

Gill v. OPM; Massachusetts v. Health & Human Services

“The Marriage Cases,” the evolving Prop. 8 case, these two companion cases from the First Circuit, and a more recent case from the U.S. District Court in New York, all involve a melange of highly emotional, legally complex, strongly held religious beliefs, adherence to historical tradition, civil rights claims, personal liberty [the list could go on] of evolving social mores seeking clarity and resolution in the judicial process. Before we turn to the recent First Circuit cases, a brief summary provides some needed context.

On May 15, 2008, the California Supreme Court decided *In re Marriage Cases* (2008) 43 Cal.4th 757, in which, in a 4-3 decision, the Supreme Court held unconstitutional two statutes limiting marriage to opposite-sex couples as violative of the state constitutional rights of same-sex couples. After the passage of Proposition 8 on November 4, 2008, the California Supreme Court decided *Strauss v. Horton* (2009) 46 Cal.4th 364, in which the court ruled that Proposition 8 was valid, but the 18,000 same-sex marriages existing before its effective date were allowed to stand.

In February 2012, the 9th Circuit issued a 2-1 decision holding Proposition 8 unconstitutional. On June 5, 2012, the 9th Circuit Court denied an *en banc* rehearing of the February decision and stayed enforcement pending the filing by Proposition 8 proponents of a Petition for Hearing before the United States Supreme Court.

On June 6, 2012, the U.S. District Court in New York, in *Windsor v. U.S.* (DC NY June 6 2012) 109 ASTR 2d ¶2012-870, ruled in favor of a same-sex surviving spouse’s constitutional challenge to Section 3 of the Defense of Marriage Act, which denies recognition of same-sex marriages for purposes of administering federal law. The result of this District Court holding was to allow an estate tax marital deduction for the same-sex spouse of a decedent.

It is within the evolving context of the above judicial process that *Gill v. OPM* and *Massachusetts v. Health & Human Services* must be viewed. In these two companion cases, the appeals present constitutional challenges to Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. Section 7, which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from married couples. The cases did not challenge the right of states to define marriage as they see fit, the appeals instead contested the right of Congress to undercut the choices made by same-sex couples and by individual states deciding who could be married to whom. A key point emphasized in the opinion is that DOMA does not formally invalidate same-sex marriages in states that permit them, but its adverse consequences for such a choice are considerable. The act prevents same-sex married couples from filing joint federal tax returns, prevents a surviving spouse of a same-sex marriage from collecting social security survivor benefits, and DOMA leaves federal

employees unable to share their health insurance and certain other medical benefits with same-sex spouses. The First Circuit opinion pointed out that DOMA affects a thousand or more generic cross-references to marriage in a myriad of federal laws. The holding of the cases was that Section 3 of DOMA violates the equal protection clause, meaning that denial of federal benefits to lawfully married same-sex couples was held invalid.

These issues, and these cases, have evolving legal, political and historical nuances which engender heated debate and public demonstrations on both sides. Mere recognition of the myriad of *amicus curiae* briefs on all sides illustrates that point. These are fascinating and evolving issues, the last episode of which has yet to be written.

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