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Gerard V. Bradley

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12:53 pm ET
Jun 23, 2015

[SUPREME COURT](#)

The Gay Marriage Case: How the Supreme Court Could Rule

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By JACOB GERSHMAN

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The potential outcomes in the [gay marriage battle](#) before the Supreme Court are both straightforward and legally complex.

The basic question in the case, [Obergefell v. Hodges](#), is simply put: Are laws restricting marriage to a man and a woman constitutional under the 14th Amendment?

If the nation's highest court rules that gay marriage bans are unconstitutional, same-sex marriage would become legal across the country. At the moment, it's permitted in about [three-dozen states](#) and the District of Columbia.

If justices rule against gay marriage, that would leave in place state bans currently in effect. Such a ruling also wouldn't affect the laws in more than a dozen states, such as [New York](#), Maine, Maryland and Washington, that legalized gay marriage through legislation, ballot initiatives or state-court rulings. The legality of gay marriage in other states whose bans were struck down by lower federal courts, such as Colorado and Virginia, might require more litigation to sort out, [as Law Blog reported earlier](#).

Even if the court concludes there's no constitutional right to same-sex marriage, it could hand the gay rights movement a partial victory. Under that scenario, the court could rule that states prohibiting gay marriage can keep their bans but must recognize same-sex unions performed elsewhere in the country.

Depending how justices frame their arguments, their ruling could have big legal implications beyond the fate of gay marriage.

"I think they're probably going to rule for gay marriage. The question is how," Vanderbilt Law School professor [Brian T. Fitzpatrick](#) told Law Blog. "They're a range of options that get you the same answer."

It's possible that at least five justices could agree there's a national right to same-marriage but disagree on why. The 14th Amendment's guarantees of equal protection



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The Law Blog covers the legal arena's hot cases, emerging trends and big personalities. It's brought to you by lead writer **Jacob Gershman** with contributions from across The Wall Street Journal's staff. Jacob comes here after more than half a decade covering the bare-knuckle politics of New York State. His inside-the-room reporting left him steeped in legal and regulatory issues that continue to grab headlines.



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and due process offer a myriad of "doctrinal pathways," says Mr. Fitzpatrick.

One way justices could look at gay marriage is through the lens of equal protection.

They could, for instance, say that banning same-sex marriage is unconstitutional because it's a form of sex discrimination. In states where gay marriage isn't allowed, **as the argument goes**, the ability of a person to marry another person hinges on gender.

In this scenario, the court could say that bans cannot be justified under **a higher level of judicial review** that laws discriminating on the basis of gender are typically subjected to.

Sticking with equal protection, the court could also say that denying same-sex couples the right to marriage is sexual-orientation discrimination.

Such an argument could have the most sweeping impact on gay rights, says Mr. Fitzpatrick, by potentially subjecting any law that disadvantages gays to more intense judicial scrutiny. That could influence litigation in areas ranging from public employment, to adoption, to issues as local as public school policies restricting who can **attend a dance**.

There's also the possibility the court could say that marriage is a fundamental right and as such, excluding gay couples from the institution violates their **"substantive due process"** rights. The right to marry isn't mentioned in the Constitution. But the court has identified new rights before — often drawing **objections** from conservative justices — based on the 14th Amendment's guarantee that no one's "liberty" may be deprived without "due process of law."

Articulating a "fundamental right" to marriage could "open the courthouse door to lots of other people who want non-traditional marriages," said Mr. Fitzpatrick of Vanderbilt, raising the question of whether the same fundamental right extends to polygamous unions.

Alternatively, justices could conclude that gay marriage bans are motivated by an unconstitutional "animus" toward gays, echoing an argument that **Justice Anthony Kennedy briefly made** against the federal **Defense of Marriage Act** when the court overturned the federal law in 2013.

If the court comes down on the opposite side and says states are free to exclude same-sex couples from marriage, justices could still leave arguments on the table and suggest the matter could be revisited in the future, said University of Minnesota Law School professor **Dale Carpenter**.

Notre Dame Law School professor **Gerard Bradley** told Law Blog he expects a ruling against gay marriage would "track pretty closely" with **the opinion handed down** by the Sixth U.S. Circuit Court of Appeals in the same case now before the high court. That ruling by Judge Jeffrey Sutton "tracked the main line of reasoning in [**U.S. v. Windsor**], about state sovereignty over domestic-relations law," said Mr. Bradley.

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9:50 am August 24, 2015

Nancy D. wrote:

What separates marriage from every other form of Loving relationship is the ability and desire to exist in relationship as husband and wife. INow that The Supreme Court has removed the necessary requirement for a marriage contract in order to accommodate some, but not all persons who do not have the ability and desire to exist in relationship as husband and wife, there is no such thing as a binding marriage contract as in order to be married it is no longer necessary to exist in relationship as husband and wife.

It is not possible to compromise truth without ending with error, which is why we can know through both Faith and reason that marriage cannot be, in essence, existing in relationship as husband and wife, and not existing in relationship as husband and wife, simultaneously.

Professor Bradley, I suppose one could say The Supreme Court's Obergefell Decision was the end of the binding marriage contract between husband and wife. It was nice to meet you a few weeks ago. Keep up the Good work!

12:38 pm June 24, 2015

Bill wrote:

We might be better off if government stopped recognizing marriage altogether in the tax code and in all associated benefits and leave marriage to the church as a religious ceremony similar to baptism.

All the current rights that proponents of changing marriage definition cite can be granted with a relatively simple legal contract. At that point, I suspect gays will not participate so much because I don't think this is about marriage as it is about replacing morals with regulations.

All of this misses the social purpose of marriage anyway, which is to provide protection to women and children in terms of property rights, inheritance, provide a safety net, prevent polygamy, and enforce responsibility on men to provide for their family. You can look at the places where this has broken down and draw your own conclusions about whether it will be good or bad.

We can be sure that 9 people in black robes know what is best for us, however, and much quicker than trying to build a consensus that might be different in the different states.

4:51 pm June 23, 2015

aislander wrote:

Given that anti-gay forces could not even get just FOUR (let alone five) Supreme Court Justices to grant Certiorari and forestall SSM becoming legal in 20 states, it is almost inconceivable that the Court would now reverse course and rule against legal marriage for same sex couples. Doing so would create an enormous legal mess of the Court's own making. While the paths to marriage equality are several, at least one of them surely will happen by the end of the month. Indeed, it seems it is not a question of if, but how.

2:26 pm June 23, 2015

Jeffsfla wrote:

I am expecting the SCOTUS to add some form of heightened scrutiny to the ruling. And when they do I just hope beyond hope that Justice Scalia will use the term "argle barge" again.

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