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Court to rule on same-sex marriage and American freedom

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The US Supreme Court will consider whether state bans on same-sex marriage are constitutional.

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The US Supreme Court agreed last Friday to hear four cases about same-sex marriage. Essentially, this means that, having previously avoided doing so, the court will finally consider whether or not same-sex marriage is constitutional.

Each of the four cases presents the hardships faced by gay and lesbian families. These hardships include their marriages not being recognised on their death certificates, same-sex couples with children being denied legal family status, and couples married in one state having their married rights denied in another state.

The Supreme Court justices consolidated these cases by changing the wording to focus on two questions. The first question asks whether the 14th Amendment to the Constitution requires a state to allow same-sex marriage. The second question asks whether the 14th Amendment requires a state to recognise same-sex marriage performed in another state.

Why is the 14th Amendment the key?

The 14th Amendment was adopted in 1868. It came out of the post-Civil War reconstruction era and was the means by which former slaves – and all others born in the US – were guaranteed citizenship and federal protection of their rights. It also prohibited states from denying freedom to citizens without “due process” and required them to provide all citizens “equal protection of the law”.

Like the Bible, the meaning of the US Constitution and its amendments has been broadly interpreted, hotly debated and manipulated to serve different ends – including the violation of minority civil rights to protect majority interests.

From the late 19th century, southern states enforced and practised legal racial segregation. Until 1954, when the Supreme Court ruled that this segregation was unconstitutional, southern states circumvented the 14th Amendment's guarantee of equal protection of all citizens by arguing that black Americans were equal but should be separated from white Americans.

Until the Supreme Court's 1967 ruling in *Loving v Virginia*, interracial marriage was illegal due to state-based anti-miscegenation laws. In the unanimous opinion on that case, the court stated that marriage was a basic human and civil right. To deny it on the basis of race violated the spirit and the terms of the 14th Amendment.

Then-Chief Justice Earl Warren wrote:

The 14th 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.

To bring it into the present day, the language about racism in that opinion could be easily replaced with the words "invidious homophobic discrimination". In relation to ensuring the individual's freedom to marry, the words "another race" could be replaced with "the same sex".

Certainly, *Loving v Virginia* has been used as the precedent – or at least referred to – in a number of rulings in favour of same-sex marriage. The Supreme Court cited the case in 2013 when it struck down the Defence of Marriage Act (DOMA), which had defined marriage as only between a man and a woman.

Despite this precedent, to date the Supreme Court has left individual states to decide both the legality of same-sex marriage and whether or not to recognise same-sex unions from out-of-state.

Where do most states and Americans stand?

A majority of states have done the right thing. According to the Freedom to Marry campaign:

Over 70% of the US population lives in a state currently issuing marriage licences to same-sex couples state-wide, and over 64% of the US population lives in a state with the freedom to marry.

Opinion polls show the majority of Americans support same-sex marriage. The highest percentage of those in favour is among people aged 18-29. With approval for same-sex marriage steadily increasing over the past decade, forecaster Nate Silver has predicted that by 2016 support will be significant enough for gay marriage to be voted into national law.

Same-sex political lobbying in many states has reflected the positive change in opinion. Responding to the Supreme Court's decision to consider the constitutionality of same-sex marriage, the Obama administration says it will:

... urge the Supreme Court to make marriage equality a reality for all Americans.

What factors are in play in the Supreme Court?

With nine justices making up the court, and four of them expected to vote in favour of same-sex marriage, conservative Justice Anthony Kennedy is again the potential swing vote on the cases to be considered. In the past, he has expressed concern about the potential consequences of meddling with traditional marriage.

However, Kennedy has written the opinions for three Supreme Court decisions that favoured gay and lesbian rights. And he has sympathised in court with the human toll on same-sex families, and particularly on their children, of not receiving the "full recognition and full status" of the law.

All the evidence suggests that the legalisation of gay marriage is inevitable. So why would the Supreme Court avoid ruling for same-sex civil rights across all American states this year?

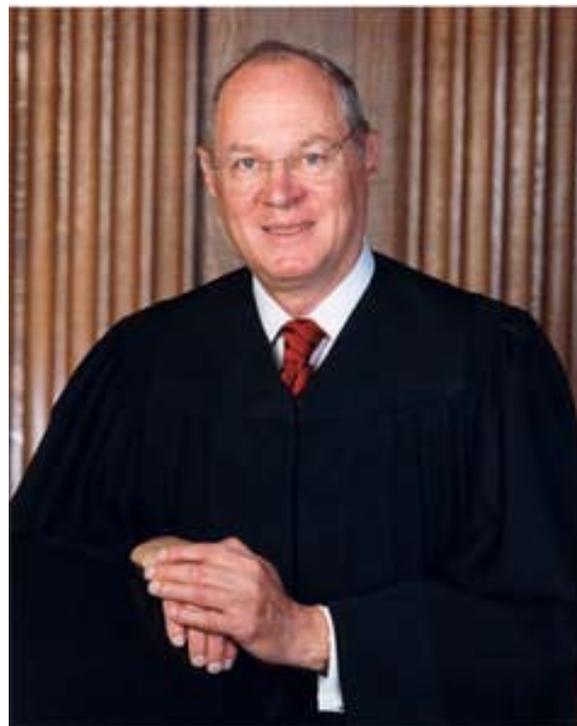
Opponents of same-sex marriage argue that the Supreme Court should not interfere with the democratic process. For support, they quote liberal Justice Ruth Bader Ginsburg on the Supreme Court's 1973 *Roe v Wade* abortion decision. Although she supports abortion rights – and same-sex marriage – Ginsburg has reflected outside the court that the abortion decision "moved too far, too fast" by taking the process away from individual states and triggering a conservative backlash still being played out in bitter partisan culture wars.

To avoid similar fallout, groups opposed to same-sex marriage, like the Alliance Defending Freedom, have urged the Supreme Court to leave same-sex marriage to individual states and voters.

Yet unlike the issue of abortion, which continues to divide Americans, the numbers show that most Americans support same-sex marriage. That means the battle boils down to one between a shrinking minority who want to enforce a form of apartheid on the homosexuals they believe are wrong and those who are seeking to realise their civil rights.

In deciding for same-sex marriage across all states this June, the US Supreme Court can end the wait and positively change the lives of humans who suffer daily inequities and humiliation simply because of their sexual orientation.

Each member of the court enjoys the title "Justice". The time is right for them to deliver it.



Anthony Kennedy has been identified as the key Supreme Court swing vote on same-sex marriage. US Supreme Court

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