

Is the Supreme Court Going to Settle for "States' Rights" on Same-Sex Marriage?

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By [Peter Dreier](#), [Truthout](#) | [News Analysis](#)



Ryan Toney, a student at The George Washington University, demonstrates with other supporters of same-sex marriage outside the U.S. Supreme Court in Washington, March 27, 2013. (Photo: Doug Mills / The New York Times)

Peter Dreier reviews some of the options available to the US Supreme Court in its review of two same-sex marriage cases now before it and their relationship to the 1967 decision that struck down antimiscegenation laws and allowed interracial couples to marry.

Should the states decide whether black Americans can marry white Americans?

Today that idea seems absurd. Most Americans believe that states shouldn't be allowed to trample the basic right of interracial couples to marry - even if a majority of people in a state want to do so. It would be unfair - a clear violation of equal rights. That's one reason we have a federal government.

In 1967, in *Loving v. Virginia*, the nation's highest court knocked down state anti-miscegenation laws.

Now the nation - and the Supreme Court - confront a very similar situation, only this time the issue is same-sex marriage.

Last week, the court heard arguments in two cases related to same-sex marriage. Justices are being asked to rule on whether California's Proposition 8 (which voters approved in 2008 to outlaw gay marriage) and the 1996 federal Defense of Marriage Act (which defines marriage as heterosexual and requires the federal government to deny benefits to gay and lesbian couples married in states that allow same-sex unions) are Constitutional.

Based on the questions that the justices asked the lawyers in these two cases, many court watchers believe that the court, led by Chief Justice John Roberts, will decide to punt rather than rule on either case. But if the justices want to move the law toward more support for gay marriage, they have two choices. They can overturn DOMA, which would allow every state to decide for itself whether to legalize same-sex marriage. Or the court can strike down Proposition 8, on the grounds that states don't have the right to discriminate against gays and lesbians when it comes to marriage.

In 1948, when California's Supreme Court legalized interracial marriage (the first state to do so) in *Perez v Sharp*, most Americans opposed the idea. In 1958, when half the states still had laws prohibiting interracial marriage, 96 percent of Americans opposed black-white marriages. By 1967, when the Supreme Court decided the *Loving v Virginia* case, 16 states still had anti-miscegenation laws on the books. More shocking, 72 percent of the American public still opposed interracial marriages.

It wasn't until the 1990s that even half of Americans said they approved of marriage between blacks and whites. In 2011, the most recent poll on the topic, 96 percent of black Americans and 84 percent of white Americans supported interracial marriage. It may be shocking to some that 16 percent of white Americans still disapprove of interracial marriages, but the shift in public opinion over five decades has been steady, irreversible and overwhelming. Equally important, 97 percent of [Americans younger than 30](#) support interracial marriage.

In 1967, the Supreme Court justices, no doubt influenced by the civil rights movement, were ahead of public opinion. Based on the 14th Amendment's "equal protection" and "due process" clauses, the court ruled that states did *not* have the right to ban marriage between people of different races.

The case was filed by an interracial couple - Mildred Jeter Loving, a black woman, and Richard Loving, a white man - who lived in Central Point in rural Virginia. In June 1958, they drove 90 miles and got married in Washington, DC, to circumvent Virginia's Racial Integrity Act of 1924, which made interracial marriage a crime. The local police raided their home at night, hoping to find them having sex, which was also a crime in Virginia. The cops found the couple in bed. Mrs. Loving showed them their marriage certificate on the bedroom wall. That was used as evidence that they had violated Virginia's law. The Lovings were charged with "cohabiting as man and wife, against the peace and dignity of the Commonwealth."

In his ruling, Leon M. Bazile, the Virginia trial judge wrote:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

On January 6, 1959, the Lovings pled guilty and Bazile sentenced them to one year in prison. The judge said he'd suspend their sentence if they agreed to leave the state for 25 years. They agreed and moved to Washington, DC.

In November 1963, the Lovings filed a motion in the state trial court to reverse the sentence on the grounds that it violated the Constitution's Fourteenth Amendment. It took four years to reach the US Supreme Court. In the interim years, the civil rights movement galvanized America and stirred its conscience about racial injustice. Congress passed the Civil Rights Act and the Voting Rights Act. Change was in the air.

The court at the time included two conservative Republicans (John Harlan and Potter Stewart), a moderate Democrat (Byron White), and two Southerners (former KKK member Hugo Black of Alabama and Tom Clark of Alabama, both Democrats), as well as three solid liberal Democrats (William Douglas, William Brennan and Abe Fortas). Chief Justice Earl Warren, a moderate Republican as California governor who became a liberal on the court, used his persuasive skills to engineer a unanimous decision. In deciding the *Loving* case, the justices no

doubt recognized that, despite the fact that many Americans still opposed interracial marriage, the tide of history was turning, and they wanted to be on the right side.

Warren penned the opinion for the court, noting that the Virginia law endorsed the doctrine of white supremacy. He wrote:

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Today's version of antimiscegenation laws are those that prohibit same-sex marriage. Currently, 37 states ban same-sex marriage, of which 31 states have written it into their constitution and six have passed statutory laws. Until last year, in every state where the issue had been put to the voters, they rejected legalizing gay marriage. In most states, it was the opponents, not the advocates, of gay marriage that forced the issue into the public debate. Hoping to whip up fears and energize conservative voters to go to the polls and help elect Republicans, they put measures on the ballots to ban same-sex marriage.

Last November, for the first time, gay rights advocates scored big victories when voters in Maine, Maryland and Washington [approved same-sex marriage](#) laws, while voters in Minnesota defeated a same-sex marriage [constitutional ban](#).

In this historic context, what might the Supreme Court do?

First, they could do nothing, refusing to rule on either case. In that scenario, DOMA would remain in federal law. And the Ninth Circuit Court of Appeals ruling - which affirmed the California Supreme Court's decision declaring Proposition 8 ban on same-sex marriage to be unconstitutional - would stand. That would legalize gay marriages in California, wouldn't impact other states that already permit same-sex marriage but not extend such laws elsewhere.

Second, they could overturn DOMA. If they do, the federal government would then recognize state gay marriage laws and grant couples in those states the same benefits as heterosexual couples. (There are currently nine states, plus Washington, DC, that have legalized gay marriage). But overturning DOMA would not challenge state laws which prohibit same-sex marriage. They would remain in place unless voters or state legislators overturn them.

Justice Anthony Kennedy, who is considered the key swing vote on this issue, raised concerns about federalism, saying there was a "real risk" of the federal law running into conflict with a state's power. Even some of the liberal justices on the court may not be willing to challenge "states' rights" when it comes to gay marriage.

Justice Sonia Sotomayor raised a concern that, "If the issue is whether to let the states experiment and letting the society have more time to figure out its direction, why is taking the case now an answer?"

She isn't the only justice who apparently believes that gay marriage is still an experiment that hasn't been around long enough to find out if it somehow undermines the institution of marriage or does irreparable harm to the children of same-sex couples. Justice Samuel Alito also seemed wary of moving too quickly on gay marriage. "Traditional marriage has been around for thousands of years. Same-sex marriage is very new," he said. "But you want us to step in and render a decision based on an assessment of the effects of this institution, which is newer than cell phones or the Internet?" Kennedy seemed to agree, then appeared to contradict himself. "There is

substance to the point that sociological information is new. We have five years of information to weigh against 2,000 years of history or more," he said. But then he observed that California has 40,000 children living with same-sex couples who "want their parents to have full recognition and full status. The voice of these children is important in this case."

Similar arguments - for example, that the offspring of interracial couples face discrimination and are not easily accepted by other children or by society at large - were made a half-century ago in favor of antimiscegenation laws. Fortunately, the Warren Court ignored the bogus argument that state antimiscegenation laws were needed to protect children from the emotional and social hardships of being the offspring of interracial marriages.

In other words, in this scenario, if the court overturns DOMA, it will be doing so on federalism or "states' rights" grounds, conceding that states should determine marriage laws, even if they discriminate against gays and lesbians. "State's rights" was the justification used by Southern racists to defend Jim Crow laws, including school segregation and bans on interracial marriage.

Third, if the court wants to make a broader statement in favor of marriage equality, it could decide, on 14th Amendment "equal protection" grounds, against California's Proposition 8 and rule that *no* state has the right to prohibit marriage among same-sex couples, just as the court ruled in *Loving v. Virginia* that states could not ban interracial marriages.

Judge Bazile's statement in his 1959 ruling that convicted the Lovings for violating Virginia's antimiscegenation law is filled with blatant racism and ignorance, justifying segregation by suggesting that God ordained it.

At the time, many Americans agreed with some version of those outrageous views. No judge would make such a public statement today. That doesn't mean that we don't have racist judges. It means that such unabashed racism is no longer socially acceptable. And polls show that white Americans in general are much less prejudiced than they were 50 years ago in terms of holding racist stereotypes, believing that African Americans are socially or intellectually inferior and opposing interracial friendships and marriage.

Some Americans today have similarly bigoted views about homosexuals, also justified on religious grounds and with reference to what they believe the Bible says and what God wants. You could hear these beliefs echoed by the lawyers and some of the witnesses staking out the anti-gay marriage side in the Proposition 8 trial in California. You can hear them on conservative talk radio shows and among the protesters in front of the Supreme Court building last week, claiming to be "defending" the institution of marriage.

There is, of course, a hard core of antigay Americans who may be more fervent in their views than the majority of live-and-let-live Americans. Their activism has fueled the campaigns against extending wedding vows to gays and lesbians. But many people who have voted against gay marriage are not haters. They support other aspects of gay rights and may eventually change their views on same-sex marriage.

Indeed, the number of Americans who hold antigay views is rapidly shrinking. More and more people have confronted their own values and views about a subject that was once taboo in their own lifetimes. In 1992, only [52 percent of Americans](#) said that they knew someone who is gay or lesbian. By 2010, that figure had increased to 76 percent. In 1994, 40 percent of Americans believed that people choose to be gay, and in 2004, 33 percent thought so. This year, 62 percent of those surveyed agreed that "being homosexual is just the way they are," while only 24 percent believed that "being homosexual is something that people choose to be."

In 1993, only 44 percent of Americans believed that gays should be allowed to openly serve in the military,

according to a Washington Post/ABC News poll. Three years ago, more than 75 percent thought so. In 2010, President Obama signed legislation ending the 17-year "don't ask, don't tell" policy.

Public [support for gay marriage](#) has hit a new high. According to a new Washington Post/ABC News poll, conducted earlier this month, 58 percent of Americans now believe it should be legal for gay and lesbian couples to get married; 36 percent say it should be illegal. Only 10 years ago, those numbers were reversed, with 37 percent favoring same-sex marriage and 55 percent opposed. Among Americans ages 18 to 29, support for gay marriage is overwhelming, hitting a record high of 81 percent in the new poll, up from 65 percent just three years ago. Support has also been increasing among older Americans. Three years ago, 66 percent of Americans ages 65 and older opposed same-sex marriage. This year, 55 percent of that age group oppose gay marriage, 44 percent support it and 6 percent have no opinion.

Soon, conservative politicians and groups will no longer be able to use gay marriage as a "wedge" issue to stir controversy and win elections.

Two movies about the Lovings' case - *Mr. and Mrs. Loving* (a 1996 made-for-TV dramatic film) and *The Loving Story* (a 2011 documentary) - make clear that the Lovings were not civil rights activists. They were a humble working-class couple who simply wanted to live as husband and wife and raise their three children in Virginia, where they were born and where they and their extended families lived.

Today there are tens of thousands of gay couples who, like the Lovings, simply want their love recognized by our society as equal to that of other couples. They don't want to be second-class citizens.

One such person is Edie Windsor, an 83-year-old woman from New York who married Thea Clara Spyer in 2007 after they had lived together as a couple for 40 years. When Spyer died in 2009, Windsor was denied - under DOMA - an exemption on federal estate taxes that she had paid on her spouse's estate. She is now the lead plaintiff in the case to strike down DOMA.

Reread Chief Justice Warren's words in the *Loving v. Virginia* decision. Then substitute same-sex marriage for interracial marriage and see if his views are any less compelling. Most Americans would now agree that to deny gays and lesbians the right to marry is, as Warren put it, "directly subversive of the principle of equality at the heart of the Fourteenth Amendment."

In 1967, the Warren Supreme Court boldly ignored prevailing public opinion and overturned state bans on interracial marriage on the grounds that they violated the 14th Amendment.

It is hard to see how the legal case for same-sex marriage is any different.

Soon the Supreme Court will have to decide whether to be on the side of "state's rights" caution or the side of "equal protection" for all. If a majority of the justices wimp out, history books will no doubt pronounce that the Roberts Court missed an opportunity to bend the arc of history toward real justice.

That would be unfortunate, because eventually most states will surely vote to legalize same-sex marriage. The tide of public opinion has already turned, and there's no going back. Even a growing number of Republican politicians are reversing course and jumping on this bandwagon. When children born this year reach voting age 18 years from now, they will take same-sex marriage for granted. And they will surely wonder how it was even possible that America once deprived gays and lesbians the right to marry.

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PETER DREIER

Peter Dreier teaches politics and chairs the Urban & Environmental Policy Department at Occidental College. His most recent book is [*The 100 Greatest Americans of the 20th Century: A Social Justice Hall of Fame*](#) (Nation Books, 2012).

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