



United States Senate

Committee on the Judiciary

Hearing on S.598

July 20, 2011

Statement of Austin R. Nimocks
Senior Legal Counsel, Alliance Defense Fund



As debates rage these days regarding budget deficits, debt ceilings, and jobs, I am pleased that this body is taking time to discuss the jobs of mother and father—arguably the two most important jobs in our society. This particular legislation gives us the opportunity to examine the roles of mothers and fathers in our society, as well as ask a query that is oftentimes overlooked in these debates—why is government in the marriage business?

As you are aware, Congress enacted Federal DOMA in 1996 by an 84% margin, stating that “[a]t bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.”¹ This truth remains today, and as evidenced by likely the most extensive national research survey on American’s attitudes about marriage, completed on May 19, 2011, we know that 62% of Americans agree that “marriage should be defined only as a union between one man and one woman.”²

It is noteworthy that the topic at hand is not just a mere law or creature of statute, but a social institution that has universally crossed all political, religious, sociological, geographical, and historical lines. As put by the famous philosopher, Bertrand Russell, a self described atheist: “But for children, there would be no need of any institution concerned with sex.”³ “[I]t is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution.”⁴ In the words of highly respected anthropologist Claude Levi-Strauss, “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

¹ H.R. Rep. No. 104-664 at 13, 1996 U.S.C.C.A.N. at 2917.

² See <http://www.adfmedia.org/News/PRDetail/?CID=27539> (last visited July 18, 2011). This result unsurprisingly correlates to the collective votes of Americans from across the country regarding marriage. <http://oldsite.alliancedefensefund.org/userdocs/MarriageAmendmentVotePercentages.pdf> (last visited July 18, 2011).

³ Bertrand Russell, *Marriage & Morals* 77 (Liveright Paperbound Edition, 1970). See also *THE VIEW FROM AFAR* 40-41 (1985) (“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 practically universal phenomenon, present in every type of society.”); G. ROBINA QUALE, *A HISTORY OF MARRIAGE SYSTEMS* 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.”); cf. *ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY* 71 (6th ed. 1951) (defining marriage “as a union between a man and a woman such that children borne by the woman are recognized as the legitimate offspring of both partners”).

⁴ *Id.* at 156.



children—appears to be a practically universal phenomenon, present in every type of society.”⁵

Accordingly, from the lexicographers who have defined marriage,⁶ to the eminent scholars in every relevant academic discipline who have explained marriage, to the legislatures and courts that have given legal recognition and effect to marriage, they all demonstrate that an animating purpose of marriage in every society is to increase the likelihood that procreative relationships benefit society.⁷ Marriage between a man and a woman is a long-standing, world-wide idea that is a building block of society.

Marriage doesn't proscribe conduct or prevent individuals from living how they want to live. It doesn't prohibit intimate relationships or curtail one's constitutional rights. Individuals marry, as they always have, for a wide variety of

⁵ THE VIEW FROM AFAR 40-41 (1985); *see also* G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 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.”); *cf.* ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY 71 (6th ed. 1951) (defining marriage “as a union between a man and a woman such that children borne by the woman are recognized as the legitimate offspring of both partners”).

⁶ Samuel Johnson, for example, defined marriage as the “act of uniting a man and woman for life.” A DICTIONARY OF THE ENGLISH LANGUAGE (1755). Subsequent dictionaries have consistently defined marriage in the same way, including the first edition of Noah Webster's, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), and prominent dictionaries from the time of the framing and ratification of the Fourteenth Amendment, *see, e.g.*, NOAH WEBSTER, ETYMOLOGICAL DICTIONARY 130 (1st ed. 1869); JOSEPH E. WORCESTER, A PRIMARY DICTIONARY OF THE ENGLISH LANGUAGE (1871). A leading legal dictionary from the time of the framing and ratification of the Fourteenth Amendment, for example, defined marriage as “[a] contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife.” JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 105 (1868); *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 225 (1st ed. 1852) (“Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex”). Modern dictionaries continue to reflect the same understanding. The NEW OXFORD AMERICAN DICTIONARY (2010), for example, defines marriage as “the formal union of a man and a woman, typically recognized by law, by which they become husband and wife.”

⁷ At present, 41% of births in the United States are out-of-wedlock. *See* <http://www.catholicculture.org/news/headlines/index.cfm?storyid=9843> (last visited July 18, 2011). In his 1995 State of the Union address, President Clinton stated that out-of-wedlock childbearing was “our most serious social problem.” <http://www.let.rug.nl/usa/P/bc42/speeches/sud95wjc.htm> (last visited July 18, 2011). Out-of-wedlock births are economic strains upon a state's budget. *See, e.g.*, <http://www.foxnews.com/story/0,2933,351300,00.html> (last visited July 18, 2011) and <http://www.michiganfamily.org/main-resources/publications/Out-of-Wedlock%20Brief.pdf> (last visited July 18, 2011).



personal reasons. However, this legislation seeks to replace the essential public purposes of marriage with various private purposes. But today's discussion should not be about the *private* reasons why individuals marry, why the institution of marriage benefits any particular couple, or why any two people should or should not marry. Today, we're talking about social policy for our country as a whole and the government's interest in the institution.

Because the government's interest in marriage is unique and specific, entrance therein has never been conditioned on a couple's actual ability and desire to find happiness together, their level of financial entanglement, or their actual personal dedication to each other.⁸ Because the scope of fundamental due process rights is determined by this Nation's history, traditions, and legal practices, and not the individual circumstances of anyone, marriage laws stem from the fact that children are the product of the sexual relationships between men and women,⁹ and that both fathers and mothers are viewed to be necessary and important for children. Thus, throughout history, diverse cultures and faiths have recognized marriage between one man and one woman as the best way to promote healthy families and societies.

Moreover, the studies and science over a long period of time demonstrate that the ideal family structure for a child is a family headed by two opposite-sex biological parents in a low-conflict marriage.¹⁰ The life outcomes measured by these

⁸ Nor is marriage premised upon any person's sexual orientation, even in jurisdictions where same-sex marriage is now law. *See, e.g.*, copies of the marriage license applications from the states of Iowa (http://www.nytimes.com/packages/pdf/national/20090427_iowa_marriage_application.pdf - last visited July 18, 2011), Vermont (<http://www.ci.burlington.vt.us/ct/forms/docs/marriageapplication.pdf> - last visited July 18, 2011), and even in foreign jurisdictions like Canada ([http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetAttachDocs/007-11018E~1/\\$File/11018E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetAttachDocs/007-11018E~1/$File/11018E.pdf)).

⁹ As reported by the Centers for Disease Control (CDC), across the United States, 99% of the babies born in this country are the product of natural sexual intercourse between men and women. *See* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_24.pdf (last visited July 18, 2011) and <http://www.cdc.gov/art/ART2007/section5.htm> (last visited July 18, 2011).

¹⁰ *See, e.g.*, Sara McLanahan and Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1-78, 134-55 (1994); Shelly Lundberg & Robert A. Pollack, *The American Family and Family Economics*, February 2007 at 5, 19; Christopher Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence from NHANESII (2007)*; Pierre van den Berghe, *Human Family Systems* 33-60 (1979); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-being of the Next Generation*, 15 *Future Child*. 75, 89 (2005); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 *J. Marriage and Fam.* 876, 890 (2003); Femmie Juffer & Marinus H. van Ijzendoorn, *Adoptees Do Not Lack Self-Esteem: A Meta-Analysis of Studies on Self-Esteem of Transracial, International, and Domestic Adoptees*, 133 *Psychological Bulletin* 1067-68 (2007) ("Many studies and several meta-analyses have shown that adopted children lag behind in physical growth, school performance, and language abilities; show more attachment and behavior problems; and are



studies, encompass a variety of behavioral, cognitive, psychological and financial results, further highlighting the depth of the scientific support for giving preference to married biological parenting in relation to other possible parenting models and family structures.¹¹

But advocates for redefining marriage are asking you to cast aside the natural attachment of parents to their own children, and the natural desires of children to know who they are and where they came from.¹² These advocates are asking the whole of society to ignore the unique and demonstrable differences between men and women in parenthood: no mothers, no fathers, just generic parents. But there are no generic people. We are composed of two complementary, but different, halves of humanity. As stated by one scholar,

We should disavow the notion that ‘mommies can make good daddies,’ just as we should disavow the popular notion . . . that ‘daddies can make good mommies.’ . . . The two sexes are different to the core, and each is necessary – culturally and biologically – for the optimal development of a human being.¹³

This body should also disavow any notion that, in light of the Obama Administration’s refusal to defend Federal DOMA, its repeal is somehow a constitutional mandate. In 1967, the Supreme Court decided the case of *Loving v. Virginia*.¹⁴ In the *Loving* case, the Supreme Court struck down as unconstitutional a race-based marriage law that prohibited whites from marrying anyone of color. In so ruling, the Supreme Court called marriage “fundamental to our very existence and survival,”¹⁵ discussing the timeless and procreative aspects of the institution. It was exactly because of the procreative nature of marriage that miscegenation

substantially overrepresented in mental health referrals and services for learning programs.); Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress through School*, 47 *Demography* 755 (2010) (noting that “[s]tudies of family structure and children’s outcomes nearly universally find at least a modest advantage for children raised by their married biological parents”).

¹¹ See, e.g., Lorraine Blackman et al., *The Consequences of Marriage for African-Americans: A Comprehensive Literature Review* 24, Inst. for Amer. Values (2005) (delinquency, self-esteem and school performance); W. Bradford Wilcox et al., *Inst. For American Values, Why Marriage Matters: 26 Conclusions from the Social Sciences* 32-33 (2d ed. 2005) (school performance, delinquency, smoking, and risk of suicide); Paul R. Amato, *Parental Absence During Childhood and Depression In Later Life*, 32 *Soc. Q.* 543, 547 (1991) (risk of adult depression).

¹² See, e.g., *My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, found online at http://www.familyscholars.org/assets/Donor_FINAL.pdf (last visited July 18, 2011).

¹³ David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage are Indispensable of the Good of Children and Society*, (New York: The Free Press, 1996), p. 197.

¹⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁵ *Loving*, 388 U.S. at 12.



laws were ever enacted. But in making its ruling, the Supreme Court returned marriage in the United States to its original status at common law—no racial prejudice, but concretely the union of one man and one woman.¹⁶

Yet, those who hold a different view of marriage oftentimes cite *Loving* as somehow supportive of their arguments, overlooking the link between marriage and procreation discussed by the Supreme Court. But not even the Department of Justice, in its new refusal to defend Federal DOMA, cites the *Loving* case as somehow supportive of its new anti-marriage position.¹⁷

Advocates of same-sex marriage also routinely overlook the fact that, just five years after the *Loving* decision, in 1972, the Supreme Court dismissed an appeal from the Minnesota Supreme Court claiming that an alternate definition of marriage was somehow a fundamental right. In *Baker v. Nelson*,¹⁸ the Minnesota Supreme Court rejected claims for same-sex marriage and significantly held that “in commonsense and in constitutional sense, there is a clear distinction between marital restriction based merely upon race and one based upon the fundamental difference in sex.”¹⁹ The United States Supreme Court upheld this decision by the Minnesota Supreme Court which also emphasized the defining link between marriage and “the procreation and rearing of children,” and rejected a claim for same-sex marriage.²⁰ Not a single Justice of the United States Supreme Court found the constitutional claims for an alternate definition of marriage substantial enough even to warrant a review.

Since the *Baker* case, every appellate court in this country, both state and federal, that has addressed the validity of marriage as the union of one man and one woman under the United States Constitution, has upheld the institution as rationally related to the state’s interest in responsible procreation and child-rearing. And while some may argue that times have changed, they cannot credibly argue that humanity, as a gendered species, has changed. Men and women still compose the two great halves of humanity, men and women are still wonderfully and uniquely different, and men and women still play important and irreplaceable roles in the family. As stated by the Supreme Court, “[t]he truth is that the two

¹⁶ Francis J. Beckwith, *Interracial Marriage and Same-Sex Marriage: Why the Analogy Fails* (May 21, 2010), available at <http://www.thepublicdiscourse.com/2010/05/1324> (last visited July 18, 2011).

¹⁷ See February 23, 2011 letter of Attorney General Eric Holder to Speaker John Boehner (<http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> - last visited July 18, 2011) and the Justice Department’s brief of July 01, 2011 (<http://metroweekly.com/poliglot/DOJ-OppToBLAGMtD.pdf> - last visited July 18, 2011) filed in the Federal DOMA case of *Golinski v. OPM*, No. C 3:10-00257-JSW (N.D. Cal.).

¹⁸ *Baker v. Nelson*, 219 Minn. 310, 191 N.W.2d 185 (1971).

¹⁹ *Baker*, 219 Minn. at 315, 191 N.W.2d at 314.

²⁰ See *Baker v. Nelson*, 409 U.S. 810 (1972).



sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.”²¹ “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration”²²

Without question, the overwhelming majority of people *on both sides* of this debate are good and decent Americans, coming from all walks of life, all political parties, all races and creeds. But humanity remains unchanged—a collection of men and women. And because of the fundamental truth that children are the product of sexual relationships between men and women, and that men and women each bring something important and unique to the table of parenting, this government maintains a compelling interest in protecting and preserving the institution of marriage as the union of one man and one woman. Marriage between a man and a woman naturally builds families – mom, dad, and children – and gives hope that the next generations will carry that family into the future.

²¹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 133-34 (1994) (quoting *Ballard v. U.S.*, 329 U.S. 187, 193-194 (1946)).

²² *United States v. Virginia*, 518 U.S. 515, 533 (1996).