

Backers of gay marriage look for small victory

by [Richard Wolf](#) in the [May 1, 2013](#) issue

Jeff Zarrillo brought his case for gay marriage to the Supreme Court in late March because, he said, “the court is supposed to step in and protect the minority from the tyranny of the majority.” Edith Windsor brought her case for same-sex spousal benefits to the high court because, she said, “from my fourth-grade civics class, I somehow trust the Supreme Court to bring justice.”

Both Zarrillo, one of four people challenging California’s Proposition 8 ban on same-sex marriage, and Windsor, the New York widow challenging the Defense of Marriage Act, may win their cases when the Supreme Court rules in June. But few expect the type of landmark decisions that would make civil rights history.

Yet any victory may be good enough for proponents of marriage equality. “Sometimes, the court takes things in one fell swoop. Sometimes, it takes things one step at a time,” said Theodore Boutrous, one of the lawyers representing the Proposition 8 challengers. “I think the path is clear. The law points all in one direction.”

Though proponents and opponents of same-sex marriage had anticipated a debate over discrimination and equal protection, at times the debate in the court revolved around issues of federal and state jurisdiction.

“I would have liked to see a bigger ‘Aha!’ moment—that at the heart of these cases is the need to get the law where the American people are already going, which is to embrace the full equality and inclusion of gay people in marriage and in American life,” said Evan Wolfson, president of the group Freedom to Marry.

Still, the result could be historic. By late June, wedding bells may be ringing for gay and lesbian couples in California, where one in eight Americans live. In nine other states and the District of Columbia, married same-sex couples may get full federal recognition and benefits.

Regardless of the court's decisions in the Proposition 8 and the Defense of Marriage Act cases, gay marriage laws may be passed soon in four more states—Illinois, Minnesota, Rhode Island and Delaware. By the end of next year, the same could be true in New Jersey, Oregon and Hawaii.

Those who hope for landmark Supreme Court rulings similar to Justice Anthony Kennedy's 2003 opinion in *Lawrence v. Texas*, which struck down state sodomy laws, may have to wait a bit longer. Kennedy wrote then, "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime." On gay marriage, however, he said in March, "we have five years of information to weigh against 2,000 years of history or more."

"Those of us who were hoping for sort of the *Lawrence* of marriage—sweeping, eloquent language vindicating the rights of gay and lesbian couples to get married—that looks rather unlikely," said Elizabeth Wydra, chief counsel of the liberal Constitutional Accountability Center.

On the most momentous questions before them—Do gays and lesbians have a fundamental right to marry? Does the Constitution forbid restrictions on same-sex marriage? Do gays and lesbians qualify for heightened protection?—the justices indicated they may take a pass. That would prevent a 50-state, court-imposed solution.

"I think they realize what a significant step that would be," said John Eastman, a law professor at Chapman University in California and chairman of the National Organization for Marriage, which opposes same-sex marriage. "The public opinion on this question might be changing, but it has not changed to the point that the court would be out front of two-thirds of the states in the country."

That's OK with Chad Griffin, a leader of the opposition to Proposition 8 who took over last year as president of the Human Rights Campaign, the nation's most influential gay rights group.

"There are multiple ways to victory here," Griffin said. "We'll see what this court does, and then we'll see what fights we have left to fight." —*USA Today*