

## ISSUES IN PERSPECTIVE

Dr. James P. Eckman, President Emeritus  
Grace University, Omaha, Nebraska  
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### *The Supreme Court and Marriage*

That marriage and family are changing is now a given. Law, insurance practices and government policies all reflect this change. Both are defined in many different ways and marriage is no longer solely heterosexual in its nature. Furthermore, Stephanie Coontz of Evergreen State College in Washington recently observed that “marriage is no longer the central institution that organizes people’s lives. Marriage is no longer the only place where people make major life transitions and decisions, enter into commitments or incur obligations. The rising age of marriage, combined with the increase in divorce and cohabitation since the 1960s, means that Americans spend a longer period of their adult lives outside of marriage than ever before.” What was once viewed as the central institution of human civilization is now confusing and in a state of dizzying flux. In 1996, with the support of President Bill Clinton, Congress passed the Defense of Marriage Act (DOMA), which sought to preserve and defend marriage as between a man and a woman. Among other things, DOMA was also to insure that states that did not recognize same-sex marriages could not be forced to accept as legal same-sex marriages that were legal in other states. Seeking to preserve marriage as an institution defined as between a man and a woman was also what drove Proposition 8, a California voter-approved ban on same-sex marriage. In this confused state of affairs in America, the Supreme Court agreed to hear cases challenging both DOMA and Proposition 8. Unfortunately, the Court’s decisions, handed down in late June, did not clarify the situation; they added to the confusion.

- First, a summary of the Court’s rulings. The DOMA case, *United States v. Windsor*, was a 5-4 decision that overturned a portion of DOMA that defined marriage as a union only between a man and a woman, which had affected more than 1,000 federal laws and programs. Justice Kennedy wrote for the Court’s majority that DOMA was “unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.” In the Proposition 8 case, *Hollingsworth v. Perry*, another 5-4 decision, Chief Justice Roberts, writing for the majority, argued that the proponents of the constitutional challenge to the ballot measure lacked standing to appeal. Nonetheless, the dismissal of the Proposition 8 challenge leaves intact the 2010 lower court ruling, which had argued that same-sex marriage caused no harm to the state or society but did cause harm to same-sex couples by depriving them of their rights to equal protection and due process. In effect, California is now the 13<sup>th</sup> state to legitimize same-sex marriage. The end result is that the federal government must now recognize same-sex marriages in the 13 states where they are legally recognized. But neither decision settled the issue of what happens when a same-sex couple moves from, for example, California to Alabama. Which state law does the federal government recognize? Further litigation and court review are imminent. The Court did stop short of declaring same-sex marriage a constitutional right, but it gave those who support same-sex marriage the ammunition to ultimately prevail.

- Second, how should we think about these controversial court decisions? As columnist Charles Krauthammer has observed, in declaring DOMA unconstitutional, the Court used seemingly contradictory arguments that do not clarify but add to the confusion. First, the Court recognized that marriage is the province of the states, which means that tipped their collective hats toward federalism. Each state defines marriage and legally recognizes who is and who is not married. The federal government cannot intervene. Thus, with the DOMA decision of the Court, the federal government must recognize same-sex marriage where it is legal. The Court did not declare same-sex marriage to be a constitutional right, affirming that marriage is a state issue. Some states will recognize same-sex marriage; some will not. In short, the Court avoided the disaster of *Roe v. Wade* in 1973, which ended all state laws restricting abortion. With the Court's decision on DOMA, it seemingly permits a political settlement of the same-sex marriage question on a state by state basis. But, second, the Court inserted equal protection into the legal mix when it comes to defining marriage. In states with same-sex marriage, the federal government must provide identical benefits to gay couples as it does to straight couples, because to do otherwise is to discriminate against gay couples, which denies them equal protection of law. This is the crucial problem with the Court's decision: Why should equal protection apply only in states that recognize same-sex marriage? As Krauthammer questions: "Why doesn't it apply equally—indeed, even perhaps more forcefully—to gays who want to marry in states that refuse to marry them?" Future litigation on this question is a certainty. With one hand the Court affirmed the doctrine of federalism, but with the other hand it gave the weapon of equal protection to those who want to see same-sex marriage legitimized in all 50 states.
- Third, there was an important section in Justice Kennedy's DOMA decision that is profoundly disturbing. Of the DOMA law, Kennedy wrote: "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states." In doing so, Congress violated "the due process and equal protection principles applicable to the Federal Government." He also wrote that society is "evolving [in its] understanding of the meaning of equality and declared that the states have the right to confer on same-sex marriages the equal dignity of a marriage between a man and a woman." Not only was Congress morally wrong in passing DOMA, but those who oppose same-sex marriage are wrong. As theologian Albert Mohler concludes, "In condemning a moral judgment, he arrogantly made a moral judgment." Indeed, Justice Scalia understood what Kennedy was doing and in his scathing dissent castigated the Court for condemning all opposition to same-sex unions as "irrational and hateful." Kennedy's opinion implicitly invites any "citizen who resides in a state that does not allow for same-sex marriage to claim that his or her constitutional rights are violated on the basis of the Court's opinion. . ." Thus Scalia boldly declared that "As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe." The Court provided the ammunition for all who want full legalization of same-sex marriage in all fifty states by "judicial fiat."

I believe quite strongly that the Court's decisions on DOMA and Proposition 8 are potentially devastating. In this culture, there will be multiple challenges to the states that do not recognize same-sex marriage. [Indeed, those challenges have already begun. The ACLU just filed suit in Pennsylvania, arguing that the Court's DOMA decision means that Pennsylvania's restrictions against same-sex marriage are unconstitutional.] Once all states have legitimized it or the Court declares it to be a constitutional right based on equal protection and due process, there will be a concomitant threat to the religious liberty of those who oppose same-sex marriage on biblical grounds. Churches, Christian educational institutions and even Christian citizens will be ostracized, sued and perhaps even charged with a criminal offense. As Mohler declares, "Christians will have to think hard—and fast—about these issues and our proper response. We will have to learn an entire new set of missional skills as we seek to remain faithful to Christ in this fast-changing culture."

See Charles Krauthammer in the *Washington Post* (1 July 2013); [www.albertmohler.com](http://www.albertmohler.com) (27 June 2013); editorials in the *Wall Street Journal* (27 June 2013) and the *New York Times* (27 June 2013); and Stephanie Coontz in the *New York Times* (23 June 2013).