

THE HILL

Supreme Court appears reluctant to issue broad gay-marriage ruling

By Sam Baker March 27, 2013

The Supreme Court seemed to make clear this week that it is in no rush to expand the rights of same-sex couples to marry.

The court made history simply by taking up the first cases it has ever heard on the issue of marriage equality. And in both cases, the justices seemed concerned with minimizing the footprint their decisions will leave.

Rulings are expected this summer, and however they come down, they're unlikely to be the last word — or even the high court's last word — on same-sex marriage.

Many legal experts were surprised when the court announced which cases it would take. The decision to hear a challenge to California's Proposition 8 was especially noteworthy, because that case created the possibility for a sweeping decision in favor of same-sex marriage.

But by the end of oral arguments in both cases, the justices seemed to be testing the waters rather than diving in.

"You want us to step in and render a decision based on an assessment of the effects of this institution, which is newer than cellphones or the Internet?" Justice Samuel Alito said Tuesday. "I mean, we do not have the ability to see the future."

Justice Anthony Kennedy, who typically casts the court's swing vote, likely holds the key to both rulings.

Kennedy seemed skeptical Wednesday of the Defense of Marriage Act (DOMA), the federal law that defines marriage as a union between a man and a woman in the eyes of the federal government.

There appeared to be five votes in favor of overturning DOMA — Kennedy, plus the court's four more liberal members. But even when Kennedy appeared sympathetic to the case for marriage equality, he steered the debate away from the most fundamental questions.

Solicitor General Donald Verrilli urged the court on Wednesday to strike down DOMA on the grounds that it violates the Constitution's guarantee of equal protection.

Kennedy appeared skeptical of DOMA but also skeptical of a decision based on an equal-protection argument. He pushed for a narrower focus on DOMA's intrusion into an area that has usually been left to the states.

If the court is able to throw out DOMA on federalism grounds, it wouldn't need to address the broader argument of equal protection under the Constitution.

"You are insisting that we get to a very fundamental question about equal protection, but we don't do that unless we assume the law is valid otherwise to begin with. And we are asking, is it valid otherwise? What is the federal interest in enacting this statute and is it a valid federal interest, before we get to the equal protection analysis?" Kennedy said to Verrilli.

The same resistance to a broad ruling on equal-protection grounds is what made a broad ruling seem unlikely in the Proposition 8 case.

There, former Solicitor General Ted Olson argued that the Constitution guarantees a right to marry, and any state that bans same-sex marriage, as California did, is violating that right.

Olson asked the justices not only to uphold a lower court's decision invalidating Proposition 8 but also to rule that same-sex marriage must be protected in every state.

“The problem with the case is that you’re really asking ... for us to go into uncharted waters. And you can play with that metaphor; there’s a wonderful destination: It is a cliff,” Kennedy said.

Kennedy wasn’t the only one looking for a narrower path Tuesday. Justice Sonia Sotomayor, who was appointed by President Obama, pressed the attorneys to articulate a “principled” ruling that would only apply to California, rather than throwing open the door to same-sex marriage nationwide.

“If the issue is letting the states experiment and letting the society have more time to figure out its direction, why is taking a case now the answer?” Sotomayor said.

Ilya Shapiro, a legal expert with the libertarian Cato Institute, said he could see the court striking down DOMA and finding a narrow way to leave Proposition 8 invalidated without affecting other states.

Even if the court’s liberal members are willing to strike down DOMA on equal-protection grounds, Shapiro said, Kennedy’s crucial fifth vote will likely hinge on a narrower federalism analysis.

Under those two rulings, gay couples’ ability to receive federal benefits would likely depend on whether their state recognizes same-sex marriage. Proposition 8 would be gone, and gay and lesbian couples could marry in California, but no other states would be affected.

Such rulings would echo the basic tenor of this week’s arguments: Same-sex marriage is happening and deserves some legal consideration, but the court shouldn’t cut off a process that is working its way through the democratic process in the states.

Some state laws will probably end up in the courts, Shapiro said.

“It’s probably not the last time gay marriage is going to come before the court,” he said, but the next time might be a long way off.

He noted, as some justices did this week, that by the time the court prohibited states from banning interracial marriage, only about five states still had those bans in place.

The court might not reconsider the fundamental equal-protection arguments for gay marriage until it's legal in the vast majority of states, he said.