

ISSUE BRIEF

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The Supreme Court and the Future of Marriage

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In a 5–4 majority opinion written by Justice Anthony Kennedy, the Supreme Court in *U.S. v. Windsor* struck down section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage in federal law for federal policy as the union of one man and one woman. The Court held that the federal government has to accept state redefinitions of marriage for federal policies.

The majority concluded its opinion by stating: “This opinion and its holding are confined to those lawful marriages.” So while the federal government has been ordered to recognize all state-recognized marriages, the Court declared that “the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.” The states remain free—and should continue—to define marriage as the union of one man and one woman.

The Court got the case wrong.¹ While there is little of value in the majority opinion, the three dissenting opinions signal the path that marriage proponents should take from here.

Three Dissents

Alito. Justice Samuel Alito makes clear the *actual* constitutional status of marriage laws. Alito frames the debate as a contest between two visions of marriage—what he calls the “conjugal” and “consent-based” views. It is a contest in which the Constitution takes no sides.

Alito cites the book *What Is Marriage? Man and Woman: A Defense* as an example of the conjugal view of marriage: a “comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life.”² He cites Jonathan Rauch as a proponent of the consent-based idea that marriage is a commitment marked by emotional union.³

Alito explains that the Constitution is silent on which of these substantive visions of marriage is correct. The Court, he says, should defer to democratic debate.

Roberts. Chief Justice John Roberts emphasizes the limits of the majority’s opinion. He writes that “the logic of its opinion does not decide the distinct question whether the States, in the exercise of their ‘historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”⁴

Roberts notes that the “majority goes out of its way to make this explicit” at the end of its opinion. And he argues that “the disclaimer is a logical and necessary consequence” of the fact that “its judgment is based on federalism.”⁵

Roberts insists that the Court refused to manufacture a constitutional right to same-sex marriage. Citizens and their elected representatives remain free to discuss, debate, and vote about marriage policy in all 50 states. They still have the freedom to

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define marriage in civil law as the union of one man and one woman.

Americans need to champion this message. Liberals are saying that Kennedy's opinion reaches further than it does. Roberts has provided insight on how to accurately describe this ruling.

Scalia. Justice Antonin Scalia accurately characterizes the rhetoric of the Court's majority opinion:

To defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements.... To hurl such accusations so casually demeans this institution. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement.... All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.⁶

Scalia writes that he does not mean “to suggest disagreement with the Chief Justice's view” about the confines of Kennedy's opinion. But Scalia tells Americans to be clear-eyed: “I promise you this: The only thing that will ‘confine’ the Court's holding is its sense of what it can get away with.”⁷

Three Things to Do to Strengthen Marriage in Policy and Practice

The Court will be less likely to rule in a way that usurps the authority of citizens if it is clear that citizens are engaged in this democratic debate and care about the future of marriage.

1. Live Out the Truth. Long before there was a debate about same-sex anything, far too many heterosexuals bought into a liberal ideology about sexuality that makes a mess of marriage: Cohabitation, no-fault divorce, extra-marital sex, non-marital childbearing, massive consumption of pornography and the hook-up culture all contributed to the breakdown of the marriage culture.⁸ At one point in American life, virtually every child was given the great gift of being raised to adulthood by the man and the woman who gave them life. Today, that number is under 50 percent in many communities.

Same-sex marriage did not cause this, but it does nothing to help it and will only make things worse. After all, redefining marriage to make it simply about emotional companionship sends the signal that mothers and fathers are interchangeable.⁹ Redefining marriage directly undercuts the rational foundations for the norms of marriage: permanence, exclusivity, and monogamy.¹⁰

Defenders of marriage need to live out the truth about marriage. Husbands and wives need to take seriously their vows to be faithful to one another. Mothers and fathers should take their obligations to their children seriously. The unmarried should prepare now for their future marital lives so they can live out the vows they will make.

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1. Sherif Girgis, Ryan T. Anderson, and Robert P. George, “The Supreme Court, You and Me, and the Future of Marriage,” *Public Discourse*, June 27, 2013, <http://www.thepublicdiscourse.com/2013/06/10455/> (accessed August 7, 2013).
 2. *United States v. Windsor*, No. 12-307, 570 U.S. 13 (and 8) (2013) (Alito, S., dissenting); Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012).
 3. *United States v. Windsor*, No. 12-307, 570 U.S. 13 (and 8) (2013) (Alito, S., dissenting).
 4. *United States v. Windsor*, No. 12-307, 570 U.S. 2 (2013) (Roberts, J., dissenting).
 5. *Ibid.*
 6. *United States v. Windsor*, No. 12-307, 570 U.S. 21 (2013) (Scalia, A., dissenting).
 7. *Ibid.*
 8. See Girgis, Anderson, and George, *What Is Marriage?*
 9. See Ryan T. Anderson, “Marriage: What It Is, Why It Matters, and the Consequences of Redefining It,” Heritage Foundation *Backgrounder* No. 2775, March 11, 2013, <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it>.
 10. See Ryan T. Anderson, “The Consequences of Redefining Marriage: Eroding Marital Norms,” Heritage Foundation *Issue Brief* No. 3885, March 25, 2013, <http://www.heritage.org/research/reports/2013/03/redefining-marriage-eroding-marital-norms-and-other-impact>.

2. Protect Religious Liberty. When he “evolved” on marriage last year, President Obama insisted that the debate about marriage was a legitimate one, that there were reasonable people of good will on both sides. He explained that supporters of marriage “are not coming at it from a mean-spirited perspective. They’re coming at it because they care about families.” He added that “a bunch of ‘em are friends of mine...you know, people who I deeply respect.”¹¹

But government has not respected these Americans. For example, Christian adoption agencies have already been forced out of the work of serving children because of their beliefs about marriage. Pushing out these agencies does not help those orphans or society at large.

Americans should insist that government not discriminate against those who hold to the historical definition of marriage. Policy should prohibit the government—or anyone who receives taxpayers’ dollars—from discriminating in employment, licensing, accreditation, or contracting against those who believe that marriage is the union of a man and a woman.

3. Make the Public Argument. Americans need to redouble their efforts at explaining what marriage is, why marriage matters, and what the consequences are of redefining marriage.¹² Defenders of

marriage need to frame their messages, strengthen coalitions, devise strategies, and bear witness. They should develop and multiply artistic, pastoral, and reasoned defenses of the conjugal view as the truth about marriage, and to make ever plainer the policy reasons for enacting it.

The left wants to insist that the redefinition of marriage is “inevitable.”¹³ The only way to guarantee a political loss, however, is to sit idly by.

Take the Long View

Marriage matters for children, for civil society, and for limited government. Marriage is the institution that unites a man and a woman as husband and wife to be father and mother to any children that their union produces. Public policy recognizes marriage not because it cares about adult romance but because it cares about the rights of children.

In this struggle to preserve marriage, as in the pro-life cause, Americans need to take a long view. Such a view does not look to immediate wins or losses but decades-long paradigm shifts that reshape how Americans think about marriage.

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11. Robin Roberts, interview with President Barack Obama, ABC News, May 9, 2012, http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true#.UdCMN4zD_cs (accessed August 5, 2013).

12. Anderson, “Marriage: What It Is, Why It Matters, and the Consequences of Redefining It.”

13. Ryan T. Anderson, “On Marriage, Inevitability Is a Choice We Can Reject,” The Heritage Foundation, *The Foundry*, June 6, 2013, <http://blog.heritage.org/2013/06/06/on-marriage-inevitability-is-a-choice-we-can-reject/>.