

Fifth Session Readings

Supreme Court Briefs in Gay Marriage Cases (Excerpts)

Brief for Proponents of Proposition 8.

A. Proposition 8 advances society's vital interest in responsible procreation and childrearing.

1. Responsible procreation and child-rearing has been an animating purpose of marriage in virtually every society throughout history.

. . . . [A]n overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and

enduring family units by both the mothers and the fathers who brought them into this world.

2. Proposition 8 furthers society's vital interests in responsible procreation and childrearing.

By providing special recognition, encouragement, and support to committed opposite-sex relationships, the traditional institution of marriage preserved by Proposition 8 seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests in responsible procreation and childrearing.

Because same-sex relationships cannot naturally produce offspring, they do not implicate the State's interest in responsible procreation and childrearing in the same way that opposite-sex relationships do.It is plainly reasonable for California to maintain a unique institution to address the unique challenges posed by the

unique procreative potential of sexual relationships between men and women.

. . . [T]he question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether the child will be raised by both its mother and its father or by its mother alone, often relying on the assistance of the State. . . . And there can be no question that children raised by both their mother and father generally do better than children raised by their mother alone, and that the State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with single motherhood. Thus, regardless of any provisions the State may make regarding the families of gays and lesbians, it is plainly rational for the State to make special provision through the institution of marriage to minimize the social risks uniquely posed by potentially procreative sexual relationships between men and women. . . .

B. Proposition 8 serves California's interest in proceeding with caution before fundamentally redefining a bedrock social institution.

... [T]he People of California could reasonably fear that redefining marriage without first securing a broad-based democratic consensus for the change could weaken that institution, which has traditionally drawn much of its strength not from the State, but from social norms derived from and sustained by public opinion, the community and the private organizations (such as churches) that have long partnered with the State in encouraging marriage, performing marriage ceremonies providing marriage counseling, and otherwise supporting this vital institution. ... Social consensus is important in this context, because marriage's unique strength is its ability to fortify, not just ratify, the bond that creates family; and that ability comes from the web of social expectations and support that the community brings to the marriage.

. . . . Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget. . . . [B]y redefining marriage, the law would teach that marriage is essentially an emotional union without any inherent connection to procreation and family life. And if marriage is understood as an essentially emotional union, then marital norms, especially permanence and exclusivity, will make less sense.

Indeed, some gay rights advocates favor redefining marriage *because* of its likely adverse effects on the traditional understanding and purposes of marriage. They argue that redefining marriage “is a breathtakingly subversive idea” [cite] that “will introduce an implicit revolt against the [institution of marriage] into its very heart,” [cite], such that “that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers” [cite].

More generally, even some supporters of redefining marriage to include same-sex relationships . . . identify such a redefinition as “the most recent development in the deinstitutionalization of marriage,” which [Prof. Chertlin of Johns Hopkins] defines as the “weakening of the social norms that define people’s behavior in . . . marriage.” [cite]. This weakening of social norms entails shifting the focus of marriage from serving vital societal needs to facilitating the personal fulfillment of individuals. . . .

Other scholars agree. Professor Norval Glenn, for example, believes that the traditional purposes of marriage – “regulation of sexual activity and the provision for offspring that may result from it” – have been weakened by the gradual “blurring of the distinction between marriage as an institution and mere ‘close relationships.’” [cite] He fears that “acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of

society, the community, or any social entity larger than the couple.” [cite]

Amicus Brief for Prof. Helen Alvare, George
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III. REDEFINING MARRIAGE IN A WAY THAT
DE-LINKS SEX, MARRIAGE AND CHILDREN
CAN HARM THE MOST VULNERABLE
AMERICANS AND EXACERBATE THE

“MARRIAGE GAP,” WHICH IS RESPONSIBLE
FOR INCREASING LEVELS OF SOCIAL
INEQUALITY IN AMERICA.

The disappearing of children’s interests in marriage, both at law and in culture, and the vaulting of adults’ emotional and status interests, are, today, associated with a great deal of harm, particularly among the most vulnerable Americans. This, in turn, has led to a growing gap between the more and less privileged in the United States, threatening our social fabric. Recognizing same-sex marriage would confirm and exacerbate these trends.

. . . .

The notion of marriage that same-sex advocates are describing and demanding from this Court and from every state, closely resembles the adult-centric view of marriage associated with the “retreat from marriage” among disadvantaged Americans. It would intrinsically and overtly separate sex and children from marriage, for

every marriage and every couple and every child. .

..

Of course, it is not solely the fault of same-sex marriage proponents that we have come to a “tipping point” regarding marriage in the United States, where if the procreational aspects of marriage are not explicitly preserved and highlighted, additional harm will come upon vulnerable Americans and our social fabric itself.

The historic institution of marriage was already weakened, likely emboldening same-sex marriage advocates to believe that a redefinition of marriage was only a step, not a leap away. But in its essence, and in the arguments used to promote it, same-sex marriage would be the coup de grace to the procreative and social roles of marriage. It is hoped that the necessary movements for equality and nondiscrimination for gays and lesbians will choose a new path and leave marriage to serve the crucial purposes it is needed to serve.

Brief for Parties Challenging Proposition 8

A. Discrimination On The Basis of Sexual Orientation Triggers Heightened [Judicial] Scrutiny.

[G]ay men and lesbians have faced and continue to face severe discrimination based on naked prejudice and unfounded stereotypes. . . .

[T]he fact that the current Administration and a narrow majority in a handful of States have expressed support for marriage equality is no guarantee that a future Administration or populace will not target gays and lesbians for discrimination. . . . In fact, in 15 of 21 referenda held on the sole question whether an existing law

or executive order prohibiting sexual orientation discrimination should be repealed, a majority voted for repeal [cite] Thus, as much as any other minority group, gay men and lesbians require the protections of heightened [judicial] scrutiny to shield them from the often-discriminatory whims of the political process.

B. Laws That Prohibit Gay Men and Lesbians From Marrying Cannot Survive . . . Heightened [Judicial] Scrutiny.

In the words of the court of appeals, ‘there is no rational reason to think that taking away the designation of ‘marriage’ from same-sex couples would advance the goal of encouraging California’s opposite-sex couples to procreate more responsibly.”

There are many classes of heterosexual persons who cannot procreate unintentionally, including the old, the infertile, and the incarcerated. And there are still other classes of heterosexual persons who might have the capacity to procreate, but who have no desire to do so. *All*

of these classes of heterosexual persons are as unlikely to procreate by accident as a same-sex couple, yet Proposition 8 is concerned with *none* of them. Proposition 8 targets gay men and lesbians for exclusion and them alone.

Ironically, the surest and most direct impact of Proposition 8 on children is not to increase the likelihood that they will be raised in stable and enduring family units, but . . . to make it *less* likely that California children will be raised in stable households by reducing the number of families who can be married. . . .

To the extent that [the plaintiffs] are asserting that Proposition 8 furthers a purported interest in raising children in . . . the ‘optimal social structure’ for child development [cite] . . . that, too, fails even the most cursory scrutiny. . . . In fact, the district court squarely and unequivocally found that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted.”

Proponents presented no witness who discussed data or studies tending to show that permitting gay men and lesbians to marry harms the institution of marriage. Proponents' "deinstitutionalization" expert . . .; had not even seen a seminal 2009 study . . . that concluded that 'laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women.' [cite] [Indeed, Proponents' witness conceded] that "heterosexuals . . . did the deinstitutionalizing" through the growing prevalence of divorce, nonmarital cohabitation, and other factors."

[The] complete failure of proof by Proponents is accurately reflected in the district court's factual finding that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."

Proponents fall back on the claim that the tradition of restricting marriage to opposite-sex couples is itself a rational justification for continuing to do so. . . . It is beyond peradventure, however, that a tradition of discrimination – no matter how continuous or longstanding – cannot justify the perpetual marginalization and exclusion of a minority group. [citing school desegregation cases]

Brief for Congressional parties defending DOMA

C. Congress Rationally Proceeded with Caution When Faced with the Unknown Consequences of an Unprecedented Redefinition of Marriage, a Foundational Social Institution, by a Minority of States.

Congress rationally could have regarded any significant change in the definition of this bedrock institution as having potentially significant consequences. Congress thus rationally could

have concluded that any experimentation with such a longstanding institution should proceed first at the state level, while the federal government retains the traditional definition for its own purposes. [Cite]

Virtually no society anywhere has had even a single generation's worth of experience with treating same-sex relationships as marriages. There is thus ample room for a wide range of rational predictions about the likely effects of such recognition As two supporters of same-sex marriage put it, "whether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them." [Cite] In light of the uncertainty about the consequences of changing such a long-established institution, it certainly was rational for Congress to decide to allow states to act as laboratories of democracy, while the federal government awaited the results of such state experiments.