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William C. Duncan

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THE IMPERIAL JUDICIARY'S NEW ROBES

WILLIAM C. DUNCAN

INTRODUCTION

The emperor in Hans Christian Andersen's story, "The Emperor's New Clothes," is fooled into parading down the street without a stitch on (or, in some illustrations, in a demure pair of boxer shorts perhaps decorated with heart patterns). The effectiveness of the tailors' ruse was that the vanity of the emperor, courtiers and nearly all the unnamed kingdom's subjects prevented them from admitting they could not see the clothes they had been convinced could be seen only by those fit for office or not "incorrigibly stupid."¹ In the story's denouement, a little child witnessing the parade cries out: "But he has nothing on!"²

In August 2010, a U.S. District Court for the Northern District of California decided that Proposition 8, California's marriage amendment, violated various provisions of the U.S. Constitution and was, therefore, invalid.³ The court's decision is curiously reminiscent of the royal outfit of Hans Andersen's tale. This article will describe the similarities.

I. WHAT'S MISSING?

In the court's decision, the suspicion of stark absences is raised at the very outset; in fact, in the caption of the case. There we see that two same-sex couples have sued the governor of the state. Yet, in no time we learn: "With the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, the government defendants refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8."⁴ So, the first thing missing is the government's defense of

¹ Hans Christian Andersen, *The Emperor's New Clothes* in FOLK-LORE & FABLE 237 (The Harvard Classics 1937).

² *Id.* at 238.

³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

⁴ *Id.* at 928.

its law duly enacted according to constitutional procedures.⁵ This is not a minor omission. If government officials can refuse to discharge their responsibilities and, thus, accomplish what they are not granted authority to do and what they failed to do in their opposition to voter approval of the amendment, the state constitution's procedure for amendment would be a dead letter since the state constitution would always be prey to collusion between government attorneys (who opt for inaction in defense of an approved measure) and an activist judiciary.

Strangely, the court allowed in an extra plaintiff, the City and County of San Francisco, but refused to allow another municipality, Imperial County, to intervene in defense of the law.⁶

Another startling instance of absence is the nearly total lack of recognition of contrary legal authority. Most striking is the opinion's failure to address controlling precedent in the U.S. Supreme Court. In *Baker v. Nelson*, the Court dismissed a federal constitutional challenge (raising the same issues as the Proposition 8 challenge) to Minnesota's marriage law brought by a same-sex couple.⁷ The dismissal was for want of a substantial federal question, which is a ruling on the merits.⁸ Given that the decision was a summary adjudication and occurred three decades ago, it is not inconceivable that the court might have decided that it did not have the weight a fully adjudicated case would have, but it is exceedingly odd that the court did not even acknowledge the existence of the decision.

Similarly, the court did not acknowledge contrary precedent in the U.S. Court of Appeals for the Eighth Circuit. In a constitutional challenge to Nebraska's marriage amendment, a unanimous panel concluded: "We cannot conclude that the State's justification [for a "government interest in 'steering procreation into marriage'"] 'lacks a rational relationship to legitimate state interests.'"⁹ It ignored, as well, a number of federal district court decisions coming to the opposite conclusion about the constitutionality of state marriage laws.¹⁰

Given the court's conclusion that Proposition 8 advanced no legitimate

⁵ See *Strauss v. Horton*, 207 P.3d 48, 100–01 (Cal. 2009).

⁶ *Perry*, 704 F. Supp. 2d at 929.

⁷ *Baker v. Nelson*, 191 N.W.2d 185, 185–86 (Minn. 1972), *dismissed for lack of substantial federal question*, 409 U.S. 810 (1973).

⁸ *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

⁹ *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (quoting *Romer v. Evans*, 517 U.S. 632 (1996)).

¹⁰ *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147–48 (Bkrtcy. W.D. Wash. 2004).

interests, it is surprising that the court did not note significant state high court decisions finding just such interests. For instance, the New York Court of Appeals decision that the state legislature could “rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships” and that “it is better, other things being equal, for children to grow up with both a mother and a father.”¹¹ The Maryland Court of Appeals similarly said: “We agree that the State’s asserted interest in fostering procreation is a legitimate governmental interest.”¹²

The Washington Supreme Court upheld that state’s marriage law holding it was constitutional “because the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents.”¹³

Of course, the court is not bound by these decisions but it is odd that it did not recognize the entirely apposite conclusions they contained.

II. FACT FINDING

This article will not discuss what is absent in the court’s legal conclusions. At any rate, the legal analysis of the court offered little that was new. Other courts have rejected the specific arguments that state marriage laws discriminate on the basis of sex,¹⁴ others have rejected the idea that same-sex marriage is a fundamental right,¹⁵ and a series of state high courts have soundly rejected the idea that the state has no rational basis for defining marriage as the union of a husband and wife.¹⁶

The court’s conclusion that sexual orientation discrimination and sex discrimination are synonymous is quite novel (perhaps wildly so).¹⁷ This, like most of the court’s other constitutional conclusions, is not necessary to the court’s final decision. However, it became important because the court ultimately holds that regardless of the nature of the right or the class

¹¹ *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

¹² *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007).

¹³ *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006).

¹⁴ *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 953 n.11 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384, 438–40 (Cal. 2008).

¹⁵ See *Hernandez*, 855 N.E.2d at 1.

¹⁶ See *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

¹⁷ *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921, 996 (N.D. Cal. 2010).

affected, Proposition 8 would be unconstitutional because it is utterly lacking in any rational basis and must thus be understood as a mere act of spite.¹⁸

The real novelty of the decision, of course, is the extensive fact-finding based on a lengthy trial.

A trial does not seem to have been intended by the parties to the lawsuit but was rather suggested by the court itself.¹⁹ However, the spectacle the court had in mind was grander than the actual event. The U.S. Court of Appeals for the Ninth Circuit was first to put a damper on the contemplated festivities by reversing an order to the proponents of Proposition 8 to disclose internal campaign documents.²⁰ The court said the proponents had “shown that discovery would likely have a chilling effect on political association and the formulation of political expression” and there was no “sufficiently compelling need” for disclosure of the internal communications plaintiffs sought.²¹

The U.S. Supreme Court also weighed in on the spectacle aspect of the trial when it ruled the trial would not be the first federal trial to be broadcast on television and the internet.²² The Court said the “balance of equities” between the advocates for and against the broadcast favored the defenders of Proposition 8 because they “have demonstrated the threat of harm they face if the trial is broadcast” (the possibility of harassment and persecution of witnesses) while the plaintiffs “have not alleged any harm if the trial is not broadcast.”²³ The Court concluded the trial court “attempted to change its rules at the eleventh hour to treat this case differently than other trials in the district. Not only did it ignore the federal statute that establishes the procedures by which it rules may be amended, its express purpose was to broadcast a high-profile trial that would include witness testimony about a contentious issue.”²⁴

The trial that did occur, though scaled down in dramatic effect, became the cornerstone of the court’s decision regarding the constitutionality of Proposition 8. In fact, in the decision the court equated trial witnesses to evidence though the concepts are, of course, distinct.²⁵ The long trial has

¹⁸ *Id.* at 1002.

¹⁹ See Dahlia Lithwick, *A Brilliant Ruling*, SLATE.COM (Aug. 4, 2010), <http://www.slate.com/id/2262766/>.

²⁰ *Perry v. Schwarzenegger*, 2009 U.S. App. LEXIS 27064 (9th Cir. 2010).

²¹ *Id.* at 42.

²² *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

²³ *Id.* at 713.

²⁴ *Id.* at 714–15.

²⁵ *Perry v. Swarzenegger*, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010).

been seized on by the decision's defenders who argue that it shows that there was no real evidence in favor of the constitutionality of Proposition 8.²⁶ The factual findings made by the court on the basis of the trial testimony are the fancy dress on the constitutional conclusion that Proposition 8 is unconstitutional and thus any marriage law based on the complementarity of husband and wife must be invalidated.

Perhaps because so few people saw the trial, it should not be surprising that one of its really salient characteristics has not been widely noted. That fact is that the court's extensive factual findings based on the trial contain little substance. Like the boy in the fable, looking at the decision allows us to see that there's really nothing there.

At first glance, the factual findings of the court are unlike the outfit in Andersen's fable in that the conclusions are certainly substantial. The eighty findings occupy fifty-six pages of the 136 page opinion (contrasted with twenty-seven pages for legal analysis). Most findings are buttressed by citations to the trial or other evidence. A close examination of this factual fabric, however, reveals that it is a tissue of inapposite uses of authority, irrelevant statements, and non-factual "facts."

III. AUTHORITY

In the first finding regarding the legal principle of coverture, the court cites California's attorney general as authority who, the court says, "admits that the doctrine of coverture, under which women, once married, lost their independent legal identity and became the property of their husbands, was once viewed as a central component of the civil institution of marriage."²⁷ It may be true that the attorney general believes this, but on what basis are we to credit this belief? The court had already noted the attorney general believes Proposition 8 is unconstitutional but that hardly ended the court's analysis. Is there some reason to believe California's attorney general will have special information about century-old attitudes about the centrality of various ideas about marriage? This particular attorney general has argued that the California [] contains unwritten mandates that trump specific constitutional language to the contrary but even the California Supreme Court did not buy that.²⁸

Throughout the opinion, the court relied heavily on statements of

²⁶ Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CALIFORNIA LAWYER (Jan. 2010), <http://www.callawyer.com/story.cfm?eid=906575&evd=1>.

²⁷ *Perry*, 704 F. Supp. 2d at 958.

²⁸ *Strauss v. Horton*, 207 P.3d 48, 117-18 (Cal. 2009).

professional organizations to support its findings.²⁹ The American Psychiatric Association statement referenced by the court is, as the court notes, a “Position” statement rather than a scholarly article. The sources cited in the statement are all other policy documents rather than research findings. The American Medical Association policy document is devoid of citations.

Similar organizational statements relied on by the court are also problematic. The statements of the American Anthropological Association and the American Academy of Child and Adolescent Psychiatry³⁰ are devoid of citations. The groups issuing many of these statements typically endorse a range of causes to which social science considerations are tangential at best.³¹ They have also been subjected to criticism within their ranks.³² The scientific accuracy of a statement by the American Academy of Child and Adolescent Psychiatry was highlighted in testimony in the Proposition 8 trial. After reading the Academy’s statement that “[l]esbian, gay, bisexual or transgender people have faced more rigorous scrutiny than heterosexual people regarding their rights to be or become parents,” an attorney for Proponents asked a plaintiffs’ expert: “Dr. Lamb, there is not a rich empirical literature relating to child outcomes of transgender individuals, is that right?” Dr. Lamb responded, “I’m not familiar with it, no.” The attorney then asked, “[a]nd there is not a rich literature on the child outcomes of the children of bisexuals, correct?” Dr. Lamb responded, “That’s correct.” The attorney then stated the obvious conclusion: “So this statement is not based in empirics, but, rather, in politics, correct?” Dr. Lamb concurred: “Well, I can’t speak to the basis. That would be my understanding, yes.”³³

²⁹ Perry v. Schwarzenegger, 3:09-cv-02292 (Dist. N. Cal. 2010) *slip op.* at 84, 92 (citing a “Position Statement” of the American Psychiatric Association for the proposition that children of same-sex couples are harmed because the couple cannot marry) (citing an American Medical Association “Policy” that same-sex couples experience health disparities as a result of the current definition of marriage).

³⁰ American Academy of Child & Adolescent Psychiatry, *Gay Lesbian, Bisexual, or Transgender Parents Policy Statement* (October 2008), available at http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement.

³¹ The American Anthropological Association has positions on boycotting the state of Arizona (<http://www.aaanet.org/issues/press/Arizona-Immigration.cfm>) and the American Medical Association on abortion, global warming, recycling, gun control and others (http://www.ama-assn.org/ama1/pub/upload/mm/15/digest_of_actions.pdf).

³² See Peter Wood, *The Marriage Debate Goes Multicultural*, NATIONAL REVIEW ONLINE (April 26, 2005), available at <http://old.nationalreview.com/comment/wood200504260810.asp> (criticizing the American Anthropological Association statement); *Letters to the Editor* 110 PEDIATRICS 408 & 419 (2002) (publishing letters critical of the American Academy of Pediatrics’ 2002 statement).

³³ Perry v. Schwarzenegger, Trial Transcript at 1052–54 (Jan. 15, 2010).

There are many problems endemic in a reliance on these kinds of professional organization statements. Dr. Daniel Robinson points out: “Even when there is relevant expertise within the discipline of psychology there is no *a priori* basis upon which to credit a given Board or Council with possession of it. Scholars and scientists do not vote on matters of fact, nor do they install theories into positions of supremacy by fiat.”³⁴ This is true because “[m]oral authority does not inhere in committees, boards, councils, or memberships, but in the weight of reason attached to arguments for and against actions of a certain kind.”³⁵

To take another example, the findings of the court regarding child outcomes relied heavily, almost exclusively, on one expert witness and on a document produced by the American Psychological Association.³⁶ This APA document, however, does not contain citations and admits to serious limitations. The four findings that proceed the language quoted by the court say that (1) sexual identities of “children of lesbian mothers” develop similarly to those of heterosexual parents though “[f]ew studies are available regarding children of gay fathers”, (2) children of lesbian mothers have few differences in personality development than children of heterosexual parents (with the same note about the lack of studies of gay fathers), (3) children of gay parents have normal social relationships, and (4) children of gay parents are not more likely to be sexually abused.³⁷ Then, based on this thin record, it comes to the conclusion quoted by the court below which conflates “lesbian and gay parents” even though the statements note a dearth of research about the latter. This hardly promotes confidence in the “scientific” nature of the assertions.

IV. IRRELEVANCE

In describing the evidentiary presentations, the court says “[p]roponents’ evidentiary presentation was dwarfed by that of plaintiffs” without explaining the relevance of the observation. Perhaps this is because the bulk of assertions about a matter are really irrelevant to their accuracy. A defense attorney who brings hundreds of witnesses in a criminal matter will have a hard time prevailing on a jury to accept her client’s innocence if

³⁴ Daniel N. Robinson, *Ethics and Advocacy*, 39 AMERICAN PSYCHOLOGIST 787, 788 (1984).

³⁵ Robinson, *supra* note 33, at 792.

³⁶ Perry v. Schwarzenegger, No. 09-02292, *slip op.* at 95–96 (N.D. Cal. Aug. 4, 2010).

³⁷ AMERICAN PSYCHOLOGICAL ASSOCIATION, *Answers to Your Questions For a Better Understanding of Sexual Orientation & Homosexuality* 5, available at <http://www.apa.org/topics/sexuality/sorientation.pdf>. One wonders if any of these points was even in dispute.

there is only one piece of evidence on the other side and that evidence is a video recording of the client clearly committing the crime.

At a number of points, the court raises the specter of anti-miscegenation laws. Finding #23, for instance, makes the uncontroversial assertion that marriage requires consent of the parties. The court then adds this unnecessary illustration (particularly unnecessary since the main point was not in contention): “Because slaves were considered property of others at the time, they lacked the legal capacity to consent and were thus unable to marry. After emancipation, former slaves viewed their ability to marry as one of the most important new rights they had gained.”³⁸ Finding #24 notes that many states “had laws restricting the race of marital partners so that whites and non-whites could not marry each other.”³⁹ Since Proposition 8 had absolutely nothing to do with racial restrictions, what would be the relevance of these points? There is, of course, no direct relevance and one is left to assume that these points are raised only to tar opposition to same-sex marriage with the brush of bigotry by associating that position with racist opposition to interracial marriage.

Something similar seems to be at work with the next set of findings. Finding #26 describes, of all things, the doctrine of coverture.⁴⁰ Finding #27 argues: “Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family.”⁴¹ Of course, Proposition 8 says nothing about men or women’s suitability for employment or what tasks men and women should perform in a marriage. The race and gender analogy is raised again in Finding #33, “eliminating gender and race restrictions in marriage has not deprived the institution of marriage of its validity,”⁴² and in the court’s legal analysis “[r]ace restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre.”⁴³

Finding #47 is another example of irrelevance. It says: “California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California.”⁴⁴ On seeing

³⁸ *Perry*, at 61.

³⁹ *Id.*

⁴⁰ *Id.* at 62.

⁴¹ *Id.* at 63.

⁴² *Id.* at 66.

⁴³ *Id.* at 112.

⁴⁴ *Id.* at 76.

this, a reader might well ask if anyone had argued that the state of California did have such an interest. This is not part of the Proponents' case but instead is a straw man created by the court.

Some irrelevant findings are more subtle. Finding #48 reads:

Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.⁴⁵

This is all well and good but it has nothing to do with the state's interest in Proposition 8. The court does not claim that Proponents supported the amendment as a way of preventing unhappy marriages.

Similarly, #51 says: "Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals."⁴⁶ Again, there's no indication that Proponents supported Proposition 8 as a way of encouraging gay men to marry women or lesbian women to marry men, so what is the relevance of a finding that the law would not do what it was not intended to do in the first place?

Finding #53 argues, as a way of supporting the idea that same-sex couples are disadvantaged in a tangible way by being given all of the benefits of marriage available under state law, but not the formal status, that: "California domestic partners . . . are not recognized by the federal government."⁴⁷ This may be true but the court does not note that if marriage were redefined in California to include same-sex couples, the state would also not recognize that marriage because the federal Defense of Marriage Act precludes such recognition.⁴⁸

Another set of irrelevant findings concern economic issues. Finding #64 says "Proposition 8 has had a negative fiscal impact on California and local governments."⁴⁹ Finding #65 says the City and County of San Francisco

⁴⁵ *Id.* at 77.

⁴⁶ *Id.* at 79.

⁴⁷ *Id.* at 81.

⁴⁸ See 1 U.S.C. § 7 (1996) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife."); see also 28 U.S.C. § 1738C (1996) ("No State . . . shall be required to give effect to any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State").

⁴⁹ *Perry*, at 90.

“would benefit economically if Proposition 8 were not in effect.”⁵⁰ Finding #66 says: “Proposition 8 increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage.”⁵¹ Assuming each of these propositions is true, what would that have to do with the constitutionality of Proposition 8? There is no constitutional mandate to do what is best fiscally for San Francisco or California. On any law, its supporters can validly decide that some kinds of costs are justified by different kinds of benefits. The court’s tax law discussion is particularly inapposite since some tax laws will benefit the married while others will create an advantage for unmarried couples.⁵² This is the regular give-and-take of the legislative process.

In Finding #75, the court notes, “Public and private discrimination against gays and lesbians occurs in California and in the United States.”⁵³ The court immediately notes that Proponents do not dispute this. That is hardly surprising since the existence of discrimination does not mean that every law affecting a group that experiences discrimination is itself discriminatory. Similarly, Finding #76 says that “[w]ell-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming long-term intimate relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality.”⁵⁴ The existence of stereotypes does not, however, mean that they are believed in every instance. The court does not charge, as it surely would if there were evidence to support the charge, that the Proponents of Proposition 8 held or disseminated such stereotypes.

Irrelevant assertions are not confined to the formal findings. In its due process analysis, the court asserts: “Never has the state inquired into procreative capacity or intent before issuing a marriage license.”⁵⁵ Certainly, the court must be aware that there might be reasons to avoid such an inquiry, such as intrusiveness or unreliability, other than that the state believes that marriage and procreation have no relevance to one another. If the state really believed this, why would it presume that the

⁵⁰ *Id.* at 91.

⁵¹ *Id.*

⁵² See Theodore Seko, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

⁵³ *Perry v. Swarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010)

⁵⁴ *Id.* at 982–83.

⁵⁵ *Id.* at 992.

husband of a child's mother is the father? If marriage and procreation are not related, why not just require a blood test to establish every child's paternity?

As a final example, consider this passage from the court's discussion of state interests: "One example of a legitimate state interest in not issuing marriage licenses to a particular group might be a scarcity of marriage licenses or county officials to issue them."⁵⁶ This seems to be a weak attempt at humor unless the court actually believes that a scarcity of marriage licenses would be a legitimate state reason for not allowing people to marry. Following this logic, could a clerk's office just extinguish the right to marry by refusing to print new marriage licenses? This idea that the mere existence of a piece of paper called a marriage license is what makes a marriage is strangely reductionistic. It is like the person who believes they have money as long as they still have checks to write on. It also has nothing to do with the proffered justifications for Proposition 8.

V. MISSTATEMENTS

Inaccuracy plagues the court's opinion, and particularly the Findings section. For space reasons, this article will select only a few examples.

Before the formal list of factual findings begins the reader is tipped off to the possibility that what follows may be something less than exactly accurate. The court says: "The key premises on which Proposition 8 was presented to the voters thus *appear to be* the following."⁵⁷ There follows a list of straw men arguments that bear little or no relation to the arguments actually made by the proponents of Proposition 8. These include: "Denial of marriage to same-sex couples preserves marriage;" and "[d]enial of marriage to same-sex couples allows . . . others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;" and "[s]ame-sex couples' marriages redefine opposite-sex couples' marriages."⁵⁸ These first and last are not really comprehensible statements, whatever their accuracy. The second statement seems bizarre—is the court really arguing that people supported Proposition 8 just to ignore the existence of same-sex couples? Wouldn't it seem that a high-profile political argument over same-sex marriage would be a poor way to accomplish that end? This passage is particularly strange given that the court seems capable of a more accurate summary of the proponents'

⁵⁶ *Id.* at 997.

⁵⁷ *Id.* at 930.

⁵⁸ *Id.*

position. Thus, contrast, these excerpts of how the proponents' arguments "appear" to the court with the court's own summary of the case made by proponents:

Proponents' procreation argument, distilled to its essence, is as follows: the state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households. The state therefore, the argument goes, has an interest in encouraging all opposite-sex sexual activity, whether responsible or irresponsible, procreative or otherwise, to occur within a stable marriage, as this encourages the development of a social norm that opposite-sex sexual activity should occur within marriage. Entrenchment of this norm increases the probability that procreation will occur within a marital union. Because same-sex couples' sexual activity does not lead to procreation, according to proponents the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to proponents, the state's only interest is in opposite-sex sexual activity.⁵⁹

Notice the dramatic contrast between this summary and the strange argument that proponents were trying to pretend same-sex couples don't exist or were arguing that same-sex couples are changing the "definition" of existing marriages.

Some of the court's findings are hard to reconcile as "facts." Finding #28, for instance, says the enactment of no-fault divorce laws "allowed spouses to define their own roles within a marriage."⁶⁰ The logic here is hard to follow. Is the court really saying that men and women couldn't make decisions about their roles within marriage prior to 1969? The evidence cited in support of this statement does not support it at any rate. The sources merely argue that the change in divorce laws "indicates" a shift in spousal roles or "underlines" that shift; that divorce used to require fault grounds; and that divorce rates began to rise before the change in the law.

In Finding #30, the court avers that the legislative history of California's marriage statute enacted in 1977 "supports a conclusion that unique roles of a man and a woman in marriage motivated legislators to enact the amendment."⁶¹ The source for this surprising conclusion (can it really be

⁵⁹ *Id.* at 932.

⁶⁰ *Id.* at 959.

⁶¹ *Id.* at 960.

the case that the California Legislature in 1977 decided that men ought to work outside the home and women ought to be homemakers and so decided to codify this opinion by enacting a law defining marriage as the union of a husband and wife, the only definition that had ever existed in California law?) is the California Supreme Court's decision in *In re Marriage Cases*.⁶² The page cited as authority, however does not support this conclusion. Here is the California Supreme Court's entire discussion of the legislative history of the 1977 law:

In the mid-1970's, several same-sex couples sought marriage licenses from county clerks in a number of California counties, relying in part upon the 1971 change in the language of Civil Code section 4101, subdivision (a), noted above. All of the county clerks who were approached by these same-sex couples denied the applications, but in order to eliminate any uncertainty as to whether the then existing California statutes authorized marriage between two persons of the same sex, legislation was introduced in 1977 at the request of the County Clerks' Association of California to amend the provisions of sections 4100 and 4101 to clarify that the applicable California statutes authorized marriage only between a man and a woman. (Stats. 1977, ch. 339, § 1, p. 1295, introduced as Assem. Bill No. 607 (1977-1978 Reg. Sess.); see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1; Governor's Legal Affairs Off., Enrolled Bill Rep. on Assem. Bill No. 607 (1977-1978 Reg. Sess.) Aug. 18, 1977, p. 1.)

The 1977 legislation added the phrase "between a man and a woman" to the first sentence of former section 4100, so that the sentence read: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." The measure also revised the language of former section 4101 to reintroduce the references to gender that had been eliminated in 1971. As we explained in *Lockyer, supra*, 33 Cal.4th 1055, 1076, footnote 11: "The legislative history of the [1977] measure makes its objective clear. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 ['The purpose of the bill is to prohibit persons of the same sex from entering lawful marriage'.])" In 1992, when the Family Code was enacted, the provisions of former sections 4100 and 4101 of the Civil Code, as amended in 1977, were reenacted without change as Family Code sections 300 and 301,

⁶² *Id.*

respectively. (Stats. 1992, ch. 162, § 10, p. 474).⁶³

In the finding on the extraterritorial effect of California domestic partnerships referenced above, the court says: “California domestic partners may not be recognized in other states and are not recognized by the federal government.”⁶⁴ The evidence the court cites in support actually directly contradicts this statement, noting that “[p]laintiffs and proponents agree only that Connecticut, New Jersey and Washington recognize California domestic partnerships” and that the state defendants identified as additional recognizing jurisdictions Washington D.C., Nevada and New Hampshire.⁶⁵

In Finding #55, the court says: “Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.”⁶⁶ How this future eventuality can be known with such certainty is unclear. The evidence cited in support is selective, focusing on data from Massachusetts (which has only had same-sex marriage since 2004) and on irrelevant matters such as the fact that other factors are related to marital stability. The Massachusetts data, of course, cannot tell us what will happen in the future, only that in a place where social conditions are very similar there is reason to assume the changes will not be significant. The court also ignored evidence to the contrary. One of plaintiffs’ witnesses, for instance, testified in the trial that she agreed to the statement “the social meaning of marriage unquestionably has real world consequences.”⁶⁷ This same witness testified that it is impossible to accurately predict the consequences of mandating same-sex marriage.⁶⁸ Even the case of Massachusetts is not entirely clear. In 2009, the National Organization for Marriage commissioned a survey in Massachusetts of attitudes about marriage five years into that state’s experiment with same-sex marriage. The survey found that “in the five years since gay marriage became a reality in Massachusetts, support for the idea that the ideal is a married mother and father dropped from 84 percent to 76 percent.”⁶⁹

In finding #60, the court says: “Proposition 8 reserves the most socially

⁶³ *In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008).

⁶⁴ *Perry* 704 F. Supp. 2d at 970.

⁶⁵ *Id.* at 971.

⁶⁶ *Id.* at 972.

⁶⁷ Transcript of Record at 311-312, *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

⁶⁸ *Id.* at 254.

⁶⁹ *Five Years After Goodridge: Gay Marriage Divides Massachusetts Voters*, THE NATIONAL ORGANIZATION FOR MARRIAGE (May 19, 2009), available at <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075187&ct=7000219>.

valued form of relationship (marriage) for opposite-sex couples.”⁷⁰ The evidence supported by the court, however, does not support this statement. The court cites four authorities. One is a study that says more same-sex couples marry than get domestic partnerships. Another says that many same-sex couples in a domestic partnership later chose to marry and another describes a proponent of Proposition 8 expressing a concern that redefining marriage will affect what is taught about marriage in the public schools. The fourth source is a book describing interviews with a handful of Dutch people in which they express their opinion that marriage is socially valuable.

The next finding, #61, says Proposition 8 codifies “distinct and unique roles for men and women in marriage.”⁷¹ One could read that measure many, many times and never find anything that suggests that married women ought to mow lawns and married men ought to sweep the kitchen. The eleven sources that follow this finding say nothing about this assertion. They consist of statements that men and women are different and testimony from one plaintiff’s witness that the concept of the traditional family has been understood in the past to encompass the idea of gender roles.

This same problem afflicts Finding #67, that “Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents.”⁷² The six sources cited in support include two statements of witnesses that Proposition 8 creates “structural stigma,” two that describe the existence of stereotypical attitudes, one that relays a concern that Proposition 8 will affect the teaching of marriage in the public schools, and another that says that Proposition 8 would send a message that might encourage or at least be “consistent with holding prejudicial attitudes.”⁷³ None of the statements demonstrate that Proposition 8 “perpetuates stereotypes” and it would be hard to imagine that it would since it says nothing about same-sex couples.

The findings related to children’s outcomes are similarly unsupported. Finding #69 says “*The* factors that affect whether a child is well-adjusted are . . .” and then lists three factors.⁷⁴ Is the court really asserting that there are no other factors in child development? The court then says: “The gender of a child’s parent is not a factor in a child’s adjustment.”⁷⁵ It is not

⁷⁰ *Perry*, 704 F. Supp. 2d. at 974.

⁷¹ *Id.* at 975.

⁷² *Id.* at 979.

⁷³ *Id.*

⁷⁴ *Id.* at 980 (emphasis added).

⁷⁵ *Id.*

clear what this even means. Is the court asserting that a child doesn't need a mother or father? Why does the court use the singular "parent" since every child has two? Is the court trying to avoid talking about the really salient issue of family structure, instead focusing on the irrelevant question of whether a man can be a good parent or a woman or someone who experiences same-sex attraction? The court concludes this finding with the very odd statement that its assertion is accepted "without debate in the field of developmental psychology." Again, so what? Why exclude insights of sociologists, medical doctors, or whomever else? The next finding is tricky. It says: "Children do not *need* to be raised by a male parent and a female parent to be well-adjusted, and having both a male and female parent does not increase the likelihood that a child will be well-adjusted."⁷⁶ This phrasing allows the court to focus on one uncontroversial but totally irrelevant point—that some children may do fine without a mother or father. The key word is "need." By the same token, children don't "need" any parent at all since some people raised in group homes will turn out alright. The court does not explain what "well-adjusted" means either. Evidence indicates that children fare better, on average, in some settings than others (i.e. they are likely to do better with married parents rather than cohabiting parents or in an intact family rather than a stepfamily), but the court does not talk about child outcomes that have been measured, like educational success, later family formation, etc.. It only mentions the nebulous term "adjustment" which could merely mean that the children do not have heightened instances of major psychosis. The discussion could continue.

Interestingly, the developmental psychologist the court relied on to support these assertions acknowledged at trial that a number of his earlier articles noted the importance of fathers in children's development. For instance, "it is disturbing that there appears to have been a devaluation of the father's role in western society such that many children may suffer affective paternal deprivation."⁷⁷ Some other examples from his early articles include:

"[b]oys growing up without fathers seem to have problems in the area of sex role and gender identity development, school performance, psychosocial adjustment, and perhaps in the control of aggression."⁷⁸

⁷⁶ *Id.* at 981 (emphasis added).

⁷⁷ Transcript of Record at 1071, *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. CA 2010) (No. C 09-2292-VRW).

⁷⁸ *Id.* at 1079.

“[b]oys growing up with[out] fathers seem especially prone to exhibit problems in the areas of sex role and gender identity development.”⁷⁹

He also wrote about differences between men and women in terms of parenting: “[t]he data suggests that the differences between maternal and paternal behavior are more strongly related to either the parents’ biological gender or sex roles, than to either their degree of involvement in infant care or their attitudes regarding the desirability of paternal involvement in infant care.”⁸⁰

This witness also admitted at trial that there are a number of areas in which a father’s absence is meaningful for child outcomes. For instance:

an admission that “[t]he increase in father’s absence is particularly troubling because it is consistently associated with poor school achievement, diminished involvement in the labor force, early child bearing, and heightened levels of risk-taking behavior.”⁸¹

an admission that boys without fathers are “prone to poor school performance.”⁸²

an admission that boys without fathers fare worse in terms of psychosocial adjustment.⁸³

an admission that there are differences in terms of self control and delinquent behavior in adolescence between boys with and without fathers.⁸⁴

agreeing “that nurturant fathers may contribute greatly to the psychological adjustment of their daughters.”⁸⁵

agreeing that nurturant fathers “may facilitate their [daughters’] happiness in subsequent heterosexual relationships.”⁸⁶

an admission that there are “some fairly long-term associations between the quality of the relationship that young children have with their fathers and the way that they interact as young adults with their

⁷⁹ *Id.* at 1074.

⁸⁰ *Id.* at 1068.

⁸¹ *Id.* at 1073.

⁸² Transcript of Record at 1074: 18-19, *Perry*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

⁸³ *Id.* at 1074: 21-24.

⁸⁴ *Id.* at 1074-75: 25-33.

⁸⁵ *Id.* at 1075: 12-15.

⁸⁶ *Id.* at 1075: 16-18.

own peers.”⁸⁷

In addition, Dr. Lamb admitted at trial that there are differences between men and women which have implications for child development:

an admission that mothers and fathers are different in a number of respects, that those differences may be the result of their different genders, and that being raised by people with such differences is beneficial for children.⁸⁸

an admission that it was an accurate summary of the literature to say “[r]esearch clearly demonstrates that children growing up with two continuously married parents are less likely than other children to experience a wide range of cognitive, emotional, and social problems not only during childhood but also in adulthood” and that this “distinction is even stronger if we focus on children growing up with two happily married biological parents.”⁸⁹

an admission that it was an accurate summary of the literature to say “[w]e conclude that in practice the kind of mother-father relationship most conducive to responsible fathering in contemporary U.S. society is a caring, committed, collaborative marriage. Outside of this arrangement, substantial barriers stand in the way of active, involved fathering.”⁹⁰

an admission that it was true that children in the average intact married families do better than children in average single and stepparent families.⁹¹

an admission that there are differences between men and women: men are more likely than women to become incarcerated, be involved in violent altercations, perpetuate sexual abuse, become addicted to alcohol, and to engage in aggressive behavior; men and women suffer from different diseases at different times; women tend to live longer than men; that men are disproportionately represented on the bottom of the bell curve for cognitive abilities; men are less likely to graduate high school than women; that men cannot breastfeed; and men earn more money than women.⁹²

an admission that he had stated, in regards to parenting, that men and

⁸⁷ Transcript of Record at 1080-81:23-25, *Perry*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

⁸⁸ *Id.* at 1082:8-24.

⁸⁹ *Id.* at 1098:3-8, 14-16.

⁹⁰ *Id.* 1102:1-7.

⁹¹ *Id.* at 1102-03:23-4.

⁹² *Id.* 1057-58:22-19.

women are not “completely interchangeable with respect to skills and abilities.”⁹³

an admission that gender “is one of those variables that can have ripple effects in a variety of different ways on the way in which people behave, and can in a variety of ways affect the way they behave with their children.”⁹⁴

It is hard to reconcile these statements with the conclusions of the court which, supposedly, are based on them.

The court’s discussion of religion similarly manifests some significantly questionable conclusions. Finding #77, arguably the most striking of the lot, says: “Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.”⁹⁵ It is hard to imagine how this could be anything other than a statement of opinion. If this is true would it not be true that religious beliefs that certain other religions are untrue would harm them? What can “harm” mean in this context? Two witnesses cited by the court suggest that religious beliefs lead to bigotry, but surely more than a mere assertion is needed to establish such a proposition. The third witness cited says that religious groups block political progress for gays and lesbians, but this too seems rather speculative. Why, if this is the case, does the state of California provide all of the benefits of marriage to same-sex couples? Is that not progress as the witness would define it? Why did religious views not block the enactment of that law? The next fifteen sources merely relay religious teachings about non-marital sexual relationships. The court does not clarify how the existence of these teachings constitutes a legally cognizable harm.

Finding #79 asserts that the campaign for Proposition 8 “relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian.”⁹⁶ The court, then immediately contradicts this statement by saying: “[t]he reason children need to be protected from same-sex marriage was never articulated in official campaign advertisements.”⁹⁷ Then how would the court know that this is what the advertisements were saying? The court says that the ads “insinuated” that hearing about same-sex marriage would make a child gay “and that parents should dread having a gay or lesbian child.” How does the court know this? Maybe the ads are

⁹³ Transcript of Record at 10064-1065:24-6, *Perry*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

⁹⁴ *Id.* at 1065:20-24.

⁹⁵ *Perry*, 704 F. Supp. 2d at 985.

⁹⁶ *Id.* at 988.

⁹⁷ *Id.*

merely raising concerns about the age appropriateness of the topic. This is likely since a number of instances highlighted in the campaign involve very young children being taught about same-sex marriage. The charge that the ads encourage people to “dread” gay children is particularly unfounded. It seems very likely that many people who voted for Proposition 8 have loved ones who identify as gay or lesbian. Even those parents who would be distressed by having the public schools teach that same-sex marriage is a good idea might still love their children if they were to identify as gay. The court gives no reason why we should believe otherwise.

Factual problems continue in the legal analysis section. The court, for instance, says that the definition of marriage as the union of a husband and wife “exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage.”⁹⁸ Is the court honestly asserting that marriage would have a different definition if gender roles were abandoned? According to the court, gender roles were jettisoned with the advent of no-fault divorce⁹⁹ yet all the states retained the male-female definition of marriage after that change took place. California provided in its 1850 Constitution that married women could own property but still understood marriage to require a husband and wife. Surely this “factual” statement is a stretch. Similarly, the court later says that “the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles” and Proposition 8 is “nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.”¹⁰⁰ Again, is the court really asserting that same-sex marriage was the norm until the notion of coverture was developed? Why have societies without such notions not recognized same-sex marriages? This is an entirely ahistorical claim. Again, why did same-sex marriage then not ensue in 1850 in California or in the United States on ratification of the Nineteenth Amendment?

The court also expounds on current realities. Thus: “[g]ender no longer forms an essential part of marriage.”¹⁰¹ Not surprisingly, the court cites to no authority for this proposition. It is, in fact, entirely rebutted by the case since if it were true it would not matter to the plaintiffs that they could marry only a person of the opposite-sex. They should just, if the court’s logic holds, recognize that gender means nothing to marriage so any gender

⁹⁸ *Id.* at 113.

⁹⁹ *Id.* at 64 (referencing the court’s 28th finding).

¹⁰⁰ *Id.* at 124.

¹⁰¹ *Id.* at 113.

should be permissible in terms of partner selection.

I will highlight one more, somewhat minor, but amusing example. The decision includes this sentence: “[p]roponents pointed only to a difference between same-sex couples (who are incapable through sexual intercourse of producing offspring biologically related to both parties) and opposite-sex couples (some of whom are capable through sexual intercourse of producing such offspring).”¹⁰² Given the factual inaccuracies that plague the rest of the opinion, perhaps one should be grateful that the court is willing to concede that sexual relationships between people of the same sex do not result in procreation. What is humorous, though, is the dismissive phrase about opposite-sex couples: that “*some of*” them “are capable of producing offspring through sexual intercourse” related to them both. Actually it seems that the court could even take judicial notice that *lots* of opposite-sex couples are capable of creating children through sexual intercourse. Perhaps even a large majority.

VI. AD HOMINEM

As this recitation (which if far, far from exhaustive) makes clear, the more carefully the factual findings are scrutinized, the more threadbare they appear until it becomes clear that the material the court puts forward to bolster its conclusion is sheer at best, and that what is most prominent is naked *ad hominem* argumentation.

We have already noted the court’s guilt by association references to racial restrictions on marriage and to beliefs about the proper roles of men and women. These, however, are not the end of accusatory passages that make up the core of the court’s decision—that the fatal flaw in Proposition 8 is the motivation of its supporters.

Early in the factual section, the court makes the seemingly irrelevant statement that the campaign for Proposition 8 was a “‘broad coalition’ of individuals and organizations including the Church of Jesus Christ of Latter-day Saints (the ‘LDS Church’), the California Catholic Conference and a large number of evangelical churches.”¹⁰³ Why are these churches singled out when the coalition is admittedly “broad?” The court will return, again and again, to discussions of churches and religion because ultimately the court will assert that religious involvement in the campaign is somehow nefarious and taints the constitutionality of the measure.

¹⁰² *Id.* at 122.

¹⁰³ *Id.* at 59.

As the decision comes to a close, the accusations come more frequently. The court, for instance, claims that the “purported interests” advanced by Proponents for Proposition 8 “are nothing more than a fear or unarticulated dislike of same-sex couples.”¹⁰⁴ A few sentences later, the court says, “Proposition 8 was premised on the belief that same-sex couples are simply not as good as opposite-sex couples.”¹⁰⁵ On the next page, the court argues that since it has discredited all of the proffered interests in Proposition 8 all that “is left is evidence that Proposition 8 enacts a moral view that there is something ‘wrong’ with same-sex couples.”¹⁰⁶ To the court, the advertisements in favor of the amendment “ensured California voters had . . . fear-inducing messages in mind.”¹⁰⁷ The evidence, the court says, “conclusively” demonstrates “that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples.”¹⁰⁸ Or, as the opinion later says, “Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”¹⁰⁹ For the court, the “most likely explanation for its passage” is “a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.”¹¹⁰

This is nothing more than an exercise in mind reading. How would it be possible for the court to know that the voters who approved Proposition 8 “fear” or “dislike” same-sex couples (especially when this “dislike” is “unarticulated”) or think that marriage is a good way to signal their inferiority? It defies belief to imagine that a social institution recognized with remarkable consistency across history and across cultures was actually nothing more than an elaborate homophobic conspiracy.¹¹¹ To believe this would require us to imagine that in a state of nature or behind the veil of ignorance, malign forces assembled to figure out how to prevent gay and lesbian people from getting their due and came up with the idea of marriage as the best means for advancing that goal.

Wouldn't it make more sense to just take seriously two basic realities, one social and the other biological? The biological one is that men and women are different and that a basic consequence of their difference is that

¹⁰⁴ *Id.* at 132.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 133.

¹⁰⁷ *Id.* at 134.

¹⁰⁸ *Id.* at 135.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 133–34.

¹¹¹ *Id.* at 71 (noting that the “concept of an identity based on an object desire . . . developed in the late nineteenth century”).

both are required to create a child. The social reality is that nearly all human societies have recognized the relationship between a man and a woman because this relationship alone can result in the creation of children. The law of Ockham's razor would suggest that this is a more reasonable explanation than that marriage has existed from time immemorial as an instrument of oppression. One can disagree that continuing to recognize marriage as a union of a husband and a wife is a good idea but one need not assume that only evil motives animate those with whom you disagree.

This is particularly true for judges whose mission is not to enshrine policy preferences in our organic law.

CONCLUSION

A fact-sensitive court decision whose facts are at best inadequate, and at worst, entirely missing, does not prompt confidence in its legal outcome. In fact, the absence of so much that is necessary to sustain its stunning conclusions, leads one to conclude that something other than factual adjudication is at work. In fact, the court's opinion seems to be an elaborate cover for a predetermined conclusion—marriage is nothing more than the state's way of giving its stamp of approval to adult relationships. As the court says, “[t]he state respects an individual's choice to build a family with another and protects the relationship because it is so central a part of an individual's life.”¹¹² This conclusory statement does not, as would seem appropriate, appear in the fact-finding section of the decision.¹¹³ Instead, it is a central part of the court's conclusion that same-sex marriage is entirely consistent with the history and tradition of the nation. As novel as such a conclusion is, it does follow from the key premise. If marriage is nothing more than an adult agreement then all adult agreements might be marriages.

The real question, however, is whether it is really the province of the federal courts to endorse such a premise. For now, it is up to reviewing courts to see through the fabric of faulty facts and shaky conclusions woven by the district court. If it can do so, Proposition 8 will stand.

¹¹² *Id.* at 111.

¹¹³ *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 204-205 (1986) (Blackmun, J., dissenting)). Interestingly, the only authority cited for the proposition is a dissenting opinion written by Justice Blackmun.

