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Erin Ryan

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## **Why Equal Protection Trumps Federalism in the Same-Sex Marriage Cases**

*A federalism scholar's take on why federalism isn't the issue.*

**--Erin Ryan**

Federalism is once again at the forefront of the Supreme Court's most contentious cases this Term. The cases attracting most attention are the two same-sex marriage cases that were argued in March. Facing intense public sentiment on both sides of the issue and the difficult questions they raise about the boundary between state and federal authority, some justices [openly questioned whether to just defer](#) to the political process. And while this is often a wise prudential approach in review of contested federalism-sensitive policymaking, it's exactly the wrong course of action when the matter under review is an individual right.

While both cases raise curious issues of standing, the substantive issue at the heart of each case is whether same-sex couples should be able to marry. [Hollingsworth v. Perry](#) asks the Court to review the constitutionality of a California's "Prop 8," a ballot initiative banning same-sex marriages within the state. [United States v. Windsor](#) tests the constitutionality of the Defense of Marriage Act (DOMA), a federal law that prevents the U.S. government from recognizing same-sex marriages performed in states that allow it (and affecting the administration of some 1,100 federal benefits connected with marriage).

Yet the looming question for the Supreme Court is not just whether gays and lesbians have the right to marry—the justices must also confront the question of *who should decide* whether same-sex couples can marry. Is this something that states should be able to decide for themselves, by making and interpreting state law? (After all, matters of family law have traditionally been left to state regulation.) Or, is the decision to marry so fundamentally important that it triggers the federal Constitution's promise that all citizens will be treated equally under the law? (After all, even though family law is traditionally left to the states, the Constitution won't allow them to deny interracial marriages.)

So these cases are not only about the rights of same-sex couples to marry, but also about the relationship between the state and federal governments in regulating marriage. And what's especially strange about the cases is that they pose the 'same-sex marriage' question from opposite sides of the 'federalism' issue.

In the Prop 8 case, same-sex marriage advocates want federal law to override the state approach, arguing that the U.S. Constitution prevents California from discriminating against gay and lesbian citizens who wish to marry—and opponents want the feds to butt out of an area of traditional state prerogative. In the DOMA case, same-sex marriage advocates want the feds to butt out, arguing (in part) that Congress shouldn't interfere with state authority by limiting the legal effect of marriages performed according to state law—while opponents are maintaining the propriety of federal intrusion. (Some analysts have even surmised that members the Court may have strategically partnered the two cases together, using each as a foil against the other.)

Indeed, should the Court invalidate DOMA on federalism grounds alone—holding that the federal law unconstitutionally intrudes on a protected zone of state sovereignty—then same-sex marriage advocates would be celebrating a mixed victory. DOMA would no longer bar legally married gays and lesbians from federal benefits in the few states that have legalized same-sex marriage. But it would seemingly affirm the ability of states like California to deny them the legal right to marry in the first place, without the threat of federal interference.

Joining with same-sex marriage advocates, the Justice Department has advanced the other constitutional argument that would resolve both cases on the same grounds: that both DOMA and Prop 8 violate the Constitution's essential promise to treat all citizens equally before the law.

By this claim, both laws violate the Equal Protection Clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments, because there is no legitimate basis for the federal or state governments to discriminate between heterosexual and homosexual couples who wish to marry. If the Court agrees that there is an equal protection problem with DOMA, then that federal interest would properly override the traditional allocation of family law to the states, because the Bill of Rights clearly limits all state and federal lawmaking. (Again, recall the constitutional invalidation of anti-miscegenation laws for the same reason.) If this happens, the Court will also have to set, for the first time, the specific level of equal protection “scrutiny” that courts should apply when reviewing laws that discriminate on the basis of sexual orientation.

At least on the (sketchy) basis of reading the tea leaves at oral argument, no clear majority is ready to take either approach to invalidating the challenged laws—nor is a majority prepared to uphold them. Most analysts are presuming that the four most liberal members of the Court would accept the equal protection rationale for invalidating DOMA and that the four most conservative members are sympathetic to preserving it. Justice Anthony Kennedy, the likely swing vote, is the author of past opinions that have championed both states' rights and gay rights. In the DOMA oral arguments, he seemed drawn to the federalism rationale for invalidating DOMA, though it was not clear this view could command a majority. In the Prop 8 arguments, he appeared deeply reluctant to insert the Court in the dispute at all, fueling uncertainty and anxiety among stakeholders on both sides.

Indeed, [Justice Kennedy seemed moved](#) by the argument frequently made by the supporters of Prop 8 and DOMA against judicial interference in both cases. The argument is that American culture is in transition on the issue of gay marriage, and that the Court should allow the democratic process to proceed legislatively. Following suggestive [public comments by Justice Ruth Bader Ginsburg](#) last month, some are pointing to the abortion-related culture wars that followed the Court's decision in *Roe v. Wade* as a cautionary tale about what can happen when the Court gets out too far in front of public opinion. Leave gay marriage to the ballot box, they argue, and the people will work this out for themselves—as they have in the handful of states that have independently legalized gay marriage (and of course, the vast majority that have not).

But from the jurisprudential perspective, deference to the political process misses the very point of judicial review and the constitutional rights that these nine justices have sworn to protect. Constitutional individual rights are—by their very nature—counter-majoritarian. You

hold them regardless of what the majority thinks, and they are most dear when the majority is against you. Freedom of religion means that your neighbors can't force you into their church if they don't particularly like yours. Your right to jury trial is especially valuable when the public at large believes you should be locked up and the key thrown away. Your right to free speech is important precisely because others may prefer that you just shut up. Equal protection is the Constitution's promise that you won't be treated unfairly by the government, even when most Americans really want you to be.

So when, as here, the issue on the line is about protecting individual rights against unfair discrimination by the majority—then the Supreme Court has a constitutional obligation *not* to just leave the matter to the majoritarian political process. Questions about the existence and scope of individual rights are exactly the kind of issue that requires the judiciary to weigh in, delivering on the Constitution's sacred promise of fair and equal treatment. Can you imagine if the Supreme Court had concluded that *Brown v. Board of Education* was “improvidently granted” in order to allow the political process more time to work things out?

Properly understanding the same-sex marriage cases as matters of equal protection also squarely resolves the federalism issue. Under the Supremacy Clause, there is no question but that state law falls when it conflicts with constitutionally protected individual rights—which is precisely as it should be. After all, one of the most frequently acknowledged [purposes of our federal structure](#) is its maintenance of checks and balances between local and national authority *in order to protect individual rights against incursion by either side*. To put abstract federalism concerns before equal protection is to put the constitutional cart before the horse, and to misunderstand the underlying purposes of American federalism to begin with. “States’ rights” serve only one true purpose: the fuller protection of individuals.

The Court should recognize the critical relationship between the federalism and equal protection arguments in these cases. Questions about the boundary between state and federal authority may hold more sway in murkier interjurisdictional realms like health care and education, but if the Constitution protects gay and lesbian people from discrimination, then the issue is elevated beyond the reach of federalism for its own sake. Federalism is important, but there is no federalism “for its own sake”—[it is a structural means to a substantive end](#). In the United States, that end should be fairness and justice for all.

--Erin Ryan, a professor at the Northwestern School of Law, Lewis & Clark College, is the author of [Federalism and the Tug of War Within](#). A version of this essay first appeared on the [American Constitution Society Blog](#).