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Same-Sex Marriage and the Supreme Court

On June 26, 2013, the United States Supreme Court announced its decisions in two cases involving same-sex marriage. While both rulings mark a victory for gay rights advocates, they do not mark an end to the legal debate. This study aims to give a clearer description of the complex legal issues in each case and to identify some of the moral issues Christians should consider in light of these rulings.

One case heard by the Supreme Court (*United States v. Windsor*) focused on a *federal* law: section 3 of the Defense of Marriage Act (DOMA), which prevents same-sex couples from receiving federal benefits even if they are legally married in their home state. The other (*Hollingsworth v. Perry*) examined a *state* law: Proposition 8, which amended the California State Constitution to ban same-sex marriages. Each case is described below, providing the *history* of the legal battle, *questions* addressed, the *decision* and how the justices voted, some *key points* in the argument, and *legal implications* of the ruling.

The United States v. Windsor

After Hawaii considered legalizing same-sex marriage in 1993, the Defense of Marriage Act passed by a substantial majority in both houses of Congress and was signed into law by President Clinton in 1996. DOMA has three sections. Whereas section 1 of DOMA simply identifies the law's name, section 2 supports each state's right to refuse to recognize same-sex marriages legally performed in other states. Section 2 was not under scrutiny in this case. The focus of attention was section 3, which defines marriage as "a legal union between one man and one woman as husband and wife" and defines "spouse" as referring only to a husband or wife of the opposite sex. These definitions applied to over one thousand federal laws regarding the responsibilities and benefits of marriage, including joint tax returns, social security and retirement benefits, and inheritance tax. Section 3 of DOMA was Edith Windsor's target in her lawsuit against the United States.

Windsor, now 83, and her partner, Thea Spyer, lived together for 40 years in New York. In 2007 they were legally married in Canada. Although New York had not legalized same-sex marriage at the time, it recognized same-sex marriages legally performed elsewhere. The federal government, however, did not, as section 3 of DOMA required that it only recognize opposite-sex marriages. When Windsor inherited Spyer's estate in 2009, she had to pay $363,053 in estate tax, a tax

that would not have been imposed on the surviving spouse of a legally married heterosexual couple. Windsor paid the tax, but filed a refund suit, claiming that DOMA violated the Equal Protection Clause incorporated into the Fifth Amendment. The Equal Protection Clause ensures that all classes of people are equally protected under the law, including minorities often targeted by discrimination.

When Windsor filed suit in U.S. district court, President Obama instructed the Department of Justice not to defend section 3 of DOMA, while at the same time saying that the federal government would continue to enforce the law. This move thereby encouraged the judicial branch of the government to determine section 3's constitutionality. Subsequently, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) defended DOMA in district court. The district court ruled in Windsor's favor, a decision upheld by the Court of Appeals of the Second Circuit. The executive branch, however, continued to enforce DOMA, and Windsor did not receive her refund.

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Questions Set before the Supreme Court

The questions considered were (a) whether section 3 of DOMA is unconstitutional, (b) whether the Supreme Court should hear the case at all, since the United States agreed with Windsor, and (c) whether the Bipartisan Legal Advisory Group had standing.

Decision

By a 5-4 vote, the court decided that it did have jurisdiction and that section 3 of DOMA violates equal liberty of persons protected by the Fifth Amendment. Justices Ginsberg, Kagan, Sotomayor, Breyer, and Kennedy voted in the majority; Roberts, Alito, Scalia, and Thomas voted against. The vote fell along well established lines, with more liberal justices voting yes, more conservative justices voting no, and Justice Kennedy providing the swing vote.

Arguments

Justice Kennedy wrote the majority opinion, while both Scalia and Roberts filed dissenting opinions. Some of the key arguments stated by Justices Kennedy and Scalia are presented here.

On the question of jurisdiction, Kennedy argued that the court had jurisdiction to consider the merits of the case. Even though the executive branch agreed with Windsor, BLAG presented a strong argument against Windsor in court, and the U.S. had something to lose if required to refund the estate tax. Scalia, on the other hand, argued that the Supreme Court determines the constitutionality of laws only when a law is challenged by one party and defended by another. Never in its history has it heard a case where there is *agreement* between the two parties. By hearing a case where such disagreement did not exist, he believes the court overreached its authority.

Regarding constitutionality, Kennedy argued that the authority to define and regulate marriage traditionally falls within the domain of the states. Section 3 of DOMA, therefore, contradicts the right of states to legalize same-sex marriage by treating same-sex couples differently than heterosexual couples within the same state. This difference in treatment demeans couples and humiliates the tens of thousands of children being raised by same-sex parents. Hence, "DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon

all who enter into same-sex marriages made lawful by the unquestioned authority of the States." Furthermore, denying equal dignity to same-sex marriages is not an incidental effect, but the essence of the law. Because the purpose of DOMA is to injure a class of people that the state and its courts seek to protect, it violates not only equal protection, but also due process, or the right of the courts to administer their decisions without arbitrary interference by the government.

Justice Scalia insists that DOMA was not motivated by malice toward a particular group: "But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements . . ." Furthermore, according to Scalia, the Constitution does not prohibit the government from enforcing "traditional moral and sexual norms." Whereas Kennedy's primary concern was the right of states to define marriage, Scalia maintains that state-level "experimentation" with the definition of marriage should not automatically alter federal law.

Legal Implications

The proponents of gay rights have reason to celebrate the Supreme Court's decision in *Windsor*. Thousands of legally married same-sex couples will now receive benefits from the federal government just like their heterosexual counterparts. The decision in *Windsor* did *not*, however, give same-sex couples a constitutional right to marry. Although Justice Scalia believes that the majority was laying a foundation to defend the constitutionality of this right, the majority report claims that this decision is limited to same-sex marriages recognized as lawful by individual states. Complex problems, however, arise when federal law does not apply uniformly to all states. For instance, will a same-sex couple residing in New York, where their marriage is legal, lose federal benefits when they move to New Jersey, where it is not? Furthermore, what will the federal government do if each partner in a same-sex marriage holds legal residency in a different state—one that recognizes same-sex marriage and one that does not? Countless other questions will have to be addressed now that federal law recognizes the legality of same-sex marriage in some states, but not in others.

Hollingsworth v. Perry

In recent years, the state of California has been on a seesaw regarding same-sex marriage:

- In June 2000, 61 percent of California's electorate voted "yes" to Proposition 22, which declared: "Only marriage between a man and a woman is valid or recognized."
- In 2008, the California State Supreme Court ruled that this law conflicted with the State Constitution. About 18,000 couples were subsequently married in California.
- Five months later (November 2008), 52.3 percent of the electorate passed Proposition 8, amending the state constitution to ban same-sex marriages.
- In May 2009, Kristin Perry and Sandra Stier were, as a same-sex couple, denied a marriage license, as were Paul Katami and Jeffrey Zarrillo. Both couples filed suit. Attorney General Jerry Brown and Governor Arnold Schwarzenegger refused to defend Proposition 8 in court. When Brown became governor and Kamala Harris became attorney general, they continued this refusal.
- Since the government would not defend Proposition 8, a coalition of Proposition 8 supporters led by Senator Dennis Hollingsworth took up the case.
- In 2010, U.S. District Court Judge Vaughn Walker ruled in *Perry v. Schwarzenegger* that Proposition 8 violated due process and equal protection guaranteed by the Fourteenth Amendment. This decision was

upheld on appeal by the Ninth Circuit, in *Perry v. Brown*.
- Proponents of Proposition 8 appealed the case (now *Hollingsworth v. Perry*) to the United States Supreme Court.

Questions Set before the Supreme Court

The questions considered were (a) whether the ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment, and (b) whether the proponents of Proposition 8 had standing.

Decision

In a 5-4 vote, the court ruled that the backers of Proposition 8 did not have standing. This decision left in place the original district court ruling, which had overturned Proposition 8. Because of this ruling, the Supreme Court did not discuss the merits of the case. The vote in *Hollingsworth v. Perry* did not fall along typical conservative versus liberal lines. Justices Roberts, Scalia, Ginsburg, Breyer, and Kagan were in the majority with Kennedy, Alito, Thomas, and Sotomayor dissenting.

Arguments

Chief Justice Roberts wrote the majority opinion of the court, arguing that while proponents of Proposition 8 had standing to defend the law in district court, they did not have standing in federal court. Unlike the governor (who could have defended the law in court, but refused) petitioners had no responsibility for enforcing the law; their only interest was to vindicate its constitutionality. This "generalized grievance" is not sufficient to merit standing, which requires that a party has "suffered a concrete and particularized injury." Kennedy's dissenting opinion argues that the Supreme Court should accept California state law, which allowed the petitioners to represent the government. He also worries that whenever the government refuses to enforce a law, as the governors and attorney generals of California have done in this case, the people won't have an avenue for defending it.

Legal Implications

This ruling legalized same-sex marriage in the most populous state in the country. By not hearing the merits of the case, however, the ruling had no effect on any state except California. Constitutional amendments banning same-sex marriage in other states remain unchallenged.

Conclusion

As important as these two Supreme Court rulings are, they do not settle the legality of same-sex marriages nationwide. Supporters and opponents of same-sex marriage will most likely turn their immediate attention to the states as the primary arena for this ongoing legal battle, although the issue of the constitutional right of same-sex couples to marry will remain part of the debate.

> Recognizing that the tone and terms of the debate itself have become part of the moral issue, Christians need to find ways to disagree *respectfully* with their brothers and sisters in Christ . . . .

Issues Christians Should Consider

Looking at changes in civil law, public opinion polls, and policies within churches, one can observe a growing movement toward greater acceptance of same-sex marriage in the United States. When DOMA was enacted in 1996, no state in the union recognized the legality of

same-sex marriage. In 2003, Massachusetts became the first state to declare that denying same-sex couples the right to marry was unconstitutional. Now, ten years later, thirteen states will have legalized same-sex marriage by August 2013, with at least six more states providing some form of civil union or domestic partnership similar to marriage. And, of course, the federal government, for the first time, now recognizes the legality of same-sex marriages in those states that allow it.

This trend toward greater acceptance of gay marriage is reflected in public opinion polls, which have shown that, beginning in 2010, over 50 percent of Americans believe that same-sex marriage should be legal.[1] There is also noticeable change in the number of Christian denominations that now allow their pastors to perform same-sex marriage, and who allow their ordained clergy to include gays and lesbians.[2] One poll shows that 44 percent of evangelicals between ages 18 and 29 are in favor of same-sex marriage,[3] while some well-known evangelicals, such as Rob Bell, have stated their approval. This shifting trend in state and federal law, in public opinion, and even in churches does not, of course, mean that nation-wide acceptance of same-sex marriage is inevitable. It does, however, raise the continuing question of how Christians should negotiate the relationship between church and state or between their personal beliefs and civil law.

Churches that already support same-sex marriage are relieved that civil law is increasingly consistent with their Christian commitment to welcoming the stranger and standing on the side of the least of the brothers and sisters. They believe that the integrity of biblically informed marriage with its insistence on fidelity and on providing a nurturing home for children is strengthened by being extended to same-sex couples.

Churches that oppose same-sex marriage are dismayed at the changes in civil law and may, as Mark Galli describes it, "feel like the armored tank of history is rolling over them, crushing traditional marriage under its iron treads."[4] These Christians believe that the Bible only allows marriage between one man and one woman, and that endorsing same-sex marriage jeopardizes the strength of heterosexual marriages. They will, no matter what the trend, continue to resist all efforts to legalize gay and lesbian marriages at the state and federal levels. There is, however, another group of Christians who continue to hold that same-sex marriage is sinful and yet support its legality, separating their personal faith from what they believe should be protected as a civil right.[5] Christians need to consider the moral, civil, and legal issues surrounding same-sex marriage very carefully in light of their Christian faith. Also, recognizing that the tone and terms of the debate itself have become part of the moral issue, Christians need to find ways to disagree *respectfully* with their brothers and sisters in Christ even as they hold passionately to their diverse views.

Endnotes

1. Jeffrey M. Jones, "Same-Sex Marriage Support Solidifies Above 50% in U.S.," Gallup Politics, May 13, 2013, http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx.

2. There is also increased, although by no means universal, acceptance of the LBGT community in Reconstructionist, Reform, and Conservative synagogues.

3. See Public Religion Research Institute, "Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights," August 29, 2011, http://publicreligion.org/research/2011/08/generations-at-odds/.

4. Even before the recent Supreme Court decision, Mark Galli, editor of *Christianity Today*, addressed how evangelical Christians are responding to the changing trends regarding acceptance of same-sex marriage: "Is The Gay Marriage Debate Over? What the Battle for Traditional Marriage Means for Americans—and

Evangelicals," *Christianity Today* 53, no. 7 (July 2009): 30, http://www.christianitytoday.com/ct/2009/july/34.30.html?start=1.

5. See reference to Tim Miller, "one of the leading intellectuals of evangelical Christianity," in Jon Ward, "Evangelicals Face Growing Tension Between Political And Personal Views Of Gay Marriage," *Huffington Post*, July 5, 2013, http://www.huffingtonpost.com/2013/03/26/evangelicals-gay-marriage_n_2956917.html.

6. See the Pew Forum on Religion & Public Life, "Religious Groups' Official Positions on Same-Sex Marriage," December 7, 2012, http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx.

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What Can We Do?

1. Keep well-informed as legal developments continue to unfold regarding same-sex marriage.
2. Be aware of any official statements by your denomination regarding same-sex marriage.[6]
3. Encourage open, fair, and well-informed discussion of this issue among members of your congregation.

For Further Reading

- The Pew Forum has a very helpful Web site identifying how major religious groups (not just Christians) have responded to the issue of same-sex marriage. See the Pew Forum on Religion & Public Life, "Religious Groups' Official Positions on Same-Sex Marriage," December 7, 2012, http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx.
- It's too soon for academic essays or books to have been published about the two cases discussed in this study, but online research will uncover many Web sites that summarize and analyze each case. Readers may want to sample Web sites sponsored by well-established news agencies such as ABC or CBS, as well as Web sites sponsored by groups that clearly stand on one side or the other. For instance, ProtectMarriage.com and nationformarriage.org define marriage exclusively as a union between one man and one woman, while lambdalegal.org and the ACLU's site at aclu.org support the right of same-sex couples to marry.
- In discussions about *U.S. v. Windsor*, reference is often made to *Loving v. Virginia*, a 1967 Supreme Court decision that invalidated laws prohibiting interracial marriage. Marshall Sonenshine shows how the two decisions are different in significant ways in "Gridlock at the Supreme Court," CNN Opinion, June 29, 2013, http://www.cnn.com/2013/06/29/opinion/sonenshine-politicized-court/index.html.

Questions for Discussion

1. How do you understand the relationship between what is legal and what is moral? Can or should Supreme Court Justices interpret the law without considering what they believe to be moral?

2. Can or should Christians support a civil law even if it makes legal an action their personal faith defines as sinful?

3. How do you respond to the claim that same-sex marriage threatens the integrity of heterosexual marriage and that it should therefore not be legalized?

4. Should churches residing in states where same-sex marriage is legal be able to perform same-sex marriages? Why or why not?