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# Going to the Show: The Supreme Court Will Consider Validity of Same-Sex Marriage Bans

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# Verdict

December 11, 2012

[Joanna L. Grossman](#)

## Going to the Show: The Supreme Court Will Consider Validity of Same-Sex Marriage Bans



The U.S. Supreme Court will finally wade into the same-sex marriage debate that has embroiled virtually every other governmental body at the state and federal level at some point in the last twenty years. Last Friday, the Court agreed to review two cases that raise, in different ways, the question whether bans on same-sex marriage violate the federal constitution.

The first case, *United States v. Windsor*, presents the question whether a provision of the Defense of Marriage Act (DOMA), which precludes the federal government from giving effect, for any federal law purpose, to a validly celebrated same-sex marriage, is unconstitutional. The second case, *Hollingsworth v. Perry*, considers the constitutionality of a voter referendum in California that eliminated a right of same-sex marriage that the state's highest court had previously ruled constitutionally necessary.

The initial media coverage of the Supreme Court's decision to review these rulings has focused on (1) why the Court decided to enter the fray now and (2) given that decision, why it chose these particular cases, among many that presented similar issues, to review. But these are questions that we might defer for historians who will one day examine the private papers of the current justices. A more pressing question is what the Court will do with these cases now that it has decided to review them. In this column, I'll discuss the lower-court rulings in national context, the questions presented to the Supreme Court, and the array of possible outcomes.

### Same-Sex Marriage Laws: A National Patchwork and a Subject of Continued Controversy

Since the early 1990s, the country has been embroiled in a heated controversy about whether same-sex couples should be allowed to marry. At that time, state and federal laws were mostly silent on the question whether same-sex couples were permitted to marry. None expressly allowed it, but most did not expressly prohibit it either. Thus, lawsuits were filed, in several states, in which plaintiffs argued that same-sex couples should be allowed to marry under those laws and, if not, that those laws were unconstitutional under state constitutions. Lawyers were careful, in most cases to sue under state constitutions only, in order to avoid review by the U.S. Supreme Court, which was presumed at the time to be hostile to same-sex marriage. (State high courts are the final arbiters of the meaning of their own constitutions.)

Those early lawsuits produced an unprecedentedly harsh political reaction against same-sex marriage, long before they produced any victories for advocates of same-sex marriage. In response to the threat that a lawsuit to establish same-sex marriage rights in Hawaii might be successful, Congress enacted DOMA, ostensibly to protect other states from Hawaii's same-sex marriages (which never came to pass) and to protect the federal government from them as well. Dozens of states accepted Congress's invitation to defend themselves against full faith and credit claims (which was unnecessary, because full faith and credit principles do not require states to recognize one another's marriages) by enacting statutes or constitutional amendments (or both) to ban the celebration and recognition of same-sex marriage. At the high point of the anti-same-sex marriage movement, forty-four states had such laws. A few of those laws have since been repealed or, in the case of statutes, have been declared unconstitutional by state courts. But more than forty remain on the books, and are fully enforced.

But as the opposition to same-sex marriage reached a fever pitch, advocates of same-sex marriage were eking out their own victories. Vermont was the first to grant formal recognition to same-sex couples at the state level, when it invented the civil union in 2000, in response to a ruling from its highest court that the legislature could not constitutionally deny same-sex couples the benefits of marriage. Then, in 2003, the Supreme Judicial Court of Massachusetts ruled, in *Goodridge v. Department of Public Health* (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>), that the legislature could deny same-sex couples neither the benefits of marriage nor the name "marriage" under the state constitution's guarantees of due process and equal protection. The following year, the state began to allow same-sex couples to marry.

For several years, Massachusetts was the lone state to issue marriage licenses to same-sex couples (such licenses were first restricted to residents, but later opened up to non-residents as well). But in 2008, a handful of other states also began to do so, some pursuant to rulings like *Goodridge*; others, pursuant to voluntary actions of the state legislature. Another group of states joined in between 2009 and 2011, and the November 2012 elections that just passed resulted in the addition of three more states to the pro-same-sex-marriage list. All told, nine states and the District of Columbia now authorize same-sex couples to marry on exactly the same terms as opposite-sex couples may. And another half-dozen states offer a status equivalent to marriage, such as a civil union or a robust form of the domestic partnership, which differ from same-sex marriage in name only.

Meanwhile, public opinion has shifted dramatically on this issue. More than half of Americans now support marriage equality for same-sex couples. President Obama announced his support for gay marriage before winning re-election in November 2012, and still won. Opponents of same-sex marriage lost all four state voter referendums that dealt with the issue in the most recent election. (I explain the particular referendums and results [here \(http://verdict.justia.com/2012/11/13/an-historic-first\)](http://verdict.justia.com/2012/11/13/an-historic-first).)

Although most states have staked out a firm position on the same-sex marriage issue, the controversy has not subsided. To the contrary, it has become even more pressing as the conflict between state and federal law on same-sex marriage arises in even more situations. Thus, one focus of the current controversy is the constitutionality of DOMA. The key question is whether the federal government can refuse to give effect to marriages based on the gender or sexual orientation of the parties. In addition, despite the longstanding advocates' strategy of confining same-sex marriage litigation to state law and state courts, a case challenging California's same-sex marriage ban was filed in federal court and under the federal constitution, giving the Supreme Court a platform to consider the federal constitutionality of same-sex marriage bans. In other words, the Court might answer the following question: Can a state prohibit same-sex marriage without running afoul of the federal constitution?

It is these two issues that the Supreme Court will have the opportunity to consider in the cases newly under review.

### **Is DOMA Constitutional?**

In the past year, four federal courts have ruled that the federal-law provision of DOMA is unconstitutional. This provision, Section 3, defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife."

Although DOMA was signed into law in 1996, it was essentially irrelevant until 2004, when Massachusetts began licensing gay couples to marry. It matters all the more now that very populous states like New York allow the celebration of same-sex marriages. There are now thousands and thousands of same-sex marriages that are valid in some states, but that do not count for any federal-law purpose. And marital status matters for a huge number of federal laws and programs—from immigration and Social Security, to military-cemetery access and federal taxation.

As a general matter, federal statutes do not provide their own definition of marriage. Federal laws, instead, typically defer to state determinations of marital status, as they do to state definitions of parent-child relationships. DOMA thus represents a departure from the usual rules, one that means that a person's marital status may differ depending on why that status matters. It is thus not surprising that DOMA is now the subject of many lawsuits.

DOMA litigation is complicated by the fact that the Obama Administration **declared** (<http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>) in the “Holder Memo,” in February 2011, that it would no longer defend Section Three challenges in court, at least in jurisdictions where there is no binding precedent regarding the appropriate level of scrutiny for sexual-orientation classifications. The Administration's position is that such classifications are entitled to heightened scrutiny and, further, that this provision of DOMA cannot survive such scrutiny.

In most pending DOMA challenges now, the law is defended by the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), which is comprised of certain members of Congress who support DOMA.

The federal government has also weakened DOMA by allowing exceptions to the law to be made in specific administrative situations, or in individual cases.

### ***United States v. Windsor: The Ultimate Test for DOMA***

*Windsor* illustrates a typical federal-state law conflict. In that case, the widow of a same-sex spouse, who had been married in Canada, sought (and won) a refund of estate taxes that would not have been owed had the federal government given effect to the couple's same-sex marriage. At the time, New York did not allow for the celebration of valid same-sex marriages, but it did give effect to those that were validly celebrated elsewhere. Subsequently, the New York legislature passed a law to legalize same-sex marriage (a development I discuss [here \(http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications\)](http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications)).

Edith Windsor challenged the estate tax assessment on the ground that the federal-law provision of DOMA was unconstitutional. A federal district judge ruled in her favor, reasoning that Congress had no legitimate reason for refusing to recognize marriages based solely on the sexual orientation of the parties. The judge declined to adopt heightened scrutiny for sexual-orientation classifications, but looked to two Supreme precedents (*Romer v. Evans* (<http://supreme.justia.com/cases/federal/us/517/620/>) and *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/>)) that nonetheless supported a closer look at such classifications, especially if they are suggestive of animus or mere moral disapproval of homosexuality. Viewed through this lens, Judge Barbara Jones held that Section 3 of DOMA “does not pass constitutional muster.” She ordered, without a stay of the judgment, that the Internal Revenue Service refund over \$350,000 to the decedent spouse's estate.

The ruling was appealed to the Second Circuit, but before a decision came from that court, both parties petitioned for certiorari before judgment—asking the Supreme Court to take the case immediately. While the petition was pending, the Second Circuit did issue its ruling. It affirmed the trial court's ruling in favor of the plaintiffs, holding that sexual-orientation classifications merit heightened scrutiny and that the government did not have sufficiently good reasons for this one.

The question presented by the petitioner to the Supreme Court is “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." In its order granting review, the Supreme Court asked the parties to brief and argue two additional questions: "Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case." These questions touch on complicated issues that I will address in a future column.

### **Same-Sex Marriage in California: What a Long, Strange Trip It's Been**

The development of the national landscape on same-sex marriage has been piecemeal, patchwork, and at times, complicated. California can make the same boast about the developments just within its own borders. The controversy there started in earnest when the then-Mayor of San Francisco, Gavin Newsom, decided, as an act of civil disobedience, to issue marriage licenses in February 2004 to same-sex couples despite a clear statutory prohibition. (California had added a clause limiting marriage to a union between a man and a woman in the 1970s, two decades before the mass adoption of such express prohibitions.) In just a few weeks, 4000 same-sex marriages were performed. The Newsom operation was shut down in less than a month, however, by an order of the California Supreme Court, which voided the marriages and insisted that the city stop issuing new licenses.

The court in that case did not consider the constitutional issue on the merits, but separate litigation followed on that point. A trial court later determined that the state law limiting marriage to heterosexual couples was unconstitutional, a ruling affirmed on appeal in *In re Marriage Cases*. In that case, the court held, among other things, that the ban constituted unconstitutional discrimination on the basis of sexual orientation. Central to that holding was the court's conclusion that classifications on the basis of sexual orientation are "suspect" and therefore deserving of the highest form of judicial scrutiny. This paved the way for same-sex marriages to begin within the confines of the law. And 18,000 of them were celebrated before being halted by a ballot initiative, passed with 52.1 percent of the vote in the November 2008 elections, which amended the California state constitution to ban same-sex marriages (and overrule *In re Marriage Cases*).

In 2009, the California Supreme Court upheld the initiative, in *Strauss v. Horton* (<http://law.justia.com/cases/california/supreme-court/2009/s168047/>), against a procedural challenge. Although Prop 8 would bar future same-sex marriages, the court ruled that the intervening ones were valid.

### ***Hollingsworth v. Perry*: The Validity of Proposition 8**

After the adoption of Prop 8, a new round of litigation began, but this time in federal court, on federal constitutional grounds. The case was masterminded by strange bedfellows—David Boies and Ted Olson—two men who were on opposite sides of the Supreme Court's highly politicized ruling in *Bush v. Gore*, the case that gave a second term as president to George W. Bush, rather than Al Gore. In this challenge, which has changed names several times, plaintiff-couples alleged that Prop 8 violates the Equal Protection and Due Process Clauses of the Federal Constitution.

The district court held a lengthy trial and ultimately invalidated Prop 8 on federal constitutional grounds. It ruled that that Prop 8 violates both due process and equal protection principles. The appellate court affirmed, ruling that there was no rational basis on which to exclude same-sex couples from marriage. The court stayed judgment pending possible review by the Supreme Court.

The question presented in the petition for review asks "Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman."

### **The Supreme Court's Likely Ruling? A Wide Array of Possible Outcomes**

Because the Supreme Court has agreed to review both a DOMA case and a state prohibition case, it has before it a wide array of options.

Let's start by pointing out an option the Court does not have: It has no power to stop states from allowing same-sex marriage. The cases before it ask whether state and federal governments have the power to prohibit same-sex

marriage, not whether they can allow it.

And obviously, the Court could rule in favor of same-sex marriage in both cases. This would happen if the Court ruled that a state or federal ban on same-sex marriage violates federal constitutional guarantees of equal protection or due process.

The cases are both being litigated as equal protection cases—alleging sexual orientation discrimination. (It is also possible, although somewhat unlikely, that the Court could reconceive of them as Due Process cases, in which prohibitions of same-sex marriage violate the fundamental right to marry.) Holding that all same-sex marriage prohibitions violate the Equal Protection Clause would bring about dramatic consequences. DOMA would be unenforceable, but so would the forty-one state laws that prohibit same-sex marriage. In other words, same-sex marriage would be simultaneously legal everywhere in the United States.

As many commentators have noted, this would be a somewhat surprising result, given the general conservatism of the Supreme Court and given the Court's tendency to weigh in on important social issues only after a majority of states have shifted in the same direction. The Court generally acts to bring along the stragglers, rather than to impose new social policy on the majority.

Notable, relevant examples of the “bringing along the stragglers” model include the ruling in *Loving v. Virginia* (<http://supreme.justia.com/cases/federal/us/388/1/>) (1967), in which the Court invalidated the bans on interracial marriage that persisted in about a third of the states, and the ruling in *Lawrence v. Texas* (2003), in which the Court invalidated criminal sodomy laws that remained in about a dozen states. A notable exception, however, is *Roe v. Wade* (<http://supreme.justia.com/cases/federal/us/410/113/>) (1973), in which the Court held that a woman's right to seek an abortion was constitutionally protected. At the time, most states prohibited abortion in all, or virtually all, circumstances. The Court's moving so far ahead of public opinion in *Roe* is blamed, in part for the tremendous backlash against the ruling and the subsequent, continued fighting over abortion.

But it might be equally surprising for the Court to rule that there is no constitutional protection for same-sex marriage. This would leave in place a wide array of federal and state laws that are discriminatory, unfair, and increasingly out of step with public opinion, which is moving rapidly in favor of same-sex marriage and gay rights. Such a result would also be surprising given the Court's prior rulings in *Lawrence* and *Romer*, mentioned above, which show the Court's increasing sensitivity to sexual-orientation discrimination and the harms it inflicts.

It may well be that a majority of the Court will look for a way to split the baby. Both cases present procedural escape hatches that relate to standing and appealability. Both may also present substantive escapes.

On the DOMA challenge, the Court could rule, on federalism grounds, that the federal government cannot refuse to honor marriages validly created by the states. It could do this potentially without declaring any level of constitutional protection for an underlying right of same-sex marriage.

On the Prop 8 challenge, the Court could rule that California, alone, violated the federal constitution by acting to take away a right of same-sex marriage that had earlier existed in the state by virtue of the decision in *In re Marriage Cases*. Or, perhaps more likely, the Court might rule that states like California, which grant all the benefits of marriage but withhold the label “marriage,” have committed a federal equal protection violation because the distinction in name only can only be explained by animus against gay and lesbian citizens.

Great attention will—and should—be paid to these cases as they are briefed, argued, and, ultimately, decided next June. While the existing protection for same-sex marriage does not hang in the balance, the Court's decision could delay the inevitable nationwide recognition of same-sex marriage that will surely ensue—for many years.



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