

Will US Supreme Court Decide on Gay Marriage Merits?

The running fight over **gay marriage** is shifting from the ballot box to the Supreme Court.

Three weeks after voters backed **same-sex marriage** in three states and defeated a ban in a fourth, the justices are meeting Friday to decide whether they should deal sooner rather than later with the claim that the Constitution gives people the right to marry regardless of sexual orientation.

The court also could duck the ultimate question for now and instead focus on a narrower but still important issue: whether Congress can prevent legally married gay Americans from receiving federal benefits otherwise available to married couples.

The court could announce its plans as soon as Friday afternoon. Any cases probably would be argued in March, with a decision expected by the end of June.

Gay marriage is legal, or will be soon, in nine states—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington—and the District of Columbia. Federal courts in California have struck down the state's constitutional ban on same-sex marriage, but that ruling has not taken effect while the issue is being appealed.

Voters in Maine, Maryland and Washington approved gay marriage earlier this month.

But 31 states have amended their constitutions to prohibit **same-sex marriage**. North Carolina was the most recent example in May. In Minnesota earlier this month, voters defeated a proposal to enshrine a ban on gay marriage in that state's constitution.

The biggest issue the court could decide to confront comes in the dispute over California's **Proposition 8**, the constitutional ban on **gay marriage** that voters adopted in 2008 after the state Supreme Court ruled that gay Californians could marry. The case could allow the justices to decide whether the U.S. Constitution's guarantee of equal protection means that the right to marriage cannot be limited to heterosexuals.

A decision in favor of **gay marriage** would set a national rule and overturn every state constitutional provision and law banning same-sex marriages. A ruling that upheld California's ban would be a setback for gay marriage proponents in the nation's largest state, although it would leave open the state-by-state effort to allow gays and lesbians to marry.

Throughout U.S. history, the court has tried to avoid getting too far ahead of public opinion and mores. The high court waited until 1967 to strike down laws against interracial marriage in the 16 states that still had them.

Some court observers argue that the same caution will prevail in the California case.

"What do they have to gain by hearing this case? Either they impose same sex marriage on the whole country, which would create a political firestorm, or they say there's no right to same-sex marriage, in which case they are going to be reversed in 20 years and be badly remembered. They'll be the villains in the historical narrative," said Andrew Koppelman, a professor of law and political science at Northwestern University. Koppelman signed onto a legal brief urging the justices not to hear the California case.

Yet some opponents of **gay marriage** say the issue is too important, and California is too large a state, for the court to take a pass.

"The question is whether there's a civil right to redefine

marriage, as the California Supreme Court did. We don't think there is," said Brian Brown, president of the National Organization for Marriage.

Regardless of the decision on hearing the California case, there is widespread agreement that the justices will agree to take up a challenge to a part of the federal **Defense of Marriage Act**.

The law was passed in 1996 by overwhelming bipartisan majorities in the House and Senate and signed by President Bill Clinton. It defines marriage for all purposes under federal law as between a man and a woman and has been used to justify excluding gay couples from a wide range of benefits that are available to heterosexual couples.

Four federal district courts and two courts of appeal have overturned the provision in various cases on grounds that it unfairly deprives same-sex couples of federal benefits. The justices almost always will hear a case in which a federal law has been struck down.

The Obama administration broke with its predecessors when it announced last year that it no longer would defend the provision. President Barack Obama went further when he endorsed gay marriage in May.

Republicans in the House of Representatives stepped in to take up the defense of the law in court.

Paul Clement, the Washington lawyer representing the House, said the law was intended to make sure that federal benefits would be allocated uniformly, no matter where people live.

"DOMA does not bar or invalidate any state-law marriage, but leaves states free to decide whether they will recognize same-sex marriage," Clement said in court papers.

The court has several cases to choose from, including that of

83-year-old Edith Windsor of New York. Windsor faces \$363,000 in federal estate taxes after the death of her partner of 44 years in 2009. In two other cases, same-sex couples and surviving spouses of gay marriages in Connecticut, Massachusetts, New Hampshire and Vermont are seeking a range of federal benefits, including Social Security and private pension survivor payments, access to federal employee health insurance and the right to file a joint federal income tax return.

In the only instance in which a gay couple already is receiving federal benefits, federal court employee Karen Golinski in San Francisco has been allowed, under a court order, to add her wife to her health insurance coverage. That could be reversed if the Supreme Court upholds the marriage law provision.

No matter which case the court chooses, the same issue will be front and center—whether legally married gay Americans can be kept from the range of benefits that are otherwise extended to married couples.

Justice Elena Kagan strongly suggested in her Supreme Court confirmation hearings that she would not take part in a **gay marriage** case from Massachusetts because she worked on it while at the Justice Department. The Massachusetts case is one of only two cases that have been decided by a federal appeals court. Windsor's is the other.

Another case, from Arizona, has some similarities to the Defense of Marriage Act appeals. The 9th U.S. Circuit Court of Appeals, which invalidated Proposition 8 in California, struck down a state law that said only married state employees were eligible for health benefits and withdrew domestic partner benefits for unmarried state workers. Separately, the Arizona constitution bars **same-sex marriage**, so gay couples had no way to obtain the state benefits.