

Same-sex marriage and the courts

By [David Heim](#)

March 12, 2013

In a recent [editorial calling for same-sex marriage to be legal](#), the *Century* editors noted that if and when legalization happens at the national level, the First Amendment will protect religious groups that have their own position on the question. The government won't, for example, be able to force a church or minister to perform a same-sex wedding against their will.

Yet [as Mark Silk notes](#), a range of religious liberty questions will likely have to be addressed—and probably litigated. These are limited and justiciable but not trivial. They include whether

- religious colleges must provide married student housing to same-sex couples
- religious organizations can discriminate in employment against people in same-sex marriages
- religious organizations must offer benefits to same-sex spouses of their employees
- individuals or organizations can refuse to provide services to same-sex couples

As in the debate over including contraception in health-care coverage, defining what constitutes a “religious organization” will be a major concern.

The question of how much the courts should get involved in deciding same-sex marriage at all is an interesting strategic one. Some advocates for same-sex marriage worry that a positive ruling from the Supreme Court, which hears arguments on the issue this month, might turn out to be an empty victory. At a time when popular opinion in the states is already trending toward same-sex marriage, it might be preferable to let the democratic process run its course rather than have the high court intervene.

The worry is that a Supreme Court ruling for same-sex marriage might have the effect that *Roe v. Wade* had on the legalization of abortion: it galvanized the opposition, polarized debate and forestalled a legislative solution that was emerging. Judging from [Jeffrey Toobin's profile in the New Yorker](#), Supreme Court Justice Ruth

Bader Ginsburg appears to share this concern.