

JUDGES & THE COURTS

FACT SHEET

***Hollingsworth v. Perry* and *United States v. Windsor*: The Supreme Court Should Presume Laws Discriminating on the Basis of Sexual Orientation Are Unconstitutional**

*This term, the Supreme Court will decide *United States v. Windsor* and *Hollingsworth v. Perry*.¹ *Windsor* challenges Section 3 of the Defense of Marriage Act ("DOMA"), which prohibits the federal government from recognizing marriages between same-sex couples, and *Hollingsworth* challenges the constitutionality of California's Proposition 8, a state constitutional amendment that revoked same-sex couples' right to marry in that state.*

The *Windsor* Case

Edie Windsor married Thea Spyer, her partner of 42 years, in 2007. The state of New York, where the couple lived, recognized their marriage, but because of DOMA, the federal government did not. As a result, when her wife died, Ms. Windsor was required to pay hundreds of thousands of dollars in federal estate taxes from which her inheritance would otherwise have been exempt. Ms. Windsor challenged this result in court, arguing that DOMA violates the Constitution's equal protection guarantee.

Ms. Windsor won her case in the district court, and the Second Circuit Court of Appeals affirmed, finding that gay persons have faced a lengthy history of discrimination unrelated to their ability to contribute to society, and, as a result, laws that categorize based on sexual orientation should be subject to "heightened scrutiny" under the Constitution. Laws subject to heightened scrutiny are presumed unconstitutional and will be struck down if they are not shown to be based on an exceedingly persuasive justification and substantially related to an important state interest. The Second Circuit found that Section 3 of DOMA did not survive this scrutiny because the law did not actually promote any of the purposes its defenders claimed it furthered. Specifically, the court found the DOMA provision was

not substantially related to creating uniformity in federal laws related to marriage, conserving federal resources, preserving a traditional definition of marriage, or promoting "responsible" child-rearing.²

The *Hollingsworth* Case

The plaintiffs in *Hollingsworth* are two same-sex couples residing in California. Each couple is in a long-term, committed relationship, and one couple is raising four children. Both couples sought marriage licenses and were denied on the basis of Proposition 8. They brought suit challenging Proposition 8 as discrimination that violates the Equal Protection Clause.

The district court ruled that Proposition 8 was unconstitutional, and the Ninth Circuit Court of Appeals affirmed, deciding that Proposition 8 failed "rational basis" review, meaning that it was not rationally related to any legitimate state interest. The Ninth Circuit concluded that Proposition 8 was based on animus toward same-sex couples and thus forwarded no legitimate state interest, because it singled same-sex couples out by depriving of them a right they previously held (marriage between same-sex couples had been lawful in California prior to the Proposition 8) and because the campaign for Proposition 8 portrayed same-sex couples as socially undesirable.³ The Ninth Circuit did not reach

the question of whether gay persons were a protected class under the equal protection clause and whether laws discriminating against them must be subject to heightened scrutiny.

Laws that discriminate on the basis of sexual orientation must be subject to heightened scrutiny under the Constitution’s equal protection guarantee, as are laws that discriminate on the basis of race or sex.

- A law that discriminates on the basis of sex is presumed unconstitutional. It will only pass constitutional muster if the government shows an “exceedingly persuasive justification” for the law, including demonstrating “at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives,” without “rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁴ This is called “heightened scrutiny.”
- One of many important reasons why heightened scrutiny should apply to sexual orientation discrimination is the close connection between laws that treat men and women differently based on gender stereotypes and laws that treat people of different sexual orientations differently on the basis of stereotyped assumptions about appropriate intimate relationships for men and women. In both contexts, the Constitution must provide strong protection against government efforts to perpetuate traditional, stereotyped gender roles.

In applying heightened scrutiny to laws that discriminate on the basis of sex, the Supreme Court has recognized the harm done by laws enforcing gender stereotypes.

- Over the past forty years, the Supreme Court repeatedly has emphasized that laws that classify based on gender stereotypes violate the federal Constitution’s equal protection principle. In particular, the government may not assume and enforce gender-specific rules based on stereotypes about roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents.⁵

- In adopting heightened scrutiny for laws discriminating on the basis of sex, the Supreme Court recognized these laws “employ[ed] gender as an inaccurate proxy for other, more germane bases of classification.”⁶ It determined that imprecise, overbroad gender stereotypes were “incapable of supporting . . . statutory schemes . . . premised upon their accuracy.”⁷
- Such laws violate the Constitution because they fail to recognize that many men and women either do not wish to or are unable to conform to gender stereotypes. When the law enforces “assumptions about the proper roles of men and women,” it closes opportunity, depriving individuals of their essential liberty to depart from gendered expectations.⁸

Historically, the law of marriage has reflected and enforced gender stereotypes.

- For most of modern history, laws related to marriage required and assumed separate roles for men and women, based on gender stereotypes of the husband as breadwinner and decision-maker, and the wife as economically dependent homemaker and mother.
- For centuries, under the doctrine of coverture, “the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended.”⁹ For example, coverture prohibited wives from independently contracting or disposing of their own assets without their husbands’ cooperation¹⁰ and allowed a husband to sexually abuse his wife.¹¹
- Federal and state laws continued to apply sex-specific rules relating to marriage well into the second half of the twentieth century. For example, state laws prohibited married women from administering the estates of those who died without wills, limited married women’s right to engage in independent business, and required the domiciles of married women to follow their husbands’ domiciles.¹² Across a variety of programs, federal law provided benefits to wives on the assumption that they were financially dependent on their husbands, but denied benefits to husbands altogether or unless they could prove financial dependence on their wives.¹³
- Courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that these roles do not properly reflect

individuals' actual "ability to perform or contribute to society" and thus violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."¹⁴

- As a result, the law of marriage no longer explicitly enforces separate roles for husband and wife. Under law, men and women entering into marriage today can decide for themselves the responsibilities each will shoulder as parents or wage earners or family decision-makers, regardless of whether these responsibilities conform to or depart from traditional arrangements.

Like sex discrimination, discrimination on the basis of sexual orientation often rests on gender stereotypes that should be subjected to close constitutional scrutiny.

- Like discrimination on the basis of sex, discrimination on the basis of sexual orientation often rests on stereotypes about supposedly "natural," "moral," or "traditional" behavior for women and men. Both sex discrimination and sexual orientation discrimination often take the form of punishing or burdening individuals who fail to conform to gender stereotypes. For this reason, federal courts have noted the difficulty of distinguishing "between sexual orientation discrimination and discrimination 'because of sex.'"¹⁵
- For example, in *Centola v. Potter*, a case about a male postal worker who was tormented by his colleagues for being effeminate and subjected to anti-gay slurs even though he never disclosed his sexual orientation at work, the court observed that "[s]ex

stereotyping"—"making assumptions about an individual because of that person's gender . . . that may or may not be true"—"is central" both to discrimination based on sex and to discrimination based on sexual orientation.¹⁶ It continued: "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms."¹⁷

- Laws prohibiting marriage between same-sex couples embody similar stereotyped gender norms: that a woman should be attracted to a man, and that a man should be attracted to a woman; that a woman's role is to form a household and a family with a man, and that a man's role is to form a household and a family with a woman; and that women should not enter intimate relationships with each other, and that men should not enter intimate relationships with each other.
- Laws specifying that women can be wives only to men and that men can be husbands only to women—and that marriage requires one of each—assume that men and women must fill separate and complementary roles within marriage. These laws are vestiges of a legal regime that imposed separate and unequal roles on men and women within marriage on the basis of gender stereotypes in violation of the Constitution.¹⁸

The Supreme Court has repeatedly struck down laws enforcing overbroad gender stereotypes because they arbitrarily limit individuals' most personal choices about their own lives. Section 3 of DOMA and Proposition 8 should be subjected to heightened scrutiny under the Constitution and struck down as well.

1 *Hollingsworth v. Perry*, 133 S.Ct. 786 (No. 12-144) (U.S. Dec. 7, 2012); *United States v. Windsor*, 133 S.Ct. 786 (No. 12-307) (U.S. Dec. 7, 2012).

2 *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), cert. granted No. 12-307.

3 *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth*, No. 12-144.

4 *United States v. Virginia* (VMI), 518 U.S. 515, 533.

5 E.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion).

6 *Craig v. Boren*, 419 U.S. 190, 198 (1976).

7 *Id.* at 199.

8 *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

9 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-445 (1765); see also NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11 (2000).

10 BLACKSTONE, *supra* note 9, at 442-445; COTT, *supra* note 9, at 11.

11 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736).

12 App. to Appellant's Br., *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area).

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- 13 See, e.g., *Frontiero*, 411 U.S. at 677 (military spousal benefits); *Wiesenfeld*, 420 U.S. at 643 (Social Security survivor benefits); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (same); *Califano v. Coffin*, 430 U.S. 924 (1977) (Social Security spousal benefits); *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976), *aff'd*, 431 U.S. 909 (1977) (Railroad Retirement Act spousal benefits).
- 14 *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).
- 15 *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (reversing summary judgment grant for the employer where a gay male employee's presented evidence that fellow employees harassed him because his appearance, behavior, and demeanor did not accord with what was regarded as typical male behavior at the factory where he worked); see also *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment for failing to act "as a man should act," including being derided for not having sex with a female colleague, constituted actionable sex discrimination because plaintiff was discriminated against for violating gender stereotypes).
- 16 183 F. Supp. 2d 403, 406-410 (D. Mass. 2002).
- 17 *Id.* at 410.
- 18 See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 960 (N.D. Cal. 2010) ("California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their depend[en]ts. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman.").