

BACKGROUND

No. 2737 | OCTOBER 10, 2012

Circumventing Citizens on Marriage: A Survey

Dominique Ludvigson

Abstract

Despite a history of consistent voter support for traditional marriage, the U.S. Supreme Court has been asked to address questions concerning this foundational social institution. The issue has been forced onto the Court's docket by activist judges who have overruled democratically established marriage policies and by executive branch officials who have abandoned their duty to faithfully execute the law. In its coming term, the Court will have the opportunity to ensure that questions about the nature, purpose, and public interest in marriage are answered by the people through democratic processes, not by unelected judges.

Despite a history of consistent support for the traditional definition of marriage, both at the ballot box¹ and in the enactment of the Defense of Marriage Act (DOMA) by large bipartisan majorities in both Houses of Congress in 1996, the question of marriage has now reached the U.S. Supreme Court. In recent years, the institution of marriage—the basic building block of civil society—has been the target of unrelenting pressure by advocates seeking its redefinition.

This fall, the U.S. Supreme Court will decide whether to hear one or more legal challenges to the institution of marriage. The issue has been forced onto the Court's docket by activist judges who have overruled democratically established marriage policies and by executive branch officials who have abandoned their duty to faithfully execute duly enacted laws.

Litigation over marriage has drawn outsized media coverage, presenting the appearance of a powerful cultural movement to transform the institution—a fiction that unravels when Americans go to the polls. In its coming term, the Court has the opportunity to ensure that questions about the nature, purpose, and public interest in marriage are answered

KEY POINTS

- In 42 states, marriage continues to be defined as a union between one man and one woman by statute, state constitutional amendment, or both.
- Advocates have largely sought to redefine marriage primarily through litigation rather than through democratic processes. The media's portrayal of this litigation as a powerful cultural movement is not borne out when Americans actually go to the polls.
- In the 32 states where the question has been put directly to the people, they have voted for the traditional definition of marriage.
- The U.S. Supreme Court has been asked to consider multiple cases involving the definition of marriage. Activist judges who overruled democratically established marriage policies and executive branch officials who failed to faithfully execute duly enacted marriage laws have contributed in large measure to such cases arriving at the Court.
- Questions about the nature, civic purpose, and public interest in the institution of marriage are best resolved by citizens through democratic processes.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2737>

Produced by the Richard and Helen DeVos Center for Religion and Civil Society

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

by the people through democratic processes, not by unelected judges.

Cases Appealed to the U.S. Supreme Court

The Supreme Court has been asked to consider multiple marriage cases in its new term. If the Court agrees to review one or more of these cases, it will likely issue its ruling by June 2013.

Hollingsworth v. Perry. This case addresses Proposition 8, the successful 2008 ballot initiative in which California voters adopted a marriage amendment to their state constitution that preserves marriage as a union between one man and one woman.² Both a federal trial court and a divided panel of the U.S. Court of Appeals for the Ninth Circuit ruled against Proposition 8. Parties defending Proposition 8 have asked the U.S. Supreme Court to determine whether the U.S. Constitution bars the people of California from adopting a constitutional amendment that defines marriage as a union of one man and one woman.

Multiple cases challenging the constitutionality of the

federal Defense of Marriage Act. The other set of cases involves the Defense of Marriage Act, which President Bill Clinton signed into law in 1996 after it was passed with overwhelming bipartisan support by both houses of Congress (342–67 in the House and 85–14 in the Senate). For the purposes of federal law, Section 3 of DOMA defines marriage as the union of one man and one woman.³ In May, a panel of the U.S. Court of Appeals for the First Circuit struck down DOMA's definition of marriage.⁴ This decision is the subject of three petitions to the Court for review.⁵ Three additional DOMA petitions ask the Court to bypass typical appellate court review to rule now on several district court decisions that also invalidated Section 3 of DOMA.⁶

Marriage in the States

In the vast majority of states, marriage is still defined as between one man and one woman by statute, state constitutional amendment, or both. Where the question has been put directly to the people of the states, they have overwhelmingly supported

retaining this definition of marriage. For instance:

- Under the laws of 42 states, marriage remains defined as the union of a man and a woman.⁷
- Citizens have voted for this definition of marriage in every state where they have been given the opportunity to do so—32 states in all.
- In 30 of these states, marriage between one man and one woman is constitutionally protected, thereby precluding the legislature and state courts from redefining the institution without the people's consent. North Carolina became the 30th state to pass a constitutional amendment retaining the definition of marriage between one man and one woman in May of this year. Its voters approved the amendment by a wide margin: 61 percent to 39 percent.⁸ In addition, Hawaii's constitution reserves the question of marriage to the legislature,⁹ which voted to retain the traditional

1. See Alliance Defending Freedom, *Marriage Amendment Vote Percentages: State by State*, <http://www.alliancealert.org/2011/08/24/marriage-amendment-vote-percentages-state-by-state/> (accessed September 25, 2012).

2. *Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144) (formerly captioned *Perry v. Brown* and *Perry v. Schwarzenegger*).

3. Section 3 of DOMA states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S. Code § 7 (1996).

4. *Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012).

5. See *Bipartisan Legal Advisory Group v. Gill*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. Jun. 29, 2012) (No. 12-13); *HHS v. Massachusetts*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. Jul. 2, 2012) (No. 12-15); and *Massachusetts v. HHS*, *petition for cert. filed*, 81 U.S.L.W. 3065 (U.S. Jul. 20, 2012) (No. 12-97).

6. See *Office of Personnel Management v. Golinski*, 824 F.Supp.2d 968 (N.D. Cal., 2012), *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. Jul. 3, 2012) (No. 12-16); *Windsor v. U.S.*, 833 F.Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. Jul. 16, 2012) (No. 12-63); and *Pederson v. Office of Personnel Management*, 2012 WL 3113883 (D. Conn. 2012), *petition for cert. filed*, 81 U.S.L.W. 3087 (August 21, 2012) (No. 12-231).

7. See National Conference of State Legislatures, "Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws," June 2012, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (accessed September 10, 2012).

8. North Carolina State Board of Elections, Primary Election, Official Results, May 8, 2012, <http://results.enr.clarityelections.com/NC/36596/85942/en/summary.html> (accessed September 10, 2012).

9. Hawaii Constitution, art I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

definition of marriage,¹⁰ and voters in Maine supported a ballot measure in 2009 that repealed a bill redefining marriage that was passed by the legislature.

- Marriage has never been redefined by a referendum of the people in any state.

Only six states and the District of Columbia currently issue marriage licenses to same-sex couples. State supreme courts judicially imposed same-sex marriage in Massachusetts, Connecticut, and Iowa. In Vermont,¹¹ New Hampshire, the District of Columbia, and New York, legislative action has authorized same-sex marriage.

In November 2012, voters in Maine, Maryland, Minnesota, and Washington will consider ballot initiatives on the definition of marriage.

- In Minnesota, voters will consider whether to amend their state constitution to preserve the definition of marriage between one man and one woman consistent with state statute.

- Voters in Maryland and Washington will weigh referenda asking whether they wish to ratify the same-sex marriage measures adopted by their state legislatures and signed into law earlier this year. Those statutes have not yet gone into effect pending the referenda.

- In Maine, voters will consider a ballot initiative to issue marriage licenses to same-sex couples and render gender-neutral any terms in the state's laws relating to marital and familial relationships.

These state initiatives are taking place in a fluid political environment regarding marriage. After North Carolina's historic vote, President Barack Obama announced his "evolution" on the definition of marriage. The announcement marked a reversal of his earlier public position that marriage is between one man and one woman.¹² The President also publicly called for the repeal of DOMA,¹³ which he directed the Department of Justice to stop defending in 2011.¹⁴ His statement marked the first time in the nation's

history that a sitting President has publicly announced his support for redefining the institution of marriage.

In another first, the Democratic Party has explicitly embraced same-sex marriage in its party platform.¹⁵ It also reiterated its 2008 platform position calling for DOMA's repeal.¹⁶

Circumventing Citizens on Marriage

Largely unable to redefine marriage through democratic processes, advocates have resorted to the courts to do so. When vigorously defended, marriage laws have been largely upheld.¹⁷ Nonetheless, at critical junctures, the actions of some judges and executive branch officials at both the state and federal levels have played a prominent role in bringing the marriage debate to this point.

Marriage Undermined by State Courts. The redefinition of marriage in state courts is of relatively recent vintage, transpiring only in the past two decades. For example:

- In 1993, a plurality of the Hawaii Supreme Court suggested that granting marriage licenses only to

10. Hawaii Revised Statutes § 572-1. In an August 2012 decision, a federal district court in Hawaii rejected a federal constitutional challenge to the state's marriage amendment and laws. *Jackson v. Abercrombie*, 2012 WL 3255201 (D. Haw. 2012).

11. In 1999, the Vermont Supreme Court ruled that the legislature must grant full and equal benefits of marriage to same-sex couples. As a result, the Vermont legislature was forced to pass an extensive civil unions law providing same-sex couples virtually all protections and benefits afforded to civil marriage. See *Baker v. State*, 744 A.2d 864 (Vt. 1999). The Vermont legislature eventually adopted same-sex marriage outright in 2009.

12. Rick Klein, "President Obama Affirms His Support for Same Sex Marriage," ABC News, May 9, 2012, <http://gma.yahoo.com/blogs/abc-blogs/president-obama-affirms-his-support-for-same-sex-marriage.html> (accessed September 25, 2012).

13. Lesa Jansen, "POTUS Weighs in on DOMA and JP Morgan Chase," CNN, May 14, 2012, <http://whitehouse.blogs.cnn.com/2012/05/14/potus-weighs-in-on-doma-and-jp-morgan-chase/> (accessed September 25, 2012).

14. Letter from Attorney General Eric Holder to Speaker of the House John Boehner on Litigation Involving the Defense of Marriage Act, February 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (accessed September 25, 2012).

15. Democratic National Committee, "2012 Democratic National Platform: Moving America Forward," <http://www.democrats.org/democratic-national-platform#protecting-rights> (accessed September 8, 2012).

16. *Ibid.*

17. Alliance Defending Freedom, "Marriage Legal Landscape," <http://www.alliancedefendingfreedom.org/content/docs/issues/marriage-and-family/Marriage-Legal-Landscape.pdf> (accessed October 2, 2012).

opposite-sex couples constituted sex discrimination and could be justified only by a compelling state interest.¹⁸ In response, the Hawaii State Legislature passed an act the following year reaffirming marriage as between a man and a woman, but a Hawaii trial court struck down the statute.¹⁹ The people of Hawaii subsequently adopted a constitutional amendment reserving the question of marriage to the state legislature, which defined marriage as one man and one woman.

- This early state court case raised questions about whether states with a traditional definition of marriage must recognize same-sex marriages conducted in jurisdictions that allowed such unions. Furthermore, this decision raised questions about the relationship between state law and federal law in federal benefits keyed to marital status. Congress addressed these questions in the federal Defense of Marriage Act in 1996.
- In 2003, a slim majority of the Massachusetts Supreme Judicial Court reinterpreted its state

constitution to redefine the institution of marriage for an entire state, declaring male–female marriage to be nothing more than a “mantra of tradition” that is “rooted in persistent prejudices” with “no rational reason.”²⁰

- The supreme courts of Connecticut²¹ and Iowa²² judicially imposed same-sex marriage in their states in 2008 and 2009, respectively. Three judges who joined in the Iowa ruling were voted out of office a year later.²³
- The California Supreme Court struck down the state’s marriage laws under its constitution by a 4–3 margin in 2008, overturning a 2000 state statute passed by ballot initiative that defined marriage as between a man and a woman.²⁴ However, voters effectively overturned the court’s decision with the Proposition 8 amendment to the California constitution by a 52 percent–48 percent margin. Litigation over Proposition 8 continues in federal court.
- In Maryland and New York, state courts ratified executive branch

actions recognizing same-sex marriages entered into out-of-state even when in-state same-sex marriages were not yet authorized under state law. These decisions preceded their state legislatures’ decisions to redefine marriage.

Marriage Undermined by Federal Courts. Challenges to marriage have also been made in federal courts.

- **Proposition 8 Cases.** After California voters passed Proposition 8, several plaintiffs challenged the constitutional amendment in federal court as a violation of the U.S. Constitution. In a highly criticized decision, a trial judge ruled against Proposition 8 in federal district court. The judge concluded that the 7 million Californians who voted for the law had no rational basis for retaining the male–female definition of marriage and were instead motivated by impermissible animus toward gays and lesbians.²⁵

During the course of the proceedings, higher courts—including

18. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

19. *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

20. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

21. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

22. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

23. Grant Schulte, “Iowa Ousts 3 Judges After Gay Marriage Ruling,” *USA Today*, November 4, 2010, http://www.usatoday.com/news/politics/2010-11-03-gay-marriage-iowa-election_N.htm (accessed September 26, 2012).

24. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

25. See *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 997–98 and 1002 (N.D.Cal., 2010). This, despite the fact that Californians had adopted the most progressive domestic partnership laws in the nation, giving same-sex couples all the rights and privileges available to married couples.

the U.S. Supreme Court²⁶—overturned the trial court three times. One legal observer has characterized the trial-level proceedings as “the most egregious performance ever by a federal district judge.”²⁷ Yet a divided panel of the Ninth Circuit also ruled against Proposition 8. This case is now pending review by the U.S. Supreme Court.

■ **DOMA Cases.** Several challenges have been brought against Section 3 of the federal Defense of Marriage Act, which defines marriage as the union of one man and one woman for purposes of federal law. A panel of the U.S. Court of Appeals for the First Circuit created a new legal test to rule against DOMA,²⁸ and the case is now pending review by the U.S. Supreme Court. The Supreme Court has also been asked to review several federal district court rulings against Section 3 of DOMA, which are pending appellate court review.

Marriage Undermined by State and Federal Executive Branch

Actors. In many cases, federal and state executive branch officials have undermined democratic determinations on the definition of marriage. One prominent example is the Obama Administration’s conduct toward the federal Defense of Marriage Act.

■ The Department of Justice (DOJ) initially offered only a weak defense of the statute, omitting arguments in favor of the law that had previously succeeded. For example, in its filings *in support of dismissing* a challenge to DOMA, it called the statute discriminatory, noting the President’s disagreement with it as a matter of policy and saying that he wanted the statute repealed.²⁹ Indeed, the executive branch’s defense of DOMA was so lacking that even supporters of same-sex marriage publicly concluded, “DOJ’s faint-hearted advocacy is no way to run a legal system.”³⁰

■ In February 2011, at the White House’s direction, the DOJ announced that it would no longer defend the statute.³¹ Two former U.S. Attorneys General have expressed concern over the “extreme and unprecedented” nature of this decision, arguing that these actions “abdicate a part of the President’s constitutional obligation to take care that the laws be faithfully executed.”³²

■ As a result of the Administration’s actions, the U.S. House of Representatives has intervened in court to defend the constitutionality of DOMA.³³

■ Notably, during the Bush Administration, the Department of Justice vigorously defended DOMA against various constitutional challenges, marshaling the strongest legal arguments in support of the statute and winning every case that reached final judgment.³⁴

26. The U.S. Supreme Court rebuffed a procedurally irregular, last-minute rules change by the trial judge that would have allowed him to broadcast the proceedings without regard to the abuse and harassment likely to befall witnesses in the case as a result, observing: “The district court attempted to change its rules at the eleventh hour to treat this case differently than other trials in the district. Not only did it ignore the federal statute that establishes the procedures by which its rules may be amended, its express purpose was to broadcast a high-profile trial that would include witness testimony about a contentious issue. If courts are to require that others follow regular procedures, courts must do so as well.” *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam).

27. Ed Whelan, “The Most Egregious Performance Ever by a Federal District Court Judge,” National Review Online, August 16, 2010, <http://www.nationalreview.com/bench-memos/243693/most-egregious-performance-ever-federal-district-judge-ed-whelan> (accessed September 25, 2012).

28. *Gill v. Office of Personnel Management*, 682 F.3d 1 (1st Cir. 2012).

29. For example, see Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss, Aug. 24, 2009, at 2, in *Smelt v. U.S.*, Case No. SACV09-00286 DOC (C.D. Cal.), http://www.politico.com/static/PPM118_090817_domareplybrief.html (accessed September 25, 2012).

30. Richard A. Epstein, “Judicial Offensive Against Defense of Marriage Act,” *Forbes*, July 12, 2010, <http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html> (accessed September 25, 2012).

31. See Letter from Attorney General Eric Holder to Speaker of the House John Boehner.

32. Brief of Amici Curiae Former Attorneys General Edwin Meese III and John Ashcroft, *Golinski v. U.S. Office of Personnel Management* (9th Cir. 2012) (Nos. 12-15388 & 12-15409).

33. Jake Sherman, “House GOP Moves to Defend DOMA,” Politico, MARCH 10, 2011, <http://www.politico.com/news/stories/0311/50987.html#ixzz24y70k4GI> (accessed September 25, 2012).

34. See *Wilson v. Ake*, 354 F.Supp. 2d 1298 (M.D. Fla. 2005); *Smelt v. Cnty. of Orange*, 374 F.Supp. 2d 861 (C.D. Cal. 2005), affirmed in part and vacated in part for lack of standing, 447 F.3d 673 (9th Cir. 2006); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. March 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Some state executive branch officials have also undermined democratic judgments regarding marriage at the state level. For example:

- In 2004, San Francisco Mayor Gavin Newsom directed the County Clerk's office to begin issuing marriage licenses to same-sex couples in blatant violation of two existing state statutes, including Proposition 22, which voters passed in 2000 by strong margins.³⁵
- When same-sex marriage activists challenged Proposition 8 in federal district court, California's governor and attorney general refused to defend the electorate's decision,³⁶ forcing the initiative's sponsors—ProtectMarriage.com—to intervene to defend the law.
- In two lawsuits challenging Illinois' marriage laws, plaintiffs have named as the defendant Cook County Clerk David Orr, a longtime outspoken advocate for same-sex marriage.³⁷ Instead of defending the law, the clerk and

the states attorney's office have taken the position that the state's reservation of marriage licenses to opposite-sex couples violates the equal protection guarantee of the Illinois constitution.³⁸ In addition, Illinois Attorney General Lisa Madigan not only has not defended the statute, but also has asked the court for permission to intervene in the litigation so that she can attack the law.³⁹

- The Minnesota State Supreme Court recently rebuffed efforts by the secretary of state to alter the legislatively approved title of Minnesota's upcoming marriage ballot initiative, ruling that the executive branch official lacked the authority to do so.⁴⁰ Some proponents of the measure had alleged that the secretary of state, who opposed the amendment, changed the title in an attempt to confuse or sway voters against the ballot initiative.⁴¹

On both the state and federal levels, traditional marriage is under assault, regardless of voter sentiment.

Reaffirming a Crucial Principle

Marriage continues to be defined as one man and one woman in the large majority of states. Recent ballot initiatives, such as North Carolina's marriage amendment, demonstrate strong voter support for the traditional understanding of marriage. Despite this sustained support, however, several courts have ruled against democratically established marriage policies. In several instances, the actions of state and federal executive officials have undermined marriage and the people's ability to engage the policy questions at issue.

Citizens in the voting booth—not activist courts or agenda-driven bureaucrats—should decide questions about the nature, civic purpose, and public interest in marriage. In the coming months, the Supreme Court will have the opportunity to reaffirm this crucial principle.

—*Dominique Ludvigson is a Research Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.*

35. Rachel Gordon, "The Battle Over Same Sex Marriage," *San Francisco Chronicle*, FEBRUARY 15, 2004, <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php> (accessed September 25, 2012).

36. Maura Dolan, "Schwarzenegger Decides Against Defending Prop. 8 in Federal Court," *Los Angeles Times*, June 13, 2009, <http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18> (accessed September 25, 2012).

37. See *Lazaro, et al. v. Orr*, Case No. 12 CH 19718 (Cook County Chancery Court), and *Darby v. Orr*, Case No. 12 CH 19719 (Cook County Chancery Court) (filed May 30, 2012).

38. "Orr, Alvarez Won't Fight Suits Challenging Gay Marriage Ban," CBS Chicago, June 14, 2012, <http://chicago.cbslocal.com/2012/06/14/orr-alvarez-wont-fight-suits-challenging-gay-marriage-ban/> (accessed Aug. 26, 2012).

39. See State's Motion to Intervene, *Lazaro, et al. v. Orr*, Case No. 12 CH 19718 (Cook County Chancery Court), http://www.metroweekly.com/poliglot/LAZARO%20PETITION%20TO%20INTERVENE_06-01-2012_16-48-26.pdf (accessed September 25, 2012). See also Rex W. Huppke, "Attorney General Backs Challenges to Gay Marriage Ban," *Chicago Tribune*, June 1, 2012, <http://www.chicagotribune.com/news/local/breaking/chi-attorney-general-backs-challenges-to-gay-marriage-ban-20120601,0,3481460.story> (accessed September 25, 2012).

40. *Limmer v. Ritchie*, Nos. A12-1149 and A12-1258 (Minn. S. Ct. Aug. 27, 2012), <http://www.adfmedia.org/files/LimmerOpinion.pdf> (accessed September 25, 2012).

41. Tim Nelson, "Backers Sue over Marriage Amendment Title," Minnesota Public Radio News, July 9, 2012, http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2012/07/backers_sue_ove.shtml (accessed September 25, 2012). The news report cited Minnesota State Senator Warren Limmer (R) arguing, "Those words are definitely considered negative and misleading, and I believe they're created to sway the voters."