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Marriage and the Court

SAN FRANCISCO'S ROLE IN THE DEBATE

Associate Professor of Law Kathleen Morris came to GGU in July 2012 after eight years at the San Francisco City Attorney's Office and four years in private practice. While working for the city, she litigated the marriage-equality cases and approximately 100 additional cases.

In the following piece, she explores several fascinating constitutional questions regarding marriage — sharing both her personal experience and her professional expertise.

By Kathleen Morris
GGU Associate Professor of Law

The United States Supreme Court has several cases remaining on its docket this term, but none are more high profile than the marriage-equality cases scheduled for argument on March 26 and 27. The first group of cases — which I'll call “the DOMA cases” — presents a constitutional challenge to the federal Defense of Marriage Act, or “DOMA.” The second group — which I'll call the “Prop. 8 cases” — challenges California's Proposition 8. These are exciting times for law professors, public lawyers and everyone interested in the marriage debate in which this nation has been actively engaged for almost a decade.

In the DOMA cases, the court will consider whether under the US Constitution the federal government may refuse to recognize legally valid same-sex marriages. (You can get married only under state law, not federal law, so if your marriage is valid under state law, it is a legally valid marriage.) Currently nine states and the District of Columbia allow same-sex couples to marry, and national polling strongly suggests other states are likely to follow. But if the court upholds DOMA, no matter how many states

legalize same-sex marriage, the federal government could refuse to recognize those marriages. That means same-sex “marrieds” would be considered “unmarried” for purposes of federal employee benefits, immigration, income taxes, and so on. (For example, in one of the DOMA cases, a married female federal employee sued after her wife was denied spousal benefits.)

The DOMA case is fascinating because it touches not only on the legal question of whether same-sex couples have a federal constitutional right to equality in civil marriage; but also on the practical and policy question of whether the federal government should treat as unmarried two people who are, in fact, married. Put another way: Can you be “married” when you walk into a state government office in your hometown, but “unmarried” when you walk into the federal government office across the street? This is the outcome that Congress and President Clinton — who supported DOMA and signed it into law — intended, but does the Equal Protection Clause allow for it? President Obama thinks not. His administration — via Attorney General Eric Holder — has filed a brief urging the court to strike down DOMA.

The Prop. 8 case raises slightly different but equally important questions. In that case, the plaintiffs argue that a California constitutional provision

that allows civil marriage only between “a man and a woman” is unconstitutional under the US Constitution. (Because federal law is supreme, the US Constitution “trumps” the state constitutions.) Like the DOMA case, the Prop. 8 case asks the court to decide whether same-sex couples have a federal constitutional right to equality and privacy in marriage. But it also raises a practical policy issue, namely: Once the voters of a state have decided not to allow civil marriage between same-sex couples, ought the federal courts force them to reverse course?

At their core, then, both the DOMA and Prop. 8 cases raise the deep (and loaded) structural questions of whether policies relating to sexual orientation should be set at the federal or state levels; and whether they should be the subject of statutory or constitutional law (that is, legislative or judicial right). The court decided half a century ago that our nation's policies relating to race would be subject to strict scrutiny under the Equal Protection clause, and thus as a practical matter, set at the federal level as a matter of constitutional law. Ten years later, the court decided to also apply heightened (though not “strict”) scrutiny to gender classifications. The court has hinted in recent years that it may be ready to take a similar step when it comes to sexual orientation, but is it?

I have been involved with these questions, both professionally and personally, for almost a decade. In February 2004, then-San Francisco Mayor Gavin Newsom (now lieutenant governor of California) decided that the city would begin issuing marriage licenses to same-sex couples. I was then a deputy city attorney for San Francisco, which is to say, one of Mayor Newsom's public lawyers. Under orders from the city's independent city attorney, Dennis Herrera, our legal team worked around the clock for weeks, filing rounds and rounds of briefings, to keep the marriages going. (I happened to agree with Mayor Newsom's actions, but as a lawyer for the city, I was duty-bound to defend

privacy provisions of the California Constitution. (The city chose at that time not to challenge the marriage laws under the US Constitution.) We filed the city's complaint only a few hours after the California Supreme Court invited it. The city ultimately prevailed on its arguments that the state marriage laws violated the California Constitution. In May 2008, the California Supreme Court struck down those laws for the reasons San Francisco articulated in its complaint. (These same arguments were presented in complaints filed by nonprofit organizations, but the city was lead plaintiff in the case.)

Six months later, in a riveting twist of popular democracy, California

California Supreme Court struck down the marriage laws and the date Prop. 8 overturned that decision). Which brings me to the personal side of the story. In October 2008, my wife, Shawn, and I were legally married (we had married "in the church" in September 2001). California Appellate Justice Anthony Kline — whose view of the marriage cases was ultimately adopted by the California Supreme Court — presided over the civil ceremony. Accordingly, my wife and I are among the 28,000 same-sex couples who are permanently

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his actions regardless of whether I agreed with them.)

The city's legal team managed to keep City Hall open to same-sex couples for about a month, during which video of the marriages streamed into television sets across the nation, galvanizing a national discussion. In March 2004, the California Supreme Court ordered the city to stop marrying same-sex couples until it could consider whether Mayor Newsom had the authority to defy a state statute he believed to be unconstitutional. In August 2004, that court ruled that California mayors do not have that authority. If anyone had a problem with the marriage laws, the court wrote, they should sue to have them overturned.

Anticipating that possible ruling, City Attorney Herrera had already directed our legal team to draft a complaint challenging the state marriage laws under the equality, liberty and

voters overturned the Supreme Court's decision by enacting Proposition 8. Proposition 8 altered the state Constitution to limit civil marriage to "a man and a woman." (To understand how a new constitutional provision can overturn a Supreme Court decision interpreting a different constitutional provision, think of Proposition 8 as having "carved out" the topic of same-sex marriage from the equality, liberty and privacy clauses.) Arguably the two most famous US Supreme Court litigators in the nation — David Boies and Ted Olson of *Bush v. Gore* fame — challenged Proposition 8 under the US Constitution. San Francisco and others soon joined that effort.

Notably, Proposition 8 did not invalidate the 28,000 same-sex marriages that occurred between June and November 2008 (that is, marriages entered into between the date the



photo by Charlotte Florio

Kathleen Morris

married under California law regardless of whether the US Supreme Court upholds Prop. 8.

Needless to say, it was thrilling to be part of the state marriage team and part of history. It is equally thrilling to have the opportunity to bring that experience to teaching and scholarship at Golden Gate University, where I can encourage law students to pursue employment in public law offices; and I can write about the untapped potential of cities, counties and other localities to be champions of the public interest.



Kathleen Morris has been a visiting lecturer at Yale Law School; a lecturer at UC Berkeley Law School; and a visiting assistant professor at Rutgers-Camden Law School. She has a JD from UC Berkeley; a master's in politics from the University of Edinburgh; and a BA from CSU Northridge.