

3-1-2012

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Recommended Citation

Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 Loy. L.A. L. Rev. 781 (2012).
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THE DESCENT OF RESPONSIBLE PROCREATION: A GENEALOGY OF AN IDEOLOGY

*Julie A. Nice**

Just as societal practices related to marriage and procreation have changed remarkably during the past several decades, the amount of litigation regarding same-sex marriage has increased substantially. Over time, defenders of state bans on same-sex marriage have primarily leaned on the responsible-procreation defense, which surmises that same-sex couples already procreate responsibly and that the rights and responsibilities of marriage should be limited to furthering the goal of encouraging more responsible procreation by heterosexuals.

This Article traces the genealogy of responsible procreation. Rooted in religion, the defense was once rejected as a justification for limiting heterosexuals' constitutional rights. Later, it appeared as a justification of the federal Defense of Marriage Act. Soon, courts split on its constitutionality: the high court of Massachusetts found it to be "unpersuasive" while other state appellate courts used it as a justification for their rejections of challenges to same-sex-marriage bans. Finally, with the first federal trial and subsequent Ninth Circuit decision on the constitutionality of California's Proposition 8, the responsible-procreation defense succumbed to the overwhelming weight of evidence against its logic.

As a result, the emerging trend is that both executive officials and courts are rejecting the defense and concluding that same-sex-marriage bans are drawn not to further proper legislative ends but to make same-sex couples and their children unequal to everyone else.

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I. INTRODUCTION

This Article traces the genealogy of responsible procreation, which has emerged as the primary defense of the same-sex-marriage ban. To put it succinctly, the responsible-procreation defense surmises that same-sex couples already procreate responsibly and that the rights and responsibilities of marriage should be limited to furthering the goal of encouraging more responsible procreation by heterosexuals.¹ This Article seeks to illuminate the responsible-procreation defense by tracing how it emerged and how it has functioned and fared in constitutional challenges.²

What does this genealogy of responsible procreation reveal? Here is a brief preview of what is to come. The roots of responsible procreation are undoubtedly religious,³ and its presuppositions are in considerable tension with current social and legal realities.⁴ Most saliently, responsible procreation has been rejected as a justification for limiting heterosexuals' constitutional rights.⁵ Its starring role was in welfare reform's racialized and gendered rhetoric demonizing poor, single, black mothers.⁶ On welfare reform's heels, Congress hastily harnessed responsible procreation for use in the Defense of Marriage Act,⁷ racing against the much-feared first state recognition of same-sex marriage.⁸ When first subjected to trial at the state level, the responsible-procreation defense lacked credible supporting evidence.⁹ But leading social-conservative academics and advocates came to its rescue.¹⁰ The newly elaborated defense was rejected

1. See Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 781–87 (2001).

2. Although I limit my historical reach to relatively recent contemporary time, my aim is "to defamiliarize taken-for-granted beliefs in order to render them susceptible to critique and to illuminate present-day conflicts[.]" in the great tradition of Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS: J. WOMEN CULTURE & SOC'Y 309, 310–11 (1994).

3. See *infra* notes 69–84 and accompanying text.

4. See *infra* notes 85–105 and accompanying text.

5. See *infra* notes 103–27 and accompanying text.

6. See *infra* notes 134–40 and accompanying text.

7. H.R. REP. NO. 104-664, pt. 5, at 12–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910–14.

8. See *infra* notes 130–54 and accompanying text.

9. See *infra* notes 155–71 and accompanying text.

10. See *infra* note 176 and accompanying text.

nonetheless as “unpersuasive” in a sleeper test case as well as in the notorious decision invalidating the same-sex-marriage ban in Massachusetts.¹¹ Eventually, however, several state intermediate and high courts endorsed it.¹² But other state high courts have rejected the defense, and some state governments and now the federal government have disavowed it.¹³ It has failed to withstand the rigor of its first federal trial, succumbing to the overwhelming weight of evidence against its logic.¹⁴ In addition, most courts since the first federal trial have rejected the defense in recent challenges to various anti-gay measures.¹⁵ In short, the responsible-procreation defense appears to be ideological, invidious, and on the wane.

This genealogy was provoked by two particularly riveting moments that occurred during the litigation of California’s Proposition 8 (“Prop 8”), revealing the crux of the constitutional controversy over banning same-sex marriage. First came the “I don’t know” moment. During a pretrial hearing, the federal district court judge asked counsel representing the Prop 8 proponents how recognizing same-sex marriage impaired the state’s interest in regulating procreation via marriage.¹⁶ The Prop 8 proponents’ counsel responded, “Your honor, my answer is: I don’t know. I don’t know.”¹⁷ Not surprisingly, media reports highlighted what seemed like a critical admission.¹⁸ The Prop 8 proponents argued on appeal, however, that their counsel’s meaning was clarified by his full

11. See *infra* notes 174–82 and accompanying text.

12. See *infra* notes 190–202 and accompanying text.

13. See *infra* note 203–205 and accompanying text.

14. See *infra* notes 228–234. In *Perry v. Schwarzenegger*, the trial court made roughly eighty factual findings supported by over 330 subparts citing to specific evidence in the record, and the court further incorporated seventy-five citations to evidence in its legal analysis. 704 F. Supp. 2d 921, 953 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012). The court noted that it relied primarily on the evidence cited but also on “uncited cumulative documentary evidence in the record.” *Id.*

15. See discussion *infra* Parts XI, XII.

16. *Perry*, 704 F. Supp. 2d at 931.

17. *Id.*

18. See, e.g., Bob Egelko, *Judge Won’t Toss Prop. 8 Challenge; Same-Sex Marriage*, S.F. CHRON., Oct. 15, 2009, at A1; Adam Liptak, *In Battle on Marriage, the Timing May Be Key*, N.Y. TIMES, Oct. 27, 2009, at A14; *Judge Refuses to Dismiss Gay Marriage Ban Suit*, MSNBC.COM (Oct. 14, 2009, 9:31:14 PM), http://www.msnbc.msn.com/id/33319490/ns/us_news-crime_and_courts.

statement that “it depends on things we can’t know” because the impact of same-sex marriage “can’t possibly be known now.”¹⁹

Second came the “you don’t have to have evidence” moment. During closing argument, the Prop 8 proponents’ counsel emphasized, “[R]esponsible procreation is really at the heart of society’s interest in regulating marriage.”²⁰ When the trial court interjected and asked counsel to identify the evidence from the trial that supported this contention, counsel replied, “[Y]ou don’t have to have evidence of this point.”²¹ Again, the proponents argued on appeal that their counsel’s full response clarified his meaning: “*You don’t have to have evidence of this point* if one court after another has recognized [it].”²²

These moments revealed the constitutional dispute’s core question: whether the government needs, and whether it has, any evidence to support the now-residual justification that banning same-sex marriage is rationally related to the purported governmental interest of ensuring responsible procreation. The Prop 8 proponents maintain that the constitutionality of banning same-sex marriage could not be determined based on evidence at a trial.²³ This position was itself a turnabout for those defending the same-sex-marriage ban. During the litigation in Iowa, for example, the state insisted the constitutional challenge to the ban raised “factual disputes” and claimed the denial of a trial there had hindered the state’s ability to present evidence to demonstrate that banning same-sex marriage was, in fact, rationally related to “preserving procreative marriage.”²⁴

19. Defendant-Intervenors-Appellants’ Opening Brief at 41 n.17, *Perry*, 2012 WL 372713 (Nos. 10-16696, 11-16577), 2010 WL 3762119, at *41 n.17 [hereinafter Proponents’ Appellate Brief] (internal quotation marks omitted).

20. *Perry*, 704 F. Supp. 2d at 931 (internal quotation marks omitted).

21. *Id.* (internal quotation marks omitted).

22. Proponents’ Appellate Brief, *supra* note 19, at 42 (internal quotation marks omitted).

23. *See id.* at 41 n.17 (arguing that the implications of same-sex marriage cannot yet be determined at a trial).

24. *See* Final Amended Reply Brief of Defendant-Appellant at 19, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499), 2008 WL 5156763, at *19 (arguing that the state’s witnesses “should have been considered as their reasoning is something that the legislature could believe as being part of the purpose in preserving procreative marriage which is a rational basis for the law” and that “factual disputes” should have barred summary judgment for the plaintiffs). It is interesting to note that the two witnesses Iowa’s brief claimed the state had intended to call as marriage experts, *id.*, were the same two witnesses who were deposed during the California litigation, namely Katherine Young and Paul Nathanson from McGill University in Canada. *Perry*, 704 F. Supp. 2d at 944. When the Prop 8 proponents withdrew Young and Nathanson as witnesses, the plaintiffs entered their deposition testimony into evidence because their testimony

So what about the evidence? Two trials have served as bookends, thus far, for the current wave of litigation that is challenging the governmental justifications for banning same-sex marriage. During the first trial in Hawaii in 1996, the state promised to present evidence demonstrating how banning same-sex marriage was necessary to ensure responsible procreation, but the state effectively abandoned any effort to support this argument at trial.²⁵ Most recently in California in 2010, the state defendants declined to defend Prop 8 in any manner, and thus the state remained officially silent as to its interests.²⁶ But state officials expressly disavowed the responsible-procreation defense during prior litigation in state court on the grounds that the defense hardly comports with official state policy.²⁷ In lieu of the state asserting its official interests, the ballot proponents defending Prop 8 have relied on responsible procreation as their primary defense.²⁸ They have not, however, supported the argument with much evidence. Indeed, the federal district court characterized their strategy as “eschewing all but a rather limited factual presentation.”²⁹

That the question has come down to the responsible-procreation defense is rather remarkable for two reasons relevant here, one jurisprudential and one ideological. Certainly, defenders of the same-sex-marriage ban have marshaled the full panoply of jurisprudential

included critical admissions that supported the plaintiffs’ evidence. *Id.* For example, according to the trial court’s description of their testimony,

Young testified at her deposition that homosexuality is a normal variant of human sexuality and that same-sex couples possess the same desire for love and commitment as opposite-sex couples. Young also explained that several cultures around the world and across centuries have had variations of marital relationships for same-sex couples. . . . Nathanson testified at his deposition that religion lies at the heart of the hostility and violence directed at gays and lesbians and that there is no evidence that children raised by same-sex couples fare worse than children raised by opposite-sex couples.

Id. at 944–45 (citation omitted).

25. See *infra* note 158 and accompanying text.

26. *Perry*, 704 F. Supp. 2d at 928. The attorney general conceded that Prop 8 is unconstitutional. *Id.*

27. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 723 n.33 (Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5.

28. *Perry*, 704 F. Supp. 2d at 931 (“During closing arguments, proponents again focused on the contention that responsible procreation is really at the heart of society’s interest in regulating marriage.” (citation omitted)).

29. *Id.* The trial court emphasized that the proponents had an “ample opportunity” to support their arguments in a “full trial” in which they were represented by “able and energetic counsel.” *Id.* at 1001–02.

arguments, with the responsible-procreation defense buried among formal, historical, doctrinal, moral, structural, positive rights, and slippery-slope arguments. The responsible-procreation defense essentially makes a functional argument, asserting that marriage's function is to encourage responsible procreation and optimal parenting.³⁰ It seems especially surprising that such a functional argument would emerge as the nearly exclusive focal point for the same-sex-marriage-ban defense precisely because legal policy at the state and federal levels generally does not prevent same-sex couples from procreating and parenting, studies show no difference in the well-being of their children, and their children have the same need for stability as marital children have.³¹

Why then has the responsible-procreation defense emerged as the primary defense? Perhaps it remains because the other doctrinal arguments simply fail to withstand contemporary constitutional jurisprudence. The formal argument—asserting that the same-sex-marriage ban merely follows the definition of marriage to include only opposite-sex couples—fails on its own circularity, just as any definitional exclusion begs the question of its justification. The historical argument—asserting that the ban preserves the tradition of including only opposite-sex couples³²—fails because tradition alone does not suffice to justify denials of liberty and equality. The doctrinal argument—asserting that the ban is constitutional because the Supreme Court has not recognized same-sex marriage as a fundamental right or same-sex couples and their children as a suspect class so as to warrant heightened scrutiny³³—fails because the Court has yet to reach these questions and also because both *Romer v. Evans*³⁴ and *Lawrence v. Texas*³⁵ demonstrate that discrimination against gays sometimes fails even rationality review. The moral argument—asserting that the societal majority disapproves of

30. *Id.* at 932 (“[T]he state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households.”).

31. *See supra* notes 3–5 and accompanying text.

32. *Perry*, 704 F. Supp. 2d at 930 (“Denial of marriage to same-sex couples preserves [the tradition of opposite-sex] marriage.”).

33. Proponents’ Appellate Brief, *supra* note 19, at 70.

34. 517 U.S. 620 (1996).

35. 539 U.S. 558 (2003).

homosexuality as unnatural and/or immoral³⁶—fails because moral disapproval alone is not a sufficient justification for denials of equality or liberty. The structural argument—asserting that separation-of-powers principles would leave the question to the legislature and federalism principles would leave it to the states³⁷—fails because the judiciary must enforce constitutional protections of liberty and equality against both the legislature and the states. The positive-right argument—asserting that marriage is a positive rather than a negative right and thus is effectively protected from constitutional challenge³⁸—fails because the Court has not treated marriage as such a positive right in its other marriage decisions. Finally, the typical last resort slippery-slope argument—asserting that allowing same-sex marriage will lead to a parade of horrors such as polygamy or incest or the like³⁹—fails because the law draws lines every day, and the duty of the judiciary is precisely to examine the constitutionality of these lines as challenges arise.

It is surprising, nonetheless, that the responsible-procreation defense would be the last defense standing, given that it has so little “footing in the realities” of the context,⁴⁰ a fact that the courts must consider.⁴¹ Whether at the level of heightened scrutiny or rationality review, any justification for an unequal denial of liberty must be based on a means-to-end relationship that is actually or factually rational considering the relevant evidence (rather than merely

36. *Perry*, 704 F. Supp. 2d at 936 (“[A] primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California.”).

37. Proponents’ Appellate Brief, *supra* note 19, at 102–03 (“[O]ur Constitution establishes a federal system that permits a diversity of approaches to difficult and uncertain state issues.”).

38. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *see also Perry*, 704 F. Supp. 2d at 957 (making an analogy with racial restrictions on marriage that “[d]efenders of race restrictions argued the laws were ‘naturally-based and God’s plan just being put into positive law’”).

39. FAMILY RESEARCH COUNCIL, THE SLIPPERY-SLOPE OF SAME-SEX MARRIAGE (2004), available at <http://downloads.frc.org/EF/EF04C51.pdf>.

40. *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *22 (9th Cir. Feb. 7, 2012) (citing *Heller v. Doe ex rel Doe*, 509 U.S. 312, 321 (1993)).

41. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369, 370–73, 376, 378 (1967) (considering “immediate objective,” “ultimate effect,” and “historical context and the conditions existing prior to its enactment,” while also “sifting facts and weighing circumstances” to determine whether a voter initiative that amended the California Constitution to prohibit anti-discrimination housing laws “constitutionalized” discrimination in violation of equal protection).

conceivable because relevant evidence is ignored).⁴² Yet after two full trials, defenders of the same-sex-marriage ban have not demonstrated that it rationally furthers responsible procreation. So why do they continue to press this defense?

The remaining explanation for the endurance of the responsible-procreation defense is ideological. In short, perhaps the defense itself best reflects the ideology of the movement against same-sex marriage, which has made exhaustive efforts to deny same-sex couples and their children the rights and responsibilities of marriage.⁴³ This movement has proven its dedication to restoring and imposing traditional family values through law,⁴⁴ and perhaps the responsible-procreation defense best matches these traditional family values. What is surprising on the ideological level is that the responsible-procreation defense actually contradicts a well-established ideological belief that forms the underlying basis of the opposition to gay rights. Those mobilized around opposition to gay rights routinely have charged gay and lesbian individuals with engaging in sexually promiscuous and irresponsible behavior. For example, the Family Research Council has declared: “[T]he vast majority of homosexual relationships are short-lived and transitory,” “homosexual couples typically engage in a shocking degree of promiscuity,” and therefore they “are unsuitable role models for children because of their lifestyle.”⁴⁵ In defending same-sex-marriage bans, however, such organizations are contradicting these historic stereotypes of gays and lesbians, arguing in effect that same-sex couples have behaved so responsibly in planning and investing in their families that they do not need the support of marriage.⁴⁶ These

42. See, e.g., Brief Amicus Curiae of Constitutional Law & Civil Procedure Professors Erwin Chemerinsky, et al., in Support of Plaintiffs-Appellees Urging Affirmance at 15–19, *Perry*, (Nos. 10-16696, 11-16577), 2010 WL 4622572, at *15–19.

43. See EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* 194–97 (2004) (explaining that preventing gay couples from marrying denies them and their children certain tangible and intangible benefits); see, e.g., Richard Kim, *Why Proposition 8 Won in California*, CBS NEWS (Nov. 7, 2008), <http://www.cbsnews.com/stories/2008/11/07/opinion/main4581859.shtml> (explaining that the Christian Right used a “staggering disinformation campaign” to organize support for California’s ban on gay marriage).

44. See, e.g., Kim, *supra* note 43.

45. FAMILY RESEARCH COUNCIL, *supra* note 39, at 3–4. In this example, the FRC cites one study on HIV infections in Amsterdam as support for its conclusion. *Id.* at 4 n.8.

46. One appellate brief went so far as to assert that a state “could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in

organizations now assert in litigation that different-sex couples are the ones whose sexual promiscuity and parental irresponsibility endanger societal interests, and therefore marriage must be reserved as an incentive available only for different-sex couples to encourage more responsible heterosexual behavior.⁴⁷

Lower courts that have endorsed the responsible-procreation justification also appear to be relying on this new nonpromiscuous and ultrasensible stereotype of same-sex parents as the basis for arguing that same-sex couples do not need marriage.⁴⁸ For example, one state intermediate appellate court reasoned that parents

who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional

opposite-sex than in same-sex relationships” and “that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.” Brief Amici Curiae of James Q. Wilson et al., Legal & Family Scholars in Support of Defendant-Appellees at 5, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716), 2007 WL 4725446, at *5 [hereinafter Brief Amici Curiae of James Q. Wilson et al.] (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006)).

47. See *id.* The federal trial court in *Perry* described the logic of the Prop 8 proponents’ argument as follows:

[T]he state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households. The state therefore, the argument goes, has an interest in encouraging all opposite-sex sexual activity, whether responsible or irresponsible, procreative or otherwise, to occur within a stable marriage, as this encourages the development of a social norm that opposite-sex sexual activity should occur within marriage. Entrenchment of this norm increases the probability that procreation will occur within a marital union. Because same-sex couples’ sexual activity does not lead to procreation, according to proponents the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to proponents, the state’s only interest is in opposite-sex sexual activity.

Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010) (citations omitted), *aff’d sub nom. Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

48. See, e.g., *Hernandez*, 855 N.E.2d at 7. It is perhaps ironic that the assumption of ultrasensible procreative behavior on the part of same-sex couples seems to make more sense if both same-sex partners are recognized as legal parents with duties to support the child, which the anti-gay-rights movement opposes. At the very least, it seems doubtful that a similar accolade of responsibility would be bestowed upon sperm donors with prolific offspring. See, e.g., Jacqueline Mroz, *From One Sperm Donor, 150 Children*, N.Y. TIMES, Sept. 6, 2011, at D1 (discussing how, in the United States, not only are sperm donors anonymous but there are no limitations on the number of sperm a male can donate).

commitment exerted in conceiving or adopting a child or children in the first place.⁴⁹

This court specifically described such parents as “heavily invested”⁵⁰ and simply dismissed in footnotes the fact that some same-sex couples have children without any extraordinary financial investment, such as from prior opposite-sex relationships or from unassisted artificial insemination.⁵¹ This court nonetheless commended these purportedly responsible same-sex parents while criticizing irresponsible opposite-sex parents who procreate by “natural” reproduction “with no foresight or planning” and “without any thought for the future,” because “‘accidents’ do happen” and “unintended children” may arrive “unexpectedly.”⁵² This court concluded the state “may legitimately create” opposite-sex marriage “to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse” and to encourage parents to stay together to raise their children.⁵³ Because same-sex couples “are not at ‘risk’ of having random and unexpected children,” this court held that the state could distinguish based on “the ability to procreate ‘naturally.’”⁵⁴ Neither this court nor any of the others that have endorsed the responsible-procreation defense has grappled meaningfully with the fact that dissolution, disability, and death happen to same-sex couples and that their children sometimes suffer the loss of a parent’s support.

The cognitive dissonance is apparent: the anti-gay-rights movement often has promulgated an ideological belief about the promiscuity of gays and lesbians⁵⁵ to justify denying rights. But they now contradict this belief in an effort to justify denying marriage rights to same-sex couples, basically sacrificing their goal of

49. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

50. *Id.*

51. *Id.* at 24 nn.9–10.

52. *Id.* at 24–25 (emphasis omitted).

53. *Id.*

54. *Id.* at 30–31.

55. I limit my analysis to gay and lesbian rights, rather than bisexual and/or transgender rights, because that has been the focus of the campaign against same-sex marriage. For a superb analysis of how the containment of bisexuality pervades this controversy, see Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. (forthcoming 2012).

perpetuating the ideological belief about same-sex promiscuity in favor of their overarching goal of denying gay rights.⁵⁶

To be sure, although the responsible-procreation argument contradicts the stereotype of the promiscuous gay, it nonetheless serves to reinforce the stereotype of the affluent gay by assuming that same-sex parents have sufficient resources to invest in their families. Justice Antonin Scalia notoriously invoked the affluent-gay stereotype in his dissent in *Romer*.⁵⁷ To support his argument that gays have disproportionate political power, Justice Scalia explained: “[T]hose who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large”⁵⁸ But Justice Scalia’s generalized assumption of affluence belies the evidence. As recent Census Bureau data reveal, same-sex couple families are “significantly more likely to be poor than are heterosexual married couple families.”⁵⁹ Even more striking is the finding that children in households headed by same-sex couples suffer “poverty rates twice those of children in heterosexual married couple households.”⁶⁰ In short, the children deemed nonmarital due to the same-sex-marriage ban have no less need of parental responsibility than marital children have.

Surely the fervor behind the opposition to same-sex marriage reflects the various ideological commitments of the anti-gay-rights movement. The question is what role the responsible-procreation defense plays in perpetuating this ideology. In other words, what is the meaning of judicial endorsement of the responsible-procreation defense? This question is of enormous importance. A rich scholarly literature continues to demonstrate and explore the productive role of government in shaping not only law and policy but also social status

56. For a richly detailed contextual analysis about “how these debates over same-sex marriage are all about rights, and ironically all about their limits,” see JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 37 (2002).

57. 517 U.S. 620, 636–52 (1996) (Scalia, J., dissenting).

58. *Id.* at 645–46 (citations omitted).

59. RANDY ALBELDA ET AL., *THE WILLIAMS INST., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* at i (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

60. *Id.*

and even identity, including sexuality.⁶¹ To illuminate the role of the responsible-procreation defense, this Article starts at the beginning of the contemporary same-sex marriage controversy and traces its genealogy.

II. THE RELIGIOUS ROOTS OF RESPONSIBLE PROCREATION

During the first wave of litigation challenging state refusals to allow same-sex couples to marry in the early 1970s, courts rejected challenges to the denial of same-sex marriage based in part on assumptions that same-sex couples do not procreate to form families and that marriage is the natural channel for procreation. As the state of Washington's intermediate appellate court succinctly explained in *Singer v. Hara*,⁶² "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union."⁶³

In addition to the original appeal to nature in attempting to establish a link between marriage and procreation, this purported link was also tied to a particular religious heritage.⁶⁴ For example, in *Baker v. Nelson*,⁶⁵ the Minnesota Supreme Court explained, "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁶⁶ Of course, this biblical source also

61. Perhaps the most formidable recent example of such scholarship is the multiple-award-winning book MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009). Canaday melds sexuality studies with social policy, political theory, and legal theory to examine the contexts of the military, immigration, and welfare regulation. *See id.* She meticulously demonstrates how the construction of status/identity and the state were simultaneous and mutually reinforcing, ultimately producing "a state that not only structures but is itself structured by sexuality." *Id.* at 258. For an excellent overview of the types of scholarly literature exploring the various roles of state actors, see John D. Skrentny, *Law and the American State*, 32 ANN. REV. SOC. 213 (2006).

62. 522 P.2d 1187 (Wash. Ct. App. 1974).

63. *Id.* at 1195. The state intermediate appellate court also concluded that marriage "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." *Id.*

64. Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One*, 2001 U. ILL. L. REV. 1, 8-31 (2001) (providing an examination of the religious roots of the opposition to same-sex marriage).

65. 191 N.W.2d 185 (Minn. 1971).

66. *Id.* at 186.

provided abundant material contradicting the notion that procreation is inherently tied to monogamous marriage.⁶⁷

As the nascent movement for gay rights struggled for legal traction during the 1970s and 1980s, the assumptions that same-sex couples do not procreate⁶⁸ and that religious morality condemns homosexuality were quite common.⁶⁹ Perhaps the most famous articulation of each assumption emerged from the Supreme Court in its 1986 decision upholding the criminalization of sodomy in *Bowers v. Hardwick*.⁷⁰ Justice White's reasoning for the majority directly made the point: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated"⁷¹ It was left to Chief Justice Burger to cite religious heritage in his concurrence, asserting that condemnation of homosexuality "is firmly rooted in Judeo-Christian moral and ethical standards"⁷² and invoking Blackstone's notorious description of sodomy as "an offense of 'deeper malignity' than rape."⁷³

The following year, the Vatican released its own articulation of "responsible procreation" in response to scientific advances in biomedical-reproductive technology.⁷⁴ Penned by then-Cardinal Joseph Ratzinger, the Vatican's *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation* sought to establish procreative guidelines based on Catholic morality

67. E.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 20 (2009) ("Sarah's handmaiden Hagar, who gave birth to Abraham's children because of Sarah's infertility, would be quite surprised to discover that marriage was the institution designed to police Abraham's sexual impulses; and the sisters Rachel and Leah, both married to Jacob, knew that marriage facilitated, rather than constricted, Jacob's access to multiple sexual partners.").

68. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1396–97 (2010).

69. See Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 167–68 (1998).

70. 478 U.S. 186 (1986).

71. *Id.* at 191.

72. *Id.* at 196 (Burger, C.J., concurring).

73. *Id.* at 197.

74. JOSEPH CARDINAL RATZINGER & ALBERTO BOVONE, CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (1987), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

principles.⁷⁵ In explaining why human procreation must take place in marriage, the Instruction was clear: “from the moral point of view a truly responsible procreation vis-à-vis the unborn child must be the fruit of marriage.”⁷⁶ An examination of the text of the Vatican’s explanation for this *Instruction* reveals how strikingly similar it is to the responsible-procreation argument that has emerged in constitutional litigation, as this key excerpt reveals:

For human procreation has specific characteristics by virtue of the personal dignity of the parents and of the children: the procreation of a new person, whereby the man and the woman collaborate with the power of the Creator, must be the fruit and the sign of the mutual self-giving of the spouses, of their love and of their fidelity. The fidelity of the spouses in the unity of marriage involves reciprocal respect of their right to become a father and a mother only through each other. The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage: it is through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper human development. The parents find in their child a confirmation and completion of their reciprocal self-giving: the child is the living image of their love, the permanent sign of their conjugal union, the living and indissoluble concrete expression of their paternity and maternity[.] By reason of the vocation and social responsibilities of the person, the good of the children and of the parents contributes to the good of civil society; the vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage. The tradition of the Church and anthropological reflection recognize in marriage and in its indissoluble unity the only setting worthy of truly responsible procreation.⁷⁷

75. *Id.*; see also Rachel Anne Fenton, *Catholic Doctrine Versus Women’s Rights: The New Italian Law on Assisted Reproduction*, 14 *MED. L. REV.* 73, 79 (2006) (examining the influence of Catholic doctrine on Italian law restricting assisted reproduction).

76. RATZINGER & BOVONE, *supra* note 74, at pt. II.A.1.

77. *Id.* (endnotes omitted).

As the *Instruction* explained, the Vatican linked responsible procreation to both child development and societal stability. The Vatican's language presaged the current litigation argument in terms resembling constitutional jurisprudence, emphasizing that marriage is the necessary means to securing the "right" of married spouses to be parents only with one another, securing the "right" of children to be brought up within marriage for purposes of "proper human development," and securing the "truly responsible procreation" presumably required for society's "vitality and stability."⁷⁸ Of course, the *Instruction*'s logic explicitly depended on marriage being an "indissoluble unity," which obviously no longer reflects current societal and legal realities.⁷⁹

Like the Vatican, same-sex-marriage opponents have expressed similar concern about the demise of the permanence of marriage and have used the corollary limit of marriage's effectiveness as a means to their ends.⁸⁰ Opponents' litigation arguments also reflect their religious and societal laments.⁸¹ Whether or not marriage is a necessary or effective means for family and societal stability, those who agree with the Vatican's moral guidelines seek to guard the marriage ideal by characterizing it as the necessary gateway to family and societal stability.⁸²

Both the Vatican and other opponents of same-sex marriage have treated marriage as the sole means to the end of achieving security for all involved—spouses, children, and society.⁸³ In this

78. *Id.*

79. *Id.*; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 98 tbl.133 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0133.pdf> (finding 1.182 million divorces were filed in the United States between 1990 and 2009, compared with 2.443 million marriages).

80. See Brief for U.S. Conference of Catholic Bishops et al. as Amici Curiae In Support of Defendant-Intervenors-Appellants and Supporting Reversal at 7, *Perry v. Schwarzenegger*, 2012 WL 372713 (9th Cir. Feb. 7, 2012) (Nos. 10-16696, 11-16577), 2010 WL 4075739, at *7.

81. See, e.g., *id.* at 7–17.

82. See, e.g., Brief of Amicus Curiae, The Family Research Council, In Support of the Intervening Defendant-Appellants at 2, *Perry*, 2012 WL 372713 (9th Cir. Feb. 7, 2012) (Nos. 10-16696, 11-16577) ("It is precisely because the opposite-sex nature of marriage is the *essence* of marriage as it has been understood in our history, that the district court's fundamental rights analysis must be rejected."). During the Hawaii trial of the constitutionality of the state's same-sex-marriage ban, one of the state's expert witnesses testified that marriage is a "gateway to becoming a parent," although he conceded that gays and lesbians "can create stable family environments and raise healthy and well-adjusted children." *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *6–7 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

83. RATZINGER & BOVONE, *supra* note 74, at pt. II.A.1.

regard, they have framed a particular question for constitutional resolution: if the underlying goal is securing parents, children, and society, then the question becomes whether—and, if so, to what extent—denying marriage for same-sex couples advances the security of parents, children, and society. Addressing this question requires knowledge of societal actualities in order to assess the nature and degree of the fit between the means of banning same-sex marriage and the state's interest in family security. It is precisely these societal realities that have undergone fundamental change.⁸⁴

III. CHANGED SOCIETAL AND LEGAL REALITIES

During the forty years since litigants brought the first same-sex-marriage challenges in the early 1970s, societal practices related to both procreation and marriage have changed dramatically.⁸⁵ For example, using contraception to prevent unwanted procreation has become the norm. According to recent data from the Guttmacher Institute, more than 99 percent of women aged fifteen to forty-four who had heterosexual intercourse used contraception.⁸⁶ Nonetheless, nearly half of the pregnancies in the United States are unintended, and 40 percent of these are terminated by abortion.⁸⁷

Over the last three decades, the use of assisted reproductive technology to assist procreation also has grown rapidly. For example, among developed countries, 3 percent of live births have been conceived through in vitro fertilization.⁸⁸ The worldwide estimate is that four million children have been conceived through in vitro fertilization.⁸⁹

In the United States, a recent report from the National Center for Health Statistics found a surge in heterosexual cohabitation, with the percentage of women who have cohabited with an opposite-sex

84. Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189, 189–90 (2005).

85. *Id.*

86. GUTTMACHER INST., FACTS ON CONTRACEPTIVE USE IN THE UNITED STATES (2010), available at http://www.guttmacher.org/pubs/fb_contr_use.pdf.

87. GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES (2010), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf.

88. Nicholas Wade, *In Vitro Fertilization Pioneer Wins Nobel Prize*, N.Y. TIMES, Oct. 5, 2010, at A1 (announcing the Nobel Prize to English biologist Dr. Robert G. Edwards for his contribution to in vitro fertilization as an advance in human reproductive technology).

89. *Id.*

sexual partner doubling between 1987 and 2002.⁹⁰ This report's estimates suggest that two-fifths of all children will spend some time in a cohabiting household prior to age sixteen.⁹¹ Social scientists and legal scholars have been studying the rise and effects of cohabitation for some time.⁹² The Census Bureau has redoubled its efforts to collect data about the actual incidence of cohabiting households, culminating in one recent report that found more than a quarter of unmarried mothers previously presumed to be single were living with an unmarried partner, whether of the same or opposite sex.⁹³ These developments are not limited to heterosexual couples, as confirmed by recent findings from a joint study of the Williams Institute and the Urban Institute showing that "[m]ore than one in three lesbians have given birth and one in six gay men have fathered or adopted a child."⁹⁴

During this period of profound change in sexual and marital practices, the legal framework for regulation of the family has

90. NAT'L CTR. FOR HEALTH STATISTICS, CDC, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 4 (2010), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf.

91. *Id.*

92. For an insightful and comprehensive examination of the history, demography, social science literature, and legal treatment of heterosexual cohabitation, as well as law reform proposals, see CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010). For earlier law reform proposals regarding cohabitation, see Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); and Linda McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379 (2003). For a detailed analysis of why the law should not favor marriage, regardless of sexual orientation, see NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008). Professor Polikoff sensibly suggests three principles, rather than marriage, to guide the rights and responsibilities of family law: "(1) place the needs of children and their caretakers above the claims of able-bodied adult spouses/partners; (2) support the needs of children in all family constellations; and (3) recognize adult interdependency." *Id.* at 137-38. Her functional focus on economic stability and emotional peace of mind matches the California Supreme Court's understanding of how marriage has functioned: "[E]ntry into a formal, officially recognized family relationship provides an individual with the opportunity to become a part of one's partner's family, providing a wider and often critical network of economic and emotional security." *In re Marriage Cases*, 183 P.3d 384, 424 (2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5. For an argument that the family should be freed from control by the state, see Alice Ristorph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

93. Tamar Lewin, *Many Single Mothers Have a Live-in Partner, Census Bureau Finds*, N.Y. TIMES, Nov. 6, 2010, at A17 (describing the findings of a report entitled "Fertility of American Women: 2008").

94. GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>.

undergone enormous change as well. As Professor Edward Stein has succinctly summarized: legislatures and/or courts have protected contraception, allowed no-fault divorce, recognized cohabitation and non-marital relationships, allowed surrogacy, and recognized nonbiological parents.⁹⁵ Another important change has been the development of a comprehensive federal system for establishing paternity and enforcing child support obligations regardless of marital status.⁹⁶ Indeed, in a robust examination of every recorded judicial decision in gay and lesbian adoption and custody cases over fifty years, Professor Kimberly Richman found that the flexibility of family law gradually but inexorably has facilitated the inclusion of same-sex couples and their children.⁹⁷

In addition to changes in societal practice and legal regulation, major developments have occurred in constitutional jurisprudence. Most famously, the Supreme Court's contraception trilogy initially relied on a zone of privacy encompassed within the liberty protected by due process to invalidate restrictions on access to contraception for married couples in *Griswold v. Connecticut*⁹⁸ and subsequently extended contraceptive protection by applying equal protection to invalidate restrictions on access to contraception for unmarried individuals in *Eisenstadt v. Baird*⁹⁹ and then for minors in *Carey v. Population Services International*.¹⁰⁰ The Supreme Court's decision

95. Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 412 (2009) ("[C]ourts have found that laws prohibiting contraception are unconstitutional; the divorce process has become much easier (especially because of the move from fault to no-fault divorce); courts have recognized cohabitation for some legal purposes; non-marital legal relationships have been created; courts have upheld surrogacy agreements; people who are not the 'biological' parents of their children are listed as the parents on the birth certificates; and, more generally, the notion of who counts as a parent has been expanded." (footnotes omitted)).

96. For an engaging analysis of how strengthening child-support enforcement has been a key focus of welfare reform, see BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 130-42 (2007).

97. KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* (2009).

98. 381 U.S. 479 (1965).

99. 405 U.S. 438 (1972).

100. In *Griswold v. Connecticut*, the Court decided that a state could not prohibit access to contraception because such a regulation invaded the constitutional protection of a zone of privacy that includes marriage. 381 U.S. at 485. In *Eisenstadt v. Baird*, the Court concluded: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453. In *Carey v. Population Services International*, the Court explicitly applied strict scrutiny, explaining that "where a decision as

in *Zablocki v. Redhail*¹⁰¹ presupposed that procreation was not

fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” 431 U.S. 678, 686 (1977) (citing *Roe v. Wade*, 410 U.S. 113, 155–56 (1976)). The Court then invalidated New York’s law criminalizing the sale or distribution of contraceptives to minors under age sixteen. *Id.* at 698.

Both *Eisenstadt* and *Carey* rejected the suggestion that the state could penalize irresponsible procreation. The majority in *Eisenstadt* reasoned that “[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under [the state statute].” 405 U.S. at 448. Similarly, the Court in *Carey* endorsed and quoted this statement from *Eisenstadt*, noting that other provisions in New York law contradicted the justification of deterring illegal sexual conduct among minors. 431 U.S. at 695 n.18 (citing New York statutes that allowed girls as young as fourteen to marry with parental and judicial permission as well as those that required distribution of contraception to certain welfare recipients, including children who could be considered sexually active).

Carey also provided clarification about the burden on the government to justify its regulation. The Court in *Carey* noted that there was no evidence that limiting access to contraceptives would discourage early sexual behavior and that the state’s burden to justify its interference with a fundamental right required “more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.” *Id.* at 696. Although this statement was made in the plurality section of Justice Brennan’s opinion (part I—joined by only four justices), Justice White’s concurrence agreed that the state had “not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction.” *Id.* at 702 (White, J., concurring).

Two final notes about the opinions in *Carey* are relevant here. First, the Court engaged in a side skirmish about potential challenges to laws restricting sexual relations between consenting adults, foreshadowing *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Powell’s concurrence objected that the majority seemed to be extending strict scrutiny whenever the government burdens “personal decisions in matters of sex,” *Carey*, 431 U.S. at 703 (Powell, J., concurring), which prompted Justice Brennan to reply—twice—that the majority was not deciding about statutes regulating private consensual sexual behavior among adults. *Id.* at 711 n.5; *id.* at 694 n.17 (majority opinion). Justice Rehnquist was paying attention as well. In his dissenting opinion, Justice Rehnquist refused to refute the majority point-by-point because doing so would concede too much validity to their decision, but he could not let pass the majority’s assertion that the Court had not definitely answered whether and to what extent the Constitution prohibits regulation of private, consensual sexual behavior. Justice Rehnquist responded that the constitutional validity of such regulation had been “definitively established.” *Id.* at 718 n.2 (Rehnquist, J., dissenting). Second, Justice Stevens’ concurrence emphasized that there was no evidence, or any serious contention, that the state’s interest in inhibiting minors’ sexual conduct would be achieved significantly by limiting access to contraception, and therefore, he argued that the law was defended “as a form of propaganda rather than a regulation of behavior.” *Id.* at 715 (Stevens, J., concurring). Justice Stevens explained,

Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Id.

101. 434 U.S. 374 (1978).

inherently linked to marriage. The Court in *Zablocki* specifically justified marriage protection as a fundamental right on the basis that marriage should receive “equivalent protection” as procreation receives.¹⁰² In short, the importance of marriage led to treating procreative decision-making as a fundamental right in *Griswold*, which could not be denied unequally in *Eisenstadt* and *Carey*, while the importance of procreative decisions led to treating marriage as a fundamental right in *Zablocki*. In other words, the Court has recognized that marriage and procreation are independent aspects of liberty and has relied on the constitutional protection of each to justify the constitutional protection of the other.

IV. CONSTITUTIONAL PROTECTION OF IRRESPONSIBLE HETEROSEXUAL PROCREATION

The Supreme Court’s decision in *Zablocki* deserves special attention here because it squarely addressed the purported state justifications for denying marriage as a means to encouraging responsible heterosexual procreation, which is the issue now occupying center stage in the same-sex-marriage litigation.¹⁰³ *Zablocki* involved both equal protection and due process challenges to a Wisconsin statute that prohibited granting a marriage license to any resident who had failed to prove both that he had complied with any prior court-ordered child-support obligation and that his children were not public charges or likely to become public charges.¹⁰⁴

In that case, a state court had ordered high school student Roger Redhail to pay child support for a daughter born “out of wedlock.”¹⁰⁵ Redhail failed to make any support payments while unemployed over the following two years, and his child had received welfare benefits since birth.¹⁰⁶ When Redhail then applied for a license to marry a woman with whom he was expecting another child, the county clerk denied his application pursuant to the statute.¹⁰⁷

102. *Id.* at 386.

103. *See id.* at 388–91.

104. *Id.* at 375.

105. *Id.* at 377–78.

106. *Id.* at 378.

107. *Id.*

In an 8–1 decision, the Court applied what looked like strict scrutiny (which it referred to as “critical examination”)¹⁰⁸ and invalidated the Wisconsin statute under the Equal Protection Clause because it violated Redhail’s fundamental right to marry.¹⁰⁹ Writing for five justices,¹¹⁰ Justice Marshall first emphasized that the Court in *Loving v. Virginia*¹¹¹ had invalidated Virginia’s ban on interracial marriage based on independent equal protection and due process grounds.¹¹² His opinion extolled the fundamental importance of the right to marry through an eloquent litany of quotations from a series of equal protection and due process decisions relating to family autonomy.¹¹³ While the majority conceded that the state’s ends were “legitimate” and even “substantial,” they concluded that the statute’s means “unnecessarily impinge[d] on the right to marry.”¹¹⁴

The state argued that its interest in counseling non-custodial parents to pay child support justified the statute.¹¹⁵ The majority found no provision in the statute for such counseling and no evidence in the record that such counseling occurred, and it rejected the sufficiency of this justification for denying marriage after any such

108. *Id.* at 383. The Court reasoned that a classification that significantly interferes with a fundamental right must be invalidated “unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.* at 388.

109. *Id.* at 382, 387–88.

110. *Id.* at 375. In addition to the five-justice majority, Justices Stewart and Powell concurred in the judgment but declined to join Justice Marshall’s opinion. *Id.* at 391–96 (Stewart, J., concurring); *id.* at 396–403 (Powell, J., concurring). Justice Stewart rejected the majority’s equal protection basis but nonetheless agreed that the statute violated due process. *Id.* at 391–96 (Stewart, J., concurring). Justice Powell objected to declaring marriage to be a “fundamental right” and to using “critical examination” or “compelling state interest” analysis, but he agreed that the statute did “not pass muster under either due process or equal protection standards” because the state failed to justify its “unprecedented foreclosure of marriage to many of its citizens solely because of their indigency.” *Id.* at 396–97, 400, 403 (Powell, J., concurring). Justice Powell also noted that requiring a compelling government interest would cast doubt on other state marriage restrictions, such as “bans on incest, bigamy, and homosexuality.” *Id.* at 399.

111. 388 U.S. 1 (1967).

112. *Zablocki*, 434 U.S. at 383 (citing *Loving*, 388 U.S. at 11–12).

113. *Id.* at 383–85 (discussing *Loving*, 388 U.S. at 11–12; *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541–42 (1942); *Maynard v. Hill*, 125 U.S. 190, 205 (1888); and other cases).

114. *Id.* at 388. Although Justice Marshall did not consider whether the state’s interests were “compelling,” Justice Powell lamented that the majority had applied a compelling-interest test, which would cast doubt on other restrictions governing marriage. *Id.* at 396, 399 (Powell, J., concurring). In a similar criticism, Justice Rehnquist’s dissenting opinion disagreed with Justice Powell’s use of an “intermediate” standard of review, although Justice Powell did not label his analysis as intermediate. *Id.* at 407 (Rehnquist, J., dissenting).

115. *Id.* at 388 (majority opinion).

counseling had occurred.¹¹⁶ The state also argued that its interest in safeguarding the welfare of out-of-custody children justified the statute.¹¹⁷ The majority noted that the state's argument was somewhat unclear regarding this connection, but it nonetheless examined whether the justification could be advanced through two corollary interests: first, providing an incentive for Redhail to make past-due child support payments, and second, preventing him from incurring new support obligations.¹¹⁸

The Court rejected the first "collective device" justification because the statute merely denied marriage rather than actually collecting child support payments. In addition, the Court stated that the state already collected child support through more direct and effective measures, such as wage assignments, civil contempt proceedings, and criminal penalties.¹¹⁹ The Court also rejected the second justification of preventing new support obligations as both "grossly underinclusive," because the statute did not prevent Redhail from incurring new financial commitments by having additional children, and "substantially overinclusive" because the statute prohibited Redhail from potentially improving his financial situation by adding income from a new spouse.¹²⁰ The Court also noted that, if the state wished to require parents to be responsible for ensuring that their children do not become public charges, the state could address this directly by adjusting the criteria for determining child support amounts.¹²¹

The majority's reasoning in *Zablocki* thus recognized the reality that Redhail might procreate, incur child support obligations, and not be able to pay, regardless of whether he is allowed to marry.¹²² Therefore, the *Zablocki* Court held that conditioning a marriage license on financial support of children interferes "directly and substantially" with the right to marry and that denying marriage "cannot be justified" by the state's interests related to responsible procreation.¹²³ This constitutional holding severed marriage from

116. *Id.* at 388–89.

117. *Id.* at 389.

118. *Id.* at 389–90.

119. *Id.*

120. *Id.*

121. *Id.* at 390.

122. *Id.* at 389–90.

123. *Id.* at 387, 391.

procreation. Applying *Zablocki* to the same-sex-marriage ban, it stands to reason that if a state cannot deny marriage to those who actually have procreated irresponsibly, it would be anomalous to allow a state to deny marriage to those who presumably have not procreated irresponsibly.

Lurking behind the responsible-procreation defense is a concern about the cost of the governmental safety net.¹²⁴ This was not lost on then-Justice Rehnquist, who began his dissent in *Zablocki* by arguing that the Court should have applied the most deferential form of rational basis famously established by *Dandridge v. Williams*.¹²⁵ Justice Rehnquist's dissent in *Zablocki* cited the section of *Dandridge* in which the Court reasoned that states have leeway to make an "imperfect," "rough," "illogical," and "unscientific"¹²⁶ classification in the area of economics and social welfare so long as "any state of facts may reasonably be conceived to justify it."¹²⁷ Justice Rehnquist argued that, regardless of whether the Court applied the rational basis test under equal protection or the rational relation test of due process, both standards viewed the statute in light of "the traditional presumption of validity" and, so viewed, the statute was "a permissible exercise of the State's power to regulate family life and to assure the support of minor children."¹²⁸ But Justice Rehnquist filed these objections in a lone dissent.

Thus, as things stood at the end of the 1980s, same-sex couples apparently could be denied the right to marry because they presumably could not procreate irresponsibly, but heterosexuals could *not* be denied the right to marry even if they did procreate irresponsibly. In 1990, several same-sex couples in Hawaii brought the game-changing lawsuit challenging this discrimination, which

124. *Id.* at 408–09 (Rehnquist, J., dissenting).

125. *Id.* at 407 (citing *Dandridge v. Williams*, 397 U.S. 471, 485–87 (1970) (upholding Maryland's limitation of welfare benefits to a maximum grant amount per family and rejecting the equal protection claim that the family cap discriminated against larger families as compared to smaller families)).

126. *Dandridge*, 397 U.S. at 485 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69–70 (1913)).

127. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

128. *Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting). Justice Rehnquist also rejected the reasoning of the concurring justices, who had agreed to invalidate the statute on the basis that it would deny marriage to the truly indigent, because Justice Rehnquist claimed there had been no showing that Redhail was truly indigent in fact. *Id.* at 408–09.

would provoke a national backlash and provide the first opportunity for an evidentiary vetting of the responsible-procreation defense.¹²⁹

V. THE HAWAIIAN GAUNTLET AND CONGRESSIONAL FERVOR

In December 1990, Hawaiian officials denied three same-sex couples' applications for marriage licenses.¹³⁰ Represented by local civil rights lawyer Dan Foley, these couples challenged the denial as violating the state's constitution, launching the current wave of litigation seeking recognition of same-sex marriage.¹³¹ In 1993, the Supreme Court of Hawaii ruled that the denial of marriage to same-sex couples was a sex-based classification that would be unconstitutional unless the state could show that its denial furthered a compelling state interest and was narrowly drawn to avoid unnecessary abridgements of constitutional rights.¹³² Rather than ruling based on generalized assumptions, Hawaii's high court remanded the case for trial.¹³³

While the Hawaii litigation was pending, much attention at the federal level was focused on President Bill Clinton's struggle to enact bipartisan legislation to fulfill his campaign promise to "end welfare as we know it."¹³⁴ The key phrase of welfare reform was the promotion of "personal responsibility."¹³⁵ Congress and President Clinton battled over competing versions of welfare reform,¹³⁶ eventually reaching a compromise in the summer of 1996. In the Personal Responsibility and Work Opportunity Reconciliation Act,¹³⁷ Congress sought to end dependence of impoverished families on welfare benefits by promoting work and marriage, preventing and reducing the incidence of out-of-wedlock pregnancies, and

129. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *6-7 (Haw. Cir. Ct. 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

130. *Id.*

131. GOLDBERG-HILLER, *supra* note 56, at 2.

132. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

133. *Id.*

134. Douglas J. Besharov, *End Welfare Lite as We Know It*, N.Y. TIMES, Aug. 15, 2006, at A19.

135. See, e.g., Linda McClain, *Irresponsible Reproduction*, 47 HASTINGS L.J. 339, 339 (1996); Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform*, 17 HASTINGS WOMEN'S L.J. 269, 277 (2009).

136. McClain, *supra* note 135, at 341 & n.6, 342.

137. See Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

encouraging the formation of two-parent families.¹³⁸ This landmark legislation drastically altered the structure of welfare by removing the federal floor (e.g., eliminating the federal entitlement for eligible individuals and giving states block grants with discretion to establish their own conditions on eligibility) and imposing a federal ceiling (e.g., imposing new federal time limits on receipt of benefits, strengthening the federal requirements for workfare and child support enforcement, and prohibiting benefits to many immigrants).¹³⁹ Throughout the welfare reform debates, racialized and gendered stereotypes of the “welfare queen” and “deadbeat dad” dominated the discourse.¹⁴⁰

While they were busy battling over welfare reform, conservative members of Congress were watching the events in Hawaii with considerable alarm. Republican leaders of the House of Representatives proposed the Defense of Marriage Act (DOMA) in direct response to the events in Hawaii.¹⁴¹ In its report accompanying the proposed DOMA (the “House Report”), the House Judiciary Committee lambasted two sets of now-familiar villains: gay-rights lawyers and activist judges.¹⁴² The House Report acknowledged that leading gay-rights organizations had not been willing to make same-sex marriage a priority prior to the independent challenge pursued by the three same-sex couples in Hawaii.¹⁴³ But the House Report nonetheless underscored that it was “critical to understand” that DOMA had to be considered within the context of an “orchestrated

138. JULIE A. NICE & LOUISE G. TRUBEK, *CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE* 93–95, 617–28 (1997).

139. *Id.*; see also Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 NW. J.L. & SOC. POL’Y 1 (2009) (critiquing the propriety of welfare policy experimentation in the context of poor people’s lack of political leverage or judicial protection); Julie Nice, *Promoting Marriage Experimentation: A Class Act?*, 24 WASH. U. J.L. & POL’Y 31 (2007) (critiquing marriage promotion for welfare recipients as class-based experimentation when considered in light of recent social science evidence about marriage and poverty).

140. See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 119–42 (2007).

141. H.R. REP. NO. 104-664, pt. 2, at 4–6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910–14.

142. *Id.* at 3–4.

143. *Id.* at 4, *reprinted in* 1996 U.S.C.C.A.N. 2908 (acknowledging that neither the Lambda Legal Defense and Education Fund nor the American Civil Liberties Union Lesbian and Gay Rights Project had prioritized same-sex marriage).

legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.”¹⁴⁴

The House Report further described judges in Hawaii as “prepared to foist the newly-coined institution of homosexual ‘marriage’ upon an unwilling Hawaiian public.”¹⁴⁵ The House Report then assigned blame to both gay-rights lawyers and activist judges, further linking them by claiming that “the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers.”¹⁴⁶ These assertions ignored the fact that a local civil-rights lawyer, not gay-rights organizations, initiated the Hawaii litigation on behalf of the three same-sex couples.

The House Report proceeded to identify four governmental interests advanced by DOMA, including defending heterosexual marriage, defending traditional morality, protecting state sovereignty and democratic self-governance, and preserving scarce government resources.¹⁴⁷ Within the section describing the governmental interest in defending heterosexual marriage, the House Report explicitly articulated the responsible-procreation rationale:

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. . . .

. . . .

. . . Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship.¹⁴⁸

144. *Id.* at 2–3, reprinted in 1996 U.S.C.C.A.N. 2906–07.

145. *Id.* at 6, reprinted in 1996 U.S.C.C.A.N. 2910.

146. *Id.* at 5, reprinted in 1996 U.S.C.C.A.N. 2905, 2909. The House Report further explained: “Just as it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual ‘marriage’ upon an unwilling Hawaiian public, the Hawaii lawsuit also presents the possibility that other States could, through the protracted and complex process of litigation, be forced to follow suit.” *Id.* at 6, reprinted in 1996 U.S.C.C.A.N. 2910.

147. *Id.* at 12, reprinted in 1996 U.S.C.C.A.N. 2916. With the exception of defending heterosexual marriage, similar governmental arguments were rejected in *Romer v. Evans*. See *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

148. H.R. REP. NO. 104-664, at 13–14, reprinted in 1996 U.S.C.C.A.N. 2905, 2917–18.

During congressional hearings, various members of Congress argued that same-sex marriage would harm children, for example, by threatening the “moral fiber” of society and causing the family to “lose its very essence,” by “deliberately” creating “motherless or fatherless families,” by declaring homosexuality to be “desirable and good” when it is “not healthy and is actually destructive to individuals,” and by teaching children that “chastity is old fashioned.”¹⁴⁹ Many other statements directly impugned homosexuality as “immoral,” “aberrant,” “depraved,” “unnatural,” and “harmful.”¹⁵⁰

These legislative statements are precisely the type of direct evidence of intent that the courts typically consider to determine whether an invidious discriminatory purpose was a motivating factor.¹⁵¹ Nonetheless, just four months after DOMA was introduced, and only a few weeks after President Clinton signed the overhaul of welfare to mandate greater personal responsibility on the part of impoverished parents, Congress and President Clinton agreed to enact DOMA, with final congressional approval coming on the same day that the trial of Hawaii’s same-sex-marriage ban began.¹⁵²

Despite congressional fervor in support of the responsible-procreation defense, the U.S. Department of Justice has now expressly and repeatedly disavowed any reliance on the responsible-procreation defense in recent federal court litigation specifically because “the United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA’s constitutionality.”¹⁵³ Nonetheless, in between

149. Charles J. Butler, Note, *The Defense of Marriage Act: Congress’s Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 873–76 (1998) (recounting these and other statements from the congressional debates).

150. Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2701–02 (2004) (collecting statements from the congressional record).

151. As the Supreme Court has explained: “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

152. GOLDBERG-HILLER, *supra* note 56, at 4.

153. Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at pt. 3, at 6–7, *Smelt v. United States*, No. SACV 09-00286 (C.D. Cal. Aug. 24, 2009), 2009 WL 2610458, at pt. 3, at *6–7 [hereinafter Reply to Motion to Dismiss, Smelt]; *see also* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, FAM. ADVOC.,

DOMA's reliance in 1996 and the Justice Department's disavowal in 2009, the responsible-procreation argument gained considerable traction as the primary justification in decisions upholding same-sex-marriage bans.¹⁵⁴ But the argument's momentum would not have seemed likely when the defense went missing during its first test at trial.

VI. MISSING IN ACTION AT THE FIRST TRIAL

When the Hawaii trial finally began in September 1996, the political controversy had been raging for more than five years since the lawsuit was filed, and more than three years had passed since the Supreme Court of Hawaii had remanded the case to the trial court to allow the state an opportunity to demonstrate that the ban was narrowly drawn to further compelling state interests.¹⁵⁵ Unquestionably, the possibility of same-sex marriage in Hawaii fundamentally altered the political and legal landscape with regard to same-sex marriage, with advocates on both sides of the controversy spending enormous sums of money.¹⁵⁶

For their defense of the same-sex-marriage ban, state officials initially proclaimed they would prove that the ban served the interest of "fostering procreation within a marital setting," among other interests.¹⁵⁷ Just before the trial commenced, the state apparently modified this strategy, shifting focus to the argument that the state

Winter 2010, at 10, 16 (describing the Justice Department's disavowal of purported interests in "responsible procreation and child-rearing" in its memorandum (citing Memorandum of Law in Support of Defendant's Motion to Dismiss at 19 n.10, *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309), 2009 WL 5803678, at *22 n.10 [hereinafter Motion to Dismiss, Gill])).

154. Reply to Motion to Dismiss, Smelt, *supra* note 153, at pt. 3, at 6–7.

155. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

156. Over three million dollars were spent on the constitutional amendment designed to overrule the *Baehr* decision. GOLDBERG-HILLER, *supra* note 56, at 112, 251 n.83. For an examination of the economic impact of recognizing same-sex marriage, see Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 759, 810–15 (1995) (discussing the positive and negative economic consequences of Hawaii becoming the first state to legalize same-sex marriage).

157. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (Finding of Fact 18). After a majority of state voters passed the constitutional amendment authorizing the state legislature to deny same-sex marriage, *Same-Sex Marriage Timeline*, PROCON.ORG, <http://borngay.procon.org/view.resource.php?resourceID=000025#20th> (last updated Feb. 22, 2012), the Hawaii Supreme Court reversed the trial court decision without opinion. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished table decision).

has a compelling interest in promoting the optimal development of children, each of whom would be served best by being “raised in a single home by its parents, or at least by a married male and female.”¹⁵⁸ The state effectively abandoned any effort to support the procreative defense of the ban.

Proceeding instead with its optimal-child-development defense, the state presented four expert witnesses at trial.¹⁵⁹ Two of the state’s experts conceded that same-sex couples are able to raise children who are healthy and well adjusted,¹⁶⁰ and a third proffered no opinion on whether children raised by same-sex couples could be healthy and well adjusted.¹⁶¹ The remaining expert witness testified to various theoretical or methodological shortcomings within nine studies of same-sex parents and/or their children.¹⁶² The trial court noted, however, that this expert’s criticism of the relevant studies was undercut by his admission that he doubted the value of any social-science studies, even if conducted properly.¹⁶³ In short, none of Hawaii’s experts offered credible support for the assertions that sexual orientation is an indicator of parental fitness and that children raised by same-sex couples are less healthy or less well adjusted. One of the state’s experts testified, to the contrary, that gay and lesbian parents are “doing a good job” and “the kids are turning out just fine.”¹⁶⁴

Against these key concessions by the state’s experts, the challengers to Hawaii’s denial of same-sex marriage presented testimony from four expert witnesses.¹⁶⁵ These experts testified that sexual orientation is not an indicator of parental fitness and that same-sex couples are as fit and loving as married couples are and that their children are as healthy and well adjusted as children of

158. *Baehr*, 1996 WL 694235, at *3 (Finding of Fact 19).

159. *Id.* at *4 (Findings of Fact 20–21).

160. *Id.* at *5, *7 (Findings of Fact 31, 51).

161. *Id.* at *10 (Finding of Fact 70).

162. *Id.* at *8 (Finding of Fact 59).

163. *Id.* at *8–9 (Findings of Fact 58–60).

164. *Id.* at *5, *18 (Findings of Fact 38, 135). For a recent synthesis of the robust evidence that the kids are indeed alright, see for example, Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81 (2011).

165. The trial court found two of these experts, Pepper Schwartz and David Brodzinsky, to be “especially credible,” and commended them for presenting their testimony in a “knowledgeable, informative and straightforward manner” and basing their opinions “on their significant research and analysis, and their clinical and professional experience, respectively.” *Baehr*, 1996 WL 694235, at *10 (Finding of Fact 76).

married couples are.¹⁶⁶ Each emphasized that it is the nurturing quality of the relationship between parent and child that is most important to the child's optimal development.¹⁶⁷

Based on the paucity of support from the state's experts and the persuasive testimony from the challenger's experts, the trial court subsequently found that the state had "failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage."¹⁶⁸

Buried in the testimony and findings from this first trial was an important, albeit subtle, point emphasized by Pepper Schwartz. Professor Schwartz testified that society shores up marriage by bringing others into the marriage fold, offering rituals for entering their relationships, providing support along the way, but also by asking them to behave responsibly with regard to supporting their children and making them confront "legal complications" before exiting those relationships.¹⁶⁹ In other words, Professor Schwartz emphasized that society supports and enforces family rights and responsibilities not only at the point of commitment but also, if necessary, at the dissolution of the adult partnership. This point is particularly relevant here because, while the responsible-procreation argument takes some account of a couple's initial investment in having children, it wholly fails to account for the effects of a couple's dissolution on the security of their children.

Although the Hawaii trial court made detailed findings that rejected the state's limited defense,¹⁷⁰ the state courts did not have the final word. The now-familiar template of political backlash was set when a supermajority of state voters amended the Hawaii Constitution to grant authority to the state legislature to regulate marriage, which authorized recognition of "reciprocal beneficiaries" but denied same-sex marriage.¹⁷¹

166. *Id.* at *11, *13–16 (Findings of Fact 83–85, 93–96, 102–106, 111–114).

167. *Id.* at *11, *13, *15 (Findings of Fact 85, 93, 105, 111).

168. *Id.* at *18 (Finding of Fact 139).

169. *Id.* at *12 (Finding of Fact 87).

170. *Id.* at *20.

171. With 69 percent of the vote, Hawaii voters in November 1998 approved a constitutional amendment giving the legislature jurisdiction over marriage. GOLDBERG-HILLER, *supra* note 56, at 43. The legislature previously had enacted the Reciprocal Beneficiaries Act, recognizing some legal rights and benefits for same-sex couples. *Id.* at 42. According to Goldberg-Hiller, the

The substantive rulings of the Hawaii trial court proved to be not anomalous, however, as they were soon replicated by the Vermont Supreme Court in 1999.¹⁷² While Vermont's high court conceded that the state has a legitimate interest "in promoting a permanent commitment between couples for the security of their children,"¹⁷³ it squarely rejected the procreation justification for the same-sex-marriage ban.¹⁷⁴ The court held that Vermont extended the benefits of marriage to many opposite-sex couples "with no logical connection to the stated governmental goal" because they do not procreate, and it also held that there was an "extreme logical disjunction" between the state's exclusion of same-sex couples and the state's purpose of providing security for children because same-sex couples who are raising children "are no differently situated with respect to this goal than their opposite-sex counterparts."¹⁷⁵

VII. A LIFT FROM CONSERVATIVE ACADEMICS AND ADVOCATES

A leading academic defender of the same-sex-marriage ban soon stepped up to respond to the Vermont decision and give support to the responsible-procreation defense. In a law review article published in 2002, Lynn Wardle argued that "[a]llowing infertile heterosexual couples to marry, but not same-sex couples, conveys a very clear message of public policy—that responsible procreation *is* an important purpose of marriage, and that procreation should take place only *within* marriage."¹⁷⁶ Professor Wardle claimed boldly that same-sex marriages "generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been able to further the social interests in responsible procreation."¹⁷⁷ Professor Wardle pulled few punches in that article, referring to the children of same-sex parents who were

combination of the constitutional amendment and the legislation recognizing reciprocal beneficiaries was the result of a political compromise. *Id.* at 4.

172. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

173. *Id.* at 881.

174. *Id.* at 884.

175. *Id.*

176. Wardle, *supra* note 1, at 801. Professor Wardle focused much less on responsible procreation in an earlier article, mentioning it as one among eleven aspects of marriage "as it has evolved in our constitutional jurisprudence." Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 *How. L.J.* 289, 336, 338–39 (1998).

177. Wardle, *supra* note 1, at 797.

conceived with assisted reproductive technology as “orphans or half orphans, deliberately conceived to be raised in a unisex parenting environment,” and asserting that this raised “very serious concerns” about their welfare.¹⁷⁸

The attorney general of Indiana quickly translated Professor Wardle’s article into litigation arguments in an appellate brief. The case involved a state constitutional challenge to Indiana’s decision denying a three-day funeral leave to a state employee who suffered the death of her same-sex partner’s father (although such leave was granted to employees with opposite-sex spouses).¹⁷⁹ In this sleeper test case, *Cornell v. Hamilton*,¹⁸⁰ the Indiana attorney general’s brief launched a seemingly unnecessary but nonetheless full-blown defense of the state’s same-sex marriage prohibition.¹⁸¹ The attorney general argued that classifications distinguishing between same-sex and opposite-sex couples are constitutional because they promote procreation and child-rearing, promote sound political ordering, foster a free society, and protect the integrity of traditional marriage.¹⁸² The Indiana Court of Appeals squarely rejected the state’s “proffered justifications” relating to “promoting marriage and encouraging procreation” as “unpersuasive” because, in part, the funeral-leave policy “exists to strengthen family relationships, and families are different today than they once were.”¹⁸³ The appellate court nonetheless also rejected the plaintiff’s state constitutional challenge solely because her appellate brief “curiously” had conceded that the policy was rationally related to marriage.¹⁸⁴

Four months after the *Cornell* decision, the high court of Massachusetts issued its much-anticipated and groundbreaking 4–3 decision in *Goodridge v. Department of Public Health*,¹⁸⁵ which

178. Wardle, *supra* note 1, at 803. Professor Wardle extended his critique of assisted reproduction in *The Curious Case of the Missing Legal Analysis*, 18 *BYU J. PUB. L.* 309 (2004).

179. Brief of Appellees at 27, *Cornell v. Hamilton*, 791 N.E.2d 214 (Ind. Ct. App. 2003) (No. 49A02-0208-CV-635), 2002 WL 33952542, at *27. The attorney general’s brief cites repeatedly to Professor Wardle’s article. *Id.* at 27–28, 31–35.

180. 791 N.E.2d 214 (Ind. Ct. App. 2003).

181. Brief of Appellees, *supra* note 179, at 27–39.

182. *Id.*

183. *Cornell*, 791 N.E.2d at 219.

184. *Id.* (“Curiously, however, *Cornell* concedes that the policy is rationally related to marriage.”); see also *id.* at 220 (“But for the legal act of marriage, we cannot discern how *Cornell*’s situation is different from that of other state employees involved in committed relationships. However, she concedes that a distinction based on marriage is rational.”).

185. 798 N.E.2d 941 (Mass. 2003).

directly rejected the responsible-procreation defense and held that the ban violated the state constitution.¹⁸⁶ As Chief Justice Margaret Marshall succinctly summarized for the majority, “[t]he ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”¹⁸⁷ She further explained that this “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”¹⁸⁸ But Justice Cordy filed a particularly vigorous dissent, extensively citing conservative commentators such as Lynn Wardle and arguing that marriage functions to bind fathers to children and that the state rationally could conclude that recognizing same-sex marriages could diminish society’s ability to steer procreation into marriage.¹⁸⁹

VIII. JUDICIAL TRACTION

In 2003 and 2004, two intermediate appellate panels finally secured the initial footholds for the responsible-procreation defense in rejecting challenges to the same-sex-marriage bans in Arizona and Indiana. The appellate judges in *Standhardt v. Superior Court*¹⁹⁰ and *Morrison v. Sadler*¹⁹¹ reasoned that the states’ means of limiting marriage to opposite-sex couples were rationally related to the purpose of encouraging responsible procreation. The reasoning in *Morrison* particularly drew links to poverty and single motherhood. The opinion cited Professor Wardle’s assertion that out-of-wedlock births resulting from opposite-sex intercourse resulted in “higher instances of physical and sexual child abuse, educational failure, and poverty.”¹⁹² The lower court then quoted at length from Justice Cordy’s dissenting opinion in *Goodridge* in which he argued that marriage fills the “void” and avoids the “chaotic” alternative “by

186. *Id.* at 961–62.

187. *Id.* at 962.

188. *Id.* For an analysis of how the conservative defense of the same-sex-marriage ban reflects sex stereotyping, see Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

189. *Goodridge*, 798 N.E.2d at 995–1003 (Cordy, J., dissenting).

190. *Standhardt v. Superior Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003).

191. 821 N.E.2d 15 (Ind. Ct. App. 2005).

192. *Id.* at 24 n.11.

formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood,”¹⁹³ echoing again the primary theme of welfare reform.

Conservative amicus briefs began to emphasize Indiana’s intermediate appellate court decision in *Morrison* as support for the proposition that responsible procreation had been deemed to be a rational and sufficient justification for denying same-sex marriage. For example, during litigation challenging Maryland’s same-sex-marriage ban, amicus briefs submitted on behalf of James Q. Wilson and the Maryland Catholic Conference, as well as the state’s reply brief, cited Indiana’s intermediate appellate court decision as approving the responsible-procreation argument.¹⁹⁴ Conservative briefs cited either Professor Wardle’s argument or the Indiana decision, or both, as support for the argument that a state’s interest in responsible procreation justified banning same-sex marriage.¹⁹⁵ The emerging justification was framed in an unusual manner, however. Rather than explaining why the state had an interest in denying same-sex marriage or even how extending marriage to same-sex couples would harm any state interest, most of the arguments asserted instead that extending marriage to same-sex couples would not advance the state’s interest in encouraging responsible procreation among heterosexuals.¹⁹⁶ While some courts adopted this

193. *Id.* at 25–26 (citing *Goodridge*, 798 N.E.2d at 995–96 (Cordy, J., dissenting)).

194. *See, e.g.*, Reply Brief of Appellants at 12, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 2499), 2006 WL 3905926, at *12; Brief for James Q. Wilson et al. as Amici Curiae Supporting Defendants-Appellants, *Conaway*, 932 A.2d 571 (No. 2499), 2006 WL 2725660; Brief for Maryland Catholic Conference as Amici Curiae Supporting Defendants-Appellants, *Conaway*, 932 A.2d 571 (No. 2499), 2006 WL 5263472.

195. *See, e.g.*, Brief Amici Curiae of James Q. Wilson et al., *supra* note 46, at 3–4; Final Amended Reply Brief of Defendant-Appellant, *supra* note 24, at 20; Brief of Appellees, *supra* note 179, at 27; Reply Brief of Appellants, *supra* note 194; Brief for James Q. Wilson et al. as Amici Curiae Supporting Defendants-Appellants, *supra* note 194, at 26; Brief for Maryland Catholic Conference as Amici Curiae Supporting Defendants-Appellants, *supra* note 194; Brief for N.J. Coalition to Preserve & Protect Marriage et al. as Amici Curiae at 15, 17, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), 2004 WL 5234683, at *15, 17.

196. *See, e.g.*, Brief Amicus Curiae of the Family Institute of Connecticut in Support of the Defendants-Appellees at 2–3, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716), 2007 WL 4729865, at *2–3; Amicus Brief of Concerned Women for America & New York Family Policy Council at 14–15, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 103434/2004), 2006 WL 1930152, at *14–15; Brief of the New York State Catholic Conference as Amicus Curiae in Support of Defendant-Respondent at 62, *Hernandez*, 855 N.E.2d 1 (No. 103434/2004), 2006 WL 1930153, at *62; Brief of Family Research Council as Amicus Curiae in Support of Defendants-Respondents at 44–45, *Samuels v. New York Department of Health*, 29 A.D.3d 9 (N.Y. App. Div. 2006), *aff’d sub nom. Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006),

unusual framing, others followed the more typical course of requiring the government to explain why it denied the right to marry to same-sex couples.¹⁹⁷

Conservatives gained considerable momentum during this period. One variation or another of the responsible-procreation argument¹⁹⁸ was subsequently endorsed by plurality opinions of the state high courts of Washington in *Andersen v. King County*¹⁹⁹ and of New York in *Hernandez v. Robles*,²⁰⁰ and by the majority opinion of Maryland's high court in *Conaway v. Deane*.²⁰¹ Along the way, a panel of the Eighth Circuit endorsed the defense as well.²⁰²

This momentum was quickly interrupted, however, when executive branch officials began eschewing the defense. The states of

2006 WL 1930156, at *44–45; Appellant State of Washington's Reply to Supplemental Brief of Respondents Castle at 4–5, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (Nos. 75934-1, 75956-1), 2005 WL 1841352, at *5.

197. Some courts focused on whether recognition of same-sex marriage would *advance* the encouragement of responsible procreation (and upheld the ban). *E.g.*, *Morrison v. Sadler*, 821 N.E.2d 15, 28 (Ind. Ct. App. 2005). Other courts focused on whether recognition of same-sex marriage would *undermine* the encouragement of responsible procreation by heterosexual couples (and invalidated the ban). *E.g.*, *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999). Some courts split on the proper framing. For example, the plurality opinion of the Supreme Court of Washington noted that court's disagreement over framing, with the dissent framing the question as whether *denying* same-sex marriage furthers legitimate government interests whereas the plurality framed the question as whether *allowing* opposite-sex couples to marry furthers legitimate governmental interests. *Andersen*, 138 P.3d at 984–85.

198. Slight variants of the responsible-procreation argument have been articulated. For example, as the Court of Appeals of Indiana recognized: "We are using the term 'responsible procreation' to mean the procreation and raising of children by persons who have contemplated, and are well-suited for, the required commitment and challenges of child-rearing. This is a slight re-wording of Professor Wardle's definition of the term." *Morrison*, 821 N.E.2d at 25 n.13 (citing Wardle, *supra* note 1, at 782 n.24 (defining "responsible procreation" as "procreation by parents who share a clear, firm, permanent commitment to each other and to the protection and care of children who are the offspring of their procreative union")).

199. 138 P.3d 963 (Wash. 2006) (plurality opinion). "We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." *Id.* at 985.

200. 855 N.E.2d 1 (N.Y. 2006) (plurality opinion). "The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more." *Id.* at 7.

201. 932 A.2d 571 (Md. 2007). "This 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)." *Id.* at 630–31.

202. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). The responsible-procreation argument also was raised and endorsed in federal proceedings related to bankruptcy in *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004) and interstate marriage recognition in *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005).

Connecticut and New Jersey explicitly disavowed any reliance on the responsible-procreation defense during the litigation over their state bans on same-sex marriage.²⁰³ As mentioned, the U.S. Department of Justice also now disavows any reliance on the responsible-procreation defense as justification for DOMA.²⁰⁴ Along the way, the judiciary reversed course as well when the high courts of California and Iowa rejected the defense.²⁰⁵

IX. THE PROTRACTED
(AND PENDING)
BATTLE IN CALIFORNIA

The responsible-procreation defense is receiving its most rigorous consideration during California's pending battle over same-sex marriage. Perhaps the most surprising aspect of California's emergence as ground zero in the battle over responsible procreation is that the defense makes little sense in California because state public policy clearly contradicts it. Other than Prop 8's effect of amending the state constitution to ban the official designation of marriage for same-sex couples, California broadly grants equal rights regardless of sexual orientation.²⁰⁶ For example, the state legislature enacted a series of statutes that prohibit discrimination based on sexual orientation in employment, public accommodations, housing, and, most saliently, parenting;²⁰⁷ the legislature also conferred all the same state rights on domestic partners, including parental rights, that married spouses enjoy.²⁰⁸ Not only did California's highest court rule that the state constitution prohibited banning same-sex marriage before voters approved Prop 8²⁰⁹ but it also continues to require strict

203. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 477–78 (Conn. 2008); *Lewis v. Harris*, 908 A.2d 196, 205–06 (N.J. 2006).

204. Reply to Motion to Dismiss, *Smelt*, *supra* note 153, at pt. 3, at 6–7; Motion to Dismiss, *Gill*, *supra* note 153, at 19 n.10.

205. *In re Marriage Cases*, 183 P.3d 384, 430–33 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Varnum v. Brien*, 763 N.W.2d 862, 899–902 (Iowa 2009).

206. *In re Marriage Cases*, 183 P.3d at 428–30.

207. For a description of this statutory history, see *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 694–97 (Ct. App. 2006), *rev'd*, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5.

208. *Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009).

209. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5. In enacting Prop 8, voters stripped the designation of

scrutiny for discrimination based on sexual orientation.²¹⁰ In addition, the state's supreme court has interpreted state statutes to recognize that a child can have two parents of the same sex,²¹¹ to permit second-parent adoptions by a same-sex partner,²¹² and to enforce child-support obligations by a non-biological same-sex parent.²¹³ The court also enforced a pre-birth declaration of joint parentage that a parent had signed with her former same-sex partner.²¹⁴

With both the state's legislature and its courts broadly recognizing same-sex relationships and parentage and the threat that California might be required to recognize same-sex marriages allowed by some other state,²¹⁵ it was no surprise that anti-gay-rights advocates turned to the voters. The battle began with the initiative known as Proposition 22, which voters approved in November 2000 and amended the state's family law statute by adding the language: "Only marriage between a man and a woman is valid or recognized in California."²¹⁶ A few years later, the mayor of San Francisco

marriage that had been mandated for same-sex couples by this California Supreme Court decision. *Strauss*, 207 P.3d at 59.

210. *In re Marriage Cases*, 183 P.3d at 441–42. Even after the voters approved Prop 8 and thereby amended the state constitution to deny same-sex marriage, the Supreme Court affirmed that discrimination based on sexual orientation would trigger strict scrutiny. *Strauss*, 207 P.3d at 73, 78. For a particularly insightful examination of *Strauss v. Horton*, see Anna Marie Smith, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. REV. 517 (2010). With regard to the effect of the California Supreme Court's ruling in *Strauss* on the pending federal challenge to the constitutionality of Prop 8, Professor Smith emphasized two points, which are particularly relevant here: first, "*Strauss* characterizes Proposition 8 as the fruit of ideological traditionalism," which is not a sufficient justification under current constitutional jurisprudence; and second, "since domestic partners have the same parental rights and duties as married couples under state law, it would contradict California's legal history to say that the State has a legitimate interest in restricting child-rearing to married heterosexuals and Proposition 8 is a reasonable means for the pursuit of that objective." *Id.* at 530–31, 534–35 (footnote omitted).

211. *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005). California is not alone in confronting decisions about parentage for children born with biological links to both members of a same-sex couple (one genetic mother and another gestational mother). Most recently an intermediate appellate panel in Florida followed and quoted the conclusion from *K.M.*: "[W]hen partners in a lesbian relationship decide to produce children in this manner, both the woman who *provides* her ova and her partner who bears the children are the children's parents." *T.M.H. v. D.M.T.*, No. 5D09-3559, 2011 WL 6437247, at *3 (Fla. Dist. Ct. App. Dec. 23, 2011) (emphasis added in *T.M.H.*) (quoting *K.M.*, 117 P.3d at 675).

212. *Sharon S. v. Superior Court*, 73 P.3d 554, 570 (Cal. 2003).

213. *Elisa B. v. Superior Court*, 117 P.3d 660, 670–71 (Cal. 2005).

214. *Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005).

215. See Smith, *supra* note 210, at 523.

216. *Id.* (quoting CAL. FAM. CODE § 308.5(a) (West 2012)).

authorized the issuance of marriage licenses to same-sex couples,²¹⁷ but the California Supreme Court quickly halted the issuance of licenses and nullified the mayor-authorized marriages, ruling that only the state, not counties or municipalities, may define marriage.²¹⁸ San Francisco and other parties then filed several actions challenging the same-sex-marriage ban as a violation of the state constitution, and the California Supreme Court ruled the ban unconstitutional in May 2008.²¹⁹

In this state court litigation challenging the ban on its merits, the state did not raise the responsible-procreation defense, but the ban's proponents asserted it.²²⁰ The California Supreme Court nonetheless rejected the responsible-procreation argument as not providing an appropriate basis for limiting the scope of the constitutional right to marry²²¹ because the constitutional right to marry is equally important to both those who procreate accidentally and those who procreate responsibly²²² and because family stability is equally important to children raised by same-sex couples and to children raised by opposite-sex couples.²²³

Following the California Supreme Court's decision in May 2008 that invalidated the same-sex-marriage ban on state constitutional grounds, approximately 18,000 same-sex marriages were performed before California voters approved Prop 8 in November 2008.²²⁴ The language of Prop 8 simply repeated the language of the prior

217. See *Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459, 464–65 n.4 (Cal. 2004) (discussing the mayor's belief that the equal protection clause of the California Constitution provides that marriage licenses should be issued on a "non-discriminatory basis, without regard to gender or sexual orientation").

218. *Id.* at 472.

219. *In re Marriage Cases*, 183 P.3d 384, 402–03 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5.

220. *Id.* at 430.

221. *Id.* at 431.

222. *Id.* at 431–32.

223. *Id.* at 433. The reasoning of the California Supreme Court in *In re Marriage Cases* seems to echo two major rulings by the U.S. Supreme Court. In *Cleveland Board of Education v. LaFleur*, the Court invalidated state bans of continued employment of pregnant public school teachers because the rules served "to hinder attainment" of the very objectives the rules were "purportedly designed to promote." 414 U.S. 632, 643 (1974). In *New Jersey Welfare Rights Organization v. Cahill*, the Court invalidated the New Jersey's ban on receipt of welfare benefits by non-marital families because it operated "in practical effect" to deny benefits to "illegitimate" children for whom the benefits "are as indispensable to the health and well-being" as they are for marital children. 411 U.S. 619, 621 (1973).

224. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

statutory ban: “Only marriage between a man and a woman is valid or recognized in California.”²²⁵ Challengers quickly filed an action with the California Supreme Court arguing primarily that Prop 8 should be characterized as a “revision” rather than an “amendment” of the state constitution and therefore should have followed the state’s more robust procedure for enactment of a constitutional revision. But the California Supreme Court rejected this technical challenge.²²⁶ After internal consideration and debate, gay-rights organizations decided not to bring a further federal constitutional challenge but instead pledged to overturn Prop 8 at the ballot box.²²⁷

When gay-rights organizations did not file a federal challenge to Prop 8, an unlikely pair of nationally prominent lawyers—Ted Olson from the right and David Boies from the left—brought the suit instead.²²⁸ Much of the initial press focused on why and how these strange bedfellows decided to represent two same-sex couples to claim that Prop 8 violated the federal constitution.²²⁹ As events unfolded, however, the controversy shifted focus to who would defend Prop 8. The plaintiffs filed suit against California’s then-Governor, Arnold Schwarzenegger; its then-Attorney General, Jerry Brown; the director and deputy director of public health; and the two county clerks who had denied the plaintiffs’ marriage licenses.²³⁰ Each of the state defendants declined to defend Prop 8.²³¹ The trial court subsequently granted leave to intervene to five individuals that established the organization Protect Marriage, which comprised the coalition of individuals and organizations that campaigned to enact Prop 8.²³² Protect Marriage included a network of 1,700 pastors, as well as Evangelical, Catholic, and Mormon groups.²³³ The trial court

225. *Id.* at 927 (quoting CAL. CONST. art. I, § 7.5).

226. *Strauss v. Horton*, 207 P.3d 48, 60, 122 (Cal. 2009).

227. Maura Dolan, *Amendment Ease Draws Activists’ Ire*, L.A. TIMES, May 31, 2009, at A35. For an insightful analysis of the strategic decisions made by gay-rights advocates and how they might be understood within the framework of legal mobilization, see Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

228. Ted Olson and David Boies sparred most prominently in *Bush v. Gore*, 531 U.S. 98 (2000).

229. See e.g., *Bill Moyers Journal* (PBS television broadcast Feb. 26, 2010), available at <http://www.pbs.org/moyers/journal/02262010/watch.html>.

230. *Perry*, 704 F. Supp. 2d at 953–54.

231. *Id.* at 928.

232. *Id.* at 928, 954–56.

233. *Id.* at 955–56.

also granted the City and County of San Francisco leave to intervene as a plaintiff.²³⁴

At trial, the proponents (1) abandoned their prior campaign reliance on morality as a defense of Prop 8,²³⁵ (2) failed to fulfill their promise to provide evidence demonstrating “twenty-three specific harmful consequences” caused by allowing same-sex marriage;²³⁶ and (3) withdrew four of their six designated witnesses.²³⁷ Proponents called only two witnesses: one think-tank founder whose credibility was undermined by his failure to support his opinions with reliable evidence or otherwise explain his methodology,²³⁸ and one professor of government whose credibility was undermined by the inconsistency between his testimony and his prior publications, and by his minimal familiarity with issues relating to the relative political power of lesbians and gays.²³⁹ As a result, the district court limited the weight given to the witnesses’ opinions due to their lack of relevant expertise and insufficient reliability.²⁴⁰

The plaintiffs, on the other hand, called eight lay witnesses and nine expert witnesses, including two historians (from Harvard and Yale),²⁴¹ two economists (with Ph.D. degrees from UC Berkeley),²⁴² three psychologists (from UCLA, UC Davis, and Cambridge),²⁴³ a social epidemiologist (from Columbia),²⁴⁴ and a political scientist (from Stanford).²⁴⁵ The trial court found that each of the plaintiffs’ expert witnesses were “amply qualified” by their education and

234. *Id.* at 928–29.

235. *Id.* at 930–31.

236. *Id.* at 931.

237. *Id.* at 944.

238. *Id.* at 945–50.

239. *Id.* at 950–52. David Blankenhorn, the think-tank founder who was found not to be credible by the federal district court, was one of the commentators cited by the proponents of California’s same-sex-marriage ban during the state litigation as a key supporter of the responsible-procreation defense. *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5. Professor Lynn Wardle and conservative advocate Maggie Gallagher were the other two commentators cited by the California Supreme Court as experts who believed that same-sex marriage would send a message that “would sever the link that marriage provides between procreation and child rearing.” *See id.* at 432–33.

240. *See Perry*, 704 F. Supp. 2d at 950, 952.

241. *Id.* at 940.

242. *Id.* at 941–42.

243. *Id.* at 942–43.

244. *Id.* at 942.

245. *Id.* at 943.

experience and demonstrated comfort with the subjects of their expertise.²⁴⁶

The district court described the evidence as focusing on three broad questions, which were used to summarize the testimony.²⁴⁷ The first question was whether any evidence showed that California had an interest in refusing to recognize marriage between two people because of their sex, but the district court found no basis in the record for any government interest in a differentiation based on sex.²⁴⁸ The second question was whether any evidence showed that California had an interest in differentiating between same-sex and opposite-sex unions, and the district court again found no basis in the record for any government interest in differentiating based on sexual orientation.²⁴⁹ The third question was whether the evidence showed that Prop 8 enacted private moral disapproval of same-sex couples without advancing any legitimate government interest, and the district court answered affirmatively and concluded that “[t]he evidence demonstrated beyond serious reckoning that Prop 8 finds support only in such disapproval.”²⁵⁰

The district court then made roughly eighty factual findings supported by over 330 subparts citing to specific evidence in the record, and it further incorporated seventy-five citations to evidence in its legal analysis.²⁵¹ These factual findings variously described: the parties;²⁵² the civil and consensual basis of marriage;²⁵³ the historical and contemporary absence of any requirement of ability or willingness to procreate;²⁵⁴ the racial and gendered history of marriage;²⁵⁵ the contemporary functions of marriage;²⁵⁶ the contemporary understanding of sexual orientation;²⁵⁷ the comparative abilities of same-sex and opposite-sex couples;²⁵⁸ the

246. *Id.* at 940.

247. *Id.* at 932.

248. *Id.* at 932–34.

249. *Id.* at 934–36.

250. *Id.* at 936–38.

251. *Id.* at 953–91.

252. *Id.* at 953–56 (Findings of Fact 1–18).

253. *Id.* at 956 (Findings of Fact 19–20).

254. *Id.* (Finding of Fact 21).

255. *Id.* at 957–61 (Findings of Fact 22–33).

256. *Id.* at 961–63 (Findings of Fact 34–41).

257. *Id.* at 963–67 (Findings of Fact 42–47).

258. *Id.* at 967–70 (Findings of Fact 48–51).

differences between domestic partnership and marriage;²⁵⁹ the effects of same-sex marriage;²⁶⁰ the effects, costs, and burdens of Prop 8;²⁶¹ the factors affecting a child's well-being;²⁶² and both historical and contemporary discrimination against gays.²⁶³

In its legal analysis, the district court frequently cited evidence that showed that the Prop 8 campaign had relied on fears that exposing children to the concept of same-sex marriage would cause them to become gay or lesbian, which was treated as an outcome that parents should dread.²⁶⁴ The district court also found that the campaign specifically relied on stereotypes that same-sex relationships are inferior to opposite-sex relationships.²⁶⁵ Although the proponents of Prop 8 abandoned their campaign's morality-based justification for Prop 8 at trial, the district court nonetheless found that the evidence at trial revealed that a belief that opposite-sex couples are morally superior to same-sex couples was "the most likely explanation for its passage" and that the campaign played on fears about the dangers of exposing children to homosexuality; the court also found that the evidence at trial demonstrated that those fears were "completely unfounded."²⁶⁶ The district court concluded that Prop 8 enacted "a private moral view that same-sex couples are inferior," which alone was an improper basis for denying rights and was not supported by any rational justification.²⁶⁷

The district court's legal analysis grappled with several thorny constitutional issues. Given that marriage is a fundamental right, the court first analyzed whether the plaintiffs sought to exercise this right or sought recognition of some new right.²⁶⁸ Courts look to history and tradition as one method to determine if a right is fundamental

259. *Id.* at 970–72 (Findings of Fact 52–54).

260. *Id.* at 972–73 (Findings of Fact 55–56).

261. *Id.* at 973–80 (Findings of Fact 57–68).

262. *Id.* at 980–81 (Findings of Fact 69–73).

263. *Id.* at 981–91 (Findings of Fact 74–80).

264. *Id.* at 988–90, 1001–03 (citing repeatedly to Finding of Fact 79).

265. *Id.* at 990–91, 1001–03 (citing repeatedly to Finding of Fact 80).

266. *Id.* at 1002–03.

267. *Id.* at 1003 ("Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment." (citation omitted)).

268. *Id.* at 992.

under the U.S. Constitution.²⁶⁹ While marriage is traditional,²⁷⁰ it also has undergone enormous change. For example, the district court emphasized that racial restrictions that were “once common” are now “shameful” and unconstitutional and that “once-unquestioned” gender restrictions, such as the husband’s “coverture” of his wife, are now regarded as “antithetical to the notion of marriage as a union of equals.”²⁷¹ The district court, therefore, focused on those characteristics of marriage that have survived throughout history and described the core components of marriage as two parties freely consenting to form a relationship that forms the foundation of a household, including mutual support of one another and of any dependents.²⁷²

The district court noted that the state regulates marriage to encourage stable households but respects an individual’s choice to build family relationships because they are central to life.²⁷³ The district court emphasized that the state has “never” inquired into procreative capacity or intent before issuing a marriage license and that the U.S. Supreme Court has stated that treating marriage as “simply about the right to have sexual intercourse” would demean it.²⁷⁴ The district court turned to the evidence at trial and concluded that the traditional exclusion of same-sex couples in the United States was never about procreation but was “an artifact of a time when the genders were seen as having distinct roles in society and in marriage,” which has now passed.²⁷⁵ The district court also emphasized that same-sex couples are situated identically to opposite-sex couples regarding their ability to perform the core rights and obligations of marriage.²⁷⁶

269. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997)).

270. *Id.* (acknowledging that neither party disputed the ability to marry as a fundamental right).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

275. *Id.* at 993.

276. *Id.* (Finding of Fact 48) (citing to eleven evidentiary sources, including relevant admissions by proponents and the attorney general, psychological research and opinions, and demographical data showing no meaningful differences between opposite-sex couples and the more than 107,000 same-sex couples in California who live throughout the state, who are racially and ethnically diverse, who depend on one another financially, who participate in the economy, and 18 percent of whom are raising children).

The court provided a detailed analysis of the differences between domestic partnerships and marriage in its findings of fact and conclusions of law.²⁷⁷ The district court noted that the proponents did not dispute the “significant symbolic disparity” between the two statuses and ruled that domestic partnerships are “a substitute and inferior institution” that do not satisfy the state’s constitutional obligations under the Due Process and Equal Protection Clauses.²⁷⁸

Regarding the protection of the fundamental right to marry under the Due Process Clause, the district court noted that courts must apply strict scrutiny when legislation infringes on fundamental rights and that a majority of voters may not deny such rights.²⁷⁹ The district court then reasoned that, because Prop 8 failed even rational basis review, it could not survive strict scrutiny and therefore violated due process.²⁸⁰ The district court turned to its equal protection analysis and reasoned that, even under rational basis review, courts must “insist on knowing the relation between the classification adopted and the object to be attained”²⁸¹ to “find some footing in the realities of the subject addressed by the legislation.”²⁸² The district court further emphasized that courts may look to evidence²⁸³ as one means to ensure some rational basis for the ban, other than merely disadvantaging the group burdened.²⁸⁴

The district court then circumvented two potentially difficult dilemmas: (1) choosing between sex discrimination and sexual-orientation discrimination to frame the case; and (2) distinguishing between sexual orientation as a status or as conduct. With regard to the first, the trial court found that sexual-orientation discrimination and sex discrimination are “necessarily interrelated” and thus “equivalent” claims both because sexual orientation informs the sex of one’s intimate partner and because the sex of one’s intimate

277. *Id.* at 970–72 (Findings of Fact 52–54), 993–94.

278. *Id.* at 994, 1004.

279. *Id.* at 994–95 (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

280. *Id.* at 995.

281. *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993)).

282. *Id.* (citing *Heller*, 509 U.S. at 321).

283. *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 228 (1982)).

284. *Id.* at 995–96 (citing *Romer*, 517 U.S. at 633; *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

partner defines one's sexual orientation.²⁸⁵ With regard to the second, the proponents' argument that Prop 8 targets mere conduct and not identity, the trial court relied on the Supreme Court's reasoning in *Lawrence*—affirmed recently in *Christian Legal Society v. Martinez*²⁸⁶—which similarly rejected any distinction between status and conduct with regard to sexual orientation.²⁸⁷ The district court then cautiously avoided a skirmish about the standard of review by finding that, while the evidence showed that classifications based on sexual orientation appeared suspect and therefore should be subjected to strict scrutiny, Prop 8 failed even rational basis review because the proposition is not rationally related to any legitimate state interest.²⁸⁸ The court came to this conclusion after considering all six governmental interests asserted by the ballot proponents, including interests related to (1) tradition; (2) caution; (3) responsible procreation and parenting; (4) freedom to discriminate; (5) difference; and (6) the catchall.²⁸⁹

Although state officials declined to defend Prop 8,²⁹⁰ the district court considered each of the purported governmental interests that the Prop 8 proponents proffered.²⁹¹ First, regarding tradition, the district court rejected preserving the traditional definition of marriage because tradition alone is not a sufficient justification for continued discrimination.²⁹² Also, evidence at trial showed that much of the tradition was based on the “artifact” of gender roles or on preferring

285. *Id.* at 996. The trial court nonetheless described sexual orientation discrimination as “a phenomenon distinct from, but related to, sex discrimination.” *Id.*

286. 130 S. Ct. 2971 (2010).

287. *Perry*, 704 F. Supp. 2d at 996 (citing *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *Martinez*, 130 S. Ct. at 2990). Seven years before the Supreme Court's ruling in *Lawrence* overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld legislation that criminalized same-sex sexual conduct, Justice Scalia's dissent in *Romer* argued that the majority there should have distinguished between status and conduct. 517 U.S. at 644 (Scalia, J., dissenting). Justice Scalia argued that the greater power to criminalize and/or disapprove of same-sex conduct included the lesser power to deny civil rights to those who engage in such conduct. *Id.* at 644–45. Thus, the Court implicitly rejected the status-conduct distinction in 1996 in *Romer*, and it explicitly rejected the distinction in 2003 in *Lawrence* and reaffirmed that rejection in 2010 in *Martinez*. For a more detailed discussion of the import of the *Martinez* decision, see Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631 (2011).

288. *Perry*, 704 F. Supp. 2d at 997.

289. *Id.* at 998–1002.

290. *Id.* at 928.

291. *Id.* at 998–1002.

292. *Id.* at 998.

opposite-sex relationships, which is itself discriminatory and tautological.²⁹³

Second, regarding caution, the district court emphasized that the evidence at trial showed no negative effects of same-sex marriage; thus, the state did not have any governmental interest in acting incrementally to decrease the probability of negative effects.²⁹⁴

Third, regarding responsible procreation and parenting, the district court noted that this category encompassed the proponents' largest group of purported state interests.²⁹⁵ The district court found that fertility was the only difference that the proponents identified between same-sex and opposite-sex couples but that the proponents failed to present any evidence about why sexual orientation should be used as a proxy for fertility or why fertility should be considered with regard to marriage,²⁹⁶ especially considering that the state had never required marriage applicants to demonstrate procreative capacity or intent.²⁹⁷ The district court nonetheless considered whether any evidence supported the argument that Prop 8 advanced responsible procreation or parenting and found no such evidence.²⁹⁸ Regarding procreation, the district court found that the evidence showed that Prop 8 "does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents"²⁹⁹ and further that Prop 8 actually harms any interest in channeling sexual activity to marriage because it effectively requires "some sexual activity and child-bearing and child-rearing to occur outside marriage."³⁰⁰ Regarding parenting, the district court found that Prop 8 did not affect who could or should become parents.³⁰¹ Moreover, the evidence at trial demonstrated that same-sex and opposite-sex parents are of "equal quality,"³⁰² "parents' genders are

293. *Id.*

294. *Id.* at 998–99.

295. *Id.* at 999.

296. *Id.* at 997.

297. *Id.* at 992.

298. *Id.* at 999–1000.

299. *Id.*

300. *Id.* at 1000.

301. *Id.* ("Proposition 8 has nothing to do with children, as Proposition 8 simply prevents same-sex couples from marrying. Same-sex couples can have (or adopt) and raise children. When they do, they are treated identically to opposite-sex parents under California law." (citations omitted)).

302. *Id.* at 999.

irrelevant to children's developmental outcomes,"³⁰³ and Prop 8 actually undermines any state interest in family stability because it makes same-sex families less stable.³⁰⁴

Fourth, regarding the freedom of those who oppose same-sex marriage, the district court rejected the purported government interests as a matter of law based on two prior California Supreme Court decisions that found that Prop 8 does not affect any First Amendment rights³⁰⁵ and that the state's antidiscrimination law otherwise prohibits discrimination between same-sex unions and opposite-sex marriages.³⁰⁶

Fifth, regarding purported differences, the district court found that same-sex and opposite-sex couples are "exactly the same" "for all purposes relevant to California law"³⁰⁷ and also that Prop 8 hinders any state interest in administrative convenience by requiring the maintenance of two separate institutional schemes for California couples.³⁰⁸

Finally, the district court rejected the proponents' attempt to preserve any conceivable "catchall" interest identified at any later stage of the litigation because the proponents already had an "ample opportunity" at trial to identify interests other than fear or discrimination.³⁰⁹

The district court concluded that the evidence demonstrated that Prop 8 fit the purported justifications "so poorly" that the most likely explanation for the law was a belief in the moral superiority of opposite-sex couples.³¹⁰ Moreover, the district court found that the evidence demonstrated that the Prop 8 campaign relied on negative stereotypes, fear, and moral disapproval of gays,³¹¹ and that these messages about gays were "completely unfounded."³¹² Given the "overwhelming evidence" demonstrating that Prop 8 violated the due

303. *Id.* at 1000.

304. *Id.*

305. *Id.* (citing *In re Marriage Cases*, 183 P.3d 384, 451–52 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5).

306. *Id.* at 1000–01 (citing *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1217–18 (Cal. 2005)).

307. *Id.* at 1001.

308. *Id.*

309. *Id.* at 1001–02.

310. *Id.* at 1002–03.

311. *Id.*

312. *Id.* at 1003.

process and equal protection rights of the plaintiffs,³¹³ the district court held that Prop 8 was unconstitutional and permanently enjoined its enforcement.³¹⁴

While the district court's meticulous analysis seemed to portend a resounding victory for same-sex couples, the proponents of Prop 8 pursued an appeal to the Ninth Circuit.³¹⁵ The substitution of the ballot proponents as the sole defenders of Prop 8 initially confounded the judiciary.³¹⁶ Because the proponents, rather than the state, decided the defense strategy, the defense reflected the proponents' ideological interests rather than the state's governmental interests.³¹⁷ On a more technical level, a related and serious question emerged on appeal about whether the proponents had constitutional standing to pursue an appeal given that they were not elected by the voters to represent the interests of the state.³¹⁸

313. *Id.*

314. *Id.* at 1004.

315. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011).

316. *Id.* (“[W]e are now convinced that Proponents’ claim to standing depends on Proponents’ particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative, which rights it appears to us have not yet been clearly defined by the Court. We therefore request clarification in order to determine whether we have jurisdiction to decide this case.”).

317. *Id.* at 1197 (discussing the particularized interest the proponents may have had in enacting Prop 8 relative to the government’s own interest).

318. *Id.* at 1195. No state defendant opted to appeal the trial court ruling, but the Prop 8 proponents filed an appeal with the Ninth Circuit. *Id.* The Ninth Circuit promptly ordered the proponents to address the question of standing in their opening brief. *Id.* After considering the parties’ briefs, the Ninth Circuit certified the standing question to the California Supreme Court. *Id.* at 1199. The California Supreme Court held that “the official proponents of a voter-approved initiative measure are authorized [under the California Constitution] to assert the state’s interest in an initiative’s validity” “when the public officials . . . decline to [defend a law].” *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011).

Should the Prop 8 proponents appeal the Ninth Circuit decision to the U.S. Supreme Court, standing may once again become an issue. While the U.S. Supreme Court has not ruled definitively on the question of whether initiative proponents have standing to defend the constitutionality of their initiative, the Supreme Court summarily dismissed an appeal by an initiative proponent for lack of standing. *See Don’t Bankrupt Wash. Comm. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chi.*, 460 U.S. 1077 (1983). In another case, the Supreme Court also expressed “grave doubts” that ballot initiative proponents would have standing to appeal in lieu of government officials. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). In the Arizona case, the Supreme Court highlighted the lack of any state law appointing initiative sponsors to serve as agents of the people, in lieu of public officials, to defend the constitutionality of an enacted initiative. *Id.* at 65. The California Supreme Court distinguished *Arizonans* from *Perry* because California law did authorize the proponents of a ballot initiative to assert the state’s interest. *Perry*, 265 P.3d at 1013–14.

Whether or not ending litigation regarding a constitutional issue on a technical basis is desirable, it is not unusual. *See, e.g., Don’t Bankrupt Wash. Comm.*, 460 U.S. at 1077. A federal

X. ECHOES OF
LOVING ON APPEAL

In appealing the district court decision to the Ninth Circuit, the Prop 8 proponents first faced the task of defending their standing to pursue an appeal, without which the Ninth Circuit would have no constitutional authority to decide the issue.³¹⁹ With regard to the merits of the case, the proponents have relied on the arguments that sexual relationships between men and women naturally produce children and that society must protect itself from the threat posed by unwanted children by affirming the exclusive availability of marriage to heterosexuals.³²⁰ They also objected strenuously to the trial court's reliance on social-science evidence.³²¹ Indeed, constitutional scholars weighing in have disagreed as well about whether the voluminous evidence amassed at trial would matter.³²²

Front and center in the Prop 8 appeal has been the comparison to *Loving v. Virginia*.³²³ In the most sustained comparison, the NAACP amicus brief argued that “the parallels between this case and *Loving* are evident in the rationales advanced by the proponents of Proposition 8, which bear a striking resemblance to those proffered by the Commonwealth of Virginia in its defense of the anti-

court has no discretion to proceed with a suit unless the court finds it has jurisdiction sufficient to satisfy Article III of the Constitution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 464 (1982). But exactly what constitutes the constitutional minimum requirement for standing remains unclear, as the Supreme Court itself conceded when noting that “the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court.” *Id.* at 475 (quotation marks omitted).

319. The Ninth Circuit certified a question to the California Supreme Court asking whether California law entitled the ballot proponents to defend Prop 8 in lieu of state officials. *Perry*, 628 F.3d at 1199. On November 17, 2011, the California Supreme Court announced that, in the absence of public officials willing to do so, the official Prop 8 proponents have authority under state law to defend the constitutionality of the initiative. *Perry*, 265 P.3d at 1032–33.

320. Defendant-Intervenors-Appellants’ Opening Brief at 77–78, *Perry*, 628 F.3d 1191 (No. 10-16696).

321. *Id.* at 88.

322. For example, during San Francisco’s KQED broadcast of *Forum* hosted by Michael Krasny during the hour before the oral arguments, commentator David Levine opined that “the factual record is almost beside the point,” while law professor Eugene Volokh argued that the application of the rational basis test would involve a “difficult empirical question.” *Forum with Michael Krasny: Prop. 8 Federal Appeal*, KQED RADIO (Dec. 6, 2010), <http://www.kqed.org/a/forum/R201012060900>.

323. 388 U.S. 1 (1967).

miscegenation statute at issue in *Loving*.”³²⁴ Indeed, the similarity between the arguments advanced in the proponents’ appellate briefs to the Ninth Circuit and the arguments made in the briefs filed before the Supreme Court in *Loving* is remarkable. The NAACP highlighted multiple examples in its brief.³²⁵

The Commonwealth of Virginia’s brief to the Supreme Court emphasized that the constitutionality of interracial marriage bans had been “thoroughly settled” by an “exhaustive array of judicial authority”³²⁶ in a “virtually uninterrupted line of judicial decisions”³²⁷ “covering a period of almost one hundred years.”³²⁸ The Prop 8 proponents in the *Perry* appeal have asserted a nearly identical claim that the constitutionality of banning same-sex marriage is well settled.³²⁹

Virginia’s brief also argued that “an inquiry into evidence of a scientific nature” was “clearly impermissible”³³⁰ and “irrelevant.”³³¹ The Prop 8 proponents similarly have argued against the consideration of evidence.³³²

Virginia’s brief argued that the meaning of the original intent of the framers of the Fourteenth Amendment cannot change over time, and it cited numerous statements from members of Congress that rejected any suggestion that the Fourteenth Amendment might call the interracial marriage ban into question.³³³ Supporters of Prop 8 similarly have argued that the original framers of the Fourteenth

324. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Plaintiffs-Appellees and Affirmance of the District Court Judgment at 3, *Perry*, 628 F.3d 1191 (No. 10-16696).

325. *Id.*

326. Brief & Appendix on Behalf of Appellee at 5, *Loving*, 388 U.S. 1 (No. 395), 1967 WL 93641, at *5.

327. *Id.* at 32.

328. *Id.* at 37.

329. Defendant-Intervenors-Appellants’ Reply Brief at 5, *Perry*, 628 F.3d 1191 (No. 10-16696), 2010 WL 4622581, at *5 (“[E]very appellate court, both state and federal, to address the validity of traditional opposite-sex marriage laws under the United States Constitution has upheld them as rationally related to the state’s interest in responsible procreation and child-rearing.”).

330. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 6–7.

331. *Id.* at 38.

332. For example, Prop 8 proponents have argued that the Ninth Circuit owes no deference to the trial court’s findings of fact because they are “legislative facts” rather than “adjudicative facts.” Defendant-Intervenors-Appellants’ Reply Brief, *supra* note 329, at 20–24.

333. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 9–31.

Amendment would not have intended for it to prohibit banning same-sex marriage.³³⁴

Virginia's brief stressed the fact that the Supreme Court had denied certiorari in a challenge to Alabama's interracial marriage ban just six months after it had decided *Brown v. Board of Education*.³³⁵ The Prop 8 proponents have made a similar technical argument that the Supreme Court already decided the constitutional question when it previously dismissed a same-sex marriage case for want of a substantial federal question.³³⁶

Virginia's brief quoted at length from *Naim v. Naim*,³³⁷ which discussed the concurring and dissenting opinions in the California Supreme Court decision in *Perez v. Sharp*,³³⁸ which invalidated California's interracial marriage ban.³³⁹ Opponents of same-sex marriage similarly have focused on the dissenting opinion of Justice Cordy in *Goodridge*.³⁴⁰

Virginia's brief highlighted what it characterized as "the definitive book on intermarriage" by Dr. Albert I. Gordon, which argued, for example, that "our obligation to children should tend to reduce the number of such marriages" and that "the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice."³⁴¹ Similarly, the same-sex-marriage briefs have featured the writings of social conservative scholars, such as Lynn

334. See Defendant-Intervenors-Appellants' Reply Brief, *supra* note 329, at 47 ("[T]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." (quoting *Loving v. Virginia*, 388 U.S. 1, 10 (1967)) (internal quotation marks omitted)).

335. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 34–35.

336. See Defendant-Intervenors-Appellants' Reply Brief, *supra* note 329, at 15–18.

337. 87 S.E.2d 749 (Va. 1955).

338. 198 P.2d 17 (Cal. 1948).

339. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 36–37 (quoting *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. Ct. App. 1955)).

340. Defendant-Intervenors-Appellants' Opening Brief, *supra* note 320, at 90–91, 93 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 999–1000, 1003 (Mass. 2003) (Cordy, J., dissenting)).

341. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 47–48 (quoting ALBERT I. GORDON, INTERMARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC 334–35, 357 (1964)).

Wardle,³⁴² and its authors have bristled at the suggestion that their defense of the ban reflects animus based on sexual orientation.³⁴³

Virginia's brief ended by arguing the judiciary may not invade "the exclusive province of the Legislature of each State" to decide whether to permit or prevent such alliances.³⁴⁴ This point has been one of the primary arguments made by supporters of Prop 8 as well.³⁴⁵

Arguments made by the Lovings also bear remarkable similarity to those made by the challengers to the same-sex-marriage ban. Most saliently, while commentators frequently assume that the *Loving* dispute triggered strict scrutiny due to the presence of facial racial classifications,³⁴⁶ strict scrutiny was neither assumed nor asserted by the parties. Rather than invoking heightened scrutiny in their February 1967 brief to the Supreme Court, Mildred and Richard Loving argued that the question for both equal protection and due process was whether the interracial marriage ban had "a legitimate legislative purpose" and whether it bore "a reasonable relationship to such purpose."³⁴⁷

Just as the parties, courts, and commentators are now debating the meaning of *Lawrence v. Texas*, the Lovings noted that scholars then were unsure about the meaning of *Brown v. Board of Education*, specifically whether it meant that segregation constituted intentional

342. Defendant-Intervenors-Appellants' Opening Brief, *supra* note 320, at 65 (citing Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117, 180–81 (2007)).

343. *Id.* at 105 ("[T]he inference of anti-gay hostility drawn by the district court is manifestly false. It defames more than seven million California voters as homophobic, a cruelly ironic charge, as noted earlier, given that California has enacted some of the Nation's most progressive and sweeping gay-rights protections, including creation of a parallel institution, domestic partnerships, affording same-sex couples all the benefits and obligations of marriage.").

344. Brief & Appendix on Behalf of Appellee, *supra* note 326, at 7–8.

345. *See, e.g.*, Defendant-Intervenors-Appellants' Reply Brief, *supra* note 329, at 74 ("The Constitution simply does not authorize the judiciary to sit as a super legislature to second guess the wisdom or desirability of the balance the people of California have struck." (internal quotation marks omitted) (citing *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993))).

346. *See, e.g.*, Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 656 & n.145 (2006) (citing to *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967) to support the proposition that restricting marriage on racial classifications violates the central purpose of the Equal Protection Clause).

347. Brief for Appellants at 39, *Loving*, 388 U.S. 1 (No. 395), 1967 WL 113927, at *39.

discrimination, lacked a rational basis, or constituted a denial of the freedom to associate.³⁴⁸

The Lovings' brief did not dither over the doctrinal level of scrutiny but instead focused squarely on understanding the ban within its historical and social context. For example, their brief demonstrated that the function of the interracial-marriage ban had changed over time, citing historical and scholarly evidence to show the evolution of the justification for banning interracial marriage from its religious and then economic roots to its later social justifications grounded in eugenics.³⁴⁹ The Lovings further emphasized the immeasurable social harm caused by the ban, citing Gunnar Myrdal's explanation that the majority utilized "the dread of 'intermarriage'" to justify discrimination designed not only to protect the purity of the white race but also to keep African Americans in a lower status.³⁵⁰ Their brief also argued that the original legislative intent of the Fourteenth Amendment was arguable and not determinative in any event, because the Fourteenth Amendment was "open-ended and meant to be expounded in light of changing times and circumstances."³⁵¹ Their brief finally stressed the lack of any evidence supporting the bans, noting that the state had not presented—and could not present—"reputable scientific evidence" to prove that persons of mixed race were "inferior."³⁵²

The Lovings ended their brief with points nearly identical to those of the Prop 8 challengers. First, they underscored the intertwinement of liberty and equality in arguing that the ban deprived personal liberty just as it denied equal protection.³⁵³ Second, they argued that the ban was the last remaining vestige of the "elaborate legal structure of segregation" and thus the remaining symbol of the relegation of African Americans to "second-class citizenship."³⁵⁴ Finally, they argued that, whether or not the Court

348. *Id.* at 31–32 (citing scholarly articles in the *Yale Law Journal*, *Georgetown Law Journal*, and *Harvard Law Review*). In an earlier section, the brief again noted the uncertainty about *Brown's* meaning in arguing that the principle of *Brown*, "however it is articulated," makes clear the invalidity of the interracial marriage ban. *Id.* at 10.

349. *Id.* at 16–24.

350. *Id.* at 27.

351. *Id.* at 10.

352. *Id.* at 36.

353. *Id.* at 38–39.

354. *Id.* at 39–40.

had been wise to avoid the issue in the past, the time had come to strike down the ban.³⁵⁵

Same-sex couples now stand in a nearly identical litigation posture to interracial couples prior to the path-breaking decision in *Loving*.³⁵⁶ What is more, nearly every argument made by both sides in the Prop 8 appeal has tracked the same argument made during the *Loving* litigation. But the Ninth Circuit's ruling in the Prop 8 litigation would make only passing reference to *Loving*.³⁵⁷

XI. A RESOUNDING REJECTION BY THE NINTH CIRCUIT

Shortly before this Article went to press, a panel of the Ninth Circuit issued its 2–1 ruling in *Perry v. Brown* and affirmed the district court's ruling that Prop 8 violated the Fourteenth Amendment.³⁵⁸ The panel determined that *Romer v. Evans* governed its analysis³⁵⁹ and concluded that Prop 8 served “no purpose,” and had “no effect, other than to lessen the statute and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”³⁶⁰ The panel resoundingly rejected the responsible-procreation defense because Prop 8 had “no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples,”³⁶¹ given that California law affords same-sex couples the same rights as opposite-sex couples to enter into state-recognized relationships and to raise children together³⁶² and that Prop 8 “in no

355. *Id.* at 40.

356. By no means does this comparison of argumentation within the constitutional litigation suggest that sexual orientation and race are identical. For a critique of making an analogy between racial minority rights and gay rights, see Devon Carbado & Russell Robinson, *What's Wrong with Gay Rights* (2011) (unpublished manuscript), available at <http://www.law.berkeley.edu/1108.htm>.

357. *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *26 (9th Cir. Feb. 7, 2012).

358. *Id.* at *1, *29.

359. *Id.* at *17.

360. *Id.* at *1.

361. *Id.*

362. *Id.* at *13 (citing provisions allowing same-sex couples to raise children together, enjoy the presumption of parentage, adopt each other's children, become foster parents, share community property, file state taxes jointly, participate in a partner's group health insurance policy, enjoy hospital visitation privileges, and make medical decisions for an incapacitated partner, among others).

way” altered state law governing childrearing and procreation.³⁶³ The panel reasoned, moreover, that “to explain how *rescinding* access to the designation of ‘marriage’ is rationally related to the State’s interest in responsible procreation, Proponents would have had to argue that opposite-sex couples were *more* likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of ‘marriage.’”³⁶⁴ The panel further emphasized that it was “aware of no basis on which this argument would be even conceivably plausible.”³⁶⁵

As a technical matter, the Ninth Circuit panel framed its ruling narrowly to establish binding precedent only as to the unconstitutionality of Prop 8 and did not purport to resolve the broader question of whether a state may ever deny same-sex couples the right to marry.³⁶⁶ But the panel’s decision wholly rejected the functional arguments primarily advanced in defense of Prop 8. The panel found no actual or conceivable rational relation between stripping the designation of marriage and the purported state interests in encouraging responsible procreation and child rearing,³⁶⁷ proceeding with caution (which was also advanced by Prop 8’s proponents), as well as protecting religious liberty and protecting children (which were proffered by amici curiae).³⁶⁸ Repeatedly

363. *Id.* at *22.

364. *Id.* at *21.

365. *Id.* The panel further explained:

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. . . . It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman.

Id. at *21, *23.

366. *Id.* at *1 (“Whether under the Constitution same-sex couples may *ever* be denied the right to marry, a right that has long been enjoyed by opposite-sex couples, is an important and highly controversial question. . . . We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of ‘marriage,’ and Proposition 8’s only effect was to take away that important and legally significant designation, while leaving in place all of its incidents. This unique and strictly limited effect of Proposition 8 allows us to address the amendment’s constitutionality on narrow grounds.”).

367. *Id.* at *22 (“Proposition 8 in no way alters the state laws that govern childrearing and procreation. . . . [G]iven all other pertinent aspects of California law, Proposition 8 simply could not have the effect on procreation or childbearing that Proponents claim it might have been intended to have. Accordingly, an interest in responsible procreation and childbearing cannot provide a rational basis for the measure.”).

368. *Id.* at *23–25.

referring to the specific context surrounding Prop 8,³⁶⁹ the panel also considered and rejected other common justifications for banning same-sex marriage, including: the historical argument of the ban's tradition or historical pedigree;³⁷⁰ the moral argument of the ban's reflection of societal disapproval;³⁷¹ and the positive-right argument that government is under no affirmative duty to recognize marriage.³⁷²

After considering and rejecting each potential justification, the panel inferred from Prop 8's effect that the voters took away the designation of marriage because they disapproved of gays and lesbians "as a class."³⁷³ Relying on *Romer*, the panel ruled that the Equal Protection Clause does not permit Prop 8's disapproval of a class undertaken for its own sake.³⁷⁴ In short, the panel's conclusion that Prop 8 reflects disapproval of a class mirrors this Article's assertion that the same-sex marriage ban is essentially invidious.

XII. ON THE WANE, REGARDLESS OF THE LEVEL OF SCRUTINY

Other federal and state courts in various contexts recently have considered and, for the most part, rejected the responsible-procreation defense.³⁷⁵ Perhaps most interesting for constitutional jurisprudence is that the essence of the constitutional dispute remains the same whether the battle is waged *between* heightened judicial scrutiny (due to interference with a fundamental right or a suspect

369. See, e.g., *id.* at *15, *27.

370. *Id.* at *25–26.

371. *Id.* at *27.

372. *Id.* at *18 ("This does not mean that the Constitution is a 'one-way ratchet,' as Proponents suggest. It means only that the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right *from one group but not others*, whether or not it was required to confer that right or benefit in the first place. . . . In both *Romer* and *Moreno*, the constitutional violation that the Supreme Court identified was not the failure to confer a right or benefit in the first place; Congress was no more obligated to provide food stamps than Colorado was to enact antidiscrimination laws. Rather, what the Supreme Court forbade in each case was the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens. The constitutional injury that *Romer* and *Moreno* identified—and that serves as a basis of our decision to strike down Proposition 8—has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself.").

373. *Id.* at *27.

374. *Id.*

375. See, e.g., *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1190–91 (N.D. Cal. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388–89 (D. Mass. 2010).

class) and rational basis review, or whether it is waged *within* the rational basis review level. Within the rational basis review level, the question is whether courts will apply the most deferential form of rational basis review exemplified by *Dandridge v. Williams*³⁷⁶ or the more robust form of rational basis review “with bite” associated with the trilogy of *United States Department of Agriculture v. Moreno*,³⁷⁷ *City of Cleburne, Texas v. Cleburne Living Center*,³⁷⁸ and *Romer v.*

376. 397 U.S. 471 (1970).

377. 413 U.S. 528 (1973). In *Moreno*, the Supreme Court applied rational basis review to invalidate a food stamp amendment denying benefits to households of unrelated members in order to prevent “hippies” from receiving food stamps. *Id.* at 534. The *Moreno* Court established what is now a boilerplate equal protection principle: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* As to the government’s argument that it nonetheless had a conceivably legitimate interest in minimizing food stamp fraud, the *Moreno* Court rejected any reliance on the government’s “wholly unsubstantiated assumptions” about the greater danger of fraud in unrelated households. *Id.* at 535. The Court explained that, “in practical effect,” the food stamp ban did not rationally further fraud prevention because the law did not exclude those likely to commit fraud but instead excluded those who were too poor to change their living arrangement so as to retain eligibility. *Id.* at 537–38. The Court also noted that other provisions of the Food Stamp Act directly addressed fraud prevention, which “necessarily casts considerable doubt” that Congress intended the exclusion of unrelated household members to prevent these same abuses. *Id.* at 536–37. The majority rejected using unrelated household status as a proxy for fraud, *id.* at 537–38, over Justice Rehnquist’s direct objection that the Court was required to defer to Congress because preventing fraud “conceivably” could justify the denial of food stamps to unrelated households, some of which might have been formed to take advantage of the food stamp program. *Id.* at 547 (Rehnquist, J., dissenting). Thus, the *Moreno* Court emphasized scant but specific evidence in the legislative record revealing that the food stamp ban was intended to discriminate against hippies and rejected the government’s assumption that household relatedness was a reasonable proxy for likelihood to commit fraud as “wholly without any rational basis.” *Id.* at 538 (majority opinion).

378. 473 U.S. 432 (1985). The Court in *Cleburne* applied only rational basis review, *id.* at 442, but invalidated the city’s denial of a special use permit to a group home for individuals with developmental disabilities, *id.* at 450. The Court emphasized some specific evidence in the record that the city council had been concerned with “the negative attitude of the majority of property owners” and the fear that junior high students across the street might harass the group home’s occupants, both justifications the Court rejected, reasoning that if either of those was the city’s interest, the city violated the Equal Protection Clause. *Id.* at 448–49. The Court specifically explained, “It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.” *Id.* at 448 (citation omitted). As in the *Moreno* food stamps case, the Court then considered the government’s other more neutral justifications including the group home’s location, size, and density of occupancy, as well as neighborhood occupancy and congestion. *Id.* at 449–50. The Court reasoned that none of these other concerns rationally justified singling out the group home as compared to other multiple occupancy dwellings and therefore concluded that the city’s action appeared “to rest on an irrational prejudice” against developmentally disabled persons. *Id.* at 450.

Evans.³⁷⁹ One paradigmatic example of the battle within rational basis review occurred in *Romer*, where the majority applied what Justice O'Connor later described as a more searching form of rational basis review,³⁸⁰ while Justice Scalia in his dissenting opinion in *Romer* insisted that the more deferential *Dandridge* standard was more appropriate.³⁸¹ Two key points emerge here: first, courts apply the more robust version of rational basis review when the government's means are so far removed from its purported ends that the courts suspect invidious discrimination;³⁸² and second, regardless

379. 517 U.S. 620 (1996). The six-justice majority in *Romer* did not require specific evidence to deduce that Colorado voters had enacted Amendment 2 based on "animus" toward gays and lesbians. *Id.* at 632. As it did in *Moreno* and *Cleburne*, the *Romer* Court required Colorado to show that Amendment 2 exhibited some rational relationship to a legitimate interest independent of discrimination so as to ensure "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 632–33. The state had attempted to justify the law as merely a denial of "special rights" to gays, which might have been an attempt to trade on a potential distinction between positive and negative rights, but the Court instead looked to the effects of the law and found that it imposed a "special disability" only upon homosexuals. *Id.* at 631. The state also attempted to defend the law as protecting the freedom of association and liberties of persons who object to homosexuality, as well as preserving scarce anti-discrimination resources, but the Court rejected these as "impossible to credit" because they were "so far removed" from the actual breadth of the amendment. *Id.* at 635. By process of elimination, and without citing any empirical or specific evidence, the Court concluded that Colorado voters classified homosexuals in Amendment 2 "to make them unequal to everyone else," which violated equal protection. *Id.*

The majority reached its conclusion over a vehement dissent. Justice Scalia took issue with the majority's assertion of voter animosity and instead characterized Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." *Id.* at 636 (Scalia, J., dissenting). Justice Scalia further defended the Colorado voters as having enacted an "eminently reasonable" law. *Id.* at 644. He argued that exhibiting "animus" toward conduct was constitutionally permissible and that this type of animus—"moral disapproval of homosexual conduct"—was the only sort of animus exhibited in Amendment 2. *Id.*

Although Justice Kennedy's majority opinion did not cite particular evidence of animosity in the record to refute Justice Scalia, it emphasized the attenuation between the facial classification of gays and the purported governmental interests to support its conclusion that Amendment 2 was based on animus against the class it targeted. *Id.* at 635 (majority opinion).

380. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.")

381. *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

382. Within the Ninth Circuit, two administrative rulings on personnel matters have concluded that discrimination based on sexual orientation could be unconstitutional and refused to allow the federal government to deny health benefits to the legal same-sex spouses of federal employees. *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009); *In re Golinski*, 587 F.3d 901 (9th Cir. 2009). In the *Golinski* decision, the Ninth Circuit's Chief Judge, Alex Kozinski, construed the Federal Employee Health Benefits Act broadly to allow coverage of a same-sex spouse of a Ninth Circuit staff attorney specifically because to construe it narrowly to deny such coverage would require resolution of whether the resulting discrimination would violate equal protection and due

of how the courts characterize the level of review, nearly all seem to agree that the government must prove that the fit between its means and its ends has some footing in social reality.³⁸³

The emerging trend is for courts to apply, at the very least, the more robust *Romer* version of rational basis review. For example, in *Gill v. Office of Personnel Management*,³⁸⁴ a federal district court in Massachusetts insisted upon some modicum of factual support for the linkage between the government's means and its ends and, finding none, rejected each purported justification of DOMA as so far removed from the sweeping status-based enactment as to reflect irrational prejudice.³⁸⁵ Notably, the federal district court in *Gill* specifically rejected the responsible-procreation argument because the federal government conceded that the argument bore no rational relationship to the operation of DOMA and because denying same-sex marriage "does nothing to promote stability in heterosexual parenting."³⁸⁶

process. 587 F.3d at 903–04. Chief Judge Kozinski reasoned that, because moral disapproval is not a legitimate governmental end, and because the government may not punish an individual based on sexual orientation, *id.*, determining the constitutionality of DOMA would require a "searching and careful" inquiry into "history and context," which would be a "delicate and difficult task[.]" *id.* at 903 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967)). To avoid this "constitutional thicket," *id.* at 904, Chief Judge Kozinski construed the federal employment benefits statute to allow the equal treatment required by the Ninth Circuit's equal employment opportunity program, which prohibited discrimination based on sex and sexual orientation, *id.* at 902, 904. Chief Judge Kozinski issued a subsequent order in the same case directing the federal Office of Personnel Management to cease interfering with his order that Ms. Golinski's same-sex spouse be enrolled for health benefits. *In re Golinski*, 587 F.3d at 958, 963.

In a similar ruling, Ninth Circuit Judge Stephen Reinhardt ordered relief to a deputy federal public defender who was denied enrollment of his legal same-sex spouse in the federal health benefit program. *In re Levenson*, 587 F.3d 925. Similar to the trial judge in *Perry*, Judge Reinhardt reasoned that the federal government discriminated against Mr. Levenson in violation of the federal employment plan's prohibitions of sex discrimination and sexual orientation discrimination, *id.* 929–30, and that "some form of heightened constitutional scrutiny" likely applied to his constitutional claims. *Id.* at 931. Nonetheless, Judge Reinhardt did not find it necessary to determine which form of heightened scrutiny to apply. *Id.* He concluded instead that applying DOMA to deny such benefits was unconstitutional because "there is no rational basis for denying benefits to the same-sex spouses of [Federal Public Defender] employees while granting them to the opposite-sex spouses of FPD employees. . . ." *Id.*

383. One outlier from this pattern is a recent decision by an intermediate appellate panel in Texas, which followed Justice Scalia's dissent rather than the *Romer* majority, invoking the deferential *Dandridge* standard as establishing all that was required for the state to justify restricting marriage and divorce to opposite-sex couples and squarely rejecting the reasoning of *Perry*. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659, 676–77 (Tex. App. 2010) (denying a divorce to a same-sex couple who legally married in Massachusetts and then moved to Texas).

384. 699 F. Supp. 2d 374 (D. Mass. 2010).

385. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388–97 (D. Mass. 2010).

386. *Id.* at 388–89. The court explained:

In a more narrowly focused employment benefits case, *Dragovich v. United States Department of Treasury*,³⁸⁷ three California state employees and their lawful same-sex spouses filed suit against the U.S. Department of the Treasury and various federal officials challenging the constitutionality of DOMA's infringement on their ability to participate in the state's long-term care insurance program.³⁸⁸ In ruling that the plaintiffs stated sufficient equal protection and due process claims, the federal district court acknowledged that the federal defendants disavowed the responsible-procreation defense but nonetheless noted that "DOMA's definition of marriage does not bear a relationship to encouraging procreation, because marriage has never been contingent on having children" and because excluding same-sex couples from the federal definition of marriage "does not encourage heterosexual marriages."³⁸⁹

In a more recent and sweeping rejection of the justifications proffered for DOMA, a federal district court judge ruled that the federal government violated a federal employee's right to equal protection under the Fifth Amendment when it refused to enroll the employee's lawful same-sex spouse in a federal health-benefits

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA. Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents. But even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure," when afforded equal recognition under federal law.

Id. (footnotes omitted) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 964 (Mass. 2003)).

387. 764 F. Supp. 2d 1178 (N.D. Cal. 2011).

388. *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1179–80 (N.D. Cal. 2011).

389. *Id.* at 1190–92 (citing *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J. dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012)).

plan.³⁹⁰ Ninth Circuit staff attorney Karen Golinski married her same-sex spouse in the summer of 2008 during the window when California law recognized same-sex marriages.³⁹¹ After the federal Office of Personnel Management relied on DOMA as its basis for repeatedly refusing to enroll Golinski's spouse in her health-benefits plan, Golinski filed a constitutional challenge.³⁹² Noting that the Supreme Court and the Ninth Circuit have yet to determine whether discrimination based on sexual orientation is suspect or quasi-suspect,³⁹³ the district court conducted the standard suspect-class analysis. The district court found that gays and lesbians as a class have suffered a history of discrimination, that the class is relatively politically powerless against majority prejudices, that the trait defining the class is irrelevant to an individual's ability to contribute to society, and that the trait is a defining or immutable characteristic.³⁹⁴ Accordingly, the district court applied "heightened scrutiny"³⁹⁵ and found that none of the proffered justifications satisfied the standard.³⁹⁶

Most relevant here, the district court found that those defending DOMA had provided no credible evidence to genuinely dispute that same-sex married couples function as responsible parents,³⁹⁷ that denying federal recognition and benefits of same-sex marriage "does nothing to support opposite-sex parenting,"³⁹⁸ that denying federal recognition does not alter parental rights under state law, and that denying federal recognition of same-sex marriage "does nothing to

390. *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-00257, 2012 WL 569685, at *27 (N.D. Cal. Feb. 22, 2012).

391. *Id.* at *1.

392. Golinski previously obtained several administrative orders from Ninth Circuit Chief Judge Alex Kozinski ordering the Office of Personnel Management to enroll Golinski's spouse in the health benefits plan; the Office of Personnel Management declined to either follow or appeal these administrator orders, but the federal district court ruled that it lacked jurisdiction to issue mandamus relief based on such administrative orders. *Id.* at *1-3; *see also infra* note 382 (discussing two administrative rulings of the Ninth Circuit).

393. *Golinski*, 2012 WL 569685, at *11.

394. *Id.* at *11-14.

395. Rather than applying the typical strict scrutiny standard (requiring that the classification be necessary to achieve a compelling government interest), the court used the standard associated with intermediate scrutiny (requiring that the classification be "substantially related to an important governmental objective"). *Id.* at *15 (citing *United States v. Virginia*, 518 U.S. 515, 535-36 (1996)).

396. *Id.* at *20.

397. *Id.* at *17.

398. *Id.*

encourage or discourage opposite-sex couples from having children within marriage.”³⁹⁹ The district court then ruled, in the alternative, that DOMA failed even rational basis review, reiterating its findings that DOMA has no effect on who may become a parent under federal or state law, or on any couple’s ability to procreate, or on procreation and child-rearing practices.⁴⁰⁰ The district court therefore found that “Congress’ stated justification of encouraging responsible procreation and child-rearing bears no rational relationship to the classification which burdens same-sex married couples.”⁴⁰¹ Again, this court, like others, concluded its decision with a focus on the invidious nature of the ban. The district court was persuaded that, even if the animus present in the legislative history did not motivate DOMA’s passage, it may have been motivated by prejudice that may result “from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.”⁴⁰²

In another federal case, *Collins v. Brewer*,⁴⁰³ involving state health benefits, a federal district court judge in Arizona issued a preliminary injunction against the state’s stripping of health benefits from the domestic partners and children of state employees because the action was not rationally related to any legitimate state interest.⁴⁰⁴ The court specifically found that denying benefits to same-sex domestic partners cannot promote marriage because those couples are ineligible to marry and that the denial of health benefits bears no relationship whatsoever to encouraging marriage of opposite-sex couples, who already enjoy the right to marry.⁴⁰⁵ Given the lack of relationship between denying same-sex marriage and promoting heterosexual marriage, the district court noted that the responsible-procreation defense might have been merely a post hoc justification

399. *Id.* at *18.

400. *Id.* at *22–23.

401. *Id.* at *23. The district court also rejected the purported justifications of nurturing traditional marriage, defending traditional morality, preserving scarce government resources, maintaining the status quo, proceeding with caution, and avoiding inconsistency. *Id.* at *18–20, *23–26.

402. *Id.* at *26 (quoting *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374–75 (2001) (Kennedy, J., concurring)).

403. 727 F. Supp. 2d 797 (D. Ariz. 2010).

404. *Id.* at 807.

405. *Id.*

for litigation purposes.⁴⁰⁶ Throughout its analysis, the district court emphasized that most of the state's defenses amounted to invidious discrimination: rejecting advancing cost saving based on an "invidious distinction," rejecting advancing administrative efficiency based on an "impermissible invidious classification," rejecting selectively subsidizing heterosexual spouses as discriminatory animosity, and rejecting promoting marriage and procreation as not rationally related to the ban on health benefits.⁴⁰⁷

Similarly, within the family law context, both a state trial court and a state appellate court in Florida recently invalidated that state's ban on adoption by gays and lesbians because they found "no rational basis for the statute."⁴⁰⁸ In this matter of the adoption of X.X.G., there was no specific as-applied factual dispute because all parties agreed that the petitioning foster parent was a fit parent and that his adoption of the foster children was in their best interest.⁴⁰⁹ Moreover, all parties agreed to apply the state's rational basis test, which generally tracks the federal standard in requiring that the state's classification bear a rational relationship to a legitimate governmental objective.⁴¹⁰ Florida's courts have interpreted this rational basis standard to require the classification to be "based on a real difference which is reasonably related to the subject and purpose of the regulation."⁴¹¹

As in the Prop 8 litigation, there was some dispute in the Florida adoption case about whether a trial was appropriate. The state opposed having a trial and producing findings about social-science evidence.⁴¹² However, both the trial court and appellate court disagreed,⁴¹³ relying in part on a prior Florida Supreme Court ruling that a sufficient factual record would be needed to determine whether the adoption ban satisfied the rational basis standard for equal

406. *Id.*

407. *Id.* at 804–07. The district court conceded that cost control, administrative efficiency, and the promotion of marriage are "legitimate" state interests but concluded that the absolute denial of benefits to employees with same-sex partners is not rationally related to these interests. *Id.* at 807.

408. Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 81, 91 (Fla. Dist. Ct. App. 2010).

409. *Id.* at 82.

410. *Id.* at 83.

411. *Id.* (emphasis omitted) (internal quotation marks omitted).

412. *Id.* at 87.

413. *Id.*

protection under the state constitution.⁴¹⁴ Therefore, the state court in *X.X.G.* held a four-day trial at which the foster parent and the state each presented expert witnesses about the relative parenting capabilities of homosexuals and heterosexuals, resulting in the trial court's fifty-three-page ruling invalidating the ban.⁴¹⁵

The merits of the arguments used to defend the adoption ban are quite similar to those used to defend the marriage ban. Florida officials did not claim that gay people are unfit parents and even conceded, "[G]ay people and heterosexuals make equally good parents."⁴¹⁶ The state argued instead that the rational basis for prohibiting homosexual adoption is that "children will have better role models, and face less discrimination, if they are placed in non-homosexual households, preferably with a husband and wife as the parents."⁴¹⁷ In rejecting this defense, the appellate court simply noted, "that is not what the statute does."⁴¹⁸ Moreover, after hearing the petitioner's ten expert witnesses and the state's two expert witnesses, the trial court found that "robust" research supported the scholarly consensus that "there are no differences in the parenting of homosexuals or the adjustment of their children" and that this consensus "is so far beyond dispute that it would be irrational to hold otherwise."⁴¹⁹ As to the risk of discrimination and stigma that children might face if they were placed with gay parents, the appellate court ruled that this factor did not provide a reasonable basis for Florida's contradictory policy of allowing gays to serve as foster parents and guardians but prohibiting them from serving as adoptive parents.⁴²⁰ Because the state's experts' opinions were not shown to be scientifically valid, the appellate court also rejected the

414. *Id.* at 83–84, 87 (citing *Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902, 903 (Fla. 1995) (remanding a prior equal protection challenge to the state's ban on adoption by gay persons for "a factual completion of the record as to this single constitutional issue and a decision as to this issue based upon the completed record")). In *Cox*, the petitioner abandoned the case, so no trial was held. *Id.* at 84.

415. *Id.* at 82–83.

416. *Id.* at 85 (internal quotation marks omitted).

417. *Id.*

418. *Id.*

419. *Id.* at 86–87 (emphasis omitted).

420. *Id.* at 91.

state's argument that their experts' alternative view of the scientific data could provide a sufficient rational basis.⁴²¹

In another specific example of the effect of DOMA, a legally married same-sex couple has challenged the constitutionality of DOMA's interference with their ability to file a joint bankruptcy petition.⁴²² The federal bankruptcy court's recent ruling in *In re Balas*⁴²³ rejected the responsible-procreation defense and the other interests asserted by Congress in DOMA as not standing up to "any level of scrutiny."⁴²⁴ More specifically, the bankruptcy court reasoned, "[T]he joint petition of the Debtors will have no effect on procreation or child-bearing. It would not appear to be fair or rational for the court to conclude that allowing the Debtors to file a joint bankruptcy petition will in any way harm any marriage of heterosexual persons."⁴²⁵ Like the courts in *Perry*, *Gill*, *Dragovich*, *Golinski*, *Collins*, and *X.X.G.*, the bankruptcy court in *Balas* concluded that the same-sex-marriage ban is, in the final analysis, an enactment of a moral view that is neither supported by evidence nor consistent with the Constitution.⁴²⁶

XIII. CONCLUSION

This genealogy of the responsible-procreation defense has traced its religious roots; its linkage to a tarnished legacy of stereotypes based on race, gender, and class; its attenuated linkage to contemporary societal and legal norms; its utter lack of demonstrated evidentiary support, after full trials at both the state and federal levels; and its rise and fall among court decisions, depending primarily upon whether courts unquestionably accepted its presuppositions or subjected them to meaningful review.

421. *Id.* at 89–90. The appellate court agreed with the trial court that the testimony of Walter Schumm from Kansas State University did "not support the blanket prohibition on homosexual adoption" and also acquiesced to the trial court's acceptance of other experts' testimony that Dr. Schumm's research "contained fundamental statistical errors." *Id.* at 88. Similarly, other experts testified to errors in scientific methodology and reporting by George Rekers from the University of South Carolina, and the appellate court acquiesced to the trial court's finding that his testimony was "far from a neutral and unbiased recitation of the relevant scientific evidence." *Id.* at 89–90 (internal quotations omitted).

422. *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011).

423. 449 B.R. 567 (Bankr. C.D. Cal. 2011).

424. *Id.* at 578.

425. *Id.*

426. *See id.* at 578–79.

In the final analysis, the responsible-procreation defense appears to be not only ideological but also invidious, and on the wane. It has failed to withstand even the most deferential standard of rational review. As the Supreme Court explained in *Romer*, “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained” because “[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”⁴²⁷ After ample opportunity, opponents of same-sex marriage have failed to demonstrate that the responsible-procreation defense finds “some footing in the realities of the subject.”⁴²⁸ As a result, the emerging trend is that both executive officials and courts are rejecting the defense and concluding that the same-sex-marriage ban is drawn, not to further a proper legislative end but to make same-sex couples and their children unequal to everyone else.⁴²⁹ Even conservative commentators defending the same-sex-marriage ban openly concede that it is drawn to disadvantage same-sex couples and to favor opposite-sex couples.⁴³⁰ Regardless of which level of scrutiny is applied, contemporary constitutional jurisprudence is quite clear that such an invidious ideology is not a legitimate basis for law: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁴³¹

427. *Romer v. Evans*, 517 U.S. 620, 632–33 (1996).

428. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993).

429. *See Romer*, 517 U.S. at 624, 635 (concluding that Colorado’s voter-approved constitutional amendment prohibiting governmental protection of gays, lesbians, and bisexuals from discrimination was “not to further a proper legislative end but to make them unequal to everyone else”).

430. *See, e.g.,* George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359, 409–11 (2011).

431. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

