colorado (civil unions, 2013), Hawaii (civil unions, 2012), Illinois (civil unions, 2011), Nevada (civil unions, 2009), New Jersey (civil unions, 2007), and Oregon (civil unions, 2008).

States with constitutional amendments barring same-sex marriage (30):
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

States with statutory bans on same-sex marriage but no constitutional amendment banning same-sex marriage (6):

States that do not have a constitutional amendment or statute on same-sex marriage (2):
New Mexico and New Jersey.
Prop. 8 at the Supreme Court

The U.S. Supreme Court is considering whether Prop. 8 violates the U.S. Constitution, paving the way for a ruling on marriage equality for gay and lesbian couples.

Final Decision Expected by the end of June 2013.

The Court could decide to:

- **Strike Down Prop. 8**
  On the grounds that all marriage bans are unconstitutional
  - Marriage equality in all fifty states.

- **Decline to Rule**
  On the grounds that civil unions and domestic partnerships are separate and unequal
  - Gay and lesbian couples are able to get married in the states with civil unions or domestic partnerships, in addition to the states currently with marriage equality.

- **Uphold Prop. 8**
  States may include or exclude gay and lesbian couples from the institution of marriage.
  - Marriage equality returns to California.

*Marriage equality legislation goes into effect in Delaware on July 1, and in Rhode Island and Minnesota on August 1. Both Delaware and Rhode Island currently have civil union laws in effect.*
TIMING OF THE DECISION
The Supreme Court has finished hearing oral arguments for its current Term, which began on October 1, 2012. The Justices are now busy drafting and circulating opinions in the cases that have yet to be decided. The Court recesses for the summer at the end of June.

The Court generally releases opinions at 10 a.m. Eastern Time. No advance notice is given as to when a particular decision will be handed down. However, because the Prop. 8 and DOMA cases were argued in late March, decisions are more likely to be released in late June.

HOW MIGHT THE COURT RULE?
The Supreme Court has many options to choose from when deciding the Prop. 8 case. Here’s how the Justices could rule:

Fifty-State Ruling: Prop. 8 and all other state marriage bans are unconstitutional. Gay and lesbian couples will be able to get married in all fifty states.

Seven-State Ruling: Civil unions and domestic partnerships are separate and unequal. Gay and lesbian couples will be able to get married in California and the six other states with relationship recognition, in addition to the twelve states currently with marriage equality.

One-State Ruling: California cannot eliminate marriage equality. Gay and lesbian couples will once again be able to get married in the state.

No Standing: The Court could conclude that it does not have jurisdiction to decide the case because the Proponents of Prop. 8 do not have standing to defend the law in court in place of the Governor and Attorney General of California, who agree with AFER that Prop. 8 is unconstitutional and have refused to defend it. If this happens, the August 2010 decision of the Federal District Court that struck down Prop. 8 is made permanent, and marriage equality will be restored in California.

Dismissal: The Court could decide that it should not have granted review. If this happens, the February 2012 decision of the Ninth Circuit Court of Appeals that struck down Prop. 8 is made permanent, ending four years of marriage inequality in California.

Prop. 8 is constitutional: States may exclude gay and lesbian couples from the institution of marriage.

WHEN COULD WEDDINGS START?
If the Supreme Court rules that Prop. 8 unconstitutional, marriages could begin as the Court’s decision becomes final. Once this happens, the Clerk of the Court will send an order to the clerk of the Ninth Circuit, and that court will issue its mandate shortly thereafter.

If the Court rules that Prop. 8 is unconstitutional (scenarios 1-3), the Proponents will have 25 days to petition for rehearing after the decision is handed down. If they do not do so, the Court’s decision will become final. If they do, the Court’s decision will be stayed while the Justices consider the petition.

U.S. Supreme Court issues decision on the merits. Ninth Circuit issues mandate. Decision goes into effect.

25 DAYS

(POSSIBLE) Losing side petitions for rehearing.

Decision sent to the Ninth Circuit

Denied

Granted

If the Court concludes that it lacks jurisdiction or that it should not have granted review (scenarios 4 & 5), its ruling will immediately become final. If the Court concludes that it lacks jurisdiction (scenario 4), marriage equality will begin in California as soon as the District Court’s judgment takes effect. If the Court concludes that it should not have granted review (scenario 5), marriage equality will begin in California as soon as the Ninth Circuit issues its mandate.

American Foundation for Equal Rights
WWW.AFER.ORG
How the Defense of Marriage Act Hurts Americans

The Defense of Marriage Act says that the federal government can treat legally married same-sex couples differently from all other married couples. DOMA’s unfairness negatively affects Americans from all walks of life.

1,138

The General Accounting Office issued a report in 2004 concluding that 1,138 federal laws use marital status as a factor for specific federal protections, benefits and responsibilities.

DOMA Threatens the Security of Senior Citizens

Even though they have worked hard and paid into the system, senior citizens married to a same-sex partner are denied the full protections of programs intended to provide safety nets to older Americans, such as Social Security, Medicaid and Medicare, and retirement benefits.

“...The extra $700 every month from John’s Social Security would cover my gap health insurance—what I get above and beyond Medicare. My medications alone are more than $700 each month. It would make a big difference.”

Herb Burtis

DOMA Hurts Military Families

Although they serve our country, military members and veterans who are married to a same-sex partner are unable to provide for their spouses the way that other married service members can. Their spouses are denied the health coverage, housing allowance, and other benefits all other military spouses receive. Most devastatingly, their spouses do not receive emergency notification in the event of the service member’s injury or death, and are not eligible for death benefits.

DOMA Separates Families and Hurts Children

Denying federal marital protections unfairly affects legally married couples and their children. Children suffer when their families are stressed by unfair tax burdens, are denied Social Security parent benefits, and most significantly, when families are physically separated by DOMA. This happens when one parent who is not a legal resident cannot be sponsored for citizenship by their spouse and has to leave the country.

$1069

On average, employees receiving health insurance through their employer for a same-sex spouse pay an extra $1069 annually in federal income taxes.

DOMA Costs Businesses

DOMA makes it more difficult and costly for businesses to fairly and equally provide medical benefits and retirement plans to all their employees. For example, a gay or lesbian employee must pay taxes on the worth of his or her spouse’s medical insurance; some companies like Google, JetBlue, and Morgan Stanley have taken on the burden of reimbursing their employees for this cost.

DOMA Discriminates Against Taxpayers

Hard-working, legally married same-sex couples cannot file their federal taxes jointly as married, like all other married couples do. When one spouse dies and the other inherits, they have to pay taxes as though inheriting from a stranger—unlike other married couples. When divorcing, same-sex couples are subject to additional tax burdens that other divorcing couples are not subject to.

198

There are a total of 198 federal statutes involving marital status and taxation.

Sources:
2. Center for American Progress & UCLA Williams Institute, Unequal Taxes on Equal Benefits, pg. 7 (2007)
ASSOCIATED PRESS: Will Justices Take Note Of New Gay Marriage Laws? .......................... 17
WASHINGTON POST: Gay marriage marching along ahead of Supreme Court justices’ ruling ........................................................................................................................................... 20
OXFORD UNIVERSITY PRESS BLOG: Why equal protection trumps federalism in same-sex marriage cases ............................................................................................................................................................ 22
STATELINE (THE DAILY NEWS SERVICE OF THE PEW CHARITABLE TRUSTS): What’s Next in the Fight Over Same-Sex Marriage? .................................................................................................................. 25
NEW YORK TIMES: About the Children ................................................................................................................................. 28
USA TODAY: For same-sex marriage, progress without precedent? ................................................................. 31
THE NEW YORKER: Why The Gay-Marriage Fight Is Over .......................................................................................... 33
WALL STREET JOURNAL: Obama: Gay-Marriage Is Constitutional ................................................................................. 35
WASHINGTON POST: Political debate on same-sex marriage is arguably over .................................................. 35
NEW YORK TIMES: Marriage and the Supremes ................................................................................................................. 37
LOS ANGELES TIMES: Public opinion could sway Supreme Court's ruling on gay marriage .......................................................... 40
NEW YORK TIMES: Brief Supporting Same-Sex Marriage Gets More Republican Support. 42

ASSOCIATED PRESS: Will Justices Take Note Of New Gay Marriage Laws?
By: Mark Sherman
5/28/2013

WASHINGTON (AP) -- Three U.S. states and three countries have approved same-sex unions just in the two months since the Supreme Court heard arguments over gay marriage, raising questions about how the developments might affect the justices' consideration of the issue.

In particular, close observers on both sides of the gay marriage divide are wondering whether Justice Anthony Kennedy's view could be decisive since he often has been the swing vote on the high court.

It is always possible that Justice Kennedy is reading the newspapers and is impressed with the progress," said Michael Klarman, a Harvard University law professor and author of a recent book on the gay marriage fight.

In earlier cases on gay rights and the death penalty, Kennedy has cited the importance of changing practices, both nationally and around the world.
The court is expected to rule by late June in two cases involving same-sex marriage. One is a challenge to California's voter-approved Proposition 8 that defines marriage as the union of a man and a woman. The other seeks to strike down a portion of the federal Defense of Marriage Act that denies to legally married same-sex couples a range of benefits that generally are available to married heterosexuals.

The justices took an initial vote in the days after hearing arguments in the two cases in late March. The senior justice on the winning side and the senior justice in dissent assigned opinions based on those votes. But while that first vote is important, it is not the end of the process; justices' assessments of a case can shift subtly or, in some cases, dramatically.

In 1992, Kennedy initially drew the assignment to write a majority opinion for five justices allowing prayers at public school graduations. In the end, he ended up writing the opinion for a different five-justice majority striking down the graduation prayers. According to several accounts, Kennedy simply changed his mind during the writing process.

Current events also can find their way into opinions. Last year, Justice Antonin Scalia's fiery dissent from a court ruling that watered down Arizona's crackdown on immigration included a reference to comments President Barack Obama made at a news conference that took place between the argument in the case in April and the announcement of the decision in June.

There is no way to know at this point whether anything similar will happen in the gay marriage cases, either of which could be decided on technical legal grounds that would say little about the court's view of the issue. But there has been no shortage of action.

In a 10-day span earlier this month, lawmakers in Delaware, Minnesota and Rhode Island gave final approval to bills to legalize same-sex marriages. Minnesota was the last of the three to act, on May 13, and when Gov. Mark Dayton signed the bill into law the following day, Minnesota became the 12th state, plus the District of Columbia, to approve same-sex unions. The other nine are: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington.

Internationally, French President Francois Hollande signed a law this month making France the 14th country to recognize gay marriages. Uruguay and New Zealand took similar steps in April.

And further change could come soon. The Illinois Senate has approved a gay marriage bill that now is pending in the state House in advance of the May 31 end of the legislative session. Gov. Pat Quinn has said he would sign it.

In Great Britain, a bill to legalize same-sex weddings in England and Wales easily cleared the House of Commons and will be debated in the House of Lords beginning in July.

Both sides in the high court gay marriage debate say the recent events reinforce arguments they made to the court in March.
Defenders of limiting marriage to heterosexuals say the justices need only look at the change in marriage laws to see that there is no reason for them to step in and declare a national rule in favor of gay marriage that would upend constitutional bans in 30 states and laws prohibiting same-sex unions in roughly half a dozen others.

"These developments provide yet further evidence...that the claim that gays and lesbians are politically powerless and that the courts therefore have some special role in subjecting classifications affecting them to strict scrutiny is baseless," said Ed Whelan, an opponent of same-sex marriage who is president of the Ethics and Public Policy Center.

Jim Campbell, a lawyer for Alliance Defending Freedom, said the court should not short-circuit a vigorous national debate.

"The vast majority of the states have decided to retain the traditional view of marriage that has existed throughout Western civilization. This decision belongs to the people and should be decided by the people," Campbell said.

Mary Bonauto, the director of the Civil Rights Project at Gay and Lesbian Advocates and Defenders, said the assessment of the political clout of gays and lesbians is misleading. The number of states allowing same-sex weddings has doubled in less than a year and now represents 18 percent of the U.S. population. If Illinois joins in and the court were to affirm a lower court decision that struck down the California ban, just over a third of the population would live in 14 states and the District of Columbia where gay marriage would be legal.

That's not nearly enough, especially in the context of a decades-long struggle by gays and lesbians to win the right to marry, Bonauto said. "These states moving in the direction of marriage is a far cry from all states doing it," she said.

Klarman said gays and lesbians have made huge political strides in "deep blue" Democratic states.

"It is absolutely true that the political process continues to work and it is working with extraordinary rapidity," he said. By some estimates, in roughly 10 years majorities in all but a handful of Southern states will favor gay marriage.

"The only argument against this position is, what about the gay couple in Mississippi?" Klarman said, pointing to a state where the prohibition on same-sex unions is likely to endure.

The same argument could have been made, and was, during the court's deliberations over the Brown v. Board of Education case that outlawed segregation in public schools, he said.

Justice Stanley Reed, a Southerner, suggested that the court "let things play themselves out," although he eventually joined in the unanimous opinion in Brown.
During argument in the California case, Kennedy strongly suggested that he was not about to give gay marriage proponents what they are asking for, a decision that would allow same-sex couples to wed everywhere in the United States.

But Klarman wonders whether Kennedy might consider his legacy and the fact that at 76 years old, he might not be on the court for the next big gay marriage case. "He knows that today, he can write the opinion that would be the Brown of the gay rights movement," Klarman said.


**WASHINGTON POST: Gay marriage marching along ahead of Supreme Court justices’ ruling**

By: Robert Barnes

5/19/2013

After Chief Justice John G. Roberts Jr. said, “The case is submitted,” on March 27, the justices of the Supreme Court presumably took a private vote and now are at work writing the opinions that will decide the fate of same-sex marriage in the United States.

But real life doesn’t stop just because the justices have commenced their labors. And what has happened since raises the question of how events outside the Marble Palace affect the deliberations within.

Over two days in March, the justices heard separate arguments that courts should not have overturned a 2008 decision by California voters to ban same-sex marriages in that state and that it was unconstitutional for Congress in the Defense of Marriage Act to withhold federal benefits from same-sex couples who are legally married in the states where they reside.

And those challenging California’s Proposition 8 urged the court to go boldly beyond just that and declare there is a constitutional right to marry that would sweep away state bans on same-sex unions.

Since then, the remarkable turnaround in public attitude about same-sex marriage has only accelerated.

Ten senators reacted to the court’s hearings by declaring their support for same-sex marriage. That means 54 of the 100-member body, including two Republicans, favor the unions.

In the past two weeks, legislatures in three states — Rhode Island, Delaware and Minnesota — joined nine other states and the District of Columbia in legalizing same-sex marriage. A vote is likely soon in Illinois.
A Washington Post poll said that in Virginia — where in 2006 voters overwhelmingly amended the state constitution to recognize marriage as only between a man and a woman and banned civil unions — a majority now favors same-sex marriage.

Fred Sainz of the Human Rights Campaign, a gay rights group, said he feels sure the “positive momentum” won’t be lost on the court.

“It’s clear that they take into account the temperature of the American public,” he said.

No place makes a more dramatic statement than Minnesota.

“It’s got to be one of the most incredible turnarounds in political history,” said Dale Carpenter, a University of Minnesota law professor who is an expert on same-sex-marriage issues and who was active in the campaign.

After Republicans took control of the legislature, they proposed a constitutional amendment on the 2012 ballot that would ban same-sex marriage. But instead of finding an agreeable public, the move galvanized the opposition, which raised $13 million to fight the referendum measure.

Not only was it narrowly defeated, but Democrats were returned to control in the legislature. Only six months after the vote to ban same-sex marriage, Gov. Mark Dayton (D) signed a law allowing the unions.

But assuming the court is paying attention, what is the lesson? Is it that the court should feel free to act boldly, because same-sex marriage is inevitable? Or is it a sign that, as the Prop 8 proponents’ attorney Charles Cooper urged during oral arguments, the court should stay out of an ongoing political discussion?

“The question before this court is whether the Constitution puts a stop to that ongoing democratic debate and answers this question for all 50 states,” Cooper said, adding, “We would submit to you that that question is properly decided by the people themselves.”

Said Carpenter of the justices, “I think they could reason it either way.”

To that end, those who hope for a constitutional right for gays to marry could not have been heartened by recent remarks by Justice Ruth Bader Ginsburg, who they must count on for a win.

At a seminar on Roe v. Wade at the University of Chicago Law School, Ginsburg repeated her oft-stated criticisms of the decision. Although a supporter of abortion rights, she said the ruling went too far too fast and created a backlash.

“Judicial restraint” is a better alternative, Ginsburg said. “The court can put its stamp of approval on the side of change and let that change develop in the political process.”
Ginsburg never mentioned the same-sex-marriage cases, but her interviewer at the event, law professor Geoffrey R. Stone, wrote later that “the connection could not have been lost on the audience.”

The problem with that approach, according to Sainz, is that political momentum doesn’t have that much further to go.

There are 30 states with a constitutional amendment banning same-sex marriage, and overturning them would be an expensive and cumbersome process. Even if the polling is accurate about the new views of Virginians, for instance, there is no voter initiative available to change the constitution. The Republican-led legislature is unlikely to propose such a change, which requires votes in two successive legislative sessions, anytime soon.

Besides Illinois, the Human Rights Campaign sees only Nevada, New Jersey, Hawaii and Oregon as “states in play” in the next several years.

If all of those states broke in favor of same-sex marriage, and the Supreme Court reinstates unions in California, the HRC estimates that 40 percent of Americans would live in states that allow gays to marry by the end of 2016.

http://www.washingtonpost.com/politics/gay-marriage-marching-along-ahead-of-supreme-court-justices-ruling/2013/05/19/33c348c8-bf22-11e2-9b09-1638acc3942e_story.html

OXFORD UNIVERSITY PRESS BLOG: Why equal protection trumps federalism in same-sex marriage cases
By: Erin Ryan
6/1/2013

Federalism is once again at the forefront of the Supreme Court’s most contentious cases this Term. The cases attracting most attention are the two same-sex marriage cases that were argued in March. Facing intense public sentiment on both sides of the issue and the difficult questions they raise about the boundary between state and federal authority, some justices openly questioned whether they should just defer to the political process. And while this is often a wise prudential approach in review of contested federalism-sensitive policymaking, it’s exactly the wrong course of action when the matter at hand is an individual right.

While both cases raise curious issues of standing, the substantive issue at the heart of each case is whether same-sex couples should be able to marry. Hollingsworth v. Perry asks the Court to review the constitutionality of a California’s “Prop 8,” a ballot initiative banning same-sex marriages within the state. United States v. Windsor tests the constitutionality of the Defense of Marriage Act (DOMA), a federal law that prevents the U.S. government from recognizing same-sex marriages performed in states that allow it (and affecting the administration of some 1,100 federal benefits connected with marriage).
Yet the looming question for the Supreme Court is not just whether gays and lesbians have the right to marry; the justices must also confront the question of who should decide whether same-sex couples can marry. Is this something that states should be able to decide for themselves, by making and interpreting state law? (After all, matters of family law have traditionally been left to state regulation.) Or, is the decision to marry so fundamentally important that it triggers the federal Constitution’s promise that all citizens will be treated equally under the law? (After all, even though family law is traditionally left to the states, the Constitution won’t allow them to deny interracial marriages.)

So these cases are not only about the rights of same-sex couples to marry, but also about the relationship between the state and federal governments in regulating marriage. And what’s especially strange about the cases is that they pose the ‘same-sex marriage’ question from opposite sides of the ‘federalism’ issue.

In the Prop 8 case, same-sex marriage advocates want federal law to override the state approach, arguing that the US Constitution prevents California from discriminating against gay and lesbian citizens who wish to marry — and opponents want the feds to butt out of an area of traditional state prerogative. In the DOMA case, same-sex marriage advocates want the feds to butt out, arguing (in part) that Congress shouldn’t interfere with state authority by limiting the legal effect of marriages performed according to state law — while opponents are maintaining the propriety of federal intrusion. (Some analysts have even surmised that members the Court may have strategically partnered the two cases together, using each as a foil against the other.)

Indeed, should the Court invalidate DOMA on federalism grounds alone — holding that the federal law unconstitutionally intrudes on a protected zone of state sovereignty — then same-sex marriage advocates would be celebrating a mixed victory. DOMA would no longer bar legally married gays and lesbians from federal benefits in the few states that have legalized same-sex marriage. But it would seemingly affirm the ability of states like California to deny them the legal right to marry in the first place, without the threat of federal interference.

Joining with same-sex marriage advocates, the Justice Department has advanced the other constitutional argument that would resolve both cases on the same grounds: that both DOMA and Prop 8 violate the Constitution’s essential promise to treat all citizens equally before the law.

By this claim, both laws violate the Equal Protection Clause of the 5th and 14th Amendments, because there is no legitimate basis for the federal or state governments to discriminate between heterosexual and homosexual couples who wish to marry. If the Court agrees that there is an equal protection problem with DOMA, then that federal interest would properly override the traditional allocation of family law to the states, because the Bill of Rights clearly limits all state and federal lawmaking. (Again, recall the constitutional invalidation of anti-miscegenation laws for the same reason.) If this happens, the Court will also have to set, for the first time, the
specific level of equal protection “scrutiny” that courts should apply when reviewing laws that discriminate on the basis of sexual orientation.

At least on the (sketchy) basis of reading the tea leaves at oral argument, no clear majority is ready to take either approach to invaliding the challenged laws — nor is a majority prepared to uphold them. Most analysts are presuming that the four most liberal members of the Court would accept the equal protection rationale for invalidating DOMA and that the four most conservative members are sympathetic to preserving it. Justice Anthony Kennedy, the likely swing vote, is the author of past opinions that have championed both states’ rights and gay rights. In the DOMA oral arguments, he seemed drawn to the federalism rationale for invalidating DOMA, though it was not clear this view could command a majority. In the Prop 8 arguments, he appeared deeply reluctant to insert the Court in the dispute at all, fueling uncertainty and anxiety among stakeholders on both sides.

Indeed, Justice Kennedy seemed deeply moved by the argument frequently made by the supporters of Prop 8 and DOMA against judicial interference in both cases. The argument is that American culture is in transition on the issue of gay marriage, and that the Court should allow the democratic process to proceed legislatively. Following suggestive public comments by Justice Ruth Bader Ginsburg, some are pointing to the abortion-related culture wars that followed the Court’s decision in Roe v. Wade as a cautionary tale about what can happen when the Court gets out too far in front of public opinion. Leave same-sex marriage to the ballot box, they argue, and the people will work this out for themselves — as they have in the handful of states that have independently legalized gay marriage (and of course, the vast majority that have not).

But from the jurisprudential perspective, deference to the political process misses the very point of judicial review and the constitutional rights that these nine justices have sworn to protect. Constitutional individual rights are — by their very nature — counter-majoritarian. You hold them regardless of what the majority thinks, and they are most dear when the majority is against you. Freedom of religion means that your neighbors can’t force you into their church if they don’t particularly like yours. Your right to jury trial is especially valuable when the public at large believes you should be locked up and the key thrown away. Your right to free speech is important precisely because others may prefer that you just shut up. Equal protection is the Constitution’s promise that you won’t be treated unfairly by the government, even when most Americans really want you to be.

So when, as here, the issue on the line is about protecting individual rights against unfair discrimination by the majority — then the Supreme Court has a constitutional obligation not to just leave the matter to the majoritarian political process. Questions about the existence and scope of individual rights are exactly the kind of issue that requires the judiciary to weigh in, delivering on the Constitution’s sacred promise of fair and equal treatment. Can you imagine if
the Supreme Court had concluded that Brown v. Board of Education was “improvidently granted” in order to allow the political process more time to work things out?

Properly understanding the same-sex marriage cases as matters of equal protection also squarely resolves the federalism issue. Under the Supremacy Clause, there is no question but that state law falls when it conflicts with constitutionally protected individual rights — which is precisely as it should be. After all, one of the most frequently acknowledged purposes of our federal structure is its maintenance of checks and balances between local and national authority in order to protect individual rights against incursion by either side. To put abstract federalism concerns before equal protection is to put the constitutional cart before the horse, and to misunderstand the underlying purposes of American federalism to begin with. “States’ rights” serve only one true purpose: the fuller protection of individuals.

The Court should recognize the critical relationship between the federalism and equal protection arguments in these cases. Questions about the boundary between state and federal authority may hold more sway in murkier interjurisdictional realms like health care and education, but if the Constitution protects gay and lesbian people from discrimination, then the issue is elevated beyond the reach of federalism for its own sake. Federalism is never “for its own sake;” it is a structural means to a substantive end. In the United States, that end should be fairness and justice for all.

A version of this article originally appeared on the ACS Law blog.

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STATELINE (THE DAILY NEWS SERVICE OF THE PEW CHARITABLE TRUSTS): What’s Next in the Fight Over Same-Sex Marriage?
By: Jake Grovum
5/22/2013

Momentum in the states to allow gay marriage may be about to stall.

Recent victories have given same-sex marriage advocates hope that the tide has turned in their long-running fight for marriage equality, given the number of states approving same-sex marriage has doubled since Election Day 2012.

But 36 states still ban such unions, and there’s little sign of change in those states anytime soon.
While national public opinion polls show Americans warming to same-sex marriage, voters in many states remain staunchly opposed. And even where the politics and sentiment have changed, bans enshrined in many state constitutions could prove especially difficult to overturn — exactly the reason opponents pushed for constitutional measures in the first place.

In some states, public opinion is overwhelmingly opposed to same-sex marriage. In Kentucky, a recent poll found nearly two-thirds opposed to same-sex marriage; just one in three Democrats supported it. In Montana, about half of voters opposed legalizing gay marriage. Both states have Democratic governors and GOP control of the legislature. In Louisiana, meanwhile, one poll found same-sex marriage support at just 29 percent.

The trend follows regional lines. Aggregated data from four 2012 surveys by the Pew Research Center found gay marriage support in New England at 62 percent — those states all allow the unions. In the central south (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee and Texas), opposition was 56 percent. Each of those states has a gay marriage ban.

The disparate trend has led to a patchwork of laws covering same-sex marriage, civil unions, domestic partnerships and even benefits for state workers. The Supreme Court is weighing a pair of cases that could shift the debate. But absent a broad ruling from the justices when the decision comes, likely in late June, the current landscape will probably remain static.

The issue facing supporters is straightforward: In many states where supporters could win, they already have. Now they’ll be taking their fight to more challenging territory. Even where they see favorable odds, advocates face other obstacles — particularly the 30 states where bans of same-sex marriage are in their constitutions.

Colorado, which legalized civil unions earlier this year, is a key example. Voters there approved a constitutional ban on same-sex marriage in 2006. Changing it requires either a signature drive to get a referendum on the ballot or a supermajority in each chamber before it could go to voters.

Those hurdles mean that despite Democratic majorities and public support for same-sex marriage in the state, advocates had to settle for civil unions this year. House Speaker Mark Ferrandino, the state’s first openly gay lawmaker, said that a same-sex marriage referendum optimistically could be sent to voters by the end of the decade.

“\text{I would love to be able to do marriage,}” Ferrandino said. “\text{But given our constitutional amendment, the farthest we could go was civil unions.}”

More broadly, Ferrandino said Colorado offers a cautionary tale about constitutional amendments. “\text{It’s very difficult for the legislature to change with the changing times,}” he said. “\text{And there’s nothing changing quicker than attitudes on equality}” for the gay community.

Colorado isn’t alone. More than half the states require a supermajority for any amendment to pass. Twelve require that a proposal pass two consecutive legislative sessions. And in many
cases, the amendment is eventually put to a popular vote before enactment, raising the prospect of an expensive, hard-fought statewide campaign that can be decided on turnout or other ballot items. Democrats, for example, tend to vote more heavily in presidential election years.

That’s what same-sex marriage supporters face in Oregon, where the state allows domestic partnerships for same-sex couples but where marriage for them has been banned constitutionally since 2004. Activists are in the early stages of getting an amendment on the ballot for 2014, a process that will require more than 100,000 signatures — all before the actual campaign begins.

An eventual vote could be a close one. A recent poll found 49 percent support changing the constitution to allow same-sex marriage with 42 percent opposed. Nine percent are undecided.

Even in other states where the public is closely divided, the amendment process is just one hurdle, and not even the most difficult one. There’s also legislative reality.

In Wisconsin and Virginia, for example, constitutional amendments to allow same-sex marriage require successive legislative approvals before voters weigh in. For now, supporters say there’s little chance of even preliminary success.

“Virginians are in the right place, unfortunately our House of Delegates is not,” said James Parrish, Equality Virginia’s executive director. “I personally just don’t see the House of Delegates moving.”

The situation is similar in Wisconsin. “You have to have legislative support for repeal, which we do not have right now,” said Fair Wisconsin executive director Katie Belanger. “That’s going to be a multi-year and multi-electoral-cycle process.”

The staying power of constitutional bans on same-sex marriage harkens back to the debate in many states when the measures were first debated. To supporters of the bans, they’re a bulwark against activist lawmakers and judges and a way to protect the interests of religious groups from laws that would “redefine” marriage.

To gay marriage supporters, the bans make it harder for lawmakers to respond to public opinion.

Minnesota illustrates the difference. The state has had a law banning same-sex marriage since 1997, but last fall voters rejected an effort to make it a constitutional ban. That measure was put on the ballot by the then Republican-controlled legislature.

In November, Democrats retook control, and six months later, lawmakers overturned the state law. Democratic Gov. Mark Dayton’s signature made the change official.

“It definitely proves our point that the constitutional amendment was necessary (to preserve the ban),” said Autumn Leva of Minnesota for Marriage, which campaigned in favor of the measure last year. “That’s why we were pushing for the constitutional amendment.”
The National Organization for Marriage, too, called the turnaround in Minnesota a warning sign for other states.

“The recent actions in Minnesota should serve as a wakeup call to other states that have not yet passed Marriage Protection Amendments,” Brian Brown, the organization’s president, said in a statement after the Minnesota vote. “If you do not protect marriage proactively in your constitution, the powerful and wealthy gay marriage lobby will target your state for their next campaign to change your laws.”

In Nevada, same-sex marriage supporters face a stiffer challenge, even though the state has seen a significant shift since voters approved a constitutional ban in 2002. Democrats now control the legislature, and LGBT-friendly measures, like a bill to allow harsher sentences for crimes against transgender victims, have gained currency with Republican Gov. Brian Sandoval.

But there, like in many other states, the system is designed to slow-walk change. The process for amending the state’s constitution requires successful votes in two legislative sessions before a statewide vote. The earliest the state could repeal its ban would be Election Day 2016.

“It’s frustrating,” said Nevada state Sen. Kelvin Atkinson, a Democrat who came out as gay on the Senate floor while his colleagues were debating the repeal amendment.

“You look at things as momentum, and momentum is on our side,” he said. “We would like to ride that wave.”

The Nevada Senate eventually approved a measure to allow same-sex marriage, and it’s on its way to passage in the Assembly. If it passes again in 2015, the issue would head to voters the following year.

How that vote would turn out is anyone’s guess. Atkinson is optimistic, even as he wishes the process could move more quickly. “I wish we could just go ahead and do it,” he said. “The good thing is I won’t have to come out again.”


NEW YORK TIMES: About the Children
By: Bill Keller
4/7/2013

THE defensors of traditional marriage tell us the argument is, first and foremost, about the children. You might not know that from the buzz surrounding the Supreme Court deliberations. The children of gay and lesbian parents got a few splashes of attention, including a powerful endorsement of marriage equality from the 60,000-member American Academy of Pediatrics and one sympathetic-sounding aside from Justice Anthony Kennedy during the
hearings. But for the most part, the debate has focused on the rights of grown-ups and the powers of states, not so much on the well-being of children. And when that subject does come up, the discussion is often shallow or misleading.

So let’s talk about the children.

The stakes for children in this debate fall roughly into two categories. One is legal: A great scaffolding of laws and benefits created to keep children secure and loved is denied to children who grow up with parents of the same gender. Can that be solved without letting same-sex couples marry? The other is social: Researchers have attempted to ascertain whether kids who grow up with two moms or two dads fare differently from kids growing up with one of each. Is there any reason to think same-sex households are bad for children, and if so should policy makers tread carefully?

Take the legal question first.

Nobody knows how the Supreme Court will rule, but the best guess of court-watchers is this: The justices will throw out the federal Defense of Marriage Act, assuring that married same-sex couples will be entitled to approximately the same treatment under federal law as other couples. But they seem likely to leave it up to the states to decide whether gays can get married in the first place.

That means, first of all, that states can continue to deny children of homosexuals many safeguards that protect children of straight couples. The history of this issue is filled with stories of hardship and heartbreak befalling children whose parents are not recognized as — well, as parents. There are the cases of mothers and fathers turned away from a child’s hospital bed because they are not “family.” There are the cases of beloved adults denied visitation rights after a breakup. Many states restrict the ability of a gay parent to adopt or to respond to a child’s medical emergency. Divorce laws were created in large part to assure that children get financial and emotional support when marriages end: no marriage, no divorce, no support.

It is true that a well-crafted civil union law — one that assures gay and lesbian partners the same spousal parenting rights as marriage — can help remedy these cruelties. But many states do not offer civil unions at all. Among those that do, not all civil union laws are so rigorous; some are mere approximations of equality that do not confer full parental rights. Justice Ruth Bader Ginsburg might refer to them as “skim-milk civil unions.”

And civil unions do not address the stigma attached to being treated as if your family is not a “real” family — a stigma that amounts to an official imprimatur for bullying and humiliation. “Kids understand and internalize the sense that something is wrong with their families and that they should be ashamed,” said Camilla Taylor of Lambda Legal, who has followed many of these cases through the courts.
Which brings us to the social question. Defenders of the status quo (including Justice Antonin Scalia) would have you believe that the research on children growing up with gay parents is deeply ambiguous. If you spend time in the recent archives of such periodicals as Pediatrics, Applied Developmental Science, Social Science Research and the Journal of Marriage and Family, you will learn otherwise.

Taken one by one, the studies are far from perfect. The samples are usually small and not random. Few are “longitudinal” — that is, following subjects over years or decades. Social science rarely delivers conclusive results under the best circumstances, and with same-sex marriage researchers face particular handicaps. The number of children who have been raised entirely by stable, same-sex couples is relatively small. (According to the demographer Gary Gates of U.C.L.A., a majority of children being raised by gay or lesbian parents were born to opposite-sex couples who later broke up.) Homosexuality still encounters bigotry that makes potential study subjects wary. And it is hard to untangle all the variables in the raising of children.

But it is fair to say that the research shows no significant disadvantage associated with being raised by lesbian mothers or gay fathers — not in academic performance, not in psychological health, not in social or sexual development, not in violent behavior or substance abuse. And the research leaves little doubt that stable, two-parent households (of whatever flavor) are likely to be better off financially, more attentive to the upbringing of children and more secure than single-parent households.

(You can find excellent roundups of this work in the March issue of Pediatrics, and in the amicus brief of the American Sociological Association.)

Of course, the burden of proof lies with opponents of marriage equality. In legal parlance, they are the ones who seek to establish a “governmental interest” that justifies discriminating against gay couples. So where’s their evidence?

They lean heavily on one study published last year by Mark Regnerus, an associate professor of sociology at the University of Texas. He compared two groups of young adults. The first group told interviewers that at some point in their upbringing a parent experienced a same-sex “romantic relationship.” In most cases, the parents subsequently broke up. In other words, this group wasn’t the offspring of committed gay couples but of failed unions, some of them probably sham marriages. It’s not even clear whether the parents who strayed were gay or lesbian, or simply experimenting. The second group consisted of kids who spent their childhoods in lasting, married, mom-and-dad families.

Guess which group had problems?

The study was pretty well demolished by peers. It may have confirmed the emotional toll of broken homes, but it said nothing much about growing up with gay parents. Regnerus, when I
talked to him, conceded that his study compared apples and oranges, because “I didn’t have oranges.” He was unable to articulate what bearing his study had on gay marriage except that it “paints the reality of people’s lives as fairly complicated.”

Activists against same-sex marriage, however, are not all that particular about the quality of their evidence. They are happy to enlist and exaggerate dubious research to create the illusion that there is a scientific stalemate, and they often get away with it. When David Gregory of “Meet the Press” brought up the fact that the American Academy of Pediatrics endorses marriage equality, Ralph Reed of Focus on Family retorted, “And the American College of Pediatrists came out the other way.” Nobody pointed out that this “college” is a tiny, conservative rump that broke away from the main pediatric group in 2002 over gay adoption. To quote its Web site, “The College bases its policies and positions upon scientific truth within a framework of ethical absolutes.” Among its inviolable beliefs are “the sanctity of human life from conception to natural death and the importance of the fundamental mother-father family (female-male) unit in the rearing of children.” Naturally, the college loves the Regnerus study.

Even if the research showed that children of same-sex couples were less well adjusted, which it does not, would we really want government to intervene? After all, there is research showing that children whose parents are of different races struggle more, on average, than children with parents of the same race. But no serious person suggests we turn back the clock on interracial marriage.

“It really doesn’t matter very much what Regnerus or anybody else shows,” concludes James Wright, the editor of the journal that published the Regnerus study and its critics. “It’s a question of fundamental civil rights.”


USA TODAY: For same-sex marriage, progress without precedent?
By: Richard Wolf
3/29/2013

WASHINGTON — Jeff Zarrillo brought his case for gay marriage to the Supreme Court because, he said, "the court is supposed to step in and protect the minority from the tyranny of the majority."

Edith Windsor brought her case for same-sex spousal benefits to the high court because, she said, "from my fourth-grade civics class, I somehow trust the Supreme Court to bring justice."

Both Zarrillo, one of four people challenging California's Proposition 8 ban on same-sex marriage, and Windsor, the New York widow challenging the Defense of Marriage Act, may win
their cases when the justices rule in June. But few expect the type of landmark decisions that would make civil rights history.

For proponents of marriage equality, that would mean progress without precedent. And that may be good enough.

"Sometimes, the court takes things in one fell swoop. Sometimes, it takes things one step at a time," said Theodore Boutrous, one of the lawyers representing the Proposition 8 challengers. "I think the path is clear. The law points all in one direction."

After months of media hype befitting such a transformational issue as same-sex marriage, the debate inside the courtroom often focused on who could challenge what, or whether there even was a dispute to resolve once the defendants had taken up with the plaintiffs.

Though proponents and opponents of same-sex marriage had anticipated a debate over discrimination and equal protection, at times they got a discussion about federal vs. state jurisdiction over family law.

"I would have liked to see a bigger 'Aha!' moment — that at the heart of these cases is the need to get the law where the American people are already going, which is to embrace the full equality and inclusion of gay people in marriage and in American life," said Evan Wolfson, president of Freedom to Marry.

Still, the result could be historic progress. By late June, wedding bells may be ringing for gay and lesbian couples in California, where one in eight Americans live. In nine other states and the District of Columbia, married same-sex couples could get full federal recognition and benefits.

Regardless of the court's decisions in Hollingsworth v. Perry and United States v. Windsor, gay marriage laws soon may be passed in four more states — Illinois, Minnesota, Rhode Island and Delaware. By the end of next year, the same could be true in New Jersey, Oregon and Hawaii.

Those who hope for landmark Supreme Court rulings similar to Justice Anthony Kennedy's 2003 opinion in Lawrence v. Texas, which struck down state sodomy laws, may have to wait a bit longer.

Kennedy wrote then, "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime." On gay marriage, he said this week, "we have five years of information to weigh against 2,000 years of history or more."

"Those of us who were hoping for sort of the Lawrence of marriage — sweeping, eloquent language vindicating the rights of gay and lesbian couples to get married — that looks rather unlikely," said Elizabeth Wydra, chief counsel of the liberal Constitutional Accountability Center.
On the most momentous questions before them — Do gays and lesbians have a fundamental right to marry? Does the Constitution forbid restrictions on same-sex marriage? Do gays and lesbians qualify for heightened protection? — the justices indicated they may take a pass. That would prevent a 50-state, court-imposed solution.

"I think they realize what a significant step that would be," said John Eastman, a law professor at Chapman University in California and chairman of the National Organization for Marriage, which opposes same-sex marriage. "The public opinion on this question might be changing, but it has not changed to the point that the court would be out front of two-thirds of the states in the country."

That's OK with Chad Griffin, a leader of the opposition to Proposition 8 who took over last year as president of the Human Rights Campaign, the nation's most influential gay rights group.

"There are multiple ways to victory here," Griffin said. "We'll see what this court does, and then we'll see what fights we have left to fight."


THE NEW YORKER: Why The Gay-Marriage Fight Is Over
By: Jeffrey Toobin
3/28/2013

This is what I will remember about the atmosphere at the Supreme Court during the same-sex marriage cases: that it wasn’t terribly memorable. The place was relaxed. The Justices were attentive but unemotional. The audience was cheerful. It was a lot like most arguments before the Justices, except that every seat in the courtroom was taken.

The reason for the mellow vibe was unspoken but clear. Everyone knows that same-sex marriage is here to stay; indeed, it’s expanding throughout the country at a pace that few could have imagined just a few years ago. The Justices were not irrelevant to the process, but they weren’t central either. They knew that—and so did everyone else.

I don’t mean to diminish the significance of the issues in the Proposition 8 and DOMA cases. Edith Windsor, the highly appealing plaintiff in the DOMA case, illustrated in stark terms the stakes of that case. She had to pay $363,000 in inheritance taxes because DOMA, the 1996 law, forced the Internal Revenue Service to treat her late wife as a legal stranger. If Justice Anthony Kennedy was previewing his vote with his comments, then Windsor will likely get her money back—not because DOMA is a piece of legislative bigotry, but because Kennedy has a consuming affection for state’s rights. (In other words, he thinks that the states alone should define the meaning of marriage.)
Indirectly, the two most memorable moments in Wednesday’s argument made clear how much the world had changed—and why the Supreme Court was kind of a sideshow to what’s really going on in the country.

About midway through the argument, Paul Clement, who was representing the House Republicans and defending DOMA, was cruising along. He was portraying DOMA as almost a kind of housekeeping measure, designed to keep federal law consistent across all fifty states. As Clement told it, there was almost no ideological content to the law at all.

Then Justice Elena Kagan swiftly and elegantly lowered the boom on him. She said, “Well, is what happened in 1996—and I’m going to quote from the House Report here—is that ‘Congress decided … to express moral disapproval of homosexuality.’” A collective woo went through the audience. Kagan had the temerity to tell what everyone knew to be the truth—that DOMA was a bigoted law designed to humiliate and oppress gay people.

Clement, an eloquent advocate in oral arguments, was reduced to stammering like Ralph Kramden. He said that was not enough to invalidate the law: “Look, we are not going to strike down a statute just because a couple of legislators may have had an improper motive.” But suddenly it was clear. No one could deny that there was an improper motive—anti-gay prejudice—underlying DOMA.

But the second key moment illustrated the difference between 1996 and 2013. Toward the end of the argument, Roberts asked Roberta Kaplan, the lawyer for Windsor, “You don’t doubt that the lobby supporting the enactment of same sex-marriage laws in different states is politically powerful, do you?” Kaplan—somewhat improbably—denied it. Roberts fought back: “As far as I can tell, political figures are falling over themselves to endorse your side of the case.”

But Roberts was right on both counts—that the gay-rights movement is politically powerful and many politicians have been lining up to support same-sex marriage. Roberts was raising the point to argue that gay people no longer needed the protection of the courts. They could take care of themselves in the rough and tumble of politics. In this Roberts was half right. Gay people now can take care of themselves—but they also suffer under the yoke of discriminatory laws like DOMA.

The larger point was clear: times have changed. Gay people deserve changes in the law—now. That’s why we have courts. But the extraordinary subtext of the two days of arguments was that everyone knew those changes were coming, with or without the Supreme Court. That’s why everyone could relax (sort of) in the courtroom. Everyone knew how this story ended.

WALL STREET JOURNAL: Obama: Gay-Marriage Is Constitutional
By: Jared A. Favole
3/28/2013

President Barack Obama sees a strong basis in the Constitution for the Supreme Court to decide that same-sex couples have the same rights as heterosexuals, though he said couldn’t predict how the court would rule.

“I used to teach Constitutional Law and I think that there’s certainly a strong basis for determining that, in fact, in this age given what we now know, given the changes that have been taking place in states around the country, that same-sex couples should be treated fairly and have the same rights to benefits” as men and women who marry, Mr. Obama said in an interview Wednesday with the Spanish-language television network Univision.

The president, who Republicans have accused of being an out-of-touch former law professor, rarely discusses his time as a law professor at the University of Chicago.

Mr. Obama’s comments follow two days of oral arguments at the Supreme Court on gay marriage, where the justices appeared reluctant about making sweeping changes on gay rights and raised questions about whether the cases belonged before the court at all.

Mr. Obama said he thinks it’s “appropriate for the court to weigh in on this issue.” He said public opinion has shifted on gay marriage. Lawmakers from both parties in recent weeks have said they favor allowing same-sex couples to marry.

Mr. Obama last year became the first sitting president to say same-sex couples should have the right to marry. “For them to be penalized because of their status is something that I think is inconsistent with our traditions,” Mr. Obama said Wednesday.

He said he understands that some people may not support gay marriage and their views should be respected. “But when it comes to the law, everybody should be equal before the law,” Mr. Obama said.

Pressed whether he thinks the court should decide on gay marriage now, Mr. Obama said, “I don’t know what the court will do. I never predict what the court will do.” Rather than ruling on gay marriage, the court could rule that the sponsors of the cases lacked standing, meaning the question of the legality of same-sex marriage would persist.

WASHINGTON POST: Political debate on same-sex marriage is arguably over
By: Chris Cillizza
3/24/2013
The Supreme Court will hear two landmark cases on gay marriage this week that have the potential to reshape how the country defines one of its most sacred institutions. But, no matter how the high court rules later this year on California’s Proposition 8 and the Defense of Marriage Act, one thing is already clear: The political debate over gay marriage is over.

“There’s no putting this genie back in the bottle,” Florida-based Republican strategist Ana Navarro said Sunday on CNN. “This is now undeniable. The shift is here. We’re not going back.”

Evidence of that reality is everywhere. Dozens of prominent Republicans — led by former Republican National Committee chairman Ken Mehlman — have signed onto a brief to the court urging repeal of Proposition 8, which bans same-sex marriage in the Golden State. Sen. Rob Portman (R-Ohio), a finalist to serve as Mitt Romney’s vice presidential nominee in 2012, announced last week that he was reversing course and would now support the right of gay men and lesbians to marry. (Portman said his decision was influenced by his son, Will, who is gay.)

Anecdotal evidence aside, national polling tells the story in stark terms. In a Washington Post-ABC poll released last week, nearly six in 10 Americans said they support the legalization of gay marriage. That’s the highest level of support ever measured in the Post-ABC survey — and compares with just 41 percent who supported legalization in 2004.

A look inside the numbers makes the case even more strongly. It’s no secret that the issue divides strongly along generational lines, with 80 percent of those ages 18 to 29 supportive of gay marriage, compared with 44 percent of those older than 65. But what’s remarkable is that the generational divide on the question is stronger than the partisan one. In the Post-ABC survey, a slim majority of Republicans and GOP-leaning independents younger than 50 now support gay marriage. Nearly seven in 10 of those age 65 and older oppose it, but that number was more than eight in 10 as recently as 2009.

And, it’s not simply the fact that young people are strongly supportive of allowing gay people to marry that means the political fight on same-sex marriage is over. After all, there is the possibility that as young people age, they might grow less amenable to the idea.

In fact, according to National Opinion Research Center data going back to 1988, each generation has grown more supportive of gay marriage as it has aged. Just 25 percent of baby boomers backed legalizing gay marriage in 2004, but that number had risen to 43 percent in 2012. Ditto Gen X’ers — 37 percent of whom backed gay marriage in 2004 and 53 percent who said the same in 2012.

It’s not just national surveys where the shift is evident. In a Columbus Dispatch poll released Sunday, 54 percent of Ohioans favor repealing a 2004 ballot initiative that established marriage as between a man and a woman in the state’s constitution. (The measure passed with 62 percent of the vote nine years ago.)
All of the above is not to say that the Republican Party will shift its broadly held opposition to gay marriage — at least any time soon. “I can’t imagine that position would ever change,” House Speaker John Boehner (R-Ohio) said last Sunday when asked about the possibility of switching to support gay marriage.

“I still think the Republican Party is going to remain a pro-family, pro-marriage, you know, pro-life party,” Ralph Reed, a leading social conservative strategist, said during an appearance on NBC’s “Meet the Press” last Sunday. “I don’t think that’s going to change.”

To date, it hasn’t; 21 percent of self-identified Republicans supported gay marriage in 2001 while 25 percent supported it 2012, according to Pew Research Center data. What that suggests is that much of the Republican Party remains opposed to same-sex marriage and probably will continue to be so — no matter what the Supreme Court rules later this summer.

But, the trajectory of the data suggests that ambitious Republicans who want to win statewide in swing states or get elected president in 2016 and beyond simply won’t proactively talk about the issue. Outside of Republican primary fights, gay marriage will disappear from the national political dialogue as an issue.

NEW YORK TIMES: Marriage and the Supremes
By: Frank Bruni
3/23/2013

I’m not sure I’ve ever seen advocates of gay rights — of equal rights, I should say — as revved up as they are right now, with the Supreme Court poised, on Tuesday and Wednesday, to consider same-sex marriage in two separate cases.

But while they’re watching this moment raptly and hopefully, it’s not with a sense that the fate of the cause hangs in the balance. Quite the opposite. They’re watching it with an entirely warranted confidence, verging on certainty, that no matter what the justices say during this coming week’s hearings and no matter how they rule months from now, the final chapter of this story has in fact been written. The question isn’t whether there will be a happy ending. The question is when.

That’s what’s truly remarkable about this juncture: the aura of inevitability that hovers over it. In an astonishingly brief period of time, this country has experienced a seismic shift in opinion — a profound social and political revolution — when it comes to gay and lesbian people. And it’s
worth pausing, on the cusp of the court hearings, to take note of this change and to mull what’s behind it.

As for the change itself, look at the last month alone. Look merely at the Republican Party. Although its 2012 platform called for a constitutional amendment to ban gay marriage, scores of prominent Republicans, including a few senior advisers to Mitt Romney’s campaign, broke ranks in late February and put their names to a Supreme Court amicus brief in favor of marriage equality.

That these dissidents can’t be dismissed as pure anomalies was made clear at the annual gathering of the Conservative Political Action Conference last weekend. CPAC, mind you, is no enclave of moderation and reason. It’s more like an aviary for the far-right “wacko birds” whom John McCain recently called out.

But as BuzzFeed’s Chris Geidner, who covered the conference, noted, “Opponents of gay rights spoke to a nearly empty room, while supporters had a standing-room-only crowd.” That observation came under a headline that said, “At CPAC, the Marriage Fight Is Over.” The article went on to quote a bit of counsel that the Washington Post blogger Jennifer Rubin gave her fellow conservatives. On the issue of same-sex marriage, she told them, the country was headed in one and only one direction. Republicans could either get with the program or get comfy with their image of being woefully out of touch.

The BuzzFeed article was posted last Sunday. On Thursday, in Politico, came the sweeping declaration that March 2013 would perhaps go down as “the month when the political balance on this issue shifted unmistakably from risky to safe.” That assessment reflected formal endorsements of same-sex marriage, in less than a week’s span, by both Rob Portman and Hillary Clinton.

Clinton, tellingly, didn’t just articulate her position in the course of a broader interview or speech. She released a precisely scripted video dedicated to marriage equality, and that spotlight and care spoke volumes about the way this issue has suddenly become central to Democratic politics: something a serious national figure who wants party approval and donor dollars must support and must get right.

What a difference four years make. In 2008, both Clinton and Barack Obama publicly opposed same-sex marriage. Just a year ago, that was still Obama’s formal stance. But by the summer of 2012, marriage equality had made its way into the party platform. Now it’s woven into the party’s very fiber.

There’s no going back. In an ABC News/Washington Post survey released early last week, respondents nationwide favored marriage equality by a 58-to-36 margin. That’s an exact flip of a similar survey just seven years ago, when the margin was 36-to-58.
And among young Americans, who will obviously make up more and more of the electorate as time goes by, support was stronger still. The ABC/Washington Post survey showed that 81 percent of people in the 18-to-29 age group endorsed marriage equality.

The buildup to the Supreme Court hearings has demonstrated the breadth of diversity of support for it. There have been amicus briefs signed, or proclamations of solidarity issued, by dozens of professional athletes and by the American Academy of Pediatrics, by tech giants and accounting firms and retailers and airlines. Somewhere along the way, standing up for gay marriage went from nervy to trendy. It’s the Harlem Shake of political engagement.

And the unstoppable advances made by gays and lesbians were suggested by a quiet but revealing statement recently by the president of the Gay and Lesbian Alliance Against Defamation, who signaled that the organization would put a new emphasis on transgender equality.

These advances happened in largest part because of the increased visibility of gay people who have had the courage and optimism to share their lives and truths with family, friends, colleagues. Although many critics nitpicked Portman for changing his views only out of what was deemed a selfish concern for his own gay son, that’s precisely the way many people are illuminated and tugged along: by emotion, not abstraction; by what’s immediate and personal, not what’s foreign and theoretical. Clinton has acknowledged as much by citing the influence of gays and lesbians she has known and respected. And the decades-long rallying cry of the gay-rights movement — come out, come out, so that Americans understand the impact of discrimination on people they care about — was predicated on that wrinkle of human nature.

Additionally, the quest for same-sex marriage has forced many Americans to view gays and lesbians in a fresh light. We’re no longer so easily stereotyped and dismissed as rebels atop parade floats, demanding permission to behave outside society’s norms. We’re aspirants to tradition, communicating shared values and asserting a fundamentally conservative desire, at least among many of us, for families, stability, commitment. What’s so threatening about any of that?

And who really loses if we win? Where’s the injured party? The abortion debate grinds on in part because to those who believe that life begins at conception and warrants full protection from then on, every pro-choice victory claims victims. The gun debate grinds on because new restrictions are just that — restrictions — and no matter how justifiable and necessary they may be, opponents will rail that their freedom is being curtailed.

But the legalization of same-sex marriage takes nothing from anyone, other than the illusion, which is all it is and ever was, that healthy, nurturing relationships are reserved for people of opposite sexes.
The Supreme Court cases and their resolutions indeed matter. If the court doesn’t dismantle the Defense of Marriage Act, there’s no telling how many more years will pass before this repugnant 1996 law tumbles in some other way and before gay and lesbian couples married in states that allow such weddings are treated equally under federal law.

And the court could, in its ruling on the constitutionality of a California ban against same-sex marriage, hasten the spread of marriage equality beyond those nine states and the District of Columbia. For now the count builds slowly, through time-consuming, patience-fraying, expensive legislative and referendum battles, and a matter of basic fairness is beholden to local politics and pockets of enduring bigotry.

But fairness is where we’re heading, at least in regard to marriage, which has emerged as the terrain on which Americans are hashing out their feelings about gays and lesbians. The trajectory is undeniable. The trend line is clear. And the choice before the justices is whether to be handmaidens to history, or whether to sit it out.


LOS ANGELES TIMES: Public opinion could sway Supreme Court’s ruling on gay marriage
By: David Savage
3/1/2013

WASHINGTON — Public opinion on marriage for gay and lesbian couples has shifted with almost unprecedented speed since California voters banned such unions in 2008.

That shift could influence the Supreme Court, in particular Justice Anthony M. Kennedy and possibly Chief Justice John G. Roberts Jr., as it decides whether to uphold Proposition 8 in coming months.

Throughout his long career, Kennedy has been willing to make major changes in the law on issues including the death penalty, gun rights and gay rights. Kennedy has been a strong, steady proponent of constitutional principles such as free speech, individual liberty and limits on government power.

But before signing on to major changes — abolishing the death penalty for young murderers, for example — he has wanted to feel comfortable that the change was in line with public opinion and the trend in the law.

"Among all the justices, he is most concerned about public opinion," New York University law professor Barry Friedman said of Kennedy. "The more there is a groundswell of support for gay marriage, the more it is likely he will vote to support it."
Kennedy, along with others on the court, probably would also resist going too fast. The current justices, both liberals and conservatives, say the court of the early 1970s made a mistake by striking down all state laws on abortion and capital punishment. Both decisions appeared to trigger a backlash, and the death penalty was soon restored to law.

Better to move in line with — or just slightly ahead of — shifting opinion, they believe.

In California, public opinion clearly has shifted since Proposition 8 passed in 2008 and banned same-sex marriage. A Field Poll survey released this week showed that California voters, by a nearly 2-1 margin, now approve of allowing same-sex couples to marry, a finding in line with states that legalized gay marriage in November's election.

With that shift, lawyers supporting same-sex marriage have offered the justices a range of options they could use to rule in favor of gay rights. The Obama administration's legal brief advocates a step-by-step approach.

Commenting Friday on the administration's filing in the case, President Obama told reporters: "I do think that we're seeing, on a state-by-state basis, progress being made — more and more states recognizing same-sex couples and giving them the opportunity to marry and maintain all the benefits of marriage that heterosexual couples do." But, he added, the administration wanted to "answer the specific question" before the court — whether "the California law is unconstitutional."

In providing that answer, Solicitor Gen. Donald Verrilli Jr. drew on arguments he had filed with the court just a few days earlier saying the justices should strike down part of the Defense of Marriage Act, which denies federal benefits to legally married gay couples in states such as Massachusetts. He advised the court to say that discrimination based on a person's sexual orientation is highly suspect, akin to gender bias. It can be justified only if a state can show a strong need to treat gays and lesbians differently than other citizens, the administration argued.

Verrilli's brief filed Thursday applied that same approach in the Proposition 8 case. It argues that because California and seven other states — Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon and Rhode Island — already have given gay couples full legal rights, there is no justification for denying them a right to marry.

This is what some lawyers have dubbed the "eight-state solution."

Already, nine other states and the District of Columbia authorize same-sex marriage. If the Supreme Court were to adopt the administration's view, it could raise the total to 17, mostly in the Northeast and on the West Coast.

While this would be a significant ruling, it would not require Justice Kennedy and his colleagues to mandate gay marriage in the red states where majority opinion continues to oppose it.
The defenders of Proposition 8 also cite the change in public opinion, but argue it is a reason for the court to stand aside. Because there is a great national debate over gay marriage, and some states are changing their laws, the court has no need to intervene, they said.

Andy Pugno, general counsel for the Proposition 8 proponents, said it was "very disappointing" that the Obama administration had urged the court to strike down the voter initiative. "The president has impugned the motives of millions of Californians," he said, "and disregarded the rights of each state to decide for itself whether to redefine marriage."

If the court were to adopt a version of the eight-state solution, it would allow most states to decide for themselves, as Pugno advocates — at least for now. But it is also true that if the justices decided discrimination against gays violates the Constitution's guarantee of equal protection of the laws, that same argument eventually could be used to invalidate the remaining state laws against same-sex marriage. The justices might be particularly willing to do so if the majority of states already had acted.

In 1967, the Supreme Court ruled that laws barring mixed-race couples from marriage violated the Constitution. By then, only 16 states still had such laws on their books.

http://articles.latimes.com/2013/mar/01/nation/la-na-court-prop8-20130302

NEW YORK TIMES: Brief Supporting Same-Sex Marriage Gets More Republican Support
By: Sheryl Gay Stolberg
2/27/2013

More than two dozen Republicans — including a top adviser to Mitt Romney, the 2012 Republican presidential nominee — have added their names to a legal brief urging the Supreme Court to declare that gay couples have a constitutional right to wed. The brief comes as the White House is considering whether to weigh in on the same-sex marriage case; at this point, the Republicans who signed the document are taking a more expansive stance than President Obama, who favors same-sex marriage but has said he would leave it to the states, as opposed to making it a constitutional right.

The list of Republicans on the brief now tallies more than 100, organizers say. It now includes Beth Myers, who ran Mr. Romney’s 2008 campaign and was a senior adviser to him in 2012; Charles Bass, a former member of Congress from New Hampshire; and Douglas Holtz-Eakin, an economist who advised Senator John McCain’s 2008 presidential campaign. Also on the list is B. J. Nikkel, who made national news last year when she became the only Republican on the Colorado House Judiciary Committee to vote in favor of same-sex civil unions. She previously worked as district director for Representative Marilyn Musgrave, a former congresswoman whose signature issue in Washington was banning same-sex marriage.
The brief, organized by Ken Mehlman, a former chairman of the Republican National Committee who is gay, will be filed on Thursday as a friend-of-the-court, or amicus, brief to a lawsuit that seeks to overturn Proposition 8, a California ballot initiative that forbids same-sex marriage, and all similar bans. The landmark case will be heard alongside a request that the court overturn the 1996 federal Defense of Marriage Act, which defines marriage for the purposes of federal law as the union between a man and a woman.

Mr. Obama strongly supports the repeal of the defense of marriage law, and has instructed his Justice Department not to defend it in court. His move prompted the House speaker, John A. Boehner, and the House Republican leadership to authorize the expenditure of tax dollars to defend the law; Mr. Boehner, who is personally opposed to same-sex marriage, has said he believes it is up to the Supreme Court, not the Obama administration, to determine the constitutionality of the measure.

Last week, the administration filed its brief in the Defense of Marriage case, asking the court to declare the measure unconstitutional. The brief notes that same-sex couples may already legally marry in some states and argues that singling them out is “a harsh form of discrimination that bears no relation to their ability to contribute to society.”

But the administration has been far more cautious in the Proposition 8 case. A White House official said Tuesday morning that no decision had been made on whether to file an amicus brief; the deadline is Thursday. The Wall Street Journal, citing unnamed sources, reported Tuesday evening that the administration was still weighing its decision, and was “looking at options that fall short of embracing a constitutional right” to same-sex marriage.

Mr. Obama has made supporting same-sex marriage a central theme in his recent speeches, including his second inaugural address, and has often stated that Americans ought to have equal rights, “no matter who you love.” He announced during his re-election campaign last year that, after months of saying his views were “evolving,” he had concluded that gay couples ought to be allowed to marry.

But in announcing that decision, Mr. Obama said he believed the issue would be “worked out at the local level,” because marriage has traditionally been the province of the states, not the federal government.

That position enrages many gay rights activists, who view it as immoral and note that it was the same explanation opponents of interracial marriage once used to prevent couples like Mr. Obama’s own parents from marrying.

The elder Obamas married in 1961 in Hawaii, which permitted interracial unions. But it was not until the landmark Loving v. Virginia case — decided in 1967, when Mr. Obama was 6 — that the Supreme Court declared interracial marriage a constitutional right and overturned a Virginia ban.