

# LEGAL MEMORANDUM

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## Memo to Supreme Court: State Marriage Laws Are Constitutional

*Gene Schaerr and Ryan T. Anderson, PhD*

### Abstract

*There is nothing in the U.S. Constitution that requires all 50 states to redefine marriage. The only way one can establish the unconstitutionality of man–woman marriage laws is to adopt a view of marriage that sees it as an essentially genderless, adult-centric institution and then declare that the Constitution requires that the states (re)define marriage in such a way. In other words, one needs to establish that the vision of marriage our law has long applied is wrong and that the Constitution requires a different vision. There is, however, no basis in the Constitution for reaching that conclusion. Marriage is based on the anthropological truth that men and women are distinct and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children deserve a mother and a father, and states have constitutional authority to make marriage policy based on these truths.*

Over the past year, four federal circuit courts—the Fourth, Seventh, Ninth, and Tenth Circuits—have ruled that the states and their people lack the ability under the federal Constitution to define marriage as it has always been defined: as the legal union of a man and a woman.<sup>1</sup> In their breathtaking sweep, those four rulings are reminiscent of the U.S. Supreme Court’s now-discredited decision in *Dred Scott v. Sandford*,<sup>2</sup> which likewise limited the people’s right to decide an issue of fundamental importance: whether their representatives in Congress had the constitutional authority to abolish slavery in the federal territories.<sup>3</sup>

Last fall, the Supreme Court allowed those four circuit decisions to go into effect, thereby overriding the votes of tens of millions of

### KEY POINTS

- Those who are suing to overturn the marriage laws in Ohio, Kentucky, Michigan, and Tennessee have to prove that the man–woman marriage policy that has existed in the United States throughout its history is prohibited by the U.S. Constitution.
- The Constitution is silent as to what marriage is and what policy goals the states should design it to serve. Judges should not insert their own policy preferences and declare them to be required by the U.S. Constitution.
- Nothing in the text or original meaning of the Fourteenth Amendment—in Supreme Court jurisprudence on Fundamental Rights of the Due Process Clause or the Equal Protection Clause—requires the redefinition of marriage.
- Nor do male–female marriage laws lack a rational basis or fail to serve a compelling state interest in a narrowly tailored way.
- This is a debate about whether citizens or judges will decide an important and sensitive policy issue: the very nature of civil marriage.

This paper, in its entirety, can be found at <http://report.heritage.org/lm148>

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

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citizens in many parts of the nation. Fortunately, however, the Court has now agreed to revisit the issue in the context of a decision issued by the Sixth Circuit, which reaffirmed the right of a state's people to choose the traditional man–woman definition of marriage.

The overarching question before the Supreme Court in the four cases that were consolidated before the Sixth Circuit and for purposes of review by the Supreme Court—*Obergefell v. Hodges*, *Tanco v. Haslam*, *DeBoer v. Snyder*, and *Bourke v. Beshear*—is not whether an exclusively male–female marriage policy is the best, but only whether it is allowed by the U.S. Constitution.<sup>4</sup> In other words, the question is not whether government-recognized same-sex marriage is good or bad policy, but only whether it is required by the U.S. Constitution.

To resolve that overarching question, the Supreme Court has directed the parties in those cases to address two precise questions:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

Those suing to overturn the marriage laws in the four states covered by the Sixth Circuit (Ohio, Kentucky, Michigan, and Tennessee) thus have to prove that the man–woman marriage policy that has existed in the United States throughout our entire history is prohibited by the U.S. Constitution.

The only way someone could succeed in such an argument is to adopt a view of marriage that sees it as an essentially genderless institution based only on the emotional needs of adults and then declare that the U.S. Constitution requires that the states (re)define marriage in such a way. Equal protection

alone is not enough. To strike down marriage laws, the Court would need to say that the vision of marriage that our law has long applied equally is just wrong: that the Constitution requires a different vision entirely.

The U.S. Constitution, however, is silent on what marriage is and what policy goals the states should design it to serve, and there are good policy arguments on both sides. Judges should not insert their own policy preferences about marriage and declare them to be required by the U.S. Constitution any more than the Justices in *Dred Scott* should have written into the Constitution their own policy preferences in support of slavery.

That, of course, is not to suggest that same-sex marriage is itself comparable to slavery. The point is simply that, as in *Dred Scott*, this is a debate about whether citizens or judges will decide an important and sensitive policy issue—in this case, the very nature of civil marriage.

### **The Fourteenth Amendment's Original Meaning**

A legal challenge to these state marriage laws cannot appeal successfully to the text or original meaning of the Fourteenth Amendment. The text, invoking American citizens' "privileges or immunities," the "equal protection of the laws," and the "due process of law," nowhere mentions marriage. Back in the 1860s, could anyone who drafted that amendment or any of the citizens who voted to ratify it have reasonably thought that it could be used to invalidate state marriage laws defining marriage as a man–woman union?

Imagine, for example, how President Lincoln—an accomplished lawyer and an ardent opponent of *Dred Scott*—would have reacted if the amendment had been introduced before his death and someone had suggested that it might one day be interpreted to require states to recognize same-sex marriages. He would have viewed that suggestion as preposterous. There has never been any general right, he

1. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014).

2. 60 U.S. 393 (1857).

3. For more on the legal parallel, see Michael Stokes Paulsen, *Abraham Lincoln and Same-Sex Marriage*, Public Discourse (Feb. 20, 2015), <http://www.thepublicdiscourse.com/2015/02/14443/>.

4. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571); see also *Obergefell v. Hodges* (No. 14-556); *Tanco v. Haslam* (No. 14-562); *Bourke v. Beshear* (No. 14-574).

would have said, to marry anyone you claim to love, so a state's rejection of that claimed "right" could not possibly be a denial of due process.

Lincoln would also have noted the similarities between *Dred Scott* and a decision imposing same-sex marriage. As distinguished law professor Michael Stokes Paulsen has elegantly argued, "in the structure and logic of the legal arguments made for judicial imposition of an across-the-board national rule requiring every state to accept the institutions [of slavery and the redefinition of marriage], the two situations appear remarkably similar."<sup>5</sup>

Moreover, unlike miscegenation laws, the man-woman definition of marriage does not offend the Amendment's equal-protection guarantee because it allows any otherwise qualified man and woman to marry, *regardless* of their sexual orientation or other circumstances. The fact that the institution of marriage, rightly understood, may be more attractive to some of a state's citizens than others does not mean that a state violates the Fourteenth Amendment simply by refusing to redefine the institution to make it more attractive to more romantic partnerships.

Indeed, as the Sixth Circuit pointed out, all sides agree that the original meaning of the Fourteenth Amendment does not require the redefinition of marriage: "Nobody...argues that the people who adopted the 14th Amendment understood it to require the States to change the definition of marriage."<sup>6</sup> The Sixth Circuit continued: "From the founding of the republic to 2003, every state defined marriage as a relationship between a man and a woman, meaning that the 14th Amendment permits, though it does not require, states to define marriage in that way."<sup>7</sup>

The opinion closes by noting that "not a single U.S. Supreme Court Justice in American history has written an opinion maintaining that the tra-

ditional definition of marriage violates the 14th Amendment."<sup>8</sup>

### ***United States v. Windsor***

Nor can a challenge reasonably appeal to the Supreme Court's *Windsor* decision, which was written by Justice Anthony Kennedy and applied the Fourteenth Amendment's protections in striking down a portion of the federal Defense of Marriage Act (DOMA). Whether it was right or wrong as to DOMA, *Windsor* strongly supports the authority of states to define marriage: Every single time that *Windsor* talks about the harm of DOMA, it mentions that the state had chosen to recognize the bond that the federal government was excluding. Every single time, Justice Kennedy expressly said it was Congress's deviation from the default of deference to state definitions that drove his opinion.

Kennedy's opinion for the Court hinged on the reality that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning."<sup>9</sup> "The definition of marriage," *Windsor* explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities."<sup>10</sup>

United States District Judge Juan Pérez-Giménez recently highlighted this feature of *Windsor*:

The *Windsor* opinion did not create a fundamental right to same gender marriage nor did it establish that state opposite-gender marriage regulations are amenable to federal constitutional challenges. If anything, *Windsor* stands for the opposite proposition: it reaffirms the States' authority over marriage, buttressing *Baker's* conclusion that marriage is simply not a federal question.<sup>11</sup>

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5. Paulsen, *supra* note 3.

6. *DeBoer*, 772 F.3d at 403.

7. *Id.* at 404.

8. *Id.* at 416.

9. *United States v. Windsor*, 570 U.S. \_\_\_, 133 S.Ct. 2675, 2692 (2013).

10. *Id.* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

11. *Conde-Vidal v. Garcia-Padilla* (D.P.R.) (D.P.R. Oct. 21, 2014) (No. 14-1253), 2014 WL 5361987. See also *Baker v. Nelson*, 409 U.S. 810 (1972) (summarily dismissing "for want of a substantial federal question" an appeal that argued that Minnesota's man-woman only marriage laws violated the Fourteenth Amendment).

*Windsor* also taught that federal power may not “put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.”<sup>12</sup> Yet since that time, the federal government—through federal judges—has repeatedly put its thumb on the scales to influence a state’s decision about its own marriage laws—all the while claiming that *Windsor* required them to do so.

Judge Pérez-Giménez bemoaned this reality, noting that “[i]t takes inexplicable contortions of the mind or perhaps even willful ignorance—this Court does not venture an answer here—to interpret *Windsor*’s endorsement of the state control of marriage as eliminating the state control of marriage.”<sup>13</sup>

### **Fundamental Right Under the Fourteenth Amendment’s Due Process Clause**

Just as neither the actual text nor the original meaning of the Fourteenth Amendment, nor the *Windsor* decision, requires the redefinition of state marriage laws, nothing in the Supreme Court’s Fourteenth Amendment jurisprudence requires states to abandon the male–female definition of marriage. Consider first the Court’s “fundamental rights” doctrine under the Due Process Clause, where, if the Court finds a law infringing upon a fundamental right, the law is subject to “strict scrutiny,” meaning that the government must provide a compelling interest in having the law and the law must be narrowly designed to promote that interest. Not surprisingly, laws almost always fail strict scrutiny.

***Glucksberg.*** As the Supreme Court held in *Glucksberg* in rejecting a fundamental right to assisted suicide, fundamental rights must be “deeply rooted in this Nation’s history and tradition” and “implicit in

the concept of ordered liberty” such that “neither liberty nor justice would exist if they were sacrificed.”<sup>14</sup>

Clearly, a right to marry someone of the same sex does not fit this description. As the Supreme Court explained in *Windsor*, including same-sex couples in marriage is “a new perspective, a new insight.”<sup>15</sup> Same-sex marriage is not deeply rooted in the nation’s history and tradition; thus—whatever its policy merits—it cannot be a fundamental right under the Due Process Clause. *Windsor* correctly observed that “until recent years...marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”<sup>16</sup>

Whenever the Supreme Court has recognized marriage as a fundamental right, it has always been marriage understood as the union of a man and woman, and the rationale for the fundamental right has emphasized the procreative and social ordering aspects of male–female marriage. None of the cases that mention a fundamental right to marry deviate from this understanding, including decisions that struck down laws limiting marriage based on failure to pay child support,<sup>17</sup> incarceration,<sup>18</sup> and race.<sup>19</sup> Those decisions took for granted the historic, common law, and statutory understanding of marriage as a male–female union having something to do with family life. Thus, a challenge to state male–female marriage laws cannot appeal successfully to the fundamental-rights doctrine under *Glucksberg*.

***Loving.*** Comparisons to interracial marriage fare no better.<sup>20</sup> As Fourth Circuit Judge Paul Niemeyer explained in his dissent in *Bostic v. Schaefer*, in *Loving v. Virginia*, where the Supreme Court

12. *Windsor*, 133 S.Ct. at 2693 (citations omitted).

13. Conde-Vidal, 2014 WL 5361987 at 8\*.

14. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Besides the right to marry (with marriage always understood as a union of husband and wife), examples of fundamental rights the Court has found are the right to procreate, the right to have sexual autonomy, the right to buy and use birth control and abortion, the right to travel freely among the states, the right to raise one’s children as one sees fit, the right to vote, and the right to the freedoms protected by the First Amendment (speech, religion, and association).

15. *Windsor*, 133 S.Ct. at 2689.

16. *Id.*

17. *Zablocki v. Redhall*, 434 U.S. 374, 385–87 (1987).

18. *Turner v. Safley*, 482 U.S. 78, 95–98 (1987).

19. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

20. For an extended analysis, see Ryan T. Anderson, *Marriage, Reason, and Religious Liberty: Much Ado About Sex, Nothing to Do with Race*, Heritage Foundation Backgrounder No. 2894 (Apr. 4, 2014), available at <http://www.heritage.org/research/reports/2014/04/marriage-reason-and-religious-liberty-much-ado-about-sex-nothing-to-do-with-race>.

found laws that prohibit interracial marriage to be unconstitutional, the couple was “asserting a right to enter into a traditional marriage of the type that has always been recognized since the beginning of the Nation—a union between one man and one woman.”<sup>21</sup> He concluded:

*Loving* simply held that race, which is completely unrelated to the institution of marriage, could not be the basis of marital restrictions. To stretch *Loving*’s holding to say that the right to marry is not limited by gender...is to ignore the inextricable, biological link between marriage and procreation that the Supreme Court has always recognized.<sup>22</sup>

In *Loving*, the Supreme Court defined marriage as one of the “‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>23</sup> Professor John Eastman of Chapman Law School has helpfully explained why the Supreme Court did so:

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.<sup>24</sup>

Thus, a challenge to state male–female marriage laws cannot properly rely upon *Loving*.

**Limiting Principle?** To be sure, the Supreme Court has ruled that entering into and having the government recognize a marriage—understood as a union of husband and wife—is a fundamental right, but if this right is redefined to be understood simply as the committed, care-giving relationship of one’s

choice, where does the logic lead? Justice Sonia Sotomayor asked this of Ted Olson, the lawyer for the same-sex couples, during oral argument in California’s Proposition 8 case, and he had no answer. If marriage is a fundamental right understood as consenting adult love, Justice Sotomayor asked, “what State restrictions could ever exist,” for example, “with respect to the number of people...that could get married?”<sup>25</sup>

The Sixth Circuit saw Justice Sotomayor’s logic. With respect to those who would redefine marriage, the court observed that:

Their definition does too little because it fails to account for plural marriages, where there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot.<sup>26</sup>

The Sixth Circuit concluded that “if it is constitutionally irrational to stand by the man–woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point.”<sup>27</sup> Just so. And for that reason too, a challenge to state male–female marriage laws cannot properly invoke the Fourteenth Amendment’s Due Process Clause.

### **The Fourteenth Amendment’s Equal Protection Clause**

Equal protection jurisprudence likewise does not require the redefinition of marriage.

**Animus.** Although a couple of Supreme Court decisions have relied upon the concept of “animus” in invalidating on equal-protection grounds state laws that impinged upon the interests of gays and lesbians,<sup>28</sup> anyone with passing familiarity with the

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21. *Bostic*, 760 F.3d at 390 (Niemeyer, J., dissenting).

22. *Id.* at 392.

23. *Loving*, 388 U.S. at 18.

24. John Eastman, *The Constitutionality of Traditional Marriage*, Heritage Foundation Legal Memorandum No. 90 (Jan. 25, 2013), available at <http://www.heritage.org/research/reports/2013/01/the-constitutionality-of-traditional-marriage>.

25. Transcript of Oral Argument at 46:25, 47:1–3, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (No. 12-144) (2010).

26. *DeBoer*, 772 F.3d at 407.

27. *Id.*

28. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

history of marriage knows that the institution did not arise because of animus toward gays and lesbians. Ancient thinkers as well as the political society in Greece and Rome, without being influenced by Judeo-Christian teaching, affirmed that marriage is a male-female union even as they embraced same-sex sexual relations.<sup>29</sup>

Even in *Windsor*, Justice Kennedy did not claim that the man-woman definition of marriage was fueled by animus. Rather, as noted, he held that the federal government's refusal to recognize state-sanctioned same-sex marriages was based on animus. One need not agree with Justice Kennedy on DOMA to see that the holding in *Windsor* does not undermine state marriage laws.

The Sixth Circuit acknowledged that same-sex couples have experienced unjust discrimination but noted that marriage laws are not part of that phenomenon:

But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." (citing *Lawrence*).<sup>30</sup>

While *Lawrence* struck down laws that prohibited sex between persons of the same gender, it did not—and does not—require the redefinition of marriage. Laws that banned homosexual sodomy are radically different from laws that define marriage as the union of husband and wife. The Supreme Court found that the former infringed a privacy and liberty right, while the latter specify which unions will be eligible for public recognition and benefits. A right to liberty or privacy is a right to be left alone by the

government, not a right to have the government recognize or subsidize the relationship of one's choice.

**Protected Class.** Other advocates of same-sex marriage, including the Ninth Circuit,<sup>31</sup> have argued that the denial of marriage to same-sex couples infringes the rights of a protected class: namely, gays and lesbians. But the Supreme Court, including in *Windsor*, has never held sexual orientation to be a suspect class and thus has not applied "heightened scrutiny" to laws implicating their interests.<sup>32</sup> In contrast, the Court has held that race is a suspect class and gender a quasi-suspect class (which invokes heightened scrutiny but not quite strict scrutiny).<sup>33</sup>

Even if the Supreme Court did find sexual orientation to be a suspect class, as liberal scholars like Andrew Koppelman have recognized, marriage laws do not discriminate on the basis of sexual orientation anyway. They have a disparate impact on gays, but that is not the Court's test. The reason Koppelman believes—correctly—that they do not discriminate based on orientation is that they simply do not require checking someone's orientation at all in determining whether that person will receive the benefits of civil marriage.<sup>34</sup> Thus, under man-woman marriage laws, a gay man may marry a lesbian woman, while two heterosexual men cannot receive a marriage certificate from the state.

Nevertheless, if one were to argue that sexual orientation should be a protected class under equal protection jurisprudence, one would have to establish that sexual orientation creates a "class...[which] exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a *discrete* group."<sup>35</sup> Gays and lesbians do not satisfy that requirement.

The American Psychological Association (APA) describes sexual orientation as a "*range* of behaviors and attractions" and reports that "[r]esearch over several decades has demonstrated that sexual ori-

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29. John Finnis, *The Collected Essays of John Finnis: Volume III: Human Rights and Common Good* 340 (Oxford Univ. Press, 2011).

30. *DeBoer*, 772 F.3d at 413.

31. *Latta*, 771 F.3d at 468.

32. *But see* *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) (holding that sexual orientation was a suspect class triggering heightened scrutiny).

33. The heightened scrutiny of gender classifications is often called "intermediate scrutiny" because it falls between the lower rational basis review and the higher strict scrutiny review.

34. Andrew Koppelman, *Response: Sexual Disorientation*, 100 *Geo. L.J.* 1083, 1087 (2012).

35. *Bowen v. Gilliard*, 483 U.S. 587, 603 (1987) (quoting *Massachusetts B. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976)) (emphasis added).

entation ranges along a *continuum*, from exclusive attraction to the other sex to exclusive attraction to the same sex.”<sup>36</sup> The APA also reports that “there is no consensus among scientists” on why particular orientations develop and that, despite extensive research, scientists cannot conclude whether sexual orientation is determined by “genetic, hormonal, developmental, social, [or] cultural influences.”<sup>37</sup>

The APA, in short, says that no one can agree on the causes or even the definition of homosexuality, so it is not a readily identifiable group. These APA findings fatally undermine the idea that sexual orientation describes a “discrete group” for suspect-class purposes.

This point is confirmed by Dr. Paul McHugh, former chief of psychiatry at Johns Hopkins Hospital and former chairman of the psychiatry department at Hopkins medical school, and legal scholar Gerard Bradley:

“Sexual orientation” should not be recognized as a newly protected characteristic of individuals under federal law.... In contrast with other characteristics, it is neither discrete nor immutable. There is no scientific consensus on how to define sexual orientation, and the various definitions proposed by experts produce substantially different groups of people.

Nor is there any convincing evidence that sexual orientation is biologically determined; rather, research tends to show that for some persons and perhaps for a great many, “sexual orientation” is plastic and fluid; that is, it changes over time. What we do know with certainty about sexual orientation is that it is affective and behavioral—a matter of desire and/or behavior.<sup>38</sup>

In a February 2015 interview, Justice Ruth Bader Ginsburg admitted as much. While asserting incorrectly that it would not be a major adjustment for the American public to accept same-sex marriage, she correctly observed that:

[Americans have] looked around, and we discovered it’s our next door neighbor, we’re very fond of them. Or it’s our child’s best friend. Or even our child. I think that as more and more people came out and said, “This is who I am,” and the rest of us recognized that they are one of us, that there—there was a familiarity with people that didn’t exist in the beginning when the race problem was on the burner, because we lived in segregated communities and it was truly a we/they kind of thing. But not so, I think, of the gay-rights movement.<sup>39</sup>

A better argument why gays and lesbians are not discrete and insular minorities—not easily identifiable or clustered together apart from the rest of society—could not be offered.

Furthermore, to be a protected class under equal protection jurisprudence, a group must be “politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”<sup>40</sup> Yet, as Chief Justice John Roberts pointed out during oral arguments in *Windsor*, “political figures are falling over themselves” to support gay marriage.<sup>41</sup> Indeed, support for same-sex marriage and for LGBT (lesbian, gay, bisexual, and transgender) non-discrimination laws has been embraced by the President of the United States and the Democratic Party—the largest political party in the nation.<sup>42</sup>

In short, it is hard to say that gays and lesbians are politically powerless. It is therefore impossible for the Court to find that they are a suspect class.

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36. *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality* American Psychological Association (2008), <http://www.apa.org/topics/lgbt/orientation.aspx?item=4>.

37. *Id.*

38. Paul McHugh & Gerard Bradley, *Sexual Orientation, Gender Identity, and Employment Law*, Public Discourse (July 25, 2013), <http://www.thepublicdiscourse.com/2013/07/10636/>.

39. Interview by Greg Stohr and Matthew Winkler, *Ginsburg: Doubt Gay Marriage Won’t Be Widely Accepted*, Bloomberg (Feb. 12, 2015), <http://www.bloomberg.com/news/videos/2015-02-12/ginsburg-doubt-gay-marriage-won-t-be-widely-accepted>.

40. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985).

41. Transcript of Oral Argument at 108:13-14, *Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307).

42. *Election Trends by Group: Party Affiliation*, Gallup, available at <http://www.gallup.com/poll/15370/party-affiliation.aspx>.

**Rational Basis: Social Function.** One could also argue, as the Fourth, Seventh, and Tenth Circuits have held, that there is simply no rational basis for man–woman marriage laws, meaning either that there is no legitimate purpose in such laws or that the laws are not rationally related to a legitimate purpose.<sup>43</sup> This argument fails completely as it ignores the universal historical record witnessing to the rational basis of man–woman marriage laws based on the social function that marriage plays.

From a policy perspective, marriage is about attaching a man and a woman to each other as husband and wife to be father and mother to any children their sexual union may produce. When a baby is born, there is always a mother nearby: That is a fact of biology. The policy question is whether a father will be close by and, if so, for how long. Marriage, rightly understood, increases the odds that a man will be committed to both the children that he helps to create and to the woman with whom he does so.<sup>44</sup> The man–woman definition of marriage reinforces the idea—the social norm—that a man *should* be so committed.

The man–woman definition, moreover, is based on the anthropological truth that men and women are distinct and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children deserve a mother and a father. Even President Barack Obama admits that children deserve a mother and a father:

We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.<sup>45</sup>

In short, fathers matter, and marriage helps to connect fathers to mothers and children. But you do not have to think this marriage policy is ideal to think it constitutionally permissible. Unless gays and lesbians are a suspect class, for an equal protection challenge to succeed, this simple analysis of the social function of marriage would have to be proved not just misguided, but positively irrational. Universal human experience, however, confirms the rationality of that policy.

**Compelling Interest and Narrowly Tailored: Constitutional at Any Level of Scrutiny.** Even if one (implausibly) granted that sexual orientation was a suspect class and that marriage laws thus had to be held to heightened scrutiny, man–woman marriage would still be constitutional. A strong marriage culture is a compelling interest because it affects virtually every other state interest, and defining marriage as the permanent and exclusive union of a husband and wife is a narrowly tailored means of allowing it to fulfill its social function.

As noted, there is no dispute that marriage plays a fundamental role in society by encouraging men and women to commit permanently and exclusively to each other and to take responsibility for their children. As the Sixth Circuit concluded, “[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States create[] an incentive for two people who procreate together to stay together for purposes of rearing offspring.”<sup>46</sup>

In addition to financial incentives, as ample social science confirms, this combination of state-sanctioned status and benefits also reinforces certain child-centered norms or expectations that form part of the social institution of marriage. Those norms—such as the value of gender-diverse parenting and of biological connections between children and the adults who raise them—independently encourage man–woman couples “to stay together for purposes of rearing offspring.” Given the importance of those norms to the welfare of the children of such couples,

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43. When courts find animus against a group, then laws fail rational basis review, though it is a more searching standard of review and so is often referred to as “rational basis with bite.”

44. Ryan T. Anderson, “Marriage: What It Is, Why It Matters, and the Consequences of Redefining It,” Heritage Foundation Backgrounder No. 2775 (Mar. 11, 2013), available at <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it>.

45. President Barack Obama, *Father’s Day Remarks*, N.Y. TIMES, July 15, 2008, <http://www.nytimes.com/2008/06/15/us/politics/15text-obama.html?pagewanted=print>.

46. *DeBoer*, 772 F.3d at 405.

the state has a compelling interest in reinforcing and maintaining them.

Most of those norms, moreover, arise from and/or depend upon the man–woman understanding that has long been viewed as central to the social institution of marriage.<sup>47</sup> For example, because only man–woman couples (as a class) have the ability to provide dual biological connections to the children they raise together, the state’s decision—implemented by the man–woman definition—to limit marital status and benefits to such couples reminds society of the value of those biological connections. It thereby gently encourages man–woman couples to rear their biological children together, and it does so without denigrating other arrangements—such as adoption or assisted reproductive technologies—that such couples might choose when, for whatever reason, they are unable to have biological children of their own.

Like other social norms traditionally associated with the man–woman definition of marriage, the biological connection norm will be diluted or destroyed if the man–woman definition (and associated social understanding) is abandoned in favor of a definition that allows marriage between “any two otherwise qualified persons”—which is what same-sex marriage requires. And just as those norms benefit the state and society, their dilution or destruction can be expected to harm the interests of the state and its citizens.

For example, over time, as fewer heterosexual parents embrace the biological connection norm, more of their children will be raised without a mother or a father. After all, it will be very difficult for the law to send a message that fathers and mothers are essential if it has redefined marriage to make fathers or mothers optional, and that in turn will mean more children of heterosexuals raised in poverty, doing poorly in school, experiencing psychological or emotional problems, having abortions, and committing crimes—all at significant cost to the state.

In short, law affects culture. Culture affects beliefs. Beliefs affect actions. The law teaches, and it will shape not just a handful of marriages, but the public understanding of what marriage is. Consider the impact of no-fault divorce laws, which are widely acknowledged to have disserved, on balance, the interests of the very children they were supposedly

designed to help. By providing easy exits from marriage and its responsibilities, no-fault divorce helped to change the perception of marriage from a permanent institution designed for the needs of children to a temporary one designed for the desires of adults. Thus, not only was it technically much easier to leave one’s spouse, but it was psychologically much easier as well, and the percentage of children growing up with just one parent in the home skyrocketed, with all of the attendant negative consequences.

This analysis also explains why a state’s decision to retain the man–woman definition of marriage should not be seen as demeaning to gay and lesbian citizens or their children and why it satisfies any form of heightened scrutiny. In the early 2000s, in the face of state judicial decisions seeking to impose same-sex marriage under state law, the definitional choice a state faced was a binary one: Either preserve the man–woman definition and the benefits it provides to the children (and the state) or replace it with an “any two qualified persons” definition and risk losing those benefits.

There is no middle ground. A state’s choice to preserve the man–woman definition is thus narrowly tailored—indeed, it is perfectly tailored—to the state’s interests in preserving those benefits and in avoiding the enormous societal risks that accompany a genderless-marriage regime. Under a proper means–ends analysis, therefore, a state’s choice to preserve the man–woman definition passes muster under any constitutional standard.<sup>48</sup>

### **Recognizing Same-Sex Marriages from Out of State**

If the points made above succeed—on the rational basis of state marriage laws defining marriage as the union of husband and wife and the reasonableness of thinking that redefining marriage will undermine the public policy purpose of such marriage laws—then a state should not be required to recognize other state marriage laws that would undermine its own public policy.

This conclusion follows from Article IV of the Constitution, which requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other

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47. See *Windsor*, 133 S.Ct. at 2718.

48. See *Grutter v. Bollinger*, 539 U.S. 982 (2003) (holding that affirmative action programs satisfied strict scrutiny and that the courts were required to defer to legislative facts found by decision-makers).

State.<sup>49</sup> This clause enabled the sovereign states to come together to form one union without everything having to be relitigated when parties moved to a new state,<sup>50</sup> but the Full Faith and Credit Clause does not require a state to recognize the policies of another state when doing so would undermine that state's own public policy. Full Faith and Credit "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."<sup>51</sup>

*Windsor* points out that "[m]arriage laws vary in some respects from State to State," such as "the required minimum age" and "the permissible degree of consanguinity."<sup>52</sup> If a state has good policy reasons for promoting marriage as the union of a man and a woman, then it does not have to accept out-of-state marriages that undermine its own policy preferences.<sup>53</sup> A state may apply its own marriage laws in preference to an out-of-state policy that it judges would undermine its own policy, because "as a sovereign [it] has a rightful and legitimate concern in the marital status of persons domiciled within its borders."<sup>54</sup>

Moreover, given that the Full Faith and Credit Clause deals specifically with the recognition of official acts in other states, there is no sound basis for invoking the Fourteenth Amendment as a stand-alone basis for requiring a state to recognize a marriage performed in another state.

## Conclusion

At the end of the day, there simply is nothing in the U.S. Constitution that requires all 50 states to redefine marriage. Part of the design of federalism is that experimentation can take place in the states: As the Sixth Circuit noted, "federalism...permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time."<sup>55</sup>

To make a plausible case to the contrary, as we have seen, one cannot reasonably appeal to the

authority of *Windsor*, to the text or original meaning of the Fourteenth Amendment, to the fundamental rights protected by the Due Process Clause, or to *Loving v. Virginia*. So, too, one cannot properly appeal to the Equal Protection Clause or to animus or *Lawrence*. Nor can one say that gays and lesbians are politically powerless, so one cannot claim they are a suspect class. Nor can one say that male-female marriage laws lack a rational basis or that they do not serve a compelling state interest in a narrowly tailored way.

The only way one can establish the unconstitutionality of man-woman marriage laws is to adopt a view of marriage that sees it as an essentially genderless, adult-centric institution and then declare that the Constitution requires that the states (re)define marriage in that way. In other words, one needs to establish that the vision of marriage our law has long applied is just wrong and that the Constitution requires a different vision entirely.

There is, however, no basis in the Constitution for reaching that conclusion any more than there was a basis in the Constitution for concluding—as *Dred Scott* did—that the people of the United States lacked the power to abolish slavery in their territories. Accordingly, any decision requiring states to redefine marriage is as much a usurpation of the people's authority as *Dred Scott* was.

—*Gene Schaerr* is a Washington, D.C.-based attorney who specializes in constitutional and appellate litigation. He has previously served as Associate Counsel to the President and as law clerk to Justice Antonin Scalia and has handled dozens of cases (including six he personally argued) before the U.S. Supreme Court. **Ryan T. Anderson, PhD**, co-author of the book *What Is Marriage? Man and Woman: A Defense*, is William E. Simon Fellow in the Richard and Helen DeVos Center, of the Institute for Family, Community, and Opportunity, at The Heritage Foundation.

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49. U.S. Const. art. IV, § 1.

50. See Erin O'Hara O'Connor, *Full Faith and Credit Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed.), available at <http://www.heritage.org/constitution#!/articles/4/essays/121/full-faith-and-credit-clause>.

51. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998) (quotes omitted).

52. *Windsor*, 133 S.Ct. at 2691-92.

53. The Supreme Court has required "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494-95 (2003) (quotes omitted).

54. *Williams*, 317 U.S. at 298.

55. *DeBoer*, 772 F.3d at 406.