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## Justices Hint at Fears of Acting Too Quickly on Gay Marriage

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WASHINGTON — As the Supreme Court on Tuesday weighed the very meaning of marriage, several justices seemed to have developed a case of buyer's remorse about the case before them. Some wondered aloud if the court had moved too fast to address whether gay and lesbian couples have a constitutional right to marry.

"I just wonder if this case was properly granted," said Justice Anthony M. Kennedy, who probably holds the decisive vote.

Justice Sonia Sotomayor said there may be value in letting states continue to experiment. "Why is taking a case now the answer?" she asked.

Addressing the merits of the case during the first of two days of arguments on same-sex marriage, Justice Kennedy voiced sympathy for the children of gay and lesbian couples.

"There's some 40,000 children in California that live with same-sex parents," he said, as the justices debated the state's Proposition 8, which banned same-sex marriage. "They want their parents to have full recognition and full status. The voice of those children is important."

But Justice Kennedy also spoke of uncertainty about the consequences for society of allowing same-sex marriage. "We have five years of information to pose against 2,000 years of history or more," he said, speaking of the long history of traditional marriage and the brief experience allowing gay men and lesbians to marry in some states.

Justice Samuel A. Alito Jr. said the court should not move too fast.

"You want us to step in and assess the effects of this institution, which is newer than cellphones and/or the Internet?" he said.

Many of the questions directed to Charles J. Cooper, a lawyer for opponents of same-sex marriage, concerned whether there was any good reason to exclude same-sex couples from the institution.

Justice Elena Kagan, for instance, asked how letting gay and lesbian couples marry harmed traditional marriages. “How does this cause and effect work?” she asked.

Mr. Cooper said that “the state’s interest and society’s interest in what we have framed as ‘responsible procreation’ is vital.”

Theodore B. Olson, representing the ban’s challengers, said California’s ban on same-sex marriage “walls off gays and lesbians from marriage, the most important relationship in life.”

Several justices also challenged the notion that procreation was the key to the state’s interest in marriage. Justice Stephen G. Breyer asked Mr. Cooper about sterile opposite-sex couples. “There are lots of people who get married who can’t have children,” he said.

Justice Kagan raised the question of a man and a woman over 55 years old seeking to get married, despite the fact that they would not be able to have children. Mr. Cooper agreed that the court could not constitutionally ban such marriages, but returned to the hazards of a “redefinition” of marriage.

Justice Antonin Scalia remarked wryly, “I suppose we could have a questionnaire at the marriage desk asking, ‘Are you fertile?’” When Justice Kagan noted that people were frequently asked about their age by the government, Justice Scalia joked about Senator Strom Thurmond, who fathered in his 70s and served in the Senate until age 100.

Mr. Cooper avoided a direct attack on same-sex marriage, which has rapidly gained public support in recent years. Instead, he argued that there was already under way a lively, democratic debate over “the age-old definition of marriage” and suggested that the court should not interrupt it. The court should not, he said, “put a stop to this democratic debate” over what he called “an agonizingly difficult issue.”

There was also an extended discussion of a preliminary issue: whether the plaintiffs in the case actually have legal standing to challenge the state court ruling that overturned Proposition 8, the ballot initiative banning same-sex marriage.

Seconds into the morning hearing, as Mr. Cooper began his argument, Chief Justice John G. Roberts Jr. cut him off and asked him to address the standing issue. It could prove a crucial

question, since the court could decide that they have no standing and effectively leave in place lower-court rulings striking down the same-sex marriage ban.

Mr. Olson said that the plaintiffs did not have standing. But his main argument was that Proposition 8 “walls off gays and lesbians from marriage,” which both sides in the case recognize as a fundamentally important institution. Mr. Olson said that a ban on same-sex marriage would have the effect of “labeling their most sacred relationship” as “not O.K.”

Nine states and the District of Columbia allow gay and lesbian couples to marry. Polls show that a majority of Americans support same-sex marriage, suggesting that further gains are likely in state legislatures and at the ballot box.

The trends lend support to both sides. The ban’s challengers ask the court to provide leadership in cementing victories in what they call the civil rights issue of the day. Its defenders counter that the increase in the number of states that allow same-sex marriage shows that the democratic process is working and that the court should not interfere.

The case, *Hollingsworth v. Perry*, No. 12-144, was filed in 2009 by Mr. Olson and David Boies, two lawyers who were on opposite sides in the Supreme Court’s decision in *Bush v. Gore*, which settled the 2000 presidential election. They argued that California voters had violated the federal Constitution the previous year when they approved Proposition 8, overriding a decision of the state’s Supreme Court allowing same-sex marriages.

Judge Vaughn R. Walker of the Federal District Court in San Francisco agreed, issuing [a broad decision](#) that said the Constitution required the state to allow same-sex couples to marry. The decision has been stayed.

A divided three-judge panel of the United States Court of Appeals for the Ninth Circuit, also in San Francisco, [affirmed the decision](#). But the majority relied on a narrower ground, saying that voters were not permitted to withdraw the right to marry once it had been established by the state Supreme Court. The logic of the ruling was thus confined to California.

The decision of the appeals court seemed calculated to avoid Supreme Court review or, at least, attract the vote of Justice Kennedy, the presumed swing member of that court. The first gambit failed, and the fate of the second is an open question.

“We do not doubt the importance of the more general questions presented to us concerning the rights of same-sex couples to marry, nor do we doubt that these questions will likely be resolved

in other states, and for the nation as a whole, by other courts,” Judge Stephen R. Reinhardt wrote for the majority.

“For now,” he added, “it suffices to conclude that the people of California may not, consistent with the federal Constitution, add to their state Constitution a provision that has no more practical effect than to strip gays and lesbians of their right to use the official designation that the state and society give to committed relationships, thereby adversely affecting the status and dignity of the members of a disfavored class.”

In urging the Supreme Court to strike down Proposition 8, the Obama administration suggested another path that would not immediately lead to requiring same-sex marriage throughout the nation. The administration argued that the court could require same-sex marriage in the eight states that provide committed gay and lesbian couples with all of the legal benefits and burdens of marriage through civil unions or domestic partnerships but withhold only the name “marriage.”

This theory seems to apply to California and seven other states: Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon and Rhode Island.

The Supreme Court has other options, too. It could establish a constitutional right to same-sex marriage that would apply to all 50 states. It could continue to leave the issue to individual states. Or it could duck a decision on the merits by finding that the parties who filed the appeal, proponents of Proposition 8, were not injured directly enough by the ruling striking down the ban to have standing to appeal.

On Wednesday, the justices will hear two hours of arguments on the Defense of Marriage Act.