



# ISSUE ANALYSIS

## Marriage at the Supreme Court:

### Why One-Man, One-Woman State Laws Remain Constitutional

#### EXECUTIVE SUMMARY

#### INTRODUCTION

Early in 2015, the Supreme Court agreed to hear an appeal of a decision in which the U.S. Court of Appeals for the Sixth Circuit had upheld the laws in Michigan, Ohio, Kentucky, and Tennessee that define marriage as the union of one man and one woman. Oral arguments in the cases (consolidated under the name of one Ohio case, *Obergefell v. Hodges*) were scheduled for April 28, 2015, with a decision expected by late June of 2015.

This paper explains why state definitions of marriage as the union of one man and one woman are consistent with the U.S. Constitution and with existing Supreme Court precedents.

**Q: What does the Constitution of the United States say about marriage?**

A: No provision of the Constitution makes any reference to marriage.

**Q: What has the Supreme Court said about state laws that define marriage as the union of one man and one woman (and thus prevent same-sex couples from “marrying”)?**

A: *Baker v. Nelson*

In 1972, the Supreme Court received an appeal from a Minnesota Supreme Court decision upholding that state’s marriage laws against an early challenge by a homosexual couple. The case was “dismissed for want of a substantial federal question.” This is considered a ruling on the merits and is binding precedent.

***Hollingsworth v. Perry* (The “Proposition 8” Case)**

In the case challenging California’s marriage amendment (Proposition 8) in 2013, the Supreme Court was urged to declare a federal constitutional right to same-sex “marriage.” The Court declined to do so.

**Q: What portion of the U. S. Constitution do advocates of redefining marriage believe is violated by laws defining marriage as the union of a man and a woman?**

A: Those asking courts to overturn state marriage definitions argue that they conflict with the “liberty” interest found in the Due Process Clause of the Fourteenth Amendment, and with the Equal Protection Clause of the Fourteenth Amendment.

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**Q: Do laws defining marriage as the union of one man and one woman violate the “fundamental right to marry?”**

A: The Supreme Court has said that there is a “fundamental right to marry” – but only in cases involving opposite-sex marriages, and often by explicitly linking marriage to procreation and childrearing. There can be no “fundamental right” to marry a person of the same sex, because such a “right” is not “objectively, deeply rooted in this Nation’s history, legal traditions, and practices.”

**Q: Do such laws “discriminate” on the basis of sex?**

A: If the law clearly puts neither sex at any disadvantage relative to the other, it cannot be asserted that the marriage laws discriminate on the basis of sex.

**Q: Do such laws “discriminate” on the basis of “sexual orientation?”**

A: The marriage laws are neutral on their face, because marriage licenses do not inquire as to a person’s “sexual orientation.” Such laws do not prevent anyone from marrying because of “who they are” – ironically, a number of plaintiffs in lawsuits to redefine marriage have already been legally married (to persons of the opposite sex).

**Q: But don’t one-man-one-woman marriage definitions have a “disparate impact” on homosexuals?**

A: While the definition of marriage has a “disparate impact” on the ability of homosexuals to marry the person of their choice, this alone does not offend the Constitution unless it can be proven that such laws were originally enacted with the sole intent of discriminating against homosexuals.

**Q: What standard of review should courts use in cases involving “sexual orientation?”**

A: There is no “fundamental right” to marry a person of the same sex. Homosexuals also do not meet any of the criteria for identifying a “suspect” (or “quasi-suspect”) class that calls for “heightened scrutiny” (listed below). Therefore, even if courts find that marriage laws do classify on the basis of sexual orientation, such classification is subject only to “rational basis” review, which is highly deferential to legislative choices.

**“History of Discrimination”**

There has been a long history of disapproval of homosexual *conduct*, but such conduct-based judgments are not comparable to discrimination based on an innate characteristic such as race.

**“Ability to Perform or Contribute to Society”**

While homosexuals can “perform or contribute to society,” they *cannot* “perform or contribute” to the core public purposes of *marriage*, such as natural procreation and dual-gender parenting.

**Immutability**

Homosexual attractions can be changed, although it may not be easy; homosexual *behavior*, however, is voluntary and can be changed at will.

**Political Powerlessness**

If anything, homosexuals currently possess a disproportionately *high* level of political power, relative to the size of that population.

**Q: What public purposes of marriage provide a rational basis for limiting it to unions of a man and a woman?**

A: The State has legitimate interests in encouraging responsible procreation, in furthering an environment in which the children so procreated will be raised in a family with both a mother and a father to whom they are biologically related and in preserving the traditional institution of marriage.

**Responsible Procreation**

Only opposite-sex couples can ever procreate naturally, or do so accidentally. (Opposite-sex couples who do not or cannot procreate are still permitted to marry because it would be both practically and legally impossible to exclude them on that basis.)

**Encouraging the Raising of Children by Their Mother and Father**

Children benefit from having a stable relationship in the home with both biological parents, and from having parental role models of both sexes.

The fact that not all opposite-sex couples have or raise children, and that some people in same-sex relationships do, is not sufficient to prove that it is “irrational” to define marriage as the union of a man and a woman.

**Preserving the Institution of Marriage**

It is not irrational to speculate that changing the fundamental definition of marriage may change the nature of the institution, especially by further separating marriage, procreation, and family structure. In parts of Europe, recognition of same-sex unions led to a decline in marriage and increase in out-of-wedlock births.

**Q: Do other Supreme Court decisions involving “sexual orientation” provide a precedent for overturning state marriage definitions?**

A: *Romer v. Evans* (1996) struck down a state constitutional amendment in Colorado that specifically named those with a “homosexual . . . orientation” and served only to exclude them from seeking special “protected status.” In contrast, marriage laws are neutral on their face and serve positive purposes related to legitimate government interests in responsible procreation.

*Lawrence v. Texas* (2003) struck down a Texas law against homosexual sodomy. Forbidding a state to punish homosexual relationships is far different from ordering it to celebrate them.

**Q: Does the 1967 Supreme Court decision in *Loving v. Virginia*,<sup>1</sup> which struck down bans on interracial marriage, provide a precedent for overturning laws defining marriage as the union of a man and a woman?**

A: The *Loving* decision did not establish an unlimited right to “marry the person of your choice.” It merely said that such a choice may not be restricted on the basis of race. Laws against interracial marriage built a wall to keep the races apart. Marriage builds a bridge to bring the sexes together.

**Q: Does the 2013 Supreme Court ruling in *United States v. Windsor*,<sup>2</sup> in which the court struck down part of the federal Defense of Marriage Act, provide a precedent for overturning state marriage definitions?**

A: The 1996 federal Defense of Marriage Act (DOMA) said that states would not have to recognize same-sex “marriages” from other states, and that marriage would be defined as the union of one man and one woman for all purposes under federal law.

The latter provision (the federal definition of marriage) was struck down by the Supreme Court in the 2013 case of *United States v. Windsor*. However, the decision was based largely on DOMA’s deviation from the tradition of the federal government deferring to state definitions of marriage. That same tradition would suggest that the Court should allow states to continue defining marriage as they choose.

**Q: Could the Supreme Court choose a middle ground between upholding laws that define marriage as the union of one man and one woman, and ordering all fifty states to issue civil marriage licenses to same-sex couples?**

A: Yes. It would be theoretically possible for the Court to rule that all fifty states must *recognize* legal same-sex civil marriages from other states, but that states need not *license* such unions themselves.

## CONCLUSION

Because the Constitution is silent on the subject of same-sex “marriage,” this policy issue should be decided through the democratic process.

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<sup>1</sup> 388 U.S. 1 (1967).

<sup>2</sup> 133 S. Ct. 2675 (2013).

# Marriage at the Supreme Court:

## Why One-Man, One-Woman State Laws Remain Constitutional

### INTRODUCTION

Those who wish to change the definition of marriage from the union of one man and one woman to a union of any two persons, in order to permit same-sex couples legally to “marry,” have pursued this agenda in state courts, in legislatures, and at the ballot box.

Currently, however, the principal focus is on the federal courts, where dozens of lawsuits have been filed across the country asserting that state laws which limit civil marriage to the union of one man and one woman are in violation of the Constitution of the United States. At this writing, federal District Court judges in more than two dozen states, as well as four federal appeals courts, have issued rulings declaring a constitutional right to same-sex “marriage.” Judges in federal District Courts in Louisiana<sup>3</sup> and Puerto Rico<sup>4</sup>, as well as in the U.S. Court of Appeals for the Sixth Circuit<sup>5</sup>, have upheld laws defining marriage as the union of one man and one woman.

In January of 2015, the Supreme Court accepted an appeal of the Sixth Circuit ruling, which upheld the marriage laws of Michigan, Ohio, Kentucky, and Tennessee. The Supreme Court scheduled oral arguments on the cases (consolidated under the name of one Ohio case, *Obergefell v. Hodges*) for April 28, 2015, and a decision is expected by late June of 2015.

This paper is offered as an explanation, in a legally sound but easily understood question-and-answer format, of why we at the Family Research Council (FRC) believe (1) these decisions are in error (2) the Constitution and existing Supreme Court precedents permit states to define marriage as the union of one man and one woman; and (3) resolution of the debate over the definition of marriage can and should be left to the democratic process.

### What does the Constitution of the United States say about marriage?

Supreme Court Justice Samuel Alito addressed this in his dissenting opinion in *United States v. Windsor*, the 2013 case involving a challenge to part of the federal Defense of Marriage Act:<sup>6</sup>

Same-sex marriage presents a highly emotional and important question of public policy – but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.<sup>7</sup>

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<sup>3</sup> *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

<sup>4</sup> *Conde-Vidal v. Garcia-Padilla*, Civil No. 14-1253 (PG) (D. P.R. 2014).

<sup>5</sup> *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

<sup>6</sup> The history of the Defense of Marriage Act and the decision in *Windsor* are described later in this paper.

<sup>7</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting).

**What has the Supreme Court said about state laws that define marriage as the union of one man and one woman (and thus prevent same-sex couples from “marrying”)?**

*Baker v. Nelson*

Many people are unaware that despite the Supreme Court’s refusal to decide on the merits in the Proposition 8 case in 2013 (see below), there *is* already a binding Supreme Court precedent upholding a state definition of marriage as the union of one man and one woman.

In 1970, in an early forerunner to the current push to redefine marriage, two homosexual men attempted to obtain a marriage license in Minnesota, but were refused. In 1971, their case was considered by the Supreme Court of Minnesota. It denied their request in a written opinion that outlined the couple’s federal constitutional arguments and refuted them in terms very similar to those now being heard forty years later.<sup>8</sup> The plaintiffs appealed the Minnesota decision to the U.S. Supreme Court.

In 1972, the appeal was “dismissed for want of a substantial federal question.”<sup>9</sup> Unlike when the Supreme Court simply declines to hear a case (by denying a “writ of certiorari”), a “dismissal for want of a substantial federal question” constitutes a binding precedent on the questions presented in the case.

One of the briefs filed for the proponents of Proposition 8 in their case described the meaning of such a decision (some citations omitted)<sup>10</sup>:

In *Baker v. Nelson*, as previously noted, the Supreme Court unanimously dismissed, “for want of substantial federal question,” an appeal from the Minnesota Supreme Court presenting the same questions at issue here: whether a State’s refusal to authorize same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The *Baker* Court’s dismissal was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided.<sup>11</sup> *Baker*’s precedential value “extends beyond the facts of the particular case to all similar cases,”<sup>12</sup> and lower courts are bound by that decision “until such time as the [Supreme] Court informs them they are not.”<sup>13</sup> Plaintiffs assert the same claims as those rejected in *Baker*, and they are thus foreclosed by that decision.

The Supreme Court, of course, does have the power to overturn its own previous precedents, and on rare occasions will do so. Some observers today are doubtful that the Court will feel strongly bound by a decision issued over forty years ago without even a written opinion. Advocates for redefining marriage argue that subsequent “doctrinal developments” in the

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<sup>8</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

<sup>9</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).

<sup>10</sup> Opening brief of Defendant-Intervenor-Appellants Dennis Hollingsworth, et al., *Perry v. Schwarzenegger and Hollingsworth*, No. 10-16696 (9th Cir. Sept. 17, 2010).

<sup>11</sup> *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

<sup>12</sup> *Wright v. Lane County Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981).

<sup>13</sup> *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)

Court's jurisprudence regarding sexual orientation and marriage have weakened the foundations of the *Baker* ruling.

Nevertheless, it is important to realize that in light of *Baker*, the current precedent of the United States Supreme Court *upholds* a state's ability to limit marriage to opposite-sex couples.

### *Hollingsworth v. Perry (The "Proposition 8" Case)*

In 2008, voters in California adopted "Proposition 8," an amendment to the state constitution to define marriage as the union of one man and one woman. It was challenged on federal constitutional grounds, and in a sweeping decision a District Court judge declared it unconstitutional. California state officials refused to defend Proposition 8, but the official proponents of the ballot initiative intervened to appeal the case to the U.S. Court of Appeals for the Ninth Circuit (which also found the measure unconstitutional, but on narrower grounds specific to California). Proponents then appealed to the Supreme Court.

The Supreme Court issued its ruling in *Hollingsworth v. Perry*<sup>14</sup> in June of 2013 (on the same day as *United States v. Windsor*, a case involving the federal Defense of Marriage Act). The Court, however, refused to rule on the merits of the California case, instead deciding that the proponents of Proposition 8 did not have the proper legal "standing" to appeal the case to *either* the Circuit Court or the Supreme Court. The Ninth Circuit decision was "vacated," and the District Court's ruling was therefore left as the federal judiciary's final word on Proposition 8.

Although the Court did not rule on the merits, it is significant that when explicitly asked by the plaintiffs to declare a federal constitutional right to same-sex "marriage," the justices declined. Notwithstanding the unique procedural aspects of this case, it may signal that the Supreme Court is *not* eager to repeat the mistake it made with *Roe v. Wade*, its 1973 decision legalizing abortion. In that case, a ruling intended to put an end to the debate over a controversial social policy served only to inflame it. The Court would be wise not to do the same regarding the same-sex redefinition of "marriage," and instead to leave it to the democratic process to decide.

### **What portion of the U. S. Constitution do advocates of redefining marriage believe is violated by laws defining marriage as the union of a man and a woman?**

Court cases charging that state laws or state constitutions which define marriage as the union of one man and one woman are in violation of the U.S. Constitution generally rest this claim upon one or both of two constitutional provisions found in the Fourteenth Amendment.

#### *Fourteenth Amendment - "Due Process"*

The first is the Due Process Clause of the Fourteenth Amendment, which states in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Many scholars believe that at the time of its adoption after the Civil War, the Fourteenth Amendment requirement of "due process" (which places a limit on the states that parallels that

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<sup>14</sup> 133 S. Ct. 2652 (2013).

imposed on the federal government by the Due Process Clause of the Fifth Amendment) was primarily a procedural protection, and the “liberty” mentioned in the Amendment referred primarily to physical liberty – the freedom to move about and travel without being physically restrained in any way. Subsequently, however, the Supreme Court has ruled that “due process” includes more than just procedural protections, and that “liberty” refers to more than just physical freedom. This more expansive view is sometimes referred to as “substantive due process.”

### ***Fourteenth Amendment - “Equal Protection”***

The other constitutional text cited by those challenging state marriage laws is the Equal Protection Clause of the Fourteenth Amendment, which follows the Due Process Clause by saying, “nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>15</sup>

### **Do laws defining marriage as the union of one man and one woman violate the “fundamental right to marry?”**

Some rights are explicitly enumerated by the U.S. Constitution, such as the First Amendment rights to freedom of speech and of religion, and freedom of the press. However, courts have deemed other rights to be “fundamental rights” based on the interest in “liberty” expressed in the Due Process Clause of the Fifth and Fourteenth Amendments.

The Court has recognized a substantive due process right to marry.<sup>16</sup> But the right recognized in these decisions all concerned *opposite-sex*, not *same-sex*, couples. That the right to marry is limited to opposite-sex couples is clearly implied in a series of cases relating marriage to procreation and childrearing.<sup>17</sup>

None of the Supreme Court’s precedents supports a right to enter into a same-sex marriage. In determining whether an asserted liberty interest (or right) should be regarded as fundamental, the Supreme Court applies a two-prong test. First, there must be a “careful description” of the asserted fundamental liberty interest. Second, the interest, so described, must be “objectively, deeply rooted in this Nation’s history, legal traditions, and practices.”<sup>18</sup>

The issue before federal courts today is not one of who may exercise the fundamental right to marry, nor of whether there is a fundamental right to enter into a marriage with “the person of one’s choice,” but whether there is a right to “marry” *a person of the same sex*. It is clear that no

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<sup>15</sup> Further information can be found in: Gary Lawson, “Amendment V: Due Process Clause,” pp. 337-341; James W. Ely, Jr., “Amendment XIV, Section 1: Due Process Clause,” pp. 394-98; and David Smolin, “Amendment XIV, Section 1: Equal Protection,” pp. 398-404; in Edwin Meese III, David F. Forte, Matthew Spalding, eds., *The Heritage Guide to the Constitution* (Washington: Regnery Publishing, Inc., 2005).

<sup>16</sup> E.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>17</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process Clause includes “the right of the individual . . . to marry, establish a home and bring up children”); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (referring to marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress”).

<sup>18</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710, 721 (1997) (citation and internal quotation marks omitted).



such “right” is “objectively, deeply rooted in this Nation’s history, legal traditions, and practices.”

Thus, reserving marriage to opposite-sex couples does not violate the fundamental right to marry protected by the Due Process Clause.

### **Do such laws “discriminate” on the basis of sex?**

*If the law clearly puts neither sex at any disadvantage relative to the other, it cannot be asserted that the marriage laws discriminate on the basis of sex.*

The reservation of marriage to opposite-sex couples does not discriminate against either men or women. Such laws treat men and women the same. Both may marry someone of the opposite sex; neither may marry someone of the same sex. Put succinctly, “the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently.”<sup>19</sup>

### **Do such laws “discriminate” on the basis of “sexual orientation?”**

Laws defining marriage as a male-female union, on their face, do not discriminate on the basis of sexual orientation. Every single (adult) individual already has an absolutely equal right to marry. Marriage licenses do not and never have inquired as to the “sexual orientation” of the spouses. However, “marriage” is, *by definition*, a union of a man and a woman. Any homosexual is completely free to marry – as long as he or she marries a person of the opposite sex. On the other hand, every person is also free to choose a private relationship with a person of the same sex rather than the opposite sex. A person who chooses a partner of the same sex, however – like a person who merely cohabits with a partner of the opposite sex – is choosing something other than a marriage.

The classification which the marriage laws apply is one of “gender complementarity.” This is not the same as mere “sexual orientation,” since gender complementarity implicates issues like natural procreative potential and the optimal household setting for the parenting of children, whereas “sexual orientation” deals only with a person’s sexual attractions and behaviors.

### **But don’t one-man-one-woman marriage definitions have a “disparate impact” on homosexuals?**

Admittedly, the one-man, one-woman definition of marriage has a greater *impact* on homosexuals who, if they wish to marry, presumably would prefer to marry someone of the same sex, than on heterosexuals, who presumably would prefer to marry someone of the opposite sex. Nevertheless, it cannot be argued that the one-man, one-woman definition of marriage creates an insuperable barrier to any individual being able to exercise the right to marry because of “who they are.” A little-known fact, highlighted in the Family Research Council’s *amicus curiae* (friend of the court) brief to the Supreme Court,<sup>20</sup> is that the record

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<sup>19</sup> *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 876 (C.D. Cal. 2005) (collecting cases).

<sup>20</sup> Brief of Family Research Council as Amicus Curiae Supporting Respondents, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted *Obergefell v. Hodges* (No. 14-556), available at <http://downloads.frc.org/EF/EF15D21.pdf>.

shows more than two dozen of the plaintiffs in various lawsuits seeking to redefine marriage have already been legally married (to persons of the opposite sex).

The fact that there may be a “disparate impact” – meaning a law impacts certain self-identified groups differently even though it is not intended to target those groups – does not mean marriage should be redefined to include both homosexuals and heterosexuals. Under well-established federal equal protection doctrine, a law that appears neutral on its face (or other official act) may not be challenged on the basis that it has a disparate impact on a particular group unless that impact can be traced back to a discriminatory purpose or intent. The challenger must show that the law was enacted (or the act taken) *because of*, not *in spite of*, its foreseeable disparate impact. (In the case of a statute or state constitutional amendment placed on the ballot through a citizen initiative, and approved by the electorate, no such inquiry is even possible, since it would be impossible to determine the “intent” of hundreds of thousands or millions of individual voters.)

### **What standard of review should courts use in cases involving “sexual orientation?”**

Even if courts find that marriage laws do classify on the basis of sexual orientation, such classification is subject only to “rational basis” review, which is highly deferential to legislative choices:

[“Rational basis” is t]he level of judicial review for determining the constitutionality of a federal or state statute that does not implicate either a fundamental right or a suspect classification under the Due Process Clause and the Equal Protection Clause of the Constitution. When a court concludes that there is no fundamental liberty interest or suspect classification at stake, the law is presumed to be Constitutional unless it fails the rational basis test. Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The challenger of the constitutionality of the statute has the burden of proving that there is no conceivable legitimate purpose or that the law is not rationally related to it. This test is the most deferential of the three levels of review in due process or equal protection analysis (the other two levels being intermediate scrutiny and strict scrutiny) . . .<sup>21</sup>

As noted above, there is no “fundamental right” to marry a person of the same sex. Furthermore, the Supreme Court has never concluded that homosexuals are members of a “suspect” class, like race (which would trigger “strict scrutiny” of any classification affecting them), or “quasi-suspect” class, like sex (which would trigger “heightened” or “intermediate,” but not “strict,” scrutiny). They do not meet the standards applicable to such classifications. Courts have identified four characteristics that suspect classes commonly share: (1) a history of discrimination; (2) a trait that “bears no relation to ability to perform or contribute to society[.]” (3) an immutable trait; and (4) political powerlessness.

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<sup>21</sup> “Rational Basis Test: Definition,” online at: [http://www.law.cornell.edu/wex/rational\\_basis\\_test](http://www.law.cornell.edu/wex/rational_basis_test) (accessed February 28, 2014).

### *“History of Discrimination”*

With respect to the first criterion, there is no question that there has been a long history of moral and legal disapproval of homosexual *conduct*. Judgments about the morality, wisdom, or harmful consequences of particular voluntary *behaviors*, however, are not at all the same as “discrimination” based on a characteristic, such as race, that is indisputably inborn, involuntary, immutable, and innocuous.

### *“Ability to Perform or Contribute to Society”*

With respect to the second criterion, many homosexuals are able to “perform or contribute to society” in many areas. But, for purposes of equal protection analysis, the relevant question is not whether the class included (opposite-sex couples) and the class excluded (same-sex couples) have *some* characteristics in common. The question is whether they are “similarly situated” (meaning “in *all* relevant aspects alike”) with respect to the specific purposes of the law. Because same-sex couples can neither “procreate by themselves” nor “provide dual-gender parenting,”<sup>22</sup> they are not similarly situated to opposite-sex couples.<sup>23</sup>

### *Immutability*

With respect to the third criterion—immutability—there is no question that the most relevant aspect of sexual orientation—that is, sexual behavior—can be changed at will. However, even though same-sex sexual *attractions* may be more difficult (but not impossible)<sup>24</sup> to change, there is no evidence (unlike with race, gender or national origin) that such attractions are irrevocably fixed at birth.

### *Political Powerlessness*

With respect to the fourth criterion, it cannot be plausibly said that homosexuals are “politically powerless.” If anything, homosexuals have gained political power that is disproportionately large relative to the size of their population. For example, they are powerful enough such that no major law firm is willing to defend laws defining marriage as between a man and a woman.<sup>25</sup> Large corporations have heavily weighed in on the side of homosexuals, certainly more than any have done in defense of natural marriage.<sup>26</sup> It is clear that in certain sectors, homosexuals wield the *most power of any group*. Regardless, the mere fact that a class of persons

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<sup>22</sup> *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 520 (Conn. 2008) (Zarella, J. dissenting) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)) (emphasis added by Justice Zarella).

<sup>23</sup> *Hernandez v. Robles*, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring), *aff’d*, 855 N.E.2d 1 (N.Y. 2006).

<sup>24</sup> See generally James E. Phelan, Neil Whitehead, Philip M. Sutton, “What Research Shows: NARTH’s Response to the APA Claims on Homosexuality,” *Journal of Human Sexuality* (National Association for Research and Therapy of Homosexuality, Encino, CA) 1, (2009): 9-39.

<sup>25</sup> Adam Liptak, *The Case Against Gay Marriage: Top Law Firms Won’t Touch It*, N.Y. Times, Apr. 11, 2015, [http://www.nytimes.com/2015/04/12/us/the-case-against-gay-marriage-top-law-firms-wont-touch-it.html?\\_r=0](http://www.nytimes.com/2015/04/12/us/the-case-against-gay-marriage-top-law-firms-wont-touch-it.html?_r=0).

<sup>26</sup> Austin Ruse, *Corporations Ask Supreme Court to Impose Gay Marriage on the Country*, Breitbart, Mar. 6, 2015, <http://www.breitbart.com/big-government/2015/03/06/corporations-ask-supreme-court-to-impose-gay-marriage-on-the-country/>.

is unable to enact its entire legislative agenda does not reflect “political powerlessness,” otherwise *every* class could be said to be “politically powerless.”

Because state statutory or constitutional provisions defining marriage as the union of one man and one woman are reasonably related to multiple, legitimate state interests, they pass constitutional muster.

### **What public purposes of marriage provide a rational basis for limiting it to unions of a man and a woman?**

The State has legitimate interests in encouraging responsible procreation and in furthering an environment in which the children so procreated will be raised in a family with both a mother and a father to whom they are biologically related and in preserving the traditional institution of marriage.

#### ***Responsible Procreation***

It is an incontestable fact that, *as a class*, opposite-sex couples *are* capable of natural procreation while same-sex couples are *not*. On rational basis review, that in itself provides a plausible foundation for upholding the classification limiting marriage to opposite-sex couples.

Advocates for redefining marriage argue that marriage cannot be about procreation because opposite-sex couples who do not or cannot procreate are still permitted to marry. They argue that if the purpose of marriage is procreation, the classification which allows *all* opposite-sex couples (even non-procreative ones) to marry is “over-inclusive.” However, a number of courts, such as the Arizona Court of Appeals, have explained why it would not be feasible to exclude opposite-sex couples from marriage because of their failure to procreate:

First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. [Citations omitted]. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry [citation omitted], excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest [citation omitted], which is not readily apparent.<sup>27</sup>

Such difficulties with attempting to exclude non-procreating opposite-sex couples from marriage do not exist – or not nearly to the same degree – with the exclusion of same-sex couples. *None* of the latter couples can procreate, or run the risk of an unintended pregnancy, as a natural result of their sexual relationship; and as noted before, they do not have a fundamental right to marry each other that is “deeply rooted in this Nation’s history, legal traditions, and practices.”

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<sup>27</sup> *Standhardt v. Superior Court*, 77 P.3d 451,462 (Ariz. Ct. App. 2003).

## *Encouraging the Raising of Children by Their Mother and Father*

States have a legitimate interest in “encouraging families with a mother and a father and children biologically related to both.”<sup>28</sup> Social science research has shown that such households provide the optimal family structure for children.<sup>29</sup> Having a relationship with both *biological* parents is one benefit; having a role model in the home of both sexes and of the relationship between the two is another. It is rational to conclude that “children are benefited [*sic*] by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman, individually and collectively, contribute to the relationship.”<sup>30</sup>

Advocates of redefining marriage argue that existing marriage laws should be struck down because it cannot be proven that actively *excluding* same-sex couples from marriage makes achieving the goal of responsible procreation more likely, or increases the number of households in which biological mothers and fathers raise their own children. Under the rational basis test, however, the issue is not whether “recognizing same-sex marriage . . . [would] *harm* the institution of opposite-sex marriage,” but whether “the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable.”<sup>31</sup>

Supporters of marriage redefinition complain that limiting marriage to opposite-sex couples because of state interests in procreation and child-rearing is a classification which is not only “overinclusive” (because not all opposite-sex married couples procreate or raise children), but also “underinclusive” (because some persons in same-sex relationships *do* procreate using artificial reproductive technology, while others adopt children or are raising children from previous heterosexual relationships).

For purposes of rational basis review under the Equal Protection Clause, however, “[t]he Supreme Court repeatedly has instructed that neither the fact that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational.”<sup>32</sup>

## *Preserving the Institution of Marriage*

Most advocates of redefining marriage – at least in public – scoff at the idea that allowing same-sex couples to legally marry would change the institution of marriage at all. However, some courts have recognized that “it is not beyond rational speculation to conclude that altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation, and family structure.”<sup>33</sup>

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<sup>28</sup> *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006) (plurality opinion).

<sup>29</sup> A summary of this research can be found on the Family Research Council Blog at: <http://frcblog.com/2014/10/we-know-social-science-children-do-best-mom-and-dad-true/>.

<sup>30</sup> *In re J.B.*, 326 S.W.3d 654, 678 (Tex. App. 2010).

<sup>31</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005).

<sup>32</sup> *Lofton v. Secretary of Dep’t of Children & Family Services*, 358 F.3d 804, 822-23 & n. 20 (11th Cir. 2004) (citing *FCC v. Beach Communications*, 508 U.S. 307, 315-16 (1993)).

<sup>33</sup> *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1117 (D. Haw. 2012).

Such speculation is not unreasonable. The experience in Scandinavia and the Netherlands indicates that formal governmental recognition of same-sex relationships, whether through domestic partnerships, civil unions or marriage, has been associated with an accelerated decline in marriage and a marked increase in the number of out-of-wedlock births.<sup>34</sup>

### **Do other Supreme Court decisions involving “sexual orientation” provide a precedent for overturning state marriage definitions?**

In major Supreme Court decisions in 1996 and 2003, the Court struck down State laws that were perceived as imposing disadvantages on homosexuals. Neither, however, provided precedent for throwing out state definitions of marriage.

#### ***Romer v. Evans***

*Romer v. Evans*<sup>35</sup> involved a challenge to a state constitutional amendment, adopted by the voters of Colorado, which forbade the state or local governments to create any sort of “protected status” based on “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”

Colorado’s “Amendment 2” was struck down because it specifically singled out, by name, those with a “homosexual, lesbian or bisexual orientation,” and made it more difficult for them to seek special legal protections than for other groups.

As noted earlier in this paper, laws defining marriage as the union of one man and one woman make no specific reference to “sexual orientation,” and are intended not to exclude, but rather to recognize the uniqueness of the positive role played by opposite-sex relationships as the only type capable of resulting in natural procreation and dual-gender parenting. Thus, *Romer* is not relevant to the marriage issue before the Court now.

#### ***Lawrence v. Texas***

In *Lawrence v. Texas*,<sup>36</sup> the Supreme Court struck down a Texas law which outlawed homosexual sodomy, and declared that the “right to privacy” prevents use of the criminal law to punish sexual acts carried out in private by consenting adults.

However, *forbidding* states to *punish* private sexual relationships is very different from *ordering* states formally to *affirm and celebrate* them. Indeed, Justice Kennedy even declared in his opinion that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>37</sup> As a result, *Lawrence* does not decide the question before the Court regarding marriage.

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<sup>34</sup> See Stanley Kurtz, “The End of Marriage in Scandinavia,” *Weekly Standard* (Feb. 2, 2004); William C. Duncan, “The Tenth Anniversary of Dutch Same-Sex Marriage: How is Marriage Doing in the Netherlands?”, *Institute for Marriage and Public Policy Research Brief* (Vol. 4, No. 3, May 2011).

<sup>35</sup> 517 U.S. 629 (1996).

<sup>36</sup> 539 U.S. 558 (2003).

<sup>37</sup> *Id.* at 578.

## Does the 1967 Supreme Court decision in *Loving v. Virginia* provide a precedent for overturning laws defining marriage as the union of a man and a woman?

Advocates of marriage redefinition claim there is an analogy between laws which once existed in some states that banned interracial marriages (“anti-miscegenation” laws), and laws today which “ban same-sex marriage” by defining marriage as the union of one man and one woman. For support they look to *Loving v. Virginia*,<sup>38</sup> which struck down bans on interracial marriage.

However, it is impossible for *Loving* to stand for the proposition that there is a constitutional right to same-sex marriage, for as the 6th Circuit pointed out, “[h]ad *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker [v. Nelson]* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.”<sup>39</sup>

### *Marrying “the person of your choice”?*

The laws at issue in these two cases are similar in only one respect. Both place some limit on the ability of an individual to marry “the person of his or her choice” – in the one case because of the race of the prospective spouse, and in the other because of the sex of the prospective spouse. There, however, the similarity ends.

First, it is important to note that *no one* – regardless of sexual orientation – possesses an unlimited right to “marry” the partner “of their choice.” States already place limitations on marrying a child, a close blood relative, a person who is already married, or – according to the laws adopted through the democratic process in most states – a person of the same sex. If the Supreme Court were to strike down laws which prevent same-sex couples from “marrying” on the basis of a supposed “right” to marry “the person of your choice,” these other restrictions (particularly the one prohibiting polygamy) would be immediately called into question.

### *A Classification Based on Race*

The bans on interracial marriage were struck down not simply because they limited the choice of marriage partner, but because they did so on the basis of *race*. Three amendments to the Constitution (the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup>, all adopted following the Civil War) were added primarily to eliminate legal discrimination based on race. No similar constitutional provisions exist regarding “sexual orientation.” In addition, legislative classifications based on race are subjected to “strict scrutiny,” meaning they can only be justified by a *compelling* government interest. The *Loving* Court said:

We have consistently denied the constitutionality of measures which restrict the rights of citizens *on account of race*. There can be no doubt that restricting the freedom to marry *solely because of racial classifications* violates the central meaning of the Equal Protection Clause (emphasis added).<sup>40</sup>

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<sup>38</sup> 388 U.S. 1 (1967).

<sup>39</sup> *Deboer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014).

<sup>40</sup> *Loving*, 388 U.S. at 11-12.

## *Building Walls vs. Building Bridges*

Laws banning interracial marriage were designed to build *walls* between groups of people, reinforcing a system of segregation to keep the races *apart*. Laws defining marriage as the union of a man and a woman build a *bridge* across the most fundamental divide in the human race, bringing the sexes together and regulating an essential social task – reproduction – that can only be accomplished by the contributions of both male and female.

In fact, ironically, it may be the *advocates* of same-sex “marriage” who most closely resemble the *opponents* of interracial marriage. Both have sought to use the institution of marriage in pursuit of social goals (racial segregation in one case; the official public affirmation of homosexuality in the other) which have nothing to do with the core public purposes of marriage.

**Does the 2013 Supreme Court ruling in *United States v. Windsor*, in which the court struck down part of the federal Defense of Marriage Act, provide a precedent for overturning state marriage definitions?**

### *The Federal Defense of Marriage Act (DOMA)*

In the 1990’s, a state court ruling in Hawaii led to concern that if marriage were redefined in one state, all fifty states and the federal government might be forced to recognize same-sex “marriages.” In response, Congress passed (by overwhelming bipartisan majorities in both houses of Congress), and President Bill Clinton signed, the federal Defense of Marriage Act (DOMA).

DOMA provided (in its Section 2) that states would not be required to recognize same-sex “marriages” from other states, and also specified (in Section 3) that for all purposes under *federal* law, marriage would be defined as the union of one man and one woman.

### *United States v. Windsor*

In 2013, the Supreme Court heard a case, *United States v. Windsor*, challenging only Section 3 of DOMA, and in June of that year issued a ruling striking down Section 3 of the law as unconstitutional.<sup>41</sup>

Since *Windsor* was decided, judges have attempted to use it as precedent for rulings striking down *state* definitions of marriage as the union of one man and one woman. They point, for example, to strongly-worded passages in the majority opinion which declare that Section 3 of DOMA “violates basic due process and equal protection principles,”<sup>42</sup> because it “demeans the couple, whose moral and sexual choices the Constitution protects, . . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples.”<sup>43</sup>

However, arguing that *States* may not define marriage as the union of a man and a woman goes beyond – and in some ways contradicts – anything required by either the holding or the

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<sup>41</sup> 133 S. Ct. 2675, 2682-84 (2013).

<sup>42</sup> *Id.* at 2693.

<sup>43</sup> *Id.* at 2694.



reasoning in *Windsor*. Indeed, the Court explicitly stated, “This opinion and its holding are confined to those lawful marriages,”<sup>44</sup> referring to “persons who are joined in same-sex marriages *made lawful by the State*” (emphasis added).<sup>45</sup>

### ***Windsor Decision Based on Federalism***

The Court’s holding in *Windsor* was largely based on concerns regarding federalism—the historic and proper relationship between the federal government and the states. Specifically, the Court found DOMA to offend the Constitution because it represented an “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage...”<sup>46</sup> The Court went on to affirm that States possess the “historic and essential authority to define the marital relation.”<sup>47</sup>

The Court majority stated, “The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily interaction and constant interaction with each other”<sup>48</sup> The “formation of consensus” that only the union of a man and a woman should be recognized as “marriage” is precisely what the “discrete communit[ies]” within a majority of States have done by passing laws or amending their state constitutions to that effect.

As Chief Justice Roberts pointed out in his dissent:

[W]hile “[t]he State’s power in defining the marital relation is of central relevance” to the majority’s decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case.<sup>49</sup>

Unlike the federal Defense of Marriage Act, state laws defining marriage as a male-female union are not an “unusual deviation from the usual tradition . . .”<sup>50</sup> They *are* “the usual tradition.” Continued deference to state definitions of marriage—in all states, including the majority which still define marriage as the union of one man and one woman—is more consistent with *Windsor* than are court rulings overturning such definitions.

Chief Justice Roberts thought this point particularly worthy of emphasis: “I write only to highlight the limits of the majority’s holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA’s constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.”<sup>51</sup>

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<sup>44</sup> *Id.* at 2696.

<sup>45</sup> *Id.* at 2695.

<sup>46</sup> *Id.* at 2693.

<sup>47</sup> *Id.* at 2692.

<sup>48</sup> *Id.* at 2692.

<sup>49</sup> *Id.* at 2697 (Roberts, C.J., dissenting).

<sup>50</sup> *Id.* at 2693.

<sup>51</sup> *Id.* at 2697.

What was that issue? “[C]hallenges to state marriage definitions affecting same-sex couples,” which the Chief noted was “not before us in th[at] case.”<sup>52</sup>

*Windsor* did not decide the question of whether states can define marriage as between a man and a woman. The Court in *Windsor* recognized this. If it stands for anything, *Windsor* stands for the proposition that this issue must be left to the states to decide.

### **Could the Supreme Court choose a middle ground between upholding laws that define marriage as the union of one man and one woman, and ordering all fifty states to issue civil marriage licenses to same-sex couples?**

Yes. The cases on appeal to the Supreme Court from the U.S. Court of Appeals for the Sixth Circuit include some in which the demand is not for the issuance of a marriage license, but for state recognition of a same-sex civil marriage that was contracted in a different state. It would be theoretically possible for the Court to rule that all fifty states must *recognize* legal same-sex marriages from other states, but that states need not *license* such unions themselves.

Such a decision may appear to preserve a veneer of respect for the power of states to determine their own definition of marriage, but the ultimate effect of such a ruling would be little different from imposing a fifty-state redefinition of marriage. Same-sex couples in any state would need only to travel across their state’s border to obtain a civil marriage, and would then be able to demand recognition of their union as a “marriage” in all fifty states. Nothing in the Constitution requires such an infringement upon each state’s power to determine who among its residents is entitled to the classification, and the benefits, of marriage.

### **CONCLUSION**

The words of Supreme Court Justice Samuel Alito, with which this paper began, also provide its fitting conclusion:

. . . [T]he Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.<sup>53</sup>

*Note: Significant portions of this paper (not otherwise identified) are excerpted or adapted from amicus curiae (“friend of the court”) briefs submitted on behalf of the Family Research Council and authored by attorney Paul Benjamin Linton. This paper was compiled and edited, and additional text was written, by Peter Sprigg, Senior Fellow for Policy Studies at the Family Research Council. Mr. Sprigg bears final responsibility for the content of this paper.*

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2716 (Alito, J., dissenting).