



Same-Sex Marriage May Define Current Supreme Court Term

By: David Lampo

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This week the Supreme Court will hear oral arguments in not one but two historic cases that may dramatically alter the legal trajectory of same-sex marriage in the United States. The first one, *Windsor v. United States*, will examine the constitutionality of the Defense of Marriage Act (DOMA), passed in 1996 under President Clinton with overwhelming support from both Democrats and Republicans. DOMA defined marriage as the union between one man and one woman for the purposes of the federal government and was meant to discourage various states from adopting gay marriage. But as many conservative and libertarian constitutional scholars have argued, it impinges on the right of the states to define marriage as they see fit by denying legally married same-sex couples more than a thousand federal monetary benefits and legal privileges. And it clearly violates the constitutional principle of equal protection by treating legally married couples in different ways.

The second case, *Hollingsworth v. Perry*, is an appeal of a lower court ruling that supported the overturning of Proposition 8 in California, a 2008 voter-backed measure that added a prohibition of same-sex marriage to the state's constitution. Ted Olson, former solicitor general under President George W. Bush, will challenge the constitutionality of Proposition 8, arguing that it violates equal protection and due process of gay couples in California. If a majority of the Court agrees, it's possible that the Justices could void all state laws against same sex marriage (not just California's) by finding a fundamental right to marry for gay and lesbian couples in the Constitution. Not only would that be an historic development, it would be the ultimate irony since this case is now before the Supreme Court precisely because the proponents of Proposition 8 appealed a lower court's decision. Even a narrow decision by the Court (one that simply upholds the lower court's decision that Proposition 8 is unconstitutional), would make same-sex marriage legal once again in California, making it the tenth state with same-sex marriage.

In a sign of the times, over 100 prominent Republicans and conservatives signed an amicus brief to the Court in favor of legalizing same-sex marriage, including conservative economist Douglas Holtz-Eakin, former RNC chairman Ken Mehlman, former Representatives Mary Bono Mack and Deborah Pryce, Bush national security advisor Stephen Hadley, Representatives Richard Hanna and Ileana Ros-Lehtinen, former California gubernatorial candidate Meg Whitman, Reagan budget director David Stockman, and former New Jersey governor Christine Todd Wittman. Although he did not sign the brief, Sen. Rob Portman, once on the short list to be Mitt Romney's running mate, came out last week in favor of marriage equality, the first Republican senator to do so.

A victory in one or both cases for those supporting same-sex marriage rights would add dramatic momentum to a movement that has already made enormous strides in the past several years. It was only four years ago, after all, that all public opinion polls showed a majority of voters (shrinking though it was) opposed to same-sex marriage. But three years ago, most polls began showing a flip to majority support for same-sex marriage, and it has continued to grow. A *Washington Post*/ABC News poll released earlier this month, for example, showed support has climbed to 58 percent (with just 36 percent opposed), a dramatic jump from just six months ago and a new high in support. Among Millennials (ages 18 to 29), however, support is even higher: 81 percent in the *Washington Post* poll. Even among Young Republicans, support for marriage is now over 50 percent, and Millennial evangelicals are not far behind. Is it any wonder, then, that even the CEO of the anti-gay group Focus on the Family, Jim Daly, has said, "We're losing on [gay marriage], especially among the 20- and 30-somethings: 65 to 70 percent of them favor same-sex marriage... We've probably lost." Independents, another group crucial to the electoral fortunes of the Republican Party, are also uniformly pro-gay rights, with support for same-sex marriage now above 60 percent.

Many Republicans are finally waking up to the challenges this overwhelming support for equality will cost the party if it doesn't change, and the Republican Party establishment has finally specifically responded to its lack of support for even modest gay rights measures. In a report issued last week by the Republican National Committee, the all-important issue of the Party's outreach to previously shunned groups like gays and lesbians was specifically addressed in a respectful way. "We need to campaign among Hispanic, black, Asian, and gay Americans and demonstrate that we care about them," the report said. "Already, there is a generational difference within the conservative movement about issues involving the treatment and the rights of gays—and for many younger voters, these issues are a gateway into whether the Party is a place they want to be," it continued. The report did not mention the Republican Party platform, which opposes same-sex marriage and endorses a federal marriage amendment, but that platform will have to change if these recent attempts at outreach are to be successful.

Predicting what the Supreme Court will decide in a particular case is never a slam dunk, but according to most Court watchers, it seems likely that it will overturn DOMA, which means all legally married gay couples in Washington, Iowa, New York, Massachusetts, Maine, Maryland, New Hampshire, Connecticut, Vermont, and the District of Columbia

(and soon California) will have all the same legal rights and privileges as heterosexual couples when it comes to marriage.

There is still strong opposition in part of the Republican base to the Party changing its views on this issue: Tony Perkins, head of the Family Research Council, warns that such a change “would place the Republican Party on a path to a permanent minority,” a clear threat that social conservatives would abandon the party, one that dramatically highlights how little they really believe in the party’s traditional principles of individual rights and limited government. Brian Brown of the National Organization for Marriage promises a primary challenge to Sen. Rob Portman in 2016 for his recent announcement, and many Christian Right leaders will no doubt join in. But the real trend in the Party and in the nation is toward greater legal equality for gays and lesbians, in spite of people like Perkins, Brown, and others. Their histrionics will be on full display when the Supreme Court announces its decisions in these cases in June.

David Lampo is the author of [“A Fundamental Freedom: Why Republicans, Conservatives, and Libertarians Should Support Gay Rights \(Rowman & Littlefield, 2012\).”](#) He is also a member of the national board of Log Cabin Republicans.