The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 90 | JANUARY 25, 2013

The Constitutionality of Traditional Marriage

John C. Eastman, PhD

Abstract

In United States v. Windsor *and* Hollingsworth v. Perry*, the Supreme Court will consider the constitutionality of government policies that reflect traditional marriage—that is, marriage as a union between one man and one woman. If the Court does not dismiss these cases on jurisdictional grounds, it should act to uphold traditional marriage. Nothing in the Court's jurisprudence suggests that the right of same-sex couples to have their relationships recognized as marriages is so fundamental as to be protected by the Constitution's Due Process Clause. Nor does the Equal Protection Clause require that result, given the societal purpose and value of marriage as furthering procreation and child-rearing. Because the Constitution does not speak to this question, it is one that is left to ordinary political processes, not to judicial fiat.*

This paper, in its entirety, can be found at **http://report.heritage.org/lm90**

Produced by the Center for Legal & Judicial Studies

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

On December 7, 2012, the Supreme Court of the United States announced that it would hear two cases challenging laws that define the institution of marriage as it has traditionally been understood: as a union between one man and one woman.

In *United States v. Windsor*,[1] the Court will review the decision by the U.S. Court of Appeals for the Second Circuit holding that Section 3 of the Defense of Marriage Act (DOMA), which defined marriage as one man and one woman for purposes of federal law, was unconstitutional. In *Hollingsworth v. Perry*,[2] the Court will review the Ninth Circuit's decision striking down Proposition 8, which California voters adopted in 2008 to reestablish the definition of marriage as the union of a man and a woman in that state after judicial action had redefined it to include same-sex couples. The plaintiffs in both cases argue that the government's refusal to recognize same-sex marriage violates their Due Process and Equal Protection rights.

There are ample grounds for the Supreme Court to reject those arguments. The Court has been justifiably wary of establishing new rights subject to heightened judicial review and, in the process, limiting the domain

Key Points

- In *Windsor and Hollingsworth*, the Supreme Court will consider the constitutionality of Section 3 of the Defense of Marriage Act, which defined marriage as one man and one woman *Hollingsworth* challenges for purposes of federal law; and California's Proposition 8, which reaffirmed traditional marriage in that state.
- Because the Obama Administration and the State of California declined to defend these laws, the Court first has to consider whether it has jurisdiction to decide these appeals.
- The Court has held that same-sex marriage is not a fundamental right protected by the Due Process Clause. Were the Court to hold otherwise, it would face impossible line-drawing problems in future cases.
- The Equal Protection Clause does not compel recognition of same-sex marriages because same-sex couples are not situated similarly, in relevant respects, to opposite-sex couples. Moreover, policies recognizing only traditional marriage further society's compelling interests in procreation and child-rearing, among other things.

of the democratic process. Courts throughout the centuries have recognized the central role of traditional marriage in procreation, child-rearing, and society, rebutting any claim that the government's interest in furthering the institution of traditional marriage is unsupported by a compelling interest, much less by a rational basis.

The Defense of Marriage Act and *Windsor*

DOMA was enacted to prevent the policies of a single state from determining the policies of all the states and the federal government. Nearly 20 years ago, the Hawaii Supreme Court ruled that denying marriage licenses to same-sex couples was sex discrimination that, under the Hawaii Constitution, was subject to strict scrutiny.[3] Under that standard, a statute must be invalidated unless the state can prove that it is narrowly tailored to further a compelling state interest. Not surprisingly, after the case was returned to the trial court for it to apply strict scrutiny, the trial court held that Hawaii's marriage law violated the Equal Protection Clause of the Hawaii Constitution. In response, the voters of Hawaii amended their state constitution to restore the definition of marriage as being between one man and one woman.

Nonetheless, the action by the Hawaii courts raised the specter that parties to same-sex relationships sanctioned as "marriages" in Hawaii might seek recognition of those "marriages" in every other state. Article IV of the U.S. Constitution requires that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

There is a public policy exception—states are not required to accept contested policy judgments made by other states lest one state's policy be foisted on every other state—but Congress sought to reinforce the public policy exception through the exercise of its constitutional power to "prescribe...the effect" to be given to state acts by confirming that no state had to give "effect" to same-sex marriages performed in other states. Section 2 of the Defense of Marriage Act provided as much while recognizing that some states might choose to redefine marriage to encompass same-sex couples. Section 3 of DOMA then defined marriage as between one man and one woman for purposes of federal law.

The plaintiff in *Windsor*, Edith Windsor, contends that Section 3 deprived her of the estate-tax spousal deduction because she and her lesbian partner, though legally married in Canada and then domiciled in New York, were not recognized as married for purposes of federal law. The U.S. District Court for the Southern District of New York held that Section 3 of DOMA violated the Equal Protection component of the Fifth Amendment's Due Process Clause. Even before the case was heard by the Court of Appeals for the Second Circuit, requests for Supreme Court review were filed, but the Second Circuit considered the appeal quickly, rushing out a decision affirming the district court's judgment that Section 3 of DOMA was unconstitutional.

The Second Circuit applied "heightened scrutiny," a legal doctrine normally reserved for invidious classifications such as those based on race, nationality, and gender. This was a first among the federal appellate courts, and the judges on the Second Circuit panel that rendered the decision were split two to one. Although *Windsor* and the other DOMA cases currently pending before the Supreme Court all challenge Section 3, the Court's ruling will likely implicate the constitutionality of Section 2 as well.

COURTS THROUGHOUT THE CENTURIES HAVE RECOGNIZED THE CENTRAL ROLE OF TRADITIONAL MARRIAGE IN PROCREATION, CHILD-REARING, AND SOCIETY, REBUTTING ANY CLAIM THAT THE GOVERNMENT'S INTEREST IN FURTHERING THE INSTITUTION OF TRADITIONAL MARRIAGE IS UNSUPPORTED BY A COMPELLING INTEREST, MUCH LESS BY A RATIONAL BASIS.

California's Proposition 8 and *Hollingsworth*

Over the past decade, the people of California have engaged in an epic and emotional battle over the definition of marriage. The battle has pitted the majority of the state's citizens against every branch of their state government.

In 1994, the legislature added Section 308 to its Family Code, mandating that marriages contracted in

1. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, __ S.Ct. __, 2012 WL 4009654 (Dec. 7, 2012).
2. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert granted*, __ S.Ct. __, 2012 WL 3134429 (Dec. 7, 2012).
3. Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

other states would be recognized as valid in California if they were valid in the state where performed. As other states (or their state courts) began to recognize same-sex relationships as "marriages," it became clear that Section 308 would require California to recognize those relationships as "marriages" as well, even though another provision of California law, Family Code Section 300, specifically defined marriage as between "a man and a woman." This problem was resolved by the March 2000 passage of Proposition 22, a statutory initiative adopted by a 61 percent to 39 percent majority that provided, "Only marriage between a man and a woman is valid or recognized in California."[4]

In 2005, the legislature passed a bill in direct violation of Proposition 22: A.B. 849, which would have eliminated the gender requirement of Family Code Section 300. That bill was vetoed by Governor Arnold Schwarzenegger for violating the state constitutional requirement that the legislature cannot repeal statutory initiatives adopted by the people. Meanwhile, the mayor of San Francisco (now the lieutenant governor) took it upon himself to issue marriage licenses to same-sex couples in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the law,[5] it ultimately ruled that Proposition 22 violated the state constitution.[6]

The people of California responded immediately, approving at the first opportunity another initiative, Proposition 8, which was already scheduled for the November 2008 ballot. Proposition 8 effectively overturned the decision of the California Supreme Court, but it was immediately challenged on the grounds that it was an unconstitutional revision of the state constitution rather than a valid constitutional amendment.

THE ATTORNEY GENERAL OF CALIFORNIA, WHO HAD OPPOSED PROPOSITION 8, NOT ONLY REFUSED TO DEFEND THE INITIATIVE IN COURT, BUT ALSO AFFIRMATIVELY ARGUED THAT IT WAS UNCONSTITUTIONAL, DESPITE HIS STATUTORY DUTY TO "DEFEND ALL CAUSES TO WHICH THE STATE…IS A PARTY."

The attorney general of the state, who had opposed Proposition 8, not only refused to defend the initiative in court, but also affirmatively argued that it was unconstitutional, despite his statutory duty to "defend all causes to which the State…is a party."[7] As a result, the high court of the state allowed the official proponents of the initiative to intervene in order to defend it, recognizing their special status under California law. (The court simultaneously denied a motion to intervene by other supporters of Proposition 8 who were not its official proponents.) Persuaded by the proponents' arguments, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution.[8]

With the support of many of the same organizations that had just lost in the California Supreme Court, another group of plaintiffs—two same-sex couples whose desire to have the state recognize their same-sex relationship as a "marriage" was blocked by Proposition 8—then filed a lawsuit in federal court. Their case, *Hollingsworth*, named as defendants several government officials who opposed Proposition 8: the same attorney general who had previously refused to defend the initiative in state court, the governor, two health officials, and two county clerks.

None of these defendants offered any defense to the lawsuit. The attorney general instead agreed with the plaintiffs' contention that the proposition was unconstitutional, even though existing precedent of the U.S. Supreme Court and from the Ninth Circuit provided strong grounds in support of the proposition's constitutionality.[9] Indeed, circumstantial evidence from the district court's proceedings strongly suggests that the attorney general colluded with the plaintiffs to undermine the defense of the initiative,[10] and the district court even directed the attorney general to "work together

4. Cal. Fam. Code § 308.5 (West 2000).
5. Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004).
6. In re Marriage Cases, 183 P.3d 384, 452 (Cal. 2008).
7. Cal. Gov't Code § 12512 (West 2001).
8. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).
9. *See* Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 949 (9th Cir. 2009).
10. *See* Motion to Realign Defendant Attorney General Edmund G. Brown at 4–5, Perry v. Schwarzenegger, 3:09-CV-02292 (N.D. Cal. Nov. 3, 2009).

in presenting facts pertaining to the affected governmental interests" with San Francisco, which had intervened as a *plaintiff*.[11]

After what can only be described as a show trial—the judge was even chastised by the Supreme Court of the United States for attempting to broadcast the trial in violation of existing court rules[12]—the district court on August 4, 2010, issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the proponents' oral testimony while simply ignoring the extensive documentary and historical evidence supporting the rationality of Proposition 8. It articulated conclusions of law that simply ignored binding precedent of the Supreme Court and the Ninth Circuit, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case.

The Ninth Circuit affirmed the district court's decision, but on dramatically different grounds, which some have opined was a recognition of the flawed nature of the district court proceedings.[13] Without deciding whether the U.S. Constitution actually compels states to recognize same-sex relationships as "marriage," the Ninth Circuit panel, in a decision written by Judge Stephen Reinhardt, held that Proposition 8 violated the Constitution by "taking away" from homosexual couples the right to marry that had previously been recognized in California—a right that had been recognized for all of five months by way of judicial decree that many citizens believed to be illegitimate.

That narrower ruling, which purported to apply only in California, appeared to have been designed to avoid Supreme Court review, because the Supreme Court does not typically take cases unless the lower courts have divided on an important issue of constitutional law. But if that was the panel's goal, the maneuver failed. The Supreme Court chose to hear the case.

The Jurisdictional Issues

In both *Windsor* and *Hollingsworth*, the government officials responsible for defending the laws refused to do so, leading the proponents of Proposition 8 to intervene in the *Hollingsworth* case and Members of Congress to intervene in the *Windsor* case in order to defend the laws they had authored.[14] This unusual arrangement has raised concerns over their constitutional "standing" to seek review of the lower court decisions. In both cases, the Supreme Court has requested that the parties address this issue.

Only parties who have a particular stake in a case can bring suit or appeal from an adverse trial court judgment. Known as "standing," this requirement is designed to ensure compliance with the limitation on federal court jurisdiction found in Article III of the Constitution, which allows federal courts to hear only actual "cases or controversies." Ordinary citizens cannot bring a lawsuit simply because they disagree with a statute, nor can they intervene to defend a statute simply because they agree with it. In most cases, a "particularized injury" is required. Because standing is a jurisdictional requirement—meaning that the Court has no constitutional authority to consider a case in which the parties lack standing—the Court has an independent obligation to address the issue, even if the parties do not wish to do so.

The Court requested that the parties in the *Windsor* case address two jurisdictional questions: first, whether the executive branch's agreement with the court below that DOMA is unconstitutional deprives the Supreme Court of jurisdiction to decide this case and, second, whether the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), which has taken over defense of DOMA, has constitutional standing in the case.

Under existing case law, BLAG's own standing is clear. Although individual Members of Congress normally do not have any more

11. Motion to Intervene by San Francisco, *Perry*, 3:09-CV-02292, *granted in part to allow San Francisco to present issue of alleged effect on governmental interests.*

12. Hollingsworth v. Perry, 130 S.Ct. 705, 715 (2010).

13. *See, e.g.*, Ed Whelan, *Initial Assessment of Ninth Circuit's Anti-Prop. 8 Ruling*, National Review Online (Feb. 7, 2012), http://www.nationalreview.com/bench-memos/290442/initial-assessment-ninth-circuit-s-anti-prop-8-ruling-ed-whelan (noting that Judge Reinhardt's opinion is "further evidence that [Judge] Walker's whole trial was a pointless (and time-consuming) farce"); *cf.* Jane Schacter, *Splitting the Difference: Reflections on Perry v. Brown*, 125 Harv. L. Rev. F. 72, 73 (2012) (noting that "Judge Reinhardt's opinion in the case stands in stark and self-conscious contrast" to the district court opinion).

14. Under federal law, an intervenor has a similar status as a named party to participate in discovery and briefing. Fed. R. Civ. P. 24 instructs that courts must permit intervention by those who are authorized by statute to intervene and that courts may permit other intervenors as well. This is in contrast to *amicus curiae*, who are "friends of the court" and whose role is usually limited to filing a discrete brief that might aid the court in its decision by bringing attention to matters not already covered by the parties. *See* Sup. Ct. R. 37.

standing to challenge the constitutionality of statutes with which they disagree than do ordinary citizens, a group such as the Bipartisan Legal Advisory Group—authorized by the legislature itself—does.

ALTHOUGH INDIVIDUAL MEMBERS OF CONGRESS NORMALLY DO NOT HAVE ANY MORE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF STATUTES WITH WHICH THEY DISAGREE THAN DO ORDINARY CITIZENS, A GROUP SUCH AS THE BIPARTISAN LEGAL ADVISORY GROUP—AUTHORIZED BY THE LEGISLATURE ITSELF—DOES.

In *Karcher v. May*,[15] the Supreme Court confronted that issue directly. It held that individual New Jersey legislators who had lost their leadership positions no longer had standing to pursue an appeal to the Supreme Court *on behalf of the legislature*, but by allowing the lower court decisions to stand rather than vacating them, the Court confirmed that the legislators, during the time that they were authorized to speak for the legislature, did have standing to defend a statute that the attorney general of the state had refused to defend. BLAG stands in exactly the same position as those New Jersey legislators did before they lost their leadership positions, and it therefore has standing to press the appeal on behalf of Congress.

Moreover, because BLAG has standing, the executive branch's refusal to defend DOMA does not deprive the Court of jurisdiction. If the Court lost jurisdiction to hear a constitutional challenge to an act of Congress merely because the Attorney General of the United States refused to defend the statute, the lawmaking authority of Congress would be severely undermined. In particular, a law such as DOMA, which was adopted by overwhelming bipartisan majorities in both houses of Congress (85 to 14 in the Senate, 342 to 67 in the House of Representatives) and signed by a prior President (in this case, President Bill Clinton), could be struck down as unconstitutional by executive branch action alone. It may be that the Court requested briefing on this jurisdictional question specifically to express its pique with the Department of Justice's attempt to manipulate the judicial process, an increasingly common tactic for the Obama Administration.

Standing in the Proposition 8 case is a closer question. In *Arizonans for Official English v. Arizona*,[16] the Supreme Court dismissed a case involving a challenge to an Arizona ballot initiative that made English the official language of the state. The suit had been brought by a government employee who claimed that the initiative would affect how she performed her job, but because she was no longer working for the government by the time the case arrived in the Supreme Court, the Court dismissed the case as moot.

In the majority opinion, Justice Ruth Bader Ginsburg expressed "grave doubts" about whether the proponents of the initiative even had the standing necessary to have pursued the appeal to the Supreme Court in the first place when the state officials themselves did not. The initiative's proponents were "not elected representatives"; there was "no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State"; and the Court had never previously "identified initiative proponents as Article-III-qualified defenders of the measures they advocated."[17]

Hollingsworth, however, is different because California initiative proponents do have special authority under California law. Responding to a certification request from the Ninth Circuit,[18] the California Supreme Court expressly held that:

> [W]hen the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under [the California Constitution and election laws], the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to

15. 484 U.S. 72 (1987).

16. 520 U.S. 43 (1997).

17. Id. at 65.

18. When a federal court is deciding a case involving state law and is dealing with a particular issue for which there is no controlling precedent, the federal court can put its proceedings on hold and submit (or "certify") the relevant question to the highest court of the state. Under Cal. R. Ct. 8.548, the Ninth Circuit certified to the Supreme Court of California the question whether the initiative proponents had authority under California law to defend Proposition 8.

> defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.[19]

That is the definitive interpretation of California law on the subject, and it directly responds to the Court's concern in *Arizonans*. The proponents of Proposition 8 should therefore have standing to press their appeal. Here, too, one suspects that the Attorney General of California (both the former one, now governor, and the current one) may be in for a lecture from the Supreme Court for refusing to defend a state law that, as explained below, is nearly identical to one that the Supreme Court upheld in a prior case.

The Constitutional Challenges to Traditional Marriage

All of the marriage cases—*Windsor*, the many other Section 3 DOMA cases, a Section 2 DOMA case,[20] *Hollingsworth*, and several others, such as the challenge to Arizona's decision to cut health care benefits that were recently provided to domestic partners (both heterosexual and homosexual)—implicate two bedrock constitutional concepts. First is whether the laws at issue prohibit the exercise of the fundamental right to marry in violation of the Due Process Clause. Second is whether they treat some people differently because of their sexual orientation in violation of the Equal Protection Clause.[21]

The Fundamental Right to Marry Under the Due Process Clause. As a general matter, the Due Process Clause prohibits the government from infringing a fundamental right unless such is necessary to further a compelling governmental interest. In the 1967 case of *Loving v. Virginia*, the Supreme Court held that the "freedom to marry" was a fundamental freedom that could not be denied "on so unsupportable a basis as [a] racial classification," thus rendering Virginia's anti-miscegenation statute unconstitutional.[22] Many have argued that this holding recognizing a fundamental right to marry applies with equal force to homosexual relationships as it did to interracial relationships, but does it?

SIGNIFICANTLY, THE SUPREME COURT IN *LOVING V. VIRGINIA* DEFINED MARRIAGE AS A "FUNDAMENTAL" RIGHT BECAUSE IT IS ONE OF THE "'BASIC CIVIL RIGHTS OF MAN,' FUNDAMENTAL TO OUR VERY EXISTENCE AND SURVIVAL."

Significantly, the Supreme Court in *Loving* defined marriage as a "fundamental" right because it is one of the "'basic civil rights of man,' fundamental to our very existence and survival." Yet marriage is "fundamental to our very existence" only because it is rooted in the biological complementarity of the sexes, the formal recognition of the unique union through which children are produced—a point emphasized by the fact that the Supreme Court cited a case dealing with the right to procreate for its holding that marriage was a fundamental right.[23] The *Loving* Court correctly recognized that skin color had nothing to do with that basic purpose; the racial classification that lay at the heart of Virginia's anti-miscegenation statute was therefore "invidious" and could not be sustained.

Nothing in the *Loving* decision suggests that the fundamental right to marry should be extended to other relationships that did not share that unique attribute. To the contrary, the Court has repeatedly cautioned against the recognition of new fundamental rights lest the Court end up substituting its own judgment for that of the people. In fact, when the very challenge presented by the current cases was first presented to the Supreme Court 40 years ago, just five years after the *Loving* decision, the Court rejected it.

Baker v. Nelson, a 1972 case, was a Due Process and Equal Protection challenge to Minnesota's statutory definition of marriage as an opposite-sex relationship, brought by two men who had been denied a license to "marry" each other. The Minnesota Supreme Court rejected their claim because it found that the right to marry without regard to sex was not a fundamental right and that it was neither irrational nor invidious discrimination to define marriage as

19. Perry v. Brown, 265 P.3d 1002 (Cal. 2011).
20. Wilson v. Ake, 354 F.Supp.2d 1298 (M.D. Fla. 2005).
21. In addition, the challenges to Section 3 of DOMA include the claim that the federal government is improperly intruding into matters of core state concern (a federalism concept), and as noted above, the challenge to Proposition 8 also involves a relatively novel, one-way ratchet claim that once a state (or state court) redefines marriage to include homosexual relationships, the people of the state can never restore the traditional definition.
22. 388 U.S. 1, 12 (1967).
23. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942). In striking down a state statute authorizing sterilization of individuals habitually convicted of felonies involving moral turpitude, the Court noted that the statute affects "the basic civil rights of man…[m]arriage and procreation." *Id.* at 541.

it had traditionally been understood. The U.S. Supreme Court dismissed the appeal from the Minnesota court "for want of substantial federal question."

Baker remains good law, binding on the lower courts. Although the Court's current docket rarely has cases that are before it on mandatory appeal as *Baker* was—most cases are today considered after the Court chooses to hear them by granting a discretionary writ of certiorari—a dismissal of a mandatory appeal is a decision on the merits, and "lower courts are bound by [it] 'until such time as the [Supreme] Court informs (them) that (they) are not.'"[24] There is a narrow exception when doctrinal developments have occurred that significantly undermine the precedential value of the prior holding, but the Supreme Court normally expects the lower courts to await explicit overruling by it and it alone if overruling is to be had. As Judge Chester Straub correctly recognized in his dissent from the Second Circuit's *Windsor* decision, "*Baker* dictates [the] decision." For him, "the public policy choice set forth in DOMA is to be made by Congress, not the Judiciary."[25]

Moreover, *Baker's* result is still correct. The "fundamental right to marry" identified in *Loving* was explicitly tied to the way in which the exercise of that right was "fundamental to our very existence and survival." Efforts to redefine marriage as something other than an institution rooted in the biological complementarity of the sexes divorce the institution from the rationale that led the Court to hold that it was "fundamental." Moreover, as noted above, such a move would open the door to all manner of claims for entitlement to this newly minted fundamental right. Such open-ended claims of "fundamental right" have led the Court in the past to exercise great caution before articulating new fundamental rights, and there is certainly ample reason for hesitation before taking such a profound step in these cases as well.

EFFORTS TO REDEFINE MARRIAGE AS SOMETHING OTHER THAN AN INSTITUTION ROOTED IN THE BIOLOGICAL COMPLEMENTARITY OF THE SEXES DIVORCE THE INSTITUTION FROM THE RATIONALE THAT LED THE COURT TO HOLD THAT IT WAS "FUNDAMENTAL."

The Equal Protection Challenge. The other principal challenge to DOMA and to Proposition 8 is based on the Equal Protection Clause of the Fourteenth Amendment, which applies to the states, and the analogous Equal Protection component that the Court has read into the Fifth Amendment's Due Process Clause, applicable to the federal government. Advocates for altering the definition of marriage to include homosexual relationships contend that denying same-sex couples the same access to the institution of marriage that is available to opposite-sex couples is a violation of Equal Protection.

The bulk of the Supreme Court's decision in *Loving* was grounded in Equal Protection. The Court held that the racial classification at the heart of Virginia's anti-miscegenation statute was unconstitutional because there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifie[d]" it.[26] The Court further noted that two of the justices "had already stated that they 'cannot conceive of a valid legislative purpose...which makes the color of a person's skin the test of whether his conduct is a criminal offense.'"[27]

Loving involved a racial classification, however, not one grounded on sexual orientation. Racial classifications are subject to the highest form of judicial scrutiny, one that is often described as "strict in theory, but fatal in fact."[28] And while the Supreme Court upheld a race-based affirmative action program at the University of Michigan Law School in *Grutter v. Bollinger* by noting that although "all governmental uses of race are subject to strict scrutiny, not all are invalidated by it," the fact remains that racial classifications are much more difficult to sustain than any other kind of classification.[29] This heightened scrutiny for racial classifications makes perfect sense given the history and purposes of the Fourteenth Amendment and the fact that racial classifications are almost always invidious.

24. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975).
25. *Windsor*, 699 F.3d at 189.
26. *Loving*, 388 U.S. at 11.
27. *Id.*
28. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment).
29. 539 U.S. 306, 326–37 (2003).

The Threshold Inquiry. A threshold inquiry further serves to distinguish *Loving* from the same-sex marriage cases. As the Supreme Court has often recognized, "The Equal Protection Clause...is essentially a direction that all persons *similarly situated* should be treated alike."[30] "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[31] Accordingly, one of the issues in both *Windsor* and *Hollingsworth* is whether same-sex and opposite-sex relationships are similarly situated. This is a "threshold" inquiry, undertaken before application of the Equal Protection Clause, because the Equal Protection Clause is not even triggered if the relationships at issue are not similarly situated.[32]

Moreover, the issue is not whether the relationships might be similarly situated in some respects, but whether they are similarly situated in ways that are relevant "to the purpose that the challenged laws purportedly intended to serve."[33] The district court in *Hollingsworth* erroneously emphasized the ways in which same-sex and opposite-sex relationships *are* similarly situated rather than the ways in which they *are not* similarly situated. "Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners," the court found.[34] "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions," it concluded.[35]

THE SUPREME COURT ITSELF NOTED MORE THAN A CENTURY AGO THAT "THE UNION FOR LIFE OF ONE MAN AND ONE WOMAN" IS "THE SURE FOUNDATION OF ALL THAT IS STABLE AND NOBLE IN OUR CIVILIZATION."

That is the nub of the Equal Protection issue. If marriage as an institution were only about the relationships adults form among themselves, it would undoubtedly violate Equal Protection for a state (or the U.S. Congress) not to recognize as marriage any adult relationship seeking that recognition. But marriage is and always has been about much more than the self-fulfillment of adult relationships, as history, common sense, legal precedent, and the trial record in the *Hollingsworth* case itself demonstrate. Because the institution of marriage is the principal manner in which society structures the critically important functions of procreation and the rearing of children, it has long been recognized as "one of the cornerstones of our civilized society."[36] The Supreme Court itself noted more than a century ago that "the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization."[37]

This purpose has been recognized throughout our nation's history. In California, the situs of the *Hollingsworth* case, the procreative purpose of marriage has been recognized since the very beginning of the state's existence as a state. In 1859, the California Supreme Court held that "[t]he first purpose of matrimony, by the laws of nature and society, is procreation."[38] A century later, the same court recognized that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "ensures the care and education of children in a stable environment."[39] A half-century after that, on the eve of the Proposition 8 political fight, the California Court of Appeal recognized that "the sexual,

30. City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (emphasis added).
31. Plyler v. Doe, 457 U.S. 202, 216 (1982).
32. *See, e.g.*, Keevan v. Smith, 100 F.3d 644, 648 (8th Cir. 1996).
33. *Cleburne*, 473 U.S. at 454 (Stevens, J., joined by Burger, C.J., concurring); *see also* Rostker v. Goldberg, 453 U.S. 57, 78 (1981) (rejecting challenge to male-only Selective Service registration on ground that "[m]en and women...are simply not similarly situated *for purposes* of a draft or registration for a draft") (emphasis added); Reed v. Reed, 404 U.S. 71, 77 (1971) (upholding Equal Protection challenge to state probate preference for men over women as estate administrators because men and women were "similarly situated with respect to [the] objective" of the statute").
34. Perry v. Schwarzenegger, 704 F.Supp.2d 921, 967 (N.D. Cal. 2010).
35. *Id.*
36. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936, 957 (Black, J., dissenting from denial of cert.).
37. Murphy v. Ramsey, 114 U.S. 15, 45 (1885).
38. Baker v. Baker, 13 Cal. 87, 103 (Cal. 1859).
39. De Burgh v. De Burgh, 39 Cal.2d 858, 864 (Cal. 1952).

procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation."[40]

These cases are not anomalies; rather, they carry forward a long and rich historical and philosophical tradition. Henri de Bracton wrote in his 13th-century treatise, for example, that from the *jus gentium*, or "law of nations," comes "the union of man and woman, entered into by the mutual consent of both, which is called marriage" and also "the procreation and rearing of children."[41] William Blackstone, the great expositor of the law, described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated."[42] He then described the relationship of "parent and child" as being "consequential to that of marriage, being its principal end and design." And John Locke, whose influence on the American constitutional order may be unsurpassed, described the purpose of marriage, "the end of the conjunction of the species," as "being not barely procreation, but the continuation of the species."[43]

This long-standing view was confirmed by the sociological and anthropological evidence introduced into the trial record. The work of the late Claude Lévi-Strauss, the "father of modern anthropology"[44] and former dean of the Académie Française, forms part of the trial record, for example, and includes this observation: "[T]he family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society."[45] Marriage is thus "a social institution with a biological foundation," he wrote in another work.[46] Historian G. Robina Quale's comprehensive sociological survey of the development of marriage from prehistoric times to the present, also part of the trial record, reveals that "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."[47]

Given the nearly universal view, across different societies and different times, that a principal, if not *the* principal, purpose of marriage is the channeling of the unique procreative abilities of opposite-sex relationships into a societally beneficial institution, it strains credulity to contend that same-sex and opposite-sex couples are similarly situated *with respect to that fundamental purpose.*

GIVEN THE NEARLY UNIVERSAL VIEW THAT A PRINCIPAL PURPOSE OF MARRIAGE IS THE CHANNELING OF THE UNIQUE PROCREATIVE ABILITIES OF OPPOSITE-SEX RELATIONSHIPS INTO A SOCIETALLY BENEFICIAL INSTITUTION, IT STRAINS CREDULITY TO CONTEND THAT SAME-SEX AND OPPOSITE-SEX COUPLES ARE SIMILARLY SITUATED *WITH RESPECT TO THAT FUNDAMENTAL PURPOSE.*

That is undoubtedly why the plaintiffs' own expert admitted at the *Hollingsworth* trial that redefining marriage to include same-sex couples would profoundly alter the institution of marriage.[48] That is also why Yale Law Professor William Eskridge, a leading gay rights activist, has noted that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new."[49] In short, "[s]ame-sex marriage is a breathtakingly subversive idea."[50] If it ever "becomes legal,

40. In re Marriage of Ramirez, 165 Cal.App.4th 751, 757–59 (Cal. App. 4 Dist. 2008).
41. 1 H. Bracton, On the Laws and Customs of England 27 (S. Thorne, ed. 1968).
42. 1 William Blackstone, Commentaries *410.
43. John Locke, Second Treatise of Civil Government §§ 78, 79 (Peter Laslett ed. Cambridge Univ. Press 1988) (1690).
44. *Death of French anthropologist Claude Levi-Strauss,* Euronews (Mar. 11, 2009), http://www.euronews.com/2009/11/03/death-of-french-anthropologist-claude-levi-strauss/.
45. Claude Lévi-Strauss, The View from Afar 40–41 (Joachim Neugroschel, et al., trans. 1985).
46. Claude Lévi-Strauss, *Introduction* to 1 A History of the Family: Distant Worlds, Ancient Worlds 5 (Andre Burguiere, et al., eds. 1996).
47. G. Robina Quale, A History of Marriage Systems 2 (Greenwood Press 1988).
48. Transcript of Trial at 268, *Perry v. Schwarzenegger*, 3:09-CV-02292 (testimony of Harvard Professor Nancy Cott).
49. William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse? What We've Learned from the Evidence 19 (Oxford Univ. Press 2006).
50. E. J. Graff, *Retying the Knot*, Nation (June 24, 1996) at 12.

[the] venerable institution [of marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers."[51]

Yet despite all of this evidence, the district court made a highly questionable "finding" that "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions."[52] In the district court's view, "[m]arriage is [only] the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."[53]

Necessarily, given that conclusion, the district court also had to deny that procreation was part of the historical purpose of marriage. "The evidence did not show *any* historical purpose for excluding same-sex couples from marriage," the district court asserted, "as states have never required spouses to have an ability or willingness to procreate in order to marry."[54] The court also had to make the further claim that "[g]ender no longer forms an essential part of marriage." Only then, after discarding the very thing that is critical to the threshold Equal Protection inquiry, could the district court conclude that "[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law."[55]

"Relative gender composition aside" indeed: History, biology, and common sense all reveal just how critical "gender composition" is to the institution of marriage, and hence to the threshold equal protection inquiry whether same-gender and opposite-gender relationships are similarly situated with respect to that institution's central purpose.

Rational Basis Review. If the Supreme Court were to move beyond the threshold inquiry normally required, Equal Protection analysis would then involve two additional steps. The first is to discern what kind of classification is involved and therefore what level of scrutiny applies, and the second is to determine whether the classification survives that level of scrutiny.

As held in *Loving* and countless other cases before and since, racial classifications are subjected to strict scrutiny, under which the statutory classification can be upheld only if the government demonstrates that its classification is narrowly tailored to further a compelling governmental interest. Most other classifications are assessed under the highly deferential standard of "rational basis" review, pursuant to which a party challenging the classification must demonstrate that the classification does not conceivably further *any* legitimate governmental purpose. In between strict scrutiny and rational basis review is "intermediate scrutiny," under which the government must prove that its classification is closely drawn to further an important governmental objective. This has been applied primarily to gender classifications.

In determining whether a group should be treated as a "suspect class" and therefore entitled to heightened scrutiny—that is, either intermediate or strict scrutiny—the Supreme Court has considered whether the group has been discriminated against historically, whether the defining characteristic of the group is immutable, whether that characteristic bears any relation to ability to perform or contribute to society, and whether the group is such a discrete and insular minority as to lack the ability to protect itself from invidious classifications through the ordinary political processes.[56] But the Court has also been "very reluctant" to create new "suspect" or "quasi-suspect" classes entitled to heightened scrutiny, recognizing that heightened scrutiny supplants the deference that the courts normally owe to the legislative process.[57]

Until the Second Circuit's decision in the *Windsor* case, no federal appellate court had held that sexual orientation was subject to

51. *Id.*

52. *Perry v. Schwarzenegger*, 704 F.Supp.2d at 967.

53. *Id.* at 961 (citing Plaintiffs' expert, Nancy Cott); *see also id*. at 933 ("The state's primary purpose in regulating marriage is to create stable households").

54. *Id.* at 993.

55. *Id.* at 993.

56. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1982); *Cleburne*, 473 U.S. at 440–41.

57. *Cleburne*, 473 at 442–43 (reversing lower court's treatment of the "mentally retarded" as a suspect class); *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (declining to treat age as a suspect class).

intermediate scrutiny, although the First Circuit in the *Gill* case[58] had applied a form of rational basis review that had more bite to it than is normally found in application of that highly deferential standard. It likely inferred the permissibility of such a course from *Lawrence v. Texas*,[59] in which Justice Anthony Kennedy, writing for the Court, seemed to apply such a "rational basis with bite" standard to invalidate Texas's criminal prohibition against sodomy.

Under the rational basis standard of review applied by most courts to classifications based on sexual orientation, those who are challenging the constitutionality of a statute must demonstrate that there is no legitimate governmental purpose that is even conceivably advanced by the classification. Encouraging procreation in stable relationships so that children are raised, where possible, by those who beget them is certainly a legitimate governmental purpose, and it is not at all difficult to conceive how lending support to an institution designed around the biological complementarity of the sexes rationally furthers that interest.

Those who seek to redefine marriage to include homosexual relationships have been quick to point out that not all heterosexual married couples have children. Some such couples, because of age or infertility, are incapable of having children, yet marriage remains an option for them while it is not available to homosexual couples, even homosexual couples who, through artificial means, bring children into the world.

Under traditional rational basis review, however, the fit between classification and purpose need not be perfect or even close. A classification can be over-inclusive and under-inclusive and still be rational enough. Indeed, if all laws that were over- or under-inclusive were invalid, few laws would survive. Such a close means–end fit has never been required for the vast majority of laws that fall under rational basis review. Given the fact that the overwhelming number of the roughly four million children born in this country each year are born to heterosexual couples through ordinary means—children born to same-sex couples using artificial means account for less than one-half of 1 percent of the total—fostering an institution that is built around that biological fact cannot be viewed as irrational.

A number of other governmental interests have been advanced in the marriage cases that easily pass normal rational basis review as well. In addition to citing the unique procreative ability of heterosexual couples, BLAG has offered several in its defense of Section 3 of DOMA, including:

- Preserving a uniform definition of marriage across state lines for purposes of allocating federal benefits;
- Protecting the federal treasury and respecting prior legislative judgments in allocating marital benefits on the understanding that they would apply only to heterosexual married couples;
- Defending state sovereignty and democratic self-governance;
- Exercising caution to avoid "the unknown consequences of a novel redefinition of a foundational social institution"; and
- Expressing a preference for optimal parenting arrangements by encouraging child-rearing in a setting with both a mother and a father.

Because these are all at least legitimate governmental interests that are rationally furthered by laws defining marriage as being between one man and one woman, both DOMA and Proposition 8 should easily be upheld as constitutional if the Court continues to apply rational basis review.

Heightened Scrutiny. Under heightened scrutiny, the government's task in seeking to uphold a statutory classification is significantly more difficult, and concessions made by the government about the strength of its interests (or lack thereof), as occurred in the *Windsor* case before the Department of Justice switched sides in the case, could conceivably determine the outcome—if, that is, the Court is willing to overlook the ethical problems presented by the Justice Department's playing both sides of the case. One of the key issues, therefore, that the Court will confront in *Windsor* is whether the Second Circuit was correct to subject DOMA to heightened scrutiny.

There are strong reasons why the Court may reverse that holding. One is that the concept of "sexual orientation" is far more open-ended than other characteristics that are subject to heightened scrutiny. Defining

58. Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012).
59. 539 U.S. 558 (2003).

"sexual orientation" is not a clear-cut undertaking.

The cases that are currently before the Court involve two lesbian couples (*Windsor* and *Hollingsworth*) and one gay couple (*Hollingsworth*), but other cases involving other sexual orientations would likely follow. Bisexuality is a recognized sexual orientation, and it is not hard to imagine a claim that marriage to both a man and a woman may be essential to fulfillment of a bisexual's orientation; in fact, this happened recently in The Netherlands.[60] The limitation of marriage to two persons, and not more, seems more arbitrary than the limitation of marriage to the union of a man and a woman, given that other cultures have been known to allow polygamous marriages. With no logical stopping point, any limitation on marriage could be subject to heightened scrutiny—a prospect that the Court may wish to avoid.

If the Court nonetheless holds that some form of heightened scrutiny is appropriate, it will have to determine whether the governmental interests expressed in the statute itself are sufficient, even though those interests were later disavowed by the Department of Justice. Far from insubstantial, the importance of marriage as a union of a man and a woman as recognized in centuries of case law reflects a compelling interest that would arguably qualify under strict scrutiny, not just intermediate scrutiny.

As noted, *Murphy v. Ramsey* described marriage, "the union for life of one man and one woman," as "the sure foundation of all that is stable and noble in our civilization."[61] In 1952, the California Supreme Court recognized that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "ensures the care and education of children in a stable environment."[62] Justice Hugo Black referred to marriage as a bedrock institution that has long been recognized as "one of the cornerstones of our civilized society."[63] And the U.S. Supreme Court in *Loving* described marriage as "fundamental to our very existence and survival." It is hard to find an interest more compelling than that.

FAR FROM INSUBSTANTIAL, THE IMPORTANCE OF MARRIAGE AS A UNION OF A MAN AND A WOMAN AS RECOGNIZED IN CENTURIES OF CASE LAW REFLECTS A COMPELLING INTEREST THAT WOULD ARGUABLY QUALIFY UNDER STRICT SCRUTINY, NOT JUST INTERMEDIATE SCRUTINY.

Heightened scrutiny also has a second step, however. The classification must be closely drawn (or even narrowly tailored, under strict scrutiny) to further the government's important (or compelling) interest. Here, a classification that is significantly over- or under-inclusive may not pass constitutional muster. Here, also, the imperfect fit between procreation and heterosexual marriage becomes somewhat problematic, which is why the Second Circuit's decision to subject the Defense of Marriage Act to intermediate scrutiny is so significant. Many commentators believe that if heightened scrutiny is to be applied, statutes like DOMA and Proposition 8 must necessarily be unconstitutional because of this imperfect fit.

Of course, the question of "fit" cannot be viewed in a vacuum. Whether a classification is "closely drawn" may depend on how onerous it would be to bring about a more perfect fit. Requiring fertility testing before marriage and inquisitor panels seeking to determine procreative intent of fertile couples would surely yield a more perfect fit, but the cost in terms of privacy and other values would undoubtedly be deemed unacceptable. As long as encouraging procreation in the stable environment fostered by heterosexual marriage is deemed to be a sufficiently important governmental interest, it is certainly not unreasonable for the Court to recognize that the definition of marriage as the union of a man and a woman advances that goal as closely as is consonant with basic expectations of privacy.

Conclusion

Cultural institutions are fragile things. Marriage, as the more or less permanent union of one man and one woman, developed in large part to encourage the procreative relationship that is necessary for the perpetuation of society. No one knows the extent to which redefining marriage so substantially as to include relationships that are biologically not connected to that

60. *See* Paul Belien, *First Trio "Married" in The Netherlands*, Brussels Journal (Sept. 9, 2005), http://www.brusselsjournal.com/node/301.

61. 114 U.S. at 45.

62. *De Burgh*, 39 Cal.2d at 864.

63. *Meltzer*, 402 U.S. at 957.

societal purpose will undermine the institution itself.

Some of the evidence introduced at trial in the *Hollingsworth* case is not encouraging. As feminist professor Ellen Willis admitted, redefining marriage to encompass same-sex relationships "will introduce an implicit revolt against the institution into its very heart."[64] That revolt is, as Johns Hopkins University Professor of Sociology Andrew Cherlin explains, "the most recent development in the deinstitutionalization of marriage," the "weakening of the social norms that define people's behavior in...marriage."[65] In other words, the redefinition of marriage to encompass homosexual relationships may well be an experiment of civilizational magnitude.

The ultimate question before the Court, then, is whether the decision to embark on such an experiment is to be made by the people, either through their legislatures or directly by voter initiative, or whether the Constitution, which is silent on this precise question, must be interpreted to have already answered the question.

—John C. Eastman, PhD, *is Henry Salvatori Professor of Law and Community Service and former Dean at Chapman University School of Law in Orange County, California. He is also the Chairman of the Board of the National Organization for Marriage and the founder of the Center for Constitutional Jurisprudence, the public interest law arm of the Claremont Institute, on whose behalf he has participated as* amicus curiae *in several of the marriage cases currently pending before the courts.*

64. Ellen Willis, *Can Marriage Be Saved? A Forum*, Nation (June 24, 1996) at 16–17.

65. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848, 850 (2004).