

The Supreme Court and Marriage Equality

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This was a hugely important week for LGBT Americans as well as advocates for equality for all citizens because the Supreme Court heard cases regarding California's Proposition 8 as well as the Defense of Marriage Act (DOMA). It was also, however, a very important week for the Supreme Court. The Court may or may not decide to overturn both of these discriminatory pieces of legislation, but it is clear that the arc of history is again bending towards equality. LGBT Americans are winning; and those that would continue to seek to deny equality to all Americans are losing. This puts the Court in the position of either helping to bring about an inevitable, and positive, change, or of being conspicuous in support of bigoted laws and prejudices from another era.

The members of the Supreme Court are divided on the substance of marriage equality. Justice Antonin Scalia has made his views about gay people pretty clear over the years, often barely trying to conceal his prejudice. It is similarly clear that Justice Kagan is a supporter of marriage equality. As with many important Supreme Court cases, the outcome of this case will rely on the swing voters who are expected to be Justice Kennedy and perhaps even Chief Justice Roberts.

The swing votes on the court are from justices who are less committed ideologically one way or another on marriage equality and may be looking at this issue from a constitutional and legal angle. They are also undoubtedly exploring the issue from the angle of what is good for the court. This is particularly true of Chief Justice Roberts who will be held most responsible for the tone of the Court during his tenure as Chief Justice.

The decisions on DOMA and Proposition 8 will either facilitate or delay a step forward for equality in the US. Even if the Supreme Court upholds both these laws, all they will be doing is postponing full equality for LGBT Americans, not preventing it, because more states every year are voting for marriage equality; and more members of congress are announcing their support for marriage equality every month. Therefore, by 2025, probably sooner than that, the fight for marriage equality will be in the past and the country will congratulate itself on moving forward on this issue. There will still be some holdouts on the religious far right who will be angered by this expanded definition of marriage, but these people will be relegated to a distinct minority.

The justices on the Supreme Court are also almost certainly aware their decision will determine whether the history views the Court as either accelerating or opposing equality. If the Court stands in the way of marriage equality it will not only undermine the status of the Court but will reflect poorly on those justices, most notably Roberts because he is Chief Justice, who vote against it. This is not the only consideration on which the Court will base its decision, but it is one of them.

It is not an overstatement to say that these two cases will determine whether history views the role of the Supreme Court in this struggle for equality as similar to that of the Court when it ruled on *Brown v. Board of Education* and helped open the door to full equality for African Americans, or as similar to the role it played in ensuring that African Americans were not given their rights as it did during the *Dred Scott* case.

Justice Roberts has demonstrated that he understands that as Chief Justice of the Supreme Court he has a responsibility not just to his own ideological views, and interpretation of the constitution, but to the institution of the Court as well. This is one way to understand his vote to uphold the health care reform during the Court's last session. This came as a surprise to many, but it helped keep the Supreme Court from being viewed as just another victim of the hyper-partisan and ideological climate of today's Washington.

The Court would be wise to rule on the side of equality, and yes, public opinion, on the DOMA and Proposition 8 cases, particularly as even staunch opponents of marriage equality on the Court, such as Justice Scalia, must recognize that the best the Court can do is uphold the right of state's to ban marriage equality. Even upholding DOMA will only limit what the federal government can do. Moreover, it is easy to imagine that as soon as the Democrats next win control of congress, they will repeal DOMA anyway. Accordingly, at this moment, for the Court, thinking beyond ideology is not only important, but relatively cost free. The right decision here will move the US and the Supreme Court forward. Perhaps the nine justices are wise enough to realize this.