Commentary: The Supreme Court, same-sex marriage and you — or maybe a neighbor, relative or friend

By Rodger Skidmore
Contributing Writer

Whether you are for or against same-sex marriage, it is a really hot button for both this season and the next. It is a button that was pushed on March 26 and 27, but we will not hear the resulting screams of joy or despair until June. Same-sex marriage and a number of connected issues have now been argued before the U.S. Supreme Court. The first was California's Proposition 8, which is referenced as "Prop. 8." That state's supreme court had previously ruled that same-sex marriages were, under the state's constitution, legal. Prop. 8, passed by California voters in 2008, added a clause to the Constitution stating, "Only marriage between a man and a woman is valid or recognized in California."
Note: More than $20 million was contributed by Mormons — members of The Church of Latter-Day Saints — in support of Prop. 8, with additional funding by the Union of Orthodox Jewish Congregations of America, the Eastern Orthodox Church and a myriad of evangelical Christian organizations along with many words of support from the Roman Catholic Church. All of this religious organization money was donated to ensure the outcome of a religious law in our country where church and state are supposed to be separate.
In August 2010, a U.S. District Court volleyed back a ruling that Prop. 8 is unconstitutional, specifically relative to due process and equal protection clauses of the U.S. Constitution. The court's reasoning went along the lines that the Constitution says all people in the U.S. should be treated equally under the law; gays and lesbians are people; therefore, they should be treated equally — sort of like, what part of YES don't you understand?

Apparently that ruling did not satisfy those against same-sex marriage, and the controversy was bumped up to the U.S. Supreme Court for a final judicial decision.

The other issue up for review is the Defense of Marriage Act (DOMA): a federal law defining marriage as the legal union of one man and one woman for federal and interstate purposes. Now we know why Congress has not been passing meaningful legislation since 1996 (when DOMA was passed): It must be busy drafting laws defining the other 170,000-plus words in the Oxford English dictionary.

It should not have taken 17 years for DOMA to be challenged, and it might have been challenged earlier if the mayor of San Francisco had continued officiating at the marriages of same-sex partners — which were not illegal acts.

Prop. 8 was only one sentence-long. It indicated that marriage between two men or two women would not be valid or recognized in California. It did not state that such marriages could not be performed and thus be recognized in other states. This would have set up a situation where a marriage performed in California would not have been recognized there but would have been recognized in Massachusetts, for example.

Allowing that situation to go forward might have brought the states rights advocates into the mix (perhaps against their will), and DOMA might have been challenged back in 2008, right after Prop. 8 was passed.

Moving from then to now

Support of same-sex marriage has been growing over the years, state by state, partly because there does not seem to be any concrete evidence that marriages of gays and lesbians have harmed heterosexual couples. Just talking

about the subject in a reasonable way has helped as well. One such discussion took place on TV back in 2010 when, on Bill Moyers' *Journal*, Moyers spoke with lawyers Ted Olson and David Boies about their legal challenge to Prop. 8. They had opposed each other as the attorneys in *Bush v. Gore* before the Supreme Court when it heard that case following the disputed election of 2000, but they had joined forces on this new issue.

Their points, in line with their thinking on the due process and equal protection under the law clauses in the Constitution, all seem valid. People in committed relationships should have the right to visit their partners when those partners are in the hospital, but many current laws and regulations state that only relatives and spouses may do so. Similar restrictions are written in the form of thousands of laws across the country relative to the IRS, etc. However, all Olson and Boies' arguments were based upon *their* understanding of the law and *their* views of morality and of those who agreed with them — all very goody-goody and well meaning, but would these be strong enough to convenience Justices Samuel Alito, Anthony Kennedy, John Roberts, Antonin Scalia and Clarence Thomas? Coming in second in the Boston marathon is commendable but not quite so great in a case before the Supreme Court.

Instead of looking at the Constitution and the issue of right versus wrong, perhaps a more direct approach would be to look at the very basis of both Prop. 8 and DOMA: the definition of marriage — the key word being *definition* and, of course, what is being defined; not marriage, but who is being married — the man and the woman.

Once the words *Man* and *Woman* are defined, all else falls into place. Certainly the Constitution and morality are to be the building blocks for an argument before the Supreme Court, but the cement between them should be in keeping with the laws being challenged. Using this approach, I have

developed the following points. One can call this straight-line logic in a curvilinear world — taking a simple point and then extending it as far as one can while still remaining in context. One could also call it *wordsmithing*, but then, when one is defining things before the Supreme Court, that is what one does if one wishes to win.

Definitional aspects Of Proposition 8 and the Defense Of Marriage Act

For the state or any other governmental body to permit marriage between only one type of person and another is, simply put, to ban marriages between *people* with the definition of *people* being arbitrarily chosen by the deciding body. The initial question one might ask, therefore, is: How does this permitting and not permitting relate to the equal protection clause in the 14th Amendment to the U.S. Constitution?

If the state is to permit marriage only between one type of person and another, one must be able to accurately and definitively describe the types of persons that are being permitted to marry and those not being permitted to do so, in a fashion similar to defining *interstate commerce*.

Words connected with marriage that come to mind are *male*, *man*, *husband*, *female*, *woman* and *wife*.

If men are to only marry women, and women are to only marry men, one must define exactly what a man is and what a women is and how one is to tell them apart in order for the law to be enforced effectively.

The laws under review and any law crafted in the future on this subject must be workable. To that end one must create a workable set of definitions.

The framework for those definitions as outlined below is not meant to be disrespectful to the court or to any party attempting to resolve this controversy. It is structured in a way that illustrates the enormity of the problem. Taking a simple premise and extending that premise to its logical, or illogical, conclusion may show the validity of that premise or the lack thereof — sort of a “let the chips fall where they may” way of viewing the law.

Other ways of challenging a law, such as whether it is covered in the Constitution as that document originally was written or whether it is moral or fair may also be used, but, when push comes to shove, for any law to be enforced, one must know against whom it is being enforced and how to differentiate those people from the ones being “protected.”

The Definitions

1. The Pareto principle, also known as the 80-20 Rule, was developed by Joseph Juran in the late 1940s; it was named after the economist Vilfredo Pareto. Pareto observed that 80 percent of the land in Italy was owned by 20 percent of the people and that 20 percent of the pea pods in his garden contained 80 percent of the peas. The 80-20 Rule is a common rule of thumb in business for analyzing customers, product sales, etc. Perhaps this rule can be used to determine more exactly who is a male, who is a female, who all those other people are and how they all relate to each other and to the question at hand — who may marry whom. Since the states and churches recognize only two sexes, if a man is not a man, he (she?) must be a woman, and if a woman is not a woman she (he?) must be a man.

The International Olympic Committee has, for a number of years, checked the testosterone levels of athletes to see if men (usually from Communist Bloc countries) were

competing as women. This might seem to be a workable approach to setting up our definitions, as both men and women create testosterone within their bodies. However, because the level of testosterone varies as one ages, for a man to be recognized as a man and a women to be recognized as a women, one would have to determine what amount of testosterone is normal for a man and a woman at each year of life.

After having established these scientifically accurate norms, one could then test each marriage candidate and rank him or her relative to the age and the related applicable norm. In the example of a marriage candidate claiming to be a male, if the state was using the 80-20 Rule and the candidate was found to be deviating 10 percent or less from the median norm, that candidate could then be categorized as being a male and would be permitted to marry a woman.

Relative to Proposition 8, if a person in California claiming to be a man had a testosterone level below the acceptable level for a male, then he would be judged not to be a man and would not be allowed to marry a woman as a *woman* would not be allowed to marry a woman.

At the federal level, relative to DOMA, one of these “less than men” people should not be allowed to marry a woman, either. Is that not what “they” say, that allowing gays to marry would harm the institution of marriage? And by definition, that “less than a man” person must be a woman and therefore would be harming marriage.

Since those persons claiming to be males but who have testosterone levels greater than 10 percent above the norm for men are just as likely to be deviate as those with levels below the norm, then if gays are not to marry, it stands that these other kinds of people should not be allowed to marry either. However, having testosterone levels greater than the applicable norm for women would, in that separate test, make them men. This creates a kind of endless loop for

these people, which leaves them in a bit of a Catch-22, but that is a problem for another day.

2. As an aside, one could also ask the question, if one is talking about DOMA, it might be appropriate to ask, "Defending against what?" Some say in murder investigations that if one cannot find the body, it is hard to prove there was a crime. But how do you prove a crime if the crime never took place? What is the harm to a traditionally married couple if an untraditional couple marries? What is the harm to the "institution of marriage" (and how do we define that) if the definition of said institution is broadened? If the definition of marriage comes from the Christian Bible, can we, as a nation governed by the Constitution, let the Bible rule our secular society? If our definition comes from English law, which was derived from church law, can we, as a nation governed by the Constitution, let the church rule our secular society?

3. Many laws are based on absolutes: One is either dealing in interstate commerce or one is not. Based on objective (?) analysis of a given situation, a decision is made and the law is enforced. However, many situations cannot be defined based upon absolutes. Let us use colors as an example — specifically blue and yellow.

Utilizing a spectrometer, one may analyze the wavelength of a given item and determine whether it is blue or yellow. And in a fundamentalist world of absolutes, that would be it. The item is blue or yellow; the person is a man or a woman. Period.

But we do not live in a world of absolutes. In between blue and yellow there is green. Why call it *green* simply because it is midway between blue and yellow? And what about chartreuse? Is apple green the same for Benjamin Moore paints as it is for Sherwin Williams paints? According to the website *FindTheData*, Sherwin Williams carries a paint called *Witty Green*, which is 97 percent similar to the color of

the *Granny Smith* crayon produced by Crayola. Pantone's color No. 358 is a 96 percent match. Is *Witty Green* more *Granny Smith* than Pantone No. 358? Yes, but does that make Pantone No. 358 not a *Granny Smith* color? And these matches are based on an absolute corporate decision as to what color a Granny Smith apple is — or was, back in 1993 when Crayola executives decided what color they thought a Granny Smith apple was. But nature decides the color for a Granny Smith apple, not a corporation and not a church and not a state. And nature decides differently depending upon the age of the tree, the makeup of the soil, the amount of water and sun supplied, the temperature of the air and the way the wind blows.

Perhaps, for each person, the wind blows differently. Each and every gradation of color between absolute blue and absolute yellow does not have a name. And some have more than one name. And some colors between blue and yellow contain bit of red as well. So who is a man and who is a woman? Perhaps, like colors between blue and yellow, there are many sexes between male and female. We know many of their names, but perhaps there are others as well. One fact is certain: All are people and all are human and should be treated as such.

4. Genitalia are just outward manifestations of sexuality, like broader noses or kinky hair *may* be indicators for a person being an African American. But what of the offspring of an interracial couple — is the child black or white? If the child has mostly Caucasian traits, does this give him or her the "right" to pass as "white"? If one of those children is raised in an African American environment, is she/he to be considered "black"? Does the child have the right to choose to be white if 95 percent of the racial indicators are white? If so, what about 85 percent — or 83 percent? If the child has 95 percent of the white indicators but lives with African

Americans, is he/she to be sanctioned or commended if he/she wishes to live as a white or as a black?
5. When a zygote first forms, a doctor cannot tell if it is a male or a female, as the zygote has not yet become either male or female. If a doctor does not know the sex of this being, how is the state to know? Labioscrotal folds, which are to become the sex organs, do not even develop until the end of the seventh week. Currently, the state makes its decision as to a person's sex based upon what? "Observable evidence?" Does the person have a penis or a vagina?
But, as we now know, having a sex organ of a particular type is just one way of evidencing one's sexuality. As there are many other ways, one should be very careful in choosing one over another or over panoply of others. The study and practice of eugenics in Germany proved the danger of that.
6. The State of Arizona is debating a law (already passed out of committee) that would require people to use the public restroom affiliated with their birth gender. It would be a misdemeanor if a person were to use a restroom or locker room associated with a gender other than what is on his or her birth certificate. That means that if a person who had a vagina at birth has undergone a transgender modification, and now has a penis, goes into the men's restroom to urinate, he would be arrested and charged with a crime.
7. Religious fundamentalists say we have souls and are fully human at conception (when the zygote is formed). But we know from scientific observation that the zygote/embryo/fetus/being/baby/child/person is just beginning to be formed. The person that is a zygote in the beginning will become male and female later based upon many factors, including outside influences (heat, chemical, acid versus alkaline, hormonal reactions, etc.) Turtle embryos, as they move towards becoming hatchlings,

become male or female depending upon the heat of the sand in which they were buried.
8. The further development of the labioscrotal fold into definable sex organs may be the first indicator of a being's sex, but as the being develops into full personhood, other indicators develop as well.
If outside influences determine sexuality (like the heat of the sand in which a turtle egg is buried) then is a male soldier who has had his genitalia blown off by an IED a woman, and is a woman who uses a permanently implanted IUD and cannot conceive a man? More to the point: If a person is born as a hermaphrodite with more female than male sex characteristics and the parents ask the doctor to transform the child into a man, is this person really a man even when that person later decides "she" is a woman? Or vice versa?
9. Looking step by step at the development of genitalia, when the fetus is in the womb, one can see, at early stages, that what becomes the head of the penis could have become the clitoris; that which becomes the scrotum could have become the labia majora; and that which becomes the testes could just as well have become the ovaries. And for some people, they go one way with some of the genitalia and the other way for the rest. As the saying goes, "Who's to say?"
10. The breasts of men and women *appear* to be the same all the way to puberty. Then, with the outside physical influence of hormones, women's breasts are enlarged and develop other characteristics as well. Let us say that women may marry in most states at the age of 18. However, in some states, if not all, it is not just the chronological age of 16 or 18 that governs the right to marry, it is also the mental age. If, for some physical reason, a woman has not developed mentally beyond the age of, say, 10 she may not marry. Does this mean a woman without enlarged breasts is too young, physically, to marry as well? If enlarged breasts are an indicator of the right for a woman to marry a man, may a

man with enlarged breasts marry another man without enlarged breasts?
11. Homosexuals have been with us throughout history. According to Darwin's Theory of Evolution, traits that aid in the survival of the species are more apt to be passed on to succeeding generations — longer beaks on birds to sip nectar, etc. Generally speaking, gays and lesbians do not procreate and so do not pass on their genes. This might mean that the world was predominantly homosexual in the beginning. Think about Adam and Eve having only Cain and Abel (according to the Bible) as children back when the world began, then evolving to maybe just 30 percent of people being homosexuals back in ancient Greece (you have heard all the stories); and finally to only about 8 to 10 percent today. This would mean that if you believe in Darwin's Theory of Evolution, over time the homosexual trait has been losing out and may soon disappear. Or it could simply mean that being homosexual, heterosexual or bisexual is kind of like being a blonde, brunette or redhead — no big deal in the grand scheme of things, just part of the natural order ordained by our Creator.
12. What are the differences between black/white indicators and male/female manifestations? If we interchange the terms, *indicators* and *manifestations*, is there a difference? If we no longer decide who should be a slave and who should be free based upon color but decide they all should be free because they are all people, should we not decide who shall marry based upon their being people rather than upon some arbitrary definitions of who is a man and who is a woman?
13. What about less outwardly observable physical manifestations? Studies have shown that the corpus callosum, which links the left and right sides of the brain, is thicker in women than in men. Some say this is the source of woman's intuition, one side of the brain talking to the other — in effect, one woman talking to another and gaining a

consensus. Studies of autopsies done on gay men show their corpus callosums are thicker than the average male's as well. Does this mean that gays are more feminine than other men? Does this move them far enough on the 80-20 scale? Simply put, does being more feminine qualify as being feminine? There are no known studies indicating that lesbians have a thinner corpus callosum than the average woman or that bisexual or transgender people have a corpus callosum that fluctuates in thickness during their lives.
Does this mean that very gay men, being more feminine than the average male, may marry less gay men but that very gay men may not marry other very gay men? Does this mean that lesbians may marry other lesbians sometime in the future, but only if future studies bear out that their corpus callosums really are thinner?
Doing autopsies on men or women before they marry is not being advocated. Is the alternative to autopsies state-mandated CAT scans to show if *men* are really *men*, etc.?
14. Another, less observable, physical manifestation with occasional outward manifestations is, as mentioned before, testosterone. "Boys" with low testosterone are sometimes called sissies while some girls, perhaps with high testosterone levels (or low estrogen) are called tomboys. It has been shown that men and women have cycles during which their levels of testosterone and estrogen vary. Does this mean that men and women with varying levels of testosterone may marry only during certain times of the month? Or, based on state option, may only consummate (or re-consummate) their marriages based on phases of the moon? If testosterone is a male indicator and estrogen an indicator for females, then should each state administer testosterone and estrogen tests to determine who should marry? Would the marriages only be valid during the winter months?

15. Women are not called sissies but some men are — sometimes. The question is, who is doing the calling? And when? Why? Now we seem to label everything, but relationships began before labeling, even before there was language. Some say that 8 to 10 percent of humans are gay or lesbians, with an additional but lesser percentage being bi-sexual or transgender. Since the Bible and Torah make reference to homosexuality one must consider that this condition has always been with us. If it has always been with us, it is therefore part of the natural order of things.
16. What is the fate of the androgynous men and women of America? For humans, an androgynous person is who does not fit neatly into the typical masculine and feminine gender roles of society. They may also use the term *ambigender* or *polygender* to describe themselves. Many androgynes identify as being mentally "between" woman and man, or as entirely genderless. They may identify as non-gendered, gender neutral, a-gendered, between genders, genderqueer, multi-gendered, intergendered, pangender or gender fluid. Does this mean that androgynous men and women may not marry or may only marry each other; that some may marry those like themselves but others may not; or that they may marry only those not like themselves?
17. Many of those who bear the transgender label are fully “male” or “female” in their current status but have been diagnosed as having Gender Dysphoria. To describe themselves, they use some of the same terms as those who are androgynous use. They also use terms such as non-binary, neutrois and self-coined. Can we really trust the state senators and representatives of Arizona to know the difference between the two — androgyne and transgender? And if they do not know the difference, how can they make laws controlling those people’s lives?
18. One may divide America into those who are for the rights of the LGBT community to marry as they choose, those who

are against such marriage and those who do not care. If one does not care if they marry, then one is not against such marriage.

If you survey those who are for the right to marry or who do not care, you will find that some are religious and some are not. If you survey those who are against it, you will find that almost all are strongly religious. This indicates that the argument against the LGBT community having the same rights as others may very well be one of religious persecution. Could one then classify actions against LGBTs marrying as hate-crime related?

19. The Bem Sex-Role Inventory, created by Sandra Bem, is a measure of masculinity-femininity and assesses how people identify themselves psychologically. This test was created specifically to be a test; thus, it might be an ideal way for each state to determine the sexuality of potential marriage partners. Forty masculine and feminine personality traits are utilized to determine how a person feels about himself or herself.

Since this test is based on self review and is, to some degree, subjective, each state might want to change some of the questions so as to be totally objective and more in line with how that state views and values masculinity versus femininity. Because of states' rights, Texas might decide that a positive response to "I like to play with guns" is a gender-neutral statement, while California might consider it to be a more aggressive masculine response. The key, of course, is selective objectivity by each individual state. But then does having states deciding which characteristics define who is a man and who is a woman not seem capricious and arbitrary?

20. Earlier, I discussed the age at which one could marry. Chronological, physical and mental age all came into play in deciding how old a woman has to be to marry. A female by the age of 16 or 18 would normally be fully developed

sexually. She would have had her menses and thus be able to bear a child — a true woman.
A male of the same age would also be fully developed sexually, hirsute and able to ejaculate — a real man.
But what about later in life. The woman becomes barren and grows a moustache while the man's face becomes hairless and his breasts enlarge. Are they not still woman and man even though their physical traits have become reversed? Or, because they do not have the manifestations that one expects of a normal woman and man, can they no longer marry? Or can a woman with a moustache only marry a man with smooth cheeks — seemingly a man marrying a woman?
As all of this may be too complex to sort out, perhaps simply setting an upper age relative to marriage will be the best way to deal with the situation. Just as the younger marrying ages in different states — 16 to 18 —may seem a bit arbitrary, so it will probably be with the older ages. Perhaps the range will be 55 to 60.
One remaining problem would be, what would they be allowed to do or not do at those later ages? Will the state permit marriage only if there is role reversal or will the state realize that, at a later age, it does not really matter who does what to whom as long as they both are willing to put up with it.
21. In addition to the sex act, there are other acts married partners perform. For example, the wife (and not the husband) vacuums the house, while the husband (and not the wife) drives the car. Is such a statement as true today as it was in 1930 or 1955? And if not, what are the implications?
The marriage vows of the past (perhaps they are part of what we are defending when we talk about The Defense of Marriage Act) seemed to define who the participants were. The husband would honor and "protect" (hunter/gatherer type stuff) and the wife would "obey" as in "sweep the floor and slop the hogs."

However, that is no longer the case; now each is admonished to “cherish” the other. This change in the marriage vows has made the wife and husband more equal. And if they are more equal, then they are more like each other, perhaps not only in role-play but also in sexually oriented tasks. Does this mean that the church-sanctioned changes in definition equate a silent condoning of same-sex marriage — as who could be more equal in a marriage than a man married to a man or a woman married to a woman?

22. One of the reasons that fundamentalists of all persuasions are against single-sex marriage is because of selective writings in the Torah (Tanakh)/Bible/Koran. However, as not all religions or free thinkers subscribe to those beliefs, the state may not take up the beliefs of one religious group over another. One group that would not permit single-sex cohabitation (let alone marriage) was the Victorians in England. Remember, many of them would have sex with their wives only through a hole in a sheet so as not to “dirty” themselves.

The result of all this prudishness was that, with single-sex cohabitation and marriage being forbidden, homosexuals became furtive. An established homosexual relationship would be too obvious, so one took what one could get, when and where one could get it — if not in public, then in back alleys. The Religious Right now says that gays and lesbians, because many have been seen to seek multiple partners (which is not illegal for “straight” people), lack “family values.” One must respond that these family values were not discarded; they were stolen under English and American law in years past. To be denied the right to reclaim the very thing that they are accused of not wanting seems to be a bit odd, legally speaking.

23. From the time before our country was founded until the 14th Amendment was passed, there was slavery, and as with the current problem of coming up with a good legal definition

for man and woman there was a problem with who could be slaves. One could own African Americans but not Caucasians. Caucasians could, by mutual contract, become indentured servants — kind of like being a human timeshare — but that is not germane to the issue at hand. What is important is that we needed to be able to define a Negro to own one.

Someone who had just been brought over from Africa was considered to be 100 percent black and therefore African American. An African American who had had sex with a Caucasian would have had a “colored” child (the definition *biracial* had not been coined at that time). Actually, the African American would not have had sex with a Caucasian, the Caucasian would have had sex with an African American, but again, that is not the important point. What was important was that we began to have a need for definition.

According to a law passed in 1705 by the Virginia Assembly (or legislature, which was one of only two governing bodies in the Colonies to make legal definitions in this matter), that “colored” child would have been called a Mulatto, as would its children and its children’s children, and they would have been slaves.

In 1785 Virginia changed the definition of a Mulatto to be a person with one-half to one-quarter African American blood. This meant the day after that law was passed, someone with only one-eighth African American blood could be considered a full-fledged white person.

However, other states felt the need for more specific definitions, such as Quadroon for one-quarter, Octoroon for one-eighth and Quintroon for one-sixteenth African American blood. In 1910, Virginia changed the definition of Mulatto not just back to one-eighth but to *one-sixteenth* African American blood. And in 1924 and 1930, the lawmakers

decided that any African American blood made a person a Mulatto.

If those Southerners knew their world history, they would have realized that their action would have made all Latinos potential Mulattos, as the Muslims who conquered most of Spain (and parts of southern France) were a mixture of Arabs and Turks who had picked up North African Moors as warriors, along with their African genes, on the way to the Iberian peninsula. There, as most conquerors did, they engaged in a lot of begetting and spread those African genes far and wide. Actually, to be completely accurate (which we want our laws to be), since we now know that all *Homo sapiens* came from Africa in successive waves, then everyone in the world has African ancestry. Therefore, by definition courtesy of the State of Virginia, everyone who lived in America from 1492 until 1865 should be referred to as a slave. Some living here in 1865 and 1910 would be Mulatto and some Caucasian, and all those here between 1924 and perhaps1950, when the new Code of Virginia was passed, should be called Mulattos — and would not have been allowed to testify against a white person (of which there would be none) in a court of law.

What do all these definitions mean? Simply that it is really hard to define something such as race, sex and ethnic origin. And if you cannot define something, how do you control it, ban it or promote it?

24. If single-sex marriage had been allowed in America in the past, there would have been many more monogamous gay couples. With fewer single gay males, some of whom had to mask their normal monogamous nature, there would have been less rampant promiscuity and therefore fewer cases of AIDS when that disease came upon the scene. Thousands of Americans would not have been traumatized if gays had not been forced into a lifestyle that they wished to leave.

And not just gays and drug addicts have contracted AIDS; it spread to the straight community as well. Had single-sex marriage been in place, it is reasonable to say it would have saved many lives all across this land.

25. If we say that gays may not marry gays and that lesbians may not marry lesbians and if gays are only attracted to gays and lesbians to lesbians, then are we saying that, in effect, they may not marry at all? And if states can say that, should they then, by logical extension, be able to say that Lutherans cannot marry Mormons, that Irish may not marry Italians and that African Americans may not marry Caucasians? Or have we already fought those battles?

26. Did homosexuals decide to become homosexuals or are they now simply deciding to recognize that their homosexuality is part of the natural order of things? And if they can make that decision, can we not also?

The summary

All of the above points have been spelled out to deal with a real problem: how to define exactly who men and women are, so as to justify, or not justify, denying the rights of marriage to entire segments of our population. If some of these approaches, upon analysis, prove to be unworkable, it might be because the terms being defined are overly vague. Further, the above solutions, when based upon logical extensions of illogical assumptions, may also be unworkable. If that is the case, are the laws then enforceable or unenforceable? Previous laws have been overturned because their wording was vague, unworkable, unenforceable, overly broad or judicially annoying. The above, written in a layman's terms, needed to be translated into an even more torturous "legalese" before being interwoven with the other legal and moral arguments for

presentation to the Supreme Court. Based upon the combination of the two approaches, there might be a strong enough argument that the ruling overturning Proposition 8 will be upheld and that The Defense of Marriage Act will be overturned.

These points were freely submitted to the lead attorneys arguing against the constitutionality of Proposition 8 — Theodore Olson of Gibson, Dunn & Crutcher LLP and David Boies of Boies, Schiller & Flexner LLP.

The future

The same-sex marriage cases — Proposition 8 and DOMA — have now been argued before the U.S. Supreme Court. Only one of the above points was even slightly referenced. The main argument brought forward for maintaining Proposition 8, by Charles Cooper — attorney for the petitioners — was that it is in the interest of the state for married couples to procreate and that gay and lesbian couples do not do so.

Justice Elena Kagan asked if it would be constitutional to deny marriage licenses to couples over the age of 55 because they are not able to procreate. Cooper admitted that it would not be.

Olson argued against Proposition 8 because it stigmatizes a particular class of Californians, does not treat them fairly under the equal protection and due process clauses of the California constitution and abridges their fundamental rights. Such arguments are not apt to sway Justices Alito, Roberts, Scalia or Thomas.

A reading of the 68-page transcript of the oral arguments relative to Proposition 8 shows why eight of the Supreme Court justices deserve to be on the bench (as usual, Justice Thomas remained silent). They were far sharper in their

questioning than any of the lawyers were in their arguments or responses for or against Proposition 8.

The official transcript in the DOMA case was even longer, 113 pages, and has far more interesting give-and-take between the lawyers for the two sides. Basically, it came down to a discussion as to whether the federal law serves any legitimate federal interest or whether Congress simply enacted a law because “Congress decided to reflect an honor of collective moral judgment and to express moral disapproval of homosexuality” — a quote from the House Report published after the U.S. House of Representatives passed DOMA; it was mentioned during the hearing by Justice Kagan.

During the second day of hearings, as on the first, there was a lot of “Oh! Er! What I meant was …” by the lawyers on both sides when questioned by the justices. The interesting part of that day’s discussions was there are more than 1,100 federal laws and regulations that rely on the definition of who is recognized, for federal purposes, as being married, and who is not.

Arguments against DOMA were relative to the applicability of federal tax code and whether all of these 1,100 laws are being fairly applied. Those supporting DOMA seemed to be of the opinion that that law was not discriminatory and was passed by Congress simply to be helpful. They did not get much traction with that argument.

Of course these two days were the “show trial” part of the proceedings. Much more meat is in the briefs provided by both sides, and these have not been released; they are to be reviewed by the justices over the next few months.

The briefs make up hundreds and hundreds of pages supporting the testimony given during the two days before the court.

The question is, have those who argued for same-sex marriage relied on their moral beliefs — fairness and due

process — which will settle the issue on a national basis, or have they loaded their briefs with enough ammunition that could overturn Proposition 8 and DOMA on technical grounds?

If one cannot define whom a law is for or against, it is vague; if a law says a marriage is between a man and a woman but cannot define who is a man or a woman, it is vague. A law can be struck down as being overly vague, because it is unenforceable in a court of law.

The justices' decisions on these cases will not be rendered until late June. A straightforward decision on a law's constitutionality is always desired, and a more narrow decision based on the wording of a law — is it too vague to be enforced? — is less desired. But the possibility of winning in one of two ways brings up a question: Is it better to win on moral arguments by a 5-4 vote or on a technicality by 9-0 decision?

Brown v. Board of Education was decided with a 9-0 vote, and it became the law of the land. It is hard to argue against a shutout no matter what you feel in your gut. And because the justices do not just render a decision — they provide a majority opinion which outlines not just the technical reasons for their ruling but the moral, or concurring ones, as well — such a decision would be very strong indeed.

The probable outcome for DOMA is that it will fall, but the "talking heads" have not made a decision on Proposition 8. Of course, it is not their decision to make, but then it might not be the Supreme Court's either — the justices may kick it on down the road by saying it is the individual decision of each state. If they do, Proposition 8 will fall in California, but that ruling would not be applicable elsewhere. Perhaps, the above points will then be used as supporting arguments in state supreme courts around the U.S. in the coming years.