

# CHEATING MARRIAGE: A TRAGEDY IN THREE ACTS

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*[T]he Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.*

*Associate Justice Antonin Scalia*<sup>1</sup>

At the conclusion of his opinion dissenting from the Court's holding in *United States v. Windsor* that section 3 of the Federal Defense of Marriage Act was unconstitutional, Justice Antonin Scalia accused the Court's majority of cheating. The current fight being waged from one end of the country to the other is, according to Justice Scalia, a political/policy dispute, not a legal dispute, and its resolution therefore belonged in the political process. The Court could have covered itself "with honor," he noted, "by promising all sides of the debate that it was theirs to settle and that [the Court] would respect their resolution."<sup>2</sup> "We might have let the people decide," Justice Scalia added, but the Court did not, and thereby cheated both sides of the case, depriving the former of an honest victory and the latter of a fair defeat.<sup>3</sup>

The cheating of which Justice Scalia accuses his colleagues on the Court is that of interfering with the political process, contrary to "what in earlier times was called the judicial temperament."<sup>4</sup> It is the kind of cheating that lies at the heart of a debate about the appropriate role of the courts in our

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1. *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting).
2. *Id.* (alteration in original).
3. *Id.*
4. *Id.*

democratic/republican form of government that dates back at least a half century to the 1960s-era “activism” of the Warren Court and to the counter “originalism” movement of the 1980s. While the adherents to the Warren Court’s model, those who found themselves in the majority in *Windsor*, may, in candid moments, acknowledge that their view of the judiciary’s role is not that of our nation’s founders, they would not accept Justice Scalia’s description of their enterprise as cheating, preferring instead to regard their active rejection of the results of the political process as an advanced stage of the delivery of justice, a prime example of the evolved role for a judiciary giving voice to a living Constitution.<sup>5</sup>

But another kind of cheating also occurred in the case and in the parallel case of *Hollingsworth v. Perry*<sup>6</sup> involving the constitutionality of California’s one-man/one-woman marriage law, cheating of the more traditional sort that, in the end, may be even more pernicious than the cheating of which Justice Scalia complained. Both cases were, in significant measure, collusive suits with critical litigation strategies implemented by parties nominally on opposite sides of the case but who were, in truth, seeking the same outcome. This cheating involved federal and state executive officials at the highest levels of government who manipulated—not the judicial process, for the courts involved seemed to have become willing participants—but the law itself. Although there are two principal cases, this Play occurred in Three Acts, and the purpose of this article is to document what transpired and to raise a red flag of concern about the threat posed to the rule of law by the advance-the-agenda-at-any-cost tactics employed.

## PROLOGUE

In 1993, the Hawaii Supreme Court held that Hawaii’s marriage law, which, like every other marriage law in the country at the time, defined marriage as between one man and one woman, was a classification based on sex and therefore subject to strict scrutiny under the equal protection clause of the Hawaii Constitution.<sup>7</sup> Although the court remanded to the trial court for further consideration rather than ordering that a marriage license be issued to the same-sex couple who had brought the suit, most observers

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5. See John C. Eastman, *Philosopher King Courts: Is the Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?* 54 *DRAKE L. REV.* 831 (2006) (elaborating on the theoretical foundations and attendant problems inherent in this dispute). See also John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury’s Holding Apply in a Post-Warren Court World?* 28 *HARV. J.L. & PUB. POL’Y* 713, 728 (2005).

6. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

7. *Baehr v. Lewin*, 852 P.2d 44, 63–67 (Haw. 1993).

believed that the ruling would likely prove fatal to Hawaii's marriage law.<sup>8</sup> Concerns about whether same-sex "marriages" performed in Hawaii would have to be recognized elsewhere because of the Federal Constitution's Full Faith and Credit Clause<sup>9</sup> were raised across the country and in the halls of Congress. Although the Supreme Court has long recognized a public policy exception to the Full Faith and Credit Clause that likely would have allowed other states *not* to recognize same-sex "marriages" performed in Hawaii in contravention of those states contrary marriage policy,<sup>10</sup> that public policy exception was bolstered by an act of Congress in 1996 and by state statute or constitutional amendment in roughly three dozen states over the course of the next decade.

Congress passed the Defense of Marriage Act ("DOMA") in 1996,<sup>11</sup> explicitly noting that the law was adopted in the wake of the Hawaii Supreme Court decision in *Baehr v. Lewin* "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."<sup>12</sup> Parroting language in the Full Faith and Credit Clause itself, section 2 of DOMA provided that no state had to give "effect" to such marriages performed in other states.<sup>13</sup> Section 3 of DOMA defined marriage for purposes of federal law as it had traditionally been understood—a union

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8. The case's history after remand is a bit tortured. Following the Hawaii Supreme Court's "strict scrutiny" ruling, the Hawaii Legislature passed legislation reasserting the traditional definition of marriage and chastising its supreme court for breaching fundamental separation of powers requirements. It also created a commission to study the issue, however, and the trial court put the case on hold pending the study. The trial court reopened the case in September 1996 and ruled a few months later that the Hawaii marriage law was unconstitutional under the 1993 strict scrutiny ruling of the Hawaii Supreme Court. *Baehr v. Miike*, 65 U.S.L.W. 2399, 3, 22 (Haw. Cir. Ct. 1996). But the trial court then immediately stayed its own ruling pending appeal, and while the appeal was pending, the voters of Hawaii amended their state constitution in November 1998 to codify the traditional definition of marriage, effectively overruling the Hawaii Supreme Court's 1993 decision and rendering the legal challenge based on the state constitution's equal protection clause moot. *Baehr v. Miike*, 1999 Haw. LEXIS 391, at \*5 (Haw. 1999).

9. U.S. CONST. art. IV, § 1.

10. *See, e.g., Nevada v. Hall*, 440 U.S. 410, 424 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [state], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.") (alteration in original).

11. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419, *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013); 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).

12. H.R. REP. NO. 104-664, at 2 (1996).

13. 28 U.S.C. § 1738C (1996).

of one man and one woman.<sup>14</sup> The law was passed by overwhelming majorities in Congress—342 to 67 in the House of Representatives and 85 to 14 in the Senate—and signed into law by President Clinton, a left-of-center Democrat who would later repudiate his support of DOMA.<sup>15</sup>

Similar scenarios played out in numerous states around the country, with state legislatures adopting or reaffirming one-man/one-woman marriage statutes by overwhelming majorities. And in many other states, the long-standing understanding of marriage was strengthened by way of state constitutional amendment, adopted through the initiative process, or by an amendment referred to the voters by the legislature.

The situation in California played out differently. In the decade following the Hawaii Supreme Court's decision in *Baehr*, the people of California engaged in an epic battle over the definition of marriage that pitted the majority of the people of California against every branch of their state government. In 1994, the legislature added section 308 to the California Family Code, providing that marriages contracted in other states would be recognized as valid in California if they were valid in the state where performed.<sup>16</sup> Following as it did on the heels of the Hawaii decision in *Baehr*, there was concern that section 308 would require California to recognize as married same-sex couples who had been issued marriage licenses by other states, even though another provision of California law, Family Code section 300, specifically limited marriage to “a man and a woman.”<sup>17</sup> This concern was foreclosed by the people at the March 2000 election with the passage of Proposition 22, a statutory initiative adopted by an overwhelming sixty-one percent to thirty-nine percent majority that provided: “Only marriage between a man and a woman is valid or recognized in California.”<sup>18</sup>

In 2005, however, the California Legislature passed a bill in direct violation of Proposition 22, A.B. 849, which would have eliminated the gender requirement found in Family Code section 300. That bill was vetoed by Governor Arnold Schwarzenegger as a violation of the state constitutional requirement that the legislature cannot repeal statutory initiatives adopted by

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14. 1 U.S.C. § 7 (1996).

15. See 142 CONG. REC. 17094-95 (July 12, 1996) (House vote 342–67 on H.R. 3396, 104th Cong. (1996)); 142 CONG. REC. 22467 (Sept. 10, 1996) (Senate vote 85–14 on S. 1999, 104th Cong. (1996)); Acts Approved by the President 1996, 32 WKLY COMP. PRES. DOC. 1891 (Sept. 30, 1996) (bill signed on Sept. 21, 1996).

16. CAL. FAM. CODE § 308 (West 2014).

17. CAL. FAM. CODE § 300 (West 2014), *invalidated by In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

18. CAL. FAM. CODE § 308.5 (West 2014).

the people.<sup>19</sup> The legislature then adopted a domestic partnership law that provided that same-sex couples who registered as domestic partners “shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”<sup>20</sup> The governor signed that bill into law, and it was upheld by the California Court of Appeal against a challenge that the law was contrary to Proposition 22 and therefore unconstitutional under article 2, section 10(c) of the state constitution.<sup>21</sup> The court held that the legislature had “not created a ‘marriage’ by another name or granted domestic partners a status equivalent to married spouses,” and that the Domestic Partnership Act was therefore not an invalid amendment of Proposition 22.<sup>22</sup>

Nevertheless, a local elected official, the mayor of San Francisco, took it upon himself to issue marriage licenses in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the law,<sup>23</sup> it ultimately ruled in *In re Marriage Cases* that Proposition 22 was unconstitutional under the state constitution.<sup>24</sup>

The people responded immediately, placing another initiative on the ballot at the first opportunity, and in November 2008, Proposition 8 was adopted as a constitutional amendment, effectively overturning the decision of the California Supreme Court in *In re Marriage Cases*. That initiative

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19. Michael Finnegan & Maura Dolan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES, Sept. 8, 2005, available at <http://articles.latimes.com/2005/sep/08/local/me-marriage8>; see also CAL. CONST. art. II, § 10(c).

20. Act of Sept. 29, 2004, ch. 947, 2004 Cal. Legis. Serv. 5521 (West) (amending CAL. FAM. CODE § 297.5 (West 2014)); see also *In re Marriage Cases*, 183 P.3d at 398 (describing the Domestic Partnership Act as providing to same-sex couples “virtually all of the same substantive legal benefits and privileges” of marriage).

21. *Knight v. Superior Court*, 128 Cal. App. 4th 14, 29, 31 (Cal. Ct. App. 2005). That holding is hard to square with the California Supreme Court’s subsequent decision in *In re Marriage Cases*, in which the California Supreme Court held Proposition 22 invalid because it withheld the name “marriage” from relationships otherwise treated as virtually identical by California law. *In re Marriage Cases*, 128 Cal. App. at 384. But then, the conclusion from *In re Marriage Cases* that Proposition 22 was therefore unconstitutional is hard to square with the requirement of the state constitution that the legislature cannot repeal or amend a statute adopted by initiative; if the Domestic Partnership Act created a problem for Proposition 22’s constitutionality, the court should have invalidated that act rather than the initiative. *Id.*

22. *Knight*, 128 Cal. App. 4th at 30, 31.

23. *Lockyer v. City and Cnty. of S.F.*, 95 P.3d 459, 499 (Cal. 2004).

24. *In re Marriage Cases*, 183 P.3d at 452. The decision itself had an odd twist. At its core, the holding treated “marriage” between persons of the same sex as a fundamental right even though the court simultaneously recognized that “as an historical matter, civil marriage and the rights associated with it traditionally have been afforded only to opposite-sex couples.” *Id.* at 399. In addition, the court refused to stay its decision pending the vote on Proposition 8 already slated for the November 2008 ballot. See *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009).

was immediately challenged as a supposed unconstitutional revision of the state constitution rather than a valid constitutional amendment. The attorney general of the state, an opponent of Proposition 8 during the election, not only refused to defend the initiative in court, but affirmatively argued that it was unconstitutional, despite his statutory duty to “defend all causes to which the State . . . is a party.”<sup>25</sup> As a result, the high court of the state allowed proponents of the initiative to intervene in order to provide the defense of the initiative that the governmental defendants would not, recognizing proponents’ preferred status under California law (the court simultaneously denied a motion to intervene by other supporters of Proposition 8 who were not official proponents of the measure) and specifically authorizing them to respond to the court’s order to show cause that it issued to the governmental defendants.<sup>26</sup> Persuaded by the proponents’ arguments, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution.<sup>27</sup>

That set the stage for federal court resolution of the issue that, over the previous decade and a half, had pitted the people of the State of California against every branch of their state government: Their legislature, which added section 308 to the California Family Code in 1994, attempted to repeal Proposition 22 by statute in 2003, and adopted the Domestic Partnership Act in 2003; their executive officials, with Governor Schwarzenegger’s signing of the Domestic Partnership Act in 2003, then San Francisco Mayor (now Lt. Governor) Gavin Newsom’s issuance of marriage licenses in violation of Proposition 22 in 2004, and then Attorney General (now Governor) Jerry Brown’s refusal to defend and active challenging of Proposition 8 in 2008; and their courts, with the California Court of Appeal’s upholding of the Domestic Partnership Act’s award of virtually all the benefits and obligations of marriage to same-sex couples despite Proposition 22, and the California Supreme Court’s invalidation of Proposition 22 in 2008.

And with that Prologue now complete, the stage is set for our Play in Three Acts.

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25. CAL. GOV’T. CODE § 12512 (West 2014).

26. *Strauss*, 207 P.3d at 69.

27. *Id.* at 122.

## ACT I: CALIFORNIA'S PROPOSITION 8.

*Scene 1: U.S. District Court, 450 Golden Gate Ave., San Francisco.*

Following the loss of the state constitutional challenge to Proposition 8 in the California Supreme Court, another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed an action in the federal district court in San Francisco, naming as defendants several government officials: Attorney General Jerry Brown, the same attorney general who had previously refused to defend the initiative in state court; Governor Arnold Schwarzenegger, the same governor who had signed California's domestic partnership law that provided the tenuous foundation for the California Supreme Court's decision in *In re Marriage Cases* invalidating Proposition 22; two state health officials; and two county clerks, none of whom offered any defense to the lawsuit.<sup>28</sup>

Despite governing precedent from the U.S. Supreme Court in *Baker v. Nelson*<sup>29</sup> summarily upholding Minnesota's marriage law against an identical constitutional challenge, as well as governing precedent in the Ninth Circuit Court of Appeals applying mere rational basis review to sexual orientation classifications,<sup>30</sup> the attorney general again refused to defend the initiative, instead joining in plaintiffs' contention that the proposition was unconstitutional.<sup>31</sup> Indeed, evidence from the district court proceedings strongly suggests that the attorney general was actively colluding with plaintiffs to undermine the defense of the initiative.<sup>32</sup> The attorney general made material and unnecessary concessions of law and fact in his answer to plaintiffs' complaint, for example, conceding that same-sex and opposite-sex relationships are "similarly situated," a threshold inquiry for an equal protection claim, and agreeing that California's domestic partnership law created a "stigma of inequality and second-class citizenship" for gays and lesbians.<sup>33</sup> He went further in his answer to San Francisco's complaint-in-intervention, conceding additional aspects of both the equal protection and

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28. See *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009).

29. *Baker v. Nelson*, 93 S. Ct. 37 (1972) (mem.), *aff'g* 291 Minn. 310 (Minn. 2971), *abrogated by* *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

30. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

31. See *Perry*, 587 F.3d at 949.

32. See Defendant-Intervenor's Notice of Motion and Motion to Realign Attorney General Edmund G. Brown, Jr, and Memorandum of Points and Authorities in Support of Motion to Realign at 12, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 216).

33. Answer of Attorney General Edmund G. Brown Jr at 9–10, *Perry*, 704 F. Supp. 2d at 921 (No. 39).

due process claims as well as all four necessary elements for establishing that sexual orientation is a suspect classification triggering heightened scrutiny.<sup>34</sup> And although he asserted in his case management statement that he would not conduct discovery, he responded to a lengthy and detailed set of requests for admission, affirmatively admitting sixty-four of the sixty-eight requested admissions and providing his response earlier than required so that it could be used by plaintiffs in their opposition to the summary judgment motion that had been filed by the intervenors as “binding admissions of the chief legal officer of the State” that, according to plaintiffs, created genuine issues of material fact that precluded summary judgment.<sup>35</sup> Attorney General Brown admitted, for example, that “the laws of California recognize no relationship between a person’s sexual orientation” and “his or her capacity to enter into a relationship that is analogous to marriage,” and that “marriage is a public expression of love and long-term commitment,” removing from the institution’s core definition its gender-based complementarity and procreative purpose.<sup>36</sup> He admitted that California’s domestic partnership law “marginalizes and stigmatizes gay families,” and that “the inability to marry relegates gay and lesbian relationships to second-class status.”<sup>37</sup> He uncritically accepted underlying assumptions that should have been challenged, such as the claim that “allowing gay and lesbian individuals will not destabilize marriages of heterosexual individuals”<sup>38</sup>—the issue is not whether existing marriages would be destabilized, but whether the redefinition of marriage into an adult-centered, genderless institution would weaken its child-centric and procreative purposes to the detriment of society as a whole. He even admitted that California’s law “restricting the access of same-sex couples to civil marriage may reinforce gender stereotypes and traditional gender roles of men and women in child rearing and family responsibilities.”<sup>39</sup> Who knew that the “traditional” gender roles were based on invidious stereotypes rather than innate biology—that pesky little biological fact that women and not men are capable of giving birth to children. The district court even directed the attorney general to “work together in presenting facts pertaining to the affected governmental interests”

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34. Attorney General’s Answer to Complaint in Intervention at 4–7, *Perry*, 704 F. Supp. 2d at 921 (No. 166).

35. Defendant-Intervenor’s Notion of Motion and Motion to Realign Attorney General Edmund G. Brown Jr. and Memorandum of Points and Authorities in Support of Motion to Realign at 8, 9, *Perry*, 704 F. Supp. 2d at 921 (No. 216).

36. Attorney General’s Response to Requests for Admission, Set One at 3, 22, *Perry*, 704 F. Supp. 2d at 921 (No. 204-1).

37. *Id.* at 10, 11.

38. *Id.* at 14.

39. *Id.* at 13.



with San Francisco, whose motion to intervene *as a plaintiff* had previously been granted by the district court.<sup>40</sup>

Not surprisingly, given the attorney general's antipathy toward the proposition which was his duty to defend, the proponents of the initiative moved for, and were granted, intervenor-defendant status.<sup>41</sup> In granting the motion, the district court expressly noted, without objection from any of the parties, his understanding that "under California law . . . proponents of initiative measures have the standing to . . . defend an enactment that is brought into law by the initiative process" and that intervention was "substantially justified in this case, particularly where the authorities, the [governmental] defendants who ordinarily would defend the proposition or the enactment that is being challenged here, are taking the position that, in fact, it is constitutionally infirmed [sic]."<sup>42</sup>

After what can only be described as a show trial, the presiding chief judge of the district court was even chastised by the Supreme Court of the United States for attempting to broadcast the trial in violation of existing court rules.<sup>43</sup> On August 4, 2010, he issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the oral testimony and simply ignoring the extensive documentary and historical evidence supporting the rationality of Proposition 8, and articulating conclusions of law that likewise simply ignored binding precedent of the Supreme Court and the Ninth Circuit as well as persuasive authority from every other state and federal appellate court to have, up until that time, considered the issues presented by the case.<sup>44</sup> Worse, many of the "admissions" that had been made by Attorney General Brown, the nominal defendant who was actively cooperating with plaintiffs' efforts to have

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40. Transcript of Proceedings at 56, *Perry*, 704 F. Supp. 2d at 921 (No. 162); Civil Minute Order at 2, *Perry*, 704 F. Supp. 2d at 921 (No. 160).

41. *Perry*, 704 F. Supp. 2d at 928.

42. Reporter's Transcript of Proceedings at 8, *Perry*, 704 F. Supp. 2d at 921 (No. 78) (alteration in original); see also *Perry*, 587 F.3d at 950 (proponents allowed to intervene "so that they could defend the constitutionality of Prop. 8" when the government defendants would not).

43. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714–15 (2010). The objection to the broadcasting of the trial was based on serious concerns by witnesses for the initiative's proponents that they would be harassed in their professional careers and, perhaps, personally threatened as well. The story of the unauthorized broadcast of the court's proceedings unfortunately did not end with the Supreme Court's order, however. Chief Judge Vaughn Walker proceeded to videotape the proceedings anyway, on a promise that the tapes were "not going to be for purposes of public broadcasting or televising," but rather "simply for use in chambers." That was not sufficient for one of proponents' key witnesses, who refused to testify. The concern was prescient. Shortly after Judge Walker retired from the bench, and contrary to the explicit promise he had made during the trial as a pretext for ignoring the Supreme Court's clear order, he played portions of the videotapes at a speech he gave, a speech that was videotaped by CNN for later national broadcast.

44. *Id.*

Proposition 8 declared unconstitutional, found their way into Judge Vaughn Walker's "findings" of fact. The traditional opposite-sex definition of marriage is "nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life," the court found, and "gender restrictions . . . were never part of the historical core of the institution of marriage."<sup>45</sup> The "evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," and, moreover, that the genetic bond between a child and its mother and father "is not related to a child's adjustment outcomes."<sup>46</sup> "[T]he evidence shows," beyond debate, that allowing same-sex marriage "will have no adverse effects on society or the institution of marriage."<sup>47</sup> "The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples,"<sup>48</sup> and that Proposition 8's supporters were motivated by "nothing more than a fear or unarticulated dislike of same-sex couples"<sup>49</sup> and "the belief that same-sex couples simply are not as good as opposite-sex couples."<sup>50</sup> And finally, "[t]he evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples."<sup>51</sup> As should be obvious, such "findings," although bolstered by "admissions" by the attorney general, are simply *incredible*. But then, they were issued by the same judge who elsewhere in the opinion stated: "Proponents did not . . . advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating" about marriage.<sup>52</sup>

On the same day that it issued its opinion holding Proposition 8 unconstitutional, the district court issued its order denying a motion by

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45. *Perry*, 704 F. Supp. 2d at 993, 998.

46. *Id.* at 981, 1000.

47. *Id.* at 999. This "finding" was based on testimony from one of plaintiffs' experts, who found it "informative" that in four years of same-sex marriage in Massachusetts, divorce rates had not gone up. But it was directly contradicted by plaintiffs' other expert, who acknowledged the obvious: adoption of same-sex marriage is a "watershed" and "turning point" in the history of the institution that will change "the social meaning of marriage," and, therefore, will "unquestionably [have] real world consequences." Tr. 311–13 (alteration in original). Just what "the consequences of same-sex marriage" would be, the expert candidly acknowledged, are impossible to know, because "no one predicts the future that accurately." Tr. 254. It is hard to see how any judge could conclude from this testimony by one of plaintiffs' own experts that a finding of "no adverse effects on society or the institution of marriage" was "beyond debate."

48. *Perry*, 704 F. Supp. 2d at 1002–03.

49. *Id.* at 1001.

50. *Id.* at 997.

51. *Id.* at 1001.

52. *Id.* at 997.

Imperial County, the Imperial County board of supervisors, and the Imperial County deputy clerk to intervene as governmental party defendants willing to defend the initiative, a motion that had been languishing for more than eight months.<sup>53</sup> The district court held that Imperial County had no protectable interest in the litigation without once taking note of the fact that it had previously granted a motion by the City and County of San Francisco to intervene as a party *plaintiff* or that two other county clerks were already named defendants in the case, albeit ones who were offering no defense.<sup>54</sup>

Moreover, the district court selectively quoted state statutes to reach the erroneous conclusion that county clerks were under the supervision of the California director of health services with respect to all laws relating to marriage, when in fact county clerks are only under the state director's supervision with respect to the "recording" of marriage licenses, not to their determinations of marriage eligibility. Judge Walker asserted, for example, that the California director of health services "is charged with . . . supervisory power over local registrars, so that there will be uniform compliance with all the requirements of [the health and safety provisions relating to marriage]."<sup>55</sup> But the statute doesn't give the director supervisory power over all provisions relating to marriage. The actual language of the statute that Judge Walker substituted with that bracketed phrase is simply "this part," namely, part I of division 102 of the California Health and Safety Code, which deals only with the *recording* of vital statistics such as births, deaths, and marriages, not determinations of eligibility under the state's marriage laws.<sup>56</sup> The substantive requirements of the state's marriage laws do not appear in that "part" of the Health and Safety Code, or even in other parts of the Health and Safety Code. Rather, they appear in the Family Code, which includes section 300's definition that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman," and section 308.5's requirement that "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>57</sup>

There is no provision in California law giving the California director of health services supervisory authority over county clerks with respect to

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53. Order Denying Intervention, *Perry*, 704 F. Supp. 2d 921 (Dkt. No. 709)

54. *Id.*

55. *Id.* at 6–7 (quoting CAL. HEALTH & SAFETY CODE § 102180 (West 2014)) (bracketed phrase in Judge Walker's Order).

56. Judge Walker made the same bracketed replacement of actual text when quoting from California Health and Safety Code section 102195, which provides that "[t]he Attorney General shall assist in the enforcement of *this part* upon request of the State Registrar." CAL. HEALTH & SAFETY CODE § 102195 (West 2014) (emphasis added).

57. CAL. FAM. CODE ANN. §§ 300, 308.5 (West 2014).

compliance with those substantive provisions of the state's marriage laws. Indeed, just the opposite is the case. Section 354 of the Family Code places "the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied,"<sup>58</sup> and as the California Supreme Court has held, "the relevant statutes . . . reveal that the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are the county clerk and the county recorder."<sup>59</sup> The only relevant part of the Family Code that references the Department of Health Services are the requirements in sections 355 and 359 that the forms to be used for application for a marriage license, the marriage license itself, and the certificate of registry of marriage that are to be used by the county clerk "shall be prescribed by the State Department of Health,"<sup>60</sup> requirements that are consistent with the supervisorial authority that the director of health has, as the statutorily designated state registrar of vital statistics,<sup>61</sup> over county clerks *with respect to the registration of marriage licenses*.

The same day it issued its opinion invalidating Proposition 8 and its order denying intervention to Imperial County, the district court ordered responses to a motion for stay pending appeal that had been filed by intervenor-defendant proponents of the initiative the day before.<sup>62</sup> The governmental defendants joined plaintiffs in opposing the motion for a stay pending appeal.<sup>63</sup> The district court denied the motion for a stay, holding that there was little likelihood of success on the merits of the appeal, in part, because it was questionable whether the Ninth Circuit would even have jurisdiction to consider the appeal absent an appeal by the named governmental defendants who were all actively siding with plaintiffs—a function of the fact that the district court had denied requests to intervene by governmental defendants who actually had interest in *defending* the initiative.<sup>64</sup>

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58. *Lockyer v. City and Cnty. of S.F.*, 95 P.3d 459, 469 (Cal. 2004) (citing CAL. FAM. CODE § 354 (West 2014)).

59. *Lockyer*, 95 P.3d at 1080. Another federal court even dismissed an earlier challenge to the state's marriage law because the plaintiff had named only the governor and attorney general as defendants but had not alleged "that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses." *Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at \*9 (S.D. Cal. Dec. 3, 2008). Under California law, those duties rest exclusively with the county clerks.

60. CAL. FAM. CODE §§ 355, 359 (West 2014).

61. CAL. HEALTH & SAFETY CODE § 102175 (West 2014).

62. *Perry v. Schwarzenegger*, (Dkt. No. 727).

63. *Id.*

64. *See Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (denying stay pending appeal).

Finally, despite concerted efforts by the people of California to have defendants—their elected governor and attorney general and even their lieutenant governor while serving as acting governor<sup>65</sup>—file a notice of appeal to guarantee that the Ninth Circuit would have jurisdiction to consider whether the decision by the district court invalidating a solemn act of the sovereign people of California was erroneous, none of the governmental defendants filed a notice of appeal within the thirty-day window specified by the Federal Rules of Appellate Procedure.<sup>66</sup> Only the initiative’s proponents filed a notice of appeal.

*Scene 2: U.S. Court of Appeals, 95 7th Street, San Francisco.*

The action next moved to the James R. Browning Federal Courthouse, seat of the U.S. Court of Appeals for the Ninth Circuit and about five blocks away from the federal district courthouse.

The Ninth Circuit granted a motion for a stay pending appeal that was filed by the initiative proponents, but also ordered briefing on whether the proponents had standing to pursue the appeal.<sup>67</sup> After that briefing was completed, the Ninth Circuit certified to the California Supreme Court two questions of California law that it viewed as critical for determining whether initiative proponents had standing to pursue the appeal in *federal* court absent the government defendants:

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.<sup>68</sup>

The first part of this question—whether, under California law, official proponents have a “particularized interest” in the validity of the initiative they sponsored—was important because of the U.S. Constitution’s requirement in Article III that the federal judiciary only has jurisdiction to hear actual “cases or controversies,” a requirement that the Supreme Court has interpreted as requiring parties to federal litigation to have some

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65. See CAL. CONST. art. V, § 10.

66. FED. R. APP. P. 4(a)(1)(A).

67. Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).

68. *Id.*

“particularized injury” apart from an injury shared in common with the entire citizenry.<sup>69</sup> But the second part of the question—whether, under California law, initiative proponents have “the authority to assert the State’s interest in the initiative’s validity” when the elected officials of the state refuse to do so—was also important in the Ninth Circuit’s analysis because an affirmative answer would likely provide an alternative ground for standing.<sup>70</sup> This alternative basis for standing was derived from dicta in the Supreme Court’s decision in *Arizonans for Official English v. Arizona*, in which during the course of its opinion dismissing the case as moot, the Court expressed “grave doubts” about whether the appellants in the case even had standing to pursue the appeal because the Court was “aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”<sup>71</sup> In light of that dicta, the Ninth Circuit wanted to know whether, *as a matter of California law*, initiative proponents had authority to serve as agents representing the people of California (and hence the State of California, which undoubtedly did have standing to defend the constitutionality of California law<sup>72</sup>) in defense of the initiative they authored, an authority which the Ninth Circuit quite reasonably believed would provide initiative proponents with the necessary Article III standing under *Arizonans for Official English* to pursue the federal court appeal on their own.<sup>73</sup>

*Scene 3: The California Supreme Court, 350 McAllister St., San Francisco*

As a result of the Ninth Circuit’s certified question request, the case took a slight detour into the state courts—specifically, to the California Supreme Court, which coincidentally sits right across the street from the federal district courthouse in which the federal trial court proceedings had been held. Not surprisingly, given the fundamental importance that California law ascribes to the initiative process, the California Supreme Court answered the second part of the Ninth Circuit’s certified question in the affirmative.<sup>74</sup>

The initiative power in California is central to ensuring that the government is responsive to its citizens, and is “one of the most precious

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69. U.S. CONST. art. III, § 2, cl. 1.

70. *Perry*, 628 F.3d at 1193 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)).

71. *Arizonans*, 520 U.S. at 65 (emphasis added).

72. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (citing *Diamond*, 476 U.S. at 64–65) (“[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.”).

73. *Perry*, 628 F.3d at 1193.

74. See *Perry v. Brown*, 265 P.3d 1002, 1005–06 (Cal. 2011).

rights of [California's] democratic process.”<sup>75</sup> Added to the California Constitution in 1911 along with the referendum and recall powers, “[t]hese devices of direct democracy were designed to allow the people to take action in the face of government that was either unwilling or unable to serve the public interest.”<sup>76</sup> Initiative proponents, therefore, retain a power that is superior to that of the state legislature.<sup>77</sup> For example, the legislature may not repeal or amend an initiative statute unless the enactment permits it,<sup>78</sup> a prohibition that no other state carries to such lengths as California.<sup>79</sup>

To fully understand why the California Supreme Court has given such importance to the initiative power in California, it is helpful to review why the constitutional amendment establishing the initiative was adopted. Starting in the late nineteenth century, Californians grew frustrated at the unresponsive, corrupt nature of their legislature. Special interests essentially governed the state.<sup>80</sup> There was an “ever increasing public dissatisfaction with machine-controlled politics at the state and local levels. Representative government seemed unresponsive to the popular will, and legislative decisions seemed biased in favor of special interests.”<sup>81</sup> Voters were searching for a way to regain control.<sup>82</sup>

The initiative movement actually began in the cities of San Francisco and Los Angeles. Organized citizen groups succeeded in passing city charters that gave voters the right to propose city ordinances and future charter amendments.<sup>83</sup> Success at the local level spurred action at the state level, but the state legislature remained unresponsive.<sup>84</sup> That changed when the initiative movement swept Governor Hiram Johnson into office in 1910, and he immediately proposed legislation intending to “return the government to the people’ and to give them honest public service untarnished by corruption

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75. *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982) (alteration in original). *See also* *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1283 (Cal. 1978); *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976).

76. Edward J. Erler, *Californians and Their Constitution: Progressivism, Direct Democracy, and the Administrative State*, in *THE CALIFORNIA REPUBLIC: INSTITUTIONS, STATESMANSHIP, AND POLICIES* 97, 99 (Brian P. Janiskee & Kan Masugi eds., 2003).

77. Karl Man-heim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 *LOY. L.A. L. REV.* 1165, 1195–96 (1998).

78. CAL. CONST. art. II, § 10(c).

79. *People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010).

80. *See* CTR. FOR GOV'T. STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 3, 4, 14, 16, 42 (2nd. ed. 2008).

81. Steven Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America*, in 109 *AMERICAN HISTORICAL REVIEW* 205 (2004).

82. *Id.*

83. Piott, *supra* note 81, at 151; GEORGE MOWRY, *THE CALIFORNIA PROGRESSIVES* 39 (1951).

84. Piott, *supra* note 81, at 163; MOWRY, *supra* note 83, at 56–57.

and corporate influence.”<sup>85</sup> “Pressed by the Governor, the [l]egislature put before voters a reform package that consisted of Proposition 7 (the initiative power), Proposition 4 (granting women the right to vote), and Proposition 8 (providing for the recall of government officials).”<sup>86</sup> “It gave citizens the techniques to check the influence of special interest groups, alter the state’s political agenda and public policies and remove unresponsive or corrupt officeholders.”<sup>87</sup> “This reform package satisfied the demand of the people of California to directly control government when elected representatives become unresponsive to their needs.”<sup>88</sup>

“Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them.”<sup>89</sup> It is “the duty of the courts to jealously guard this right of the people,”<sup>90</sup> “and to prevent any action which would improperly annul that right.”<sup>91</sup> In short, as Justice Stanley Mosk has noted, the initiative process “is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.”<sup>92</sup>

Given the importance of the initiative in the California constitutional scheme, it was not surprising that the California Supreme Court held that California law confers special authority on the official proponents of initiatives to defend their initiatives against legal challenges. That special authority was more than sufficient for the California Supreme Court to answer the Ninth Circuit’s certified question in the affirmative, thus allowing the Ninth Circuit to confirm the Article III standing of the official proponents of Proposition 8, so that the proponents were able to continue to provide on appeal the defense of the initiative they sponsored, as they did as intervenor-defendants in the federal district court.

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85. SPENCER C. OLIN, JR, CALIFORNIA’S PRODIGAL SONS 35 (1968).

86. Application and Proposed Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Intervenor Defendants-Appellants-Petitioners at 9, *Perry v. Brown*, 2001 Cal. LEXIS 3625 (Cal. Apr. 5, 2011) (No. S189476), available at <http://www.courts.ca.gov/documents/28-s189476-amicus-curiae-brief-of-jurisprudence.pdf>.

87. CTR. FOR GOV’T. STUDIES, *supra* note 80, at 42.

88. Application and Proposed Brief, *supra* note 86, at 9.

89. *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976).

90. *Id.* (quoting *Martin v. Smith*, 176 Cal. App. 2d 115, 117 (Cal. Ct. App. 1959)).

91. *Martin*, 176 Cal. App. 2d at 117.

92. *Raven v. Deukmejian*, 52 Cal. 3d 336, 357 (Cal. 1990) (Mosk, J., dissenting).



*Scene 4: U.S. Court of Appeals, 95 7th Street, San Francisco*

Back at the Browning Federal Courthouse, proponents' arguments on the merits did not fare so well. But before exploring the substance of the Ninth Circuit's ruling, it is important to address two more significant examples of the "cheating" that occurred throughout the litigation.

First, on April 6, 2011, Chief Judge Vaughn Walker, who presided over the district court proceedings and subsequently retired, announced that he was a homosexual man who had been in a long-term committed, same-sex relationship for over ten years, a relationship that spanned the entirety of the district court proceedings and many years before.<sup>93</sup>

As proponents argued in a motion to recuse and vacate that they filed in the district court while the case was pending on appeal, Chief Judge Walker's relationship—which quite reasonably would be viewed as making him a potential beneficiary of his own ruling—created at best a waivable conflict of interest and at worst an unwaivable one. Section 455 of title 28 of the U.S. Code requires that a judge whose "impartiality might reasonably be questioned" either recuse himself or provide "full disclosure on the record of the basis of the disqualification"<sup>94</sup> so that the parties could consider and decide, before the case proceeded further, whether to request his recusal. His failure to do either was a clear violation of section 455(a), whose "goal . . . is to avoid even the appearance of partiality."<sup>95</sup>

But Chief Judge Walker may well have had a nonwaivable conflict as well. If at any time while the case was pending before him, Chief Judge Walker and his partner determined that they desired, or might desire, to marry, Chief Judge Walker plainly would have had an "interest that could be substantially affected by the outcome of the proceeding"—an interest that requires recusal and is non-waivable by the parties.<sup>96</sup> Indeed, such a personal interest in marriage would have placed Chief Judge Walker in precisely the same shoes as the two couples who brought the case. Chief Judge Walker thus had a duty to disclose not only the facts concerning his relationship, but also his marriage intentions, for the parties (and the public) were entitled to know whether his waivable conflict was actually a nonwaivable conflict mandating his disqualification. Only if Chief Judge Walker had unequivocally disavowed any interest in marrying his partner—a fact that is not publicly known even to this day given a provision in California law that

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93. Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*, REUTERS (Apr. 6, 2011, 7:39 PM), <http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406>.

94. 28 U.S.C. § 455(a), (e) (2015).

95. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

96. 28 U.S.C. § 455(b)(4) (2015).

allows issuance of “confidential marriage license[s]”<sup>97</sup>—could the parties and the public be confident that he did not have a direct personal interest in the outcome of the case in violation of section 455(b)(4). Because he did not do so when the case was assigned to him or at any time throughout the trial, appellate, or Supreme Court proceedings, the case was infected with an appearance of bias at the very least. The judge’s failure to comply with the recusal rules warranted an order vacating the judgment, but the new chief judge of the district court denied proponents’ motion, and that decision was subsequently affirmed by the Ninth Circuit (though the Ninth Circuit’s decision was then vacated for the reasons described below).<sup>98</sup>

Another conflict of interest requiring recusal infected the Ninth Circuit panel that heard the case on appeal from Chief Judge Walker’s district court ruling (and from successor Chief Judge James Ware’s denial of the motion to vacate). On that panel was Judge Stephen Reinhardt, whose own wife had participated in the development of the litigation strategy in the case when it was before the district court and, as the executive director of the ACLU Foundation of Southern California (“ACLU-SC”), had actually participated as counsel in the case, unsuccessfully for groups who sought to intervene as plaintiffs and then for a group of amici curiae in support of plaintiffs.<sup>99</sup> Proponents moved to disqualify Judge Reinhardt immediately upon learning of his assignment to the panel that would hear the appeal, a motion that Judge Reinhardt summarily denied before oral argument in the case, followed up a month later with an explanatory opinion.<sup>100</sup>

Canon 3.C of the Code of Conduct for United States Judges provides a non-exhaustive list of circumstances in which a judge *must* disqualify himself on the ground that his “impartiality might reasonably be questioned.”<sup>101</sup> Subparts (1)(c) and (d) state that those circumstances “includ[e] but [are] not limited to instances [in which] . . . [the judge’s] spouse . . . (i) is a party to the proceeding, or an officer, director, or trustee of a party; [or] (ii) is acting as a lawyer in the proceeding.”<sup>102</sup> Section 455 of

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97. CAL. FAM. CODE § 500 (West 2015).

98. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1133 (N.D. Cal. 2011), *aff’d* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

99. *National Organization for Marriage Calls for Judge Reinhardt to Disqualify Himself from Prop 8 Hearing*, NOM BLOG (Dec. 2, 2010, 2:43 PM) [hereinafter *Judge Reinhardt to Disqualify*] <http://www.nomblog.com/2349/>.

100. Ed Whelan, *Reinhardt’s Non-Disqualification Memorandum—Part 1*, BENCH MEMO (Jan. 5, 2011, 12:02 PM), <http://www.nationalreview.com/bench-memos/256394/reinhardt-s-non-disqualification-memorandum-part-1-ed-whelan>.

101. MODEL CODE OF JUDICIAL CONDUCT CANON 3(C) (1972).

102. *Id.* § (1)(c)–(d) (alteration in original).

title 28 of the U.S. Code sets forth virtually identical grounds for disqualification, and both the Code of Judicial Ethics and the federal statute were clearly violated by Reinhardt's refusal to recuse himself.<sup>103</sup>

Judge "Reinhardt's wife was an officer of an entity that acted as a lawyer in the proceeding—a trivial variation on the examples given" in the code of conduct that requires recusal, as one particularly astute commentator noted.<sup>104</sup> Yet Judge Reinhardt's memo explaining his refusal to recuse himself largely ignored that dispositive fact. Instead, he launched into a straw man (straw person?) argument that he was not required to recuse himself merely because of his wife's views on the subject of the litigation. The judge's wife, he claimed, "is a strong, independent woman who has long fought for the principle, among others, that women should be evaluated on their own merits and not judged in any way by the deeds or position in life of their husbands (and vice versa)."<sup>105</sup> "Proponents' contention that I should recuse myself due to my wife's opinions is based upon an outmoded conception of the relationship between spouses."<sup>106</sup> Only at the end of the memorandum did the judge even take up the critical issue, namely, whether the participation *as counsel* by the organization his wife headed, in the court below, whose decision was being reviewed by the appellate panel on which Judge Reinhardt was himself sitting, required recusal. Judge Reinhardt claimed it did not because the ACLU's participation in the case did "not endow [his] wife or the ACLU-SC with any 'interest that could be substantially affected by the outcome of the proceeding'" that would require recusal under section 455(b)(5)(iii), arguing again that the only "interest" his wife had in the case was the result of her personal views.<sup>107</sup> But section 455(b)(5)(iii) was not the basis for the recusal motion. Rather, section 455(b)(5)(ii) was, and that section quite clearly specifies that a judge "shall . . . disqualify himself . . . [where] . . . his spouse . . . [i]s acting as a lawyer in the proceeding False"<sup>108</sup> Judge Reinhardt's claim that the provision did not apply because his wife was not participating in the case once it got to the Ninth Circuit is foreclosed by another provision of the law, section 455(d)(1), which defines "proceeding" as "includ[ing] pretrial, trial,

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103. See 28 U.S.C. § 455 (2014).

104. Ed Whelan, *A Challenge to Liberal Legal Ethicists*, NAT'L REV. ONLINE (Dec. 1, 2010), <http://www.nationalreview.com/bench-memos/254275/challenge-liberal-legal-ethicists-ed-whelan>.

105. Memorandum Regarding Motion to Disqualify at 3, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Jan. 4, 2012).

106. *Id.* at 4.

107. *Id.* at 9 (alteration in original) (quoting 28 U.S.C. § 455(b)(5)(iii) (2015)).

108. 28 U.S.C. § 455(b)(5)(ii) (alteration in original) .

appellate review, or other stages of litigation.”<sup>109</sup> In other words, incorporating the definitional language and eliminating the extraneous language, the law requires that a judge shall disqualify himself where his spouse is acting as a lawyer in the pretrial, trial, appellate review, or other stages of litigation. Judge Reinhardt’s wife was the executive director of the ACLU-SC, which “acted as a lawyer” in the “trial” “stages of litigation,” both on behalf of amici curiae and on behalf of several Bay Area gay rights groups who sought to intervene as plaintiffs.<sup>110</sup> The law therefore required Judge Reinhardt to recuse himself, but he refused.

The analysis in Judge Reinhardt’s panel opinion on the merits was no better. From the opening line, he sets out on a counterfactual premise: “Prior to November 4, 2008,” he wrote, “the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike,”<sup>111</sup> as if to suggest that Proposition 8 was revoking a long-standing constitutional right to same-sex marriage, without any mention of that fact that the so-called “right” had been invented by the California Supreme Court only a few months before. Nor did Judge Reinhardt mention that the California Supreme Court’s decision in *In re Marriage Cases* was a significant deviation from the long-standing, uniform understanding of marriage in California.<sup>112</sup> From the earliest days of California statehood, California court decisions recognized that “the first purpose of matrimony, by the laws of nature and society, is procreation,”<sup>113</sup> a purpose that quite clearly makes same-sex and opposite-sex couples not “similarly situated.” Neither was that explicit purpose a historical anomaly. A century later, the California Supreme Court reaffirmed that “the institution of marriage” serves “the public interest” because it “channels biological drives that might otherwise become socially destructive” and “it ensures the care and education of children in a stable environment.”<sup>114</sup> Just a few months before the Proposition 8 election, the California Court of Appeals once again reaffirmed that “the sexual, procreative, [and] child-rearing aspects of marriage” go “to the very essence of the marriage relation.”<sup>115</sup>

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109. *Id.* § 455(d)(1).

110. *Judge Reinhardt to Disqualify*, *supra* note 99.

111. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

112. *In re Marriage Cases*, 43 Cal. 4th 757 (Cal. 2008).

113. *Baker v. Baker*, 13 Cal. 87, 103 (Cal. 1859).

114. *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952).

115. *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184–85 (Cal. Ct. App. 2008) (alteration in original).

By mischaracterizing what had actually transpired in California leading to the adoption of Proposition 8, Judge Reinhardt was able to offer a pretextual excuse for why the constitutionality of Proposition 8 was not controlled by binding Supreme Court precedent in the 1972 case of *Baker v. Nelson*.<sup>116</sup> In *Baker*, the Supreme Court summarily upheld a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to Minnesota's one-man/one-woman marriage law.<sup>117</sup> At the time, Supreme Court rules provided for mandatory appeal of federal constitutional challenges to state laws, but if the Supreme Court agreed with the state court's judgment that the state law did not violate the Federal Constitution, it would frequently summarily dismiss the appeal as not raising a substantial federal question.<sup>118</sup> That is what it did in *Baker v. Nelson*, and the Supreme Court has repeatedly held that such summary dispositions are decisions on the merits that are binding precedent on the lower courts. As it held in the 1975 case of *Hicks v. Miranda*, "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise," and even where such doctrinal developments may exist, "lower courts are bound by summary decisions by [the Supreme] Court 'until such time as the Court informs [them] that [they] are not.'"<sup>119</sup>

The Supreme Court has treated the *Hicks* rule as applying only to "the specific challenges presented in the statement of jurisdiction," however, not to additional questions that "merely lurk in the record"<sup>120</sup>—hence, the importance of Judge Reinhardt's mischaracterization of Proposition 8's history. If Proposition 8 was revoking a long-standing right to same-sex marriage in California, the constitutional challenge to the proposition would arguably have presented a different issue than was addressed in *Baker v. Nelson*. But if, as was patently the case, California voters adopted Proposition 8 to restore California's understanding of marriage to what it had always been before the erroneous decision of the California Supreme Court a few months earlier, then the question of the constitutionality of that law was identical to the question presented to the Supreme Court in *Baker v. Nelson*, and plaintiffs' challenge was thus foreclosed by that binding Supreme Court precedent.

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116. *Baker v. Nelson*, 409 U.S. 810 (1972).

117. *Id.*

118. *Id.*

119. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (alteration in original).

120. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

Judge Reinhardt bolstered his ahistorical description of the case with a second contention why *Baker v. Nelson* was not controlling, rooted in California's domestic partnership law.<sup>121</sup> But here, too, he was cheating the people of California out of the policy choice they had adopted with Proposition 8 (and the earlier Proposition 22), albeit with the same sleight-of-hand that had been employed by the California Supreme Court in *In re Marriage Cases*. To summarize the story set out at greater length in the Prologue above, California voters passed Proposition 22 in 2000, reaffirming the long-standing definition of marriage by a statutory initiative so that the legislature could not change the understanding of marriage.<sup>122</sup> In 2005, the California Legislature made an illegal attempt to change the law contrary to the mandate of Proposition 22, and after that attempt was vetoed by the governor,<sup>123</sup> it created a domestic partnership law to basically accomplish the same thing. The governor signed that bill into law, and it was upheld by the California Court of Appeal against a challenge that the law was contrary to Proposition 22 and therefore unconstitutional under article 2, section 10(c) of the state constitution on the ground that the Domestic Partnership Act had nothing to do with the marriage law.<sup>124</sup>

And yet, for Judge Reinhardt, the almost complete overlap between the Domestic Partnership Act and the institution of marriage as defined by Proposition 8 deprived the latter of any rationality. "Although the Constitution permits communities to enact most laws they believe to be desirable," he noted, "it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently."<sup>125</sup> According to Judge Reinhardt,

[t]here was no such reason that Proposition 8 could have been enacted. Because under California statutory law, same-sex couples had all the rights of opposite-sex couples, regardless of their marital status, all parties agree that Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right—the right to obtain and use the

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121. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

122. *No to Gay Marriage in CA*, CBS NEWS (Mar. 7, 2000, 10:00 PM), <http://www.cbsnews.com/news/no-to-gay-marriage-in-ca/>.

123. Michael Finnegan & Maura Dolan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES (Sep. 8, 2005), <http://articles.latimes.com/2005/sep/08/local/me-marriage8>.

124. *Knight v. Superior Court*, 128 Cal. App. 4th 14, 30 (Cal. Ct. App. 2005).

125. *Perry*, 671 F.3d at 1063.

designation of “marriage” to describe their relationships. Nothing more, nothing less.<sup>126</sup>

In other words, Proposition 8 was invalid because the Domestic Partnership Act had provided to same-sex couples all of the benefits of marriage except the name “marriage,”<sup>127</sup> and it was irrational for Proposition 8 not to allow same-sex couples to use the name “marriage” as well.

The legal problem should be obvious. As a matter of California constitutional law, the legislature cannot alter a statutory initiative unless the initiative specifically authorized subsequent amendment or repeal by the legislature,<sup>128</sup> and it cannot alter a constitutional initiative (such as Proposition 8) at all without a subsequent constitutional amendment approved by the voters.<sup>129</sup> The Domestic Partnership Law was upheld by the California courts only because, in the court’s view, it did not entrench on the institution of marriage. But in Judge Reinhardt’s analysis, the Domestic Partnership Law entrenched so much on the institution of marriage as to render that institution unconstitutional to the extent it was defined as an institution rooted in the unique biological complementarity of men and women. In other words, the act of the legislature was used to invalidate a constitutional act of the people, when under California’s clearly-established precedent on the power of the initiative, any conflict should have required that act of the legislature to give way to the act of the people.

From these false premises, Judge Reinhardt then found (in line with concessions that had been made by Attorney General Brown in the court below) that “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of

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126. *Id.*

127. *Id.* at 1065 (“By 2008, ‘California statutory provisions generally afford[ed] same-sex couples the opportunity to . . . obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples.’”) (quoting *In re Marriage Cases*, 83 P.3d 384, 417–18 (Cal. 2008)). “The 2003 Domestic Partner Act provided broadly: ‘Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.’” *Id.* (quoting 2003 Cal. Stat., ch. 421, § 4 (codified as CAL. FAM. CODE § 297.5(a) (West 2014))).

128. *See* CAL. CONST. art. II, § 10(c) (“[The legislature] may amend or repeal an initiative statute [such as Proposition 22] by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”) (alteration in original).

129. *See* CAL. CONST. art. II, § 1 (“All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require”).

opposite-sex couples.”<sup>130</sup> That made it an animus case governed by the Supreme Court’s decision in *Romer v. Evans*,<sup>131</sup> not a case about the right of Californians to retain the long-standing definition of marriage, which would have been controlled by *Baker v. Nelson*.

And with that, this round of cheating was complete.<sup>132</sup> The rest of the opinion is mere window-dressing, drawing extensively on the very decision of the California Supreme Court in *In re Marriage Cases* that was repudiated by the voters of California with their adoption of Proposition 8 and its sister decision in *Strauss v. Horton*,<sup>133</sup> begrudgingly upholding Proposition 8 against a California constitutional challenge.

*Scene 5: Supreme Court of the United States, 1 First Street NE, Washington, D.C.*

The next scene in the play is the majestic courthouse across the street from the nation’s capital building in Washington, D.C., the Supreme Court of the United States. The legal issue that was dispositive for the Court was jurisdictional, not one that addressed the substantive constitutional challenges on the merits: whether or not initiative proponents had the legal standing to pursue an appeal on their own when the elected officials named as defendants refused to do so. This was a close question. Whether rightly or wrongly, the Supreme Court has long held that individual citizens who do not suffer a particularized injury do not have legal standing to invoke the authority of the federal courts to determine a matter of federal constitutional

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130. *Perry*, 671 F.3d at 1063.

131. *Id.* at 1063–64 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

132. That is not to say there were not other examples of “cheating” in the opinion. For example, Judge Reinhardt references the language in the “official information guide” that asserted that Proposition 8 “[c]hanges the California Constitution to eliminate the right of same-sex couples to marry in California,” *Perry*, 671 F.3d at 1067 (quoting Official Voter Information Guide, California General Election (Nov. 4, 2008), at 54). As a California resident himself, Judge Reinhardt was undoubtedly aware that that language was put into the voter guide by elected officials opposed to the initiative in order to undermine the initiative’s electoral prospects. Although technically accurate if one assumes that the California Constitution is only what the courts say it is, a more fully accurate statement would have been: “Proposition 8 overrules the erroneous decision by the California Supreme Court finding a right to same-sex marriage in the California Constitution,” or perhaps “[r]estores the man-woman definition of marriage as a matter of California constitutional law.” Another example of “cheating,” which could be the subject of an entirely separate article, might be the activity of elected officials in San Francisco, who intervened in the case *as plaintiffs* to join the constitutional challenge against a constitutional provision adopted by the people of California that it was their duty to enforce. Using taxpayer resources to challenge an enactment of the people is dubious, made more so by the fact that the argument San Francisco advanced was the one actually adopted by Judge Reinhardt.

133. *Strauss v. Horton*, 46 Cal. 4th 364, 387 (Cal. 2009).



law.<sup>134</sup> States always have such an interest in defending the constitutionality of their own laws, of course, but normally individual citizens cannot invoke that interest themselves. The key case here is *Diamond v. Charles*, which recognized that “a State has standing to defend the constitutionality of its [laws],” but denied standing to a physician seeking to uphold the state’s restrictions on abortion after state officials declined to appeal a ruling that the law was unconstitutional.<sup>135</sup> On the other hand, the Supreme Court recognized in *Karcher v. May* that, as independent sovereigns, the states may decide for themselves who can represent the state’s interest in defending state laws.<sup>136</sup> In that case, after the attorney general refused to defend a New Jersey law providing that public schools shall allow school children to observe a moment of silence at the outset of each school day, Alan Karcher, the speaker of the New Jersey General Assembly, and Carmen Orechio, the president of the New Jersey Senate, with the permission of the legislature, intervened to defend the law.<sup>137</sup> They were allowed to participate in the federal district court proceedings, and to take an appeal to the Third Circuit Court of Appeals despite the fact that none of the named defendants—all executive branch officials responsible for enforcing the law—defended against the constitutional challenge or filed a notice of appeal from the district court’s adverse ruling.<sup>138</sup> By the time the case reached the Supreme Court, however, Karcher and Orechio had lost their legislative offices and the Supreme Court dismissed their appeal for want of jurisdiction, holding that because Karcher and Orechio no longer held their legislative leadership positions, they were no longer parties with standing to pursue the appeal.<sup>139</sup>

The Supreme Court did not address whether Karcher and Orechio could have participated in the case as intervenors on other grounds, holding only that they had not done so. Even more significantly, the Court declined to vacate the judgments in the courts below, specifically holding that “[s]ince the New Jersey Legislature had authority under state law [namely, decisions of the state supreme court] to represent the State’s interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.”<sup>140</sup>

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134. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (noting that Article III requires an “injury in fact,” which “serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem”).

135. *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (alteration in original).

136. *Karcher v. May*, 484 U.S. 72, 82 (1987).

137. *Id.* at 75.

138. *Id.* at 76.

139. *Id.*

140. *Id.* at 82 (alteration in original).

That reasoning from *Karcher* strongly supported standing by Proposition 8's proponents, not because they had a particularized injury of their own (although that, too, was a close issue, given the preferred status that California law gives to official proponents of an initiative), but because they "had authority under state law to represent the State's interests in both the District Court and the Court of Appeals."<sup>141</sup> The state law authority they had, a decision of the California Supreme Court appointing them to represent the state's interests in defending the initiative they sponsored, was the identical state law authority that had provided legal standing to the legislative leaders in *Karcher*. Moreover, the argument in favor of the proponents' standing was further bolstered by dicta in *Arizonans for Official English*, which expressed "grave doubts" whether an initiative's proponent had standing to pursue an appeal on his own because it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State," thereby implying that an initiative proponent would have standing where state law did so authorize, as was the case in California pursuant to the definite ruling of the California Supreme Court.<sup>142</sup>

Nevertheless, a slim five to four majority of the Supreme Court distinguished *Karcher* on the ground that the appellants in that case were themselves state officials, whereas Proposition 8's proponents were not.<sup>143</sup> The Court took some liberties with what *Karcher* actually held, however. *Karcher* did not reject any claim that the legislative leaders had standing in some capacity other than as legislative leaders, only that they had not sought to intervene in any other capacity, for example. But the distinction between public officials and private actors representing the state's interest is nonetheless a plausible one, albeit one which the dissent did not find particularly persuasive given the importance in California of the initiative power as a way for the people to directly control the operation of their government against recalcitrant elected officials.

While the Supreme Court's holding was a blow to the ability of the states to set their own course in determining who would represent the state's interests in defending laws adopted by popular initiative, the real damage from the Court's decision became manifest on remand, as it provided elected officials with further opportunity to undermine the initiative they had not supported from the outset.

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141. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (quoting *Karcher*, 484 U.S. at 82).

142. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

143. *See Perry*, 133 S. Ct. at 2664.

*Scene 6: City Hall, 1 Dr. Carlton P. Goodlett Place, San Francisco*

Following the Supreme Court's ruling on June 26, 2013 that neither it nor the Ninth Circuit Court of Appeals had jurisdiction to hear the appeal brought solely by the initiative's proponents,<sup>144</sup> the action of the play returned to San Francisco. There was a brief stop in the Ninth Circuit's courthouse in San Francisco, where that court was unable to resist the temptation for two more acts of lawlessness to close out its role in the saga. First, after initially announcing that "[t]he judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45" (or longer should a petition for rehearing be filed) as is customary—a petition for rehearing was not an insignificant possibility given that the Supreme Court's decision had turned in part on what may well have been a misunderstanding of the California Supreme Court's interpretation of California law—the court reversed course two days later and dissolved the stay "effective immediately,"<sup>145</sup> just in time for the city's annual Gay Pride Weekend.<sup>146</sup> It apparently gave advance warning of its unexpected turn-about to the plaintiffs in the case and their collaborating defendants without simultaneously notifying appellants—the initiative's proponents who alone had been defending Proposition 8 in the litigations—as basic judicial rules require.<sup>147</sup>

Only an hour after the stay was lifted by the Ninth Circuit, a full-scale wedding for the lead plaintiffs occurred at the San Francisco City Hall, presided over by the attorney general of California—the state official responsible for *enforcing*, not *undermining*, the law of California.<sup>148</sup> The lieutenant governor of California, Gavin Newsom (who, as mayor of San Francisco, had illegally issued marriage licenses to same-sex couples back in 2004 before the California Supreme Court declared the state's one-man/one-woman marriage law unconstitutional), made the ninety-mile trek from Sacramento through heavy weekend Bay-area traffic in order to be on hand, suggesting that perhaps he, too, had been tipped off in advance of the Ninth Circuit's order lifting the stay.<sup>149</sup>

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144. See generally *id.* at 2652.

145. *Perry v. Brown*, 725 F.3d 968 (9th Cir. 2013) (order dissolving the stay).

146. See Jean Elle, *Same-Sex Marriages Continue at City Hall: The Ninth Circuit's Lifting of the Ban Came Much Earlier than Anticipated*, NBC BAY AREA (June 30, 2013, 11:18 AM), <http://www.nbcbayarea.com/news/local/Gay-Marriages-Can-Now-Resume-in-California-213592871.html>.

147. *Id.*

148. *Id.*

149. *Id.* (indicating Lt. Gov. Newsom travelled from Sacramento to San Francisco that Friday).

Moreover, the plaintiffs in the case were not the only same-sex couples to receive marriage licenses that weekend.<sup>150</sup> Although the case had not been brought as a class action, a legal opinion from the attorney general of California (that would be the same attorney general who presided gleefully over the Perry/Steir marriage ceremony) advised the governor (that would be the same governor who, when he was attorney general, had initially refused to defend Proposition 8 and had actively aided plaintiffs in their effort to have it declared unconstitutional) that the district court's ruling should be immediately given statewide effect.<sup>151</sup> Here, too, the elected officials of the state "cheated" the people of California out of the protections of their own constitution and of some basic jurisdictional rules normally followed by the courts.

First, the Supreme Court's holding that the initiative's proponents had no legal standing in the court of appeals or the Supreme Court raised serious questions about the legal authority of the federal district court to have issued an injunction with statewide effect. The only parties at that phase of the litigation who had standing under the Supreme Court's holding—the two plaintiff couples and the named government defendants—were all supporting the same outcome, a ruling that Proposition 8 was unconstitutional. Under such circumstances, the most that a federal district court has authority to do is issue a consent or default judgment applicable only to the parties to the case, namely, the two plaintiff couples. As rule 55 of the Federal Rules of Civil Procedure explains: "When a party against whom a judgment for affirmative relief is sought has failed to plead *or otherwise defend*, [as provided by these rules] and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."<sup>152</sup>

Indeed, whether the district court even had authority to issue a broader injunction against the two county clerk defendants in the case (the county clerks in Alameda and Los Angeles Counties) that would apply to *all same-sex applicants* for marriage licenses in those counties rather than just the two plaintiff couples, much less a statewide injunction, is itself a close question that warranted careful consideration. In order to prevent collusive suits from being used to obtain from the judiciary a ruling that the government defendants preferred but could not obtain from the political process, there is a fairly well-established doctrine that prevents the use of what is called "nonmutual offensive collateral estoppel" from being used against government. The doctrine holds that a judicial ruling against a government

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150. *Id.*

151. *Id.*

152. FED. R. CIV. P. 55 (emphasis added) (alteration in original).

entity cannot be used offensively by other plaintiffs against that same governmental entity in the future,<sup>153</sup> and the doctrine exists precisely to prevent the kinds of machinations that occurred in this case, allowing a policy choice by one set of elected officials to have preclusive binding effect on future officials in future cases brought by others who were not parties in the original litigation.<sup>154</sup> Yet in the memorandum prepared in anticipation of the Supreme Court's ruling vacating the Ninth Circuit's decision for lack of jurisdiction, the successor attorney general of California advised the former attorney general, now governor, that the district court's ruling required the two county clerks named as defendants in the case to issue marriage licenses to "any qualified same-sex couple who applies" because, as defendants in the case, they were "expressly enjoined from enforcing or applying Proposition 8."<sup>155</sup> In other words, other same-sex couples who were not parties to the original litigation could use the district court's holding and injunction in the *Perry* case for their own benefit. That is nonmutual offensive collateral estoppel, and as both the Supreme Court and Ninth Circuit have held, it does not apply to the government. Attorney General Harris's memo makes no mention of the doctrine.

Even worse, AG Harris claimed in her memo that the injunction issued in the *Perry* case applied to county clerks who were not even defendants in the case.<sup>156</sup> She claimed to find authority for this extraordinary expansion of the injunction's reach in both rule 65 of the Federal Rules of Civil Procedure and in California's statutory marriage laws.<sup>157</sup> The analysis is woefully inadequate.<sup>158</sup> For starters, when Chief Judge Vaughn Walker denied the motion of Imperial County to intervene in the case at the trial court stage, he explicitly held that Imperial County had no right to intervene under Federal

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153. See, e.g., *United States v. Mendoza*, 464 U.S. 154, 158–60 (1984); *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005) (applying exemption from nonmutual collateral estoppel rule to state governments).

154. *Mendoza*, 464 U.S. at 161–62.

155. Letter from Attorney General Kamala D. Harris to The Honorable Edmund G. Brown Jr (June 3, 2013) [hereinafter Letter from Att'y Gen. Harris], available at [http://gov.ca.gov/docs/AG\\_Letter.pdf](http://gov.ca.gov/docs/AG_Letter.pdf).

156. *Id.*

157. *Id.*

158. Contrast the much more objective analysis provided by the very pro-same-sex marriage law firm, Greenberg Traurig, addressing a parallel situation in Florida. It advised that "[c]lerks who are not named defendants and who issue licenses to same-sex couples may be susceptible to a charge of violating criminal law." Although "the parties to the federal lawsuit would be bound by the [district court] ruling," it reasoned, "[c]lerks who are not parties to the federal actions would not be bound by the ruling." Memorandum from John Londot, Esq. et al., to Fla. Ass'n of Cnty. Clerks 1, 7 (July 1, 2014) (alteration in original), available at <http://www.miamiherald.com/news/local/community/gay-south-florida/article4304013.ece/binary/Greenberg%20Traurig%20memorandum%20to%20clerks%20association%20-%20July%201,%202014>.

Rule of Civil Procedure 24(a) because it did not have “a significant protectable interest that bears a relationship to the plaintiffs’ claims in this litigation.”<sup>159</sup> That conclusion was shared by plaintiffs’ attorneys, as noted by the Ninth Circuit in its order affirming the denial of Imperial County’s motion to intervene: “[A]ccording to what [plaintiffs’] counsel represented to us at oral argument, the complaint they filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California’s fifty-eight counties.”<sup>160</sup> This is in accord with long-standing Supreme Court precedent, in which the Court has “often repeated the general rule that ‘one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.’”<sup>161</sup> Yet under the attorney general’s analysis, the district court’s ruling did indeed extend to and was binding on Imperial County and the other fifty-six county clerks throughout the state who were not parties to the *Perry* litigation.

Subsection (d)(2) of Federal Rule 65 specifically provides that an order granting an injunction “binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) *the parties’ officers, agents, servants, employees, and attorneys*; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).”<sup>162</sup> For the district court’s injunction to reach county clerks who were not “parties” to the litigation, those clerks would have to be “officers, agents, servants, employees, [or] attorneys” for one of the parties in the case or in “active concert” with them.<sup>163</sup> The attorney general asserted that “[c]ounty clerks and recorders are state officials subject to the supervision and control of [the Department of Public Health] for the limited purpose of enforcing the state’s marriage license and certification laws,”<sup>164</sup> but as discussed at length above, that is not correct. County clerks and recorders are subject to the supervision and control of the director of public health only with respect to

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159. Order Denying Intervention at 6, *Perry*, 704 F. Supp. 2d 921 (Dkt. No. 709).

160. *Perry v. Schwarzenegger*, 630 F.3d 898, 907 (9th Cir. 2011); *see also Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 n.2 (9th Cir. 2011) (noting plaintiffs’ contention at oral argument that if the Ninth Circuit had to dismiss the appeal for lack of proponents’ standing, “the district court decision would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda, and that further litigation in the state courts would be necessary to clarify the legal status of Proposition 8 in the remaining fifty-six counties”); *Perry v. Brown*, Ninth Circuit Oral Argument Audio (Dec. 6, 2010, No. 10-16696) at 32:26–32:42, 55:09–55:22 (plaintiffs’ counsel candidly conceding that non-*Perry* clerks could “refuse a marriage license to a same-sex couple” “without violating th[e] injunction”), available at <http://cdn.ca9.uscourts.gov/datastore/media/2010/12/06110-16696.wma>.

161. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (citations omitted).

162. FED. R. CIV. P. 65(d)(2) (emphasis added).

163. *Id.* (alteration in original).

164. Letter from Att’y Gen. Harris, *supra* note 155, at 4 (alteration in original).

the forms to be used and the record-keeping requirements developed by the director for purpose of achieving uniformity in the recording of vital statistics. They are *not* under the director's supervision and control for purposes of their statutory responsibility in ensuring compliance with the marriage eligibility requirements of state law. The attorney general's memorandum makes the same kind of material mischaracterizations of the relevant statutes and case law that Judge Walker made in his order denying Imperial County's motion to intervene. "In *Lockyer*," she claimed, "the California Supreme Court recognized that DPH supervises and controls both county clerks and county registrar/recorders *in the execution of the marriage laws*."<sup>165</sup> Further, she claimed that the Court "emphasized that in addition to giving DPH the authority to 'proscribe and furnish all record forms' and prohibiting any other forms from being used (Health & Saf. Code, § 102200), the Health and Safety Code gives DPH '*supervisory power over local registrars, so that there shall be uniform compliance*' with state law requirements."<sup>166</sup> Note the placement of the quotation marks, in which the key phrase, "with state law requirements," falls outside of the quotation marks. What *Lockyer* actually held is that the director "has supervisory power over local registrars, so that there shall be *uniform compliance with all the requirements of this part*,"<sup>167</sup> namely, the registration of vital statistics, not the "state law requirements" for marriage more generally, as Attorney General Harris falsely claimed. At issue in *Lockyer* was the fact that the San Francisco county clerk had changed the marriage forms prescribed by the director of public health (in his capacity as registrar of vital statistics), and for that aspect of the clerk's duties, and that aspect alone, *Lockyer* held, fully consistent with the statute, that the clerk was "under the supervision of the California Director of health services [now the director of public health] who by statute, has general supervisory authority *over the marriage license and marriage certification process*."<sup>168</sup> It did not hold that county clerks were subject to the supervision and control of the director beyond the "part" of the state health code dealing with registration of vital statistics.<sup>169</sup>

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165. *Id.* at 5 (emphasis added).

166. *Id.* (internal citations omitted).

167. *Lockyer v. City and Cnty. of S.F.*, 95 P.3d 459, 1078 (Cal. 2004) (emphasis added).

168. Letter from Att'y Gen. Harris, *supra* note 155, at 5 (alteration in original) (emphasis added) (quoting *Lockyer*, 33 Cal. 4th at 1118).

169. Attorney General Harris also claimed that the California Supreme Court's decision in *In re Marriage Cases* requires the same result. In that decision, the California Supreme Court noted that "[p]laintiffs are entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." *In re*

The conclusion that an injunction issued by a single federal court judge could not properly reach government officials who were not even parties to the case and were not under the control or supervision of those who were is bolstered by a provision of the California Constitution that specifically provides that administrative agencies, including state and local elected officials, have “no power . . . [t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.”<sup>170</sup> Because the U.S. Supreme Court’s ruling in *Hollingsworth* that proponents lacked standing to appeal required that the Ninth Circuit’s appellate decision be vacated, there was no “determination” by “an appellate court” that Proposition 8 was unconstitutional. The California Constitution therefore required, at least arguably,<sup>171</sup> that other government officials not actually parties subject to the *Perry* injunction had to continue to enforce Proposition 8. Indeed, in *Fenske v. Board of Administration*, one of the first cases to arise after section 3.5 was added to the California Constitution in 1978, the California Court of Appeal specifically held that when a trial court “order relates to only a single petitioner . . . the agency under the compulsion of section 3.5 and the doctrine of *stare decisis* is not permitted to apply the order to other persons.”<sup>172</sup> Such a result flows from the rule that the doctrine of *stare decisis* applies only to decisions of appellate courts and trial courts make no binding precedents.<sup>173</sup> The attorney general’s memo does not even

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Marriage Cases, 43 Cal. 4th 757, 857 (Cal. 2008). But the court did not address at all who those appropriate state officials were or the extent of their statutory authority to give binding directives to county clerks who were not parties to the litigation. Moreover, for purposes of the government’s exemption from the doctrine of nonmutual offensive collateral estoppel, there may well be a difference between an injunction issued by the Supreme Court and an injunction issued by a single federal district court judge, particularly one whose jurisdiction does not even cover the full asserted geographic reach of the injunction.

170. CAL. CONST., art. III, § 3.5. The text refers explicitly to “administrative agencies,” but that has been interpreted to apply to local government officials as well. 64 Ops. Cal. Atty. Gen. 690 (1981) (concluding that “[c]ounty boards of equalization are required to enforce [the law] until a court determination on the issue as provided in article 3, section 3.5, of the California Constitution”) (alteration in original); see also *Billig v. Voges*, 223 Cal. App. 3d 962, 969 (Cal. Ct. App. 1990) (noting that “[a]dministrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional” (emphasis added) (citing CAL. CONST., art. III, § 3.5)). The California Supreme Court has suggested, but not yet held, that the provision applies to local officials. *Lockyer*, 95 P.3d at 475.

171. I say “arguably” because, as discussed *supra* note 170, the issue of section 3.5’s application to local officials has not been definitely resolved by the California Supreme Court. Moreover, the California courts do not appear to have addressed the applicability of the provision in the context of a *federal*, as opposed to state, trial court ruling.

172. *Fenske v. Board of Administration*, 103 Cal. App. 3d 590, 595–96 (Cal. Ct. App. 1980).

173. *Id.* (citing 6 WITKIN, CAL. PROCEDURE § 659 (2d ed. 1971) (concerning appeal)). *Fenske* deals with an order from a California Superior Court, not a federal district court, but the principal that a trial



mention article 3, section 3.5 of the California Constitution, or the definitive holding in the *Fenske* case.<sup>174</sup>

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court's rulings are not binding precedent is as applicable in the federal court system as it is in the California state court system. "The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another." *Starbuck v. City and Cnty. of S. F.*, 556 F.2d 450, 457 n.13 (9th Cir. 1977). Nor does a decision of a lower federal court addressing federal questions bind the California state courts. *People v. Bradley*, 1 Cal. 3d 80, 86 (Cal. 1969) ("[A]lthough we are bound by decisions of the United States Supreme Court interpreting the [F]ederal Constitution, we are not bound by the decisions of the lower federal courts even on federal questions").

174. The attorney general was clearly aware of the *Fenske* case, for she cited it (incorrectly, actually) a month later in her response to the petition for writ of mandate that the Proposition 8 proponents filed in the California Supreme Court. Here is the full passage from *Fenske*:

The Board contends that section 3.5 divests the superior court of jurisdiction to rule on the constitutionality of statutes governing administrative agencies. Consequently, the Board asserts that this court should adopt a procedure that a petitioner who has completed the administrative process and is still aggrieved should be authorized to bypass the superior court and petition directly in the Court of Appeal when an issue of constitutionality still remains. We disagree. While jurisdiction could have been given to a court other than the superior court, that was not the purpose of section 3.5. The power of the administrative agency, not the power of the superior court, is the subject matter of section 3.5. Section 3.5 did not deprive the superior court of its power to declare a statute unconstitutional. The power of the judiciary to declare laws unconstitutional is firmly entrenched as a basic principle of our government. In the instant case the superior court, not the administrative agency, declared the statute unconstitutional. When a superior court issues a writ directed to an administrative agency to not enforce a statute because it is unconstitutional as it relates to an individual petitioner, or class of petitioners, the administrative agency must obey that mandate. Section 3.5 has not made any real change in administrative mandamus. If the superior court order relates to only a single petitioner, as here, the agency under the compulsion of section 3.5 and the doctrine of *stare decisis* is not permitted to apply the order to other persons. Of course, once an appellate court has ruled upon the constitutionality of a statute, the administrative agency is bound by that decision. Such a result flows from the rule that the doctrine of *stare decisis* applies only to decisions of appellate courts and trial courts make no binding precedents.

*Fenske*, 103 Cal. App. 3d at 595–96 (citations omitted).

And here is how the attorney general characterized that language in her brief: "Article III, section 3.5 has no application where officials are acting under a federal court order. (*Fenske v. Board of Administration* [,]103 Cal. App. 3d 590, 595–96 ([Cal. Ct. App.] 1980) (concluding that art. III, § 3.5 does not excuse an administrative agency from complying with the direct order of a superior court)." Informal Opposition to Request for Immediate Stay or Injunctive Relief at 4, *Hollingsworth v. Brown*, No. S211990 (Cal. July 12, 2013). *Fenske* did not even involve a federal court order, and to the extent it addressed the binding effect of a state trial court order with respect to "other persons" not involved in the litigation, it stands for exactly the opposite proposition than that claimed by the attorney general. This is more than sloppy legal analysis, it is willful misrepresentation to the court, a sanctionable violation of the ethical duties of an attorney. See CAL. BUS. & PROF. CODE § 6068 (Deering 2015) ("It is the duty of an attorney . . . (d) To . . . never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"); CAL. BUS. & PROF. CODE § 6103 ("any violation of . . . his duties as [an] attorney, constitute causes for disbarment or suspension") (alteration in original); CAL. RULES OF PROF'L CONDUCT R. 5-200 (2014) ("In presenting a matter to a tribunal, a member . . . (B) Shall not seek to mislead the judge . . . by an artifice or false statement of fact or law; [and] (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision.") (alteration in original); see also CAL.

Nevertheless, acting under cover of the erroneous advice from the attorney general, the California registrar of vital statistics issued a letter to all county clerks reporting that the attorney general has “conclude[d] that the [Perry court’s] injunction applies statewide, and that county clerks . . . in all fifty-eight counties must comply with it.”<sup>175</sup> The attorney general even publicly threatened legal action against any county clerk who decided not to comply with the *Perry* injunction.<sup>176</sup> Almost all county clerks across the state dutifully and immediately complied with the commands from Sacramento, and the one exception (the county clerk in San Diego) was quickly hounded into submission.<sup>177</sup> A petition for writ of mandate that Proposition 8’s proponents filed with the California Supreme Court was summarily denied on August 14, 2013, without even a word addressing the significant legal issues presented by the petition.<sup>178</sup>

And hence ends Act I.

## ACT II. DOMA CHALLENGES IN CALIFORNIA AND MASSACHUSETTS.

### *Scene 1. Senate Judiciary Committee Hearing Room, Dirksen Senate Office Building, Washington, D.C.*

On January 26, 2009—less than a week after taking office as President of the United States, President Barack Obama nominated Harvard Law School Dean Elena Kagan to the position of Solicitor General of the United States.<sup>179</sup> In her opening remarks during her confirmation hearing in February, Ms. Kagan emphasized the “critical responsibilities” that the Solicitor General owes to Congress, “most notably, the vigorous defense of the statutes of this country against constitutional attack.”<sup>180</sup> In her response to follow-up written

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MODEL RULES OF PROF’L CONDUCT R. 1-100 (1989) (“For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.”).

175. Letter to County Clerks and County Recorders from State Registrar Tony Agurto at 1 (June 26, 2013) (alteration in original), available at [http://gov.ca.gov/docs/Letter\\_to\\_County\\_Officials.pdf](http://gov.ca.gov/docs/Letter_to_County_Officials.pdf).

176. See KamalaHarris (@KamalaHarris), TWITTER (June 26, 2013, 11:04 AM), <https://twitter.com/KamalaHarris/status/349951321555734528>.

177. See, e.g., Maura Dolan, *San Diego County Clerk Withdraws Proposition 8 Bid*, L.A. TIMES (Aug. 3, 2013), <http://articles.latimes.com/2013/aug/03/local/la-me-san-diego-clerk-20130804>.

178. Order Denying Petition for Writ of Mandate, *Hollingsworth v. Brown*, No. S211990 (Cal. Aug. 14, 2013).

179. *Senate Confirms Elena Kagan as Solicitor General of the United States*, HARV. L. TODAY (March 19, 2009), <http://today.law.harvard.edu/senate-confirms-elena-kagan-as-solicitor-general-of-the-united-states/>.

180. *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States and Elena Kagan Nominee to Be Solicitor General of the United*

questions, Kagan stated that her role as Solicitor General would be to “advance . . . the interests of the United States, as principally expressed in legislative enactments and executive policy.”<sup>181</sup> “I am fully convinced,” she added, “that I could represent all of these interests with vigor, even when they conflict with my own opinions. I believe deeply that specific roles carry with them specific responsibilities and that the ethical performance of a role demands carrying out these responsibilities as well and completely as possible.”<sup>182</sup> She even asserted that the obligation to defend acts of Congress also applied in situations where the policy of the new administration, with respect to the law, differed from that of a previous administration: “The cases in which a change between Administrations is least justified are those in which the Solicitor General is defending a federal statute. Here interests in continuity and stability combine with the usual strong presumption in favor of defending statutes to produce a situation in which a change should almost never be made.”<sup>183</sup> Ms. Kagan was confirmed on March 19, 2009.

That same month, a lawsuit challenging the Federal Defense of Marriage Act (“DOMA”) was filed in Massachusetts, and another case involving DOMA was already pending in California.<sup>184</sup> Although the Solicitor General’s office normally does not get involved in federal district court litigation—its primary task is to handle representation of the United States before the Supreme Court—the office does occasionally take an active role at the district court level in high-profile litigation in order to articulate the position that the United States will take and design the litigation strategy. That happened with the DOMA cases.<sup>185</sup>

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*States Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) [hereinafter *Kagan Nominee to Be Solicitor General*] (Kagan’s response to Sen. Specter).

181. *Id.* at 172 (Kagan’s written response to Sen. Specter’s written question No. 14).

182. *Id.*

183. *Id.* at 174 (Kagan’s written response to Sen. Specter’s written question No. 17).

184. Lisa Keen, *Historic Supreme Court Session Starts Monday; DOMA, Prop 8, and NOM on Potential Agenda*, KEEN NEWS SERV. (Sep. 27, 2012), <http://www.keennewsservice.com/2012/09/27/historic-supreme-court-session-starts-monday-doma-prop-8-and-nom-on-potential-agenda/>.

185. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the United States Senate*, 111th Cong. 64–65 (2010) (Testimony of Elena Kagan acknowledging that while Solicitor General, she had substantial enough involvement in both *Smelt* and *Gill* to require that she recuse herself if either case came before the Supreme Court).

Scene 2. *Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., NW, Washington, D.C., June 15, 2009.*<sup>186</sup>

*Principal Deputy Solicitor General Neal Katyal:* The purpose of our meeting this morning is to decide what position the United States is going to take in pending litigation challenging the constitutionality of the Federal Defense of Marriage Act. As you know, Elena here—I mean, General Kagan (sorry about that!)—testified under oath during her confirmation hearing back in February that she viewed one of the “critical responsibilities”<sup>187</sup> of the Solicitor General to be “the vigorous defense of the statutes of this country against constitutional attack.”<sup>188</sup> I know none of us who have recently been appointed by President Obama agrees with DOMA, but General Kagan also testified that her duty to vigorously defend acts of Congress applies even when those laws conflict with her own opinions. Indeed, she said that the “ethical performance”<sup>189</sup> of her job as Solicitor General “demands carrying out these responsibilities as well and completely as possible,”<sup>190</sup> even and, perhaps, especially in situations where the policy of the new administration with respect to the law differed from that of a previous administration. And she specifically said that “there is no federal constitutional right to same-sex marriage.”<sup>191</sup> So I guess we’re stuck with putting up a defense of DOMA.

*Solicitor General Elena Kagan:* Not so fast, Neal. You have to read what I said more carefully. I said that I had a duty to vigorously defend acts of Congress “as well and completely *as possible*,”<sup>192</sup> and that policy changes reflected by a change in administration should “*almost never*”<sup>193</sup> result in declining to fulfill that duty by failing to defend an act of Congress. Indeed, the two cases challenging the constitutionality of DOMA that we’re discussing this morning are exactly the cases I had in mind when I so carefully chose those words during my testimony.

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186. Note: I have taken literary license in depicting the events in this scene. I am not aware of any first-hand accounts confirming or denying whether the discussions depicted here actually occurred, but the narrative is based on a reasonable, educated estimation based on my knowledge of the workings of the Solicitor General’s office in high-profile cases, my review of the briefs filed by the United States in the cases, and on testimony provided by now Justice Elena Kagan during her confirmation hearings for appointment as Associate Justice on the Supreme Court.

187. *Kagan Nominee to Be Solicitor General, supra* note 180, at 47.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (emphasis added)

192. *Id.* (emphasis added)

193. *Id.* at 175 (Kagan’s written response to Sen. Specter).

I also took an oath to support and defend the Constitution, and in my view, DOMA is unconstitutional. Just because I said “[there] *is* no federal constitutional right to same-sex marriage”<sup>194</sup> in my testimony doesn’t mean I was saying that the courts would not recognize one at some point, only that there was not *currently* such a right that the courts had recognized. It all depends on what the meaning of “is” is! And as you know, when I was asked whether I had ever offered an opinion about whether the Federal Constitution *should be read* to confer a right to same-sex marriage, I said that “I [did] not recall ever expressing an opinion on [that] question.”<sup>195</sup>

So the short of it is that I have no intention of defending DOMA if there is, in my view, no reasonable basis for doing so. So let’s explore what our options are.

*Acting Assistant Attorney General Tony West:* Well, that should be an easy matter in the California case, *Smelt v. United States*.<sup>196</sup> As you know, on March 9—the very day I was appointed by President Obama as Acting Assistant Attorney General—the *Smelt* case was removed from state court to federal court. I directed Scott Simpson, the senior trial counsel on the case, to bring me up to speed. He tells me there are serious jurisdictional problems in that case. The plaintiffs were married in California, reside in California, and have not alleged that another state has refused to recognize their marriage in reliance on section 2 of DOMA, nor did they allege that they have sought any federal benefits that would be denied to them because of section 3 of DOMA. So we can legitimately argue that the case should be dismissed for lack of standing without actually having to put up a defense of DOMA, and did so two weeks in our opening brief asking the district court to dismiss the case.<sup>197</sup>

*Solicitor General Elena Kagan:* Not good enough. As you know, that opening brief really ticked off the President, particularly the comparison of same-sex marriage to incest on page eighteen.<sup>198</sup> I want to make a statement about how the United States no longer agrees with DOMA. Something like this: “With respect to the merits, this Administration does not support

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194. *Id.* at 148 (Kagan’s written response to Sen. Specter’s written question No. 17) (alteration in original) (emphasis added).

195. *Id.* (alteration in original).

196. *Smelt v. United States*, No. 09-00286 (C. D. Cal., S. Div. filed Mar. 9, 2009).

197. *See* Memorandum in Support of Defendant United States of America’s Motion to Dismiss, at 10–15, *Smelt v. United States*, No. 09-00286, (C. D. Cal. filed June 11, 2009).

198. *Id.* at 18 (citing *Catalano v. Catalano*, 170 A.2d 726, 728–29 (Conn. 1961) (marriage of uncle to niece, “though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of th[at] state”). *See also* JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 249–50 (Penguin Press 2014) (describing how the President “hit the roof” when he saw the news headlines about the brief, including one that read: “Obama DOJ Compares Gay Marriage to Incest”).

DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.”<sup>199</sup> But I also do not want to lock us in to saying that our only disagreement with DOMA is on policy grounds. So let’s add in our upcoming reply brief something like this: “Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes *as long as reasonable arguments can be made in support of their constitutionality*, even if the Department disagrees with a particular statute as a policy matter, as it does here.”<sup>200</sup> On second thought, let’s not put the “reasonable arguments” language in italics. No need to telegraph where we’re headed with this. But the beauty of this strategy is that, even when the case is dismissed on jurisdictional grounds, other courts will start picking up on the fact that the United States not only disagrees with DOMA as a matter of policy, but finds it to be “discriminatory”—that should get the living constitution juices flowing for our activist friends on the bench.

Oh, and one more thing. Let’s stop arguing that the United States believes only rational basis review applies. Instead, let’s just point out that governing precedent in the Ninth Circuit says that only rational basis review applies. As Tony has noted before, it doesn’t “take a rocket scientist to know that one of these days someone [is] going to file a challenge to DOMA in a circuit that [has] yet to decide whether gays and lesbians should be considered a suspect class.”<sup>201</sup> When we get such a case where there is no binding circuit precedent on the standard of review, we can argue that heightened scrutiny ought to apply. In fact, let’s start disavowing all of the arguments in support of DOMA that were actually offered when Congress approved the statute back in 1996. Under rational basis review, we don’t have to rely on rationales actually offered; any plausible argument in defense of the law will do. So in the reply brief, say something like this: “This Court should find that Congress could reasonably have concluded that there is a legitimate government interest in maintaining the status quo regarding the distribution of federal benefits in the face of serious and fluid policy differences in and among the states.”<sup>202</sup>

But let’s also repudiate the claim, advanced by those damn intervenors in the case and by Congress when it adopted DOMA, that defining marriage as between a man and a woman has anything to do with children. Say something like this:

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199. Edward Whelan, *Senate Testimony on Defending Marriage*, EPPC ETHICS & PUB. POL’Y. CENTER, <http://eppc.org/publications/senate-testimony-on-defending-marriage/> (last visited Mar. 26, 2015) (emphasis omitted).

200. *Id.* (emphasis added).

201. BECKER, *supra* note 198, at 251 (quoting Tony West) (alteration in original).

202. *Id.* at 5.

Unlike the intervenors here, the government does not contend that there are legitimate government interests in “creating a legal structure that promotes the raising of children by both of their biological parents” or that the government’s interest in “responsible procreation” justifies Congress’s decision to define marriage as a union between one man and one woman. Since DOMA was enacted, the American Academy of Pediatrics, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, and the Child Welfare League of America have issued policies opposing restrictions on lesbian and gay parenting because they concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.<sup>203</sup>

And just for fun, let’s throw Justice Scalia’s dissenting opinion in *Lawrence v. Texas* back at him—you know, that part where he said that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion—which, of course, is the prevailing law—because “the sterile and the elderly are allowed to marry.”<sup>204</sup>

*Principal Deputy Solicitor General Neal Katyal:* I like where you’re going with this, Elena. But won’t we be attacked for not defending DOMA? I mean, despite what we all know, the President has stated publicly that he is not in favor of same-sex marriage. And as you know, there is a pretty strong informal rule here in the SG’s office that it is our duty to defend.

*Solicitor General Elena Kagan:* I don’t see how we can be attacked for not defending DOMA when everything I’ve just said technically defends DOMA. It says the courts have applied rational basis review, and under rational basis review, we think DOMA should be upheld.

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203. See Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss, at 6, *Smelt v. United States*, No. 09-00286, (C.D. Cal. filed June 11, 2009) (citing policy statements of American Academy of Pediatrics: *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 399 (2002), <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339> (2002); American Psychological Association: Ruth V. Paige, *Proceedings of the American Psychological Association for the Legislative Year 2004; Meeting Minutes of the Annual Meeting of the Council of Representatives, February 20–22, 2004, Washington, DC, and Minutes of the February, April, June, August, October, and December 2004 Meetings of the Board of Directors*, 60 AM. PSYCHOLOGIST 436 (2005), <http://www.apa.org/pi/lgbc/policy/parents.html> (2004), [http://www.aacap.org/cs/root/policy\\_statements/gay\\_lesbian\\_transgender\\_and\\_bisexual\\_parents\\_policy\\_statement](http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement); American Medical Association: *AMA Policies on LGBT Issues: General Policies*, AM. MED. ASS’N., <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbtaadvisory-committee/ama-policy-regarding-sexual-orientation.shtml> (last visited June 14, 2015); and Child Welfare League of America: *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, CWLA (May 29, 2014), <http://www.cwla.org/programs/culture/glbtposition.htm> (position statement on parenting of children by lesbian, gay, and bisexual adults).

204. *Id.* at 6 (quoting *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting)).

Now, how about the Massachusetts case that was just filed this past month?

*Acting Assistant Attorney General Tony West:* That would be me again. Scott Simpson is also the senior trial counsel on this case, *Gill v. Office of Personnel Management*.<sup>205</sup> It was filed on March 3, and Scott tells me that although some of the plaintiffs lack standing, not all of them do, so we can't get out of this one on just jurisdictional grounds.<sup>206</sup> We're going to have to defend DOMA on the merits.

*Solicitor General Elena Kagan:* Well, it seems to me that the arguments we just discussed advancing in the California case are equally applicable here. Hasn't the First Circuit also held that only rational basis review applies to sexual orientation classifications, just like the Ninth Circuit? So we don't have to argue that the United States believes rational basis review is the correct standard, only that governing precedent in the First Circuit says rational basis review should be applied.

When are the briefs due? Can we make the argument initially in our reply brief in the *Smelt* case out in California, and then develop it a bit further in our opening brief in support of a motion to dismiss in the *Gill* case in Massachusetts? I particularly want to focus on the fact that, under rational basis review, "a legislative policy must be upheld so long as there is any reasonably conceivable set of facts that could provide a rational basis for it, including ones that Congress itself did not advance or consider."<sup>207</sup> Indeed, "[a]s several federal circuits have held, a court applying rational basis review "may even hypothesize the motivations of the . . . legislature to find a legitimate objective promoted by the provision under attack."<sup>208</sup> "This test imposes a 'very difficult burden' on the plaintiffs,"<sup>209</sup> and we can argue that "DOMA withstands review under this deferential standard"<sup>210</sup> because

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205. *Gill v. Office of Pers. Mgmt.*, 682 F.3d 1 (1st Cir. 2012).

206. *Id.*

207. Memorandum of Law in Support of Defendants' Motion to Dismiss at 3, *Gill v. Office of Pers. Mgmt.*, No. 09-10309, 2009 WL 5803678 (D. Mass. filed Sept. 18, 2009) [hereinafter Defendant's Motion to Dismiss] (emphasis added).

208. *Id.* at 17 (citing *Shaw v. Or. Public Employees' Retirement Bd.*, 887 F.2d 947, 948-49 (9th Cir. 1989), (internal quotation marks omitted); see also *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 246 (1st Cir. 1990) ("question is only whether a rational relationship exists between the [law] and a *conceivable* legitimate governmental objective") (alteration in original); *Lamers Dairy, Inc. v. USDA*, 379 F.3d 466, 473 (7th Cir. 2004); *United States v. Pollard*, 326 F.3d 397, 408 (3d Cir. 2003); *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995)).

209. Defendant's Motion to Dismiss, *supra* note 207, at 17 (citing *United States v. Phelps*, 17 F.3d 1334, 1345 (10th Cir. 1994); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 397 (D. Mass. 2006) ("The Supreme Court has repeatedly emphasized the deferential nature of rational-basis review.")).

210. Defendant's Motion to Dismiss, *supra* note 207, at 17.



“Congress could reasonably have concluded that there is a legitimate government interest in maintaining the status quo and preserving nationwide consistency in the distribution of marriage-based federal benefits.”<sup>211</sup> That doesn’t even have to have been Congress’s true purpose, because “for purposes of rational basis review, it is irrelevant whether this was Congress’s ‘true’ reason for enacting DOMA.”<sup>212</sup> Then we can take another swipe at the “purported interests” relied on in the legislative history of DOMA, just like we’re going to do in the *Smelt* case, but this time let’s add the word “including” before the “responsible procreation and child-rearing” interests, to make clear we’re disavowing *all* of the interests actually relied upon by Congress.<sup>213</sup> We’ll then be able to claim in a heightened scrutiny case that there are no grounds actually relied on by the legislature that have not previously been disavowed by the government.

There is another odd twist to the *Gill* case that will allow us to defend DOMA without locking ourselves in to the argument that same-sex marriage is not a fundamental right. The plaintiffs in *Gill* are all already married, so their right to marry is not at issue, only their “right” to federal benefits based on their marital status. No court has ever held that the right to benefits is a fundamental right,<sup>214</sup> and although distribution of benefits can’t be made on a discriminatory basis, the “First Circuit has concluded . . . that sexual orientation does not constitute a suspect classification under the Fifth Amendment, and that holding is binding on” the district court.<sup>215</sup>

*Principal Deputy Solicitor General Neal Katyal*: This is just brilliant. We can even tuck into the rational basis discussion a reference to Judge Stephen Reinhardt’s recent suggestion just four months ago, in his capacity as designee of the chair of the Ninth Circuit’s Standing Committee on Federal Public Defenders, that DOMA should be subject to heightened

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211. *Id.*

212. *Id.* at 17 n.9 (citing *Smithfield Concerned Citizens for Fair Zoning*, 907 F.2d at 246).

213. Defendant’s Motion to Dismiss, *supra* note 207, at 19 n.10.

214. *Id.* at 15 (citing *DeShaney v. Winnebago Cnty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 196 (1989), (noting the Due Process Clause “generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”)); *see also* *Lyng v. Automobile Workers*, 485 U.S. 360, 368 (1987) (holding that a decision “not to subsidize the exercise of a fundamental right does not infringe the right”).

215. Defendant’s Motion to Dismiss, *supra* note 207, at 16 (citing *Cook v. Gates*, 528 F.3d 42, 62 (1st Cir. 2008), (rejecting challenge to “Don’t Ask, Don’t Tell” policy regarding members of armed services); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 396–97 (D. Mass. 2006), *aff’d*, 528 F.3d 42, 62 (1st Cir. 2008) (noting that Supreme Court had avoided holding that gays and lesbians constitute a suspect class in “cases where it might have agreed to such a holding”).

scrutiny,<sup>216</sup> just to set up the argument for a future case that does not have binding circuit precedent mandating rational basis review. One has got to love Judge Reinhardt!

*Solicitor General Elena Kagan:* Now you're talking. Tony, make it so! [Nodding, Acting Assistant Attorney General Tony West, departs]

Neal, I want to add one additional thing, for your ears only. I was over at a meeting at the White House this morning. It looks as though Justice Stevens may be retiring as early as next year, and I am likely going to be appointed to his seat on the Supreme Court.<sup>217</sup> You'll probably be in charge of the office as Acting Solicitor General until a new Solicitor General can be nominated and confirmed by the Senate,<sup>218</sup> so I want you to see this strategy through to completion. Even more importantly, a case will likely be brought in a circuit that has not yet settled on the appropriate standard of review for challenges to DOMA, perhaps one filed in New York up in the Second Circuit. My sources tell me that a beloved member of New York's gay and lesbian community, Thea Spyer, passed away in February and her spouse from a marriage performed in Canada in May of 2007, Edith Windsor, is not entitled to the normal spousal exemption from the federal estate tax because of DOMA. We're going to want to argue in such a case, not only that strict scrutiny should apply, but that under strict scrutiny, there is no reasonable basis on which we can defend the law. If such a case gets filed while I am still Solicitor General—and this is critically important—I don't want to be identified as having anything to do with it. It will be your job to keep me off the paper trail on anything dealing with such a case, and even on any connection with that case and the strategy we have developed here in the *Gill* and *Smelt* cases if such a case gets filed after I'm already up at the Supreme

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216. Defendant's Motion to Dismiss, *supra* note 207, at 13 n.6 (adding to the end of the string citation of rational basis holdings a "*but cf.*" citation to *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, J.)).

217. Justice John Paul Stevens announced his retirement on April 9, 2010. See, e.g., Robert Barnes, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST (April 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html>. At the time, Kagan was considered one of the most likely possible nominees for the vacancy. *Id.* Elena Kagan was nominated a month later, on May 10, 2010. Stephanie Condon, *Elena Kagan Nominated to the Supreme Court*, CBS NEWS (May 10, 2010), <http://www.cbsnews.com/news/elena-kagan-nominated-to-the-supreme-court/>. She was confirmed by the U.S. Senate on August 5, 2010, and sworn in as Associate Justice on August 7, 2010. Peter Baker, *Kagan Is Sworn in as the Fourth Woman, and 112th Justice, on the Supreme Court*, NY TIMES (Aug. 7, 2010), [http://www.nytimes.com/2010/08/08/us/08kagan.html?\\_r=0](http://www.nytimes.com/2010/08/08/us/08kagan.html?_r=0).

218. Neal Katyal was named Acting Solicitor General on May 17, 2010. See Chidanand Rajghatta, *PIO Neal Katyal Poised to Become US Solicitor General*, THE TIMES OF INDIA (May 19, 2010), <http://timesofindia.india-times.com/world/PIO-Neal-Katyal-poised-to-become-US-solicitor-general/article-show/5946962.cms?>

Court.<sup>219</sup> I will already have to recuse myself from *Smelt* and *Gill* if they get to the Supreme Court after I'm there, and I don't want to have to recuse myself from a case like one Edie Windsor might bring that may well be the landmark case for same-sex marriage.

*Scene 3. Split Stage. Stage Left, Federal District Courthouse in Santa Ana, California (Left Coast), Chambers of Judge David Carter. Stage Right, Federal District Courthouse in Boston, Massachusetts (East Coast), Chambers of Judge Joseph L. Tauro.*<sup>220</sup>

On August 17, 2009, the U.S. Department of Justice filed its reply brief in the *Smelt* case then pending before Judge David Carter, U.S. District Court for the Central District of California, Southern Division in Santa Ana.

[Fade in lights to left side of stage, enter court clerk]

*Court Clerk:* Judge Carter, the reply brief of the United States in support of its motion to dismiss the *Smelt* case has just been filed. It contains a pretty explosive line announcing that the Obama "Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal,"<sup>221</sup> but it also says that the Department of Justice will continue defending DOMA "as long as reasonable arguments can be made in support of their constitutionality."<sup>222</sup> I thought you would find it interesting, to say the least.

[Fade out lights as clerk departs, leaving Judge Carter reading the Department of Justice's reply brief]

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219. Cf. Hans von Spakovsky, *Obamacare Litigation: More "Golden" Reasons Why Justice Kagan May Need to Recuse Herself*, THE DAILY SIGNAL (Jan. 13, 2012), <http://dailysignal.com/2012/01/13/obamacare-litigation-more-%E2%80%9Cgolden%E2%80%9D-reasons-why-justice-kagan-may-need-to-recuse-herself/> (discussing a series of emails implicating Elena Kagan's involvement in developing the legal strategy to defend the Patient Protection and Affordable Care Act, an involvement that should have required her recusal from the case when it was at the Supreme Court, including an email from Katyal to other personnel in the Solicitor General's office that "Elena would definitely like OSG to be involved" in preparing the legal defense and that he would "bring in Elena as needed"). Von Spakovsky also reports that in one email, after being invited by Associate Attorney General Tom Perrelli to a meeting of the President's health care policy team to "help us prepare for the litigation," Katyal forwarded the message to Kagan writing, "I think you should go, no? I will, regardless, but I feel like this is litigation of singular importance." Kagan's response was "[w]hat's your phone number?" implying that she did not want a paper trail record of her involvement in the litigation. *Id.*

220. As with Scene 2 above, the dialogue in this scene is fictional, an exercise of literary license to convey information that does actually appear in the litigation records.

221. Steve Benen, *Obama Admin Shifts Gears on DOMA*, POL. ANIMAL (Aug. 17, 2009), [http://www.washingtonmonthly.com/archives/individual/2009\\_08/019521.php](http://www.washingtonmonthly.com/archives/individual/2009_08/019521.php).

222. *Id.*

On September 18, 2009, the Department of filed its reply brief in the *Gill* case then pending before Judge Joseph L. Tauro of the U.S. District Court for the District of Massachusetts, in Boston.

[Fade in lights to right side of stage, enter court clerk]

*Court Clerk:* Judge Tauro, the reply brief of the United States in support of its motion to dismiss the *Gill* case has just been filed. It repeats the explosive line announcing the Obama “Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal”<sup>223</sup> that the Department included in a reply brief last month out in the California case. But I thought you would find of particular interest the government’s explicit repudiation of the rationales that Congress advanced when it passed DOMA back in 1996. This brief sure looks as though it was vetted by the top brass at the Department of Justice. You remember Elena Kagan, former dean here at Harvard? She’s now the Solicitor General, and this sure reads like she helped craft it. But wasn’t she counsel in the White House back in 1996 when President Clinton signed DOMA into law? Seems to me like a pretty dramatic shift in position is underway down in Washington. Anyway, happy reading.

[Fade out lights as clerk departs, leaving Judge Tauro reading the Department of Justice’s brief in support of its motion to dismiss]

Less than a year later, on July 8, 2010—shortly after the Senate Judiciary Committee had concluded its hearings on the nomination of Elena Kagan to the position of Associate Justice—the district court in Massachusetts rejected the Department of Justice’s feeble defense of DOMA and ruled that section 3 of DOMA violated the Equal Protection component of the Fifth Amendment’s Due Process Clause.<sup>224</sup> Then, on August 24, 2009, almost exactly a year after the Department of Justice filed its reply brief in the *Smelt* case disavowing DOMA and a short two weeks after Elena Kagan was sworn in as Associate Justice of the Supreme Court, the federal district court in

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223. *Id.*

224. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010). In a companion case brought by the Commonwealth of Massachusetts, the District Court also ruled that section 3 of DOMA exceeded Congress’s powers under the Spending Clause and violated the Tenth Amendment. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 249, 253 (D. Mass. 2010). On appeal, the Department of Justice filed a brief defending DOMA, but then filed a revised brief “altering its position,” “arguing that the equal protection claim should be assessed under a ‘heightened scrutiny’ standard and that DOMA failed under that standard.” This revised brief was filed after the Attorney General announced in a parallel case out of New York that the Obama administration would no longer defend DOMA. *See infra* Act III.

California dismissed the *Smelt* case for lack of jurisdiction as the Department of Justice had requested.<sup>225</sup>

But the stage was set for Act III.

ACT III. *WINDSOR V. UNITED STATES*

*Scene 1. The White House, East Room, 1600 Pennsylvania Ave., Washington, D.C., August 6, 2010*

Elena Kagan was confirmed as Associate Justice of the Supreme Court on August 5, 2010. The next day, President Barack Obama “marked her ascension with a jubilant televised celebration in the East Room of the White House.”<sup>226</sup>

*Scene 2. Daniel Patrick Moynihan Federal District Courthouse, Foley Square, 500 Pearl Street, New York, NY.*

On November 9, 2010, Edith Windsor filed a lawsuit against the United States, alleging that section 3 of the Defense of Marriage Act denied her a spousal exemption from the federal estate tax solely because her deceased spouse, Thea Spyer, was another woman.<sup>227</sup> According to the allegations in the complaint, because of DOMA, the federal government did not recognize the marriage of Windsor and Spyer that had been performed in Canada in May, 2007.<sup>228</sup> The case was assigned to Judge Barbara S. Jones, who had been appointed as a federal district court judge by President Clinton in 1995,<sup>229</sup> the year before the Defense of Marriage Act was overwhelmingly passed by Congress and signed into law by President Clinton.

On December 3, 2010, after a pre-trial conference, Magistrate Judge James Francis issued an order setting February 9, 2011, as the deadline for the United States, defendant in the case, to file its motion to dismiss.<sup>230</sup> That deadline was subsequently extended to March 11, 2011, pursuant to a revised scheduling order entered by Magistrate Judge Francis on January 28, 2011, apparently the result of a plea for an extension that Assistant Attorney

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225. Order Granting Defendant’s Motion to Dismiss, *Smelt v. United States*, No. 09-00286 (C.D. Cal. Aug. 24, 2009).

226. Peter Baker, *Kagan Is Sworn in as the Fourth Woman, and 112th Justice, on the Supreme Court*, NY TIMES (Aug. 7, 2010), [http://www.nytimes.com/2010/08/08/us/08kagan.html?\\_r=0](http://www.nytimes.com/2010/08/08/us/08kagan.html?_r=0).

227. *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011).

228. *Id.*

229. See Biography of Barbara S. Jones, ZUCKERMAN, SPAEDER, LLP, [http://www.zuckerman.com/barbara\\_jones](http://www.zuckerman.com/barbara_jones) (last visited Mar. 26, 2015).

230. *Windsor v. United States*, 797 F. Supp. 2d 230 (S.D.N.Y. 2011).

General Tony West had made in a telephone call to Roberta Kaplan, Edie Windsor's attorney, at the explicit behest of Attorney General Eric Holder.<sup>231</sup>

*Scene 3. Press Briefing Room, U.S. Department of Justice, 950 Pennsylvania Ave., NW, Washington, D.C.*

On February 23, 2011, Attorney General Eric Holder announced that the Obama Administration would no longer defend the Defense of Marriage Act. In his statement, he noted that the Administration had defended DOMA in jurisdictions "in which binding circuit court precedents hold that laws singling out people based on sexual orientation, as DOMA does, are constitutional if there is a rational basis for their enactment."<sup>232</sup> But he added that there were now two cases pending in the Second Circuit,<sup>233</sup> "which has no established or binding standard for how laws concerning sexual orientation should be treated."<sup>234</sup> As a result, he and the President had determined that "classifications based on sexual orientation should be subject to a more heightened standard of scrutiny," and that section 3 of DOMA "fails to meet that standard and is therefore unconstitutional."<sup>235</sup> "Given that conclusion," Holder stated that "the President has instructed the Department not to defend the statute in such cases," a determination with which Holder "fully concur[red]."<sup>236</sup>

General Holder also announced that he had "informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option," and that he would "instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that [s]ection 3 is

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231. BECKER, *supra* note 198, at 257 (recounting Kaplan's initial refusal to agree to an extension until West called her directly and begged for the extension, "The attorney general of the United States is asking you for time.").

232. Press Release, U.S. Dep't. of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

233. *Pederson v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) was filed on the same day as *Windsor*, on behalf of six same-sex couples and one same-sex widower who alleged that they were denied a variety of federal benefits available to heterosexual couples because of DOMA.

234. U.S. Dep't. of Justice, *supra* note 232.

235. *Id.*; see also BECKER, *supra* note 198, at 248 (recounting that the President and Attorney General independently decided that the "heightened scrutiny" standard should be adopted in the government's responses in pending cases and shared their views when they bumped into each other in the hallway outside the State Dining Room in the White House on Super Bowl Sunday, February 6, 2011, when the Obamas had set up big-screen televisions for a small, informal Super Bowl party).

236. U.S. Dep't. of Justice, *supra* note 232.

unconstitutional under that standard and that the Department will cease defense of [s]ection 3.”<sup>237</sup>

*Scene 4. Daniel Patrick Moynihan Federal District Courthouse, Foley Square, 500 Pearl Street, New York, NY.*

Two days after the Attorney General’s announcement that the Department of Justice would no longer defend the Defense of Marriage Act, Jean Lin, senior counsel at the Federal Programs Branch of the Civil Division at the U.S. Department of Justice filed a “Notice to the Court” advising “the [c]ourt and the parties that the Department of Justice will cease defending the constitutionality of section 3 of the Defense of Marriage Act, 1 U.S.C. § 7.”<sup>238</sup> Attached to the notice were two letters explaining the basis for the decision, one from Assistant Attorney General Tony West to the court, and the other from Attorney General Eric Holder to John Boehner, Speaker of the House of Representatives.

It is exceedingly rare for the government to decline to defend a statute, in part because of the President’s constitutional obligation to “take care that the laws be faithfully executed.”<sup>239</sup> To be sure, the Constitution also imposes on the President, by oath, the duty to “preserve, protect and defend the

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237. *Id.*; see also *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012) (“The Justice Department filed a brief in this court defending DOMA against all constitutional claims. Thereafter, altering its position, the Justice Department filed a revised brief arguing that the equal protection claim should be assessed under a ‘heightened scrutiny’ standard and that DOMA failed under that standard.”).

The Department of Justice filed pleadings in several other cases urging the respective courts to apply a higher level of scrutiny than governing precedent required and that section 3 of DOMA was unconstitutional under that standard. See, e.g., *Superseding Brief for the U.S. Dep’t of Health & Human Servs., Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, & 10-2214); *Memorandum in Opposition to [House]’s Motion to Dismiss Plaintiffs’ Complaint, Revelis v. Napolitano*, 844 F. Supp. 2d 915 (N.D. Ill. 2012) (No. 1:11-cv-01991); *Federal Defense’s Brief in Partial Support of Plaintiffs’ Motion for Summary Judgment, Gragovich v. U.S. Dep’t of Treasury*, 848 F. Supp. 2d 1091 (N.D. Cal. 2012) (No. 4:10-cv-01564); *Brief of [Dep’t of Justice] Regarding the Constitutionality of Section 3 of DOMA, Cozen O’Connor, P.C. v. Tobits*, (E.D. Pa. 2013) (Civil Action No. 11-0045), 2013 WL 3878688; *Response of Defendants [DOJ] to [House]’s Cross-Motion for Summary Judgment, Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (No. 4:04-cv-00848); *Defendants’ Memorandum of Law in Response to Plaintiffs’ Motion for Summary Judgment and [House]’s Motion to Dismiss, Pederson v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) (No. 3:10-cv-01750); *Defendants’ Opposition to [House]’s Motion to Dismiss, Lui v. Holder*, (C.D. Cal. 2011) (No. 2:11-cv-01267), 2011 WL 10653943; *Defendants’ Brief in Opposition to Motion to Dismiss at 3-23, Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. 3:10-cv-00257).

238. *Notice to the Court by the Defendant United States of America, Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435).

239. U.S. CONST. art. II, § 1, cl. 8.

Constitution of the United States,”<sup>240</sup> but the almost universal practice of the Department of Justice to reconcile these at-times conflicting duties has been to defend the laws despite any constitutional concerns by the Executive. The only exceptions recognized by the Department have been extremely narrow: laws that intrude on the executive powers of the President, and laws that are “clearly unconstitutional” under existing Supreme Court precedent.<sup>241</sup> Neither of those exemptions applied in the *Windsor* case.

The near-universal practice of the Department of Justice to defend all laws in cases that did not fit within either of those two narrow exemptions developed after a controversy during the late 1970s, in which the Carter Administration had argued that it could decline to present in court any defense of an arguably constitutional federal statute that the Department had determined for itself (independently of Congress and the Judiciary) to be unconstitutional.<sup>242</sup> After the Department notified Congress of its decision not to defend a federal statute that prohibited public broadcast licensees from using their broadcast license to endorse or oppose candidates for public office, the Office of Senate Legal Counsel “warned the Senate that if the statute were struck without a defense, the precedent would be established that the executive branch could nullify laws with which it disagrees by a default in court.”<sup>243</sup> The district court dismissed the action for lack of an adversarial party (the Senate had intervened as an *amicus curiae* rather than a party), but while the appeal was pending, the Department, under a new Attorney General at the outset of the Reagan Administration, advised the court of appeals that it would renew its defense of the statute.<sup>244</sup>

The concerns that arose out of that controversy led eventually to the adoption of 28 U.S.C. § 530D, which requires the Attorney General to notify Congress any time he determines to refrain from defending any act of Congress on the ground that he believes the act is unconstitutional.<sup>245</sup> That law presumes that Congress would take up the defense when the Executive

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240. *Id.*

241. See Press Release, Attorney General William French Smith (May 6, 1982) (“[T]he Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional.”) (cited in *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 975 n.7 (1983)).

242. *League of Women Voters of Cal. v. Fed. Commc’n. Comm’n.*, 489 F. Supp. 517, 518 (C.D. Cal. 1980).

243. See Notification to Joint Leadership Group from Senate Legal Counsel in Respect to *League of Women Voters v. F.C.C.*, reprinted in 125 CONG. REC. 35,416 (1979) (cited in *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 975 n.19 (1983)).

244. The statute was held unconstitutional. See *League of Women Voters of Cal. v. Fed. Commc’n. Comm’n.*, 547 F. Supp. 379, 381 (C.D. Cal 1982), *aff’d sub nom.* *Fed. Commc’n. Comm’n. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

245. 28 U.S.C. § 530 (D) (2002).



refused to do so. Moreover, the contrary view would effectively give to the President a post-enactment veto power that the Supreme Court has expressly held to be unconstitutional.<sup>246</sup> And it would sanction a “suspension” power that the Take Care Clause was specifically designed to prevent.

One of the charges leveled against King George III in the Declaration of Independence was that he suspended laws adopted by the colonies until his assent to them should be obtained and then, once suspended, utterly neglected to attend to them.<sup>247</sup> The concern was that the King was reasserting a power that had provoked serious tension between Parliament and the Stuart Kings during the 17th Century, where laws properly enacted through the political process were “dispense[d] with,” or suspended, at the whim of the monarch.<sup>248</sup> Early state constitutions also refused to countenance the view that the executive had the power to suspend laws.<sup>249</sup>

The ratification debates reveal that the Take Care Clause was adopted to prevent the President in the new constitutional system from being able to exercise such a power to suspend duly-enacted laws with which he disagreed.<sup>250</sup> But as the senate legal counsel recognized in response to the Department’s actions in *League of Women Voters*, the ability to suspend or

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246. *Clinton v. New York City*, 524 U.S. 417 (1998).

247. THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776).

248. See SYDNEY GEORGE FISHER, *THE STRUGGLE FOR AMERICAN INDEPENDENCE* 131 (2011) (“[T]he colonists, as good Whigs and lovers of liberty, would surely not uphold the wicked dispensing power of the Stuart Kings against whom their . . . ancestors had fought.”).

249. See VIRGINIA DECLARATION OF RIGHTS § 7 (1776) (“That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not be exercised.”); DELAWARE DECLARATION OF RIGHTS § 7 (1776) (“That no power of suspending [L]aw[] . . . ought [to] be exercised unless by the legislature.”) (alteration in original); VT. CONST. of 1786, ch. I, § 12 (“The power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature, or by any authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for.”).

250. See Letter from Americanus I to Virginia Independent Chronicle (Dec. 5, 1787), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA NO. 1, at 203–04 (John P. Kaminski et al. eds., 2009) (arguing that under the Constitution, the President had no power to affect laws without participation of Congress); VIRGINIA RATIFICATION DEBATES (1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA NO. 3, at 1552 (John P. Kaminski et al. eds., 2009) (proposing an explicit amendment to prohibit a “power of suspending laws”); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1304–05 (1996) (reviewing scholarship demonstrating that Take Care Clause was a “[T]extual rejection by the framers of the various royal devices for avoiding executive implementation of the laws.”); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (holding that there is no “dispensing power” in the President); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (“The [P]resident of the United States cannot control the statute, nor dispense with its execution.”). Cf. AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE REPORT, 18 (2006) (“[B]ecause the ‘take care’ obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign them into law and then emulate King James II by refusing to enforce them.”).

even “nullify” a law can be as effectively accomplished indirectly by non-defense and default in response to a constitutional challenge as it can be directly by refusal to enforce the law in the first place.<sup>251</sup>

The Department’s claim that the President can decline to defend any statute that he believes to be unconstitutional, even when perfectly reasonable arguments in support of its constitutionality exist, creates a serious risk that the judicial system might be manipulated to give the President a de facto post-enactment veto or suspension power. That risk manifested itself in the *Windsor* case, for the Department did more than simply decline to defend the Defense of Marriage Act; it actively joined in plaintiff’s attack on the constitutionality of DOMA and even sought to undermine the defense that was being provided by the U.S. House of Representatives by defaulting on the rationales Congress had for its overwhelming approval of the law, then using those defaults to attack the law.

The legislative history of the Act contains several rationales that Congress asserted were both important and furthered by the Defense of Marriage Act, including the development of relationships that are optimal for procreation and encouraging the creation of stable relationships that facilitate the rearing of children by both of their biological parents.<sup>252</sup> In several prior court decisions, those rationales were held to be more than sufficient to uphold the law’s constitutionality.<sup>253</sup> Yet in the *Gill* case and elsewhere, the Department “disavowed” all of the rationales that had been identified by

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251. Brief for Center for Constitutional Jurisprudence in Support of Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae Supporting Petitioner (Jurisdictional Issues) at 7, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

252. H.R. REP. NO. 104-664, at 13 (1996), reprinted in U.S.C.C.A.N. 2905 (1996).

253. See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff’d in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir 2006); *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004); *Order, Hunt v. Ake*, (M.D. Fla. Jan. 20, 2005) (No. 8:04-cv-01852) (constitutional challenges to DOMA section 3 dismissed for failure to state claim); *Order, Sullivan v. Bush*, (S.D. Fla. Mar. 16, 2005) (No. 1:04-cv-21118) (granting plaintiff’s motion for voluntary dismissal after defendants moved to dismiss). The Obama Administration initially relied on the same rationales that had proven successful in the prior litigations. See Corrected Brief for the U.S. Department of Health and Human Services, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, & 10-2214); *Federal Defendants’ Motion to Dismiss, Dragovich v. U.S. Dep’t of the Treasury*, 848 F. Supp. 2d 1091 (N.D. Cal. 2012) (No. 4:10-cv-01564); *Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint, Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 698 (N.D. Cal. 2012) (No. 3:10-cv-00257); *Defendants’ Motion to Dismiss, Torres-Barragan v. Holder*, (C.D. Cal. Apr. 30, 2010) (No. 2:09-cv-08564), 2010 WL 9485872; *In Chambers Order, Torres-Barragan v. Holder*, (C.D. Cal. Apr. 30, 2010) (No. 2:09-cv-08564), 2010 WL 9485872 (holding DOMA constitutional); *Brief in Support of Motion to Dismiss, Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (No. 4:04-cv-00848).

Congress and successfully relied on to defend DOMA, choosing instead to rely on the hypothesized interest in maintaining the status quo.<sup>254</sup>

Then, in *Windsor*, the Department mischaracterized the rationales actually advanced by Congress, contending instead that “the legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians.”<sup>255</sup> Indeed, the Department made concession after concession in the district court that no lawyer, complying with the ethical obligation to zealously advocate for his client,<sup>256</sup> would have made. It contended that opposite-sex and same-sex couples are “similarly situated,” for example, a threshold inquiry under equal protection analysis that was clearly untrue.<sup>257</sup> It unnecessarily equated the view that homosexual conduct is immoral with animus toward gays and lesbians; it accused Congress of having the “bare desire to harm a politically unpopular group”<sup>258</sup>; and it contended that “Congress’s interest in ‘promoting responsible procreation and childrearing’”<sup>259</sup> is “not materially advanced by” section 3 of DOMA.<sup>260</sup> The Department even urged the court to apply heightened scrutiny after acknowledging that numerous other courts, including the Supreme Court, had applied rational basis review to sexual orientation classifications.<sup>261</sup> And then, having “disavowed” or mischaracterized the rationales actually relied upon by Congress, the Department argued that section 3 must be held unconstitutional because, under heightened scrutiny, “a statute must be defended by reference to the

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254. Consolidated Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss and in Opposition to Plaintiff’s Motion for Summary Judgment, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *see also* *Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) (“Federal Defendants disavow the governmental interests identified by Congress in passing the DOMA, and instead assert a post-hoc argument that the DOMA advances a legitimate governmental interest in preserving the status quo.”).

255. U.S. Brief in Support of Plaintiff’s Motion for Summary Judgment at 22, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

256. *See, e.g.*, N.Y. LAWYERS CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 EC 7-1 (“The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law.”); *see also* 28 U.S.C. § 530B(a) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”).

257. *See, e.g.*, U.S. Brief in Support of Plaintiff’s Motion for Summary Judgment, *supra* note 255, at 4.

258. *Id.* at 22, 24–25.

259. *Id.*

260. *Id.*

261. *Id.* at 5 n.1.

‘actual [governmental] purpose behind it, not a different ‘rationalization’” (such as the one the Department itself had offered in the *Gill* case).<sup>262</sup>

The Department’s conduct in the district court was thus a far cry from long-standing policy that the Department “has a duty to defend the constitutionality of an Act of Congress whenever a *reasonable argument* can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts.”<sup>263</sup> It did not come close to “zealous advocacy” for the client—that is, the United States itself, the policies of which are reflected in the laws, not the personal views of the President or the Attorney General—that the standards of ethical conduct require. It instead amounted to a manipulation of the judiciary in order to have a duly-enacted act of Congress declared unconstitutional—much more than just the declining to defend to which it had alerted the court back in February, but an overt about-face, joining forces with the *plaintiff* to attack the constitutionality of the statute it was its duty to defend, “switching sides to advocate that the statute be ruled unconstitutional,” as the court of appeals would later put it.<sup>264</sup>

Worse, the Department’s conduct was designed not just to lose the particular case, but to obtain a decision from a higher court that would operate as binding authority throughout the nation. That led it to take some truly bizarre actions in the district court. For example, in order to preserve the district court’s jurisdiction to issue a substantive ruling, rather than merely a default judgment, the Department filed a motion to dismiss to provide a merely technical adversarialness that was necessary for the court’s jurisdiction in light of the Department’s position (rejected by the district court<sup>265</sup>) that Congress itself did not have legal standing to intervene on behalf of the United States, but then filed a brief *opposing its own motion to dismiss* and supporting plaintiff’s motion for summary

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262. *Id.* at 22 (alteration in original).

263. The Att’y Gen.’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981); *see also* The Att’y Gen.’s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) [hereinafter Duty to Defend & Enforce] (noting that even when the Attorney General believes a statute to be unconstitutional, “he can best discharge the responsibilities of his office by defending and enforcing” it).

264. *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012).

265. Memorandum and Order Granting Intervention, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335-cv-(L), 12-2435(Con)).

judgment.<sup>266</sup> In doing so, it even accused the Congress that enacted DOMA of doing so out of “animus.”<sup>267</sup>

“Cheating” does not begin to describe the Department’s conduct before the district court. Not surprisingly, though, particularly in light of its outcome determinative concessions and advocacy in favor of *the plaintiff*, the district court ruled on June 6, 2012 *without benefit of oral argument*, that section 3 of DOMA was unconstitutional.

*Scene 5. U.S. Court of Appeals for the Second Circuit, Thurgood Marshall United States Courthouse, 40 Centre Street (40 Foley Square), New York, NY*

True to form and its interest in securing a binding precedent from a higher court, the Department of Justice then proceeded a week later to *appeal* from the judgment against DOMA that it had just *won* from the district court,<sup>268</sup> and then to argue *against* its own appeal.

The appeal proceeded in an expedited fashion on the motion of the plaintiff that was granted without opposition from the United States, but over the opposition of the Bipartisan Legal Advisory Group of the U.S. House of Representatives (“BLAG”), which alone had been defending DOMA in the trial court. Opening briefs were due in a little over a month in early August, and oral argument was scheduled for the month after that—lightning speed for a case in the court of appeals.

But not satisfied with even that expedited consideration, the plaintiff and the U.S. Department of Justice both filed petitions for certiorari before judgment. Windsor’s petition was filed on July 16, 2012,<sup>269</sup> (supported by a brief filed by the Department of Justice on August 31, 2012, urging the Court to take the case (if it did not take one of the other cases addressing the constitutionality of section 3 of DOMA already pending before it)) arguing,

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266. Defendant United States’ Memorandum of Law in Response to Plaintiff’s Motion for Summary Judgment and Intervenor’s Motion to Dismiss, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435 (BSJ)(JCF)).

267. *Id.* at 22–23.

268. Brief for Defendant-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2435, 12-2335). The normal rule is that a “party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980); *see also Forney v. Apfel*, 524 U.S. 266, 271 (1998); *Parr v. United States*, 351 U.S. 513, 516 (1956) (Petitioner’s appeal “will not lie because petitioner has not been aggrieved. Only one injured by the judgment sought to be reviewed can appeal.”); *Pub. Serv. Comm’n of Mo. v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (“[T]he successful party below has no standing to appeal.”).

269. Petition for Writ of Certiorari Before Judgment, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 12-63).

as it had in its own petition before judgment in a case from the Ninth Circuit, that “the question of [s]ection 3’s constitutionality is a matter of ‘such imperative public importance as to justify the deviation from normal appellate practice and to require immediate determination in this Court’” before judgment by the court of appeal.<sup>270</sup> And even though the district court had applied a rational basis standard of review, the Department continued to press for heightened scrutiny by using the language of intermediate review rather than rational basis review in its brief supporting Windsor’s petition for certiorari: “Section 3 of DOMA denies to same-sex couples legally married under state law significant federal benefits that are otherwise available to persons lawfully married under state law,”<sup>271</sup> the DOJ argued. “Because such differential treatment bears no *substantial relationship* to any *important governmental objective*, [s]ection 3 violates the guarantee of equal protection secured by the Fifth Amendment.”<sup>272</sup>

The Department then filed its own petition for writ of certiorari before judgment on September 11, 2012,<sup>273</sup> and filed a supplemental brief the day after the Second Circuit’s ruling, urging the Court to grant its petition for certiorari in the *Windsor* case rather than its earlier petition in the parallel case in Massachusetts. Although the Department’s lawyers explained that the reason for its changed position was that the Second Circuit’s decision was “not constrained by prior precedent” requiring the application of mere rational basis review (as was the First Circuit in the Massachusetts case)—and they desperately wanted the Supreme Court itself to adopt heightened scrutiny—it undoubtedly had not escaped their attention that Justice Kagan would have to recuse herself from the Massachusetts case.<sup>274</sup>

Oral argument was held in the court of appeals on September 27, 2012 before Chief Judge Jacobs and Judges Straub and Droney, and the case was decided just three weeks later on October 18, 2012. Again, lightning speed, apparently in an attempt to leapfrog the Massachusetts case from which Justice Kagan would be recused and provide the Supreme Court with an alternate vehicle with which to consider the constitutionality of DOMA.

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270. Brief for the United States at 13, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (Nos. 12-2335, 12-2435) (citing SUP. CT. R. 11 and *Golinski* Pet. 13–16).

271. Brief for the United States at 13, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (Nos. 12-2335, 12-2435).

272. *Id.* at 9 (emphasis added).

273. Petition for a Writ of Certiorari Before Judgment, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-307).

274. See, e.g., Lyle Denniston, *Kagan, DOMA, and Recusal*, SCOTUSBLOG (Nov. 2, 2012, 4:59 PM), <http://www.scotusblog.com/2012/11/kagan-doma-and-recusal/>.

As it had done in the district court below, the Department of Justice did not just *decline to defend* section 3 of DOMA, it affirmatively attacked its constitutionality. And even though the district court had applied rational basis review in its decision, the Department continued to advocate for the application of heightened scrutiny, devoting more than twenty-five pages of its forty-five-page brief to that part of the argument.<sup>275</sup> “[D]iscrimination based on sexual orientation merits heightened scrutiny,” it contended (even while acknowledging that other courts had held that only rational basis review applies and that the Supreme Court itself had never applied heightened scrutiny to sexual orientation classifications), and “[u]nder that standard of review, [s]ection 3 of DOMA is unconstitutional.”<sup>276</sup> And most significantly, the Department continued to advance the “disavowal” strategy that appears to have been launched the summer before in the *Smelt* and *Gill* cases. “[U]nder any form of heightened scrutiny,” it argued, “a statute must be defended by reference to the ‘actual [governmental] purposes’ behind it, not different ‘rationalizations.’”<sup>277</sup>

The Department also repeated a number of key, outcome-determinative concessions, such as the claim that same-sex couples are “similarly situated” to “opposite-sex couples”; that the “legislative history demonstrates that the statute was motivated in significant part by disapproval of gay and lesbian people and their intimate and family relationships;” that another of Congress’s rationales, “defending and nurturing the institution of traditional, heterosexual marriage,” “does not support [s]ection 3” of DOMA; and that Congress’s asserted interest in “encouraging responsible procreation and child-rearing” was “not materially advanced by [s]ection 3 of DOMA.”<sup>278</sup>

With advocacy like that from the United States Department of Justice, which was supposed to be *defending* the law, it is little wonder that the court of appeals not only affirmed the district court’s judgment, but adopted the Department’s extensive request to apply heightened scrutiny.

### Scene 6. *Supreme Court of the United States*

The final scene in the *Windsor* Act of the play is back at the Supreme Court. As it had in the court of appeals below, the Department of Justice sought review of a ruling that had just gone *in favor of the position for which it was advocating*. It challenged the legal standing of the Bipartisan

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275. Brief for the United States at 11–36, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435).

276. *Id.* at 9, 10, 13; *see also id.* at 11–36.

277. *Id.* at 37 (alteration in original) (citing *United States v. Virginia*, 518 U.S. 515, 535–36 (1996)).

278. *Id.* at 9, 11, 39, and 41.

Legal Advisory Group of the U.S. House of Representatives to defend the statute on behalf of the United States, claiming that “no counsel will be heard” to present the position of the United States contrary to the Attorney General. It argued that BLAG’s members were only individual legislators who had no Article III standing, rather than (as the House resolution confirmed) a body acting on behalf of the House as an institution.<sup>279</sup> It again pressed hard for the Court to adopt heightened scrutiny, and it made a slew of unnecessary concessions that undermined the defense of DOMA that BLAG was trying to provide.<sup>280</sup>

In his opinion for the Court, Justice Kennedy picked up many of the themes advanced by the Department of Justice, including several aspects of the false narrative that had been spun. Justice Kennedy contended, for example, that the “State of New York deems [the 2007] Ontario [Canada] marriage [between Windsor and Spyer] to be a valid one,” without addressing the fact that at the time, New York’s highest court had *upheld* New York’s one-man/one-woman marriage law.<sup>281</sup> He claimed that “[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood,”<sup>282</sup> and to “confer[] upon [gays and lesbians] a dignity and status of immense import,”<sup>283</sup> but he did not address the fact that this “enlarge[ment]”<sup>284</sup> of the definition of marriage did not occur until 2011—two years after Thea Spyer had passed away, the event that gave rise to the claim in the case—or that the 2011 New York law was more of a jam-down by the legislature against the express will of the people of New York, the result of several legislators who had campaigned to preserve the man-woman definition of marriage switching their votes after the election, not of a deliberative process by the citizenry.

At the outset of the opinion, Justice Kennedy also characterized the Department’s “own conclusion” that heightened scrutiny should apply as one that “rel[ie]d on a definition still being debated and considered in the

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279. See Brief for the United States, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-63) 2012 WL 3838138.

280. *Id.*

281. *Windsor*, 133 S. Ct. at 2683 (alteration in original) (citing 699 F. 3d 169, 177–178 (2d Cir. 2012)); *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 2 (N.Y. Ct. of App. 2006) (holding that New York statutory law “clearly limit[ing] marriage to opposite-sex couples” was not invalid under the New York Constitution).

282. *Id.* at 2690 (emphasis added) (citing Marriage Equality Act, 2011 N.Y. Laws 749 (codified as N.Y. DOM. REL. LAW ANN. §§10-a, 10-b, 13 (West 2013))).

283. *Windsor*, 133 S. Ct. at 2681 (alteration in original).

284. *Id.* at 2689.



courts.”<sup>285</sup> This, despite the fact that at the time the Justice Department came to its “own conclusion” that heightened scrutiny should apply, every court of appeals in the country except one had reached the opposite conclusion, and that one—the Second Circuit—had not weighed in on the issue at all.<sup>286</sup> That hardly qualifies as a “definition still being debated and considered in the courts.”<sup>287</sup>

Justice Kennedy also accepted the Department’s arguments that it had standing to appeal from a decision below in which it had prevailed even while acknowledging “the prudential problems inherent in the Executive’s unusual position” in the case and the “difficulties [that] would ensue if [the Executive’s failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions] were a common practice in ordinary cases.”<sup>288</sup>

More significantly, though, Justice Kennedy also parroted the Department’s narrative that DOMA was passed only out of animus towards gays and lesbians. “DOMA seeks to injure the very class New York seeks to protect,”<sup>289</sup> he announced at the beginning of the substantive section of the opinion. He equated DOMA with laws that reflected “a bare . . . desire to harm a politically unpopular group,” and asserted that the “avowed purpose and practical effect 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.”<sup>290</sup> He reiterated later in the opinion “that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.”<sup>291</sup> And without any citation at all—to record evidence, brandeis briefs, or otherwise—he claimed that DOMA “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>292</sup> In sum, as Justice Scalia succinctly summarized in his dissenting opinion, the Court’s majority accused the overwhelming majority

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285. *Id.* at 2683–84.

286. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

287. *Windsor*, 133 S. Ct. at 2683.

288. *Id.* at 2687 (alteration in original).

289. *Id.* at 2693.

290. *Id.* at 2681. Even the claim that redefining marriage is within the “unquestioned authority of the States” is contestable. To the extent “marriage between a man and a woman” is “essential to the very definition of that term and to its role and function throughout the history of civilization,” as Justice Kennedy himself seemed to recognize at the outset of the opinion, because it is grounded in the biological complementarity of men and women found in human nature, then even the “unquestioned authority of the States” cannot redefine it. *Cf.* Abraham Lincoln Quotes, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/a/abrahamlin107482.html> (“If you call a tail a leg, how many legs does a dog have? Four. Calling the tail a leg does not make it so”) (last visited May 1, 2015).

291. *Windsor*, 133 S. Ct. at 2695.

292. *Id.* at 2694.

of both houses of Congress who passed DOMA in 1996 as having “acted with *malice*—with the ‘*purpose*’ ‘to disparage and to injure’ same-sex couples. It says that the motivation for DOMA was to ‘demean,’ to ‘impose inequality,’ to ‘impose . . . a stigma,’ to deny people ‘equal dignity,’ to brand gay people as ‘unworthy,’ and to ‘*humiliat[e]*’ their children.”<sup>293</sup> Worse, it “adjudge[ed] those who oppose [same-sex marriage] *hostes humani generis*, enemies of the human race.”<sup>294</sup>

Most troubling is that Justice Kennedy adopted this narrative of animus only after setting out near the beginning of the opinion a concise explanation of the importance of man-woman marriage: “It seems fair to conclude,” he noted, “that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. *For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.*”<sup>295</sup> It is an idea that has long been recognized in Supreme Court decisions, not to mention important treatises on law, philosophy, and political theory. In *Murphy v. Ramsey*, for example, the Supreme Court described marriage as “the union for life of one man and one woman,” “the sure foundation of all that is stable and noble in our civilization.”<sup>296</sup> Justice Black called it “a bedrock institution that has long been recognized as ‘one of the cornerstones of our civilized society.’”<sup>297</sup> Even in *Loving v. Virginia*, the case in which the Supreme Court struck down state laws banning interracial marriage, the Court described marriage as “one of the ‘basic civil rights of man’” because it was “fundamental to our very existence and survival”<sup>298</sup>—in other words, because of its tie to the unique procreative ability of men and women.

Nor has this foundational idea been unique to American law, or to the Congress that adopted DOMA in 1996. As evidence introduced into the trial record in the Proposition 8 case confirmed, “the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a

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293. *Id.* at 2708 (Scalia, J., dissenting) (internal citations omitted).

294. *Id.* at 2709 (alteration in original).

295. *Id.* at 2689 (emphasis added).

296. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

297. *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting).

298. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

practically universal phenomenon, present in every type of society.”<sup>299</sup> The great commentator of the English common law, William Blackstone, when speaking of the “great relations in private life,” described the relationship of “*husband and wife*” as “founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated,” and the relationship of “*parent and child*” as “consequential to that of marriage, being its principal end and design: [for] it is by virtue of this relation that infants are protected, maintained, and educated.”<sup>300</sup> And John Locke, the political philosopher of perhaps the greatest influence on the American founding, describes marriage as “a voluntary compact between man and woman,” the purpose of which “being not barely procreation, but the continuation of the species,” thus requiring that “this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.”<sup>301</sup>

As Justice Alito pointed out in his dissenting opinion, what was at stake was the very definition and purpose of marriage, whether it was to be an institution fundamentally tied to the unique biological complementarity and procreative ability of men and women from which society has historically derived immense benefit, or whether it was instead going to be converted into a genderless institution primarily centered on the relationships of adults.<sup>302</sup> The consequences of such a change were also the subject of evidence introduced at the Proposition 8 trial, by both plaintiffs and the intervening defendants. For example, one of plaintiffs’ exhibits was an evidence-based article from Yale Law Professor and prominent gay rights activist William Eskridge, in which he argued that “enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform [the institution] into something new.”<sup>303</sup> “Something new” was putting it mildly.

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299. CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 40–41 (Joachim Neugroschel & Phoebe Hoss trans., Univ. of Chicago Press 1985) (1983) (*Perry I*, Trial Ex. DIX 63); see also G. ROBINA QUALE, A HISTORY OF THE MARRIAGE SYSTEM 2 (1988) (“Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring can be found in all societies”) (*Perry I*, Trial Ex. DIX79); Claude Levi-Strauss, *Introduction* to 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere et al. eds., 1996) (describing marriage as “social institution with a biological foundation”).

300. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS 422 (alteration in original).

301. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78, 79 (1690).

302. *United States v. Windsor*, 133 U.S. 2675, 2711, 2718 (2013) (Alito, J., dissenting).

303. WILLIAM N. ESKRIDGE JR & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE 19 (2006) (alteration in original) (*Perry I*, Plaintiffs’ Tr. Ex. PX2342).

Other supporters of same-sex marriage have argued that it “is a breathtakingly subversive idea,”<sup>304</sup> that “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart,”<sup>305</sup> after which it would forever “stand for sexual choice, for cutting the link between sex and diapers,”<sup>306</sup> and that same-sex marriage is “the most recent development in the deinstitutionalization of marriage,” the “weakening of the social norms that define people’s behavior in . . . marriage.”<sup>307</sup>

Justice Kennedy’s opening statement that “marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization” embraced the wisdom of this insight, a wisdom that has manifested itself across time and geography, in every or nearly every culture in human history, but he never mentioned that core idea again, much less offered any rebuttal of it.<sup>308</sup> That failure may well prove to be the most profound tragedy of the entire saga.

#### EPILOGUE

In the wake of the decisions in *Windsor* and *Hollingsworth*, a number of lawsuits have been brought challenging the constitutionality of state laws defining marriage as between a man and a woman. Although Justice Kennedy’s opinion in *Windsor* focused heavily on the traditional and nearly-exclusive role that the states have played in our federal system for setting marriage policy—reasoning that should have required as much deference by the federal government to the policy choices of states that had retained a gendered, procreative definition of marriage as to the policy choices of states that had decided to pursue “a new perspective, a new insight,”<sup>309</sup> as Justice Kennedy called it—those suits largely ignored the federalism aspects of Justice Kennedy’s opinion, and focused instead on the “animus” and “harm” to the dignity of gays and lesbians language elsewhere in the opinion. For the most part, the lower courts have sided with the latter rather than the former parts of the Kennedy opinion in *Windsor*. Which side of Justice

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304. E.J. Graff, *Retying the Knott*, THE NATION at 12 (June 24, 1996) (*Perry I*, Intervenor-Defendants’ Tr. Ex. DIX1445).

305. Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION at 16–17 (July, 5, 2004).

306. Graff, *supra* note 304, at 12.

307. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848, 850 (2004) (*Perry I*, Intervenor-Defendants’ Tr. Ex. DIX49).

308. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

309. *Id.*

Kennedy's opinion will ultimately prevail is, of course, the hottest legal topic in the country, and addressing the relative merits of each side is beyond the scope of this article.

But there is another dark side to both *Windsor* and *Hollingsworth* that may have profound effects even beyond the substantive merits and potential risks of redefining marriage to encompass same-sex relationships. In several of the cases that have been litigated since *Windsor*, elected officials named as *defendants* who, for political reasons of their own, preferred to see the laws they were charged with defending invalidated, have followed the machinations of the elected officials in both *Windsor* and *Hollingsworth* that proved successful with barely a wrist-slap from the Court. Justice Kennedy's cautionary flag about the "difficulties [that] would ensue if" executive officials failure to defend the law were to become "a common practice in ordinary cases"<sup>310</sup> has proved more prophetic than cautionary. From one end of the country to the other, elected officials have chosen not to defend their state's marriage laws, even with binding Supreme Court precedent on the books,<sup>311</sup> and even with perfectly plausible federalism-based arguments derived from Justice Kennedy's majority opinion in *Windsor*.

Like Attorney General Jerry Brown in *Perry*, for example, the Attorney General Herring in Virginia decided to cross sides in the federal case challenging Virginia's marriage law, *Bostic v. Rainey*, and to affirmatively attack the position advanced by his own client, the people of the Commonwealth of Virginia.<sup>312</sup> In doing so, he argued: (1) for a more expansive definition of the fundamental right to marry than the Supreme Court has itself recognized; (2) for a higher level of equal protection scrutiny to the sexual orientation classification implicated by Virginia's law than the Fourth Circuit had expressly held applicable (taking his cue, no doubt, from the U.S. Department of Justice's position in the *Windsor* case); and (3) for the court to ignore the Supreme Court's governing precedent in *Baker v. Nelson* on the precise issues presented.<sup>313</sup> The Pennsylvania attorney general refused to defend Pennsylvania's marriage laws in *Whitewood v. Corbett*;<sup>314</sup> the Illinois attorney general refused to defend in *Darby v. Orr*;<sup>315</sup> the Kentucky attorney general withdrew his earlier defense and refused to appeal in *Bourke v. Beshear*;<sup>316</sup> the Nevada attorney general withdrew his defense in

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310. *Id.* (alteration in original).

311. *See Baker v. Nelson*, 409 U.S. 810 (1972).

312. *See Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

313. *Id.*

314. *See Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

315. *See Darby v. Orr*, No. 2012-CH-19718 (Ill. Cir. Ct. May 30, 2012).

316. *See Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014).

*Sevcik v. Sandoval* after prevailing in the district court,<sup>317</sup> the North Carolina attorney general quit defending in several cases, *Fisher-Borne v. Smith*,<sup>318</sup> and the Oregon attorney general refused to defend in *Geiger v. Kitzhaber*,<sup>319</sup> actively siding with the plaintiffs in the case. In some of these cases, such as those in Kentucky and Virginia, other elected officials stepped into the breach to defend the state's laws, but in others, such as Pennsylvania and Oregon, no one did (or was able to).

A motion by a county clerk in Pennsylvania to intervene post-judgment for purposes of taking an appeal was denied by the district court and the court of appeals, for example.<sup>320</sup> And a motion to intervene in the Oregon litigation by the National Organization of Marriage on behalf of its Oregon members, including a county clerk, wedding service providers, and voters, was actively opposed by the attorney general “defendant” in the case and denied by the district court.<sup>321</sup> Public records act requests subsequently revealed an unbelievable level of collusion between attorneys in the office of the attorney general, representing the *defendants*, and attorneys for the *plaintiffs*, collusion that began months before the suit was even filed and extended to assistance in the drafting of the complaint, recommendations for additional causes of action to include, collaboration on admissions the defendants could make in their answer to greatest benefit for the plaintiffs’ claims, and even coordination of the issues each would address at the hearing on summary judgment, at which all parties in the case were in full agreement.<sup>322</sup>

The Supreme Court in *Windsor* strongly warned that such conduct would put “the integrity of the political process . . . at risk”<sup>323</sup> should it become “a common practice in ordinary cases.”<sup>324</sup> The refusal-to-defend trend is unfortunately becoming a “common practice” and poses a serious threat to the rule of law itself. Indeed, the active participation in these cases in support of *plaintiffs* by elected officials nominally named as *defendants*, against the interests of their client, the people of the state, may well be a

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317. See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

318. See *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014).

319. See *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014).

320. Dan Packel, *Pa. Clerk Takes Gay Marriage Intervention Bid to 3rd Circ.*, LAW360 (June 18, 2014, 6:41 PM), <http://www.law360.com/articles/549389/pa-clerk-takes-gay-marriage-intervention-bid-to-3rd-circ>.

321. Emma Margolin, *Judge Deals Massive Blow to Oregon's Gay Marriage Ban* (May 14, 2014, 2:57 PM), <http://www.msnbc.com/msnbc/oregon-the-next-gay-marriage-ban-fall>.

322. See Declaration of Roger Harris in Support of Petition for Rehearing En Banc, Nat'l Org. for Marriage v. Geiger, No. 14-35427 (9th Cir. 2014) (No. 45).

323. *United States v. Windsor*, 133 U.S. 2675, 2689 (2013).

324. *Id.* at 2688.

violation of a basic rule of professional conduct against conflicts of interest and therefore sanctionable.<sup>325</sup> It also “jeopardize[s] the equilibrium established within our constitutional system” that is necessary for a proper adjudication of important constitutional issues.<sup>326</sup>

This threat to the very rule of law may well be a consequence of these cases every bit as tragic as the “breathhtakingly subversive idea” of treating same-sex relationships as “marriage” and the “deinstitutionalization” of that profoundly important societal institution that will predictably result. As Abraham Lincoln warned 177 years ago, in a speech before the Young Men’s Lyceum of Springfield, Illinois, when “the perpetrators of [lawless] acts go[] unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained.”<sup>327</sup> “[I]f the laws be continually despised and disregarded . . . the alienation of [the people’s] affections from the [g]overnment is the natural consequence; and to that, sooner or later, it must come.”<sup>328</sup>

The perpetrators of lawlessness about which Lincoln warned were simply mobs taking the law into their own hands.<sup>329</sup> What we are witnessing now, with the “cheating” described in the Three-Act Play above and this Epilogue, is lawlessness by those at the very highest echelons of political power, by elected officials whose sworn duty is to defend the laws, not undermine them. The alienation of the people from their government is therefore a much greater risk than it was in Lincoln’s day, for then the government merely sat by and watched the lawlessness unfold. The deeper tragedy, therefore, will be in the loss of the rule of law, and that will certainly come if we don’t learn in time the lessons of this play, “Cheating Marriage: A Tragedy in Three Acts.”

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325. See, e.g., VA RULES OF PROF’L CONDUCT R. 1.7 (2005).

326. Duty to Defend & Enforce, *supra* note 263, at 56.

327. Abraham Lincoln, The Perpetuation of Our Political Institutions, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), *available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm> (alteration in original).

328. *Id.* (alteration in original).

329. *Id.*