Prop. 8: What will the US Supreme Court do?

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.

In light of the 9th U.S. Circuit Court of Appeals’ decision declaring Proposition 8 unconstitutional, the question everyone is asking is what will the U.S. Supreme Court do? The 9th Circuit ruled that Proposition 8 denied equal protection because it took away the right to marry from only gays and lesbians. The court concluded, in a 2-1 decision, that this discrimination based on sexual orientation violated the 14th Amendment.

Of course, there is the possibility that the 9th Circuit could grant en banc review and could then affirm, reverse, or reverse the panel’s approach. But I am skeptical that the court will grant en banc review. I have no doubt, however, that some judges on that court will press for it. Judge Diarmuid O’Scannlain, for example, has expressed strong opposition to constitutional protection for gays and lesbians. But few, if any, of the judges likely share his views.

Even judges who are more likely to agree with Judge Randy Smith’s dissent probably will not want en banc review. The ideological composition of the 9th Circuit makes affirmation of the panel more likely than a reversal. In fact, while the panel’s decision in Perry v. Brown is narrow, an en banc opinion could be much broader in finding a right to marry for gays and lesbians. Also, especially given the narrow approach taken in Judge Stephen Reinhardt’s majority opinions, this is not a situation where the panel’s decision conflicts with other 9th Circuit precedent or is likely to affect a large number of other cases.

Assuming that there is not en banc review, what will the Supreme Court do? Many commentators have speculated that the Court will not take the case at all. Influential pundits like CNN’s Jeffrey Toobin have argued that the narrow focus of the decision makes review unlikely. The 9th Circuit held that once California had extended the right to marry to gays and lesbians it violated equal protection to take the right to marry from only them. As a result, the ruling means only that California’s law is unconstitutional and does not affect the constitutionality of laws in other states prohibiting same-sex marriage. The thought is that this will make the Supreme Court much less likely to be inclined to take the case than if the 9th Circuit had followed Judge Vaughn Walker’s approach and held that gays and lesbians have the constitutional right to marriage equality.

My intuition is different; I predict that the Supreme Court will take the case. Perry v. Brown is the first decision by any federal appellate court finding that a law prohibiting same-sex marriage to be unconstitutional. Although the court ruled narrowly in a way that just affects California, its reasoning was that there is no legitimate government interest in denying marriage equality to gays and lesbians. Also, the 9th Circuit’s approach raises a difficult constitutional question: If a state recognizes a right not required by the U.S. Constitution, when may the state rescind it?

What then will the Supreme Court do? Everyone on both sides of the issue expects that it will be a 5-4 decision with Justice Anthony M. Kennedy casting the deciding vote. Although surprises happen, everyone predicts that there will be four sure votes to uphold Proposition 8 in Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr., and four certain votes to strike it down in Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and

Government

Retiring SEC chief in LA saw dramatic tenure
The Securities and Exchange Commission’s top lawyer in Southern California is stepping down, launching what is likely to be a competitive process to fill the coveted position.

Mergers & Acquisitions

Google-Motorola deal gets the green light from regulators
Regulators in the U.S. and Europe approved Google Inc.’s acquisition of Motorola Mobility Holdings Inc. and its collection of 17,000 patents Monday in two critical - but not final - steps towards closing the deal.

Government

Vote on circuit court nominee to go forward
Republican resistance to allowing a confirmation vote for an appeals court nominee collapsed in a crucial Senate vote Monday, leaving the door open for the three candidates who hope to join the 9th U.S. Circuit Court of Appeals this year.

Solo and Small Firms

Three from DLA Piper launch litigation boutique
Betty Shumener, Robert Odson and Henry Oh cited reasons for leaving as a desire to have their own practice and the increasing conflicts at large firms that prevent litigators from handling significant cases.

Labor/Employment

Tougher guest worker rules aren’t likely to hit California hard
The Department of Labor will impose more stringent requirements on some companies who import seasonal labor, but California immigration attorneys say the impact will be relatively minor here.

Obituaries

Julian O. von Kalinowski
1916–2012

Mergers & Acquisitions

Dealmakers
A roundup of recent M&A and financing activity and the lawyers involved.

Constitutional Law

Prop. 8: What will the US Supreme Court do?
The Proposition 8 ruling raises issues that the U.S. Supreme Court will likely take up. By Erwin Chemerinsky of the University of California, Irvine, School of Law
[Justice Anthony M.] Kennedy's opinions have indicated that he wants to be on the right side of history and it is clear that the trend is towards marriage equality.

Indeed, from the outset it was expected that Justice Kennedy would decide this case. Some advocates for gays and lesbians preferred that marriage equality litigation remain in state courts under state constitutions to keep it away from the Supreme Court. They do not have sufficient confidence in Kennedy to risk a Supreme Court decision rejecting a constitutional right to marriage equality and halting the tremendous progress being made across the country in courts and legislatures. But David Boise and Ted Olsen had a different perspective behind their challenge of Proposition 8. So far they have won at both the district court and the federal appellate court, but ultimately their lawsuit was a gamble on Kennedy.

And I think it was a good gamble. There have been two Supreme Court decisions in American history advancing rights for gays and lesbians. Romer v. Evans, 517 U.S. 620 (1996), so heavily relied on in the 9th Circuit’s opinion, and Lawrence v. Texas, 539 U.S. 558 (2003). Both were written by Kennedy.

No justice on the Supreme Court looks more to foreign law and practices than Justice Kennedy. Since 2001, 10 countries have begun allowing same-sex couples to marry nationwide: Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa, and Sweden. Kennedy’s opinions have indicated that he wants to be on the right side of history and it is clear that the trend is towards marriage equality. Opinion polls show that a majority of the country now favors allowing gays and lesbians to marry, and public opinion has moved quickly in that direction. And among younger Americans, support for allowing marriage equality is overwhelming.

Moreover, a close examination of Justice Kennedy’s reasoning in Romer v. Evans and Lawrence v. Texas is revealing as to what he likely will do as to Proposition 8. In Romer, the Court struck down a Colorado initiative repealing all laws in the state protecting gays and lesbians from discrimination and precluding the enactment of any new laws. Kennedy, writing for the Court, held that the state had no legitimate interest in denying gays and lesbians, but no one else, the ability to use the political process to obtain favorable legislation. In Lawrence, the Court, in an opinion by Kennedy, said that the state has no legitimate interest in prohibiting private, adult consensual homosexual activity.

Justice Kennedy is likely to say exactly the same thing when Proposition 8 comes before the Court: There is no legitimate government interest in denying gays and lesbians the right to marry. The supporters of Proposition 8 argued to the 9th Circuit that since marriage is primarily about procreation, there is a legitimate interest in denying gays and lesbians the right to marry.

This argument makes no sense. Denying gays and lesbians the ability to marry has nothing to do with procreation. Gay and lesbian couple will procreate whether or not they can marry through adoption, surrogate, and artificial insemination. The only question is whether their children will have the benefits of having married parents. Besides, never has any state linked marriage to procreation and limited the right to couples who can or want to have children.

It is for this reason that I think that Justice Kennedy will write the opinion for the Court and it will look more like Judge Walker’s district court opinion than Judge Reinhardt’s opinion for the 9th Circuit. The Court will declare that there is just no legitimate government interest in denying gays and lesbians the right to marry. Kennedy is likely to see his decisions about gay and lesbian rights as among his most important and long-lasting contributions to constitutional law.

Ultimately, the Supreme Court’s holding will be simple: Gays and lesbians should have the same right to express love and commitment through marriage; the same ability to gain the legal benefits of marriage; the same chance to experience the joys and disappointments of marriage that heterosexual couples always have had. It is a matter of decency and equality.