

SEXUALITY LAW

SECOND EDITION

2015 SUPPLEMENT

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INTRODUCTION TO 2015 SUPPLEMENT

This supplement was prepared during June/July 2015, in the wake of the Supreme Court's historic ruling in *Obergefell v. Hodges* (June 26, 2015), holding that same-sex couples have a constitutional right to marry and to have the states recognize their marriages under the 14th Amendment. The main text of the current edition of the casebook was closed to new cases at the end of May 2009, so this supplement updates the materials with more than six years' worth of new cases, legislation and other developments. In some cases, decisions in the bound textbook were reversed by higher courts, with reversals noted and (usually) the newer decisions found in this supplement. Due to the sheer volume of new developments during this time, the Supplement is more than half as long as the casebook!

This is a field of law in which rapid changes are occurring. This is especially true in the area of relationship recognition. In sum, from the summer of 2012 to the summer of 2013 the number of states authorizing same-sex marriages doubled, and the portion of the population of the United States living in marriage equality jurisdictions jumped to about 30%. By the summer of 2014, the portion of the population living in marriage equality jurisdictions had advanced to about 44%, and the courts had been flooded with new marriage equality lawsuits in reaction to the Supreme Court's June 26, 2013, ruling in *U.S. v. Windsor* striking down Section 3 of the federal Defense of Marriage Act. Subsequent rulings by lower federal and state courts had expanded the number of states with marriage equality to 36, constituting about 70% of the nation's population, by the time the Supreme Court heard oral argument in *Obergefell v. Hodges* on April 28, 2015. Because there had been so much change in this area, rather than merely updating Chapter Four (Recognition of Same-Sex Relationships), we had totally revised that chapter for the 2014 Supplement, and it is now updated further to reflect the culmination of these efforts, including recounting the history of marriage equality litigation leading to *Obergefell*. Appendix A is a chronology of the marriage equality rulings from *Windsor* to *Obergefell*.

We have placed edited versions of the *Windsor* and *Obergefell* decisions in the supplement for Chapter 1, as they now form a quartet with *Romer v. Evans* and *Lawrence v. Texas* in providing the constitutional framework for analyzing gay rights claims. Professors might decide alternatively to take these cases up in connection with the discussion of the Defense of Marriage Act in Chapter 4 (casebook page 256 or Supplement page 150). After the *Windsor* decision was announced, legal scholars and lower court judges professed some bafflement as to the doctrinal basis of the decision (as did Justice Scalia in his dissent). Some might argue that *Windsor* did not result in any doctrinal change, but the 9th Circuit thought that it effectively mandated heightened scrutiny for sexual orientation discrimination claims, in an opinion we have included in the supplement for Chapter 2 (*SmithKline Beecham v. Abbott Laboratories*), and *Windsor* was cited in a nearly unbroken string of federal district court rulings striking down state bans on same-sex marriage, some on due process grounds and some on equal protection grounds, over the ensuing two years.

On the same date that it decided *Windsor*, the Court found in *Hollingsworth v. Perry* that the proponents of California Proposition 8 (which enacted a constitutional amendment against same-sex marriages, see casebook at 278-279), lacked standing to appeal the trial court's ruling discussed in the 9th Circuit's opinion in *Perry v. Brown*, which had declared Proposition 8 to

violate the 14th Amendment. The Court thus found that neither it nor the 9th Circuit had jurisdiction to decide the appeal, and the trial court's decision went into effect as a non-appealed decision on June 28, 2013, at which time the two plaintiff couples in the case were married in San Francisco and Los Angeles. Subsequent attempts by its proponents to limit the scope of the ruling were unavailing. We have not included the Supreme Court's *Perry* opinion because the Court said nothing on the merits of the underlying constitutional claim. Chief Justice Roberts may have had to refrain from saying anything on the merits to get five votes for his opinion, since his majority included justices who had voted to strike down Section 3 of DOMA and who subsequently joined Justice Anthony Kennedy's opinion for the Court in *Obergefell* and who would not be likely to "sign on" to an opinion that disagreed with the district court's ruling on the merits. Similarly, Justice Kennedy's dissent in *Perry* refrained from discussing the merits of the constitutional claim.

Our focus in preparing annual supplements has been on the "big changes" that have occurred since 2009 because those are the changes that can affect how law teachers present the material in this book. At the same time, we recognize that many of these changes are not "final" and so we have not included every lower or mid-level appellate court opinion on issues that are still in litigation. It is not our intention to provide a treatise on the current state of the substantive law. Thus, where possible we have kept the great cases from the 2009 edition that we believe produce the best teaching material and we have added new material in the notes that will enable teachers and students to view these cases in the context of these changing times. With the expectation that the Supreme Court would be deciding whether same-sex couples have a 14th Amendment right to marry during its 2014-15 Term, we decided to delay producing a third edition of the casebook, since such a ruling might prompt significantly rethinking about the organization of the book depending how the Court treated the due process and equal protection issues. We thus hope to produce a third edition during 2015 to be published in time for Fall 2016 courses.

CHAPTER ONE – AN INTRODUCTION

Page 59 – After *Lawrence v. Texas*, add the following:

A decade after the Court decided *Lawrence v. Texas*, it was confronted with the question whether Congress could adopt a statute that prohibited the federal government from recognizing same-sex marriages contracted under state law. The statute, the Defense of Marriage Act (DOMA), was passed in 1996, when no states were allowing same-sex couples to marry but litigation in Hawaii appeared likely to result in same-sex marriages in that state. In the event, same-sex marriages did not become available in the United States until May 17, 2004, when a 2003 ruling by the Massachusetts Supreme Judicial Court went into effect. Thus, from the time of its enactment until then, there were no same-sex couples married in the United States (and just a handful married the previous year in Canada) who could have standing to challenge DOMA’s prohibition based on a refusal by the federal government to recognize the marriage. Soon after same-sex couples began marrying, challenges arose in many places as federal rights were being denied, with the following result:

UNITED STATES v. WINDSOR,
133 S. Ct. 2675
United States Supreme Court (2013)

Justice KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, e.g., *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the

word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

1 U.S.C. § 7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO-04-353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U.S.C. § 2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s § 3. Noting that “the Department has previously defended DOMA against ... challenges involving legally married same-sex couples,” the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although “the President ... instructed the Department not to defend the statute in Windsor,” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the

United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.”

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party.

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

In granting certiorari on the question of the constitutionality of § 3 of DOMA, the Court requested argument on two additional questions: whether the United States’ agreement with Windsor’s legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as amicus curiae to argue the position that the Court lacks jurisdiction to hear the dispute. She has ably discharged her duties. [In a Part II of the opinion, omitted here, the Court held that it did have jurisdiction to decide the merits, finding that the government’s continued enforcement of Section 3 meant that there was a real case and controversy before the Court. The Court did not rule on the standing of BLAG to appeal.]

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary

and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10-a, 10-b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to preempt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta*, 133 S.Ct. 1943 (2013); see also *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen’s marriage is valid and proper for state-law purposes. 8 U.S.C. § 1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, common-law marriages also should be recognized, regardless of any particular State’s view on these relationships. 42 U.S.C. § 1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”). The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” *Haddock v. Haddock*, 201 U.S. 562, 575 (1906); see also *In re Burrus*, 136 U.S. 586, 593-594 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”). Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations.

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare *Vt. Stat. Ann.*, Tit. 18, § 5142 (2012), with *N.H.Rev.Stat. Ann.* § 457:4 (West Supp.2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful — such as Iowa and Washington, see *Iowa Code* § 595.19 (2009); *Wash. Rev.Code* § 26.04.020 2692*2692 (2012) — prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer*

v. Evans, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

The Federal Government uses this state-defined class for the opposite purpose — to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding “to the initiative of those who [sought] a voice in shaping the destiny of their own times.” *Bond v. United States*, 131 S.Ct. 2355, 2359 (2011). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973). In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. *Supra*, at 2692 (quoting *Romer, supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong

evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H.R.Rep. No. 104-664, pp. 12-13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." Massachusetts, 682 F.3d, at 12-13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this

dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U.S.C. §§ 8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as Amici Curiae 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] ... a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U.S.C. § 115(a)(1)(A), with the intent to influence or retaliate against that official, § 115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate family," § 115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See 26 U.S.C. § 106; Treas. Reg. § 1.106-1, 26 CFR § 1.106-1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at <http://www.ssa.gov/pubs/EN-05-10084.pdf>.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See 20 U.S.C. § 1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. 18 U.S.C. § 208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-

value gifts from certain sources, see 2 U.S.C. § 31-2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U.S.C.App. §§ 102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U.S., at 499-500; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed. It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I

A

The Court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete “Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

The answer lies at the heart of the jurisdictional portion of today’s opinion, where a single sentence lays bare the majority’s vision of our role. The Court says that we have the power to decide this case because if we did not, then our “primary role in determining the constitutionality of a law” (at least one that “has inflicted real injury on a plaintiff”) would “become only secondary to the President’s.” But wait, the reader wonders — Windsor won below, and so cured her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we “undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.”

That is jaw-dropping. It is an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role. *** ... I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

There are many remarkable things about the majority’s merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations — initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” ... But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. ... What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in

federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can that mean?"—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." ... The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe*, 347 U.S. 497 (1954) ... and *Romer v. Evans*, 517 U.S. 620 (1996)—all of which are equal-protection cases. And those cases are the only authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence v. Texas*, 539 U.S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below ... In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States v. Virginia*, 518 U.S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not apply anything that resembles that deferential framework. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (a classification " 'must be upheld ... if there is any reasonably conceivable state of facts' " that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," ... that it violates "basic due process" principles, ... and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment," ... The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "ordered liberty."

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe.

The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare ... desire to harm" couples in same-sex marriages. ... It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Or at least it was a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare ... desire to harm a politically unpopular group." ... The majority [affirmatively conceals] from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. ... I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as they see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, e.g., Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 *Stan. L.Rev.* 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." Ala.Code § 30-1-19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, which State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). DOMA avoided all of this uncertainty by specifying which marriages

would be recognized for federal purposes. That is a classic purpose for a definitional provision. Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only opposite-sex spouses — those being the only sort that were recognized in any State at the time of DOMA’s passage. When it became clear that changes in state law might one day alter that balance, DOMA’s definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, e.g., Don’t Ask, Don’t Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers — or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with malice — with the “purpose” ... “to disparage and to injure” same-sex couples. It says that the motivation for DOMA was to “demean,” to “impose inequality,” to “impose ... a stigma,” to deny people “equal dignity,” to brand gay people as “unworthy,” and to “humiliat[e]” their children ...

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with the purpose to “disparage,” “injure,” “degrade,” “demean,” and “humiliate” our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence — indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race. . . .

The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State.” ... I have heard such “bald, unreasoned disclaimer[s]” before. *Lawrence*, 539 U.S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” ... Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” ... — with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here — when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex

marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with. . . .

... How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion:

~~"DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage, from *ante* ...

~~"[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*,...."

Or this, from *ante*, —which does not even require alteration, except as to the invented number:

"And it humiliates ~~tens~~ of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. ... As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe. ...

NOTES and COMMENTS

1. In his opinions for the Court in *Romer*, *Lawrence* and *Windsor*, Justice Kennedy did not use the customary "textbook" constitutional law terminology to analyze the claims before the Court, leaving commentators and lower courts to debate the following questions extensively: Were *Romer*, *Lawrence* and *Windsor* "rational basis" cases, in which the challenged enactment was presumed constitutional and the burden was on the challenger to show that there was no rational justification for it? Or, were *Romer*, *Lawrence* and *Windsor* "heightened scrutiny" cases, in which the challenged enactment was presumed constitutional and the burden was on the government to prove that it substantially

advanced an important public policy? Would any of these cases be considered “strict scrutiny” cases? Could Windsor be considered a “strict scrutiny” case on the theory that it concerned discrimination with respect to marriage, and the Court’s precedents have treated the right to marry as a “fundamental” right? If the right to marry is a fundamental right, do those who are married also have a fundamental right to have their state-law marriages recognized by the federal government when it premises rights, benefits, entitlements and responsibilities on marital status? If the right to marry is fundamental, is the right to stay married when moving across state lines also fundamental? If so, would states have an obligation under the 14th Amendment to treat same-sex marriages the same as different-sex marriages in applying their rules for recognizing foreign marriages?

2. In *Romer*, Justice Kennedy suggested that Colorado Amendment 2 “defied” traditional equal protection analysis. How exactly did he analyze it for constitutional purposes? Justice Kennedy never discussed the factors that the Court traditionally has used to determine the level of scrutiny for judicial review of a discriminatory state enactment. Does that mean the Court made no decision about the appropriate level of scrutiny in that case?
3. In *Lawrence*, Justice Kennedy premised his decision on “liberty” protected by the Due Process Clause of the 14th Amendment. In the past, the Court has used the “rational basis” test to evaluate the constitutionality of a statute attacked as an impairment of liberty unless a fundamental interest is at stake, in which case the Court subjects the challenge statute to “strict scrutiny.” Which approach did Kennedy use in *Lawrence*, and why?
4. In *Windsor*, Justice Kennedy referred in the course of his opinion to federalism, to liberty protected as an aspect of due process, and to equal protection. What role did each of these concepts play in determining whether Section 3 of DOMA withstood constitutional scrutiny? Can the opinion be characterized as a “federalism” decision, as Chief Justice Robert argued in his separate dissent (not included here)? Is it essentially a due process decision, with an equality gloss, or is it primarily an equality decision, with due process being mentioned because the case arises under the 5th Amendment rather than the 14th Amendment?
5. In *Windsor*, the primary justification offered for DOMA by BLAG (this was not one of the justifications mentioned in the legislative history) was “uniformity” – the idea that Congress could rationally want there to be a uniform nationwide definition of marriage for purposes of federal law. But there are two kinds of uniformity. The uniformity identified by DOMA *supporters* was “uniform treatment of all same-sex couples regardless of what state they live in” by considering none of them to be married. The uniformity identified by DOMA *opponents* was “uniform treatment of all married couples who are recognized as such within a single state boundary” regardless of where they were married. Did Justice Kennedy address the first type of uniformity as a rational justification for the enactment of DOMA?

6. Justice Scalia was correct that *Windsor* can be cited as support for finding state bans on same-sex marriage unconstitutional under the 14th amendment. He had made a similar forecast in his dissenting opinion in *Lawrence*, and just months later the Massachusetts Supreme Judicial Court cited *Lawrence* prominently in ruling that same-sex couples had a state constitutional right to marry. As federal and state courts ruled in favor of marriage equality claims beginning in the summer of 2013 and continuing through the spring of 2015, they usually cited *Windsor* or alluded to the reasoning of Justice Kennedy's opinion, and frequently cited Justice Scalia's dissents in both *Lawrence* and *Windsor*. Thinking back prior to those developments, could you identify state interests separate and apart from federal interests that might support the non-recognition of same-sex marriage at the state level? The judges who cited Scalia's dissents were signaling potential critics that their opinions were consistent with Justice Scalia's analysis of the majority opinions in those cases.
7. There were separate dissenting opinions in *Windsor* by Chief Justice Roberts and Justice Alito that we have omitted from the edited version of the case. Chief Justice Roberts agreed with Justice Scalia that the Court lacked jurisdiction to decide the case, and that Section 3 should be upheld on the merits, but differed with him on the characterization of the majority opinion, suggesting that *Windsor* was "a federalism case." Justice Alito, by contrast, asserted that BLAG's active participation in the case preserved the Court's jurisdiction to decide the merits, but agreed with the other dissenters (apart from Roberts, who avoided committing himself on the merits) that Section 3 survived rational basis review. He argued that there are a variety of concepts or theories concerning marriage, and that a state should be able to select from among them in deciding who could marry, a traditional state function. Justice Scalia's dissent specifically rejected Chief Justice Roberts' suggestion that *Windsor* was a federalism case with no significance for the underlying question whether same-sex couples had a right to marry.

* * * * *

Justice Scalia was correct in his *Windsor* dissent in asserting that the question whether same-sex couples had a right to marry under the 14th Amendment would be confronted by the Court within a few years. Between July 2013 and June 2015, litigation was initiated in every state where same-sex couples could not marry, and by the time the Court heard oral argument in an appeal from a ruling adverse to same-sex marriage by the 6th Circuit, same-sex couples were marrying in 37 states and the District of Columbia. After exactly two years, the Court ruled on the question it had not answered in *Windsor*:

OBERGEFELL v. HODGES
135 S. Ct. 1039 (June 26, 2015)
Supreme Court of the United States

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The

petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

II

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners’ contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was

understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife."

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor* (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community."

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court’s cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common human ity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge*, 440 Mass., at 322, 798 N.E.2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.

This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. Suggesting that marriage is a right “older than the Bill of Rights,” *Griswold* described marriage this way:

“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” *Windsor* (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U.S., at 384. Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor* (slip op., at 23). Marriage also affords the permanency and stability important to children’s best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a

more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

“There is certainly no country in the world where the tie of marriage is so much respected as in America ... [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace.... [H]e afterwards carries [that image] with him into public affairs.” 1 Democracy in America 309 (H. Reeve transl., rev. ed.1990).

In *Maynard v. Hill*, 125 U.S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” Marriage, the *Maynard* Court said, has long been “a great public institution, giving character to our whole civil polity.” This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays

and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), which called for a "careful description" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53-501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Westcott*, 443 U.S. 76 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119-124. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446-454. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538-543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.”

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents’ States to await further public discussion and political measures before licensing same-sex marriages.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 amici make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U.S. ____ (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. That is why *Lawrence* held *Bowers* was “not correct when it was decided.” Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners’ cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society’s most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple’s decision making processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of *Obergefell and Arthur*, and by that of *DeKoe and Kostura*, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. *Williams v. North Carolina*, 317 U.S. 287, 299 (1942). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

NOTES & QUESTIONS

1. The Court voted 5-4, all the justices voting consistent with their votes in *Windsor*. Each of the dissenters – Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito – offered his own dissenting opinion, with Scalia and Thomas also joining the dissenting opinions of the Chief Justice and Justice Alito. A common theme running through all four dissenting opinions was that it was inappropriate for the Court to decide the hotly-contested policy question of “who can marry” that had been traditionally left to the democratic process of the states to resolve. The dissenters distinguished the cases in which the Court had overridden state laws concerning who can marry based on the view that the right to marry is protected under the Due Process Clause as a fundamental right—*Loving v. Virginia*, *Turner v. Safley*, *Zablocki v. Redhail* – by contending that none of those cases had changed the “core definition” of marriage as the union of a man and a woman. Chief Justice Roberts argued in his dissent that the Court was changing the “definition” of the term “marriage” and that this was without precedent.
2. Chief Justice Roberts and Justice Alito raised particular concerns about the potential disputes concerning the religious liberty of those who might disagree with the Court’s opinion. Roberts wrote:

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Justice Alito wrote:

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Does Justice Kennedy’s opinion for the Court deal adequately with the question how the Due Process fundamental right to marry may be reconciled with First Amendment right of free exercise of religion, which would likely also be deemed to be a “fundamental” right, in the sense that a direct intentional abridgement of that right by the government would be subjected to strict scrutiny? The Supreme Court has taken the view that religious objectors are not generally exempt under the Free Exercise Clause from complying with laws that do not expressly single out religious practices for prohibition. Thus, in the leading case of *Employment Division v. Smith*, 494 US 872 (1990), the Court upheld the state of Oregon’s refusal to pay unemployment benefits to a Native-American man who lost his job because he tested positive for using a controlled substance, even though his use of peyote was part of a Native-American religious ceremony. However, the Court has said that legislatures are free affirmatively to build religious exemptions into laws. For example, Congress has included provisions in the Civil Rights Act of 1964 allowing religious organizations to require as a condition of employment that individuals be adherents to the employer’s religion, even though the statute generally outlaws employment discrimination because of an individual’s religion.

The Supreme Court has also held that both the federal government and the states may legislate in more general terms to limit their own authority to impose obligations on religious objectors through the enactment of laws such as the federal Religious Freedom Restoration Act and similar state laws. These laws generally provide that the government will not place an undue burden on a person’s free exercise of religion unless it has a compelling reason for doing so and the government’s policy imposes the least restrictive alternative in limiting the person’s free exercise of religion. In *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), for example, the Court construed the federal Religious Freedom Restoration Act to privilege a closely-held corporation whose owners had religious objections to certain forms of contraception to avoid complying with a federal regulation under the Affordable Care Act requiring that employers provide coverage to

their female employees for the disputed forms of contraception. The Court accepted the employer's assertion that providing the coverage would impose a serious burden on its free exercise of religion, and found that alternative arrangements that the government had already extended to religious organizations could also be made available to business corporations, so the regulatory requirement was not the least restrictive alternative. *Burwell v. Hobby Lobby* was a 5-4 decision. The dissenters argued that the case might be used to allow those holding a religiously-based disapproval of homosexuality to refuse to comply with anti-discrimination laws. The majority opinion disclaimed allowing religious objectors to discriminate based on race, but was silent as to other forms of discrimination. Could an employer in a state with a Religious Freedom Restoration Act refuse to extend coverage under its employee benefits plan to a same-sex spouse of an employee due to religious disapproval of same-sex marriages? Could a small business that provides services or goods in connections with weddings refuse to deal with a same-sex couple's wedding based on the owner's religious objections?

3. An immediate subject of speculation after the Court announced its decision was whether the case would have any traction in subsequent lawsuits involving equal protection claims by LGBT plaintiffs. While the Court premised its ruling both on Due Process and Equal Protection, its Equal Protection analysis focused on the "fundamental rights" strand of Equal Protection doctrine rather than the "suspect classification" strand. The Court has traditionally looked at four factors in deciding whether a classification created by a policy or statute is suspect: (1) history of discrimination based on the classification, (2) whether the classification is immutable or not easily subject to change, (3) whether those disadvantaged by the classification are capable of contributing to society, (4) whether those disadvantaged by the classification lack sufficient political power to protect their interests in the legislative process. Does Justice Kennedy's opinion address any of these factors in a way that could be useful to LGBTQ plaintiffs in equal protection cases that do not involve fundamental rights? In this connection, the 9th Circuit construed *United States v. Windsor* to support the conclusion that sexual orientation discrimination claims require heightened scrutiny in *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, rehearing en banc denied, 759 F.3d 990 (9th Cir. 2014) (2-1 panel decision), based on the panel majority's conclusion that the result in *Windsor* was not explicable as a rational basis case. Although Justice Kennedy did *not* explicitly state that heightened or strict scrutiny was being used in *Obergefell*, he did state that the case involved a fundamental right, which would normally mandate strict scrutiny whether on due process or equal protection grounds.
4. Justices Scalia and Thomas have long advocated that the meaning of constitutional text should be determined based on the understanding of those who drafted and ratified the relevant provisions, a theory sometimes called "Originalism" or "Original Meaning." Thus, the meaning of "liberty" in the Due Process Clause, in their view, should be that which would be understood by the drafters of the 5th Amendment (1791) and the 14th Amendment (1868). Justice Scalia argued in his dissent that neither of those generations of Americans would have understood "liberty" to encompass a right to same-sex marriages. Justice Thomas, reaching further back into history, contended that the word as it was used in the 5th Amendment and reiterated in the 14th Amendment should be understood by looking back to its earlier uses in English legal history, extending to

Magna Carta in 1215. At that time, he argued, the reference to liberty was limited to locomotion; that is, when King John promised to respect the liberty of his nobles, he was affirming that he would not lock them up without appropriate legal process respecting the concept of freedom of movement. Thus, in Justice Thomas's view, it was illegitimate for the Court to use references to "liberty" in these constitutional provisions for other purposes. Even if a broader meaning were appropriate, he argued, it should be limited to government impositions, not deprivations of benefits. Justices Thomas and Scalia are also skeptical about the overall theory of substantive due process, arguing in many opinions (including these dissents) that it is inappropriate for the Court to use the Due Process Clause as a source of substantive legal rights. Of course, this originalist approach would require reversing a substantial body of Supreme Court precedent developed under the Due Process Clause over the past century or more.

Page 69 – Add two new notes after Note 4:

- 4A. Until recently, almost all health insurance policies and programs did not cover the costs of gender reassignment surgery, which are substantial. Most insurers have traditionally taken the position that such treatments are elective and cosmetic, and thus not medically necessary. This view was sharply challenged by the transgender community, with increasing success in persuading large employers to provide such coverage for their employees.

If an individual pays for those expenses out of pocket, should they be entitled to a tax deduction for coverage of a medically necessary treatment, to the extent their expenses exceed the threshold for medical deductions under the Internal Revenue Code? The Internal Revenue Service routinely denied such claimed deductions in the past, but in 2010, the Tax Court disagreed with the IRS, finding that such treatment can be medically necessary for a person diagnosed with gender identity disorder. See *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (2010). Subsequently, the Internal Revenue Service announced that it would acquiesce in the Tax Court's decision. 2011-47 I.R.B. 789. An acquiescence has the same authority as a published revenue ruling which means that the IRS will follow the *O'Donnabhain* decision in future cases that are similar. In light of this action, must private insurance companies reconsider their opposition to paying for such procedures?

In the wake of *O'Donnabhain*, several large employers announced that they were amending their employee group insurance plans to cover sex-reassignment procedures and related therapy. Under the Affordable Care Act, which went into full effect during 2014, should all government and private insurance plans be required to cover such treatment as "medically necessary"?

Most state Medicaid programs do not cover such treatment, and since the 1980s the federally-administered Medicare program also excluded it as "experimental" and too risky. Medicare changed its tune on May 30, 2014, when the Department of Health and Human Services Appeal Board ruled that the policy barring coverage for gender reassignment surgical procedures was no longer valid. NCD 140.3, Transsexual Surgery;

Docket No. A-13-87, Decision No. 2576, May 30, 2014). After many decades of experience with these procedures, the Board concluded that they had been proven safe and effective and should no longer be deemed experimental. Covered individuals under Medicare would henceforth be evaluated on an individual basis to determine whether the program would cover gender reassignment procedures for them, and the prior adverse National Coverage Determination, which was based on a 1981 study, would no longer prevail. Shortly after this ruling was released, the federal government announced that gender reassignment would no longer be categorically excluded from coverage under the federal employee health insurance benefits program. Letter No. 2015-12 (June 23, 2015). Whether state Medicaid programs and smaller employers would follow suit was not immediately known, but the Obama Administration announced that the federal employee benefits program would follow the approach that had been adopted for the Medicare program.

- 4B. Much of the litigation about rights to treatment for gender identity disorder has taken place in the context of confinement in penal institutions or similarly restrictive institutional conditions. May a state absolutely forbid the use of any public funds to treat gender identity disorder in such institutions? Wisconsin passed such a law, and then notified transgender prison inmates that they would have to be weaned off their hormone treatments, because the state would not be continuing them, and prison regulations forbade inmates from obtaining medications directly from outside the institution. Would this violate the 8th Amendment rights of inmates to be free of cruel and unusual punishment? See *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), cert. denied, 132 S. Ct. 1810 (2012) (held, blanket prohibition violates 8th Amendment). May administrators of an institution deny hormone treatment based on their concerns about maintenance of order in the institution? Consider a state institution where male sex offenders are subject to preventive detention after serving their prison sentences, because of a judicial determination that they are likely to re-offend if released back into the civilian population. If one such inmate is diagnosed as having gender identity disorder, and expert medical opinion supports the inmate's insistence on the necessity of hormone therapy, can the administration justify denying such treatment based on their concern that the inmate would be vulnerable to attack by other inmates, who are all by definition dangerous sex offenders, and that such attacks could lead to disorder in the institution, threatening the safety of all inmates and personnel? See *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011).

Would it violate a transgender prisoner's 8th Amendment rights to deny sex reassignment surgery, if qualified medical personnel concluded that such treatment was necessary for the health and well-being of the inmate? A federal district court in Massachusetts answered "yes" and was affirmed by a three-judge panel of the 1st Circuit Court of Appeals, see *Kosilek v. Spencer*, 891 F.Supp.2d 226 (D. Mass. 2012), aff'd, 740 F.3d 733 (1st Cir. 2014), but the 1st Circuit withdrew the opinion, granted en banc reconsideration, and reversed; the Supreme Court denied a petition for certiorari. See 774 F.3d 63 (1st Cir., en banc, 2014), cert. denied, 135 S. Ct. 2059 (May 4, 2015). Another federal circuit seemed to be in general accord with the 1st Circuit's three-judge panel in *Kosilek*, in *De'lonta v. Johnson*, 708 F.2d 520 (4th Cir. 2013); and see *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Calif. April 2, 2105) (granting preliminary injunction), stayed by 9th

Circuit pending appeal. Shortly after the 9th Circuit stayed the district court’s preliminary injunction in Norsworthy, a different three-judge panel ruled that a district judge erred in “screening out” a transgender prisoner complaint in *Rosati v. Igbinoso*, 2015 WL 3916977 (9th Cir. June 26, 2015). This panel held that an allegation that the California Corrections Department had a blanket policy against providing sex reassignment surgery to inmates had stated a claim under the 8th Amendment, which the inmate could prove at trial by showing that such surgery was a medically necessary treatment for the inmate. In light of the logistical issues and costs involved, this issue seems likely for Supreme Court review in the near future, especially if a split opens up between the 1st and 9th Circuits in final rulings on the merits.

Page 80 – Add a final paragraph to 3. American Civil Liberties Union Lesbian and Gay Rights Project, as follows:

In the spring of 2010, the ACLU reorganized its program structure and divided the work of the organization into four centers: Liberty, Equality, Democracy, Justice. The LGBT and AIDS Projects now report to the Center for Liberty. James Esseks is the Director of the LGBT and AIDS Projects and Matt Coles moved to become the first Director of the ACLU’s Center for Equality.

Page 82-83 – Who gets to decide?

Add the following prior to the last paragraph in this section:

GLAD’s lawsuit resulted in a ruling by U.S. District Judge Joseph L. Tauro that Section 3 of DOMA violated the Equal Protection requirement of the 5th Amendment as applied to the plaintiffs. Judge Tauro applied “rational basis” scrutiny, finding that there was no rational justification for Section 3. On the same day, he issued a ruling in a companion case filed by the Massachusetts attorney general, finding that Section 3 violated the 10th Amendment and exceeded Congress’s power under the Spending Clause by requiring Massachusetts to afford unequal treatment to same-sex marriage couples under various programs subject to federal rules. See *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010); *Commonwealth of Massachusetts v United States Department of Health and Human Services*, 698 F.Supp.2d 234 (D.Mass. 2010).

The Justice Department appealed both rulings, but subsequently announced it would not defend Section 3, having concluded that it was unconstitutional while preparing a response to a DOMA challenge filed in the Southern District of New York. The House of Representatives (or, more specifically, the Bipartisan Legal Advisory Group, BLAG) hired counsel to intervene on its behalf to defend the constitutionality of DOMA. On May 31, 2012, the First Circuit rejected the Commonwealth of Massachusetts’ argument under the 10th Amendment and the Spending Clause, but affirmed Judge Tauro’s holding that Section 3 violated the 5th Amendment. *Commonwealth of Massachusetts v. U.S. Dep’t of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012). [An edited version of the decision by the First Circuit is included in this Supplement at Chapter Four.] BLAG and the Justice Department asked the Supreme Court to review the case, but the Court held the petitions without response while taking up instead the case of United

States v. Windsor, in which the 2nd Circuit had held Section 3 of DOMA unconstitutional using heightened scrutiny in a test case brought by private counsel Roberta Kaplan and the ACLU LGBT Rights Project. The Solicitor General, whose certiorari petition was granted by the Court, argued on the side of the plaintiff, while BLAG's attorney defended the statute. The Supreme Court issued its ruling in *U.S. v. Windsor* on June 26, 2013. See 133 S. Ct. 2675 (2013), included in this supplement as part of Chapter 1, above. After announcing its opinion in *Windsor*, the Court denied the petition for certiorari in the 1st Circuit case.

On the more general question of who gets to decide when and where to bring a constitutional challenge on behalf of the LGBT community, an interesting split occurred over the American Foundation for Equal Rights' decision to retain Ted Olson and David Boies to bring a law suit in federal district court in San Francisco challenging Proposition 8, an initiative measure that amended the California Constitution to overrule the state Supreme Court's decision in favor of same-sex marriage. Most activists had said for years that the time was not right to bring a full-fledged marriage rights case into federal court. State litigation had proceeded and produced some victories and defeats. The national litigation firms had consistently advised against raising federal constitutional issues in any of these state cases, and as soon as the California Supreme Court announced that Proposition 8 had been validly enacted, the LGBT legal groups issued a joint statement urging that nobody file a federal suit, and they strenuously argued against the AFER lawsuit. When they subsequently sought to intervene as co-plaintiffs in the suit, AFER opposed intervention, and it was denied by the trial judge, who did allow them to file amicus briefs. The City and County of San Francisco was allowed to intervene.

The AFER lawsuit resulted in a decision striking down Proposition 8, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), petition for rehearing en banc denied, 681 F.3d 1065 (June 5, 2012). The 9th Circuit stayed the trial court's order pending appeal. The Intervenor-Defendant-Appellants filed a petition for certiorari, which the Supreme Court granted on December 7, 2012. The Court issued its decision on June 26, 2013, holding that the Intervenors did not have standing, not only before the Supreme Court, but also for purposes of the appeal to the Ninth Circuit, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). That left the District Court opinion as the final opinion in the case.

Immediately after the decision was handed down, the California Attorney General announced that marriage licenses would be issued in all California counties as soon as the Ninth Circuit lifted the stay. Two days later the 9th Circuit lifted the stay without waiting for formal notification by the Supreme Court, and same-sex marriages resumed in the state of California. The Proponents of Proposition 8, joined by a clerk from San Diego, asked the California Supreme Court to enjoin the issuance of licenses by clerks statewide, claiming that the only clerks bound were the two who were defendants in the action before the District Court. The Court refused to issue the requested injunction, and further attempts to limit the effect of the district court's ruling came to nothing.

An additional controversy raised by this case involved the question of whether the court could televise the trial and release the televised material to the public. Under local court rules, broadcasting of court proceedings was prohibited. The District Court was given permission by the Ninth Circuit to stream the broadcasts to selected federal courthouses around the country as

part of a new experimental program being considered by the Circuit Court. A request to release broadcasts to youtube.com was pending at the time the Proposition 8 supporters intervened and requested a stay to halt the broadcasts. Several of the intervenors were identified as witnesses scheduled to testify in the trial, and they claimed that televising their testimony would discourage them from testifying. The Supreme Court granted the stay, finding that improper procedures were followed in amending the local rule (e.g., insufficient time for meaningful public comment before amending the rule) and that the threat of televised testimony would have a chilling effect on some of the witnesses. See *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). The trial judge had a video recording made for his personal use. After the case had been concluded at the trial level, an attempt was made to release the video recording, but ultimately the 9th Circuit ruled that the trial judge's promise to the Proponents of Proposition 8 that the video would not be made public was binding. *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012). However, AFER arranged for dramatic recreation of the trial testimony using the daily transcripts to be posted to youtube.com, and subsequently an AFER board member who is a renowned Hollywood screenwriter fashioned a play based on the transcript that was staged in several cities, with the Hollywood staging (featuring major stars in the key roles) webcast on youtube.com.

Post-Windsor, lawsuits were filed in all the states that continued to ban same-sex marriage, although legislative enactment of marriage equality laws in Hawaii and Illinois effectively mooted the pending cases in those states. Some of these cases have been filed by public interest organizations such as the ACLU, Lambda, NCLR, and the Southern Poverty Law Center, but a number of other cases have been filed by private attorneys without much input from the national organizations. In one such case in Virginia, AFER offered its services to the plaintiffs, who jumped at the opportunity to be represented by Ted Olson and David Boies. There was some concern that a non-coordinated national effort to win the right to marry could result in bad decisions that might affect later cases. What do you think? Was there a role for national guidance in this state by state attack on state laws banning same-sex marriage?

As the issue played out in the courts during 2013 and 2014, the only case in which a trial court ruled against the plaintiffs was a pro se effort in Louisiana, *Merritt v. Attorney General*, 2013 Westlaw 6044329 (M.D. La., Nov. 14, 2013), in which the lay plaintiff failed to sue an appropriate defendant and the district court accepted a recommendation by the magistrate judge to dismiss the case after the plaintiff failed to file a response to the defendants' motion to dismiss. The magistrate opined, without any written analysis, that *Baker v. Nelson* precluded the lawsuit, a conclusion that was rejected by the courts in every subsequent marriage equality case. Indeed, in every other case, whether plaintiffs were represented by private attorneys or public interest organizations, the trial judges ruled, relying heavily on *Windsor*, that the ban on performing or recognizing same-sex marriages violated the 14th Amendment.

CHAPTER TWO – WHAT IS THE MEANING OF ROMER AND LAWRENCE?

[Note – This chapter heading should be amended to ask: What is the Meaning of the Supreme Court’s quartet of major gay rights rulings?]

Page 85: Substitute the following paragraph for the introductory paragraph in the casebook:

The U.S. Supreme Court’s rulings in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor* and *Obergefell v. Hodges* will now be the starting point for the analysis of constitutional rights of sexual minorities in the United States. *Romer* was the first case in which the Supreme Court ruled affirmatively on an equal protection claim brought by gay plaintiffs. *Lawrence* was the first case in which the Supreme Court ruled affirmatively in a due process claim brought by gay plaintiffs. In *Windsor*, the Supreme Court, building on *Romer* and *Lawrence*, ruled on a hybrid due process and equal protection claim in favor of gay plaintiffs. In *Obergefell*, again adopting a hybrid due process and equal protection analysis, the court ruled in favor of gay plaintiffs that same-sex couples had a constitutional right to marry. In addition, of course, *Lawrence* overruled *Bowers v. Hardwick*, a case that had been frequently cited by federal appeals and district courts, as well as many state courts, in rejecting constitutional claims by gay litigants, and *Obergefell* overruled *Baker v. Nelson*, a one-sentence ruling from 1972 that asserted that the right of same-sex couples to marry did not present a substantial federal question. Consequently, a question of first importance for constitutional principles governing claims by sexual minorities is: What is the meaning of *Romer*, *Lawrence*, *Windsor* and *Obergefell* as precedents for subsequent litigation?

The casebook, published before the *Windsor* litigation, focuses on two controversies in which the lower federal courts had to consider the meaning of *Romer* and *Lawrence*: deciding whether a Florida statute banning adoption of children by gay parents and a federal law placing stifling limitations on military service by gay people were constitutional. After *Windsor*, the first court of appeals case to consider the precedential impact of *Windsor* on constitutional doctrine outside the marriage context concerned whether a lawyer in civil litigation could use a peremptory challenge to keep a gay person off a jury. In addition to providing follow-up information on the decisions in the casebook, this Supplement presents that case, *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), petition for rehearing en banc denied, 759 F.3d 990 (9th Cir., June 24, 2014), and asks about the implications of *Windsor* for sexual minority constitutional rights. Although the Supreme Court did not specifically address the question whether sexual orientation is a suspect classification for 14th Amendment purposes in *Obergefell*, Justice Kennedy’s opinion does incidentally address several of the factors that the Court has considered in the past as relevant to that determination. In the materials that follow, we have also included selections from Court of Appeals decisions issued in 2014 in marriage equality litigation that addressed this issue and which were not disavowed or expressly addressed by the Supreme Court in *Obergefell*.

After the Supreme Court issued *Lawrence*, it was clear that states could not prosecute individuals for engaging in the conduct specified in the Court’s opinion: private, consensual sex involving adults. Did this mean that state sex crimes laws would be deemed facially unconstitutional if they penalized such conduct, or should *Lawrence* be treated as an “as applied” case, such that

existing sodomy laws could remain in effect but would just be inapplicable in cases coming within the facts of *Lawrence*? Few states actually reformed their sex crimes laws in direct response to *Lawrence*, and courts were divided on the question whether a failure to revise the laws left them vulnerable to facial attack. See, e.g., *MacDonald v. Moose*, 710 F.3d 154, cert. denied, 134 S. Ct. 200 (4th Cir. 2013), in which the federal court of appeals, ruling on a petition for writ of habeas corpus brought by a man convicted under the Virginia sodomy law, disagreed with the Virginia Supreme Court and held that the law was facially invalid under *Lawrence* because it criminalized conduct protected by the Due Process Clause and the text of the statute did not provide a way to sever the unconstitutional provision without rewriting the statute; accord, *State v. Franco*, 49 Kan.App.2d 924 (2014), and see *Williams v. State*, 2014 WL 2677722 (Ala. Ct. App., June 13, 2014) (holding sexual misconduct law as applied to consensual sodomy was unconstitutional). Despite the 4th Circuit’s ruling in *MacDonald v. Moose* that the Virginia sodomy law was facially invalid in light of *Lawrence*, lower Virginia courts continued to hold that *Lawrence* was an “as applied” precedent and the sodomy law remained valid. See, e.g., *Saunders v. Commonwealth*, 2014 WL 392913 (Va.Ct.App., 2014) and *Toghill v. Commonwealth*, 2014 WL 545728 (Va.Ct.App. 2014). Subsequent to these rulings, the Virginia legislature undertook a criminal law reform and revised the sodomy law to comply with *Lawrence* in the spring of 2014.

Page 112: Insert the following Note prior to Note 1:

Note—The 9th Circuit denied en banc review to the Court of Appeals decision in *Witt* and remanded the case for trial. On remand, 739 F.Supp.2d 1308 (W.D. Wash. 2010), U.S. District Judge Ronald B. Leighton explained that the government had failed to meet its burden of proof:

The evidence produced at trial overwhelmingly supports the conclusion that the suspension and discharge of Margaret Witt did not significantly further the important government interest in advancing unit morale and cohesion. To the contrary, the actions taken against Major Witt had the opposite effect. The 446th AES is a highly professional, rapid response, air evacuation team. It is comprised of flight nurses and medical technicians who are well-trained, well-led and highly motivated. They provide a vital service to our fighting men and women around the world. Serving within that unit are known or suspected gay or lesbian service men and women. There is no evidence before this Court to suggest that their service within the unit causes problems of the type predicted in the Congressional findings of fact referenced above. These people train together, fly together, care for patients together, deploy together. There is nothing in the record before this Court suggesting that the sexual orientation (acknowledged or suspected) has negatively impacted the performance, dedication or enthusiasm of the 446th AES. There is no evidence that wounded troops care about the sexual orientation of the flight nurse or medical technician tending to their wounds.

The evidence before the Court is that Major Margaret Witt was an exemplary officer. She was an effective leader, a caring mentor, a skilled clinician, and an integral member of an effective team. Her loss within the squadron resulted in a diminution of the unit’s ability to carry out its mission. Good flight nurses are hard to find.

The evidence clearly supports the plaintiff's assertion that the reinstatement of Major Witt would not adversely affect the morale or unit cohesion of the 446th AES. The only evidence to the contrary comes in the form of survey responses and preference polls. These surveys and polls are some evidence that there may be persons in the 446th AES who would prefer that gays and lesbians not serve openly within their unit but such preferences are not outcome determinative here. The men and women of the United States military have over the years demonstrated the ability to accept diverse peoples into their ranks and to treat them with the respect necessary to accomplish the mission, whatever that mission might be. That ability has persistently allowed the armed forces of the United States to be the most professional, dedicated and effective military in the world. The reinstatement of Major Margaret Witt will not erode the proficiency of the United States military.

The government urges the Court to evaluate the constitutionality of DADT as applied to Major Witt by looking beyond the impact on her specific unit, the 446th AES. In support of the Congressional findings underpinning DADT, the government can point to polls and petitions which reflect Congress' fear that openly serving gays and lesbians will negatively impact military readiness by eroding unit morale and cohesion across the services without regard to any one individual's billet or job description. Again, these polls are some evidence that some folks would prefer to not serve with admitted homosexuals. That such views may lead to a drop in recruitment or retention is a possibility, just as it was a possibility during the integration of blacks, other minorities and women into the armed forces.

The possibility of such push back is off-set by the known negative impact of DADT upon the military: the loss of highly skilled and trained military personnel once they have been outed and the concomitant assault on unit morale and cohesion caused by their extraction from the military. In this regard, the Court notes the Army's policy of deploying openly gay or lesbian personnel if the discharge process has not yet begun when the order to deploy issues. In this time of war, the Army, at least, has decided that allowing openly gay service is preferable to going to war without a member of a particular unit.

For the reasons expressed, the Court concludes that DADT, when applied to Major Margaret Witt, does not further the government's interest in promoting military readiness, unit morale and cohesion. If DADT does not significantly further an important government interest under prong two of the three-part test, it cannot be necessary to further that interest as required under prong three. Application of DADT therefore violates Major Witt's substantive due process rights under the Fifth Amendment to the United States Constitution. She should be reinstated at the earliest possible moment.

The government appealed to the 9th Circuit. In the meantime, however, another district court had ruled that the "Don't Ask, Don't Tell" policy was unconstitutional in *Log Cabin Republicans v. U.S.*, 716 F.Supp.2d 884 (C.D. Cal., 2010), and the combination of the two district court rulings proved helpful to the Obama Administration in seeking congressional repeal of the policy. In December 2010, Congress approved the "Don't Ask, Don't Tell Repeal Act," which authorized the Defense Department to repeal the policy.

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Don’t Ask, Don’t Tell Repeal Act of 2010’.

SEC. 2. DEPARTMENT OF DEFENSE POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654-

(1) IN GENERAL- On March 2, 2010, the Secretary of Defense issued a memorandum directing the Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654 (section 654 of title 10, United States Code).

(2) OBJECTIVES AND SCOPE OF REVIEW - The Terms of Reference accompanying the Secretary’s memorandum established the following objectives and scope of the ordered review:

(A) Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.

(B) Determine leadership, guidance, and training on standards of conduct and new policies.

(C) Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.

(D) Recommend appropriate changes (if any) to the Uniform Code of Military Justice.

(E) Monitor and evaluate existing legislative proposals to repeal 10 U.S.C. 654 and proposals that may be introduced in the Congress during the period of the review.

(F) Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.

(G) Evaluate the issues raised in ongoing litigation involving 10 U.S.C. 654.

(b) Effective Date - The amendments made by subsection (f) shall take effect 60 days after the date on which the last of the following occurs:

(1) The Secretary of Defense has received the report required by the memorandum of the Secretary referred to in subsection (a).

(2) The President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating each of the following:

(A) That the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action.

(B) That the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the amendments made by subsection (f).

(C) That the implementation of necessary policies and regulations pursuant to the discretion provided by the amendments made by subsection (f) is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

(c) No Immediate Effect on Current Policy- Section 654 of title 10, United States Code, shall remain in effect until such time that all of the requirements and certifications required by subsection (b) are met. If these requirements and certifications are not met, section 654 of title 10, United States Code, shall remain in effect.

(d) Benefits- Nothing in this section, or the amendments made by this section, shall be construed to require the furnishing of benefits in violation of section 7 of title 1, United States Code (relating to the definitions of 'marriage' and 'spouse' and referred to as the Defense of Marriage Act).

(e) No Private Cause of Action- Nothing in this section, or the amendments made by this section, shall be construed to create a private cause of action.

(f) Treatment of 1993 Policy-

(1) TITLE 10- Upon the effective date established by subsection (b), chapter 37 of title 10, United States Code, is amended--

(A) by striking section 654; and

(B) in the table of sections at the beginning of such chapter, by striking the item relating to section 654.

(2) CONFORMING AMENDMENT- Upon the effective date established by subsection (b), section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note) is amended by striking subsections (b), (c), and (d).

After the President signed the DADT Repeal Act into law, the Defense Department devised a training program and revision of regulations necessary to implementation, and certified its readiness to end the DADT policy in August 2011. The policy officially ended on September 20, 2011.

However, the Repeal Act did not include any provision banning sexual orientation discrimination in the military, and the Defense Department's implementing regulations did not include any ban on such discrimination, leaving open the question whether military personnel who encountered discrimination due to their sexual orientation might still have due process or equal protection claims to assert. After repeal went into effect, the refusal of the Defense Department to extend equal treatment to same-sex spouses of military members immediately sparked litigation in several federal district courts, which, after *U.S. v. Windsor*, was resolved by the Defense Department announcing that it would recognize all same-sex marriages of military personnel that were contracted in jurisdictions authorizing and recognizing such marriages, regardless where the personnel were stationed. The Defense Department also prevailed on state national guard units to follow the same recognition rule. In May 2015, the Defense Department announced that it would be amending its non-discrimination policies to include sexual orientation.

Several months after the DADT Repeal Act was passed, the government negotiated a settlement of Major Witt's case, under which she would retire with full rank and benefits restored in exchange for withdrawing her lawsuit. The Log Cabin Republicans case was pending on appeal at the 9th Circuit when the Defense Department implemented the DADT Repeal Act. The 9th Circuit granted the government's motion to declare the case moot and to vacate the district court's decision. *Log Cabin Republicans v. U.S.*, 658 F.3d 1162 (9th Cir. 2011).

The Defense Department continues to exclude service by transsexuals under a regulation as of the time this Supplement was prepared, but in 2014 the Secretary of Defense indicated that this policy deserved to be studied further, without making a commitment to repeal or modify it. In the spring of 2015, President Obama and a newly-appointed Secretary of Defense expressed openness to reconsidering this policy, and several transgender military personnel "came out" to advocate for allowing transgender personnel to serve on a "case by case" basis. Since the policy is not statutory, the Defense Department could change it without any action by Congress.

Page 112-113 - add to Note 1 - In *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319 (2010), the Alabama Supreme Court rejected a constitutional challenge (state and federal) to a sex toys statute.

Page 113 – delete Note 2.

Page 113 – add to Note 3 – The Supreme Court refused to review the 1st Circuit's decision in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), cert. denied sub nom *Pietrangelo v. Gates*, 556 U.S. 1289 (2009). Congress's subsequent action in passing the "Don't Ask, Don't Tell Repeal Act of 2010" rendered the controversy about military service moot when the Defense Department implemented repeal of the policy on September 20, 2011. However, the failure of the Repeal Act to include a provision forbidding sexual orientation discrimination in the military – and the continuing effect of the Defense of Marriage Act, Section 3, which was incorporated by reference into the Repeal Act – gave rise to litigation about denial of benefits and privileges for same-sex spouses of LGB service members, which was partially resolved after the Supreme Court's decision in *U.S. v. Windsor* by extending recognition to married same-sex couples in states that recognized their marriages. New litigation was filed challenging the refusal to extend such benefits to veterans living in states that denied recognition to same-sex marriages, but that

problem is prospectively solved as a result of *Obergefell v. Hodges*, which obligates all states to recognize same-sex marriages. However, claims may remain for benefits denied prior to June 26, 2015.

Page 113 – add after Note 3:

In a ruling announced on May 31, 2012, the 1st Circuit adopted a different analysis of the scope of *Romer* as a precedent in the course of determining that Section 3 of the Defense of Marriage Act violates the equal protection requirement of the 5th Amendment. See *Commonwealth of Massachusetts v. U.S. Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), cert. denied, 133 S. Ct. 2884 (2013) (relying on federalism principles to support closer scrutiny of reason for denying recognition of same-sex marriage). Here’s what the court said about the level of judicial review:

Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. And (as we later explain), in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.

In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. It is these decisions—not classic rational basis review—that the Gill plaintiffs and the Justice Department most usefully invoke in their briefs (while seeking to absorb them into different and more rigid categorical rubrics).

The oldest of the decisions, *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973), invalidated Congress’ decision to exclude from the food stamp program households containing unrelated individuals. Disregarding purported justifications that such households were more likely to under-report income and to evade detection, the Court closely scrutinized the legislation’s fit-finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a “bare congressional desire to harm a politically unpopular group.” *Id.* at 534, 537-38.

The second, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), overturned a local ordinance as applied to the denial of a special permit for operating a group home for the mentally disabled. The Court found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.” *Id.* at 448.

Finally, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a provision in Colorado’s constitution prohibiting regulation to protect homosexuals from

discrimination. The Court, calling “unprecedented” the “disqualification of a class of persons from the right to seek specific protection from the law,” deemed the provision a “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.” *Id.* at 632-33, 635.

These three decisions did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered. Several Justices have remarked on this—both favorably, *City of Cleburne*, 473 U.S. at 451-55 (1985) (Stevens, J., concurring), and unfavorably, *United States v. Virginia (VMI)*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

Circuit courts, citing these same cases, have similarly concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations. As one distinguished judge observed: “Judges and commentators have noted that the usually deferential ‘rational basis’ test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination. *United States v. Then*, 56 F.3d 464, 468 (2d Cir.1995) (Calabresi, J., concurring) (citing *City of Cleburne* as an example). There is nothing remarkable about this: categories are often approximations and are themselves constructed by weighing of underlying elements.

All three of the cited cases—*Moreno*, *City of Cleburne* and *Romer*—stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. As with the women, the poor and the mentally impaired, gays and lesbians have long been the subject of discrimination. *Lawrence*, 539 U.S. at 571. The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.

As for burden, the combined effect of DOMA’s restrictions on federal benefits will not prevent same-sex marriage where permitted under state law; but it will penalize those couples by limiting tax and social security benefits to opposite-sex couples in their own and all other states. For those married same-sex couples of which one partner is in federal service, the other cannot take advantage of medical care and other benefits available to opposite-sex partners in Massachusetts and everywhere else in the country.

These burdens are comparable to those the Court found substantial in *Moreno*, *City of Cleburne*, and *Romer*. *Moreno*, like this case, involved meaningful economic benefits; *City of Cleburne* involved the opportunity to secure housing; *Romer*, the chance to secure equal protection of the laws on the same terms as other groups. Loss of survivor’s social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.

Accordingly, we conclude that the extreme deference accorded to ordinary economic legislation in cases like *Lee Optical* would not be extended to DOMA by the Supreme Court; and without insisting on “compelling” or “important” justifications or “narrow

tailoring,” the Court would scrutinize with care the purported bases for the legislation. Before providing such scrutiny, a separate element absent in *Moreno*, *City of Cleburne*, and *Romer* – federalism—must be considered.

In a separate section of the decision the court concluded that the impact of Section 3 on the ability of Massachusetts to afford equal treatment to married same-sex couples provided an additional basis for the court’s conclusion that it should “scrutinize with care the purported bases for the legislation” rather than employ the “lighter” version of rational basis review appropriate for ordinary commercial regulation.

In *United States v. Windsor*, the Supreme Court finally struck down DOMA. It is not clear what level of scrutiny Justice Kennedy was applying in the case, but it does appear that he had some concerns about the federalism issues that seem to arise when the federal government refuses to defer to state law on matters of domestic relations. However, he explicitly premised the decision on the 5th Amendment, not federalism concerns.

Page 114. Add new Note 11:

11. In *United States v. Little*, 365 Fed. Appx. 159, 2010 WL 357933 (11th Cir. 2010), the court rejected on the merits the claim that federal obscenity laws were rendered unenforceable under *Lawrence v. Texas*, holding that the scope of the precedent in *Lawrence* was limited to the facts of that case, i.e., private consensual sexual activity between adults. The court refused to credit the broader argument that *Lawrence* renders laws premised primarily on moral judgments to be constitutionally suspect.

Page 114 – Add the following material after new Note 11:

The common law of torts has long recognized a cause of action for defamation, based upon statements—either oral or written—that have the tendency to harm the reputation of the person about whom they are made. Some kinds of statements are considered so inherently damaging to reputation that they give rise to compensatory and, sometimes, punitive damages, even without proof of any tangible economic injury (i.e., “special damages”) to the plaintiff. Such statements are referred to as *per se* defamation. For example, stating that a person has committed a serious crime was considered to be defamatory *per se*, although proof by the defendant that the statement was true would defeat the plaintiff’s defamation claim. Traditionally, one such statement has been that a person is gay or lesbian. The courts presumed that calling somebody gay or lesbian would cause severe harm to their reputation and standing in society, and thus should be compensable without requiring the plaintiff to prove tangible loss unless the defendant could prove the statement was true. Should *Romer v. Evans* and *Lawrence v. Texas* and the social changes they reflect make any difference to this analysis? Consider the following decision by the New York Appellate Division:

YONATY v. MINCOLLA

945 N.Y.S.2d 774

New York Supreme Court, Appellate Division, 3rd Department, 2012.

Leave to Appeal denied, 20 N.Y.3d 855 (2013).

MERCURE, J.P.

This appeal presents the issue of whether statements falsely describing a person as lesbian, gay or bisexual constitute slander per se. Given this state’s well-defined public policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual, we now overrule our prior case to the contrary and hold that such statements are not defamatory per se.

After a nonparty allegedly told defendant that plaintiff was gay or bisexual, defendant relayed that information to third-party defendant, a close family friend of plaintiff’s long-time girlfriend, with the hope that the girlfriend would be told. Plaintiff maintains that defendant’s actions caused the deterioration and ultimate termination of his relationship with his girlfriend. He commenced this action against defendant, alleging slander, intentional infliction of emotional distress and prima facie tort. . . . The court denied defendant’s motion insofar as she sought dismissal of plaintiff’s slander claim. As relevant here, the court concluded that it was bound to follow prior appellate case law holding that statements falsely imputing homosexuality constitute defamation per se and, thus, plaintiff’s slander claim need not be dismissed despite his failure to allege special damages.

Whether particular statements are susceptible of a defamatory meaning—and therefore actionable—presents a question of law. Only “[i]f the contested statements are reasonably susceptible of a defamatory connotation [does] it become[] the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average [person]” (James v. Gannett Co., 40 N.Y.2d 415, 419 [1976] [internal quotation marks and citation omitted]). A statement has defamatory connotations if it tends to expose a person to “public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of [a person] in the minds of right-thinking persons” (Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102 [1933]). Because the defamatory tendency of a statement depends “upon the temper of the times [and] the current of contemporary public opinion,” a statement that is “harmless in one age ... may be highly damaging to reputation at another time” (Mencher v. Chesley, 297 N.Y. 94, 100 [1947]).

Generally, a plaintiff asserting a cause of action sounding in slander must allege special damages contemplating “the loss of something having economic or pecuniary value” (Lieberman v. Gelstein, 80 N.Y.2d 429, 434-435 [2003].) Plaintiff has not done so and, thus, he cannot maintain his slander claim unless the challenged statements constitute “slander per se”—those categories of statements that are commonly recognized as injurious by their nature, and so noxious that the law presumes that pecuniary damages will result (see Lieberman v. Gelstein, 80 N.Y.2d at 435). The four established “per se” categories recognized by the Court of Appeals are “statements (i) charging [a] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [a] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman” (id.). As Supreme Court noted, the Appellate Division Departments,

including this Court in dicta, have recognized statements falsely imputing homosexuality as a fifth per se category (see *Klepetko v. Reisman*, 41 AD3d 551, 552 [2d Dept 2007]; *Tourge v. City of Albany*, 285 A.D.2d 785, 786 [3d Dept 2001]; *Nacinovich v. Tullet & Tokyo Forex*, 257 A.D.2d 523, 524 [1st Dept 1999]; *Matherson v. Marchello*, 100 A.D.2d 233, 241-242 [2d Dept 1984]; *Privitera v. Town of Phelps*, 79 A.D.2d 1, 3 [4th Dept 1981], lv dismissed 53 N.Y.2d 796 [1981]). We agree with defendant and amici that these Appellate Division decisions are inconsistent with current public policy and should no longer be followed.

Defamation “necessarily ... involves the idea of disgrace” (*Bytner v. Capital Newspaper, Div. of Hearst Corp.*, 112 A.D.2d at 667). Defendant and amici argue—correctly, in our view --that the prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual. In fact, such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a “serious crime”—one of the four established per se categories.

That premise is inconsistent with the reasoning underlying the decision of the Supreme Court of the United States in *Lawrence v. Texas* (539 U.S. 558 [2003]), in which the Court held that laws criminalizing homosexual conduct violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court stated that people who are homosexual “are entitled to respect for their private lives”, but “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination in both the public and in the private spheres.” These statements of the Supreme Court simply cannot be reconciled with the prior line of Appellate Division cases concluding that being described as lesbian, gay or bisexual is so self-evidently injurious that the law will presume that pecuniary damages have resulted.

In regard to New York in particular, we locate “the public policy of [this] state in the law as expressed in statute and judicial decision and also [by] consider[ing] the prevailing attitudes of the community” (*Debra H. v. Janice R.*, 14 NY3d 576, 600 [2010], cert denied, 131 S Ct 908 [2011]; see *Dickerson v. Thompson*, 73 AD3d 52, 54 [2010]). Rather than countenancing the view that homosexuality is disgraceful, the Human Rights Law, since 2002, has expressly prohibited discrimination based on sexual orientation in employment, public accommodations, credit, education and housing (Executive Law sec. 296). Most revealing of the respect that the people of this state currently extend to lesbians, gays and bisexuals, the Legislature passed the Marriage Equality Act (Domestic Relations Law sec. 10-a, as amended by L. 2011, ch. 95, sec. 3) in June 2011, which was strongly supported by the Governor and gave same-sex couples the right to marry in New York, thereby granting them all the benefits of marriage, including “the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State” (*Hernandez v. Robles*, 7 NY3d 338, 358 [2006]). Even prior to the Marriage Equality Act, this Court had previously explained that “the public policy of our state protects same-sex couples in a myriad of ways”—including numerous statutory benefits and judicial decisions expressing a policy of acceptance (*Dickerson v. Thompson*, *supra*). Similarly “evidenc[ing] a clear commitment to respect, uphold and protect parties to same-sex relationships[,] executive and local orders extend recognition to same-sex couples and grant benefits accordingly” (*id.*; see *Godfrey v. Spano*, 13 NY3d 358, 380-381 [2009] [Ciparick, J., concurring] [detailing statutes and court decisions reflecting a public policy of acceptance of lesbians, gays and bisexuals]).

We note that the most recent Appellate Division decision considering the issue in depth was decided nearly 30 years ago (*Matherson v. Marchello*, 100 A.D.2d 233, 241-242 [2d Dept 1984], *supra*). . . . In light of the tremendous evolution in social attitudes regarding homosexuality, the elimination of the legal sanctions that troubled the Second Department in 1984 and the considerable legal protection and respect that the law of this state now accords lesbians, gays and bisexuals, it cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome. While lesbians, gays and bisexuals have historically faced discrimination and such prejudice has not been completely eradicated, “the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians [and bisexuals], merely because of their sexual orientation, belong in the same class as criminals” (*Stern v. Cosby*, 645 F Supp 2d, at 275).

In short, the disputed statements in this case are not slanderous per se and, thus, plaintiff’s failure to allege special damages requires that the remaining cause of action for slander be dismissed.

NOTES AND QUESTIONS

1. Do you agree with the court that the formal changes in law concerning homosexuality and gay people have so changed prevailing social views that it should not be presumed harmful to a person’s reputation that somebody falsely says that they are gay? Does the court’s opinion reflect the reality of public opinion when a substantial minority of the public still told public opinion pollsters in 2012 that homosexual conduct is always immoral and that same-sex couples should not be allowed to marry? (By 2014, public opinion polls were showing a majority of the public in support of allowing same-sex couples to marry.) Would an imputation of homosexuality harm a person’s reputation in many parts of the community? Should this be a matter of factual dispute left to a jury rather than a judgment of law reserved to the judge? Would the answer to these questions be different in different parts of the country? See *Davis v. Fred’s Appliance, Inc.*, 287 P.3d 51 (Washington Court of Appeals 2012) (imputing homosexuality is not defamatory per se).

2. Mr. Yonaty also sought to hold the defendant liable for intentional infliction of emotional distress, a cause of action which would turn on whether the defendant’s conduct was “extreme and outrageous” and calculated to inflict harm on Yonaty. The court found that Yonaty’s complaint had not alleged such conduct, and affirmed the trial court’s rejection of the claim. In a decision issued shortly before Yonaty, the California 2nd District Court of Appeal rejected the contention that gossiping about somebody being bisexual could give rise to an emotional distress claim, in *Shay v. Schauble*, 2012 WL 1024649 (not officially published). “We cannot find that serious emotional distress is a natural consequence of gossip, and therefore conclude the harm to plaintiff was not foreseeable,” wrote the court. “Such private conversations are a significant part of our social existence, and the cost of imposing liability would be great, while the harm caused by these exchanges is often trivial and easily remedied.”

3. Courts applying Texas law have continued to find a false imputation of homosexuality to be slanderous per se, even after the state’s Homosexual Conduct Law was held unconstitutional

in *Lawrence v. Texas*. See, e.g., *Robinson v Radio One Inc.*, 695 F.Supp.2d 425 (N.D. Tex. 2010), where the court stated:

Plaintiff denies that he is homosexual. In Texas, the imputation of homosexuality has historically been defamatory per se as it imputes the crime of sodomy. *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 311 (5th Cir. 1997). False imputation of criminal behavior is per se defamatory. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984); *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex.1969). Indeed, a concurring opinion raised that point as the United States Supreme Court overturned the Texas sodomy statute in 2003. See *Lawrence v. Texas*, 539 U.S. 558, 584 (U.S.2003) (J. O'Connor, concurring). No case appears to address whether imputation of homosexuality continues to be defamatory as a matter of law in the wake of *Lawrence*. At a minimum, though, judicial caution requires the Court to acknowledge that the imputation of homosexuality might as a matter of fact expose a person to public hatred, contempt or ridicule. At this stage, the allegation is sufficiently well pled to warrant discovery.

New Subsection C. The subsection on State Constitutional Law beginning on page 115 of the casebook should be labeled as subsection D.

C. The Peremptory Challenge Case

The first federal court of appeals decision to consider the precedential import of *Windsor* arose not in the context of a claim of marriage equality but rather in deciding whether a defendant's lawyer could use a peremptory challenge to keep a person perceived to be gay from serving as a juror in a civil case. Under Supreme Court precedents, a peremptory challenge may not be used to eliminate a juror because of a "suspect classification" or a classification that would merit "heightened scrutiny" in an equal protection case, inasmuch as the Supreme Court has deemed categorical juror exclusion to be a form of governmental discrimination subject to the 14th Amendment. Does the ruling in *Windsor* extend the ban on peremptory challenges to gay jurors?

SMITHKLINE BEECHAM CORPORATION v. ABBOTT LABORATORIES
740 F.3d 471, rehearing en banc denied, 759 F.3d 990 (2014)
United States Court of Appeals, Ninth Circuit.

REINHARDT, Circuit Judge:

The central question in this appeal arises out of a lawsuit brought by Smith-Kline Beecham (GSK) against Abbott Laboratories (Abbott) that contains antitrust, contract, and unfair trade practice (UTPA) claims. The dispute relates to a licensing agreement and the pricing of HIV medications, the latter being a subject of considerable controversy in the gay community.

During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge. This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial. . . .

In *Batson*, the Supreme Court held that the privilege of peremptory strikes in selecting a jury is subject to the guarantees of the Equal Protection Clause. *Batson*, of course, considered peremptory strikes based on race. At stake, the Court explained, were not only the rights of the criminal defendant, but also of the individual who is excluded from participating in jury service on the basis of his race. Allowing peremptory strikes based on race would "touch the entire community" because it would "undermine public confidence in the fairness of our system of justice." Thus, the Court held, the exclusion of prospective jurors because of their race would require reversal upon a finding of intentional discrimination. Eight years later, in *J.E.B.*, the Court extended *Batson* to peremptory strikes made on the basis of gender. While expanding *Batson*'s ambit, *J.E.B.* explained the scope of its expansion. The Court stated that "[p]arties may ... exercise their peremptory challenges to remove from the venire any group or class of

individuals normally subject to ‘rational basis’ review.” Thus, if sexual orientation is subject to rational basis review, Abbott’s strike does not require reversal.

We have in the past applied rational basis review to classifications based on sexual orientation. In *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir.1990), and *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir.1997), we applied rational basis review when upholding Department of Defense and military policies that classified individuals on the basis of sexual orientation. More recently, in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir.2008), an Air Force reservist brought due process and equal protection challenges to her suspension from duty on account of her sexual relationship with a woman. We considered the meaning of the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), and concluded that because *Lawrence* relied only on substantive due process and not on equal protection, it affected our prior substantive due process cases, but not our equal protection rules. . . . Here, we turn to the Supreme Court’s most recent case on the relationship between equal protection and classifications based on sexual orientation: *United States v. Windsor*, 133 S.Ct. 2675 (2013). That landmark case was decided just last term and is dispositive of the question of the appropriate level of scrutiny in this case.

Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. *Lawrence* presented us with a nearly identical quandary when we confronted the due process claim in *Witt*. Just as *Lawrence* omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does *Windsor* fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent “by considering what the Court actually did, rather than by dissecting isolated pieces of text.”

In *Witt*, we looked to three factors in determining that *Lawrence* applied a heightened level of scrutiny rather than a rational basis analysis. We stated that *Lawrence* did not consider the possible post-hoc rationalizations for the law, required under rational basis review. We further explained that *Lawrence* required a “legitimate state interest” to “justify” the harm that the Texas law inflicted as is traditionally the case in heightened scrutiny. Finally, we looked to the cases on which *Lawrence* relied and found that those cases applied heightened scrutiny. Applying the *Witt* test here, we conclude that *Windsor* compels the same result with respect to equal protection that *Lawrence* compelled with respect to substantive due process: *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

Examining *Witt*’s first factor, *Windsor*, like *Lawrence*, did not consider the possible rational bases for the law in question as is required for rational basis review. The Supreme Court has long held that a law must be upheld under rational basis review “if any state of facts reasonably may be conceived to justify” the classifications imposed by the law. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). This lowest level of review does not look to the actual

purposes of the law. Instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law.

This rule has been repeated throughout the history of modern constitutional law. In *Williamson v. Lee Optical*, 348 U.S. 483 (1955), the Court repeatedly looked to what the legislature “might have concluded” in enacting the law in question and evaluated these hypothetical reasons. In *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), the Court emphasized that deference to post-hoc explanations was central to rational basis review:

Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,”... because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The “task of classifying persons for ... benefits ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,” ... and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 179. More recently, the Supreme Court has again stated that under rational basis review, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” *Fed. Comm’n Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

In *Windsor*, instead of conceiving of hypothetical justifications for the law, the Court evaluated the “essence” of the law. *Windsor* looked to DOMA’s “design, purpose, and effect.” This inquiry included a review of the legislative history of DOMA. *Windsor* quoted extensively from the House Report and restated the House’s conclusion that marriage should be protected from the immorality of homosexuality. Unlike in rational basis review, hypothetical reasons for DOMA’s enactment were not a basis of the Court’s inquiry. In its brief to the Supreme Court, the Bipartisan Legal Advisory Group offered five distinct rational bases for the law. *Windsor*, however, looked behind these justifications to consider Congress’s “avowed purpose:” “The principal purpose,” it declared, “is to impose inequality, not for other reasons like governmental efficiency.” The result of this more fundamental inquiry was the Supreme Court’s conclusion that DOMA’s “demonstrated purpose” “raise[d] a most serious question under the Constitution’s Fifth Amendment.” *Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress’s actual purposes. *Windsor*’s “careful consideration” of DOMA’s actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review.

Witt’s next factor also requires that we conclude that *Windsor* applied heightened scrutiny. Just as *Lawrence* required that a legitimate state interest justify the harm imposed by the Texas law, the critical part of *Windsor* begins by demanding that Congress’s purpose “justify disparate treatment of the group.” *Windsor* requires a “legitimate purpose” to “overcome[]” the “disability” on a “class” of individuals. As we explained in *Witt*, “[w]ere the Court applying

rational basis review, it would not identify a legitimate state interest to ‘justify’....” the disparate treatment of the group.

Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. See *McGowan*, 366 U.S. at 425-26 (applying the presumption that state legislatures “have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality”). Due to this distinctive feature of rational basis review, words like harm or injury rarely appear in the Court’s decisions applying rational basis review. *Windsor*, however, uses these words repeatedly. The majority opinion considers DOMA’s “effect” on eight separate occasions. *Windsor* concerns the “resulting injury and indignity” and the “disadvantage” inflicted on gays and lesbians.

Moreover, *Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians. Section 3 of DOMA violates the equal protection component of the due process clause because “it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.” *Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance: “Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways.” *Windsor*’s concern with DOMA’s message follows our constitutional tradition in forbidding state action from “denoting the inferiority” of a class of people. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). It is the identification of such a class by the law for a separate and lesser public status that “make[s] them unequal.” *Windsor*, 133 S.Ct. at 2694. DOMA was “practically a brand upon them, affixed by the law, an assertion of their inferiority.” *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). *Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

Notably absent from *Windsor*’s review of DOMA are the “strong presumption” in favor of the constitutionality of laws and the “extremely deferential” posture toward government action that are the marks of rational basis review. Erwin Chemerinsky, *Constitutional Law* 695 (4th ed.2013). After all, under rational basis review, “it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” *Lee Optical*, 348 U.S. at 487. *Windsor*’s failure to afford this presumption of validity, however, is unmistakable. In its parting sentences, *Windsor* explicitly announces its balancing of the government’s interest against the harm or injury to gays and lesbians: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Windsor*’s balancing is not the work of rational basis review.

In analyzing its final and least important factor, Witt stated that *Lawrence* must have applied heightened scrutiny because it cited and relied on heightened scrutiny cases. Part IV, the central portion of *Windsor*’s reasoning, cites few cases, instead scrutinizing Congress’s actual purposes and examining in detail the inequality imposed by the law. Among the cases that the Court cites are *Romer v. Evans*, 517 U.S. 620 (1996), *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Lawrence*. In Witt, we thought it noteworthy that *Lawrence* did not cite

Romer, a rational basis case. The citation to *Moreno*, however, is significant because the Court recognized in *Lawrence* that *Moreno* applied “a more searching form of rational basis review,” despite purporting to apply simple rational basis review. *Lawrence*, 539 U.S. at 580. Our Court has similarly acknowledged that *Moreno* applied “‘heightened’ scrutiny.” See *Mountain Water Co. v. Montana Dep’t of Pub. Serv. Regulation*, 919 F.2d 593, 599 (9th Cir. 1990). Further, the Court cited *Lawrence*, which we have since held applied heightened scrutiny. *Witt*, 527 F.3d at 816. As we stated in *Witt*, *Lawrence* did not resolve whether to apply heightened scrutiny in equal protection cases, but, nevertheless, *Lawrence* is a heightened scrutiny case. Because *Windsor* relies on one case applying rational basis and two cases applying heightened scrutiny, *Witt*’s final factor does not decisively support one side or the other but leans in favor of applying heightened scrutiny.

At a minimum, applying the *Witt* factors, *Windsor* scrutiny “requires something more than traditional rational basis review.” *Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor*. Because we are bound by controlling, higher authority, we now hold that *Windsor*’s heightened scrutiny applies to classifications based on sexual orientation.

In sum, *Windsor* requires that we reexamine our prior precedents, and *Witt* tells us how to interpret *Windsor*. Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. *Lawrence* previously reached that same conclusion for purposes of due process. Thus, there can no longer be any question that gays and lesbians are no longer a “group or class of individuals normally subject to ‘rational basis’ review.” *J.E.B.*, 511 U.S. at 143. . . .

Gays and lesbians have been systematically excluded from the most important institutions of self-governance. Even our prior cases that rejected applying heightened scrutiny to classifications on the basis of sexual orientation have acknowledged that gay and lesbian individuals have experienced significant discrimination. See *High Tech Gays*, 895 F.2d at 573; *Witt*, 527 F.3d at 824-25 (Canby, J., dissenting in part). In the first half of the twentieth century, public attention was preoccupied with homosexual “infiltration” of the federal government. Gays and lesbians were dismissed from civilian employment in the federal government at a rate of sixty per month. Michael J. Klarman, *From the Closet to the Altar* 5 (2013). Discrimination in employment was not limited to the federal government; local and state governments also excluded homosexuals, and professional licensing boards often revoked licenses on account of homosexuality. In 1985, the Supreme Court denied certiorari in a case in which a woman had been fired from her job as a guidance counselor in a public school because of her sexuality. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of certiorari). Indeed, gays and lesbians were thought to be so contrary to our conception of citizenship that they were made inadmissible under a provision of our immigration laws that required the Immigration and Naturalization Service (INS) to exclude individuals “afflicted with psychopathic personality.” See *Boutilier v. INS*, 387 U.S. 118, 120 (1967). It was not until 1990 that the INS ceased to interpret that category as including gays and lesbians. William N.

Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 133-34 (1999). It is only recently that gay men and women gained the right to be open about their sexuality in the course of their military service. As one scholar put it, throughout the twentieth century, gays and lesbians were the “anticitizen.” Margot Canaday, *The Straight State* 9 (2009).

Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.

Windsor’s reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation. “Responsibilities, as well as rights, enhance the dignity and integrity of the person.” Windsor, 133 S.Ct. at 2694. Jury service is one of the most important responsibilities of an American citizen. “[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.” Powers, 499 U.S. at 407. It gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others. To allow peremptory strikes because of assumptions based on sexual orientation is to revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system. . . .

We hold that heightened scrutiny applies to classifications based on sexual orientation and that Batson applies to strikes on that basis. Because a Batson violation occurred here, this case must be remanded for a new trial.

NOTES AND QUESTIONS

1. The 9th Circuit treats Windsor as an Equal Protection case. Is it clear that the Supreme Court viewed it that way? Was the Court’s emphasis on the importance of the right that was being denied (the right to federal recognition of marriages contracted under state law), or on the classification used by Congress to limit the right at issue (same-sex marriages vs. different-sex marriages)?
2. The 9th Circuit’s analysis of Windsor as an equal protection precedent assumes that the Supreme Court was implicitly treating sexual orientation as a suspect or quasi-suspect classification, similar to race or sex, and was analyzing DOMA’s ban on federal recognition of same-sex marriages as a form of sexual orientation discrimination. Justice Kennedy’s opinion for the Court, however, never resorts to the terminology that the Court uses in race and sex discrimination cases. Is it clear that this was the mode of analysis that the Supreme Court was using? The Supreme Court’s equal protection cases may employ heightened scrutiny either because a challenged law discriminates by classifying people with respect to some characteristic such as race or sex that it has deemed suspect, or because it discriminates with respect to a right or privilege that it

deems very important, indeed fundamental. The Supreme Court’s due process cases may employ heightened scrutiny when a challenged law deprives individuals of a right that the Court has deemed fundamental or, at least, very important for the individual. Justice Kennedy described at length the importance of the right to marry and of the right to have one’s marriage recognized by the federal government, but did not emphasize the factors that the Court used in the past to determine whether classifications were suspect. If heightened scrutiny was actually employed by the Court in *Windsor*, was it because the case involved a refusal of the federal government to recognize state-sanctioned marriages, because such refusal distinguished between same-sex and different-sex marriages, or because the effect of such refusal was to discriminate because of the sexual orientation of the partners in same-sex marriages? Would this make a difference in trying to determine the precedential significance of *Windsor* in a context other than a dispute about marriage?

3. Uncertainty about the precedential holding of *Windsor* on the issue of heightened scrutiny led many of the courts deciding marriage equality cases post-*Windsor* to hedge their bets by finding that no rational basis supported the state’s denial of the right to marry to same-sex couples. Only a minority of the courts relied on heightened scrutiny to rule in favor of the plaintiffs.

Although neither of the parties in *SmithKline* had asked the 9th Circuit to consider subjecting the panel decision to rehearing en banc, a circuit judge requested a polling of the circuit, which failed to receive a majority of votes from non-recused judges. The denial of rehearing en banc, unlikely to be appealed to the Supreme Court, drew an impassioned dissent by Judge O’Scannlain signed by two other circuit judges, which puts forth a rather different view of *Windsor*:

Today’s opinion is the only appellate decision since *United States v. Windsor*, 133 S.Ct. 2675 (2013), to hold that lower courts are “required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.” Such holding is wrong, egregiously so. Because of the danger that district courts will be misled by the opinion’s sweeping misinterpretation of *Windsor*, it is most unfortunate that we denied rehearing en banc.

. . . [N]othing in *Windsor* compels the application of heightened scrutiny to this juror selection challenge. Far less can *Windsor* be considered “clearly irreconcilable” with our rational basis precedents in a way that would justify such disregard for them. The *Windsor* dissenters considered the opinion to be “rootless and shifting,” noting crucially that it “does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality,” 133 S. Ct. at 2705–06 (Scalia, J., dissenting). Even the majority in *Windsor* declined to adopt the reasoning of the Second Circuit, which had expressly applied heightened scrutiny to the equal protection claim in the case. See *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir.2012).

The essential aspects of *Windsor* in fact cut against our own panel’s view. After the Court

declined there to identify the applicable standard of review, it significantly limited its holding in a way the panel simply ignored. The Court explained that “[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State,” and that DOMA’s “purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” The Windsor Court expressly identified the classification relevant to its inquiry, but the panel’s opinion simply invented a new classification, concluding that heightened scrutiny applies any time “state action discriminates on the basis of sexual orientation.” And the panel prefers entirely to disregard Windsor’s closing instruction: “This opinion and its holding are confined to those lawful marriages” that States like New York had chosen to recognize. As the Chief Justice observed, “[Windsor’s] analysis leads no further.” An opinion so limited compels “not only our usual obedience, but also our self-conscious restraint.” Witt, 548 F.3d at 1275 (O’Scannlain, J., dissenting from denial of rehearing en banc).

The panel grasps at Witt—a substantive due process case—as the best straw possible to justify its departure from our equal protection precedents. But even the analysis expressly prescribed by Witt cannot support today’s conclusion that heightened scrutiny applies to distinctions based on sexual orientation in the equal protection context. Witt divined from three entrails that Lawrence prescribed heightened scrutiny in the substantive due process context: first, Lawrence declined to examine hypothetical justifications for the law; second, Lawrence required a “legitimate” justification for the law; and third, Lawrence cited substantive due process cases applying heightened scrutiny. 527 F.3d at 817. But Windsor reflects none of the viscera Witt considered to be indicia of heightened scrutiny.

Indeed, the Witt factors reveal only rational basis review at work in Windsor. To employ rational basis review in the equal protection context did not require Windsor to consider hypothetical justifications for Section 3 of DOMA. In declaring that Section to be motivated by no “legitimate” purpose, Windsor only applies rational basis review in the same way that Romer reviewed Colorado’s Amendment 2 for rational basis. And, unlike Lawrence, Windsor relied on rational basis cases: Romer, a rational basis case by the panel’s own admission; Moreno, a rational basis case according to Lawrence; and Lawrence itself, which the panel admits “declined to address equal protection.”

In a final flourish of legerdemain, the panel pleads that Windsor cites Lawrence and therefore must be applying something other than rational basis review because Lawrence “is a heightened scrutiny case.” But Lawrence is not a “heightened scrutiny” case, but rather a substantive due process case, and for that reason cannot govern the equal protection analysis here. Even Witt acknowledged as much — but this panel is not so modest. Its opinion offers no justification for such an extraordinarily expansive reading of Windsor in light of these contrary indications. Indeed, there can be none.

Recall that this appeal started out as a Batson case about striking one juror allegedly based on perceived sexual orientation. Without even acknowledging the consequences of its decision, the panel has produced an opinion with far-reaching—and mischievous—

consequences, for the same-sex marriage debate and for the many other laws that may give rise to distinctions based on sexual orientation, without waiting for appropriate guidance from the Supreme Court. And in doing so, it plainly misread Windsor, abandoned our own equal protection precedents, and disregarded our procedures for departing from settled constitutional doctrine.

4. In *Lopez v. Ortiz*, 2015 WL 1470566 (D.P.R., March 31, 2015), the court refused to dismiss an equal protection claim brought by lesbians who had been state prison inmates subjected to humiliating treatment and segregation from other female inmates. The court treated this as a “rational basis” case, at least in part because of traditional deference to prison authorities in making decisions based on penological concerns, but at the same time found that the plaintiffs could seek punitive damages for intentional discrimination. The court also found that plaintiffs could assert claims under the 8th Amendment for cruel and unusual punishment.

During 2014, several U.S. Circuit Courts of Appeals confronted marriage equality claims when states appealed rulings by district courts. The 7th Circuit’s decision reviewed the traditional factors considered by the Supreme Court in considering whether to subject same-sex marriage bans in Wisconsin and Indiana to heightened scrutiny. The Supreme Court denied the states’ petitions to review this ruling. Presented here are excerpts from the opinion dealing only with the doctrinal question of standard of review.

BASKIN v. BOGAN
766 F.3d 648 (2014)
United States Court of Appeals, Seventh Circuit.

POSNER, Circuit Judge.

.....

We are mindful of the Supreme Court’s insistence that “whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither *proceeds along suspect lines* nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). The phrase we’ve italicized is the exception applicable to this pair of cases.

We hasten to add that even when the group discriminated against is not a “suspect class,” courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination. In *Vance v. Bradley*, 440 U.S. 93, 111 (1979), an illustrative case in which the Supreme Court accepted the government’s rationale for discriminating on the basis of age, the majority opinion devoted 17 pages to analyzing whether Congress had had a “reasonable basis” for the challenged discrimination (requiring foreign service officers but not ordinary civil servants to retire at the age of 60), before concluding that it did.

We'll see that the governments of Indiana and Wisconsin have given us no reason to think they have a "reasonable basis" for forbidding same-sex marriage. And more than a reasonable basis is required because this is a case in which the challenged discrimination is, in the formula from the Beach case, "along suspect lines." Discrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect. These circumstances create a presumption that the discrimination is a denial of the equal protection of the laws (it may violate other provisions of the Constitution as well, but we won't have to consider that possibility). The presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims.

The approach is straightforward but comes wrapped, in many of the decisions applying it, in a formidable doctrinal terminology—the terminology of rational basis, of strict, heightened, and intermediate scrutiny, of narrow tailoring, fundamental rights, and the rest. We'll be invoking in places the conceptual apparatus that has grown up around this terminology, but our main focus will be on the states' arguments, which are based largely on the assertion that banning same-sex marriage is justified by the state's interest in channeling procreative sex into (necessarily heterosexual) marriage. We will engage the states' arguments on their own terms, enabling us to decide our brace of cases on the basis of a sequence of four questions:

1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?
2. Is the unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails)? The characteristic must be one that isn't relevant to a person's ability to participate in society. Intellect, for example, has a large immutable component but also a direct and substantial bearing on qualifications for certain types of employment and for legal privileges such as entitlement to a driver's license, and there may be no reason to be particularly suspicious of a statute that classifies on that basis.
3. Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole? Age is an immutable characteristic, but a rule prohibiting persons over 70 to pilot airliners might reasonably be thought to confer an essential benefit in the form of improved airline safety.
4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's purported rationale for the policy implies that it should equally apply to other groups as well? One way to decide whether a policy is overinclusive is to ask whether unequal treatment is essential to attaining the desired benefit. Imagine a statute that imposes a \$2 tax on women but not men. The proceeds from that tax are,

let's assume, essential to the efficient operation of government. The tax is therefore socially efficient, and the benefits clearly outweigh the costs. But that's not the end of the inquiry. Still to be determined is whether the benefits from imposing the tax only on women outweigh the costs. And likewise in a same-sex marriage case the issue is not whether heterosexual marriage is a socially beneficial institution but whether the benefits to the state from discriminating against same-sex couples clearly outweigh the harms that this discrimination imposes.

Our questions go to the heart of equal protection doctrine. Questions 1 and 2 are consistent with the various formulas for what entitles a discriminated-against group to heightened scrutiny of the discrimination, and questions 3 and 4 capture the essence of the Supreme Court's approach in heightened-scrutiny cases: "To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. at 524 (1996), quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The difference between the approach we take in these two cases and the more conventional approach is semantic rather than substantive. The conventional approach doesn't purport to balance the costs and benefits of the challenged discriminatory law. Instead it evaluates the importance of the state's objective in enacting the law and the extent to which the law is suited ("tailored") to achieving that objective. It asks whether the statute actually furthers the interest that the state asserts and whether there might be some less burdensome alternative. The analysis thus focuses not on "costs" and "benefits" as such, but on "fit." That is why the briefs in these two cases overflow with debate over whether prohibiting same-sex marriage is "over- or underinclusive"—for example, overinclusive in ignoring the effect of the ban on the children adopted by same-sex couples, underinclusive in extending marriage rights to other non-procreative couples. But to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy, and to say that the policy is underinclusive is to say that its exclusion of other, very similar groups is indicative of arbitrariness.

Although the cases discuss, as we shall be doing in this opinion, the harms that a challenged statute may visit upon the discriminated-against group, those harms don't formally enter into the conventional analysis. When a statute discriminates against a protected class (as defined for example in our question 2), it doesn't matter whether the harm inflicted by the discrimination is a grave harm. As we said, a statute that imposed a \$2 tax on women but not men would be struck down unless there was a compelling reason for the discrimination. It wouldn't matter that the harm to each person discriminated against was slight if the benefit of imposing the tax only on women was even slighter.

Our pair of cases is rich in detail but ultimately straightforward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't need marriage because same-sex couples can't produce children, intended or unintended—is so full of holes that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological

parents or by adoptive parents. The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases.

It is also why we can avoid engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment. . . .

COMMENT

Judge Posner's opinion carries with it a dose of "law and economics" argumentation that is absent from most equal protection discussions. But he also addresses the factors that the Supreme Court has frequently used in the past to determine whether a classification established by a statute or government policy is suspect. Is it clear from his analysis that the bans on same-sex marriage establish a suspect classification? Would that conclusion carry over to other forms of discrimination because of sexual orientation? Would the same analysis apply to discrimination because of gender identity? To what extent does Justice Kennedy's opinion in *Obergefell* discuss the four factors Judge Posner identified?

* * * * *

Shortly after the 7th Circuit issued its decision in *Bogan*, the 6th Circuit ruled on marriage equality appeals by states in that circuit, taking a different approach to the equal protection issue:

DeBoer v. Snyder
772 F.3d 388 (2014),
rev'd sub nom Obergefell v. Hodges, 135 S. Ct. 1039 (June 26, 2015)
United States Court of Appeals, Sixth Circuit.

Sutton, J.

.....

A separate line of cases, this one under the Equal Protection Clause, calls for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past. This argument faces an initial impediment. Our precedents say that rational basis review applies to sexual-orientation classifications. See *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir.2012); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir.2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir.1997).

There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades. There are ample reasons for staying the course. Courts consider four rough factors in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: whether the group has been historically victimized by governmental discrimination; whether it has a defining characteristic that legitimately bears on

the classification; whether it exhibits unchanging characteristics that define it as a discrete group; and whether it is politically powerless.

We cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens. Stonewall, Anita Bryant's uninvited answer to the question "Who are we to judge?", unequal enforcement of anti-sodomy laws between gay and straight partners, Matthew Shepard, and the language of insult directed at gays and others make it hard for anyone to deny the point. But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." *Lawrence*, 539 U.S. at 570. This order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage in the same way that we can infer from history that prejudice against African Americans led to laws against miscegenation. The usual leap from history of discrimination to intensification of judicial review does not work.

Windsor says nothing to the contrary. In arguing otherwise, plaintiffs mistake Windsor's avoidance of one federalism question for avoidance of federalism altogether. Here is the key passage:

Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Windsor, 133 S.Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). Plaintiffs read these words (and others that follow) as an endorsement of heightened review in today's case, pointing to the first two sentences as proof that individual dignity, not federalism, animates Windsor's holding.

Yet federalism permeates both parts of this passage and both parts of the opinion. Windsor begins by expressing doubts about whether Congress has the delegated power to enact a statute like DOMA at all. But instead of resolving the case on the far-reaching enumerated-power ground, it resolves the case on the narrower *Romer* ground — that anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot. Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-respected authority to define the marital relation, including by "enhanc[ing] the recognition, dignity, and protection" of gay and lesbian couples. Today's case involves no such "divest[ing]"/ "depriv[ing]"/ "undermin[ing]" of a marriage status granted

through a State's authority over domestic relations within its borders and thus provides no basis for inferring that the purpose of the state law was to "impose a disadvantage"/"a separate status"/"a stigma" on gay couples. When the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), they did so to enhance liberty, not to allow the National Government to divest liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power. What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it. The only thing that has changed is the willingness of many States over the last eleven years to expand the definition of marriage to encompass gay couples.

Any other reading of *Windsor* would require us to subtract key passages from the opinion and add an inverted holding. The Court noted that New York "without doubt" had the power under its traditional authority over marriage to extend the definition of marriage to include gay couples and that Congress had no power to enact "unusual" legislation that interfered with the States' long-held authority to define marriage. A decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago—to use its Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead. That would leave the States with little authority to resolve ever-changing debates about how to define marriage (and the benefits and burdens that come with it) outside the beck and call of Congress and the Court. How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

Nor, as the most modest powers of observation attest, is this a setting in which "political powerlessness" requires "extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. This is not a setting in which dysfunction mars the political process. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). And it is not a setting, most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

Instead, from the claimants' perspective, we have an eleven-year record marked by nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past — if the federal courts will allow that future to take hold. Throughout that time, other advances for the claimants' cause are manifest. Nationally, "Don't Ask, Don't Tell" is gone. Locally, the Cincinnati charter amendment that prevented gay individuals from obtaining certain preferences from the city, upheld by our court in 1997, *Equality Found. of Greater Cincinnati*,

Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir.1997), is no more. The Fourteenth Amendment does not insulate influential, indeed eminently successful, interest groups from a defining attribute of all democratic initiatives—some succeed, some fail—particularly when succeeding more and failing less are in the offing.

Why, it is worth asking, the sudden change in public opinion? If there is one thing that seems to challenge hearts and minds, even souls, on this issue, it is the transition from the abstract to the concrete. If twenty-five percent of the population knew someone who was openly gay in 1985, and seventy-five percent knew the same in 2000, Klarman, *supra*, at 197, it is fair to wonder how few individuals still have not been forced to think about the matter through the lens of a gay friend or family member. That would be a discrete and insular minority.

The States' undoubted power over marriage provides an independent basis for reviewing the laws before us with deference rather than with skepticism. An analogy shows why. When a state law targets noncitizens—a group marked by its lack of political power and its history of enduring discrimination—it must in general meet the most demanding of constitutional tests in order to survive a skirmish with a court. But when a federal law targets noncitizens, a mere rational basis will save it from invalidation. This disparity arises because of the Nation's authority (and the States' corresponding lack of authority) over international affairs. *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). If federal preeminence in foreign relations requires lenient review of federal immigration classifications, why doesn't state preeminence in domestic relations call for equally lenient review of state marriage definitions?

COMMENT

Has Judge Sutton correctly characterized the historical record on anti-gay discrimination by the government? The quotation from *Lawrence* referred narrowly to the fact that until the introduction of the Model Penal Code beginning in the 1960s, state sodomy laws criminalized all anal or oral intercourse, not just conduct involving persons of the same-sex, such that the history of penalizing solely same-sex conduct was of relatively recent vintage. This has nothing to say about the long history of discrimination against lesbians and gay men. What is the relevance of the political success of sexual minorities in achieving protection against discrimination and marriage equality in a minority of states to the question whether exclusion from a socially-valued status because of sexual orientation should receive heightened scrutiny? Consider how the court's characterizations of the factors for determining whether a classification is suspect would apply in the case of women or people of color? In 1964, Congress outlawed discrimination because of race or sex in employment and public accommodations, and has subsequently done so in housing, voting, and numerous other contexts, with virtually all of the states taking similar actions. Yet the Supreme Court still employs heightened scrutiny in reviewing statutes that employ racial and sexual classifications. Why?

D. State Constitutional Law

Page 128 – Add the following excerpt from the New Mexico Supreme Court's marriage equality decision to the section on state constitutional law:

GRIEGO v. OLIVER
316 P.3d 865 (2013)
Supreme Court of New Mexico.

Intermediate scrutiny applies because the legislation at issue affects a sensitive class

Three potential levels of scrutiny are available under an equal protection challenge. First, if the statutes treat a suspect class differently, the least deferential standard of review, strict scrutiny, applies, and the burden is on the party supporting the statutes to prove that the legislation furthers a compelling state interest. *Breen*, 2005–NMSC–028, ¶ 12, 138 N.M. 331, 120 P.3d 413. Second, if the statutes treat differently a sensitive class such as persons with a mental disability, an intermediate standard of review applies, which requires the party supporting the statutes to prove that the legislation is substantially related to an important governmental interest. *Id.* ¶ 28. Third, if the statutes in question are social or economic legislation that do not treat a suspect or sensitive class differently, the most deferential standard of review, rational basis, applies, and the burden is on the party challenging the statutes to prove that the legislation is not rationally related to a legitimate governmental purpose. *Id.* ¶ 11.

Plaintiffs contend that strict scrutiny should be applied to their equal protection challenge because prohibiting their marriages denies same-gender couples rights based on their sex. They cite *NARAL*, 1999–NMSC–005, ¶ 43, 126 N.M. 788, 975 P.2d 841, to support their argument that New Mexico legislation which creates gender-based classifications must have a “compelling justification” to satisfy the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.

We do not agree that the marriage statutes at issue create a classification based on sex. Plaintiffs have conflated sex and sexual orientation. The distinction between same-gender and opposite-gender couples in the challenged legislation does not result in the unequal treatment of men and women. On the contrary, persons of either gender are treated equally in that they are each permitted to marry only a person of the opposite gender. The classification at issue is more properly analyzed as differential treatment based upon a person’s sexual orientation. . . .

Classification on the basis of sexual orientation requires intermediate scrutiny

Plaintiffs contend that even if the classification at issue is based on an individual’s sexual orientation, such a classification should be treated as a suspect classification requiring strict scrutiny. A suspect class is “a discrete group ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *Richardson v. Carnegie Library Rest, Inc.*, 1988–NMSC–084, ¶ 27, 107 N.M. 688, 763 P.2d 1153. Race, national origin, and alienage are considered suspect classifications. In addition, we have treated gender-based statutory classifications as suspect.

In *NARAL*, we acknowledged that federal courts have analyzed gender discrimination cases by applying intermediate scrutiny, but we chose to apply a greater level of scrutiny. We held that legislation which involved gender-based classifications would be presumed to be

unconstitutional, and the government would have the burden of establishing a compelling justification for the legislation. A key rationale for applying strict scrutiny was the 1973 addition of the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution, which added the language “[e]quality of rights under law shall not be denied on account of the sex of any person.” Before this addition, Article II, Section 18 had only the language “[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.” N.M. Const. art. II, § 18 (1972). We concluded that to honor the intent of the citizens of New Mexico to expand the guarantees of our Equal Protection Clause, we were obligated to apply a level of scrutiny greater than the one that was being applied by federal courts, particularly because the United States Constitution does not have a counterpart to New Mexico’s Equal Rights Amendment.

Another key rationale for applying strict scrutiny to gender-based classifications was the history of invidious discrimination against women, including restrictions on their rights to vote, hold public office, and other “early laws [that] continued to reflect the common-law view ‘that women were incapable mentally of exercising judgment and discretion and were classed with children, lunatics, idiots, and aliens insofar as their political rights were concerned.’” “Id. ¶ 34 (quoting *State v. Chaves de Armijo*, 1914–NMSC–021, ¶ 27, 18 N.M. 646, 140 P. 1123). We credited the Equal Rights Amendment with causing the amendment and repeal of many of these laws. Based on this analysis, we concluded that the “Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of ... gender-based discrimination,” and therefore “requires a searching judicial inquiry concerning state laws that employ gender-based classifications.”

In this case, the issue we must decide is whether a classification based on an individual’s sexual orientation parallels classifications based on gender, race, national origin, and alienage, and whether it should therefore be treated as a suspect classification. The opponents of same-gender marriage argue that same-gender couples are not even a sensitive class because same-gender couples “possess political power that vastly exceeds their small percentage of the population,” and therefore, if they do not qualify as a sensitive class, they cannot be considered a suspect class. These opponents illustrate the political power of same-gender couples by pointing to achievements that they have attained with respect to same-gender marriages:

The Democratic Party has included redefining marriage in its official party platform. See Platform Standing Comm., 2012 Democratic Nat’l Convention Comm., *Moving America Forward...* 18 (2012), available at <http://www.democrats.org/democratic-national-platform>.

The President and his administration support same-sex marriage. See Josh Earnest, President Obama Supports Same-Sex Marriage, *The White House Blog* (May 10, 2012, 7:31 PM), <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>. [<http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf>]

During the last five years, legislatures in seven United States jurisdictions—New Hampshire, Vermont, New York, the District of Columbia, Minnesota, Delaware, and Rhode Island—have voted to redefine marriage. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, National Conference of State Legislatures ([current on] July 26, 2013),

<http://www.ncsl.org/issues-research/human-services/same-sexmarriage-overview.aspx>.

Last year, the citizens of three States—Maine, Maryland, and Washington—decided to redefine marriage through a direct vote of the people. See Richard Socarides, *Obama and Gay Marriage: One Year Later*, *The New Yorker* (May 6, 2013), [http://newyorker.com/online/blogs/newsdesk/2013/05/obama-and-gay MARRIAGE-one-year-later.html](http://newyorker.com/online/blogs/newsdesk/2013/05/obama-and-gay-MARRIAGE-one-year-later.html).

Focusing on the political powerlessness prong is a reasonable strategy for the opponents of same-gender marriage because whether same-gender couples (the LGBT community) are a discrete group who have been subjected to a history of purposeful unequal treatment is not fairly debatable. Until 1975, consensual sexual intimacy between persons of the same gender was prohibited and actively prosecuted in New Mexico courts under anti-sodomy laws. See *NMSA 1953*, § 40A-9-61 (1963) ((Vol.6, 2d Repl.Pamp.), repealed, *Laws 1975*, ch. 109, § 8). Convictions for sodomy in New Mexico were upheld despite constitutional challenges to these laws. See *State v. Elliott*, 1976-NMSC-030, ¶ 9, 89 N.M. 305, 551 P.2d 1352 (reversing the Court of Appeals insofar as it held the sodomy statute unconstitutional). However, perhaps more importantly, New Mexico has recently enacted legislation to prohibit discrimination against individuals based upon their sexual orientation, 2003 N.M. Laws, ch. 383, § 2; enacted legislation to prohibit law enforcement officers from profiling individuals based on their sexual orientation, § 29-21-2; and added sexual orientation as a protected class under hate crimes legislation, § 31-18B-2(D). None of this legislation would have been required if the LGBT community was not a discrete group which has experienced a history of purposeful unequal treatment and acts of violence.

Refocusing on the contention that the LGBT community is not politically powerless, we recognize that they have had some recent political success regarding legislation prohibiting discrimination against them. However, we also conclude that effective advocacy for the LGBT community is seriously hindered by their continuing need to overcome the already deep-rooted prejudice against their integration into society, which warrants our application of intermediate scrutiny in this case. See *Breen*, 2005-NMSC-028, ¶¶ 28-29, 138 N.M. 331, 120 P.3d 413 (applying intermediate scrutiny to legislation adversely affecting persons with mental disabilities because their political advocacy remains seriously hindered despite their gains in society). The political advocacy of the LGBT community continues to be seriously hindered, as evidenced by the uncontroverted difficulty in determining whether LGBTs are under-represented in positions of political power, because many of them keep their sexual orientation private to avoid hostility, discrimination, and ongoing acts of violence. See Richard M. Vallery, *LGBT Politics and American Political Development*, *Annu. Rev. Polit. Sci.* 2012. 15:313-32 (2012). FBI statistics show that the rates of hate crimes committed against individuals based on sexual orientation have remained relatively constant over the past two decades, although they have risen slightly in the past few years, both in absolute numbers and expressed as a percentage of all types of hate crimes. *Fed. Bureau of Investigation, Uniform Crime Reports: Hate Crime Statistics 1996 through 2012*, available at <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications>. It is reasonable to expect that the need of LGBTs to keep their sexual orientation private also hinders or suppresses their political activity. See *Windsor v. United States*, 699 F.3d 169, 184-85 (2d Cir.2012) (“their position ‘has improved markedly in recent decades,’ but they still ‘face pervasive, although at times more subtle, discrimination ... in the political arena.’”) (quoting

Frontiero v. Richardson, 411 U.S. 677, 685–86, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973)).

Although the LGBT community has had political success, they have also seen their gains repealed by popular referendums. *Romer v. Evans*, 517 U.S. 620 (1996) and *In re Marriage Cases* provide two good examples. In *Romer*, numerous municipalities in Colorado enacted ordinances that prohibited discrimination against gays and lesbians in housing, employment, education, public accommodations, and health and welfare services. In response to the enactment of such ordinances, the voters of Colorado amended the Colorado Constitution to preclude the three branches of government at any level of state or local government from protecting gays and lesbians against discrimination. C.R.S.A. Const. art. 2, § 30b; *Romer*, 517 U.S. at 624, 116 S.Ct. 1620. In *Romer*, the United States Supreme Court invalidated the Colorado constitutional amendment because it violated the Equal Protection Clause of the United States Constitution. California provides another example. After the California Supreme Court filed its opinion in *In re Marriage Cases*, California voters passed Proposition 8, which amended the California Constitution to provide that “ ‘[o]nly marriage between a man and a woman is valid or recognized in California.’ “ Cal. Const., Art. I, § 7.5; *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013).

At the time this case was argued in October 2013, only a minority of states had enacted laws identifying “sexual orientation” as a protected class for purposes of anti-discrimination laws. Only six states had recognized the validity of and enacted legislation permitting same-gender marriages, or civil unions, at the time this opinion was filed: Delaware, 79 Del. Laws ch. 19 (2013); Minnesota, 2013 Minn. Sess. Law Serv. 74 (West); New Hampshire, 2009 N.H. Laws 60–66; New York, N.Y. Dom. Rel. Law § 10–a (Consol.2011); Rhode Island, R.I. Gen. Laws § 15–1–1 (2013); and Vermont, 2009 Vt. Acts & Resolves 3. Four states, Massachusetts, California, Iowa, and Connecticut, interpreted their respective constitutions to require same-gender marriages. See *In re Marriage Cases*, 76 Cal.Rptr.3d 683, 183 P.3d at 452; *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 904; *Goodridge*, 798 N.E.2d at 968. In three states, Maine, Maryland, and Washington, the electorate voted in favor of same-gender marriages. Ashley Fetters, *Same-Sex Marriage Wins on the Ballot for the First Time in American History*, *theatlantic.com* (Nov. 7, 2012), <http://www.theatlantic.com/sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/> (listing the wording of each ballot proposal). Finally, three states, New Jersey, Illinois, and Colorado, have legislation that grants same-gender couples an alternative to civil marriage and makes available to them many of the benefits granted to married couples. See Colo.Rev.Stat. §§ 14–15–102 to –119 (2013); 750 Ill. Comp. Stat. 75/1 to 75/90 (2011); N.J. Stat. Ann. 37:1–28 to –36 (2006). The history we have just recounted demonstrates that the members of the LGBT community do not have sufficient political strength to protect themselves from purposeful discrimination.

To complete the analysis of whether intermediate scrutiny should apply, we must answer whether members of the LGBT community have been subjected to a history of discrimination and political powerlessness based on a characteristic that is relatively beyond their control. *Breen*, 2005–NMSC–028, ¶ 21, 138 N.M. 331, 120 P.3d 413. This requirement cannot mean that the individual must be completely unable to change the characteristic. See *In re Marriage Cases*, 76 Cal.Rptr.3d 683 (recognizing that other classifications such as religion and alienage that receive heightened scrutiny do so despite the fact that individuals can change their religion or

become citizens); Varnum, 763 N.W.2d at 893 (“The constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change.”). Instead, the question is whether the characteristic is so integral to the individual’s identity that, even if he or she could change it, would it be inappropriate to require him or her to do so in order to avoid discrimination? We agree with those jurisdictions which have answered this question affirmatively regarding LGBTs. See Kerrigan, 957 A.2d at 438–39 (holding that gays and lesbians are entitled to consideration as a quasi-suspect class because “they are characterized by a central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual’s sense of self”) (internal quotation marks and citation omitted); see also *In re Marriage Cases*, 76 Cal.Rptr.3d 683, 183 P.3d at 442 (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”); Varnum, 763 N.W.2d at 893 (same).

Therefore, we conclude that intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination. As we noted in *Breen*, to apply intermediate scrutiny, the class adversely affected by the legislation does not need to be “completely politically powerless, but must be limited in its political power or ability to advocate within the political system.” Nor does intermediate scrutiny require the same level of extraordinary protection from the majoritarian political process that strict scrutiny demands. It is appropriate for our courts to apply intermediate scrutiny, “even though the darkest period of discrimination may have passed for a historically maligned group.” Our decision to apply intermediate scrutiny is consistent with many jurisdictions which have considered the issue. *Windsor v. United States*, 699 F.3d at 185; *Kerrigan*, 957 A.2d at 475–76; *Varnum*, 763 N.W.2d at 896.

CHAPTER THREE – GOVERNMENT REGULATION OF SEXUAL CONDUCT

Page 135 – Add new Note 3:

3. In *Cook v. Reinke*, 2012 WL 1941928 (9th Cir. 2012) (unpublished disposition), the court consider a petition for habeas corpus relief from a man who had been convicted of committing “the infamous crime against nature” in the sauna of a gym with another man. The Idaho Court of Appeals rejected his argument that his conduct was protected under *Lawrence v. Texas*, finding that the sauna of a gym was a “public place” and that his sexual partner lacked capacity to consent. The petitioner had argued that the gym was a “private club” because only members were allowed access to the facilities, and that his partner had consented to sexual contact. The question before the federal court on a petition for a writ of habeas corpus is not whether the federal court agrees with the state court’s factual findings, but rather whether the state court’s ruling was an “unreasonable application” of established federal precedent. In this case, the Idaho state court had conceded that the “infamous crime against nature” statute could not be applied to private, consensual acts between adults, but found that the act in question was neither private nor consensual. The federal court of appeals, noting that the petitioner had not presented any Supreme Court precedent on the question whether a gym sauna is a “private place,” found that the Idaho court’s application of federal law was not “unreasonable.” Do you agree?

Page 135 – Add after Note 3:

Contrast the approach of the 4th Circuit in *MacDonald v. Moose*, below, in which a 41-year-old Virginia man sought habeas corpus relief after being convicted for soliciting oral sex from a 17-year-old girl. The Virginia courts and the federal district court accepted the state’s argument that the conduct at issue was not protected under *Lawrence*, but the 4th Circuit panel found, over a strong dissent, that the Virginia sodomy law was facially invalid after *Lawrence* and thus could not provide the predicate for a conviction of solicitation of a felony. The 4th Circuit denied en banc review in *MacDonald*, despite the strong dissenting opinion, and the Supreme Court subsequently denied the state’s petition for certiorari.

MacDONALD v. MOOSE

710 F.3d 154, cert. denied, 134 S.Ct. 200 (2013)

United States Court of Appeals, Fourth Circuit

KING, Circuit Judge:

[William Scott MacDonald, then age 47, was convicted in a Virginia court of contributing to the delinquency of a minor and criminal solicitation of sodomy. His female victim, age 17, told the police that he asked her to perform fellatio upon him. He was sentenced to ten years in prison, nine suspended, on the solicitation charge, and one year on the misdemeanor charge. After serving his sentence, he was placed on probation and compelled to register as a sex offender because of the solicitation charge, a felony. He exhausted his appeals in the state court system and then filed a petition for a writ of habeas corpus, which was denied by the federal district court. His argument was that the Virginia sodomy law, which outlawed all anal or oral sex

regardless of the genders or ages of the participants, regardless whether it was consensual, and regardless whether it was in public or private, was unconstitutional under *Lawrence v. Texas*, and thus could not provide the predicate for violation of the criminal solicitation law. The federal district court held that the due process liberty described in *Lawrence* did not include sex between a 41 year old man and a 17 year old woman. MacDonald appealed the denial of habeas corpus to the 4th Circuit.]

The Certificate of Appeal circumscribes this appeal to an examination of the constitutionality of a single aspect of section 18.2–361(A), which provides: “If any person ... carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a [felony.]” We herein use the term “anti-sodomy provision” to refer to the foregoing portion of section 18.2–361(A). As explained below, we are constrained to vacate the district court’s judgment and remand for an award of habeas corpus relief on the ground that the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment.

I.

MacDonald was forty-seven years old at the time of the events giving rise to his state court convictions. On the evening of September 23, 2004, MacDonald telephoned seventeen-year-old Amanda Johnson, a young woman he had met through a mutual acquaintance. MacDonald and Johnson arranged to meet that night at a Home Depot parking lot in Colonial Heights. When they arrived at the parking lot, MacDonald got into the backseat of Johnson’s vehicle and they drove to the nearby home of Johnson’s grandmother. Johnson went into her grandmother’s residence to retrieve a book, and when she returned to the vehicle MacDonald asked her to “suck his dick.” MacDonald also suggested that they have sex in a shed in Johnson’s grandmother’s yard. Johnson declined both proposals, however, and she drove MacDonald back to the Home Depot parking lot.

Nearly three months later, in December 2004, MacDonald filed a report with the Colonial Heights police maintaining that Johnson had abducted and sexually assaulted him. MacDonald thereafter met with and was interviewed by Detective Stephanie Early. MacDonald advised Early that, sometime in September, Johnson had paged him and asked that he meet her in the Home Depot parking lot. MacDonald stated that, once they met, he got into Johnson’s car and she drove them away. When MacDonald asked Johnson where she was going, she did not respond. MacDonald told her, “[T]his has got to stop, lose my number, I’m married, don’t call me anymore.” MacDonald also advised Detective Early that he and Johnson stopped at a location on Canterbury Lane in Colonial Heights, and “at that point Ms. Johnson forcibly removed his penis from his pants and performed oral sex against his will.” MacDonald acknowledged that he knew Johnson was only seventeen years old.

Soon thereafter, Detective Early met with and interviewed Johnson, who gave a sharply conflicting account of what had occurred. Crediting Johnson’s version of the events, Early secured three arrest warrants for MacDonald. . . On June 7, 2005, MacDonald moved in the circuit court to dismiss the criminal solicitation charge on the ground that the predicate felony—the anti-sodomy provision—violated his due process rights. Relying on *Lawrence v. Texas*,

MacDonald asserted that the Supreme Court had invalidated all state statutes that prohibit “consensual sodomy between individuals with the capacity to consent.” A bench trial was conducted in the circuit court on July 12, 2005, where Johnson, Early, MacDonald, and MacDonald’s wife testified. After the trial had concluded, on July 25, 2005, the circuit court denied the motion to dismiss, ruling that the anti-sodomy provision was not being unconstitutionally applied to MacDonald. The following day, the court found MacDonald guilty of solicitation to commit a felony (i.e., the anti-sodomy provision), and deferred ruling on the misdemeanor offense of contributing to the delinquency of a minor. On August 2, 2005, the circuit court convicted MacDonald of the misdemeanor offense, and it sentenced him on both offenses.

II.

[MacDonald’s appeal of his solicitation conviction was unsuccessful in the state courts, which ruled that because his conduct involved a minor, he lacked standing to invoke the Due Process protection of *Lawrence v. Texas*. He then filed a habeas corpus petition, pro se.]

MacDonald theorized that his conviction was “in violation of the ex post facto guarantee of the U.S. Constitution because [the anti-sodomy provision] is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law.” MacDonald maintained, as he had at each previous opportunity, that the *Lawrence* decision invalidated all state anti-sodomy provisions, and that the Supreme Court “acted in accordance with numerous prior precedents that struck down laws impinging upon the liberty guarantees of the Fifth and Fourteenth Amendments.” The district court, “[i]n deference to petitioner’s pro se status,” trifurcated MacDonald’s constitutional challenges into (1) an ex post facto claim; (2) a facial due process attack; and (3) an as-applied due process challenge to the anti-sodomy provision.

In its Opinion, the district court dismissed MacDonald’s ex post facto claim. Proceeding to MacDonald’s facial due process challenge, the district court employed the deferential § 2254(d) standard of review to withhold relief. The court concluded that the Virginia Court of Appeals had reasonably applied *Ulster County* to decide that MacDonald lacked standing to pursue such a claim because his conduct was not constitutionally protected. Finally, determining that the anti-sodomy provision was constitutional as applied to MacDonald, the district court endorsed the state court’s rationale that, because the Commonwealth had properly treated seventeen-year-olds as children, and because the *Lawrence* decision had stressed that “[t]he present case does not involve minors,” 539 U.S. at 578, the anti-sodomy provision could constitutionally serve as a predicate offense under the solicitation statute. The district court further explained,

The Court of Appeals of Virginia’s determination is based on clearly established federal law. Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children. Thus, the holding that Va.Code § 18.2–361 is not unconstitutional as applied to MacDonald is not contrary to, or an unreasonabl[e] application of, federal law.

III.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs a federal court’s handling of a 28 U.S.C. § 2254 petition filed by a state prisoner. We review de novo a district court’s denial of a § 2254 petition. Pursuant to AEDPA, however, when a habeas petitioner’s constitutional claim has been “adjudicated on the merits in State court proceedings,” we may not grant relief unless the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

IV.

A.

In this appeal, MacDonald pursues both facial and as-applied due process challenges to the anti-sodomy provision. He contends not only that the anti-sodomy provision was unconstitutional as applied to him, but also that *Lawrence v. Texas* compels the facial invalidation of the anti-sodomy provision under the Fourteenth Amendment. Even though, as the Supreme Court of Virginia emphasized, *Lawrence* did not involve minors, MacDonald argues that “[t]he *Lawrence* Court did not preserve those applications of Texas’s [sodomy] law to the extent that it would apply to ‘minors’ or in any other circumstance. It invalidated the law in toto.” MacDonald maintains that he possesses standing to pursue his facial challenge under the Due Process Clause because the anti-sodomy provision was rendered unconstitutional by *Lawrence*. He relies on established Supreme Court authority for the proposition that standing exists “where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of cases it was originally designed to cover.” MacDonald next asserts that the Virginia courts have impermissibly interpreted *Lawrence* as authorizing them to recast the anti-sodomy provision—which by its terms bans all sodomy offenses—and apply the provision solely to sodomy offenses that involve minors. In explaining his position, MacDonald contends that

[t]he courts’ re-writing of the [anti-sodomy provision] wrongly “substitute [s] the judicial for the legislative department of the government” and creates a “dangerous” precedent to encourage legislatures to “ ‘set a net large enough to catch all possible offenders, and leave it to the courts to step inside’ to announce to whom the statute may be applied.”

MacDonald further argues that the Virginia courts’ rewriting of the anti-sodomy provision was contrary to the intent of Virginia’s General Assembly, because the judicially rewritten statute is at odds with other Virginia criminal statutes regulating the sexual conduct of persons over eighteen with younger persons. Cf. Va.Code § 18.2–63 (prohibiting carnal knowledge of a child between thirteen and fifteen); Va.Code § 18.2–370 (prohibiting persons over eighteen from certain “indecent” acts with children under fifteen, including soliciting sodomy).

More particularly, Virginia Code section 18.2–370(A) prohibits any person over eighteen from proposing certain sexual conduct (including sodomy) to “any child under the age of 15 years.” The foregoing provision, MacDonald maintains, was plainly not intended to criminalize activity with minors fifteen or older. He thus contends that Virginia’s judicial rewriting of the anti-sodomy provision, rendering it applicable to the solicitation of sodomy from a minor under eighteen, runs afoul of the age specification (“any child under the age of 15 years”) embedded in section 18.2–370(A). MacDonald further asserts that the judicial redrafting of the anti-sodomy provision by the Virginia courts contravened his due process rights because he did not have—and could not have had—fair notice that the anti-sodomy provision would be construed in a way that renders it applicable to his conduct.

The Commonwealth responds to MacDonald’s contentions by maintaining that Lawrence did not “establish the unconstitutionality of solicitation statutes generally ..., or MacDonald’s solicitation in particular.” Positing that Lawrence simply does not apply to statutes that criminalize sodomy involving a minor, Virginia emphasizes the district court’s determination that the anti-sodomy provision is constitutional as applied to MacDonald. The Commonwealth then asserts that MacDonald lacks standing to pursue a facial challenge to the anti-sodomy provision under the Supreme Court’s Ulster County decision, because the provision can be constitutionally applied in various circumstances, including those underlying this appeal.

B.

1. Put succinctly, the Ulster County decision does not operate to deny standing for MacDonald to pursue a facial due process challenge to the anti-sodomy provision. Under the Article III case-or-controversy requirement, a litigant must assert a concrete interest of his own. The Virginia courts ruled that MacDonald had not asserted his own concrete interest in his facial challenge, but rather was pursuing the interests of third parties, in that the anti-sodomy provision is constitutional as applied to him. Under that theory, MacDonald could only pursue a facial challenge to the anti-sodomy provision as it applies to others. This determination of the jurisdictional predicate for standing to sue relied entirely on an unfavorable legal resolution of the merits of MacDonald’s as-applied constitutional claim. In turn, our resolution of MacDonald’s as-applied claim informs—at least under the theories propounded by the state and district courts—whether MacDonald possesses standing to assert a facial challenge to the anti-sodomy provision.

In Ulster County, the Supreme Court assessed a habeas petition filed by three state prisoners, challenging a New York statute that permitted a jury to presume that two firearms found in the vehicle in which they were riding had been jointly possessed by them all. The Second Circuit declared the statute facially unconstitutional, emphasizing its broad reach in potentially applying the presumption to vehicle occupants “ ‘who may not know they are riding with a gun’ “ or “ ‘who may be aware of the presence of the gun but not permitted access to it.’ ” 442 U.S. at 146, 99 S.Ct. 2213 (quoting *Allen v. Cnty. Court, Ulster Cnty.*, 568 F.2d 998, 1007 (2d Cir.1977)).

The Supreme Court reversed the court of appeals, however, ruling that the Second Circuit had unnecessarily addressed the issue of the statute’s facial invalidity. According to the Court, the presumption was constitutionally applied to the three Ulster County petitioners, in that the

firearms had been discovered in a handbag belonging to the vehicle's fourth occupant—a sixteen-year-old female. The Court explained the applicable principle as this:

A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

Ulster Cnty., 442 U.S. at 154–55. The Court's ruling on standing to pursue a facial challenge, as in this case, depended on an unfavorable threshold resolution of an as-applied challenge. If the statute had been unconstitutionally applied to the petitioners in Ulster County, their own rights would have been adversely affected, and, therefore, reaching the merits of their facial challenge may have been appropriate.

Because, as we explain below, the anti-sodomy provision is unconstitutional when applied to any person, the state court of appeals and the district court were incorrect in deeming the anti-sodomy provision to be constitutional as applied to MacDonald. MacDonald is thus asserting his own concrete injury, and the state court's standing determination, as endorsed by the district court, was contrary to and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

2. In *Lawrence*, the Supreme Court plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment. The statute declared invalid in *Lawrence* provided that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The conduct for which the *Lawrence* defendants were prosecuted qualified as “deviate sexual intercourse,” in that it amounted to “contact between any part of the genitals of one person and the mouth or anus of another person,” that is, sodomy. The Supreme Court granted certiorari on three issues: (1) whether the criminalization of strictly homosexual sodomy violated the Equal Protection Clause of the Fourteenth Amendment; (2) more broadly, whether criminalization of sodomy per se between consenting adults contravened the fundamental liberty and privacy interests protected by the Fourteenth Amendment's Due Process Clause; and (3) whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld against facial challenge a Georgia statute criminalizing all sodomy, should be overruled.

On the third question, relating to *Bowers v. Hardwick*, the Court readily concluded that “[t]he rationale of *Bowers* does not withstand careful analysis.... *Bowers* was not correct when it was decided, and it is not correct today.... *Bowers v. Hardwick* should be and now is overruled.” Though acknowledging the equal protection argument as “tenable,” the Court premised its constitutional holding on the Due Process Clause of the Fourteenth Amendment, surmising that if it were to invalidate the statute “under the Equal Protection Clause[,] some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” The Court underscored that, although the conduct proscribed by the Texas statute might be sincerely condemned by many as immoral, “[t]hese considerations do not answer the question before us.... The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of

the criminal law.” The Lawrence Court thus recognized that the facial due process challenge in *Bowers* was wrongly decided. Because the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the Lawrence decision.

Our good colleague in dissent accords controlling weight to a single instance of word choice in Lawrence, seizing upon Justice Kennedy’s observation that the “case” then before the Court did not involve minors, rather than noting that the underlying “statute” failed to target minors specifically. Justice Kennedy could have accurately used both words interchangeably, as could have Justice White in *Bowers*, had he also chosen to write concerning what the dispute—or litigation, or matter, or issue, or case, or statute—was not about. The anti-sodomy provision in this case, being indistinguishable for all practical purposes from the statute that we now know should have been negated in *Bowers*, also does not involve minors. That is precisely why, in conformance with *Ayotte*, the provision cannot be saved through superhuman efforts. The dissent’s finely honed distinction that, unlike Lawrence and *Bowers*, this “case” involves minors, is made possible solely by the Commonwealth’s decision to institute prosecution of a man who loathsomely solicited an underage female to commit an act that is not, at the moment, a crime in Virginia. The Commonwealth may as well have charged MacDonald for telephoning Ms. Johnson on the night in question, or for persuading her to meet him at the Home Depot parking lot. The legal arm of the Commonwealth cannot simply wave a magic wand and decree by fiat conduct as criminal, in usurpation of the powers properly reserved to the elected representatives of the people.

The Commonwealth’s efforts to diminish the pertinence of Lawrence in connection with MacDonald’s challenge to the anti-sodomy provision—an enactment in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court—runs counter to *Martin v. Zihler*, 269 Va. 35, 607 S.E.2d 367 (2005). In that case, the Supreme Court of Virginia evaluated the constitutionality of a state statute having nothing to do with sodomy, but instead outlawing ordinary sexual intercourse between unmarried persons. The state supreme court nonetheless acknowledged that Lawrence was sufficiently applicable to require the statute’s invalidation.

The *Martin* decision reversed the trial court’s judgment against the plaintiff, who sought damages because the defendant had infected her with herpes. The defendant had demurred to *Martin*’s motion for judgment, pointing out that Virginia law barred tort recovery for injuries sustained while participating in an illegal activity. In its ruling, the state supreme court concluded that there was “no relevant distinction between the circumstances in Lawrence” and those in *Martin*, recognizing that, “but for the nature of the sexual act, the provisions of [the challenged statute] are identical to those of the Texas statute which Lawrence determined to be unconstitutional.” The anti-sodomy provision, of course, prohibits the same sexual act targeted by the Texas statute that failed constitutional muster in Lawrence.

Although both parties in the *Martin* case were adults, there is no valid reason why the logic of that ruling should not have applied with equal force to the ruling of the Court of Appeals of Virginia in MacDonald’s case. It is not sufficient that the *Martin* plaintiff was doubtlessly more deserving of the court’s sympathy than MacDonald. True enough, the Supreme Court implied in

Lawrence that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor. The Court's ruminations concerning the circumstances under which a state might permissibly outlaw sodomy, however, no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary.

Recently, we had occasion to consider a facial challenge to a much different statute, but the analysis in that case informs the issue presented here. See *United States v. Moore*, 666 F.3d 313 (4th Cir.2012). Moore, who had been convicted under 18 U.S.C. § 922(g) for being a felon in possession of a firearm, asserted a facial challenge to § 922(g) under the Second Amendment and the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). We explained that, "[u]nder the well-recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application." Moore contended that the Supreme Court's decision in *Heller*, which struck down the District of Columbia's general prohibition on the possession of handguns, rendered § 922(g)'s firearm restriction violative of the Second Amendment. The *Heller* Court took care to observe however, that certain prohibitions on handgun possession, such as the possession of firearms by felons, are "presumptively lawful." Seizing upon that language, we readily rejected Moore's Second Amendment facial challenge to § 922(g).

The *Lawrence* Court, as in *Heller*, struck down a specific statute as unconstitutional while reserving judgment on more carefully crafted enactments yet to be challenged. The salient difference between § 922(g) and the anti-sodomy provision, however, is that § 922(g), in a relatively narrow fashion, regulates the possession of firearms by felons, while the anti-sodomy provision, like the statute in *Lawrence*, applies without limits. Thus, although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so. The anti-sodomy provision does not mention the word "minor," nor does it remotely suggest that the regulation of sexual relations between adults and children had anything to do with its enactment. In these circumstances, a judicial reformation of the anti-sodomy provision to criminalize MacDonald's conduct in this case, and to do so in harmony with *Lawrence*, requires a drastic action that runs afoul of the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006). In *Ayotte*, the Court recognized the important principle that, "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." The Court also acknowledged, however, the dangers of too much meddling:

[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.... [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake.... All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

It is accurate for us to observe that facial constitutional challenges to state statutes are generally disfavored, and the general rule when a defect appears is “partial, rather than facial, invalidation.” We are confident, however, that we adhere to the Supreme Court’s holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional.

A consequence of the *Ayotte* decision could be that a statute closely related to the anti-sodomy provision—for example, Virginia Code section 18.2–361(B), which criminalizes incestuous sodomy involving both minors and adults—might well survive review under *Lawrence*, as may that part of section 18.2–361(A) that outlaws bestiality. The anti-sodomy provision itself, however, which served as the basis for MacDonald’s criminal solicitation conviction, cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*. Pursuant to the foregoing, we reverse the judgment of the district court and remand for an award of habeas corpus relief.

DIAZ, Circuit Judge, dissenting:

In concluding that *Lawrence v. Texas* invalidated sodomy laws only as applied to private consenting adults, the Virginia Court of Appeals did not reach a decision that “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 131 S.Ct. 770, 786–87 (2011). The majority ultimately may be proven right that the Virginia “anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment.” But because the matter is not beyond doubt after *Lawrence*, and because the district court was bound to give Virginia courts the benefit of that doubt on federal collateral review, I respectfully dissent.

In adjudicating a federal petition for habeas relief from a state court conviction, AEDPA “limit[s] the federal courts’ power to issue a writ to exceptional circumstances” where the state court decision on the merits “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir.2012) (quoting 28 U.S.C. § 2254(d)). “If this standard is difficult to meet, that is because it was meant to be.”

The majority elides this burden altogether, passing upon the constitutionality of the Virginia anti-sodomy provision as if it were presented in the first instance. In doing so, my colleagues fail to account for the rigor of federal habeas review, which is not intended to be “a substitute for ordinary error correction through appeal.” Because MacDonald’s conviction does not rise to the level of an “extreme malfunction[] in the state criminal justice system[],” *id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring)), I would affirm the district court’s judgment.

II.

. . . The as-applied and facial challenges brought by MacDonald entail the same inquiry—whether *Lawrence* invalidated sodomy statutes on an as-applied or facial basis.

The majority appears to disagree with this “as-applied” interpretation of *Lawrence* on two unrelated grounds. First, *Lawrence* overruled *Bowers v. Hardwick*, which dismissed a facial challenge to the constitutionality of a sodomy law. Because the Virginia anti-sodomy provision is indistinguishable from the statute in question in *Bowers*, the majority reasons that MacDonald’s facial challenge must succeed just as—according to *Lawrence*—the facial challenge in *Bowers* should have. Second, the majority contends that allowing the Virginia anti-sodomy provision to apply to minors would entail rewriting the statute in a manner forbidden by *Ayotte v. Planned Parenthood of N. New England*.

In *Lawrence*, Texas police officers responding to an alleged weapons disturbance entered a private residence where two men were engaged in a sexual act. The state charged the men with violating a Texas sodomy statute criminalizing “any contact between any part of the genitals of one person and the mouth or anus of another person.” Overruling *Bowers*, *Lawrence* explained that decisions made in private by consenting adults “concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” In the penultimate paragraph of the opinion, however, *Lawrence* prefaced its holding with the following qualification:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

The majority characterizes this segment of the opinion as “ruminations concerning the circumstances under which a state might permissibly outlaw sodomy” that “no doubt contemplated deliberate action by the people’s representatives, rather than by the judiciary.” I do not see how the majority can be so certain. If anything, the commentary on what “the present case does not involve” is characteristic of an as-applied ruling, particularly because the Court used the words “this case,” not “this statute,” to limit its holding. This language arguably confines the scope of constitutional protection to private sexual intimacy between consenting adults. In fact, the Court repeatedly emphasized these distinctions throughout its historical and legal analysis of sodomy laws. In defending its view that sodomy laws were never applied to private sexual conduct among consenting adults, *Lawrence* recounted the historical enforcement of sodomy statutes. This historical discussion also evinces an as-applied ruling to private consenting adults, for it is only relevant inasmuch as it identifies the valid applications of sodomy laws outside this zone of constitutionally protected liberty.

In any event, in order for MacDonald to prevail on his federal habeas petition, it must be clear that *Lawrence* facially invalidated all sodomy statutes. Nowhere in the opinion does the Court do that. The majority nevertheless infers the unconstitutionality of Virginia’s anti-sodomy provision from the fact that *Lawrence* expressly overruled *Bowers*. Again, this is a bridge too far. If it is difficult to discern from the *Lawrence* opinion whether it invalidated all sodomy statutes, it is even more of a stretch to do so by negative inference from the case it overturned.

The majority also relies on *Martin v. Zihler*, which invalidated the Virginia fornication statute as contrary to *Lawrence*. Despite the fact that *Zihler* involved the private sexual conduct of adults, the majority sees “no valid reason why the logic of that ruling should not have applied with equal force to the ruling of the Court of Appeals of Virginia in *MacDonald’s* case.” However, *Zihler* undercuts the majority’s conclusion entirely, because in that case the Supreme Court of Virginia reached the same “as-applied” interpretation of *Lawrence* as the Virginia Court of Appeals did in this case, and invalidated the Virginia fornication statute only as applied to the conduct protected by *Lawrence*:

It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes’ impact on such conduct.

Furthermore, *Zihler* was a Virginia civil case on direct appeal—a far cry from federal collateral review of a state court conviction—and is not “clearly established” federal law. It has no place in the analysis, and to the extent it does, it undermines the majority’s reasoning.

Given the opaque language of *Lawrence*, I do not share the majority’s conviction concerning the facial unconstitutionality of Virginia’s anti-sodomy provision. Reasonable jurists could disagree on whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute. In fact, they already have. Compare *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 8 n. 4 (1st Cir.2012) (characterizing *Lawrence* decision as facial invalidation of statute), and *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir.2006) (same), with *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir.2004) (explaining that *Lawrence* “invalidat[ed] Texas’ sodomy statute as applied to consensual, private sex between adults”), and *Muth v. Frank*, 412 F.3d 808, 812 (7th Cir.2005) (characterizing *Lawrence* as holding that Texas sodomy statute “was unconstitutional insofar as it applied to the private conduct of two consenting adults”).

C. The majority also misreads *Ayotte*, effectively turning the “normal rule” of “partial, rather than facial, invalidation” on its head. The exception to an as-applied invalidation is just that—an exception to that “normal rule” which, as evidenced by the cases cited by the majority, applies almost exclusively to challenges to overbroad statutes on First Amendment free-speech grounds.

Furthermore, the majority overlooks that *Ayotte* actually declined to facially invalidate the New Hampshire statute at issue in that case because there was “some dispute as to whether New Hampshire’s legislature intended the statute to be susceptible to such [an as-applied] remedy.” Concluding “that the lower courts need not have invalidated the law wholesale,” the Court “recognize[d] the possibility of a modest remedy: an injunction prohibiting unconstitutional applications.”

Even if *Ayotte* were instructive, therefore, it simply invites the next question: “Would the [Virginia] legislature have preferred what is left of its statute to no statute at all?” The majority wrongly assumes, without the proof required by *Ayotte*, that the Virginia General Assembly did not intend for its anti-sodomy provision to apply to the conduct that *Lawrence* arguably

exempted from constitutional protection, despite the fact that Lawrence itself acknowledged that “one purpose for the [sodomy laws]” could be to cover “predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault.” Lawrence, 539 U.S. at 569.

In order for the Virginia anti-sodomy provision to escape facial invalidity, it need not criminalize only conduct that falls outside constitutional protection. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”). Indeed, to suggest that a state must excise the constitutional defects of a statute by legislative revision before enforcing those portions that pass constitutional muster would turn every as-applied ruling into a facial invalidation.

III.

If a federal court is to grant a writ of habeas corpus to a state prisoner incarcerated under Virginia law, it needs to be more than “confident” that the underlying criminal conviction violates the Constitution. The foundation for the issuance of the writ requires a certainty, not just a likelihood, that a state court ruling “reached a decision contrary to clearly established federal law.” Unlike the majority, the district court here remained faithful to that distinction in declining to issue the writ. I respectfully dissent.

NOTES

1. Despite this ruling by the 4th Circuit, Virginia intermediate appellate state courts persisted in upholding prosecutions under the sodomy law for public activity, taking the position that the 4th Circuit’s ruling did not displace state law precedents. The Virginia legislature finally voted to reform the sodomy law to be consistent with Lawrence early in 2014.
2. In another state that did not reform its sex crimes laws to comply with Lawrence, the Alabama Court of Criminal Appeals vacated the conviction of a gay man, holding that the state’s sexual misconduct law, which expressly ruled out consent as a defense, was unconstitutional. The man had been charged with first-degree sodomy, a nonconsensual offense, but the jury convicted on the lesser-included offense of sexual misconduct, having been instructed by the judge that if it found the charged activities to be consensual, it could still convict under the sexual misconduct statute. The court rejected the state’s argument that it could preserve the constitutionality of the law by striking a sentence that provided that consent was not a defense. Having found the conviction unconstitutional, the court refused the state’s request to remand for a new trial, holding that this would unconstitutionally subject the defendant to “double jeopardy.” *Williams v. State*, 2014 Ala. Crim. App. LEXIS 42 (June 13, 2014).
3. As some of the cases in this chapter suggest, police “sting” activity intended to “catch” gay men cruising for sex in public spaces such as parks continues to take place. Courts have become increasingly dubious about the public order arguments supporting such

prosecutions. For example, see *U.S. v. Lanning*, 723 F.3d 476 (4th Cir. 2013), rejecting the notion that a police officer who specifically set out to entice a suspect to grope him could then claim to have been “offended,” or that such groping would constitute public obscenity.

Page 143-4 – Add new Note 3:

4. Should “indecent exposure” (i.e., exposure of the genitals in a public place) be considered a crime of “moral turpitude” for purposes of U.S. law governing grounds for deportation of non-residents? Judges of the U.S. Court of Appeals for the 9th Circuit were sharply divided over this question in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010). A majority held that an individual subject to deportation upon conviction of indecent exposure should have a chance to prove in the deportation hearing process that the circumstances of the crime were not serious enough to merit the label of “moral turpitude,” while a dissenter argued that indecent exposure necessarily involved “turpitudinous” conduct. The opinion contains an interesting discussion of the history and development of the concept of “moral turpitude.”

Page 144: Substitute the following text and opinion for *Pryor v. Municipal Court* (p. 144).

After the Supreme Court held in *Lawrence v. Texas* that private, consensual adult sex comes within the protected sphere of liberty under the 14th Amendment, to what extent does the government retain the authority to impose criminal penalties for solicitation to engage in such activity? When the Model Penal Code drafters addressed the issue of sex crimes in the 1950s, they determined that the legitimate interest of government pertained to conduct in the public sphere, and urged decriminalization of non-commercial consensual sexual conduct in private. However, they concluded that the state had legitimate concerns with public conduct anticipatory to private sexual activity, such as public loitering for purposes of finding a sex partner or public solicitation. If private consensual sexual conduct enjoys protection from law enforcement, either as a result of constitutional rulings or legislative reform, what is the justification for punishing solicitation unaccompanied by inappropriate public conduct? This question is posed when states revise their sex crimes laws without revising their solicitation laws.

In 1979, the California Supreme Court ruled in *Pryor v. Municipal Court*, 599 P.2d 636, that a public act of solicitation to engage in private consensual activity of a type that was formerly criminal but had been decriminalized by legislative enactment could not be subjected to criminal penalties. To punish such solicitation would be an inappropriate restriction on speech and freedom of association. Rather than strike down the state’s loitering/solicitation statute, however, the court construed it to apply only to solicitations that were themselves disorderly or that sought to initiate sexual conduct committed in public.

What kind of public conduct should be subject to criminal penalties? Put plainly, does the government have a legitimate interest in policing the conduct of individuals who go to public places (such as parks or public restrooms) seeking sexual partners, if any actual conduct takes place out of view of the general public?

Page 158 – Insert the following decision prior to the Notes and Questions:

WATSON v. STATE OF GEORGIA
293 Ga. 817 (2013)
Supreme Court of Georgia

HUNSTEIN, Justice.

In this criminal appeal, Appellant James Watson challenges the constitutionality of Georgia’s solicitation of sodomy statute, OCGA § 16–6–15. Watson, who at the time was an officer with the City of Nashville Police Department, was convicted of the misdemeanor offense of solicitation of sodomy as well as the felony violation of oath of office, arising from his interactions with 17–year–old Chase Browning in March 2009. Watson contends that the solicitation of sodomy statute is unconstitutional both on its face and as applied to him, as an infringement on his rights to free speech, privacy, and due process of law under the United States and Georgia Constitutions. We now reaffirm the constitutionality of the solicitation of sodomy statute, but find that the evidence was insufficient to convict Watson under that statute. In addition, because the counts in the indictment charging Watson with violating his oath of office were expressly premised on a finding that he had violated the solicitation of sodomy statute, we likewise must reverse the convictions on those counts.

On March 1, 2009, Browning was at a friend’s house when a dog attack occurred, and police were called. Watson, who was on duty with the City of Nashville Police Department, was dispatched to the scene. After the incident, Watson gave Browning a ride home. Browning testified that, during the car ride, Watson told Browning that he “wasn’t supposed to be giving [Browning] a ride home” and insinuated that he deserved “something to repay for the ride.” Also during the ride, Browning testified, Watson looked at him and made a lewd gesture, “grab[bing] at his genitals and pull[ing] down on his pants.”

The following day, Watson sent Browning a Facebook message that stated:

I guess we need to discuss my payment for yesterday. You asked what I wanted, so does that mean I get what I want, no matter what it is. I guess I know what I want I am just a little nervous about asking, because I am not sure you will go for it.

The day after that, Watson sent Browning a MySpace message, again referring to “my payment” and asking Browning to respond either online or to Watson’s cell phone. On March 4, Browning responded to Watson by text message, asking what Watson meant regarding “payment.” Watson replied, “What about me and u getting 2gether sometime 2 have a little fun if u know what I mean.” Declining, Browning responded, “Naw man I ain’t like that,” to which Watson replied, “Ok well if u change ur mind just let me know u may like it I didn’t until I let someone talk me into it.”

Browning, who testified that this exchange made him feel “very awkward,” immediately reported this exchange to his high school tennis coach, and school officials contacted law enforcement. In the presence of a GBI agent, Browning placed a phone call on March 13, 2009

to Watson, who was on duty at the time, suggesting he was considering Watson's proposal and asking what to expect. During that conversation, Watson proposed that they meet that evening at the unoccupied home of one of Watson's relatives. After the conversation, Watson sent Browning a text message asking him to come to Watson's house instead. In a second phone conversation, Watson explicitly proposed and discussed acts of sodomy. In both conversations, Watson stated repeatedly that it was up to Browning as to what ultimately would happen and that Browning did not have to do anything he did not want to do. The phone calls were recorded and played for the jury at trial.

The solicitation of sodomy statute provides: “[a] person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy.” OCGA § 16-6-15(a). “Sodomy” is defined as the “perform[ance] or submi[ssion] to any sexual act involving the sex organs of one person and the mouth or anus of another.” OCGA § 16-6-2(a)(1). We have previously held that, in order to withstand a constitutional attack, the sodomy statute must be construed in a limited manner, so as not to criminalize “private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent.” *Powell v. State*, 270 Ga. 327, 336(3), 510 S.E.2d 18 (1998). This limiting construction is necessary, the Court held, to avoid infringing on fundamental privacy rights guaranteed under the Georgia Constitution. *Id.* at 332, 335-336(3), 510 S.E.2d 18; accord *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003) (applying *Powell* to invalidate adjudication of delinquency for violating fornication statute); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding Texas sodomy statute making it a crime for two consenting adults of the same sex to engage in private sexual activity violated due process under U.S. Constitution).

Subsequent to our decision in *Powell*, this Court upheld the solicitation of sodomy statute against a constitutional challenge on free speech grounds. In *Howard v. State*, 272 Ga. 242, 527 S.E.2d 194 (2000), we held that “this Court can narrowly construe the solicitation of sodomy statute to only punish speech soliciting sodomy that is not protected by the Georgia Constitution’s right to privacy.” Though Watson invites us to overrule *Howard*, we decline to do so, because we believe its holding is well-founded. As we have recently reaffirmed, even statutes that impose content-based restrictions on free speech will not be deemed facially invalid if they are readily subject to a limiting construction. See *Final Exit Network, Inc. v. State of Ga.*, 290 Ga. 508, 511(3) (2012); see also *State of Ga. v. Davis*, 246 Ga. 761, 762(1), 272 S.E.2d 721 (1980) (declining to invalidate criminal solicitation statute, where it could be construed as criminalizing “only such language as creates a clear and present danger of a felony being committed”). We therefore adhere to our holding in *Howard* and reaffirm that the solicitation of sodomy statute is constitutional to the extent it is construed to prohibit only that speech by which a person solicits another to commit the offense of sodomy as narrowly defined in *Powell*.

In so doing, we expressly reject Watson's contention, derived from the dissenting opinion in *Howard*, that adopting a limiting construction of the solicitation of sodomy statute creates such vagueness as to violate due process. See *Howard*, 272 Ga. at 247-248(2), 527 S.E.2d 194 (Sears, J., dissenting). Watson asserts that our narrowed construction of the solicitation statute fails to afford individuals fair notice of what conduct is prohibited and renders the statute susceptible to arbitrary and selective enforcement. We disagree. Under the applicable statutes, as construed in *Powell* and *Howard*, an individual violates the solicitation of sodomy statute if he (1) solicits

another individual (2) to perform or submit to a sexual act involving the sex organs of one and the mouth or anus of the other and (3) such sexual act is to be performed (a) in public; (b) in exchange for money or anything of commercial value; (c) by force; or (d) by or with an individual who is incapable of giving legal consent to sexual activity. See OCGA §§ 16–6–15(a), 16–6–2(a)(1); Howard, 272 Ga. at 244(3), 527 S.E.2d 194; Powell, 270 Ga. at 336(3), 510 S.E.2d 18. This definition of the crime of soliciting sodomy is sufficiently precise to “give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated.” Santos v. State, 284 Ga. 514, 514(1), 668 S.E.2d 676 (2008).

Having thus defined the scope of the conduct that is prohibited by the statute, we now examine whether the State satisfied its burden of proving that Watson did in fact violate the solicitation of sodomy statute. To do so, we must determine whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt all the essential elements of each crime of which Watson was convicted. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Walker v. State, 247 Ga. 746(2), 280 S.E.2d 333 (1981). The evidence shows that Watson initiated a series of communications with Browning that became increasingly sexual in nature. Watson clearly invited Browning to engage in sexual acts falling within the express language of the sodomy statute. Therefore, the evidence was sufficient on the first two of the three elements of the offense delineated above.

However, the evidence was not sufficient as to the third element. That is, Watson did not propose acts of sodomy that were to be (a) of a public nature; (b) in exchange for money or anything of commercial value; (c) compelled by force; or (d) performed by those not legally capable of consenting. First, Watson never suggested that any encounter occur in a public place, and the only specific places he proposed meeting were private homes. The mere fact that Watson was a public officer does not render “public” his offer to engage in sex in a private residence. Second, there was never any suggestion, express or implied, that money or anything of commercial value would be exchanged in connection with the encounter. Construed in context, Watson’s references to “payment” simply do not bring this situation into the commercial realm.

Third, though the repeated suggestion that Browning owed Watson something in exchange for the car ride home was certainly inappropriate, particularly as directed from a uniformed, on-duty police officer to a 17-year-old boy, we do not find that such conduct rises to the level of intimidation or coercion that would give rise to a finding of sexual contact by force. In the context of sexual offenses, we have defined the term “force” to mean “acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation” such as would be “sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to [oneself] or others.” (Citation and punctuation omitted.) Brewer v. State, 271 Ga. 605, 607, 608, 523 S.E.2d 18 (1999); see, e.g., Richardson v. State, 256 Ga. 746(2), 353 S.E.2d 342 (1987) (sexual contact was deemed forcible where directed by defendant at stepdaughter, by force of threats, beginning when she was twelve). Here, while Browning testified that Watson’s contacts made him feel “very awkward,” there was no evidence that Browning believed Watson posed any danger to him or others. Rather, the evidence shows that Watson repeatedly told Browning that he would not have to do anything he did not want to do. Moreover, Browning actually declined Watson’s overture, after which the parties had no further contact until Browning contacted Watson while in the presence of law enforcement. And the

mere fact that Watson occupied a position of authority with respect to Browning is not sufficient to show “force” in this context. See *State v. Eastwood*, 243 Ga.App. 822, 535 S.E.2d 246 (2000) (no evidence of force where schoolteacher engaged in private, consensual sexual relations with student). In sum, the State has failed to prove that the proposed sodomy would have been accomplished by “force” as we have defined it in the realm of sexual offenses.

Finally, because sixteen is the age at which persons are deemed legally capable of consenting to sexual intercourse, see *In re J.M.*, 276 Ga. at 89(2), 575 S.E.2d 441, both parties here were legally capable of consenting to sexual contact. In sum, though the evidence was sufficient to prove the first and second elements in our definition of solicitation of sodomy, it was insufficient to prove the third element. Accordingly, Watson’s convictions and sentences for solicitation of sodomy must be reversed.

Page 159 – Add the following to the Notes & Questions:

5. The Georgia solicitation statute appears on its face to apply to all solicitations, regardless whether they are made in public or private. Officer Watson solicited Browning in his car, and later by email and telephone. While the court adopted a limiting interpretation of the statute that would excuse solicitations to engage in legal sexual activity (private activity between consenting adults), it did not limit application of the statute to solicitations made in public. What is the justification for the state policing private solicitations?

Page 159 - Add new Note 5:

5. Legal scholars tend to focus on the decisions of courts holding criminal statutes unconstitutional without considering an important part of the aftermath: whether those opinions are appropriately translated into changes in the statute books and in the conduct of law enforcement authorities. On page 149, the casebook notes *People v. Uplinger*, 58 N.Y.2d 936 (1983), in which the New York Court of Appeals struck down a state penal code provision making it a crime to solicit a person to engage in deviate sexual intercourse, having previously invalidated the application of the state’s sodomy law to private, consensual adult sex. However, the legislature, having taken more than twenty years to amend the penal law on sodomy, had still not amended the law on loitering for the purpose of soliciting deviate sexual intercourse as of 2010. Because the law was still “on the books,” it was also still in the reference materials provided to police officers and many of them continued to enforce it. Could a municipality whose police force continued to enforce a criminal law that had been held unconstitutional decades earlier be subject to liability to those who were arrested, even though charges against them were eventually dropped by prosecutors or dismissed by the courts? Should individual police officers be shielded from personal liability for making such unconstitutional arrests, on the ground that it is the responsibility of their employer to ensure that they are kept up-to-date on changes in the criminal law? Would such personal immunity disappear if the municipality actually undertakes to inform police officers about legal changes, but the officers persist in enforcing the law because it remains “on the books”? Should the legislature bear any liability for failing to modify the law in accordance with the court’s opinion? See *Casale v. Kelly*, 710 F.Supp.2d 347 (S.D.N.Y. 2010), in which a federal trial judge held New York City in contempt and established a prospective monetary penalty formula in case of continuing arrests, because

police officers had continued to enforce the loitering statute even after the City had represented to the court that it was taking steps to educate police officers about the current state of the law. See also, *Amore v. Novarro*, 610 F.3d 155 (2nd Cir. 2010), holding that a City of Ithaca police officer who made an unconstitutional arrest under the loitering statute enjoyed qualified immunity from personal liability because the statute was still “on the books” and he had never been instructed otherwise by his employer. During the summer of 2010 the New York State legislature finally removed the offending statute from the books, and New York City entered into a settlement establishing a fund to compensate those who had been unlawfully arrested.

Page 159 – Add the following Case after new Note 5 (above)

Sometimes gay people caught up in police stings succeed in getting the charges against them dropped, and then institute their own lawsuits seeking to hold the police and/or the municipality liable for violating their rights by a wrongful arrest. In the following case, the federal district court had granted a pre-trial motion dismissing the claims of the gay plaintiff and his boyfriend (whose car was impounded), and they appealed to the 6th Circuit, which held, after discussing the various legal theories for liability, that the trial court erred in dismissing these claims as a matter of law, in light of the plaintiffs’ allegations. The case provides a useful discussion and analysis of the various claims that gay people might bring when they are caught in such “sting operations” as described in this and some of the cases mentioned above.

ALMAN v. REED

703 F.3d 887

U.S. Court of Appeals, 6th Circuit, 2013

KEITH, Circuit Judge.

I. FACTUAL BACKGROUND

Plaintiffs are gay men and domestic partners who lived in Yorktown, Indiana in October 2007. Alman was arrested in Westland, Michigan on October 12, 2007, during an undercover police operation in Hix Park, while he was taking a break from helping his mother move to a nearby apartment building. This case arises out of the circumstances of his arrest and the subsequent seizure of the car Alman had driven to the park, which belonged to Barnes.

A. Alman’s Arrest

Around 1:00 p.m. on October 12, 2007, Alman decided to take a break from helping his mother move to a new apartment and go visit Hix Park, which was nearby. Hix Park is a public nature park with maintained trails winding through the woods, and its entrance drive leads to a parking lot with a pavilion nearby. When Alman arrived at the park that day, he parked his car and remained in his car for a while listening to the radio. He eventually got out and sat down at a picnic table under the pavilion. Defendant–Appellee Kevin Reed, a Wayne County Deputy Sheriff who was working undercover, approached Alman at some point after Alman sat down at the table and struck up a conversation.

Deputy Reed was part of a law enforcement task force staffed by officers from the Westland

Police Department and the Wayne County Sheriff's Department. Sergeant Robert Swope of the Westland Police Department supervised the team, which, along with Deputy Reed, also included Officers Randy Thivierge and John Buffa of the Westland Police Department. The task force, known as the Metro Street Enforcement Team ("MSET"), was formed to conduct surveillance at Hix Park to investigate complaints of lewd conduct and possible sexual activity taking place in the park. (Sgt. Swope testified that his supervisor informed him that Department of Public Service workers had found empty condom wrappers and pornographic materials while emptying trash cans in the park.)

At the request of Swope's supervisor, Lieutenant Engstrom of the Westland Police Department, MSET had conducted visual surveillance at Hix Park prior to October 12, 2007, and although they had found used condoms along the trails in the park, they had not observed any sexual or lewd activity during those outings. Lt. Engstrom instructed Sgt. Swope to continue the surveillance and conduct a decoy operation in the park with his team. That operation took place on October 12, 2007.

Sgt. Swope supervised the decoy operation, Deputy Reed acted as the decoy, and Officers Thivierge and Buffa were the surveillance and backup officers. Swope monitored the operation from his car, while Thivierge and Buffa surveilled on foot and in plain clothes. Swope testified that he selected Reed to be the decoy because Reed had experience working with the morality unit for the Sheriff's Department for about five years.

When the officers arrived at the park, they observed Alman sitting on the picnic bench under the pavilion. According to his testimony, Reed walked over to the pavilion, sat down at a picnic bench, and struck up a conversation with Alman because Alman was the only person around. Alman testified that Reed asked him what he was doing in the park, and Alman told him that he was taking a break from helping his mother move. Alman also told Reed that he and his partner had just moved to Indiana after living in California for some time. Reed testified that Alman's mentioning his "partner" led him to assume that Alman was gay.

There is some dispute about what else was discussed and what happened next. Reed testified that Alman told him he liked to visit Hix Park for recreation, but Alman testified that he had never visited Hix Park before that day. According to Reed, Alman asked him if he had found the park through a website called "squirt.org," which Reed had never heard of before that day. Reed told Alman that he was in the park to look for deer, and testified that Alman said he had often seen deer in his mother's yard nearby. According to Reed, Alman then invited Reed to "take a walk down the trail" to see if they could find "a big buck." Alman disputes this, claiming that he got up and said he was going for a walk and leaving the park, and that Reed then got up and followed him without invitation. In any event, it is undisputed that Alman began walking down a trail and that Deputy Reed followed him. According to Alman, Reed asked him if there was a more secluded spot they could go after they had been walking a short distance. Reed testified, however, that Alman veered off on his own into a small clearing after they had walked a short distance.

Once in the clearing, the two men began talking. Alman testified that he believed that Reed was flirting with him, and that Reed told Alman that he "liked to watch." Reed testified that he told

Alman he was “a little nervous” and “new to this” type of activity. The two were standing close to one another when Alman leaned forward and reached out and touched the zipper area on the front of Reed’s crotch. The fact that Alman touched Reed’s crotch is undisputed. What is disputed, however, is the nature of this touching. Alman testified that he “brushed” his hand up against Reed’s zipper area and that he did not even consider it touching; Reed testified that Alman “grabbed” his crotch with his “whole cupped hand” for “an instant, maybe a second or half a second.” Not expecting it, Reed took a step back, and Alman went down on one knee. Alman testified that he was positioned “sideways” to Reed when he went down on one knee, and that he pretended to tie his shoe to demonstrate that “everything was okay.” For his part, Reed did not mention whether Alman was facing him or facing sideways, and he did not recall whether Alman pretended to tie his shoe, stating that Alman’s hands may have been “by his side or maybe even resting on his knee.” At that point, Reed pulled out his badge and told Alman that he was under arrest.

Reed walked Alman back to the pavilion, where the other officers were waiting. They handcuffed him and placed him in a squad car when one arrived. Reed reported what had happened to Sgt. Swope, telling Swope that he arrested Alman after Alman had “grabbed me or touched my crotch.” Swope testified that he did not ask Reed if Alman had used force, whether Alman propositioned him, or whether Reed had said or done anything that might have caused Alman to believe that he had consent to touch Reed. On Swope’s orders, the car that Alman drove to the park was towed away and impounded by the Westland Police Department.

Alman was booked, and based on Swope’s instructions, Officer Thivierge wrote Alman an Appearance Ticket, charging him with Accosting and Soliciting and Fourth Degree Criminal Sexual Conduct (“CSC4”), which are Michigan state criminal offenses. Alman was held in a cell at the Westland Police Department for about two hours and was released after he posted a \$150 bond.

B. Seizure of Barnes’s Vehicle

On the day of his arrest, Alman drove to Hix Park in a car that belonged to his partner, Michael Barnes. A few days after Alman’s arrest, Barnes traveled to Michigan to retrieve Alman and his car. On October 17, 2007, after learning of his options, Barnes elected to redeem his vehicle without contesting the seizure by paying the \$900 redemption fee. Barnes signed an acknowledgment of the vehicle’s release and his payment. With the release letter in hand, Barnes went to retrieve his car from the Westland Police Department at around 2:00 p.m. on October 17. When he arrived, he was told that the only person authorized to release the car was Sgt. Jedrusik, who was not at the station at the time. (Barnes had been given a phone number and was instructed to call before retrieving his car, but he did not call before going to the police station.) The desk officer told Barnes that Officer Thivierge could release the vehicle, but that he would not return to the station until 6:00 p.m. Barnes then went to the mayor’s office to complain. After failing to meet with the mayor, Barnes contacted The Triangle Foundation, a LGBT advocacy organization that has since been renamed Equality Michigan. Barnes traveled back to the police station with a Triangle Foundation representative at around 6:00 p.m., and Barnes was able to retrieve his car after Swope, who was in the station at the time, contacted Sgt. Jedrusik.

C. Dismissal of Charges Against Alman

Alman initially was given an appearance ticket charging him with violating Mich. Comp. Laws § 750.448, Soliciting and Accosting; and M.C.L. § 750.520e, Criminal Sexual Conduct in the Fourth Degree (CSC4). Luke Skywalker, the assistant county prosecutor assigned to the case, testified that he adjourned the case until his office could check with Prosecutor Kym Worthy about whether to proceed with the case in light of the County Prosecutor's policy on prosecutions for sexual activity in public places. That policy reads, in relevant part:

The Prosecutor's Office receives a large number of warrant requests and vehicle seizure requests in cases involving allegations of sexual conduct in public places. This policy statement is intended to provide local police agencies, criminal defense attorneys, and the public in general with the standards used by the Prosecutor in reviewing those requests.

... An unsolicited sexual act or exposure to a member of the public or an undercover police officer will bring a misdemeanor charge of indecent exposure pursuant to MCL 750.335a or disorderly person-obscene conduct pursuant to MCL 750.167(f). Charges will not be pursued by this office if the officer's conduct was designed to make the individual believe the act was invited or consensual.

The policy statement also includes this disclaimer: "This policy does not govern the enforcement of municipal ordinances. That responsibility rests with the local police agencies and municipal attorneys. Nothing in this policy is intended to alter the practices of local police agencies in enforcing violations under their respective local ordinances."

Skywalker testified that someone in the Wayne County Prosecutor's Office told him to dismiss the ticket against Alman. The state charges, accordingly, were dismissed on the prosecutor's motion. On the same day, after consulting Westland's City Attorney, Officer Thivierge issued Alman an appearance ticket for having violated two Westland municipal ordinances during his encounter with Reed: § 62-97, being a disorderly person; and § 62-67, battery. Alman moved to dismiss these charges, and at a hearing on May 20, 2008, a state court judge dismissed the disorderly conduct charge. The judge stated that disorderly conduct required some "exposure of bodily parts." The judge then held an evidentiary hearing regarding the battery charge and ultimately denied Alman's motion to dismiss, clearing the way for trial. But on the day of the trial none of the officers appeared in court, so Judge Bokos dismissed the battery charge.

D. The Instant Litigation

Plaintiffs initiated this action against the officers, the City, and the County on September 27, 2008, seeking relief under 42 U.S.C. § 1983 for alleged violations of their constitutional rights. Their Amended Complaint listed twelve counts: eight on behalf of Alman; three on behalf of Barnes; and one on behalf of Alman, Barnes, and The Triangle Foundation, collectively. Alman raised claims based on the Fourth Amendment (Counts I-V), the Fourteenth Amendment (Counts VI and VII), and Michigan state malicious prosecution law (Count VIII). Based on the impoundment of his vehicle, Barnes raised Fourth Amendment claims (Counts IX and X) and a state law abuse of process claim (Count XI). Finally, Plaintiffs together raised a First

Amendment claim, claiming that the Defendants' conduct would chill other members of The Triangle Foundation from engaging in protected activity (Count XII). Following discovery, Defendants filed motions for summary judgment, which the district court granted on October 7, 2010. In their appeal Plaintiffs only address the district court's dismissal of the counts related to Alman's arrest and the seizure of Barnes's car.

DISCUSSION

A. Existence of Probable Cause

Alman was arrested and eventually charged with four different offenses: two Michigan state offenses, (1) criminal sexual conduct in the fourth degree, M.C.L. § 750.520e, and (2) solicitation or accosting, M.C.L. § 750.448; and two City of Westland municipal offenses, (3) being a disorderly person, Westland Mun. Ord. § 66–97, and (4) battery, Westland Mun. Ord. § 62–67. Those charges eventually were all dismissed, and Alman claims that his Fourth Amendment rights were violated because his initial arrest was not supported by probable cause, yielding civil liability under § 1983. The Fourth Amendment prohibits unreasonable searches and seizures, including arrests, but a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. The Supreme Court has explained that “‘probable cause’ to justify an arrest means facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). Whether Alman’s constitutional rights were violated (and by extension, the viability of his § 1983 claims) therefore hinges principally on whether there was probable cause to arrest Alman in the first place.

When no material dispute of fact exists, probable cause determinations are legal determinations that should be made by the court. But if disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts. Given then, that probable cause is a legal question, but that underlying factual disputes related to probable cause must be submitted to a jury, our inquiry on review must be whether sufficient facts are in dispute with respect to probable cause to require fact-finding by a jury here.

The district court held that probable cause existed for all of these offenses as a matter of law, rendering Alman’s arrest and the seizure of Barnes’s car lawful, and accordingly granted summary-judgment for Defendants–Appellees on the relevant counts.

1. Criminal Sexual Conduct in the Fourth Degree

The Michigan offense of criminal sexual conduct in the fourth degree (“CSC4”), a misdemeanor, occurs when an individual “engage [s] in sexual contact with another person and if any of the following circumstances exist: ... (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances: ... (v) When the actor achieves the sexual contact through concealment or by the element of surprise.” M.C.L. § 750.520e. “Sexual contact” includes “the intentional touching of the victim’s or

actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts." Alman effectively concedes that his touching of Reed's crotch constitutes "sexual contact," so the only issue is whether Alman used "force or coercion" to accomplish that contact. The district court held that the officers had probable cause for this offense because "Reed testified that Alman's actions surprised him and he backed away," making it reasonable to believe Alman achieved the sexual contact through concealment or the element of surprise. This was error.

Alman argues that no reasonable officer could have believed that Alman used force or coercion to touch Reed's crotch because the touching itself was not forceful and he did not achieve the contact by concealment or surprise. Defendants–Appellees argue that the act of touching Reed's crotch itself constituted "force" and that, in any event, Alman touched Reed by concealment or surprise because he touched Reed without warning and Reed testified that he was "surprised."

Michigan law establishes that "force or coercion" in the criminal sexual conduct statute carries its ordinary meaning, and refers to touching achieved by power or compulsion, or accompanied by circumstances sufficient to create a reasonable fear of dangerous consequences, and does not encompass any and all physical contact. Drawing all inferences in Alman's favor, as we must, no reasonable officer in Reed's position could have believed that the brief touch here was achieved by force or coercion. The dispute between Alman and Reed regarding the nature of the touching (i.e., whether Alman "brushed" his hand against Reed's crotch or whether Alman "grabbed" Reed's crotch with his "whole cupped hand" for "an instant, maybe a second or half a second") is immaterial in this case. Under either characterization, there is no indication that Alman achieved the contact in question by power or compulsion, and there is nothing in the record describing circumstances that would be sufficient to create a reasonable fear of dangerous consequences. There is no evidence that Alman physically hurt Reed, blocked Reed's exit path or led him to a place with limited access, made threatening gestures, resisted when Reed backed away, or did or said anything else to impose his will. Rather, it appears Alman reached out and touched Reed's crotch briefly while engaged in a flirtatious conversation with Reed, and that he dropped down to his knee and turned sideways as soon as Reed backed away. Under the circumstances, the contact here would not support a reasonable belief that the "force" prong was satisfied, even under Reed's characterization of the contact.

Regarding whether Alman achieved sexual contact by "concealment or by the element of surprise," Michigan cases suggest that, under CSC4, "concealment" and "surprise" do not refer to the subjective feeling of the victim, but rather the objective nature of the defendant's approach. In that vein, the statute typically prohibits someone from achieving sexual contact by sneaking up on someone while they are unaware, facing another direction, or sleeping. This does not mean that it is impossible for someone to commit CSC4 when they are facing the victim, and one can imagine any number of scenarios where, based on the context, CSC4 might be committed when a defendant makes sexual contact with someone without sneaking up on them or touching them while they are not looking. It simply means that the typical case involves a victim caught by surprise based on the defendant's surreptitious approach.

In this case, it is clear that Alman did not sneak up on Reed or touch him while he was unaware or looking the other way; rather, Alman reached out and touched Reed when they were standing

near each other and facing one another, engaged in a flirtatious conversation. Moreover, viewing the facts in the light most favorable to Alman, this was not a situation in which CSC4 may have been committed without a surreptitious approach. Alman did not engage in sexual contact with a victim in circumstances in which it would be unexpected, or in which someone would not normally expect sexual contact. The contact occurred in a secluded area in the midst of a flirtatious encounter rather than, for example, on a bus, in the workplace, or at a restaurant. A reasonable person in the situation presented in this case could expect some sort of sexual contact to occur. Without more probative facts, it cannot be said that there was probable cause to believe that Alman achieved sexual contact by concealment or surprise. Given the statute's orientation and scope, no reasonable officer in Reed's position would have thought that Alman had committed or was about to commit CSC4 based on the record before us, and it was error to hold that probable cause existed as a matter of law. Accordingly, we reverse the district court on that issue.

2. Solicitation or Accosting

The Michigan offense of solicitation or accosting provides for criminal liability for: "A person 16 years of age or older who accosts, solicits, or invites another person in a public place ..., by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act." M.C.L. § 750.448. The district court held that the officers had probable cause as a matter of law because "an Officer in Deputy Reed's position could reasonably have interpreted Alman's actions as an invitation to do a 'lewd' act." This also was error.

Drawing all reasonable inferences in Alman's favor, the record indicates that Alman and Reed proceeded to a clearing in the woods and were engaged in a sexually flirtatious conversation when Alman reached out and touched Reed's crotch. It also indicates that, after Reed backed up, Alman dropped to one knee facing sideways to Reed and either kept his hands at his side or pretended to tie his shoe. There is some dispute about whether Reed asked Alman if they could go to a more secluded spot on the trail or whether Alman veered off into the secluded clearing on his own, and about whether or not Alman pretended to tie his shoe. But these disputes are immaterial; without more probative facts to work from, no reasonable officer could have interpreted these actions (in either alternative) as an invitation to commit a lewd or immoral act in public. Alman correctly argues that "it could also be inferred from Alman's conduct that he was merely indicating sexual interest," and that a reasonable officer "would have needed more evidence of Alman's intentions before concluding that he was inviting Reed" to do a public lewd act. Aside from engaging in flirtatious conversation and his brief touching of Reed's crotch, there is nothing in the record that evinces such intentions on Alman's part. To the contrary, the only objective indications in the record about a state of mind relate to Reed, who stated that he was "new to this" and that he "liked to watch." Under these circumstances, there was no probable cause. To hold otherwise would require making assumptions about Alman's intentions that the record does not substantiate.

3. City of Westland Disorderly Person Ordinance

Alman was charged with violating Westland's disorderly person ordinance after the state charges were dismissed. That ordinance makes it a misdemeanor for someone to be a "disorderly

person,” which the ordinance defines as, *inter alia*, “A person who is engaged in indecent or obscene conduct in a public place.” Westland Mun. Ord. § 62–97(b)(6). The ordinance tracks the language of M.C.L. § 750.167(1)(f), which defines “disorderly person” identically. The district court summarily held that the Westland police officers had probable cause for this offense because “nothing on the face of this ordinance requires indecent exposure or the application of physical force, and Plaintiffs have come forward with no authority requiring such a showing for a violation of the ordinance.”

Alman argues that there was no probable cause supporting this charge because the Michigan disorderly person statute “has been construed as proscribing public indecency, ‘a concept generally associated with conduct consisting of exposing private body parts when one reasonably might expect that they would be viewed unwantedly by others.’” The Westland defendants do not offer any serious argument in response, and in our view, Alman is correct. The statute is not clearly applicable on its face, and Michigan cases analyzing the statute indicate that the typical indecent person case involves unwanted exposure of private body parts. The record is devoid of any evidence that would lead a reasonable police officer to believe that Alman was engaged in, or was about to engage in, such conduct. We have uncovered no authority indicating that a brief touching of another person’s crotch during a flirtatious conversation constitutes indecent or obscene conduct, and based on the record before us, it cannot be said that the Westland police officers had probable cause that Alman was about to expose himself.

4. City of Westland Battery Ordinance

Alman also was charged with violating Westland’s battery ordinance after his state charges were dismissed. That ordinance states: “No person shall with force or violence touch or put some substance in motion which touches another person or something closely connected with another person.” Westland Mun. Ord. § 62–67. The district court held that there was no constitutional problem with charging Alman under this provision because there was probable cause for the disorderly person charge, and “probable cause to believe that a person has committed any crime will preclude an unlawful arrest claim, even if the person was arrested on additional or different charges for which there was no probable cause.” This was error.

As explained above, the Westland officers did not have probable cause to believe that Alman violated the state offenses or the Westland disorderly person ordinance, and so the officers must have independently had probable cause supporting this charge to avoid a constitutional violation. They did not. Michigan cases establish that the term “force” requires that a person exert strength or power over another person. As explained above, the record does not support a reasonable belief that Alman used “force or violence” to accomplish the touching. Accordingly, there was no probable cause to believe that Alman had committed this offense, and we reverse the district court on this issue. Because we find that there was no probable cause supporting any of the charges brought against Alman, we reverse the district court’s dismissal of Count I of the Amended Complaint.

B. Qualified Immunity

Sergeant Swope argues that, even if Alman's arrest was not supported by probable cause, they are entitled to qualified immunity based on their reasonable mistakes. The district court did not address any of the qualified immunity arguments below because its conclusion that probable cause existed effectively decided the case. Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . .

As explained above, Alman was arrested without probable cause, which is a violation of the Fourth Amendment, and it is clearly established that an arrest without probable cause violates the Fourth Amendment. Swope argues that he is entitled to immunity because Alman has not established that Swope's belief that probable cause existed was unreasonable. In support, he points to the "conversation between Alman and Reed, as well as Alman's act of grabbing, fondling, touching, or brushing up against Reed's genitals, without Reed's consent." In our view, Swope's actions were unreasonable, and he did not have probable cause. Swope testified that he could not hear the conversation between Reed and Alman and stated that he did not ask any follow-up questions before completing Alman's arrest after Reed told him that Alman had "grabbed me or touched my crotch." Without more facts at his disposal, he had no reasonable basis to believe that any of the offenses that Alman was charged with had occurred or were about to occur. Because Alman's clearly established Fourth Amendment rights were violated, qualified immunity does not shield Sgt. Swope in this case.

C. Malicious Prosecution

Alman brought a state law malicious prosecution claim, an intentional tort, against Thivierge for issuing the ticket invoking Westland's municipal ordinances. The district court dismissed this claim based on its finding that probable cause existed. To make out a case of malicious prosecution under Michigan law, the plaintiff has the burden of proving (1) that the defendant had initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. This issue was not thoroughly briefed on appeal, and the only argument made below was Thivierge's argument that probable cause existed for those offenses. Alman only addressed the argument in his reply brief, arguing that Thivierge acted with "malice and with deliberate indifference" when he wrote the local ordinance tickets without sufficient training and without having personal knowledge of the events in question. Despite the lack of extensive briefing on this issue, we conclude that Alman has not established the elements of the tort and that his malicious prosecution claim was properly dismissed. Specifically, Alman has not pointed to any evidence establishing malice. (A lack of probable cause itself cannot constitute malice, as that would render the third and fourth elements of the tort duplicative.)

D. Municipal Liability Under § 1983 for Failure to Train

Alman raised § 1983 claims against Sgt. Swope, Wayne County, and the City of Westland based

on their alleged failure to train police officers on how to enforce the laws related to sexual activity (Counts II, III, and IV). The Supreme Court has approved municipal liability based on § 1983 when “the [municipal] action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers,” or where such actions emanate from informal governmental custom. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). Local government units cannot be held liable mechanically for their employees’ actions under a respondeat superior theory. The plaintiff must demonstrate that, through its deliberate conduct, the municipality was the ‘moving force’ behind the injury alleged. He must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. Applying that principle, the Supreme Court has held that a municipality can be liable under § 1983 on a failure-to-train theory when the “failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). This happens in the unusual case where “such inadequate training can justifiably be said to represent ‘city policy.’” We have characterized this standard as requiring the plaintiff to prove “three distinct facts”: “that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city’s deliberate indifference; and that the inadequacy is ‘closely related to’ or ‘actually caused’ the plaintiff’s injury.” *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir.1989).

The district court, having concluded that probable cause existed for Alman’s arrest and that there was no constitutional violation, did not address this issue. Alman argues that “Westland not only failed to train Reed, [but] his supervisor Sgt. Swope participated in that wrongful conduct, resulting in supervisory liability” because “Swope himself was not properly trained about the elements of the offenses” involved. Specifically, Alman argues that Swope never received specific training about the sexual activity laws or what “accosting” meant, which created a likelihood that constitutional violations would occur and recur. But that in itself does not constitute deliberate indifference, as there is no allegation that Westland (or Wayne County) officials had any specific awareness of the potential for violations. This allegation is too generalized to support municipal liability. Accordingly, we affirm the dismissal of Counts II, III, and IV.

E. Barnes’s Fourth Amendment Claim

Plaintiff–Appellant Barnes raised a § 1983 claim based on the seizure of his car, which Alman drove to Hix Park on the day he was arrested (Count IX). The seizure of a vehicle in connection with an arrest not supported by probable cause violates the Fourth Amendment in the same manner that the arrest itself violates the Fourth Amendment. There are, of course, exceptions to that rule, which permit police seizures of property when the exigencies of the situation demand it, such as during a search incident to arrest. But those exceptions do not disturb the rule that if an arrest violates the Fourth Amendment, the subsequent seizure of property based on the invalid arrest violates it as well. Although the statute and the Constitution may allow the state to seize a vehicle during an arrest for sexual conduct offenses, neither authorizes such a seizure without probable cause. The district court dismissed this claim based on its finding that probable cause existed for Alman’s arrest. As explained above, this was error because Alman’s arrest was not supported by probable cause.

F. Barnes's Abuse of Process Claim

Barnes raised a state law claim for abuse of process (Count XI) based on the seizure of his vehicle and the requirement that he pay a \$900 fee before the car was released. To establish abuse of process under Michigan law, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process which is improper in the regular prosecution of the proceeding. The district court dismissed this claim based primarily on its finding that probable cause supported Alman's arrest. Alman argues that the Wayne County Prosecutor's Office "used the nuisance abatement process to extort the payment of money" from Barnes "for its own enrichment," which constitutes an ulterior purpose and therefore an abuse of process. Alman does not cite any authority for this proposition, and he has not pointed to any evidence in the record that demonstrates that Wayne County is engaged in a "form of extortion" through the nuisance abatement law. All he offers is the fact that impounded vehicles are not released without a settlement fee being paid by the owner, and that the fee is shared among the various governmental entities. That is insufficient to establish an abuse of process claim.

BOGGS, Circuit Judge, concurring in part and dissenting in part.

This is a difficult and convoluted case, and the court's opinion generally makes an excellent exegesis of the different statutes and principles involved here. We have a fairly garden-variety police sting operation aimed at public-morals offenses, a tactic that many may find distasteful. In this case Alman did, without consent or invitation, touch the officer's crotch. However, the exact nature and contours of that touching are disputed, as is the import of the plaintiff's immediately subsequent kneeling. The court's discussion, which is appropriate and necessary under these circumstances, of the Michigan law on "force" or "surprise" makes a valiant effort to hold that there was no probable cause for an arrest in these circumstances, while not vitiating the applicability of the Michigan CSC4 statute to other cases of what might generally be called "groping." In the end, I find this effort successful, with two caveats. First, we are taking all facts and inferences in the plaintiff's favor, and on further development, either a fact-finder or a fact-based motion for summary judgment may dispose of this suit in favor of defendants. Second, the opinion correctly emphasizes that the error here was holding that probable cause "existed as a matter of law," based only on the admitted fact some degree of genital touching.

However, under these circumstances, I disagree with the court's opinion as to qualified immunity for Sergeant Swope. His involvement was only to authorize an arrest, based on the facts as reported to him by Officer Reed. Given the intricacy of the court's analysis (albeit ultimately correct), I cannot agree that we must label Officer Swope as outside the ambit of "reasonably competent police officer" because he made the judgment on the spot, under the circumstances, that there was probable cause. With that exception, I concur in the judgment of the court.

Page 177 - Add the following new case after Note 3:

Courts have unanimously agreed that a government ban on prostitution is consistent with *Lawrence v. Texas*, citing Justice Kennedy's statement that the case before the court did not involve "public conduct or prostitution." In 2013, the Supreme Court confronted the question whether Congress could condition federal funding for HIV prevention work by non-

governmental organizations overseas on those organizations adopting policies condemning prostitution. For the Court, this was a step too far. It ruled in *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), that placing this condition on eligibility for federal funds targeted for HIV prevention work violated the 1st Amendment free speech rights of the non-governmental organizations. The Court's opinion can be found in this supplement for Chapter 7 – Sexual Expression, Free Speech, and Association.

Page 178 – Add the following text and case at the beginning of Section E – Minors:

In *Lawrence v. Texas*, the Supreme Court pointed out that the case before it did not involve minors. The Lawrence Court did not explicitly state what it would consider the age of majority to be. Nonetheless, it is worth considering whether Lawrence, and the line of cases for which it provides a culmination, may suggest constitutional problems with traditional criminal statutes concerning minors and sex.

Both the common law and modern statutory criminal law generally hold that the state has a compelling interest in protecting minors from harm, and that engaging in sexual activity is ordinarily harmful to minors. One consequence of this holding is that sex between adults and minors has been treated in most jurisdictions as a strict liability offense. The defendant may not avoid liability by showing that he reasonably believed that the person with whom he was having sex was an adult, if factual proof established that the person was a minor under the law of the state. Could Lawrence be held to require reconsideration of this analysis? After Lawrence, would it make any difference whether the case involved same-sex or different-sex activity? In the following case, which should be considered together with *State of Kansas v. Limon* in the casebook at page 178, the court dealt with a defendant's contention that after *Lawrence v. Texas* he could not be prosecuted for engaging in consensual sex with a person who had represented herself as being an adult on social media.

FLEMING v. STATE
Court of Criminal Appeals of Texas
2014 Tex. Crim. App. LEXIS 879 (June 18, 2014).

MEYERS, J.

Appellant, Mark Alexander Fleming, was charged with four counts of aggravated sexual assault [statutory rape]. He filed a motion to quash the indictment on the basis that the statute is unconstitutional for failing to require the State to prove that he had a culpable mental state related to the victim's age and for failing to recognize an affirmative defense based on the defendant's reasonable belief that the victim was 17 years of age or older. . . .

FACTS

Appellant testified that in April of 2007 [when he was 25 years old] he received a text message from a girl, K.M, who said that she had obtained his phone number from her friend. When

Appellant asked her age, she replied that she was 22 years old. K.M. was actually 13 years old. The two corresponded by text message and talked on the phone for a week or two and then arranged to meet at the mall for a date. Both Appellant and K.M. testified that on their first date they went to a movie and drag races at a race track, after which Appellant drove K.M. home. Appellant stated that K.M. told him that her mother and step-father lived with her because they had lost their home. After their second date to dinner and a movie, Appellant asked K.M. if she wanted to spend the night with him at the hotel where he had been staying. Appellant testified that K.M. said that she did want to go to his hotel but that she was not ready for them to have sexual relations at that time. Appellant said that he agreed and that they went to sleep upon arrival at the hotel. Appellant testified that when he awoke early the next morning, K.M. was “messaging with” him in a way that indicated that she wanted to have sex. He asked her if she was sure, and she said that she was. Appellant and K.M. continued dating and having sex from April to May of 2007.

Later that year, K.M.’s mom found a love letter that Appellant had written to K.M. Appellant, who was 25 years old at the time, wrote in the letter, “I no you 4 years or 5 years younger than me but I love you.” When her mom confronted her about the letter, K.M. initially denied the relationship. When K.M. admitted that she did have sex with Appellant, her mom called the police.

Appellant was cooperative during questioning by the police and told the officer about the relationship. He told the officer that he did not know that K.M. was under age when he dated her. At trial, Appellant testified that he believed that K.M. was 22 years of age because both K.M. and her friend had told him that she was 22 years old, and because K.M. had told him that she was a student at the University of North Texas majoring in criminal justice. He also testified that he had seen on her MySpace page, which was entered into evidence by the defense, that she was 20 years old and was a student at UNT. The MySpace page entered into evidence by the defense also contained photos of K.M. that were taken around the time she was dating Appellant. K.M. denied having told Appellant that she was 22 years old and testified that someone else must have changed her MySpace page. She said she did not know if Appellant knew that she was under age when they dated.

The State presented evidence that Appellant had previously dated a friend of K.M.’s mom, who sometimes babysat K.M. when she was younger. The State said that K.M. would have been 11 years old when Appellant first met her at her mom’s house. K.M. said that Appellant had been to her mother’s house in the past but she did not know if he remembered meeting her then.

Appellant agreed to a ten-year probated sentence and retained the right to appeal the trial court’s denial of his motion to quash. He appealed, arguing that Penal Code Section 22.021 is unconstitutional due to its failure to require proof that he had knowledge that his victim was younger than 17 years of age and for not recognizing an affirmative defense based on the defendant’s reasonable belief that the victim was 17 years of age or older. [The lower courts all rejected this argument, whether raised under the federal or state constitutions.]

CASE LAW

The mistake-of-age defense was raised and rejected in the 1876 English case of *Regina v. Prince*, 13 Cox, Criminal Cases 138 (Eng. Crim. App. 1876). In *Prince*, the defendant was charged with unlawfully taking a girl under the age of 16 out of the possession of her father against his will. The defendant claimed that he acted on the reasonable belief that the girl was 18 years of age. The court held that it was no defense that he thought he was committing a different kind of wrong from that which he was, in fact, committing, it being wrong to remove a daughter, even one over the age of 16, from her father's household. Citing previous cases, the court stated that "any man who dealt with an unmarried female did so at his own peril, and if she turned out to be under sixteen years old he was liable under this statute." Although the issue in *Prince* was mistake of age as to abduction, early American courts applied *Prince* to statutory rape as well. The reasoning from *Prince* has been used to justify denying the mistake-of-age defense and imposing strict liability against those accused of statutory rape.

In *Morissette v. United States*, 342 U.S. 246 (1952), the Supreme Court discussed strict liability offenses and noted that, while there must usually be a "vicious will" to constitute a crime, there are exceptions to this rule, including rape cases in which age is the determinative factor, despite the defendant's reasonable belief that the victim was over the age of consent. For strict liability crimes, there is no "guilty mind" requirement, and the actor does not have to possess the mens rea to commit any crime. In such strict-liability offenses, the actor's state of mind is irrelevant, and he is guilty of the crime at the moment he commits the prohibited act. Most strict liability statutes are associated with the protection of public health, safety, or welfare, such as those involving air and water pollution, sale of adulterated food, and traffic and motor-vehicle laws. Statutory rape, however, is distinguishable in that the act of sexual intercourse is not a crime except in certain circumstances, such as when the other person has not consented to the act or when the other person is deemed unable to consent due to his or her age.

DISCUSSION

Mens rea as to the age of the victim

While it is indeed widely known that "16 will get you 20," and precocious young girls have commonly been referred to as "jail bait," such colloquialisms address only the understanding that even consensual sex with someone underage is a violation. These phrases indicate knowledge of the sexual partner's young age as opposed to an understanding that knowledge of the age is unnecessary. Texas Penal Code does not specify that mens rea as to the age of the victim is unnecessary, however, under federal law, "the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years. See 18 U.S.C. § 2241(d). See also 18 U.S.C. § 2243(d) ("In a prosecution for sexual abuse of a minor between the ages of 12 and 16, the Government need not prove that the defendant knew the age of the other person engaging in the sexual act"). See, e.g., *Brown v. State*, 74 A. 836, 841 (Del. 1909) (finding that statements of age made by the statutory rape victim and the defendant's reasonable belief about her age were "irrelevant and immaterial"); *State v. Basket*, 19 S.W. 1097 (Mo. 1892) (refusing a reasonable mistake-of-age defense for statutory rape of a twelve-year-old girl); *Lawrence v. Commonwealth*, 71 Va. 845, 854-55 (1878) (finding that the lower court did

not err by refusing to give jury instructions that the defendant could not be found guilty of statutory rape based on a reasonable mistake-of-age defense).

It is clear that the Texas legislature intends for age to be an aggravating element in certain offenses and does not intend for the State to be required to prove that the defendant knew the age of the victim. . . . Because this statute serves the legitimate state objective of protecting children, we will not read a mens rea element into the statute and do not believe that failure to require mens rea as to the victim's age violates the federal or state constitution.

The statutory prohibition of an adult having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove mens rea as to the victim's age places the burden on the adult to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters. If the adult chooses not to ascertain the age of a sexual partner, then the adult assumes the risk that he or she may be held liable for the conduct if it turns out that the sexual partner is under age.

Mistake-of-fact defense

While both the sexual assault and the murder statutes specify a more severe punishment based on the age of the victim, neither offense contains a provision that allows for a mistake-of-fact defense as to the age of the victim. Under Penal Code Section 8.02(a), "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense." Because Section 22.021 requires no culpability as to the age of the victim, there is nothing for the defendant's mistaken belief to negate, and his mistake cannot be a defense to prosecution.

Appellant asks for an affirmative defense so that he may claim that even though the allegations in the indictment are true, he should not be convicted due to his assertion that he did not know that K.M. was 13 years of age. The legislature's intent of protecting children from sexual assault is clear, and it outweighs any claim of the right to present a mistake-of-age defense. When a defendant voluntarily engages in sexual activity with someone who may be within a protected age group, he should know that there may be criminal consequences and there will be no excuse for such actions. When it comes to protecting those who are unable, due to their tender age, to consent to sexual activity, the legislature simply does not allow any variance.

It would be unconscionable for us to allow a 25-year-old man who was having sex with a 13-year-old child to claim that his actions were excused because he reasonably believed that he was having sex with an adult. Such a defense is precluded by the overriding interest in protecting children.

Alcala, J., filed a concurring opinion.

I. The Majority Opinion is Consistent With Supreme Court Precedent

Although, as a general principle, criminal intent must be proven beyond a reasonable doubt to sustain a conviction, the Supreme Court has repeatedly observed that proof of the age of a child in a prosecution for statutory rape is an exception to that general rule. See *Morissette v. United States*, 342 U.S. 246, 251 (1952). . . . Decades after the *Morissette* decision, the Supreme Court reaffirmed this principle in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994). In *X-Citement Video*, the Supreme Court stated, “*Morissette’s* treatment of the common-law presumption of mens rea recognized that the presumption expressly excepted ‘sex offenses, such as [statutory] rape[.]’”

In its more recent decision in *Lawrence v. Texas*, the Supreme Court did not suggest that due process would require a mistake-of-fact defense as to the age of the child in a prosecution for a sexual offense. Rather, in deciding whether due process would extend to protect the right of homosexual adults to engage in consensual sex, the Supreme Court in *Lawrence* described the difference between Texas’s sodomy law that Texas was enforcing against two consenting adults as compared to the historical origin of sodomy laws. It explained that, in the 19th century, “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. . . . Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.”

In deciding that the enforcement of sodomy laws against two consenting adults violated due process, the Supreme Court distinguished that situation from 19th-century laws that prohibited sexual acts with children or non-consenting adults, which were not unconstitutional. Texas’s view in enforcing sodomy laws against two consenting adults, therefore, was inconsistent with the historical application of those laws to protect a child from having sexual relations with an adult, as here. Furthermore, and of particular relevance to the issues presently before this Court, nothing in *Lawrence* suggests that a defendant has a constitutional right to a mistake-of-fact defense as to his belief about the age of a child who was thirteen years old at the time of a sexual offense. . . .

II. Existence of Emerging Technology May Be Inconsequential

Anyone can easily see that children now, unlike historically, have unprecedented access to emerging technology, cell phones, texts, and social media web sites. And children may falsify their ages on a web site or take Glamour Shots that make them appear older. Had this complainant and appellant never met in person, facts like these would likely be a good reason to explain how technological developments might impact this case. But this is not a situation where impersonal communication took place over an electronic medium, or under circumstances in which an adult may have been unaware that the person on the other end of the electronic communication was a child. Here, appellant and the complainant met in person and engaged in sexual intercourse on multiple occasions. The fact that some children will misstate their age on web sites and that this may consequently mislead someone who has never met them as to their age presents a completely different situation from one involving a defendant who engages in

person-to-person, intimate sexual contact with a child. . . . Although I remain unpersuaded that emerging technology compels us to constitutionally require a mistake-of-fact defense under these circumstances, as a matter of public policy, it may be appropriate for the Legislature to consider whether to permit such a defense for older, high-school-aged teenagers with a limited right of consent. . . .

KELLER, P.J., filed a dissenting opinion in which PRICE and JOHNSON, JJ., joined.

I would hold that, after *Lawrence v. Texas*, in a limited number of child sex cases, due process requires the submission of an affirmative defense of reasonable mistake of age.

III. CHILD SEX OFFENSES

A. Status Throughout the Nation

I begin my discussion of child sex offenses by acknowledging that the Supreme Court has recognized sex offenses as an exception to the deeply rooted notion that criminal liability must depend upon a “vicious will.” This exception may be less than it appears when one considers that the term “vicious will” was not necessarily understood by the Supreme Court to encompass all types of mental culpability—it meant an “evil-meaning mind,” not necessarily a negligent mind. Nevertheless, “[p]rior to 1964, it was the universally accepted rule in the United States that a defendant’s mistaken belief as to the age of a victim was not a defense to a charge of statutory rape.”

California was the first to break with such precedent, holding that a good-faith and reasonable belief that a victim was over the age of consent was a defense to statutory rape. The Court of Appeals for the Armed Forces has noted that one state imposes a culpable mental state with respect to age as an element of the crime (Ohio) while twenty other states currently allow for some form of mistake-of-age defense for sex offenses involving children —although only four (Alaska, Indiana, Kentucky, and Washington) allow such a defense regardless of the child’s actual age. Just four states—Alaska, California, New Mexico, and Utah—have ever recognized a mistake-of-age defense without specific statutory authorization. Of those four states, California and New Mexico remain the only states operating under a judicially created mistake-of-age defense. Alaska has codified its defense while Utah has statutorily disallowed such a defense. Utah’s Supreme Court subsequently upheld as constitutional the statute disallowing a mistake-of-age defense. Alaska is the only jurisdiction that has suggested that a mistake-of-age defense is constitutionally required, and the Supreme Court of Alaska later clarified that its due-process holding was based upon its state constitution.

Deciding that the submission of a mistake-of-age defense is sometimes required by the Due Process Clause of the United States Constitution would be breaking new ground, but doing so would be necessary if logic and precedent seem to require it and if such a holding were based, at least in part, upon a relatively new development in the law. As I shall further explain, logic and precedent do seem to require such a holding, and there is at least one relatively new, relevant development in the law: *Lawrence v. Texas*.

B. Harsh Punishment

In this country, people have a fundamental right not to be punished harshly when mental culpability is entirely absent. The first question to address, then, is whether the Texas legislative scheme imposes harsh punishments for the commission of child sex offenses. I also consider whether this is a new development.

Historically, Texas law included rape of a child within the offense of rape, which carried heavy penalties. As early as 1879, the offense of rape, including rape of a child with or without consent, carried a punishment range of “death or . . . confinement in the penitentiary for life, or for any term of years not less than five.” The modern Penal Code has spread out the proscribed conduct into several different provisions with punishments that range from two years to life, depending on the age of the victim and the seriousness of the conduct. One relatively new development that has made convictions for sex offenses more burdensome to offenders is the registration system. That system, which often requires registration for life, damages an offender’s reputation by giving notice to the public and law-enforcement agencies of the defendant’s sex-offender status. Further, if a jury were inclined to be lenient with respect to punishment because it believed that the defendant made a reasonable mistake about the child’s age, it could not do anything about the burdens imposed by the registration system. Even without the registration system, child sex offenses are and have always been serious crimes in Texas. They are a far cry from mere public-welfare offenses that carry only light penalties. Thus, for the purpose of determining whether a fundamental right is involved, Texas does indeed impose harsh punishments for child sex offenses. And though harsh punishment itself is not new, the burden of registration is relatively new.

C. Mental Culpability

. . . As has been discussed above, and will be further discussed below, the legislature is not always the final word on what constitutes blameworthy behavior. The legislature does not have carte blanche to impose criminal liability on those who are factually blameless. And as will be seen below, the concurring opinion uses the wrong standard when it asks whether the legislature has “acted unreasonably or arbitrarily.” That is the standard for a “rational basis” review, which is inapplicable if the law infringes upon a fundamental right. In any event, I do not contend that the severity of punishment is sufficient, by itself, to require the imposition of an affirmative defense of mistake of age. There is far more to my substantive-due-process argument, which I expound upon further below.

1. Rationales for Strict Liability

A number of reasons for imposing strict liability for child sex offenses have been articulated, but they generally fall within two overarching types of rationales: (1) that the defendant in such a situation knows or should know that his conduct is, in some manner, wrongful or risky, and (2) that children need to be protected. The first type of rationale relates to whether the defendant possesses some sort of mental culpability, and thus, to whether a fundamental right is implicated. If he knows or should know that his conduct is wrongful or risky, then he may be said to possess some mental culpability, under the broad constitutional definition, even if he does not possess a

specific culpable mental state regarding the age of the child. The second type of rationale—protecting children—does not speak to whether the defendant possesses any mental culpability and, therefore, is not relevant to whether a fundamental right is implicated. Rather, the protecting-children rationales are relevant to the next step in the substantive-due-process analysis: whether legislation is narrowly tailored to serve a compelling state interest. Consequently, I focus first on the wrongful-conduct rationales to determine whether a fundamental right is even implicated.

Wrongful-conduct rationales take various forms, but most of them share a similar focus, and, as a group, I will call them the “peril” rationales. These are the rationales that are generally used to justify strict-liability offenses, and they say that something about the defendant’s conduct places him on notice that he acts at his peril and must take care to avoid violating the law. Some courts have said that a person who engages in sexual relations with an individual who is not his spouse is engaging in conduct that constitutes the crime of fornication, and because the defendant knows or should know that such conduct is a crime, he assumes the risk that he may be committing a crime involving someone under the age of consent. In an early case, we also articulated this rationale.

Other courts, including our Court, have taken the position that fornication at least violates societal morals, causing the actor to assume the risk that his consort is underage. . . . Nebraska takes the position that a reasonable mistake about a victim’s age is no defense because it is not unfair “to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line.” It is not clear what constitutes “getting perilously close to proscribed conduct” with respect to the victim’s age, but the statement was derived from a case in which the issue was whether there should be a defense based upon a reasonable mistake of fact regarding whether the underage victim was “chaste.” A defendant who had sexual relations with an underage female took his chances on whether she was chaste.

Citing *Bowers v. Hardwick*, Maryland’s high court has suggested an even broader form of “peril” rationale, in line with holdings for public-welfare offenses: “that a person has no constitutional right to engage in sexual intercourse, at least outside of marriage, and sexual conduct is frequently subject to state regulation.” The Supreme Court of Massachusetts has also suggested a relationship between the rule of strict liability for child sex offenses and the rationale for strict liability for public-welfare offenses. Aside from the “peril” rationales, there is another rationale that I will call the “empirical” rationale. This rationale holds that, as an empirical matter, an adult who observes and interacts with a child knows or should know from that observation and interaction that the child is underage. The Maryland court seems to have taken this position, arguing that strict liability with respect to the victim’s age is permissible in part because a perpetrator who “confronts the underage victim personally . . . may reasonably be required to ascertain that victim’s age.” As will be discussed later, the main drawback of the empirical rationale is that it is not true in every case.

2. Statutory Developments

Three statutory developments in Texas may undercut these rationales. The first is the abolition of the offense of fornication. The legislature repealed the statutes outlawing fornication and

adultery in 1973. To the extent that one might, in the past, have argued that a person necessarily possessed a mental culpability with respect to risky or dangerous circumstances because engaging in sexual relations with a non-spouse was a crime, that rationale no longer applies. But as explained above, our Court also explicitly articulated a rationale based on societal morals rather than merely on the illegality of fornication.

The second development is the fact that the age of consent has risen throughout the years. In 1879, sexual relations with a consenting child was rape only if the child was “a female under the age of ten.” In 1895, such conduct became rape only if the child was a “female under the age of fifteen years, other than the wife” of the actor. In 1925, such conduct became rape if the child was a female under the age of eighteen and was not the wife of the actor, but it was a defense if the actor could show that the child was at least fifteen, consented, and “was not of previous chaste character.” In 1974, various child sex offenses proscribed various forms of sexual conduct with a child younger than seventeen (who was not a spouse), but it was a defense that the child was at least fourteen and had a history of engaging promiscuously in the sexual conduct. The promiscuity defense was deleted from the various child sex offenses in 1994. Our state’s modern child-sex-offense statutes generally provide an age of consent of seventeen, with younger ages resulting in an aggravated offense or an aggravated punishment, but one Texas statute criminalizes sexual conduct involving a child under age eighteen. Texas retains a defense for consensual sexual relations with a child fourteen years or older who is the spouse of the actor.

It appears that the rising age of consent has been a trend in other states as well. The Supreme Court of California has suggested that the purpose of the rule that a defendant acts “in peril” with respect to the child’s age has been undermined by statutory increases in the age of consent. . . . I do not believe that the rise in the age of consent is alone sufficient to undermine the “peril” rationales, but it is a factor to consider.

A third potentially relevant statutory development in Texas is the dramatic increase in the length of the period of limitations applicable to child sex offenses. In 1974, all sex offenses had a limitation period of one year. The short limitation period might have provided a certain amount of protection for someone who reasonably, but mistakenly, believed that he was dealing with an adult. But limitation periods have progressively lengthened for child sex offenses. Now there is no limitation for the prosecution of most child sex offenses. I do not question the wisdom of the legislature in enacting various changes in the law with respect to child sex offenses. Much more information exists now than in the past about child sex offenses that might support the wisdom of, among other changes, higher ages of consent and longer periods of limitation, including grooming conduct engaged in by perpetrators and the characteristics of child-sex-abuse victims. I mean only to point out that, in accomplishing otherwise laudable purposes, some of these changes have stripped away certain protections from those who acted reasonably and in good faith. This is not determinative of the issue before us but provides some background to assess what I see as the truly new and important legal development that changes the fundamental-rights analysis in this case.

3. Lawrence v. Texas

That development is the Supreme Court’s decision in Lawrence v. Texas. To understand the

impact of *Lawrence*, we must first understand the decision it overruled, *Bowers v. Hardwick*. . . .

In *Lawrence*, the Supreme Court reversed course and overruled *Hardwick*. The Court criticized the *Hardwick* decision's framing of the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" as "disclos[ing] the Court's own failure to appreciate the extent of the liberty at stake." The *Lawrence* Court pointed to what it called "an emerging awareness" from the past half-century "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." The Court found that this liberty belongs to all adults, whether male or female, heterosexual or homosexual. . . . And the Court found that this liberty belongs not only to married persons but also to unmarried persons. . . . Addressing the point made in *Hardwick* that "for centuries there have been powerful voices to condemn homosexuality as immoral," the Court responded, "Our obligation is to define the liberty of all, not to mandate our own moral code." Although a violation of the Texas statute outlawing homosexual conduct was punished as a mere Class C misdemeanor (fine-only offense), the Court observed that the conviction would nevertheless be on the defendant's record and it would come within the sex-offender registration laws of at least four States. The Court found that this fact "underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." Finally, the Court emphasized that the case before it involved consenting adults in a private setting. The case did not involve minors, public conduct, injury or coercion, relationships where consent might not easily be refused, or prostitution.

The rationale for holding a defendant strictly liable because he should have at least realized that he was committing the illegal, immoral, or risky conduct of fornication with an adult has been negated entirely by the holding in *Lawrence*. Under *Lawrence*, consensual sexual activity between adults, married or unmarried, is constitutionally protected. Such activity can no longer be outlawed, and moral considerations with respect to such activity are no longer legally relevant. After *Lawrence*, "consensual sexual activity between adults is no longer subject to strict legislative regulation," and, thus, a defendant does not necessarily act at his peril when he reasonably believes that he is having sexual relations with an adult. The holding in *Lawrence* has led at least two law professors to contend in published law review articles that due process requires that a defense be available to an individual who engages in sexual intercourse with a person that he non-negligently believes is an adult.

Few jurisdictions have addressed the impact of *Lawrence* on a defendant's eligibility for a mistake-of-age defense in "statutory rape" type prosecutions (i.e. prosecutions for child sex offenses that impose liability on the basis of the child's age for what would otherwise be consensual sexual conduct). . . . The Supreme Court of New Hampshire discussed *Lawrence* and maintained that the imposition of strict liability for child sex offenses was permissible because such imposition was grounded in part on reasons other than the intent to commit the wrongful act of fornication, though it appears that the court may not have been responding to a constitutional claim. Aside from the court below, I am aware of two intermediate appellate courts that have held that *Lawrence* did not affect a defendant's eligibility for a mistake-of-age instruction because the sexual conduct was in fact committed against a minor and *Lawrence*'s holding does not apply to minors.

But the courts that say simply that Lawrence does not apply when a minor is involved have missed the point—making the same mistake ascribed by the Lawrence court to the Hardwick decision: having an overly narrow concept of the right at stake. If the defendant non-negligently believed that he was having consensual sex with an adult, then he non-negligently believed in the existence of circumstances that would constitutionally protect him from liability under Lawrence. Such a non-negligent belief would negate the existence of even the most minimal sort of mental culpability. In any event, at least three of the post-Lawrence cases involved a defendant who believed that the complainant was seventeen. As I shall explain below, a belief that the complainant was under age eighteen but over the age of consent does not qualify, for constitutional purposes under Lawrence, as a belief that the complainant was an adult.

4. Limits of Lawrence’s Holding

Lawrence’s holding was limited to adults. While the Court’s opinion in Lawrence did not explicitly say what age qualifies as adulthood, the United States Constitution and Supreme Court jurisprudence draw a distinct line at the age of eighteen. One must be at least eighteen years of age to vote. Persons under eighteen years of age are considered juveniles for Eighth Amendment purposes, rendering them ineligible for the death penalty, for life without parole in non-homicide cases, and for automatic life without parole in any case. Age eighteen also appears to be the line drawn for First Amendment purposes in determining what constitutes legally proscribable child pornography. The Supreme Court has stated that “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” An eighteen-year-old has a right to exercise a certain social independence that generally does not belong to persons under that age.

The statutory age of consent is irrelevant in deciding what the Constitution requires. Constitutionally, it does not matter that a defendant lacked a culpable mental state with respect to the age of consent, if that age is younger than eighteen. The constitutional alchemy kicks in only when the defendant lacks a culpable mental state with respect to whether the child was in fact a child. For the “peril” rationales to be negated under Lawrence, a person must non-negligently believe that his sexual partner is eighteen years of age or older. A person who knows or should know that he is dealing with a child—that is, someone under age eighteen—continues to act at his peril that the child may be younger than he supposes. For this reason, we should not quarrel with the results in the three post-Lawrence cases involving defendants who believed that their victims were seventeen years old because those defendants were at least culpable with respect to whether their victims were children. The results in a number of older cases could also be upheld on this basis.

The holding in Lawrence is limited in a few other respects, including the fact that it applies only to activity that is consensual and that it does not apply to prostitution. If a defendant commits a factually non-consensual sexual assault (e.g., by force) or hires a prostitute, the holding in Lawrence will not be available to negate his mental culpability. The various limitations of Lawrence also mean that Lawrence cannot be used to justify the submission of a lesser-included offense. If, even under the facts believed by him or that he ought to believe, the defendant’s conduct would not be protected under Lawrence, then Lawrence’s holding is not available to negate the defendant’s mental culpability, and the defendant can be held to have acted in peril

that the facts are even worse than he supposes.

5. The Empirical Rationale

The holding in *Lawrence* leaves room for what I have termed the empirical rationale for imposing strict liability for child sex offenses: that a person knows or should know from observing and interacting with an underage individual that the individual is in fact a child. There are undoubtedly ages at which, under all or most circumstances, it is simply not possible for a child to be reasonably mistaken for an adult. In responding to appellant's facial challenges to the aggravated-sexual-assault statute, the amicus brief offers the hypothetical of an adult male who causes his sexual organ to penetrate the anus or sexual organ of a two-year-old child. The amicus is exactly right that no reasonable adult would mistake the two-year-old for an adult. And the amicus is exactly right that this hypothetical, by itself, causes appellant's facial challenges to fail.

The amicus brief emphasizes that the offense at issue in the present case is aggravated sexual assault, involving a child under age fourteen, and the amicus argues that no fundamental right is involved in such a case. There is some support for this position. The Supreme Court of California, which first recognized a mistake-of-age defense to statutory rape, has indicated that children under age fourteen are considered "infants" or "of tender years" and that a mistake-of-age defense may "be untenable when the offense involved a child that young." On the other hand, the California court's holding concerned the offense of lewd or lascivious conduct, and the court held that "the public policy considerations in protecting children under the age of 14 from lewd or lascivious conduct are substantial—far more so than those associated with unlawful sexual intercourse." The Court of Appeals of Maryland has noted that "Maryland's statutory rape law is less likely than a number of other state statutes to reach noncriminal sexual conduct since the victim in Maryland must be under fourteen years of age, while other states have adopted older ages of consent." In any event, most states that allow a mistake-of-age defense disallow such a defense when the child's age drops below a certain threshold."

There seems to be no unanimity as to the threshold age, however, with ages ranging from twelve to sixteen. Moreover, it is commonly known that some children enter puberty and mature before the age of fourteen and may look like an adult. As explained above, there are ages—such as age two—about which we can say, by virtue of the age alone, that it is simply not possible to reasonably mistake the child for an adult. But age thirteen is not such an age. It is true that the younger the child, the less likely it is that a mistake as to adulthood could reasonably be made. But the fundamental-rights question here—involving the defendant's mental culpability—does not turn upon what may generally be true about children of a certain age; it turns upon the defendant's mental culpability with respect to the child in question.

D. Compelling Interests and Narrow Tailoring

It is beyond dispute that the State has a compelling interest in safeguarding the physical and psychological well-being of children. Protecting children is a widely articulated rationale for imposing strict liability for child sex offenses. Courts have variously held that strict-liability laws for child sex offenses are needed to prevent the exploitation of children by predators, to protect children from physical injury, to prevent teenage pregnancy, to protect children from sexually

transmitted diseases, and to protect children from psychological injury and stigma. Strict-liability statutes have been said to achieve this goal of protecting children by deterring adults from engaging in the prohibited conduct and by making prosecutions easier by eliminating difficulties of proof that may occur due to the rapid physical development of children or the difficulty in rebutting a defendant's claims of mistake.

But a rule of rigorous strict liability—that flatly denies any defense based upon mistake of age, no matter how reasonable the defendant's mistake was nor what age he reasonably believed the complainant to be—is not narrowly tailored to achieve the goal of protecting children. Such a rule imposes liability on even the diligent defendant, who exercises all the reasonable caution that society would expect of him. A defendant who is diligent about ascertaining that his sexual partner is an adult, and reasonably (but mistakenly) believes that to be so, is not a sexual predator, nor is his relationship with the child one of exploitation.

Moreover, various mechanisms, other than rigorous strict liability, can be used to deter adults from choosing the very young as sexual partners. The law can impose an explicit requirement of diligence. The law can also require that the actor's reasonable, diligence-based, belief be that the child was an adult, not merely a child above the age of consent. An actor can thus be expected to look for social independence or other factors that signify adult status (e.g. attending university, having a of residence of one's own, paying bills). The law can also make the reasonable-mistake-of-age issue an affirmative defense, placing the burden upon the defendant to prove the circumstances that would exculpate him. Placing such a burden on the defendant would preserve the heavy incentive to be cautious because a person would know that, if he were accused: (1) the State would only have to prove the age of the child for the prosecution to go forward, (2) the defendant would have the burden to produce evidence of and prove his reasonable-mistake defense, (3) the trial judge might choose not to submit the defense, on the basis that the defendant has not sufficiently met his burden of production on an element of his defense or the evidence conclusively demonstrates that an element of his defense is not met, and (4) even if the defense is submitted, the finder of fact might choose not to believe the defendant's evidence.

With respect to the asserted difficulties in proof due to a child's rapid physical development and a defendant's ability to plausibly assert a mistake, such concerns are alleviated in an age of digital cameras and camcorders, in which it has become much easier to create and retain images of one's children. The ease with which images can be created increases the likelihood that a finder of fact will be able to examine images of the child from the relevant time periods. In any event, placing the burden of production and persuasion on the defendant with respect to the mistake-of-age issue would also alleviate this concern because the defendant, not the State, would suffer the risk of loss if the finder of fact is uncertain about the genuineness or reasonableness of any mistake about the child's age.

Some courts have said that recognizing a reasonable-mistake-of-age defense would “considerably diminish[]” the deterrent effect of child-sex-offense statutes, but such conclusions appear to be mere speculation. As explained above, twenty states have some form of mistake-of-age defense, and I am unaware of any evidence that those states have a higher incidence of child sex offenses, or a significantly lower incidence of successful prosecutions, than states that provide no such defense. Although the mere speculative possibility of a greater deterrent effect

would be sufficient to justify a rigorous strict-liability regime under the rational-basis test, such speculation is not sufficient to establish narrow tailoring under the compelling-state-interest test that applies when a fundamental right is implicated. But if one considered the speculative possibility of an increase in deterrence, one would also want to consider how a rigorous-strict-liability regime could produce additional victims.

The obvious example implicated in the present discussion is the essentially innocent defendant who is punished for a crime for which he entirely lacks any mental culpability. But other examples of the potential perverse effects of a rigorous-strict-liability regime can be conceived. An underage individual could lure an unsuspecting adult into a sexual liaison for the purpose of blackmail. The existence of several cases involving blackmail about illicit sex—including one that involved a mistake of age—suggests that the scenario is not entirely far-fetched. In an article, entitled “The Paradox of Statutory Rape,” another troubling scenario has been suggested: that an adult rape victim of an underage attacker could be liable for rape under statutory-rape laws. The authors argue that conduct by an adult rape victim of an underage attacker will often satisfy the literal elements of statutory rape and that the available defenses in many jurisdictions are insufficient to immunize the adult victim from criminal liability. As one illustration, the authors discuss the facts of *Henryard v. State*, in which an adult woman was raped at gunpoint by two males, Henryard and a fourteen-year-old. Although the woman was the victim in that case, the authors contended that the woman’s submission to the underage attacker literally satisfied the elements of the crime of statutory rape. In another illustration, the authors point to *Garnett v. State*, a Maryland case in which the defendant was mentally retarded. In that case, Raymond Garnett, a twenty-year-old mentally retarded man with an I.Q. of fifty-two, who interacted socially at the level of age eleven or twelve, had sex with a thirteen-year-old girl of normal intelligence. There was evidence that the girl invited him up to her room through an open window and told him that she was sixteen. The authors of “The Paradox of Statutory Rape” point out that, under traditional rape law, Garnett could have been considered the victim because of his mental disability, and the thirteen-year-old could have been seen as the rapist. The role reversal that results from “the paradox of statutory rape” may be more apparent if we consider a hypothetical fact situation in which an underage boy rapes a mentally retarded adult woman. Under a strict-liability regime, she would be the rapist and he the victim.

Imposing criminal liability on the rape victim simply because the attacker was underage would turn criminal law on its head. The possible existence of such a scenario under a rigorous strict-liability regime poses serious due-process concerns. It may be that various defenses available in Texas—duress, necessity, and insanity—would provide protection from criminal liability to any adult who is raped by an underage attacker. But the fact that we may need such defenses to perform that function points to the flaws of a rigorous strict-liability regime that ignores completely an actor’s lack of actual blameworthiness.

The Garnett case is a real-world example that involves the mistake-of-age issue. The argument in that case was that the defendant was entitled to assert a defense of mistake of age because he thought the child was sixteen. He was not entitled to such a defense under Maryland law. Nor would Lawrence help him, under the principles that I propose today, because he believed the child to be under the age of eighteen. But the facts in Garnett’s case suggest a related, though different, question of whether harsh punishment may be imposed upon a person who lacks

mental culpability due to a mental disability. Although Maryland's high court upheld Raymond Garnett's conviction, it acknowledged that "it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality in any case." Nevertheless, the court felt that its hands were tied, concluding, "extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing." How to handle child sex cases in which the defendant is a mentally retarded individual is not before us today, but such a scenario presents potentially serious due-process concerns that reinforce my conclusion that due process has a role to play in ensuring that the defendant possesses at least a minimal level of mental culpability for such a serious crime.

Based upon the above discussion, I conclude that a scheme of rigorous strict liability for child sex offenses is not narrowly tailored to serve the State's compelling interest in protecting children. Consequently, I would hold that, absent the availability of a mistake-of-age defense, child-sex-offense laws in Texas are unconstitutional as applied to an individual who demonstrates to the finder of fact by a preponderance of the evidence that he reasonably believed, after exercising appropriate diligence, that his sexual partner was at least eighteen years old, so long as the individual's conduct would otherwise constitute protected activity under *Lawrence*.

Questions and Comments

1. Does *Lawrence v. Texas* compel rethinking the crime of statutory rape as a strict liability crime? If the state has a compelling interest in protecting children from harmful sexual contact before they reach the age of majority, should any person who engages in sex without determining whether his sexual partner is an adult be subject to the risk of prosecution for sexual assault? Are you persuaded by the dissent's argument that the requirement of registration as a sex offender under statutory rape laws requires some consideration of whether the defendant knowingly engaged in sex with a minor?
2. The dissent asserts that the significant age for purposes of constitutional protection is 18. The Supreme Court did not mention an age of adulthood in *Lawrence*. Are you persuaded by the dissent's reasons for picking 18, even though the statutory age of consent to sex in Texas is 17? Would you agree with the concurrence's argument that it would be implausible to suggest that a man who had personal sexual contact with a 13 year old woman could reasonably believe that she was at least 18, regardless of the age appeared on her social network page or what she had represented her age to be verbally?
3. In *State v. Cervantes*, 2015 Ore. App. LEXIS 629, 2015 WL 2405153 (Ore. Ct. App., May 20, 2015), the court held that it was not harmless error for the trial court to have precluded the defense from cross-examining the male victim about whether his sexual relationship with the male defendant was consensual. The victim was 17 years old at the time of the sexual activity, one year below the age of consent in Oregon. The defendant claimed that the victim had lied about his age. Oregon law does not impose strict liability, and recognizes mistake of age as a defense in a consensual case. The court of appeals held that the trial judge erred in precluding cross-examination that could produce evidence support such a defense.

Page 194 – Add the following note 3:

3. In his opinion for the Court in *Lawrence v. Texas*, Justice Kennedy stated that the case before the Court did not involve minors, and thus the Court was not ruling on whether minors have a due process right to engage in consensual sex. Most cases involving minors concern sex between adults and minors, or between older teens and younger teens. Courts have rarely addressed the question whether pre-teens have any due process rights regarding the physical expression of their sexuality with members of their own age group.

The Ohio Supreme Court addressed the issue of sex among young age peers in *In re D.B.*, 950 N.E.2d 528 (Ohio 2011). D.B., a 12-year-old boy at the time of prosecution, was charged with violating R.C. 2907.02(A)(1)(b), the portion of Ohio’s “statutory rape” law which makes it a crime for a person to engage in “sexual conduct with another” where “the other person is less than 13 years of age, whether or not the offender knows the age of the other person.” Prosecutors alleged that D.B. had initiated sex with two other boys, one age 12 and one age 11. The original complaint alleged that D.B., who was bigger than the other two boys, had forced them to have sex, but the trial court concluded that D.B. had not forced the other boys. As consent is not an issue under a statutory rape provision, D.B. had literally violated the statute and was adjudged a juvenile delinquent and subjected to penalties. D.B.’s attorney moved to have the prosecution dismissed, arguing that D.B.’s due process and equal protection rights were violated. The trial court denied the motion, and was upheld by the Court of Appeals.

The Ohio Supreme Court reversed on constitutional grounds. The court found that the statute’s application offended Due Process, holding that it “is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is an offender and a victim, and the distinction between these two terms breaks down.” The court found that the statute gave prosecutors no guidance in determining whom to prosecute in such a situation, and that their decision to prosecute D.B. and not his sexual partners “is the very definition of discriminatory enforcement.” The court found that without evidence of complicating factors, such as compulsion by force or threat of force, prosecution of D.B. was arbitrary.

The court also found an Equal Protection violation in this case, noting that all three boys, D.B. and his two young sexual partners, were equally in violation of the statute, but only D.B. was prosecuted. “Because D.B. and M.G. were both under the age of 13 at the time the events in this case occurred,” wrote the court, “they were both members of the class protected by the statute, and both could have been charged under the offense. Application of the statute in this case to a single party violates the Equal Protection Clause’s mandate that persons similarly circumstanced shall be treated alike.” Concluded the court, “We thus hold that R.C. 2907.02(A)(1)(b) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13.”

Would the constitutional violation be cured by amending the statute to require that all pre-teen participants in sexual activity be equally prosecuted and subject to equal penalties for engaging

in consensual sex with others in their age group? Does it make sense as a matter of public policy to use the criminal law to deal with pre-teen sexual experimentation? Might *Lawrence v. Texas* place any restriction on the state's ability to impose criminal sanctions in such a case? Are the potential hazards associated with sex sufficient to justify application of the criminal law to such situations?

Page 202 – Add to note 1:

In *Lowe v. Swanson*, 663 F.3d 258 (6th Cir. 2011), the court affirmed denial of a writ of habeas corpus to the defendant in *State v. Lowe*, 112 Ohio St. 3d 507 (Ohio 2007), agreeing with the district court that *Lawrence v. Texas* did not clearly establish constitutional protection for consensual acts of incest between adults.

Page 222 – Add to note 3:

In *People v. Davis*, 117 A.D.3d 749, 986 N.Y.S.2d 488 (App. Div. 2nd Dept. May 7, 2014), the court set aside a jury verdict of second degree murder where the defendant and the victim were engaged in S&M sex during which the victim died by accidental asphyxiation. The court held that in light of the consensual nature of the activities and the unrebutted testimony of the defendant that he had not intended to kill the victim but just got carried away during sex, the verdict should be reduced to manslaughter.

Page 222 – Add to note 5:

In addition to the cited article, see Devin Meehos, 50 Shades of Consent: Re-Defining the Law's Treatment of Sodomasochism, 43 Sw. L. Rev. 97 (2013); Daniel Haley, Bound by Law: A Roadmap for the Practical Legalization of BDSM, 21 Cardozo J.L. & Gender 631 (Winter 2015). Although there is relatively little case law on the subject, law student scholars have exhibited considerable interest to judge by the publication of student notes and comments.

Page 239 – Number the Question as (1) and add the following to it:

Does *Obergefell v. Hodges* change your analysis of the constitutional question of polygamy? During oral argument of *Obergefell*, the question of multiple marriages was raised by Justice Samuel Alito and put to Mary Bonauto, an attorney representing the petitioners:

JUSTICE ALITO: Suppose we rule in your favor in this case and then after that, a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them a license?

MS. BONAUTO: I believe so, Your Honor.

JUSTICE ALITO: What would be the reason?

MS. BONAUTO: There'd be two. One is whether the State would even say that that is such a thing as a marriage, but then beyond that, there are definitely going to be concerns about coercion and consent and disrupting family relationships when you start talking about multiple persons.

...

JUSTICE ALITO: Well, what if there's no—these are 4 people, 2 men and 2 women, it's not the sort of polygamous relationship, polygamous marriages that existed in other societies and still exist in some societies today. And let's say they're all consenting adults, highly educated. They're all lawyers. (Laughter.)

JUSTICE ALITO: What would be the ground under the logic of the decision you would like us to hand down in this case? What would be the logic of denying them the same right?

MS. BONAUTO: Number one, I assume the States would rush in and say that when you're talking about multiple people joining into a relationship, that that is not the same thing that we've had in marriage, which is on the mutual support and consent of two people. Setting that aside, even assuming it is within the fundamental—

JUSTICE ALITO: But well, I don't know what kind of a distinction that is because a marriage between two people of the same sex is not something that we have had before, recognizing that is a substantial break. Maybe it's a good one. So this is not—why is that a greater break?

MS. BONAUTO: The question is one of again, assuming it's within the fundamental right, the question then becomes one of justification. And I assume that the States would come in and they would say that there are concerns about consent and coercion. If there's a divorce from the second wife, does that mean the fourth wife has access to the child of the second wife? There are issues around who is it that makes the medical decisions, you know, in the time of crisis. I assume there'd be lots of family disruption issues, setting aside issues of coercion and consent and so on that just don't apply here, when we're talking about two consenting adults who want to make that mutual commitment for as long as they shall be. So that's my answer on that.

Page 239 – add the following Question 2:

2. If a state may make it a crime for a person to have more than one spouse, can it also make it a crime for a married person to cohabit with both a spouse and another adult in an informal three-adult family group? Suppose this cohabitation includes a religious marriage ceremony with the second spouse, but does not purport to involve a legal wedding with that spouse? Would the same state interests that would support a polygamy statute also support a cohabitation statute? See *Brown v. Buhman*, 947 F.Supp.2d 1170 (D. Utah 2013) (held, cohabitation portion of polygamy statute was unconstitutional); subsequent ruling, sub nom. *Brown v. Herbert*, 43 F.Supp.3d 1229 (D. Utah 2014), appeal filed by the government, September 25, 2014 (10th Circuit).

Page 243 – Add a new Section J – Criminal Liability and HIV

During the 1980s, prosecutors in many states adapted existing sex crimes statutes to situations where it was alleged either that a person had transmitted Human Immunodeficiency Virus, a pathogen identified as the “cause” of Acquired Immune Deficiency Syndrome or had engaged in conduct that presented a threat of transmission to other persons. Many of these cases involved consensual sexual activities in which the infected party had not disclosed the fact of his or her infection to the other party. Soon state legislatures began to react to the epidemic by amending their penal codes to provide specific crimes of knowingly exposing others to HIV. Before the

introduction of new medications in the mid-1990s that made HIV infection a manageable rather than invariably fatal infection, courts routinely imposed severe penalties on defendants who had “exposed” others to HIV, even when actual transmission had not been shown to have occurred. By the early years of the 21st century, medical science had established that HIV-infected persons who were compliant with state-of-the-art anti-viral treatments did not present even a negligible risk of HIV transmission, even if they engaged in sexual activity without using barrier contraception, but state legislatures did not react to these developments by modifying their statutes. In the following case, one state supreme court grappled with such a situation.

Rhoades v. State of Iowa
848 N.W.2d 22 (2014)
Supreme Court of Iowa

WIGGINS, Justice.

A defendant brings a claim alleging his trial counsel provided ineffective assistance of counsel related to the defendant’s guilty plea to the crime of criminal transmission of the human immunodeficiency virus (HIV) in violation of Iowa Code section 709C.1 (2007). The district court disagreed and dismissed the defendant’s post-conviction relief action. The defendant appealed and we transferred the case to our court of appeals. The court of appeals affirmed. On further review, we find the guilty plea record did not contain a factual basis to support the plea. We also find the court in this case cannot use the rule of judicial notice to establish the factual basis in the guilty plea record. Based on the state of medicine both now and at the time of the plea in 2009, we are unable to take judicial notice that an infected individual can transmit HIV, regardless of an infected individual’s viral load, when that individual engages in protected anal or unprotected oral sex with an uninfected person. Accordingly, we vacate the decision of the court of appeals and reverse the judgment of the district court. We also remand the case with directions.

I. Background Facts and Proceedings.

The petitioner in this case, Nick Rhoades, was diagnosed with HIV in 1998. From 1999 to 2005, Rhoades did not receive treatment for his HIV diagnosis. In 2005, Rhoades began consistently receiving medical care for his HIV diagnosis from the University of Iowa Hospitals and Clinics. Every three to six months during this time, Rhoades received treatment. In the spring of 2008, Rhoades’s doctor informed him his HIV viral load was non-detectable.

The events of this case turn on an encounter between Rhoades and A.P. on June 26, 2008. On that evening, Rhoades met A.P. on a social networking site. Rhoades and A.P. began conversing, and subsequently A.P. invited Rhoades to his home in Cedar Falls. Rhoades accepted. A.P. understood Rhoades to be HIV negative, in part because Rhoades’s online profile listed him as HIV negative.

In Cedar Falls, Rhoades and A.P. engaged in consensual unprotected oral and protected anal sex. Several days later, A.P. learned Rhoades was potentially HIV positive. A.P. contacted the police,

and subsequently the State charged Rhoades with criminal transmission of HIV in violation of Iowa Code section 709C.1.

Rhoades engaged the services of an attorney to defend him in this criminal matter. This was the attorney's first case involving Iowa Code section 709C.1. On May 1, 2009, Rhoades pled guilty to one count of criminal transmission of HIV. The district court accepted the plea. At the sentencing hearing, the district court sentenced Rhoades to a term of imprisonment not to exceed twenty-five years with life parole and required Rhoades be placed on the sex offender registry. The district court retained jurisdiction. Rhoades filed a motion to reconsider the sentence. On September 11, the district court suspended Rhoades's twenty-five year sentence and placed Rhoades on probation for five years. Rhoades did not file a direct appeal.

On March 15, 2010, Rhoades filed an application for post-conviction relief pursuant to Iowa Code chapter 822. Rhoades alleged his trial counsel was ineffective for allowing Rhoades to plead guilty by failing to challenge the factual basis of the plea and failing to complete a proper investigation before the plea hearing. The district court denied Rhoades's application for post-conviction relief. Rhoades appealed and we transferred the case to our court of appeals. The court of appeals affirmed. Rhoades requested further review, which we granted.

We must determine if Rhoades received ineffective assistance of counsel when he pled guilty to criminal transmission of HIV in violation of Iowa Code section 709C.1.

II. Standard of Review.

Ineffective-assistance-of-counsel claims are grounded in the Sixth Amendment. We review ineffective-assistance-of-counsel claims de novo. We review issues of statutory interpretation for correction of errors at law.

III. Elements of the Crime of Criminal Transmission of HIV.

The legislature codified the crime of criminal transmission of HIV in Iowa Code section 709C.1. The Code provides in relevant part:

1. A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's human immunodeficiency virus status is positive, does any of the following:

a. Engages in intimate contact with another person.

....

2. For the purposes of this section:

a. "Human immunodeficiency virus " means the human immunodeficiency virus identified as the causative agent of acquired immune deficiency syndrome.

b. "Intimate contact " means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.

....

4. This section shall not be construed to require that an infection with the human

immunodeficiency virus has occurred for a person to have committed criminal transmission of the human immunodeficiency virus.

5. It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge.

Iowa Code § 709C.1.

Therefore, to establish the crime of criminal transmission of HIV the State must prove the following elements: (1) “the defendant engaged in intimate contact with [the victim]”, (2) at the time of intimate contact the defendant’s HIV status was positive, (3) the defendant knew his HIV status was positive, and (4) “[a]t the time of the intimate contact, [the victim] did not know that the defendant had a positive HIV status.” *State v. Stevens*, 719 N.W.2d 547, 549 (Iowa 2006). It is also incumbent on the district court to instruct the jury on the definition of “intimate contact” because the legislature has specially defined this phrase in the Iowa Code. For purposes of section 709C.1, intimate contact requires “(1) there was an intentional exposure of the body of one person to a bodily fluid of another person, and (2) this occurred in a manner that could result in the transmission of ... HIV.”

In considering the definition of “intimate contact,” we have previously defined “could” in the criminal transmission statute as requiring “that transmission of ... HIV from the infected person to the exposed person was possible considering the circumstances.” *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001). Although there are multiple definitions of “possible,” we have not previously elaborated on what “possible” means here. First, “possible” may mean something “that may or may not occur.” Webster’s Third New International Dictionary 1771 (unabr. ed.2002). This definition is broad, and some courts have recognized the word “possible” in certain contexts may mean allowing any likelihood of occurrence, no matter how remote. Second, “possible” may mean “having an indicated potential by nature or circumstances.” Webster’s Third New International Dictionary 1771. This definition considers the reality of a thing occurring, rather than a theoretical chance. In *Keene*, we linked possibility to the circumstances present. See *Keene*, 629 N.W.2d at 365. We find useful this commentary by the Eleventh Circuit Court of Appeals:

The potential for legal liability must be reasonable, not merely theoretical. In considering possible state law claims, possible must mean more than such a possibility that a designated residence can be hit by a meteor tonight. That is possible. Surely, as in other instances, reason and common sense have some role.

Legg v. Wyeth, 428 F.3d 1317, 1325 n. 5 (11th Cir.2005).

We find the second definition is more appropriate in the context of this criminal statute for at least two reasons. First, we recognize this statute requires expert medical testimony on the likelihood of transmission of HIV. Experts are not required to testify in absolutes when it comes to causation. Second, and more importantly, we would not want to deprive a person of his or her liberty on the basis the defendant’s actions caused something that can only theoretically occur.

Causation must be reasonably possible under the facts and circumstances of the case to convict a person of criminal transmission of HIV in violation of Iowa Code section 709C.1. Thus, to establish a factual basis for Rhoades's guilty plea, the record must establish the four elements of the crime together with the two requirements of the statutory definition of intimate contact.

IV. Attacking a Guilty Plea.

[A] defendant may attack his or her guilty plea on the ground the defendant did not receive effective assistance of counsel as required under the Sixth Amendment to the United States Constitution because there was no factual basis to support the defendant's guilty plea. *State v. Finney*, 834 N.W.2d 46, 54 (Iowa 2013).

A defendant must prove by a preponderance of evidence “(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice” in order to establish an ineffective-assistance-of-counsel claim. If trial counsel permits a defendant to plead guilty and waives the defendant's right to file a motion in arrest of judgment when there is no factual basis to support the defendant's guilty plea, trial counsel breaches an essential duty. It is well-settled law that under these circumstances, we presume prejudice. At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense. We review (1) the prosecutor's statements, (2) the defendant's statements, (3) the minutes of testimony, and (4) the presentence report, if available at the time of the plea, to determine if the record supports a factual basis for the plea. We have also allowed the court to take judicial notice of well-known facts to establish a factual basis. When analyzing the record, we do not require the record “to show the totality of evidence necessary to support a guilty conviction,” but only that the record demonstrates the facts to support the elements of the offense.

V. Analysis.

In deciding this case, we first look to the prosecutor's statements at the plea hearing. The prosecutor made no statements at the plea hearing that contributed to establishing the factual basis. When the district court asked if the prosecutor requested any further factual basis, the prosecutor responded, “No, Your Honor.”

Next, we consider the defendant's statements. The colloquy that took place between the district court and Rhoades was as follows:

THE COURT: What the state would have to prove is that on or about June 26th of 2008, here in Black Hawk County, Iowa, you did knowing that you had human immunodeficiency virus, that you knew that you had that, that you were positive for that and that you engaged in intimate contact with another person and you didn't acknowledge or that person didn't know that you had the virus.

Do you understand what it is you would—the state would have to prove?

THE DEFENDANT: I do.

THE COURT: Were you here in Black Hawk County on June 26th?

THE DEFENDANT: I was.

THE COURT: And at that time were you positive for the human immunodeficiency

virus?

THE DEFENDANT: Yes, sir.

THE COURT: You were aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: And did you engage in intimate contact with another person?

THE DEFENDANT: Yes, sir.

THE COURT: And did that person not know that you had this virus?

THE DEFENDANT: No, sir.

THE COURT: Can the court rely upon the minutes for a factual basis, state?

MS. FANGMAN: Yes, Your Honor.

....

THE COURT: Can the court rely upon the minutes, [defense counsel's name]?

[DEFENSE COUNSEL]: Yes, sir.

This colloquy establishes the factual basis for the elements that Rhoades was aware his HIV status was positive and at the time of his sexual encounter with A.P., A.P. was not aware of his HIV status. We find the colloquy does not establish the facts necessary for the intimate-contact element. It is true the district court informed Rhoades the crime required intimate contact and when the district court asked if he had intimate contact, Rhoades answered in the affirmative. However, intimate contact under the statute has a specific meaning. “‘Intimate contact’ means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.” Iowa Code § 709C.1(2)(b).

In a previous case, we considered whether a plea colloquy between the district court and the defendant established a factual basis. See *Ryan v. Iowa State Penitentiary*, 218 N.W.2d 616, 618 (Iowa 1974). The colloquy was as follows:

THE COURT: You have told me that you are entering a plea of guilty because you, in fact, did what it charged you here in the county attorney's information?

DEFENDANT: Yes, Your Honor.

In finding this inquiry did not establish a factual basis, we stated:

[The county attorney information] was necessarily couched in the technical language of the criminal statute. Formal criminal accusations almost of necessity include verbiage which might be expected to confound and confuse one unaccustomed to legal parlance. There was no sufficient showing of a factual basis.

Here, as in *Ryan*, the district court used technical language from the statute that was insufficient to establish a factual basis. The district court asked Rhoades if he had intimate contact with the victim. At most, we can surmise from Rhoades's affirmative response that he had some sort of sexual relations with the victim. See Webster's Third New International Dictionary 1184 (defining “intimate” as “engaged in or marked by sexual relations”). Although we do not require a detailed factual basis, we do require the defendant to acknowledge facts that are consistent with the elements of the crime. We find the district court's reference to intimate contact and

Rhoades's acknowledgement he had intimate contact does not establish the necessary factual basis an exchange of bodily fluid took place or that Rhoades intentionally exposed A.P. to his bodily fluid in a manner that could result in the transmission of HIV.

We next look to the minutes of testimony to see if a factual basis exists to establish Rhoades intentionally exposed A.P. to his bodily fluid in a manner that could result in the transmission of HIV. The minutes of testimony incorporate the police reports prepared by the sheriff's department, which included A.P.'s statements. The minutes of testimony establish A.P. received oral and anal intercourse from Rhoades. It also establishes Rhoades used a condom when performing anal sex. The minutes of testimony do not establish any exposure of bodily fluids between Rhoades and A.P. Thus, the minutes of testimony do not establish a factual basis that an exchange of bodily fluid took place or that Rhoades intentionally exposed A.P. to his bodily fluid. Nor do the minutes of testimony show the likelihood the sexual activity in this case could result in the transmission of HIV.

Next, we consider the presentence investigation report. The report states Rhoades admitted he engaged in consensual intercourse with A.P., and A.P. reported receiving unprotected oral sex and protected anal sex. The presentence investigation report contains the same information contained in the police reports, and similarly does not establish a factual basis.

The last place we look to see if a factual basis exists is by judicial notice of adjudicative facts. An adjudicative fact is "[a] controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." Black's Law Dictionary 669 (9th ed.2009). Under Iowa Rule of Evidence 5.201, a court may take judicial notice of two kinds of adjudicative facts. First, the court may take judicial notice of a fact "generally known within the territorial jurisdiction of the trial court." Iowa R. Evid. 5.201(b). Second, the court may take judicial notice of a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id.

Iowa Rule of Evidence 5.201 is nearly identical to the Federal Rule of Evidence 201. See Fed.R.Evid. 201. The advisory committee notes to the Federal Rule state "[a]djudicative facts are simply the facts of the particular case" and "[a] high degree of indisputability is the essential prerequisite." Fed.R.Evid. 201 advisory committee's note to subdivision (a). Adjudicative facts concern the immediate parties, including "who did what, where, when, how, and with what motive or intent..." Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955). Evidence must support adjudicative facts. We have previously recognized adjudicative facts are limited to a particular proceeding. See *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 836 (Iowa 2002) ("Adjudicative facts relate to the specific parties and their particular circumstances.").

We recognize judicial notice of an adjudicative fact in a prior proceeding does not automatically apply to a future proceeding. Rather, a court must take judicial notice of the adjudicative fact and recognize the same principles that supported the judicial notice in the prior case support judicial notice in the present case.

In Keene, the district court recognized a factual basis existed to support a defendant's conviction of criminal transmission of HIV based on the minutes of testimony and the defendant's statements made during the plea colloquy. The minutes of testimony indicated the victim and the defendant engaged in consensual, unprotected sexual intercourse and the victim was unaware of the defendant's HIV status. Both the victim and the defendant were uncertain if the defendant ejaculated during sexual intercourse, however the defendant admitted that if he did ejaculate he did so only on either his or the victim's stomach. The minutes of testimony also indicated a public health nurse would testify to the risk of exposure of HIV during sexual contact.

At the plea colloquy, the defendant stated all witnesses would be truthful if they testified according to the minutes of testimony. He further admitted he knew he was HIV positive when he engaged in sexual intercourse with the victim. The district court found a factual basis for the crime.

On appeal, the defendant argued there was not a factual basis to show how sexual intercourse between he and the victim could result in the transmission of HIV. We disagreed. We determined the minutes of testimony, the defendant's admissions during the plea colloquy, and our recognition of the "fact that ... HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus" established the factual basis for the crime. Accordingly, we found the defendant's ineffective-assistance-of-counsel claim lacked merit. Our judicial notice of the adjudicative facts that HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus filled in the gaps in the factual basis for Keene's plea.

Keene committed his crime in 1998. In 2003, we again recognized the adjudicative "'fact that ... HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus'" continued to be common knowledge to establish the evidence was sufficient to support a conviction under section 709C.1. Stevens, 719 N.W.2d at 550–52 (quoting Keene, 629 N.W.2d at 365).

Today we are unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person's viral load. The evidence at the post-conviction relief hearing shows there have been great strides in the treatment and the prevention of the spread of HIV from 2003 to 2008. It was not apparent in 2009, at the time of the plea, that this fact was "capable of accurate and ready determination by resort to sources whose accuracy" could not reasonably be questioned. Further, while this fact may have been a commonly held belief within the territorial jurisdiction of the trial court, we note the purpose of judicial notice is to show the fact is not subject to reasonable dispute. Here, we find the fact was subject to reasonable dispute. At the time of the plea, Rhoades's viral count was nondetectable, and there is a question of whether it was medically true a person with a nondetectable viral load could transmit HIV through contact with the person's blood, semen or vaginal fluid or whether transmission was merely theoretical. The judicial notice we took in previous cases is subject to reasonable dispute here; thus, it is improper for us to similarly take judicial notice in this case. With the advancements in medicine regarding HIV between 2003 and 2008, we are unable to take judicial notice of the fact that HIV may be transmitted through contact with an infected individual's

blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus to fill in the gaps to find a factual basis for Rhoades's guilty plea. Thus, there was not a sufficient factual basis for the district court to accept the plea. Therefore, trial counsel was ineffective for allowing the district court to accept the plea without a factual basis.

VI. Disposition.

We vacate the decision of the court of appeals and reverse the judgment of the district court. We remand the case back to the district court to enter judgment finding trial counsel was ineffective. The district court shall order the sentence in Rhoades's criminal case be set aside. Because it is possible the State can establish a factual basis, the district court should order the court in the criminal case to give the State the opportunity to establish a factual basis. The district court should further order if the State cannot establish a factual basis, the plea is withdrawn and the State can proceed accordingly.

MANSFIELD, Justice (concurring specially).

I join the majority opinion because I do not believe the record provides a factual basis for the conclusion that Nick Rhoades intentionally exposed A.P. to Rhoades's bodily fluids in a manner that could result in the transmission of the HIV virus. However, I write separately because Justice Zager's dissent makes some excellent points, and I want to comment briefly on them. Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. One of those areas is guilty pleas, where we vacate a plea whenever the record does not contain a factual basis for each element of the crime, seemingly without regard to counsel's actual competence.

Thus, even as we use the terminology "ineffective assistance" as a tool to review criminal convictions, I think it is especially important that we not appear to be criticizing counsel when we are talking about a legal construct of this court. I join the majority opinion in this case, but I do so without finding fault in the performance of Rhoades's defense counsel. WATERMAN, J., joins this special concurrence.

ZAGER, Justice (dissenting).

I respectfully dissent. I disagree that counsel was ineffective for allowing Rhoades to plead guilty to the crime of criminal transmission of the human immunodeficiency virus (HIV), as I would find that there is a factual basis to support the plea. . . .

The record plainly discloses that A.P. performed unprotected oral sex on Rhoades, and the two engaged in protected anal sex where the condom may have failed. The plea colloquy also reveals that Rhoades admitted on the record that he had intimate contact with the victim. The majority dismisses these facts as insufficient to satisfy the two sub-elements of intimate contact, however, because neither the court nor counsel expanded on the facts on the record with evidence that Rhoades admitted he intentionally exposed the victim to bodily fluid or that the exposure

occurred in a manner that could result in the transmission of HIV. I believe the acknowledgement by Rhoades that he had unprotected oral sex with the victim and his admission of intimate contact with the victim, combined with reasonable inferences based on common sense, provides a sufficient factual basis to support the guilty plea.

Had this case gone to a jury trial, jurors would have been instructed to “consider the evidence using [their] observations, common sense, and experience.” Iowa State Bar Ass’n, Iowa Criminal Jury Instruction 100.7. It would be reasonable then for a defense attorney, in considering whether to advise his or her client to accept a guilty plea, to reflect on how a jury would likely use the fact A.P. performed unprotected oral sex on Rhoades, that there was a possibility of failed protection during anal sex, and that Rhoades later apologized to the victim. Having so reflected, a seasoned lawyer might have reasonably concluded jurors would use their common sense and experience to infer a fluid exchange or intentional exposure from the unprotected oral sex; thus, the attorney could have reasonably concluded a jury was likely to convict Rhoades.

Considering the high likelihood of a guilty verdict based on these facts, counsel might reasonably advise his client to plead guilty, allowed his client to plead guilty, and not find it necessary to supplement the record with additional, specific facts regarding the intimate contact. While I agree that the ultimate fact of fluid exchange or intentional exposure is disputed in the record, this is not necessarily fatal because counsel, like jurors, should be able to draw inferences from the evidence in the record before them. In other words, if lay jurors can draw inferences from the facts in reaching a guilty verdict beyond a reasonable doubt, then a trained attorney should be permitted to do so in relying on a lesser burden of proof. . . .

[A]t the time when counsel was representing Rhoades, the factual basis for a guilty plea under Iowa Code section 709C.1 could be established without any showing of fluid exchange or intentional exposure of fluid. Even being mindful of the limitations of this record, it does show A.P. performed unprotected oral sex on Rhoades. Under Keene, that was enough. That the record developed at Rhoades’s guilty plea in 2008 did not contain evidence of Rhoades’s ejaculation is, using this court’s word, “irrelevant.” To now hold otherwise is to ignore not only the presumption of professional competence to which counsel is entitled, but also our own precedent. . . .

Supposed ambiguity in the statute and case law provides the foundation for the most glaring flaw in the majority’s reasoning. In Keene, we defined the word “could” in Iowa Code section 709C.1 to mean “that transmission of the HIV from the infected person to the exposed person was possible considering the circumstances.” According to the majority, we have never defined “possible.” The majority then considers potential meanings of the word, concluding possible means “reasonably possible,” which the majority explains “considers the reality of a thing occurring, rather than a theoretical chance.”

The majority concludes we have never defined “possible” under this statute by extracting the definition of “could” from its context in Keene. But, considering the definition of “could” in that context leads to a different conclusion about the meaning of possible. We said:

In enacting this statute, the legislature did not intend “could result” to mean “did result.”

See [Iowa Code] § 709C.1(4). Furthermore, “could” is the past tense of “can,” which is defined as “[u]sed to indicate possibility or probability.” The American Heritage Dictionary 232, 330 (2d college ed.1985). Thus, for a person to be guilty of violating section 709C.1, it must simply be shown that transmission of the HIV from the infected person to the exposed person was possible considering the circumstances.

We expressly considered a definition of “could” that incorporated a sense of probability, and we rejected it. The most reasonable conclusion to draw from this rejection is that this court believed the legislature intended “possible” to mean “theoretically possible,” not probable or “reasonably possible.” If that implication was not enough, we emphasized “possible” when defining could, making all the more clear it meant only possible, not probable. The majority simply ignores this context. Having done so, the majority holds an attorney must ensure a guilty plea factually supports not only the law as this court has interpreted it, but also the law as this court might one day interpret it (or reinterpret it).

There is no way to reconcile the majority’s conclusion. The strong presumption in favor of an attorney’s effective assistance of counsel and the need to suppress hindsight’s temptation in favor of an analysis that takes account of the law and the facts as they were at the time of the conduct under review are the hallmark of ineffective-assistance-of-counsel analysis. In 2008, when counsel examined the record to determine whether the facts met the elements of the criminal-transmission statute, he could have reasonably concluded the guilty plea was factually supported according to the law as it was then. All the necessary facts are in the record, notwithstanding the record’s limitations.

Finally, I think we need to keep in mind the underlying purpose of the statute. As testified to by Dr. Meier at the post-conviction trial, Iowa Code section 709C.1 is really a disclosure statute. That is, the crime is committed when a person knows he or she is infected with HIV. He or she needs to disclose this fact to the potential sexual partner before engaging in intimate contact with that person. As the statute provides, if he or she discloses their HIV status and the partner engages in intimate contact consensually, there is no crime. See Iowa Code § 709C.1(5) (providing an affirmative defense). In the months leading up to the criminal offense, and in the subsequent months prior to Rhoades’s decision to plead guilty, we cannot forget it is Rhoades who had all of the relevant facts. Rhoades had all of the medical information regarding his HIV status and his viral load. Rhoades knew whether he should engage in intimate contact, whether this intimate contact needed to be protected or unprotected, the reasons he believed the intimate contact did or did not need to be protected, and whether there was a possibility that the HIV could be transmitted. Nevertheless, Rhoades listed his HIV status on his online dating profile as negative and told A.P. he was “clean” before the two engaged in the intimate contact. After these initial denials, Rhoades finally admitted to A.P. two weeks later in a recorded phone call that he was HIV positive.

In this case, there is no question that the record, when viewed as a whole and allowing all reasonable inferences, provides an ample factual basis for the guilty plea. Rhoades was fully advised and knowledgeable of the elements of the crime, including the need for intimate contact as defined in the statute. He admitted this on the record. Counsel was also fully knowledgeable of the elements of the crime as well. I would not find that counsel was ineffective for allowing

Rhoades to plead guilty to the charge without a further development of the facts during the plea colloquy.

We once assured attorneys that they need not “know what the law will become in the future to provide effective assistance of counsel.” *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981). They could, we reassured them, provide effective assistance of counsel by standing on “established rules of law.” *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982). Today’s decision must leave counsel with the distinct feeling of having a rug yanked out from under him. I would affirm the decision of the district court.

NOTES AND QUESTIONS

1. Assuming agreement with the proposition that it was “wrong” for Rhoades, knowing he was HIV positive, to fail to disclose that fact to sexual partners with whom he intended to engage in unprotected oral sex and protected anal sex, should the state treat Rhoades’ conduct as a crime? Is criminal law an appropriate vehicle for getting HIV-infected people to disclose their status in sexual situations? Does Rhoades’ doctor’s statement to him that treatment had rendered his HIV infection “undetectable” mean that it was not “wrong” for Rhoades to fail to disclose his status to a sexual partner?
2. The Iowa legislature reacted to publicity about Rhoades’ conviction and subsequent appeal by changing the statute. The new statute provides:

I.C.A. § 709D.3 - Criminal transmission of a contagious or infectious disease

1. A person commits a class “B” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.
2. A person commits a class “D” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.
3. A person commits a class “D” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.
4. A person commits a serious misdemeanor when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the

contagious or infectious disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.

5. The act of becoming pregnant while infected with a contagious or infectious disease, continuing a pregnancy while infected with a contagious or infectious disease, or declining treatment for a contagious or infectious disease during pregnancy shall not constitute a crime under this chapter.

6. Evidence that a person knows the person is infected with a contagious or infectious disease and has engaged in conduct that exposes others to the contagious or infectious disease, regardless of the frequency of the conduct, is insufficient on its own to prove the intent to transmit the contagious or infectious disease.

7. A person does not act with the intent required pursuant to subsection 1 or 2, or with the reckless disregard required pursuant to subsection 3 or 4, if the person takes practical means to prevent transmission, or if the person informs the uninfected person that the person has a contagious or infectious disease and offers to take practical means to prevent transmission but that offer is rejected by the uninfected person subsequently exposed to the infectious or contagious disease.

8. It is an affirmative defense to a charge under this section if the person exposed to the contagious or infectious disease knew that the infected person was infected with the contagious or infectious disease at the time of the exposure and consented to exposure with that knowledge.

In light of the court's recitation of the facts in Nicky Rhoades' case, would a plea of guilty to violation of this statute have a sufficient factual predicate to be valid? Which section could he be held to violate? Is the classification of the offense commensurate with the seriousness of the misconduct?

3. The Iowa Supreme Court's decision was generally hailed by AIDS activists as an important advance over existing cases in Iowa and other jurisdictions that, based on outdated medical information, assumed that any unprotected sex by an HIV-infected person presented a non-negligible risk of transmission of HIV, regardless of the defendant's treatment status. See, e.g., *State of Tennessee v. Hogg*, 448 S.W.3d 877 (Tenn. 2014) (ruling based in part by "expert" testimony that was apparently inaccurate in describing risk of transmission). It is too soon to know whether courts in other states may respond to the Iowa ruling favorably. A Texas appeals court avoided opining on the issue in *Billingsley v. State*, 2015 Tex. App. LEXIS 1915 (Tex. App., 11th Dist., Feb. 27, 2015), finding that the defendant's general guilty plea precluded raising on appeal the argument that up-to-date scientific evidence about risk made the statute inapplicable to him. The Texas defendant actually transmitted HIV to the victim, but argued on appeal that modern treatments for HIV infection that can render the virus undetectable and non-disabling meant that his conduct did not fall within the statutory definition of "serious

bodily injury” as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”

4. Similar arguments have been made in the military criminal appeals system. Under the Uniform Code of Military Justice, serious liability would turn on whether particular conduct was “likely” to cause death or serious physical harm. In *United States v. Gutierrez*, 74 M.J. 61 (U.S. Court of Criminal Appeals for the Armed Forces, 2015), a case involving vaginal intercourse, the court stated:

The ultimate standard, however, remains whether—in plain English—the charged conduct was “likely” to bring about grievous bodily harm. As related to this case, the question is: was grievous bodily harm the likely consequence of Appellant’s sexual activity?

As to unprotected oral sex, the expert testimony in this case is that the risk of HIV transmission was “almost zero.” According to Dr. Sweet’s testimony, that risk does “[n]ot really” change in the case of ejaculation. There should be no question that a risk of “almost zero” does not clear any reasonable threshold of probability, including under the rubric this Court has heretofore applied in HIV-exposure cases, which required that the risk must be more than “fanciful, speculative, or remote.” Appellant’s conviction for aggravated assault, to wit, engaging in unprotected oral sex without disclosing his HIV-positive status, is legally insufficient because no rational trier of fact could conclude that his conduct was likely to cause grievous bodily harm.

In the case of protected vaginal sex, we have previously concluded that “[t]he fact that a male uses a condom during sexual intercourse is not a defense to [aggravated] assault.” That conclusion does not, however, answer the question presented, which is whether Appellant’s conduct was likely to inflict grievous bodily harm. The expert testimony in this case makes clear that condom use protects against the transmission of bodily fluids in ninety-seven to ninety-eight percent of cases, and that any HIV transmission risk only obtains in the transmission of bodily fluids. Further, Dr. Sweet, the Government’s expert witness, agreed with trial defense counsel that the risk of HIV transmission in the case of protected vaginal sex was only “remotely possible,” meaning the conviction cannot be sustained even under *Joseph*. Appellant’s conviction for aggravated assault by protected vaginal sex is legally insufficient, and *Klauck* is expressly overruled.

Turning to unprotected vaginal sex, Dr. Sweet’s testimony put the maximal risk at 20 out of 10,000, which equates to 1 in 500. She described this figure as the “high-end” statistic, and appears to have concluded in her own assessment that “between 1 and 10 per 10,000 exposures would become infected.” In any event, accepting the high-end statistic of 1-in-500 exposures resulting in HIV transmission from unprotected vaginal intercourse consistent with our obligation

to construe the evidence in the light most favorable to the prosecution under Jackson, we conclude that HIV transmission is not the likely consequence of unprotected vaginal sex. This is so because, in law, as in plain English, an event is not “likely” to occur when there is a 1-in-500 chance of occurrence. As a result, Appellant’s conviction for aggravated assault by engaging in unprotected vaginal sex is legally insufficient under Jackson.

That Appellant’s conviction for aggravated assault is legally insufficient does not mean that Appellant’s conduct is beyond the reach of military criminal law. Unlike several other jurisdictions that have created statutory crimes of HIV nondisclosure, Congress has not criminalized HIV nondisclosure in the UCMJ. Thus, prosecutors have relied on generally applicable punitive articles to litigate these cases. There is nothing improper regarding the government’s reliance on generally applicable statutes to prosecute criminal conduct, but in cases involving HIV exposure, the government will be held to its burden of proving every element of the charged offense in the same manner that is required in other cases invoking the same statute. As Judge Wiss wrote in his separate opinion in Joseph:

[W]hen the Government comes before a court of law and tries to fit a round peg of conduct into a square hole of a punitive statutory provision, it is not the proper function of the court to reshape the hole so that it will accept the peg and, in the process, distort the hole’s character. Rather, it is the proper limit of the court’s function to consider whether the hole—politically determined—already is large enough so that the peg fits within it.

This ruling was promptly followed in a case involving an HIV-infected gay military member who had been convicted of “aggravated assault” for engaging in unprotected oral sex with other men without disclosing his HIV-infection, appeals the court holding that the conviction must be set aside. However, the court still considered that the defendant had committed a battery, in light of testimony by his sexual partners that they would not have engaged in unprotected sex with him had they known of his infection. *U.S. v. Burckhardt*, 2015 WL 4039268 (U.S.A.F. Ct. Crim. App., June 12, 2015) (not published in M.J.).

CHAPTER FOUR – RECOGNITION OF SAME-SEX RELATIONSHIPS

[Replace all of Chapter Four in the text with the following:]

A. Marriage

INTRODUCTORY NOTE:

On June 26, 2015, the United States Supreme Court ruled 5/4 that the Fourteenth Amendment required states to afford all same-sex couples the same right to marry that is afforded to opposite-sex couples. See *Obergefell v. Hodges*, ___ U.S. ___, 2015 WL 2473451. The opinion is included in the Chapter One Supplement (page 19), and should be reviewed as part of the beginning of this chapter.

1. What is Marriage?

Traditionalists define marriage as “the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit.” See Sherif Girgis et al., *What is Marriage?*, 34 *Harv. J.L. & Pub. Pol’y* 245, 246 (2011). The authors of this essay claim that only an opposite-sex marriage can be a “real marriage” because only heterosexual intercourse involves the required “organic bodily union.”

Activists who support marriage equality provide a somewhat different view of marriage. They tend to focus more on the union of hearts and minds rather than bodies. Marriage is there to provide protection for any committed couple in which the partners pledge to support each other emotionally and financially.

A third group might be labelled the “beyond marriage” activists. These activists criticize the central role that marriage plays in the distribution of benefits and protections. Why not recognize many alternative forms of unions, such a triads or communes or extended families? See www.beyondmarriage.org.

Questions to ponder: What do you think marriage is? Why do we have it? What difference does it make in the lives of two partners if they are excluded from the institution? How much should the state regulate the nature of a marriage? Think about these questions as we move through the history of marriage litigation to date.

2. Historical Context: Feminists and Gay Liberation Activists

Early feminists viewed marriage as a patriarchal institution, established for the benefit of men and contributing to the destruction of any meaningful life for women. Some of this critique began during the first wave of feminism when feminists like Elizabeth Cady Stanton and Lucretia Mott argued not only for the right to vote, but also for the removal of the various

disabilities that coverture imposed on married women. Under the doctrine of coverture, a married woman could not own property, could not enter into a valid contract, and could not seek employment. Husband and wife were viewed as one and the husband had full control of the wife. In the rare instance when she could work outside the home for others, he was entitled to her earnings. If she was harmed in any way so that she could not continue her work, she could not sue. Rather the husband sued for his loss since he was the one entitled to the fruits of her service. The principle that husband and wife become one in marriage was also reflected in the Expatriation Act of 1907 which provided that when an American woman married a foreign national, she ceased to be an American citizen. When the Act was challenged by a California woman who married a British national, claiming that it deprived her of her right to vote in California, the Supreme Court upheld the Act, explaining, in part as follows:

The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it, but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband.

Mackenzie v. Hare, 239 U.S. 299 at 311 (1915)[The Expatriation Act was repealed by Act of September 22, 1922, but not retroactively.]

Under the doctrine of coverture, the merger of wife and husband at marriage served to erase any possibility of a married women's independent agency. Early feminists sought to change this by lobbying for the passage of married women's property acts that would remove some, if not all, of a married woman's disabilities. They met with some success. However, despite the passage of married women's property acts, beginning in the mid 1800s, many vestiges of coverture remained in the legal system. In community property states, for example, married women did not begin to gain management power over the community estate until the 1960s. The husband's power as sole manager of the community estate in Louisiana was still in effect in the late 1970s. In 1981, the United States Supreme Court ruled that the Louisiana system which dubbed the husband the "head and master" of all jointly owned community property constituted unconscionable sex discrimination under the Fourteenth Amendment. See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

During the second wave of feminism (roughly beginning the 1960s), more radical feminists, many of whom were lesbians, expanded the critique of marriage. Some cited to the work of Simone de Beauvoir, a French feminist who authored the *Second Sex* in the 1940s. In the *Second Sex*, Beauvoir includes a separate chapter on the married woman, in which she says:

The chains of marriage are heavy, particularly in the provinces; a wife has to find a way of coming to grips with a situation she cannot escape. Some, as we have seen, are puffed up with importance and become tyrannical matrons and shrews. Others take refuge in the role of the victim, they make themselves their husbands' and children's pathetic slaves and find a masochistic joy in it. Others perpetuate the narcissistic behavior we have described in relation to the young girl; they also suffer from not realizing themselves in

any undertaking, and being able to do nothing, they are nothing.

Simone de Beauvoir, *The Second Sex* at p 515 (2012 edition, translated by Constance Borde and Sheila Malovany-Chevallier)

In the United States, feminist Betty Friedan also wrote about suburban housewives locked into an unfulfilling role that is akin to the existential nothingness suggested by Beauvoir. She dubbed it the “problem that has no name.” Her critique, however, was mild compared to the critiques of radical lesbians. The Radical Lesbians, a short-lived political group, believed in absolute female separatism and refused to associate with men or with women who did not cut their ties to mainstream heterosexual society. Their attacks were not limited to the institution of marriage but also included an attack on heterosexuality. Another radical feminist group, Redstockings, claimed that marriage made women “domestic servants” and “breeders.” In their manifesto, available online, they say:

We identify the agents of our oppression as men. Male supremacy is the oldest, most basic form of domination. All other forms of exploitation and oppression (racism, capitalism, imperialism, etc.) are extensions of male supremacy: men dominate women, a few men dominate the rest. All power structures throughout history have been male-dominated and male-oriented. Men have controlled all political, economic and cultural institutions and backed up this control with physical force. They have used their power to keep women in an inferior position. All men receive economic, sexual, and psychological benefits from male supremacy. All men have oppressed women.

Available in full at: www.redstockings.org/index.php?option=com_content&view=article&id=76&Itemid=59.

Other, more moderate feminists, sought to make marriage more egalitarian. They argued that wives should work outside the home the same as men and husbands should take more responsibility for domestic chores, including childcare. Radical feminists sought to abolish marriage. Moderate feminists sought to transform it. These two positions are not unlike the positions that have been taken within the LGBT movement for marriage equality.

In the early 1970s, a wave of lesbian and gay activity commenced around the marriage issue. Gay activist Tim Mayhew of the Seattle Gay Alliance prepared a detailed “Position Statement on Marriage” for the ACLU of Washington. His primary focus was to explain the discriminatory effect of marriage on lesbian and gay men. However, rather than arguing to open the institution to include same-sex couples, he instead called for the total abolition of marriage. A similar document emerged from the early San Francisco gay movement. It was called “A Gay Manifesto” and it denounced traditional marriage, describing it as “a rotten, oppressive institution,” that is “fraught with role playing,” and it called for gay couples to resist mimicking heterosexual marriage. Similarly, a statement by the Third World Gay Revolution of New York City called for “abolition of the bourgeois nuclear family.”

Some same-sex couples in the early 1970s sought marriage licenses. It would be misleading to say that all of these couples genuinely sought to enter the institution of marriage.

Given the radical position of many in the early Gay Liberation movement, it was clear that some of these activities were in fact protests against marriage or at least intended to educate the public by exposing them to the existence of gay couples. Some activists claimed that the public seeking of marriage would serve as its own critique of marriage as a patriarchal institution. Others, such as Paul Barwick and John Singer, sought a marriage license as a specific political act. They were not really a couple, even though they had enjoyed sexual relations at times. They lived in a commune where apparently there were lots of sexual liaisons but not necessarily “couples.” Their political act was to challenge the monogamous expectation in marriage. [See discussion of *Singer v Hara infra*.]

Many couples applied for marriage licenses in states where the marriage statutes had been de-gendered to accommodate feminist critiques of the different rules that statutes contained as applied to wives and husbands. Once the mention of wives and husbands was deleted, the statutes could be construed to authorize county clerks to issue marriage licenses to any two “persons” who met all the other qualifications (e.g., age). This was true in California, as well as in Minnesota, the state in which one of the early marriage cases arose (discussed further below). It was reported at the time that a clerk in Boulder, Colorado actually did issue a marriage license to a male couple because it was unclear whether or not the statute could be limited to a man and a woman given its gender neutral language referring to “persons.”

The not surprising backlash to this activity was that many legislatures rushed to include gender specific terms in their marriage statutes to make it clear that legislative intent was to restrict marriage to one man and one woman. Not all state legislatures, however, took this action. Some waited until the threat of same-sex marriage became more real i.e., after the Hawaii litigation in the 1990s made it appear that Hawaii would start recognizing same-sex marriages. See discussion of Hawaii and its role in sparking the Defense of Marriage Act, later in this chapter.

3. Early litigation

In the early 1970s, during the first wave of gay rights litigation, several same-sex couples turned to the courts to challenge their exclusion from the legal institution of marriage. In these early cases, couples relied heavily on the fourteenth amendment, which the Supreme Court applied to strike down anti-miscegenation laws in 1967.

Loving v. Virginia
388 U.S. 1 (1967)

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment....On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision...

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating sec. 20—58 of the Virginia Code:

‘Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20—59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.’

Section 20—59, which defines the penalty for miscegenation, provides:

‘Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.’...

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been

common in Virginia since the colonial period....

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S.E.2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power,...the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. State of Nebraska*, 262 U.S. 390 (1923), and *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination...In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race....

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'...At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose * * * which makes the color of a person's skin the test of whether his conduct is a criminal offense.' *McLaughlin v. Florida*, supra, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered.

Notes and Questions

1. The Lovings did not attempt to marry in the state of Virginia because they knew the state law forbade interracial marriages. Instead they went to Washington, D.C., and entered into a legal marriage there, and moved back to Virginia, where they initially resided with Mrs. Loving's parents. Why should Virginia have cared about the Lovings' actions in D.C.?

2. Suppose Richard and Mildred Loving had not only married in D.C., but had also made D.C. their legal place of residence. If one year later they return to Virginia to visit family and friends, could the local authorities arrest them during this visit?

3. Are state constitutional amendments or laws that ban marriages between persons of the same sex the same or different from laws that banned interracial marriages prior to the Supreme Court's decision in *Loving v. Virginia*?

4. In subsequent cases, the Court held that the fundamental right of marriage trumped state interests in prohibiting the remarriage of a father who had fallen behind in child support payments to his first wife, *Zablocki v. Redhail*, 434 U.S. 374 (1978), or whatever interest the state might have in preventing prison inmates from marrying, *Turner v. Safley*, 482 U.S. 78 (1987). The prison case, *Turner v. Safley*, presents a particularly interesting argument in light of the interests states have articulated in opposing same-sex marriage. The state argued that because prisoners did not have rights to conjugal visits with their spouses, the marriage of an inmate could not be physically consummated and produce children, which the state defined as the essential purpose of marriage. The Supreme Court disagreed, enumerating an impressive list of other reasons why people marry and why the state sanctions marriage. Justice O'Connor, writing for the Court, explained:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance...Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits...

482 U.S. at 94.

5. Is marriage protected as a fundamental right *because* of these additional benefits listed by Justice O'Connor or is marriage protected for some other reason and these additional benefits are merely ones that tend to flow from the marital status? Or, put another way, does one have a fundamental right to social security benefits for one's spouse? See Patricia A. Cain, *Imagine There's No Marriage*, 16 *Quinnipiac L. Rev.* 27 (1996), pointing out that to the extent the fundamental right to marry is derived from the Court's privacy jurisprudence, it would appear to be a right that prevents the state from unduly interfering in a relationship, but would not necessarily require the state to provide positive benefits.

Baker v. Nelson

191 N.W. 2d 185 (Minn. 1971) appeal dismissed 409 U.S. 810 (1972)

PETERSON, Justice.

The questions for decision are whether a marriage of two persons of the same sex is authorized by state statutes and, if not, whether state authorization is constitutionally compelled.

Petitioners, Richard John Baker and James Michael McConnell, both adult male persons, made application to respondent, Gerald R. Nelson, clerk of Hennepin County District Court, for a marriage license, pursuant to Minn.St. 517.08. Respondent declined to issue the license on the sole ground that petitioners were of the same sex, it being undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioner.

The trial court...ruled that respondent was not required to issue a marriage license to petitioners and specifically directed that a marriage license not be issued to them. This appeal is from those orders. We affirm.

Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages. We think, however, that a sensible reading of the statute discloses a contrary intent.

Minn.St. c. 517, which governs ‘marriage,’ employs that term as one of common usage, meaning the state of union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom’...

We hold, therefore, that Minn.St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.

Petitioners contend, second, that Minn.St. c. 517, so interpreted, is unconstitutional. There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), which invalidated Oklahoma’s Habitual Criminal Sterilization Act on equal protection grounds, stated in part: ‘Marriage and procreation are fundamental to the very existence and survival of the race.’ This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Griswold v. Connecticut, 381 U.S. 479 (1965), upon which petitioners rely, does not support a contrary conclusion. A Connecticut criminal statute prohibiting the use of contraceptives by married couples was held invalid, as violating the due process clause of the Fourteenth Amendment. The basic premise of that decision, however, was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship. Mr. Justice Douglas, author of the majority opinion, wrote that this criminal statute ‘operates directly on an intimate relation of husband and wife,’ 381 U.S. 482, and that the very idea of its enforcement by police search of ‘the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives * * * is repulsive to the notions of privacy surrounding the marriage relationship,’ 381 U.S. 485. In a separate opinion for three justices, Mr. Justice Goldberg similarly abhorred this state disruption of ‘the traditional relation of the family—a relation as old and as fundamental as our entire civilization.’ 381 U.S. 496.

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state’s classification of persons authorized to marry. There is no irrational or invidious discrimination....

Loving v. Virginia, 388 U.S. 1 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia’s antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination. As Mr. Chief Justice Warren wrote for the court (388 U.S. 12, 87 S.Ct. 1824, 18 L.Ed.2d 1018):

‘Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival....To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

We hold, therefore, that Minn.St. c. 517 does not offend the...Ninth, or Fourteenth Amendments to the United States Constitution. Affirmed.

Notes and Questions

1. *Loving v. Virginia* held that restrictions on marriage that use race as a classification are subject to strict scrutiny. What was the classification being challenged in *Baker v. Nelson*? What level of scrutiny did the Minnesota Supreme Court use? What justification for the classification did the state offer?

2. Similar “right to marry” cases were brought in other states during the 1970s with

similar outcomes. See, e.g., *Jones v. Hallohan*, 501 S.W.2d 588 (Ky. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974), rev. denied, 84 Wash. 2d 1008 (1974). See also *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wis. 1972)(marriage license denied to two women who brought suit in federal district court; case dismissed for failure to submit briefs on legal issue). See also *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)(male couple obtained marriage license from county clerk in Boulder, Colorado, and were “married” by a minister; but marriage was not recognized by federal immigration law and thus alien “spouse” was not allowed to stay in the country).

3. In *Singer v. Hara*, mentioned earlier, the plaintiffs raised an important state claim in addition to their federal claim, arguing that the state’s Equal Rights Amendment, which had just recently been added to the state constitution by public referendum after heated debate, required the state to allow same-sex marriages. The Equal Rights Amendment added to the Washington Constitution a provision banning discrimination on account of sex. The Washington Court of Appeals found that the proponents of the ERA had stoutly denied that the amendment was intended to require same-sex marriages, which the opponents had argued in attempting to defeat its passage.

4. The *Baker* case was “appealed” to the United States Supreme Court. An appeal is not the same thing as a *writ of certiorari*. Under current appellate procedures, the Supreme Court has discretion to grant or deny *writs of certiorari*. Most decisions about whether to hear an appeal are discretionary. An affirmative vote by four of the nine justices is required before a *writ* will be granted. However, before 1988, the Court was obligated to hear appeals from state courts whenever the state court had upheld a state statute that was being challenged on the basis of federal law. To avoid this mandatory jurisdiction, often the Court would find that the case did not raise a substantial enough issue under federal law and would “dismiss” the appeal “for want of a substantial federal question.” The appeal in *Baker v. Nelson* was dismissed on this basis. Do you agree that there was no substantial federal question raised in the case? What precedential weight does this dismissal have? [Note: That question has been raised consistently in the recent array of challenges to state bans on same-sex marriage, discussed later in this chapter.]

4. Is Same-sex Marriage a Crime?

The Woman Who Married The Woman

Davenport Gazette, December 29, 1842

We mentioned yesterday that a woman dressed in the disguise of a man was arrested for marrying a woman named Mrs. Donnelly. Strange as this may appear, it is true. She has worn the trowsers, coat, hat, boots and all for some years past, and has worked at the tinsmith trade in town for a long period “on her on hook,” carrying a budget on her back, with all the utensils necessary for mending old pots and kettles.

It is also stated on very good authority that she voted the Whig ticket, in the eighth ward, at the late election. She has passed under the notorious and unfortunate cognomen of John Smith, and was married by the Rev. Mr. Stillwell, minister of the North Methodist Church, some four weeks since, to Mrs. Donnelly, a widow lady, mother to a chubby cheek boy in trowsers. They

lived together as man and wife since then; but Mr. Smith on all occasions went to bed with his trowsers on.

Mrs. Smith, for this was her name by marriage, was dissatisfied with the matrimonial state and complained to a friend of her's [sic], Micheal [sic] McGuire. Mr. McGuire, from the conversation, was led to believe that there was a mystery about the affair and protested that he would ferret it out.

A day or two subsequently to this, Mr. John Smith called at Mc's house, and enquired "any pots or kettles to mend?" "Divil'a one," said Mike; "come in my lad, I've a word to say to yourself." In walked John Smith, and Mike eyed the gentleman very sharp. "A purty trick we have been playing isn't it madam," exclaimed Mike, with a shrewd shake with his left eye.—"Madam! Don't Madam me," roared Smith, greatly excited.

"Yes, I will," said Mike, in an angry tone, "and I'll know whether you are one or not;" at this moment Mike seized hold of John Smith and tore open his coat and vest, and—saw to his great surprise that Mr. Smith was a woman.

These are the facts that led to the arrest. There is no law on the statute books, however, which covers the offence, and yesterday she was discharged from custody.
— *Albany Argus*

5. The Modern Battle for Marriage Equality.

General Background

The early same-sex marriage cases of the 1970s were brought by individuals who cared about the issue with little or no support from national LGBT organizations. An ACLU lawyer from Los Angeles did participate in the 1980 case against the Immigration and Nationalization Service involving Richard Frank Adams and his partner, Corbett Sullivan, an Australian. But no national LGBT group had marriage on its list of priorities in the 1970s and early 1980s. And, as explained earlier, some of these early cases were pursued more for their protest and educational value than out of a genuine desire to enter the traditional institution of marriage.

In October 1986, just months after the *Hardwick* decision was handed down, the ACLU became the first national civil rights organization to support the "elimination of legal barriers to homosexual and lesbian marriages." Shortly after this the legal staff and board members of Lambda began debating the pros and cons of adding marriage cases to the Lambda docket. The issue was a divisive one in the broader LGBT community and the internal debates at Lambda reflected this divisiveness, often breaking down along gender lines. Many lesbian feminists opposed marriage as a patriarchal institution and did not believe the LGBT legal community should fight to extend that institution to same-sex couples. Some lesbian feminists, disagreed, believing that opening marriage up to same-sex couples would transform the institution in positive ways for everyone.

This intra-community debate was made public in the often re-created and reprinted dialogue between Tom Stoddard, at that time executive director of Lambda, and Paula Ettelbrick,

Lambda's legal director at the time. Stoddard's primary arguments were: (1) marriage creates rights and benefits to marital partners that should be available to gay couples because these rights and benefits support the continuation of the relationship and the individual security of the spouses; (2) win or lose, fighting for the right to marry presumes that same-sex relationships and opposite-sex relationships should be accorded equal dignity; and (3) once lesbians and gay men have the right to enter the institution of marriage, the institution will be transformed for the good. Ettelbrick's main points were: (1) marriage is not likely to liberate gay men and lesbians as individuals, but instead is more likely to assimilate us into a mainstream institution; (2) if gay men and lesbians do enter the institution of marriage, they will defeat a primary goal of gay liberation – family diversity; and (3) there are so many legal barriers to gay and lesbian equality that we need to pick our battles wisely and marriage should not be a strategic priority compared with other goals such as ending employment discrimination, violence, and racism within the community.

A key issue in this debate was “who gets to decide what the goals of the community are?” Many individual gay men and lesbians cared deeply about obtaining public recognition for their relationships and gaining the right to marry seemed the only way to accomplish that goal with equal respect. These individuals did not think that legal organizations such as Lambda should have the power to decide whether they pursued this goal or not.

There was another way to gain status recognition for same sex couples. In the 1980s some recognition for same-sex relationships had occurred in the adoption by employers of domestic partner benefits. When employers did not recognize such relationships, litigators challenged employer policies as discriminatory. Most of these cases, however, concluded that employers were not discriminating on the basis of sexual orientation, but rather on the basis of marriage and that line-drawing on the basis of marriage was justified since marriage imposed legal obligations on the spouses regarding medical care. See, e.g., *Hinman v. Department of Personnel Administration*, 213 Cal. Rptr 410 (Cal. App. 1985).

There were two ways to attack these rulings: (1) fight for legislation which would extend health benefits to domestic partners; (2) bring legal cases challenging the exclusion of same-sex couples from marriage. LGBT activists worked for legislative solutions at the local level and won success in obtaining domestic partner registries in cities and counties throughout the country. Most of the time, however, very few rights accompanied this status recognition.

Hawaii

In December 1990, Nina Baehr and her partner Genora Dancel, along with two other same-sex couples, applied for marriage licenses in Honolulu, Hawaii, and were denied. The following April, Hawaii became the third state in the United States to enact statewide civil rights protections for gay men and lesbians. One month later, Baehr and the other marriage license applicants sued Hawaii's Director of Health, John Lewin, claiming that the state's denial of their marriage application violated their fundamental right to marry as well as their equal protection rights under the Hawaii constitution. They were represented by a local ACLU lawyer, Dan Foley. Foley had contacted the ACLU Lesbian and Gay Rights Project about the case and was advised to determine whether there was sufficient local support for the case. He decided there was.

The group had initially contacted Evan Wolfson, then a staff lawyer at Lambda who had written about marriage equality when he was a student at Harvard Law School and was pressing the national legal groups to consider litigating a marriage case. Lambda, the ACLU, GLAD, the National Center for Lesbian Rights and similar groups still met regularly to discuss litigation strategy. These roundtable discussions had begun when sodomy challenges were filed in the 1980s and now they continued. The group of litigators was now called simply the Roundtable. When the call from Hawaii came in, Wolfson asked his Lambda colleagues if they would consider taking this challenge on as a Lambda case. The decision was negative. As a result Dan Foley, without a specific commitment from national groups, brought the case on his own. Foley was an experienced civil rights attorney and had served as the Executive Director of Hawaii's branch of the American Civil Liberties Union. He was appointed as a state judge in 2000. Evan Wolfson and other movement lawyers, although not initially participating in the litigation, agreed to be available for brainstorming about legal theories and strategies.

The trial judge dismissed their claim and the plaintiffs appealed. At this point Lambda agreed to submit an amicus brief on behalf of the plaintiffs. Then in May of 1993, the Hawaii Supreme Court surprised people throughout the country by reversing the trial judge and remanding for a trial. The court ruled favorably on a state constitutional equal protection argument, but rejected a fundamental rights argument, finding that Hawaii's due process clause operated in the same way as the federal due process clause, and explaining that there was no fundamental right to "same-sex marriage." ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.") In the view of the majority (3 judges out of 5, with one judge in the majority only concurring in the result in a separate opinion), restricting marriage to opposite sex couples constituted sex discrimination and was thus subject to Hawaii's equal rights amendment, which made sex a "suspect classification" in Hawaii. The state could sustain the discrimination only by satisfying the compelling state interest test. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

At about the same time in the District of Columbia, Craig Dean and Patrick Gill challenged the D.C. law regarding marriage, claiming that failure to grant them a marriage license violated the D.C. Human Rights Act, which prohibited discrimination on the basis of gender and on the basis of sexual orientation. They also claimed that their right to marry was a fundamental right protected by the United States Constitution. In 1995, the D.C. Court of Appeals ruled against them, reasoning that the Human Rights Act was never intended to apply to marriage and that same-sex marriage was not a fundamental right. The court cited *Baehr* with approval regarding the fundamental right issue, and distinguished the sex discrimination issue by viewing *Baehr* as limited to a question of interpretation of the Hawaii state constitution and not applying to the statutory construction issue raised under the Human Rights Act. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). Lambda submitted an amicus brief in the *Dean* case as well.

In the meantime, the lawyers in the Hawaii litigation, now aided by lawyers from the national groups, most significantly Evan Wolfson, prepared for trial over the issue of whether the

state could satisfy its burden in proving that the discrimination in the marriage statute was necessary under the compelling state interest test. A trial was held in October 1996, during which the plaintiffs and the state were each allowed to produce testimony by four expert witnesses on the only argument the state sought to advance in justification of excluding same-sex couples from marriage: that opposite-sex couples presented a superior setting for raising children. On December 3, 1996, Judge Kevin Chang ruled that the state had failed to justify its denial of marriage licenses to same-sex couples, ordering an end to sex discrimination in marriage. Specifically, he found that excluding same-sex couples from marrying actually disadvantaged the children whom they might be raising, by depriving them of the protection and benefits from having two parents who were married to each other. Based on his review of the expert testimony, Judge Chang found that the state had failed to show that same-sex couples could not provide a satisfactory setting for raising children. The enforcement of the decision was delayed, pending appeal to the State Supreme Court by the state's new Health Director, Miike. (The name of the case was changed to *Baehr v. Miike* to reflect this change.)

The state legislature reacted to these developments by passing a pair of statutes, one of which placed on the state ballot in 1998 a proposed constitutional amendment that would reserve to the legislature the power to restrict who could marry on the basis of sex, and the other of which established a new legal status, "reciprocal beneficiary," that would provide some of the rights and benefits of marriage. This new status was opened to same-sex couples and any other couples who could not legally marry (e.g., close relatives such as mother and son).

On November 3, 1998, the people of Hawaii voted to amend their Constitution in order to authorize the state legislature to adopt a restrictive definition of marriage. The legislature had already enacted a statute (§572-1) making it clear that their intent was to restrict marriage to one man and one woman. The presumed effect of the new constitutional amendment was to trump the litigation in *Baehr v. Lewin*. However, when the appeal in that case (now titled *Baehr v. Miike*) reached the Supreme Court, the Court requested additional briefing by the parties on the exact effect of the constitutional amendment.

On December 9, 1999, the Supreme Court of Hawaii finally issued its ruling in the case. After taking judicial notice of the fact that the marriage amendment to the Hawaii Constitution had been ratified in November of 1998, the Court stated:

"The marriage amendment validated HRS §572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution....Accordingly, whether or not in the past it was violative of the equal protection clause, HRS §572-1 no longer is. In light of the marriage amendment, HRS §572-1 must be given full force and effect."

Backlash

Even though no lesbian or gay couple ever obtained a marriage license in Hawaii, the fear that the plaintiffs might succeed in their quest for marriage equality fueled fear in individuals far away from Hawaii. Other states became concerned that they might have to recognize same-sex marriages from Hawaii even though such marriages would not be valid under their own state law. Utah was the first state to react. In 1995, the legislature passed a statute providing that

marriages between persons of the same sex, even if valid in other states, would not be recognized in the state of Utah. See Utah Code Ann. S 30-1-4.

By December 1996, when Judge Chang handed down his trial court ruling in the Hawaii case an additional 15 states had joined Utah in taking some form of legislative action to ensure that same-sex marriages would not be recognized in their jurisdictions.¹

The primary impetus for this backlash came from the Republican Party. 1996 was an elections year. All Republican presidential candidates were asked in early 1996 to pledge their commitment to maintain the sanctity of marriage as an institution between one man and one woman. At the time of the Iowa caucuses, all GOP presidential candidates, except for Richard Lugar, endorsed a statement against same-sex marriages made at a rally at the First Federated Church in Des Moines.

Federal Defense of Marriage Act

Congress entered the fray in May of 1996. On May 7, Representative Bob Barr of Georgia and several co-sponsors introduced H.R. 3396, the Defense of Marriage Act (DOMA). DOMA consists of two parts, the federal part, which provides that the federal government shall not recognize same-sex marriages and the state/full faith and credit part, which provides that no state shall be required under the full faith and credit clause to recognize same-sex marriages from other states. Section 3 (the federal part of DOMA) provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Section 2 on DOMA provides:

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...or a right or claim arising from such a relationship.

The vote on DOMA was swift and lopsided. Within weeks of its introduction, the House Judiciary Committee held hearings on the bill and approved it by a vote of 20 to 10. On July 12, the House voted in favor of the bill 342 to 67. The Senate vote followed on September 10, 85 to 14. President Clinton signed the bill on September 21, 1996, thus effectively taking the issue of same-sex marriage out of debate in the pending presidential election between himself and Senator Robert Dole, who had also endorsed DOMA.

There were four articulated justifications for DOMA:

¹ The fifteen states that adopted statutes in 1996 were Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee.

1. Defending the institution of traditional heterosexual marriage;
2. Defending traditional notions of morality;
3. Protecting state sovereignty; and
4. Preserving government resources.

It is worth noting that the hearings on the bill conducted in the House were completed shortly before the Supreme Court decision in *Romer v. Evans* was handed down. The hearings on the bill in the Senate were held later and, although *Romer* was mentioned by several witnesses, no one gave a definitive explanation of why the constitutional equality principle in *Romer* should apply or not apply to the federal portion of the bill. Most of the witnesses focused on whether or not the full-faith and credit provisions in the bill were constitutional. A letter from the Justice Department, dated May 29, just a week after the *Romer* opinion had been handed down, included the following statement:

As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis (that the Defense of Marriage Act is constitutionally sustainable)...

Windsor

Of course we now know that 17 years after its passage DOMA was ruled unconstitutional in 2013. See *United States v. Windsor* (opinion can be found in the Supplement to Chapter One at page 4). The *Windsor* opinion significantly changed the landscape for marriage equality litigation and will be addressed in this history. But to fully understand the path to the ultimate Supreme Court victory in the marriage equality case, *Obergefell v. Hodges*, it will be useful to know more about the history of the spread of marriage equality in the states.

Alaska

A challenge to the Alaska marriage statute, similar to the Hawaii challenge, was initially successful. See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998)(holding that the right to marry is fundamental and thus restriction to opposite-sex couples can only be justified by compelling state interest). Shortly thereafter the legislature passed a law to amend the Alaska constitution to prohibit same-sex marriage. That amendment was ratified on Nov. 3, 1998, the same date that Hawaiians ratified their constitutional amendment against same-sex marriage.

Note the difference between the constitutional amendments in Hawaii and Alaska. The Alaska amendment makes same-sex marriages unconstitutional. Thus the legislature in Alaska could not enact a same-sex marriage statute, even if it were inclined to do so. Any such statute would be in violation of the Alaska constitution. By contrast, the Hawaii constitution does not prohibit same-sex marriages. Instead, the Hawaii constitutional amendment provides that the legislature is to have the final word on whether the state will recognize same-sex marriages. The current state statute, HRS §572-1, authorizes only opposite-sex marriages. But if the Hawaii legislature were to change its mind, it could enact a statute recognizing same-sex marriages without violating the Hawaii Constitution.

Vermont

The next key case of import was litigated in the state of Vermont. Mary Bonauto of GLAD (Gay and Lesbian Advocates and Defenders), located in Boston, and Susan Murray and Beth Robinson of Langrock Sperry & Wool in Middlebury, Vermont, represented three couples who claimed the right to marry under Vermont law. Vermont was thought to be a good state for this litigation because of language in the state constitution guaranteeing to every “person, family, or set of persons” common benefits. In addition, the Vermont legislature had enacted legislation protecting gay men and lesbians from discrimination and had codified the Vermont Supreme Court’s decision permitting the adoption of a child by the mother’s lesbian partner. Additionally, the Vermont populace had the reputation of being independent and fair-minded. As explained by the lawyers:

As the first state to prohibit slavery by constitution, and one of the few states which, from its inception, extended the vote to male citizens who did not own land, the State of Vermont has long been at the forefront of this nation’s march toward full equality for all of its citizens. In July 1997, three same-sex couples challenged Vermont to act as a leader yet again, this time in affording full civil rights to the State’s gay and lesbian citizens. Stan Baker and Peter Harrigan, Nina Beck and Stacy Jolles, and Holly Puterbaugh and Lois Farnham were denied marriage licenses by their respective town clerks in the summer of 1997. They sued the State of Vermont and the towns, arguing that the marriage statutes allowed them to marry, and that if the law did purport to limit marriage to different sex unions it would be unconstitutional. The trial court dismissed their claims in December 1997, and the couples appealed to the Vermont Supreme Court. The court heard oral arguments on the case on November 18, 1998.

The Appellants’ primary constitutional claim is based on the “Common Benefits Clause” of the Vermont Constitution, which prohibits the State from passing laws for the particular “emolument or advantage” of a “part only of [the] community.” The Vermont Supreme Court has used an analytical framework similar to federal equal protection law in applying the Common Benefits Clause, although in some cases that court has scrutinized classifications more closely than might be required under federal law.

In contrast to the State of Hawaii in *Baehr v. Lewin*, where the State argued that its laws did not discriminate, the State of Vermont articulated its rationales in support of the discriminatory marriage laws at the outset of the *Baker v. State* litigation, affording the couples the first real opportunity to flesh out in some depth not only the appropriate level of scrutiny, but also the State’s lack of an adequate justification under any standard. The couples’ opening brief delves into the State’s explanations for its discriminatory laws in some depth, arguing that even absent heightened scrutiny, the State could not justify its discriminatory marriage laws. The opening brief also lays out three arguments for heightened scrutiny, based on the State’s gender discrimination, sexual orientation discrimination, and impingement on a fundamental right—the right to marry.

See Mary Bonauto, Susan M. Murray, Beth Robinson, The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in *Baker et al. v. State of Vermont*, 5 MICH. J. GENDER & L. 409 at 412 (1999).

On December 20, 1999, the Vermont court ruled in favor of the same-sex couples.

We conclude that under the Common Benefits Clause of the Vermont Constitution...plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Baker v. Vermont, 744 A.2d 864 at 867 (Vt. 1999).

In reaching its conclusion, the Court analyzed the various interests set forth by the state to justify excluded same-sex couples from marriage. The state’s primary asserted justification was the role of procreation and child-rearing in marriage. After noting that many same-sex couples were in fact rearing children, the Vermont Supreme Court responded to the state’s argument as follows:

The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law—protecting children and “furthering the link between procreation and child-rearing”—the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts. Promoting a link between procreation and child-rearing similarly fails to support the exclusion.

On April 26, 2000, the Vermont legislature responded to the *Baker* decision by enacting a statute that created a new legal status, a “civil union.” The legislature elected to reserve the institution of marriage to opposite-sex couples, but declared that the “state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.” To carry out that interest, the legislature has provided that same-sex couples may enter a “civil union” that parallels marriage. Specifically, the new law provided:

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage. [15 Vermont Statutes Annotated §1204]

Baker v. Vermont was a milestone in the battle for recognizing same-sex marriages, as it

marked the first time that a state's highest appellate court ruled on the merits that same-sex couples were entitled to the benefits of marriage. (The Hawaii Supreme Court ruling had fallen short by remanding for trial on the state's asserted justifications, because the trial judge had initially granted a motion to dismiss. In *Baker*, the trial judge had granted judgment on the pleadings to some of the named defendants, ruling that "the marriage statutes were constitutional because they rationally furthered the State's interest in promoting 'the link between procreation and child rearing.'" As a result there was no need to remand.) The court correctly understood that the benefits provided by the state to married couples should not be uniformly denied to same-sex couples. In earlier cases across the United States, gay and lesbian plaintiffs had argued that employer-provided benefits (e.g., spousal health care, family bereavement leave) should not be denied them solely because they were not married to their partners. They lost most of these cases because courts were willing to draw the line between married couples and unmarried couples. Litigation has continued in many states to challenge the denial of benefits, benefit by benefit. In more recent times, some cases have been successful. Litigating benefit by benefit is time-consuming and costly. In *Baker*, by contrast, a single action resulted in the equal availability of all spousal benefits to same-sex couples in the state, provided they were willing to engage in a civil union.

Questions for Discussion

1. Note that the result in the Vermont case was to provide equal benefits in the absence of marriage. Remember that in *Hinman v. Department of Personnel Administration* and related cases asking for equal benefits for same-sex couples the cases basically tended to say "your problem is that you are not similarly situated to married couples" and so it is okay to deny you equal benefits. You, after all, do not have the same responsibilities that married couples have. The result in *Baker* is to create a sufficiently similar union with spousal-like responsibilities and then the principle of equal access to benefits is required.

2. In addition to the **legal** arguments that are necessary for successful constitutional challenges to discriminatory marriage statutes, there are also **policy** arguments that can be made to justify same-sex marriages. What policy arguments can you identify in favor of extending marriage to same-sex couples? What policy arguments can you identify in opposition to marriage equality?

3. Not all activists and scholars were convinced that battling for same-sex marriage was the right thing to do. Professor Janet Halley challenged us to think more carefully about this project, pointing out the inherent connection between arguing for legal recognition of a status and subjecting that status to state regulation:

...[B]y my count, we in the U.S. have four basic modes of justification for same-sex marriage. Two are explicit: Recognition and Rights. Each of these modes of justification is typically proposed as simple and internally coherent, but each is actually internally heterogeneous, and moreover each disguises while depending on a supplementary rhetoric of justification. That supplementary rhetoric is sometimes Regulation, and it is almost always Normalisation. I think this hidden complexity makes the project of seeking same-sex marriage normatively much more dubious than it might appear. Janet Halley,

Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate, in *Legal Recognition of Same-Sex Partnerships* (Wintemute and Andenaes, eds) at 97 (2001).

Do you agree?

4. The Vermont decision created an alternative to marriage, civil unions. Many people thought this a novel outcome in a civil rights case that had argued for equality. Generally there are two ways to create equality for a group that is excluded from some benefit: (1) extend equal access to the excluded group, or (2) deny access to everyone. But the Vermont remedy embraced neither of these. Instead the court allowed the legislature to craft an alternative remedy by creating a separate institution, civil unions, that would provide the same basic benefits as marriage. Why could the Court not create this remedy itself? Was the Court's relinquishment of the remedy question to the legislature an inappropriate delegation of a judicial function? What do you think about the ultimate resolution as a substantive matter? I.e., what are the pros and cons of creating an institution as an alternative to marriage that would provide gay men and lesbians with most if not all of the benefits of marriage?

6. Victory in Massachusetts

Goodridge v. Department of Public Health

798 N.E.2d 941 (Mass. 2003)

MARSHALL, C.J.

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 539 U.S. 558, —, 123 S.Ct. 2472, 2480, 156 L.Ed.2d 508 (2003)...

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex

couples from civil marriage is a question not previously addressed by a Massachusetts appellate court. It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence, supra* at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law. . . .

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. . . . In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same-sex marriage. . . .

We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed.1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law.

We conclude, as did the [trial] judge, that [the Massachusetts marriage statutes][may not be construed to permit same-sex couples to marry.²

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution. . . .

The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution

². We use the terms "same sex" and "opposite sex" when characterizing the couples in question, because these terms are more accurate in this context than the terms "homosexual" or "heterosexual," although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex. See *Baehr v. Lewin*, 74 Haw. 530, 543 n. 11, 547 n. 14, 852 P.2d 44 (1993).

can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. See, e.g., *Perez v. Sharp*, 32 Cal.2d 711, 728, 198 P.2d 17 (1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right). See also *Lawrence, supra* at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests")...

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage.

Civil marriage is created and regulated through exercise of the police power. "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities. The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." (Citations omitted).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that “hundreds of statutes” are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing; tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate); extension of the benefit of the homestead protection (securing up to \$300,000 in equity from creditors) to one’s spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth’s strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a “civil right.” See, e.g., *Loving v. Virginia*.

Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s “avowed commitment to an intimate and lasting human relationship.” *Baker v. State, supra* at 229, 744 A.2d 864. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual’s right to marry against undue government incursion. Laws may not “interfere directly and substantially with the right to marry.” *Zablocki v. Redhail, supra* at 387, 98 S.Ct. 673. See *Perez v. Sharp*, 32 Cal.2d 711, 714 (1948) (“There can be no prohibition of marriage except for an important social objective and reasonable means”).³

³. The department argues that this case concerns the rights of couples (same-sex and opposite-sex), not the rights of individuals. This is incorrect. The rights implicated in this case are at the core of individual privacy and autonomy. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (“Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State”); *Perez v. Sharp*, 32 Cal.2d 711, 716, 198 P.2d 17 (1948) (“The right to marry is the right of individuals, not of racial groups”). See also *A.Z. v. B.Z.*, 431 Mass. 150, 162, 725 N.E.2d 1051 (2000), quoting *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (noting “freedom of personal choice in matters of marriage and family life”). While two

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. But that same logic cannot hold for a qualified individual who would marry if she or he only could.

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, *Perez v. Sharp*, 32 Cal.2d 711, 728, 198 P.2d 17 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. . . .

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights. See, e.g., *Lawrence, supra*; *Loving v. Virginia, supra*. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we

individuals who wish to marry may be equally aggrieved by State action denying them that opportunity, they do not "share" the liberty and equality interests at stake.

employ “strict judicial scrutiny.” For all other statutes, we employ the “ ‘rational basis’ test.” For due process claims, rational basis analysis requires that statutes “bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.” For equal protection challenges, the rational basis test requires that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”

The department argues that no fundamental right or “suspect” class is at issue here, and rational basis is the appropriate standard of review. For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.

The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a “favorable setting for procreation”; (2) ensuring the optimal setting for child rearing, which the department defines as “a two-parent family with one parent of each sex”; and (3) preserving scarce State and private financial resources. We consider each in turn.

The judge in the Superior Court endorsed the first rationale, holding that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.” This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [The Massachusetts marriage license statute] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. See *Franklin v. Franklin*, 154 Mass. 515, 516, 28 N.E. 681 (1891) (“The consummation of a marriage by coition is not necessary to its validity”). People who cannot stir from their deathbed may marry. . . . While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.⁴

⁴ It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. Punitive notions of illegitimacy, see *Powers v. Wilkinson*, 399 Mass. 650, 661, 506 N.E.2d 842 (1987), and of homosexual identity, see *Lawrence, supra* at 2478–79, further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in “the modern age,” “heterosexual intercourse, procreation, and child care are not necessarily conjoined.” *Post* at 382, 798 N.E.2d at 995–996 (Cordy, J., dissenting).

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.

The “marriage is procreation” argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like “Amendment 2” to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly “identifies persons by a single trait and then denies them protection across the board.” *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In so doing, the State’s action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.

The department’s first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the “optimal” setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Massachusetts has responded supportively to “the changing realities of the American family,”...and has moved vigorously to strengthen the modern family in its many variations.

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the “optimal” child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be “excellent” parents. These couples (including four of the plaintiff couples) have children for the reasons others do—to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children,...same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples.

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex

couples furthers the Legislature's interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the General Court logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization—that same-sex couples are less financially dependent on each other than opposite-sex couples—ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

The department suggests additional rationales for prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.⁵ If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

⁵ Justice Cordy suggests that we have “transmuted the ‘right’ to marry into a right to change the institution of marriage itself,” *post* at 365, 798 N.E.2d at 984 (Cordy, J., dissenting), because marriage is intimately tied to the reproductive systems of the marriage partners and to the “optimal” mother and father setting for child rearing. *Id.* That analysis hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective “proper spheres” can be rigidly and universally delineated. An abundance of legislative enactments and decisions of this court negate any such stereotypical premises.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. . .

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. *So ordered.*

Notes and Questions

1. *Goodridge* was a GLAD case (Gay & Lesbian Advocates & Defenders). Remember that GLAD had also played a co-counsel/amicus role in the Vermont *Baker* litigation. Mary Bonauto of GLAD argued the case to the Massachusetts Supreme Judicial Court.

2. The court's decision reflected a vote of 4-3 by the justices, with the dissenters producing lengthy, impassioned arguments, some of which are referenced and responded to in Chief Justice Marshall's opinion.

3. What level of scrutiny did the court use? Did the court determine whether or not marriage is a fundamental right? Which of the justifications for the state statute do you think is the most persuasive?

4. In response to the court's ruling, the Massachusetts legislature considered adopting civil unions, as Vermont had done, to cure the unconstitutionality of the opposite-sex only marriage statute. In an advisory opinion, responding to an inquiry from the Massachusetts Senate, the Supreme Judicial Court said that creating civil unions would not satisfy the Massachusetts constitution. The continued exclusion of same-sex couples from civil marriage would be unconstitutional. Alluding to the U.S. Supreme Court's famous decision in *Brown v. Board of Education*, which had declared racial segregation of public schools unconstitutional and rejected the long-standing "separate but equal" doctrine, the Massachusetts court asserted that civil unions would be a futile attempt to establish a "separate but equal" institution for same-sex couples, and that separate was rarely truly equal. See *Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

5. Although the Massachusetts Supreme Judicial Court did not specify that its decision was valid only for Massachusetts residents, Governor Mitt Romney, seizing upon a provision of Massachusetts marriage law dating from 1913 (and evidently intended, among other things, to prevent interracial couples from coming to Massachusetts to marry), instructed the state officials charged with issuing marriage licenses that they could not issue licenses to same-sex couples whose state of residence would not allow or recognize same-sex marriages. Although a few local authorities initially rejected this instruction and issued licenses to out-of-state couples, within a few weeks they had ceased doing so under threats of lawsuit by the state's attorney general. Gay & Lesbian Advocates & Defenders then filed suit against the state on behalf of out-of-state couples, asserting that the 1913 statute was no longer valid and violated the *Goodridge* ruling. See *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006), upholding the denial of marriage certificates to nonresidents whose home states would not recognize the marriage.

The Massachusetts legislature acted decisively in July 2008 to repeal this 1913 law. Governor Deval Patrick signed the repeal legislation on July 31. Same-sex couples from other states have been free to obtain marriage licenses in Massachusetts since 2008.

6. The statute at issue in Massachusetts is called a marriage evasion statute. There are two types of evasion statutes: (1) Marriage invalid in state of celebration if spouses entered state to avoid marriage restrictions in their own state, and (2) Marriage invalid in state of residence if couple traveled to another state in order to obtain a marriage that would not be valid in the state of residence. A handful of states still have statutes on the books like the Massachusetts statute – i.e., marriage is invalid in the state of celebration. As marriage equality spreads the existence of these statutes has caused some problems for spouse who did in fact travel to another state to avoid the marriage restrictions in their own state. For example, New Hampshire (which is now a marriage equality state) had such a statute on the books until it was recently repealed. And numerous couples had travelled to New Hampshire to marry. Before the repeal, many lawyers recommended to such couples that they remarry in a state that did not have such a statute.

7. Marriage Litigation after Massachusetts: 2004 – 2013

Same-sex couples began marrying in Massachusetts on May 17, 2004, which coincidentally marked the 50th anniversary of the U.S. Supreme Court decision in *Brown v. Board of Education*. In the following four years over 10,000 same-sex couples wed in the state, most of them in the first six months. With the repeal of the law prohibiting non-residents from most other states from obtaining marriage licenses, that number has grown.

Other states responded to the Massachusetts decision in much the same way they had responded to the initial Hawaii Supreme Court decision in *Baehr v. Lewin*. By early 2008, over half the states had amended their constitutions, sometimes going so far as to ban not only marriages for gay and lesbian persons, but civil unions, domestic partnerships, and similar forms of recognition.

Marriage litigation, post *Goodridge*, primarily argued that the marriage ban was unconstitutional under the state constitution's requirements of equality. None of the public interest litigators involved in the marriage equality movement thought the time had come to challenge these state law bans under the federal constitution. *But see Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), reproduced in part below. In this case, the ACLU argued that the amendment to Nebraska's constitution, which not only excluded same-sex couples from marriage, but also from any benefits that were extended to married couples, was unconstitutional.

Nebraska was one of the first states to adopt a ban on same sex marriage in the state constitution. The provision provided, in part: "The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Article I, Section 29, Nebraska Constitution, added in 2000.

Citizens for Equal Protection v. Bruning 455 F.3d 859 (8th Cir. 2006)

Loken, C.J.

Relying primarily on *Romer*, Appellees argue that § 29 violates the Equal Protection Clause because it raises an insurmountable political barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship. Appellees do not assert a right to marriage or same-sex unions. Rather, they seek a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection. The argument turns on the fact that § 29 is an amendment to the Nebraska Constitution. Unlike state-wide legislation restricting marriage to a man and a woman, a constitutional amendment deprives gays and lesbians of equal footing in the political arena because state and local government officials now lack the power to address issues of importance to this minority.

The district court agreed, concluding that Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*. In this part of its opinion, the district court purported to apply conventional, rational-basis equal protection analysis--If a legislative

classification or distinction neither burdens a fundamental right nor targets a suspect class, we will uphold it so long as it bears a rational relation to some legitimate [government] end. But the court in its discussion applied the same strict scrutiny analysis applied by the Colorado Supreme Court, but not by the United States Supreme Court, in *Romer*. Like the Colorado Court, the district court based its heightened scrutiny on Appellees' fundamental right of access to the political process.

As Supreme Court decisions attest, the level of judicial scrutiny to be applied in determining the validity of state legislative and constitutional enactments under the Fourteenth Amendment is a subject of continuing debate and disagreement among the Justices. Though the most relevant precedents are murky, we conclude for a number of reasons that § 29 should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny. ...

Our rational-basis review begins with an historical fact--the institution of marriage has always been, in our federal system, the predominant concern of state government. The Supreme Court long ago declared, and recently reaffirmed, that a State has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), quoted in *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). This necessarily includes the power to classify those persons who may validly marry. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. In this constitutional environment, rational-basis review must be particularly deferential.

The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in steering procreation into marriage. By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws encourage procreation to take place within the socially recognized unit that is best situated for raising children. The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a responsible procreation theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. See *Hernandez v. Robles*, No. 86, 2006 N.Y. Slip Op 5239 at 5-6 (N.Y.Ct.App. Jul. 6, 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 24-26 (Ind.Ct.App.2005). Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification lacks a rational relationship to legitimate state interests.

The district court rejected the State's justification as being at once too broad and too narrow. But under rational-basis review, Even if the classification ... is to some extent both underinclusive and overinclusive, and hence the line drawn ... imperfect, it is nevertheless the rule that ... perfection is by no means required. *Vance v. Bradley*, 440 U.S. 93, 108 (1979). Legislatures are

permitted to use generalizations so long as the question is at least debatable. *Heller*, 509 U.S. at 326. The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature—or the people through the initiative process—may rationally choose not to expand in wholesale fashion the groups entitled to those benefits. We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience. *Vance*, 440 U.S. at 109.

We likewise reject the district court’s conclusion that the Colorado enactment at issue in *Romer* is indistinguishable from § 29. The Colorado enactment repealed all existing and barred all future preferential policies based on orientation, conduct, practices, or relationships. The Supreme Court struck it down based upon this unprecedented scope. Here, § 29 limits the class of people who may validly enter into marriage and the legal equivalents to marriage emerging in other States—civil unions and domestic partnerships. This focus is not so broad as to render Nebraska’s reasons for its enactment inexplicable by anything but animus towards same-sex couples.

Appellees argue that § 29 does not rationally advance this purported state interest because prohibiting protection for gay people’s relationships does not steer procreation into marriage. This demonstrates, Appellees argue, that § 29’s only purpose is to disadvantage gay people. But the argument disregards the expressed intent of traditional marriage laws—to encourage heterosexual couples to bear and raise children in committed marriage relationships. Appellees attempt to isolate § 29 from other state laws limiting marriage to heterosexual couples. But as we have explained, there is no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects. If the many state laws limiting the persons who may marry are rationally related to a legitimate government interest, so is the reinforcing effect of § 29. The barrier created by § 29 was enough to confer standing, but Appellees’ equal protection argument fails on the merits.

Notes and Questions

1. Were the advocates arguing for a constitutionally protected right to marry under the federal constitution? If not, what exactly was their claim?
2. Would you have recommended trying to get the Supreme Court to review this decision? Why or why not? What arguments on the merits would you make to counter the Eighth Circuit’s holding?
3. Note that this was a facial challenge to the amendment. Would it have helped to have the challenge based on a specific fact situation? For example, the Attorney General had opined that granting any sort of domestic partner benefits, even the minor benefit of making burial decisions for a partner, would violate the constitutional provision. Did the Court of Appeals adequately explain why it was rational to ban same-sex couples from this sort of benefit?
4. What is the effect of the *Obergefell* decision on this 8th Circuit case?

* * * * *

It would be some time before litigators thought that the LGBT movement's time for a *Loving v. Virginia* decision had arrived. As a result, the only states where it was possible to bring a marriage challenge under the state constitution was in those states that did not have a limiting constitutional provision. After *Goodridge*, final decisions were issued in the states listed below. Note: These cases are referenced for their historical purposes only. Some of the states in which litigation was not successful nonetheless managed to embrace marriage equality through the legislative process.

- Indiana, *Morrison v. Sadler*, 821 N.E. 2d 15 (Ind.Ct.App.2005)(upholding the exclusion of same-sex couples from marriage);
- Arizona, *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz.Ct.App.2003)(review denied 2004)(upholding the exclusion of same-sex couples)(note: in 2008 a constitutional ban was adopted by the people of Arizona);
- Oregon, *Li v. State*, 110 P.3d 91 (Oregon 2005)(ruling that constitutional amendment passed during pendency of litigation prevented the court from recognizing marriage rights for same-sex couples; however, as a result of later post-*Windsor* litigation, Oregon recognizes marriage equality);
- Washington, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006)(upholding the exclusion of same-sex couples)(no constitutional amendment was passed in Washington, leaving the legislature free to enact marriage equality which it did in 2012; an initiative in November 2012 to overturn the legislation failed, making marriage available to same-sex couples in Washington)
- New Jersey, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)(holding that excluding same-sex couples from marriage violated the equality provisions in the state constitution and referring the remedy question to the legislature, which adopted civil unions instead of marriage)(subsequent litigation challenged the premise that civil unions had resulted in real equality and ultimately, post *Windsor*, the court ruled in favor of marriage equality);
- New York, *Hernandez v. Robles*, 855 N.E.2d 1(N.Y. 2006)(upholding the exclusion)(as in Washington, no constitutional provision was adopted, leaving the legislature free to enact marriage equality, which the N.Y. legislature did in 2011);
- Maryland, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007)(upholding the exclusion)(but the legislature was free to reverse and did so in 2012, effective 2013)
- California, *In re Marriage Cases*, 183 P.3d 384(Calif. 2009)(ruling in favor of same-sex couples and extending the right to marry)(after the decision the people of California voted in favor of Proposition 8 which re-instituted the ban on marriage for same-sex couples; the California history is complicated and is dealt with in more detail below; California now recognizes same-sex spouses);
- Connecticut, *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008)(ruling in favor of same-sex couples and extending the right to marry)
- Iowa, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)(ruling in favor of same-sex couples and extending the right to marry).

While all of these cases were litigated under state constitutions, the arguments were primarily the same two that have been made under the federal constitution: (1) that marriage is a fundamental right that cannot be denied same-sex couples without a compelling state justification, and (2) that denial of marriage rights to same-sex couples is a denial of equality.

a. Marriage as a fundamental right

Although the Hawaii Supreme court was willing to apply heightened scrutiny to the marriage statute on equality grounds, it was unwilling to hold that marriage right for same-sex couples constituted a fundamental right. The court viewed the fundamental right claim as requesting recognition of a new right—the right to “same-sex marriage.” LGBT activists, especially Evan Wolfson, have counseled litigators (as well as scholars) to refrain from talking about “same-sex marriage.” Instead, the claim is that marriage is a fundamental right and that same-sex couples are being denied that right. In other words, marriage is marriage, whether entered into by persons of opposite gender or of the same gender. Same-sex couples do not want a new institution, a new fundamental right. All they want is the same right that opposite-sex couples currently possess.

Almost all court opinions in the marriage cases have followed Hawaii’s lead, holding essentially that although marriage between a man and a woman is a fundamental right, marriage between two persons of the same sex is different. “Same-sex marriage” is not rooted in history and tradition, which is what we look to when we are determining whether a claim involves a fundamental right. The California Supreme Court, by contrast, has not only specifically held that marriage is a fundamental right, even when claimed by same-sex couples, it elaborated on the nature of that right as a substantive matter.

In re MARRIAGE CASES
183 P.3d 384
California Supreme Court 2008

George, C.J.

* * *

First, we must determine the nature and scope of the “right to marry”—a right that past cases establish as one of the fundamental constitutional rights embodied in the California Constitution. Although, as an historical matter, civil marriage and the rights associated with it traditionally have been afforded only to opposite-sex couples, this court’s landmark decision 60 years ago in *Perez v. Sharp* (1948) 32 Cal.2d 711, 198 P.2d 17—which found that California’s statutory provisions prohibiting interracial marriages were inconsistent with the fundamental constitutional right to marry, notwithstanding the circumstance that statutory prohibitions on interracial marriage had existed since the founding of the state - makes clear that history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee. The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.

As discussed below, upon review of the numerous California decisions that have examined the underlying bases and significance of the constitutional right to marry (and that illuminate *why* this right has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution), we conclude that, under this state’s Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage

that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. ...

In defending the constitutionality of the current statutory scheme, the Attorney General of California maintains that even if the constitutional right to marry under the California Constitution applies to same-sex couples as well as to opposite-sex couples, this right should not be understood as requiring the Legislature to designate a couple's official family relationship by the term "marriage," as opposed to some other nomenclature. The Attorney General, observing that fundamental constitutional rights generally are defined by *substance* rather than by *form*, reasons that so long as the state affords a couple all of the constitutionally protected *substantive* incidents of marriage, the state does not violate the couple's constitutional right to marry simply by assigning their official relationship a *name* other than marriage. Because the Attorney General maintains that California's current domestic partnership legislation affords same-sex couples all of the core substantive rights that plausibly may be guaranteed to an individual or couple as elements of the fundamental state constitutional right to marry, the Attorney General concludes that the current California statutory scheme relating to marriage and domestic partnership does not violate the fundamental constitutional right to marry embodied in the California Constitution.

We need not decide in this case whether the name "marriage" is *invariably* a core element of the state constitutional right to marry so that the state would violate a couple's constitutional right even if ... the state were to assign a name other than marriage as the official designation of the formal family relationship for *all* couples. Under the current statutes, the state has not revised the name of the official family relationship for *all* couples, but rather has drawn a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership). One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect. ...

Although our state Constitution does not contain any explicit reference to a "right to marry," past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution. [citations omitted] The United States Supreme Court initially discussed the constitutional right to marry as an aspect of the fundamental substantive "liberty" protected by the due process clause of the federal Constitution (see *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042), but thereafter in *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510(*Griswold*), the federal high court additionally identified the right to marry as a component of a "right of privacy" protected by the federal Constitution. (*Griswold*, at p. 486.)With

California's adoption in 1972 of a constitutional amendment explicitly adding "privacy" to the "inalienable rights" of all Californians protected by article I, section 1 of the California Constitution—an amendment whose history demonstrates that it was intended, among other purposes, to encompass the federal constitutional right of privacy, "particularly as it developed beginning with *Griswold v. Connecticut*—the state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause.

Although all parties in this proceeding agree that the right to marry constitutes a fundamental right protected by the state Constitution, there is considerable disagreement as to the scope and content of this fundamental state constitutional right. The Court of Appeal concluded that because marriage in California (and elsewhere) historically has been limited to opposite-sex couples, the constitutional right to marry under the California Constitution properly should be interpreted to afford only a right to marry a person of the opposite sex, and that the constitutional right that plaintiffs actually are asking the court to recognize is a constitutional "right to same-sex marriage." In the absence of any historical or precedential support for such a right in this state, the Court of Appeal determined that plaintiffs' claim of the denial of a fundamental right under the California Constitution must be rejected.

Plaintiffs challenge the Court of Appeal's characterization of the constitutional right they seek to invoke as the right to same-sex marriage, and on this point we agree with plaintiffs' position. In *Perez v. Sharp, supra*, 32 Cal.2d 711, 198 P.2d 17—this court's 1948 decision holding that the California statutory provisions prohibiting interracial marriage were unconstitutional—the court did not characterize the constitutional right that the plaintiffs in that case sought to obtain as "a right to interracial marriage" and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages never had been permitted in California. Instead, the *Perez* decision focused on the *substance* of the constitutional right at issue—that is, the importance to an individual of the freedom "to join in marriage *with the person of one's choice*"—in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right. (32 Cal.2d at pp. 715, 717, 198 P.2d 17, italics added.) Similarly, in *Valerie N., supra*, 40 Cal.3d 143, 219 Cal.Rptr. 387, 707 P.2d 760 - which involved a challenge to a statute limiting the reproductive freedom of a developmentally disabled woman—our court did not analyze the scope of the constitutional right at issue by examining whether developmentally disabled women *historically* had enjoyed a constitutional right of reproductive freedom, but rather considered the substance of that constitutional right in determining whether the right was one that properly should be interpreted as extending to a developmentally disabled woman. And, in addressing a somewhat analogous point, the United States Supreme Court in *Lawrence v. Texas* (2003) 539 U.S. 558, concluded that its prior decision in *Bowers v. Hardwick* (1986) 478 U.S. 186, had erred in narrowly characterizing the constitutional right sought to be invoked in that case as the right to engage in intimate *homosexual* conduct, determining instead that the constitutional right there at issue properly should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect. (539 U.S. at pp. 565-577.)

The flaw in characterizing the constitutional right at issue as the right to same-sex marriage rather than the right to marry goes beyond mere semantics. It is important both analytically and from the standpoint of fairness to plaintiffs' argument that we recognize they are not seeking to create a new constitutional right - the right to "same-sex marriage"—or to change, modify, or (as some have suggested) "deinstitutionalize" the existing institution of marriage. Instead, plaintiffs contend that, properly interpreted, the state constitutional right to marry affords same-sex couples the same rights and benefits—accompanied by the same mutual responsibilities and obligations—as this constitutional right affords to opposite-sex couples. For this reason, in evaluating the constitutional issue before us, we consider it appropriate to direct our focus to the meaning and substance of the constitutional right to marry, and to avoid the potentially misleading implications inherent in analyzing the issue in terms of "same-sex marriage." ...

In discussing the constitutional right to marry in *Perez v. Sharp, supra*, then Justice Traynor in the lead opinion quoted the seminal passage from the United States Supreme Court's decision in *Meyer v. Nebraska, supra*, There the high court, in describing the scope of the "liberty" protected by the due process clause of the federal Constitution, stated that "[w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of one's own conscience, *and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*" (*Perez, supra*, italics added ["to marry" italicized by *Perez*], quoting *Meyer, supra*.) The *Perez* decision continued: "*Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men.*" (*Perez, supra*, 32 Cal.2d at p. 714, 198 P.2d 17, italics added.)

Like *Perez*, subsequent California decisions discussing the nature of marriage and the right to marry have recognized repeatedly the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized *family* relationship. In *DeBurgh v. DeBurgh* (1952) 39 Cal.2d 858, 250 P.2d 598, for example, in explaining "the public interest in the institution of marriage" (*id.* at p. 863, 250 P.2d 598), this court stated: "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage." (*Id.* at pp. 863-864, 250 P.2d 598.) ...

As these and many other California decisions make clear, the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual....

Although past California cases emphasize that marriage is an institution in which society as a whole has a vital interest, our decisions at the same time recognize that the legal right and opportunity to enter into such an officially recognized relationship also is of overriding

importance to the individual and to the affected couple. ... The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual's happiness and well-being. The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.

Further, entry into a formal, officially recognized family relationship provides an individual with the opportunity to become a part of one's partner's family, providing a wider and often critical network of economic and emotional security. ... The opportunity of a couple to establish an officially recognized family of their own not only grants access to an extended family but also permits the couple to join the broader family social structure that is a significant feature of community life. Moreover, the opportunity to publicly and officially express one's love for and long-term commitment to another person by establishing a family together with that person also is an important element of self-expression that can give special meaning to one's life.

There are, of course, many persons and couples who choose not to enter into such a relationship and who prefer to live their lives without the formal, officially recognized and sanctioned, long-term legal commitment to another person signified by marriage or an equivalent relationship. Nonetheless, our cases recognize that the *opportunity* to establish an officially recognized family with a loved one and to obtain the substantial benefits such a relationship may offer is of the deepest and utmost importance to any individual and couple who wish to make such a choice.

If civil marriage were an institution whose *only* role was to serve the interests of society, it reasonably could be asserted that the state should have full authority to decide whether to establish or abolish the institution of marriage (and any similar institution, such as domestic partnership). In recognizing, however, that the right to marry is a basic, *constitutionally protected* civil right—"a fundamental right of free men [and women]" (*Perez, supra*) -the governing California cases establish that this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state. Because our cases make clear that the right to marry is an integral component of an individual's interest in *personal autonomy* protected by the privacy provision of article I, section 1, and of the *liberty* interest protected by the due process clause of article I, section 7, it is apparent under the California Constitution that the right to marry—like the right to establish a home and raise children—has independent *substantive* content, and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it. (Accord, *Poe v. Ullman* (1961) 367 U.S. 497, 553, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dis. opn. of Harlan, J.) ["the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, *an institution which the State not only must allow, but which always and in every age it has fostered and protected*" (italics added)].)

One very important aspect of the substantive protection afforded by the California constitutional right to marry is, of course, an individual's right to be free from undue governmental intrusion into (or interference with) integral features of this relationship—that is,

the right of marital or familial privacy. (See, e.g., *In re Marriage of Wellman* (1980) 104 Cal.App.3d 992, 996, 164 Cal.Rptr. 148 [manner of raising one's child]; accord, e.g., *Griswold, supra*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 [use of contraception]; *Moore v. City of East Cleveland, supra*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 [cohabitation with extended family].) The substantive protection embodied in the constitutional right to marry, however, goes beyond what is sometimes characterized as simply a “negative” right insulating the couple's relationship from overreaching governmental intrusion or interference, and includes a “positive” right to have the state take at least some affirmative action to acknowledge and support the family unit.

Although the constitutional right to marry clearly does not obligate the state to afford specific tax or other governmental benefits on the basis of a couple's family relationship, the right to marry does obligate the state to take affirmative action to grant official, public recognition to the couple's relationship as a family (*Perez, supra*) as well as to protect the core elements of the family relationship from at least some types of improper interference by others.

In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.

Notes and Questions

1. The California Supreme Court ruled in favor of extending marriage rights to same-sex couple on May 15, 2008. The decision took effect 30 days after it was handed down. The first possible moment that anyone could be married was at 5:01 P.M. on June 16. At precisely 5:07 P.M. that day, Del Martin and Phyllis Lyon, long time lesbian feminist activists who had been together for over 50 years, were pronounced legally married by San Francisco mayor Gavin Newsom.

2. On November 4, 2008, the people of California flocked to the polls to elect Barack Obama as the first African American president. They were also faced with a ballot initiative to amend the California constitution to provide that only a marriage between a man and a woman would be valid or recognized in the state. Obama won easily. So did the ballot initiative, 52% to 48%. On November 5, same-sex couples applying for marriage licenses at San Francisco City Hall were faced with the following message:

ATTENTION SAME SEX COUPLES

Under the California Constitution an amendment becomes effective the day after the election at which the voters adopt the amendment. Based on this provision and on the Secretary of State's report of the semi-official results of the November 4 election relating to Proposition 8, the County Clerk has ceased issuing licenses for or performing civil marriage ceremonies for same-sex couples

Supporters of marriage equality immediately filed suit in the California Supreme Court, asking the Court to exercise original jurisdiction and declare Proposition 8 an invalid amendment to the constitution. In *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court ruled that Proposition 8 was a valid amendment to the California constitution. In an important corollary holding, it ruled that the Proposition could only be applied prospectively since there was no indication that it would be applied retroactively in the ballot initiative process. As a result all of the 18,000 marriages performed in California before November 5, 2008 remained legal in the state of California.

3. In 2009, David Boies and Ted Olson, filed suit on behalf of two same sex couples in federal district court in Northern California. They claimed that Proposition 8 was unconstitutional under the Fourteenth Amendment of the Federal Constitution. Most of the public interest lawyers working on LGBT rights issues thought this timing was ill-advised, that it was not yet time to seek the right to marry at the United States Supreme Court. But, as it turned out, a funny thing happened on the way to the Supreme Court. First District Court Judge Walker, after a full trial, ruled that Proposition 8 did in fact violate the plaintiff's constitutional rights. Then, the Governor and Attorney General of California (first Gov. Schwarzenegger and Att. Gen. Brown, then later Gov. Brown and Atty. Gen. Harris) agreed with the plaintiffs that Proposition 8 was unconstitutional and so refused to appeal the District Court decision in the case. The Prop 8 proponents asked for leave to intervene to defend the measure. They are the ones who appealed to the Ninth Circuit, where the amendment was also ruled unconstitutional, although on grounds different from the Walker ruling. And they are the ones who petitioned the Supreme Court. But the Supreme Court punted on the issue by finding that these concerned citizens did not have standing, either before the Supreme Court, or for purposes of the Appeal to the Ninth Circuit. That left the District Court's opinion standing as the final opinion in the case. After some additional wrangling by the Prop 8 Proponents, the battle was over and California once again recognizes marriages between spouses of the same sex.

4. Work through the combination of decisions that affect the California law on marriage. Will California recognize a marriage from Massachusetts entered into by a same-sex couple in 2004? How about a marriage entered into in Canada by a same-sex couple in 2009? Remember that when a law is ruled unconstitutional it is as though that law never existed.

5. If marriage is a fundamental right that can be described as "the right to marry the person of your choice," how much of a step further is it to argue in favor "the right to marry the persons of your choice?" Do the arguments that support same-sex marriage also support plural marriages, i.e., polygamy? See Jaime M. Gher, *Polygamy and Same-Sex Marriage: Allies or Adversarial Within the Same-Sex Marriage Movement*, 14 Wm. & Mary J. Women & L. 559 (2008); Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 San Diego L. Rev. 1023 (2005).

b. Equal Protection Analysis

Most of the courts that have considered marriage claims have analyzed the equality arguments using low level scrutiny. Hawaii is the only Court to authorize heightened scrutiny because the marriage statute was viewed as a discriminatory classification on the basis of sex. New Jersey equal protection jurisprudence does not rely on levels of scrutiny. The California

decision applied strict scrutiny, holding that discrimination on the basis of sexual orientation constituted discrimination against a suspect class. California only has two levels of scrutiny, low level rational basis scrutiny and strict scrutiny. Connecticut and Iowa followed suit, holding that sexual orientation discrimination was entitled to heightened scrutiny because sexual orientation was a quasi-suspect class.

1. Low level scrutiny and the proffered justifications.

Under low level scrutiny, the court only need identify a rational justification for the exclusion of same-sex couples from the institution of marriage. The New York Court of Appeals found a rational basis for the ban by relying on “the State’s legitimate interest in channeling opposite-sex relationships into marriage because of the natural propensity of sexual contact between opposite-sex couples to result in pregnancy and childbirth.” See *Hernandez v. Robles*, 855 N.E.2d at 21. The same argument was made and accepted in *Morrison v. Sadler* (Indiana)(“The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse.”) See 821 N.E.2d at 24-25.

The argument, known as the responsible procreation justification, in a nutshell is as follows:

1. Heterosexual intimacy can lead to pregnancy and childbirth.
2. Marriage is an institution that can protect pregnant women and their children and so it is rational and within the power of the legislature to create the institution and to encourage heterosexuals to enter into marital unions.
3. Same-sex couples are not at risk of unplanned pregnancies and childbirths. Thus, they do not need the same protection from the state.
4. Therefore, it is rational to create marriage for one class of couples and not for the other.

Morrison v. Sadler
821 N.E. 2d 15
Indiana Court of Appeals, 2005

* * *

One of the State’s key interests in supporting opposite-sex marriage is not necessarily to encourage and promote “natural” procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly. The State recognized this during oral argument when it identified the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage. The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual “responsible procreation.” Therefore, the legislative classification of extending marriage benefits to opposite-sex couples

but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by “natural” means.

Notes and Questions

1. The state’s interest in procreation and child-rearing has been held sufficient to justify state marriage laws that are limited to opposite-sex couples in every case that has challenged the marriage law and resulted in the application of low level scrutiny. The Arizona case, *Stanhardt v. Superior Court*, 77 P.3d at 463, reasoned as follows:

...although some same-sex couples also raise children, exclusion of these couples from the marriage relationship does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.

Children raised in families headed by a same-sex couple deserve and benefit from bilateral parenting within long-term, committed relationships just as much as children with married parents. Thus, children in same-sex families could benefit from the stability offered by same-sex marriage, particularly if such children do not have ties with both biological parents. But although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity is insufficient to negate the State’s link between opposite-sex marriage, procreation, and child-rearing.

2. There are two ways to state the reasonableness issue: (1) Is it reasonable to limit marriage to opposite-sex couples? (2) Is it reasonable to exclude same-sex couples from marriage? Should the rational basis analysis differ, depending on which was the question is phrased?

3. The majority opinion in the Washington case, *Andersen v. King County*, at footnote 2, made the following statement:

Justice Fairhurst’s dissent attempts to shift the focus from whether limiting marriage to opposite-sex couples furthers these interests to whether excluding same-sex couples furthers these interests. By doing so the dissent fails to give the legislature the deference required under the constitution.

Do you agree?

2. *Heightened scrutiny*

Varnum v. Brien
763 N.W.2d 862
Supreme Court of Iowa, 2009

CADY, Justice.

In this case, we must decide if our state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution, as the district court ruled. On our review, we hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution. Therefore, we affirm the decision of the district court.

* * *

IV. Equal Protection.

. . . The foundational principle of equal protection is expressed in article I, section 6 of the Iowa Constitution, which provides: “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa’s constitutional promise of equal protection “ ‘is essentially a direction that all persons similarly situated should be treated alike.’ . . .

The constitutional guarantee of equal protection . . . demands certain types of statutory classifications must be subjected to closer scrutiny by courts. Thus, courts apply a heightened level of scrutiny under equal protection analysis when reasons exist to suspect “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

Under this approach, classifications based on race, alienage, or national origin and those affecting fundamental rights are evaluated according to a standard known as “strict scrutiny.” *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest. *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).

A middle tier of analysis exists between rational basis and strict scrutiny. This intermediate tier has been applied to statutes classifying on the basis of gender or illegitimacy and requires the party seeking to uphold the statute to demonstrate the challenged classification is substantially related to the achievement of an important governmental objective. . . .

Classification Undertaken in Iowa Code Section 595.2. Plaintiffs believe Iowa Code section 595.2 [the marriage statute] classifies on the bases of gender and sexual orientation. The County argues the same-sex marriage ban does not discriminate on either basis. The district court held section 595.2 classifies according to gender. As we will explain, we believe the ban on civil marriages between two people of the same sex classifies on the basis of sexual orientation.

It is true the marriage statute does not expressly prohibit gay and lesbian persons from

marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. . . .

Thus, we proceed to analyze the constitutionality of the statute based on sexual orientation discrimination.

Framework for Determining Appropriate Level of Judicial Scrutiny. Our determination that the marriage statute employs a sexual-orientation-based classification does not, of course, control the outcome of our equal protection inquiry. Most statutes, one way or the other, create classifications. . . . To determine if this particular classification violates constitutional principles of equal protection, we must next ask what level of scrutiny applies to classifications of this type. The County argues the more deferential rational basis test should apply, while plaintiffs argue closer scrutiny is appropriate.

* * *

Instead of adopting a rigid formula to determine whether certain legislative classifications warrant more demanding constitutional analysis, the Supreme Court has looked to four factors. The Supreme Court has considered: (1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4) the political power of the subject class. * * *

Determination of Appropriate Level of Scrutiny. Guided by the established framework, we next consider each of the four traditional factors and assess how each bears on the question of whether the constitution demands a more searching scrutiny be applied to the sexual-orientation-based classification in Iowa's marriage statute.

1. *History of discrimination against gay and lesbian people.* The first consideration is whether gay and lesbian people have suffered a history of purposeful unequal treatment because of their sexual orientation. The County does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation. The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently. *See Lawrence*, 539 U.S. at 578-79, 123 S.Ct. 2483-84, 156 L.Ed.2d at 520 (invalidating criminalization of homosexual sodomy in 2003). Additionally, only a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice. At the same time, lesbian and gay people continue to be frequent victims of hate crimes.

In sum, this history of discrimination suggests any legislative burdens placed on lesbian and gay people as a class "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." . . .

2. *Sexual orientation and the ability to contribute to society.* A second relevant consideration is whether the characteristic at issue—sexual orientation—is related to the person’s ability to contribute to society. Heightened scrutiny is applied when the classification bears no relationship to a person’s ability to contribute to society. The existence of this factor indicates the classification is likely based on irrelevant stereotypes and prejudice. *Kerrigan*, 957 A.2d at 453. A classification unrelated to a person’s ability to perform or contribute to society typically reflects “prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others” or “reflect[s] outmoded notions of the relative capabilities of persons with the characteristic.” *Cleburne Living Ctr.*, 473 U.S. at 440-41, 105 S.Ct. at 3254-56, 87 L.Ed.2d at 320-21.

Not surprisingly, none of the same-sex marriage decisions from other state courts around the nation have found a person’s sexual orientation to be indicative of the person’s general ability to contribute to society. *See, e.g., In re Marriage Cases*, . . . More importantly, the Iowa legislature has recently declared as the public policy of this state that sexual orientation is not relevant to a person’s ability to contribute to a number of societal institutions other than civil marriage. *See* Iowa Code § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education); *id.* § 216.10 (credit practices). . . . Based on Iowa statutes and regulations, it is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society.

3. *Immutability of sexual orientation.* The parties, consistent with the same-sex-marriage scholarship, opinions, and jurisprudence, contest whether sexual orientation is immutable or unresponsive to attempted change. The County seizes on this debate to argue the summary judgment granted by the district court in this case was improper because plaintiffs could not prove, as a matter of fact, that sexuality is immutable. This argument, however, essentially limits the constitutional relevance of mutability to those instances in which the trait defining the burdened class is absolutely impervious to change. To evaluate this argument, we must first consider the rationale for using immutability as a factor.

A human trait that defines a group is “immutable” when the trait exists “solely by the accident of birth,” *Frontiero v. Richardson*, 411 U.S. 677, 686 . . . Immutability is a factor in determining the appropriate level of scrutiny because the inability of a person to change a characteristic that is used to justify different treatment makes the discrimination violative of the rather “ ‘basic concept of our system that legal burdens should bear some relationship to individual responsibility.’ . . . Additionally, immutability can relate to the scope and permanency of the barrier imposed on the group. Temporary barriers tend to be less burdensome on a group and more likely to actually advance a legitimate governmental interest. Consequently, such barriers normally do not warrant heightened scrutiny. . . . The permanency of the barrier also depends on the ability of the individual to change the characteristic responsible for the discrimination.

In this case, the County acknowledges sexual orientation is highly resistant to change. Additionally, “sexual orientation ‘forms a significant part of a person’s identity.’ . . . Sexual orientation influences the formation of personal relationships between all people - heterosexual, gay, or lesbian - to fulfill each person’s fundamental needs for love and attachment. Accordingly, because sexual orientation is central to personal identity and “ ‘may be altered [if at all] only at the expense of significant damage to the individual’s sense of self,’ “ classifications based on sexual orientation “are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.” . . .

4. *Political powerlessness of lesbian and gay people.* As observed, the political power of the burdened class has been referenced repeatedly in Supreme Court cases determining the level of scrutiny to be applied to a given piece of legislation. Unfortunately, the Court has never defined what it means to be politically powerless for purposes of this analysis, nor has it quantified a maximum amount of political power a group may enjoy while still receiving the protection from unfair discrimination accompanying heightened scrutiny. The County points to the numerous legal protections gay and lesbian people have secured against discrimination, and the County argues those protections demonstrate gay and lesbian people are not a politically powerless class. The County's argument implies gay and lesbian people must be characterized by a complete, or nearly complete, lack of political power before courts should subject sexual-orientation-based legislative burdens to a heightened scrutiny.

Notwithstanding the lack of a mathematical equation to guide the analysis of this factor, a number of helpful general principles related to the political power of suspect classes can be culled from the Supreme Court's cases. First, these cases show absolute political powerlessness is not necessary to subject legislative burdens on a certain class to heightened scrutiny. For example, females enjoyed at least some measure of political power when the Supreme Court first heightened its scrutiny of gender classifications. *See Frontiero*, 411 U.S. at 685-88 ...

Second, Supreme Court jurisprudence establishes that a group's current political powerlessness is not a prerequisite to enhanced judicial protection." "[I]f a group's *current* political powerlessness [was] a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications." *In re Marriage Cases*, 76 Cal.Rptr.3d 683 ...

We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. Gays and lesbians certainly possess no more political power than women enjoyed four decades ago when the Supreme Court began subjecting gender-based legislation to closer scrutiny. Additionally, gay and lesbian people are, as a class, currently no more powerful than women or members of some racial minorities. These facts demonstrate, at the least, the political-power factor does not weigh against heightened judicial scrutiny of sexual-orientation-based legislation.

Application of Heightened Scrutiny. Plaintiffs argue sexual-orientation-based statutes should be subject to the most searching scrutiny. The County asserts Iowa's marriage statute, section 595.2, may be reviewed, at most, according to an intermediate level of scrutiny. Because we conclude Iowa's same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny. Thus, we turn to a discussion of the intermediate scrutiny standard.

1. *Intermediate scrutiny standard.* "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." ...

2. *Statutory classification: exclusion of gay and lesbian people from civil marriage.* To identify the statutory classification, we focus on the "differential treatment or denial of opportunity for which relief is sought." Plaintiffs bring this lawsuit complaining of their exclusion from the institution of civil marriage. In response, the County offers support for the legislature's decision to statutorily establish *heterosexual* civil marriage. Because the relevant focal point is the opportunity sought by the plaintiffs, the issue presented by this lawsuit is

whether the state has “exceedingly persuasive” reasons for denying civil marriage to same-sex couples, not whether state-sanctioned, heterosexual marriage is constitutional. *See id.* at 531, 116 S.Ct. at 2274, 135 L.Ed.2d at 751. Thus, the question we must answer is whether excluding gay and lesbian people from civil marriage is substantially related to any important governmental objective.

3. *Governmental objectives.* The County has proffered a number of objectives supporting the marriage statute. These objectives include support for the “traditional” institution of marriage, the optimal procreation and rearing of children, and financial considerations.

a. Maintaining traditional marriage. First, the County argues the same-sex marriage ban promotes the “integrity of traditional marriage” by “maintaining the historical and traditional marriage norm ([as] one between a man and a woman).” This argument is straightforward and has superficial appeal. A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification. In other words, the equal protection clause is converted into a “ ‘barren form of words’ “ when “ ‘discrimination ... is made an end in itself.’ “ *Tussman & tenBroek*, 37 Cal. L.Rev. at 357 (quoting *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131, 135 (1915)).

The reasons underlying traditional marriage may include the other objectives asserted by the County, objectives we will separately address in this decision. However, some underlying reason other than the preservation of tradition must be identified. Because the County offers no particular *governmental* reason underlying the tradition of limiting civil marriage to heterosexual couples, we press forward to consider other plausible reasons for the legislative classification.

b. Promotion of optimal environment to raise children. Another governmental objective proffered by the County is the promotion of “child rearing by a father and a mother in a marital relationship which social scientists say with confidence is the optimal milieu for child rearing.” This objective implicates the broader governmental interest to promote the best interests of children. The “best interests of children” is, undeniably, an important governmental objective. Yet, we first examine the underlying premise proffered by the County that the optimal environment for children is to be raised within a marriage of both a mother and a father.

Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents. On the other hand, we acknowledge the existence of reasoned opinions that dual-gender parenting is the optimal environment for children. These opinions, while thoughtful and sincere, were largely unsupported by reliable scientific studies.

Even assuming there may be a rational basis at this time to believe the legislative classification advances a legitimate government interest, this assumed fact would not be sufficient to survive the equal protection analysis applicable in this case. In order to ensure this classification based on sexual orientation is not borne of prejudice and stereotype, intermediate scrutiny demands a closer relationship between the legislative classification and the purpose of the classification than mere rationality. Under intermediate scrutiny, the relationship between the government’s goal and the classification employed to further that goal must be “substantial.” In order to evaluate that relationship, it is helpful to consider whether the legislation is over-

inclusive or under-inclusive.

A statute is under-inclusive when the classification made in the statute “does not include all who are similarly situated with respect to the purpose of the law.” Tussman & tenBroek, 37 Cal. L.Rev. at 348. An under-inclusive statute means all people included in the statutory classification have the trait that is relevant to the aim of the statute, but other people with the trait are not included in the classification. *See id.* A statute is over-inclusive when the classification made in the statute includes more persons than those who are similarly situated with respect to the purpose of the law. *See id.* at 351. An over-inclusive statute “imposes a burden upon a wider range of individuals than are included in the class of those” with the trait relevant to the aim of the law. *Id.* As the degree to which a statutory classification is shown to be over-inclusive or under-inclusive increases, so does the difficulty in demonstrating the classification substantially furthers the legislative goal.

We begin with the County’s argument that the goal of the same-sex marriage ban is to ensure children will be raised only in the optimal milieu. In pursuit of this objective, the statutory exclusion of gay and lesbian people is both under-inclusive and over-inclusive. The civil marriage statute is under-inclusive because it does not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents. Such under-inclusion tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice or “overbroad generalizations about the different talents, capacities, or preferences” of gay and lesbian people, rather than having a substantial relationship to some important objective. If the marriage statute was truly focused on optimal parenting, many classifications of people would be excluded, not merely gay and lesbian people. . . .

The ban on same-sex marriage is substantially over-inclusive because not all same-sex couples choose to raise children. Yet, the marriage statute denies civil marriage to all gay and lesbian people in order to discourage the limited number of same-sex couples who desire to raise children. In doing so, the legislature includes a consequential number of “individuals within the statute’s purview who are not afflicted with the evil the statute seeks to remedy.” *Conaway*, 932 A.2d at 649 (Raker, J., concurring in part and dissenting).

At the same time, the exclusion of gay and lesbian people from marriage is under-inclusive, even in relation to the narrower goal of improving child rearing by limiting same-sex parenting. Quite obviously, the statute does not prohibit same-sex couples from raising children. Same-sex couples currently raise children in Iowa, even while being excluded from civil marriage, and such couples will undoubtedly continue to do so. Recognition of this under-inclusion puts in perspective just how minimally the same-sex marriage ban actually advances the purported legislative goal. A law so simultaneously over-inclusive and under-inclusive is not substantially related to the government’s objective. In the end, a careful analysis of the over- and under-inclusiveness of the statute reveals it is less about using marriage to achieve an optimal environment for children and more about merely precluding gay and lesbian people from civil marriage. . . .

. *Promotion of procreation.* The County also proposes that government endorsement of traditional civil marriage will result in more procreation. It points out that procreation is important to the continuation of the human race, and opposite-sex couples accomplish this objective because procreation occurs naturally within this group. In contrast, the County points out, same-sex couples can procreate only through assisted reproductive techniques, and some same-sex couples may choose not to procreate. While heterosexual marriage does lead to

procreation, the argument by the County fails to address the real issue in our required analysis of the objective: whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation? If procreation is the true objective, then the proffered classification must work to achieve that objective.

Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation. Thus, the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to “become” heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome. Even if possibly true, the link between exclusion of gay and lesbian people from marriage and increased procreation is far too tenuous to withstand heightened scrutiny. Specifically, the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice. In other words, the classification is not substantially related to the asserted legislative purpose.

d. Promoting stability in opposite-sex relationships. A fourth suggested rationale supporting the marriage statute is “promoting stability in opposite sex relationships.” While the institution of civil marriage likely encourages stability in opposite-sex relationships, we must evaluate whether excluding gay and lesbian people from civil marriage encourages stability in opposite-sex relationships. The County offers no reasons that it does, and we can find none. The stability of opposite-sex relationships is an important governmental interest, but the exclusion of same-sex couples from marriage is not substantially related to that objective.

e. Conservation of resources. The conservation of state resources is another objective arguably furthered by excluding gay and lesbian persons from civil marriage. The argument is based on a simple premise: couples who are married enjoy numerous governmental benefits, so the state’s fiscal burden associated with civil marriage is reduced if less people are allowed to marry. In the common sense of the word, then, it is “rational” for the legislature to seek to conserve state resources by limiting the number of couples allowed to form civil marriages. By way of example, the County hypothesizes that, due to our laws granting tax benefits to married couples, the State of Iowa would reap less tax revenue if individual taxpaying gay and lesbian people were allowed to obtain a civil marriage. Certainly, Iowa’s marriage statute causes numerous government benefits, including tax benefits, to be withheld from plaintiffs. Thus, the ban on same-sex marriages may conserve some state resources. Excluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally “rational” way. Yet, such classifications so obviously offend our society’s collective sense of equality that courts have not hesitated to provide added protections against such inequalities.

One primary requirement of the equal protection clause is a more substantial relationship between the legislative goal and the means used to attain the goal. When heightened scrutiny is applicable, the means must substantially further the legislative end. Consequently, in this case, the sexual-orientation-based classification must substantially further the conservation-of-resources objective.

As observed in our analysis of the other reasons offered in support of the marriage statute, significant degrees of over-inclusion and under-inclusion shed light on the true relationship between exclusion of gay and lesbian people from civil marriage and the goal of

conserving governmental resources. Exclusion of all same-sex couples is an extremely blunt instrument for conserving state resources through limiting access to civil marriage. In other words, the exclusion of same-sex couples is over-inclusive because many same-sex couples, if allowed to marry, would not use more state resources than they currently consume as unmarried couples. To reference the County's example, while many heterosexual couples who have obtained a civil marriage do not file joint tax returns-or experience any other tax benefit from marital status-many same-sex couples may not file a joint tax return either. The two classes created by the statute-opposite-sex couples and same-sex couples-may use the same amount of state resources. Thus, the two classes are similarly situated for the purpose of conserving state resources, yet the classes are treated differently by the law. In this way, sexual orientation is a flawed indicator of resource usage.

Just as exclusion of same-sex couples from marriage is a blunt instrument, however, it is also significantly undersized if the true goal is to conserve state resources. That is to say, the classification is under-inclusive. The goal of conservation of state resources would be equally served by excluding any similar-sized group from civil marriage. Indeed, under the County's logic, more state resources would be conserved by excluding groups more numerous than Iowa's estimated 5800 same-sex couples (for example, persons marrying for a second or subsequent time). Importantly, there is also no suggestion same-sex couples would use *more* state resources if allowed to obtain a civil marriage than heterosexual couples who obtain a civil marriage.

Such over-inclusion and under-inclusion demonstrates the trait of sexual orientation is a poor proxy for regulating aspiring spouses' usage of state resources. This tenuous relationship between the classification and its purpose demonstrates many people who are similarly situated with respect to the purpose of the law are treated differently. As a result, the sexual-orientation-based classification does not substantially further the suggested governmental interest, as required by intermediate scrutiny.

4. *Conclusion.* Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives. While the objectives asserted may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage. Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.

* * *

Conclusion.

The district court properly granted summary judgment to plaintiffs. Iowa Code section 595.2 violates the equal protection provision of the Iowa Constitution.

AFFIRMED.

All justices concur.

Notes and Questions

1. The Iowa case was the first unanimous decision in favor of extending marriage to same-sex couples.

2. In an omitted portion of the opinion, Justice Cady addressed what many people think is the 800 pound gorilla in the room: the role of religious opposition to same-sex marriage. Here is an excerpt:

Now that we have addressed and rejected each specific interest advanced by the County to justify the classification drawn under the statute, we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. . . .

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling. Consequently, we address the religious undercurrent propelling the same-sex marriage debate as a means to fully explain our rationale for rejecting the dual-gender requirement of the marriage statute.

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly. Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the “sanctity of marriage” would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained-even fundamental-religious belief.

Yet, such views are not the only religious views of marriage. As demonstrated by amicus groups, other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion.

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage-religious or otherwise-by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.

3. *Varnum v. Brien* was a Lambda case. Lawyers in the Midwest Regional Office of Lambda began laying the groundwork years before they filed suit. They met with gay and lesbian Iowa residents, they researched Iowa history, they learned about Iowa politics. Iowa had a rich and progressive civil rights history. The judiciary was known for being sufficiently independent to protect individual rights. The Iowa legislature had warded off the passage of a state

constitutional amendment on gay marriage. All of these factors made Iowa seem a plausible location for another test case on gay marriage.

4. *Backlash*: In November 2010, Iowans flocked to the polls for the general election. Three Iowa Supreme Court justices were on the ballot for a routine retention vote. A campaign to unseat them, funded primarily by out-of-state contributions from conservative political groups, proved to be successful. By contrast, the trial court judge, who had originally ruled in favor of marriage equality, was retained with 66% of the vote. Of course, he was located in Des Moines and was not subject to a statewide vote. Subsequent attempts to vote additional judge out have not been successful.

5. The Iowa case was also the first to include children as named plaintiffs. McKinley and Breeanna BarbouRoske spoke on several televised news programs the day of the court victory, as did Jamison, the young son of Ingrid Olson and Reva Evans. What do you think of this as a litigation strategy tactic?

8. The Status of Marriage Equality in the United States as of June 26, 2013 (*Windsor* and *Perry* decisions)

a. June 26, 2013

As of the date that the *Windsor* and *Perry* decisions were handed down (June 26, 2013), the following states recognized marriage equality:

1. California—the *Perry* decision effectively reinstated the decision of the California Supreme Court in *In re Marriage Cases* from 2008, holding that marriage equality was constitutionally required under the state constitution. If Prop 8 is unconstitutional then it never was in legal existence to overturn that earlier decision. Alternatively, one can read the *Perry* decision by Judge Walker as proclaiming that any and all bans on marriage equality for same-sex couples are unconstitutional. Either way, marriage between same-sex spouses is constitutionally protected by the California constitution and by Judge Walker's final decision in the *Perry* case.
2. Connecticut—2008 Connecticut Supreme Court decision. By legislation, all existing Connecticut civil unions were converted to marriages on October 1, 2010.
3. Delaware—by legislation and as of July 1, 2014 all Delaware Civil Unions are converted to marriages.
4. Hawaii—by legislation effective December 2, 2013.
5. Illinois—by legislation effective June 1, 2014, although by court order some couples were able to marry before that date.
6. Iowa—2009 Iowa Supreme court decision.
7. Maine—by voter approved citizen initiative effective December 29, 2012.
8. Maryland—by legislation in 2012, effective January 1, 2013
9. Massachusetts—Massachusetts Supreme Judicial Court in 2003, effective in 2004.
10. Minnesota—by legislation effective August 1, 2013.
11. New Hampshire—by legislative effective January 1, 2010. All existing civil unions were converted to marriages on January 1, 2011.

12. New York—by legislation marriages were authorized in 2011. Before that the state recognized out of state marriages between same-sex spouses, but not as to state tax matters.
13. Rhode Island—by legislation effective August 1, 2013. Civil unions will remain civil unions in Rhode Island unless the couple requests that the union be transformed into a marriage. No new civil unions will be recognized.
14. Vermont—by legislation effective September 1, 2009. Existing civil unions will remain civil unions but not new civil unions are authorized.
15. Washington—by legislation effective December 6, 2012. As of June 30, 2014 any registered domestic partnerships will be automatically converted into marriages unless the couple meets the 62 or older requirement. New RDPs will only be available for those who meet the 62 or older requirement.
16. District of Columbia—by legislation passed in May 2009, D.C. began recognizing same-sex marriages from other jurisdictions; by legislation passed in December 2009, D.C. authorized same-sex couples within the jurisdiction to obtain marriage licenses and marry, effective March 3, 2010.

Summary: As of the handing down of *Windsor* and *Perry*, 15 states plus the District of Columbia had extended the right to marry to same-sex couples.

9. Post *Windsor* events.

The majority opinion in *Windsor* stressed that it was only deciding the narrow issue before it: whether or not DOMA was constitutional. It was not opining on whether or not there was a constitutionally protected right for same-sex partners to marry. While the Court could find no justification for federal non-recognition of state-recognized marriages, it is at least conceivable that a different justification might be offered by a state which wished to continue not recognizing such marriages.

Justice Scalia, however, was dubious. Here's his retort to that part of the opinion (a longer version is available in the Supplement for Chapter One):

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. What to make of this? The opinion never

explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

* * *

The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State.” Ante, at 2696, 2695. I have heard such “bald, unreasoned disclaimer[s]” before. *Lawrence*, 539 U.S., at 604, 123 S.Ct. 2472. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.*, at 578, 123 S.Ct. 2472. Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” ante, at 2694 —with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with. ***

In my opinion . . . the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. As I have said, the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “‘bare ... desire to harm’ ” couples in same-sex marriages. . . . How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today’s opinion ante, at 2694:

~~“DOMA’s—This state law’s principal effect is to identify a subset of state-sanctioned marriages constitutionally protected sexual relationships, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA—this state law contrives to deprive some couples married under the laws of their State enjoying constitutionally protected sexual relationships, but not other couples, of both rights and responsibilities.”~~

Or try this passage, from ante, at 2694:

~~“[DOMA] This state law tells those couples, and all the world, that their otherwise valid marriages relationships are unworthy of federal state recognition. This places same-sex couples in an unstable position of being in a second-tier marriage relationship. The~~

differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*,....” * * *

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the “personhood and dignity” which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that “personhood and dignity” in the first place. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

State court decisions post-Windsor

New Jersey – See *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Sept, 27, 2013). In the original marriage litigation in New Jersey, the state Supreme Court had ruled that civil unions were sufficiently equal to marriages to satisfy the equality requirements of the New Jersey constitution. Plaintiff renewed the law suit, claiming that partners in civil unions were not in fact enjoying the requisite amount of equal treatment. Windsor’s extension of federal benefits to married couples and the federal government’s later decision not to treat civil unions or registered domestic partnerships as marriages certainly strengthened the plaintiff’s claims. Based on this lack of equal treatment by the federal government, the New Jersey Supreme Court held that the state marriage ban violated the New Jersey constitution.

New Mexico – In 2011, the New Mexico Attorney General had opined that it would be a violation of the New Mexico constitution to fail to recognize valid out of state marriages of same-sex spouses. State litigation challenging the refusal of some clerks to issue marriage licenses to couples who wanted to marry in their state of residence popped up after the *Windsor* decision. The case quickly made its way to the state Supreme Court which struck the ban down on December 19, 2013. The *Windsor* case was cited throughout the opinion. See *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

Final federal decisions post-Windsor

After the *Windsor* decision was handed down, litigation was pursued in both federal court and state court in all of the nonrecognition states. All federal district court opinions, other than one from Louisiana and one from Puerto Rico, ruled in favor of marriage equality. Most states appealed these decisions, although some did not. Oregon and Pennsylvania Attorney Generals, for example, agreed with the Federal District Court opinions and announced they would not appeal. Marriage equality became the law in those states at that time. See *Geiger v. Kitzhaber*, 2014 WL 2054264 (D. Ore. 2014) and *Whitewood v. Wolf*, 2014 WL 2058105 (M.D. Penn. 2014).

Courts of Appeal considering these issues similarly ruled in favor of marriage equality. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193 (C.A.10 2014); *Latta v. Otter*, 771 F.3d 456 (C.A.9 2014); *Baskin v. Bogan*, 766 F.3d 648 (C.A.7 2014); *Bostic v. Schaefer*, 760 F.3d 352 (C.A.4

2014). In all of these cases, petitions for certiorari were filed with the United States Supreme Court. And then on October 6, 2014, the Supreme Court did an extraordinary thing: it denied the cert petitions in all cases. That left the decisions of the 10th, 9th, 7, and 4th Circuit Courts of Appeal standing as final decisions and required all states within those circuits to recognize marriage equality and begin issuing marriage licenses to same-sex couples.

Baskin v. Bogan

766 F.3d 648, cert. denied

Unites States Court of Appeals, Seventh Circuit

Decided Sept. 4, 2014

POSNER, Circuit Judge.

Indiana and Wisconsin are among the shrinking majority of states that do not recognize the validity of same-sex marriages, whether contracted in these states or in states (or foreign countries) where they are lawful. The states have appealed from district court decisions invalidating the states' laws that ordain such refusal.

Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, as we shall see, they are about the welfare of American children. The argument that the states press hardest in defense of their prohibition of same-sex marriage is that the only reason government encourages marriage is to induce heterosexuals to marry so that there will be fewer “accidental births,” which when they occur outside of marriage often lead to abandonment of the child to the mother (unaided by the father) or to foster care. Overlooked by this argument is that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married.

We are mindful of the Supreme Court's insistence that “whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds *along suspect lines* nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”

We hasten to add that even when the group discriminated against is not a “suspect class,” courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination.

Our pair of cases is rich in detail but ultimately straightforward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological

parents or by adoptive parents. The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases.

We begin our detailed analysis of whether prohibiting same-sex marriage denies equal protection of the laws by noting that Indiana and Wisconsin, in refusing to authorize such marriage or (with limited exceptions discussed later) to recognize such marriages made in other states by residents of Indiana or Wisconsin, are discriminating against homosexuals by denying them a right that these states grant to heterosexuals, namely the right to marry an unmarried adult of their choice. .

The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community. Not that allowing same-sex marriage will change in the short run the negative views that many Americans hold of same-sex marriage. But it will enhance the status of these marriages in the eyes of other Americans, and in the long run it may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples.

The tangible as distinct from the psychological benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children of the marriage, whether biological or adopted, are also considerable. [Here, he lists joint tax filing spousal support obligations, etc]

[Discussion of Federal benefits omitted]

Of course there are costs to marriage as well as benefits, not only the trivial cost of the marriage license but also the obligations, such as alimony, that a divorcing spouse may be forced to bear. But those are among “the duties and responsibilities that are an essential part of married life and that [the spouses] in most cases would be honored to accept.” That marriage continues to predominate over cohabitation as a choice of couples indicates that on average the sum of the tangible and intangible benefits of marriage outweighs the costs.

In light of the foregoing analysis it is apparent that *groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws, and therefore that Indiana and Wisconsin must to prevail establish a clearly offsetting governmental interest in that rejection. Whether they have done so is really the only issue before us, and the balance of this opinion is devoted to it—[except that the Court first explains why *Baker v Nelson* is not controlling

precedent]

First up to bat is Indiana, which defends its refusal to allow same-sex marriage on a single ground, namely that government's sole purpose (or at least Indiana's sole purpose) in making marriage a legal relation (unlike cohabitation, which is purely contractual) is to enhance child welfare. Notably the state does not argue that recognizing same-sex marriage undermines conventional marriage.

When a child is conceived intentionally, the parents normally intend to raise the child together. But pregnancy, and the resulting birth (in the absence of abortion), are sometimes accidental, unintended; and often in such circumstances the mother is stuck with the baby—the father, not having wanted to become a father, refuses to take any responsibility for the child's welfare. The sole reason for Indiana's marriage law, the state's argument continues, is to try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility. The state recognizes that some or even many homosexuals want to enter into same-sex marriages, but points out that many people want to enter into relations that government refuses to enforce or protect (friendship being a notable example). Government has no interest in recognizing and protecting same-sex marriage, Indiana argues, because homosexual sex cannot result in unintended births.

As for the considerable benefits that marriage confers on the married couple, these in the state's view are a part of the regulatory regime: the carrot supplementing the stick. Marital benefits for homosexual couples would not serve the regulatory purpose of marital benefits for heterosexual couples because homosexual couples don't produce babies.

The state's argument can be analogized to requiring drivers' licenses for drivers of motor vehicles but not for bicyclists. Motor vehicles are more dangerous to other users of the roads than bicycles are, and therefore a driver's license is required to drive the former but not to pedal the latter. Bicyclists do not and cannot complain about not having to have a license to pedal, because obtaining, renewing, etc., the license would involve a cost in time and money. The analogy is not perfect (if it were, it would be an identity not an analogy) because marriage confers benefits as well as imposing costs, as we have emphasized (indeed it confers on most couples benefits greater than the costs). But those benefits, in Indiana's view, would serve no state interest if extended to homosexual couples, who should therefore be content with the benefits they derive from being excluded from the marriage-licensing regime: the cost of the license and the burden of marital duties, such as support, and the costs associated with divorce. Moreover, even if possession of a driver's license conferred benefits not available to bicyclists (discounts, or tax credits, perhaps), the state could argue that it offered these benefits only to induce drivers to obtain a license (the carrot supplementing the stick), and that bicyclists don't create the same regulatory concern and so don't deserve a carrot.

Another analogy: The federal government extends a \$2000 "saver's credit" to low- and middle-income workers who contribute to a retirement account. Although everyone would like a \$2000 credit, only lower-income workers are entitled to it. Should higher-income workers complain about being left out of the program, the government could reply that only lower-income workers create a regulatory concern—the concern that they'd be unable to support themselves in

retirement without government encouragement to save while they're young.

In short, Indiana argues that homosexual relationships are created and dissolved without legal consequences because they don't create family-related regulatory concerns. Yet encouraging marriage is less about forcing fathers to take responsibility for their unintended children—state law has mechanisms for determining paternity and requiring the father to contribute to the support of his children—than about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together. Moreover, if channeling procreative sex into marriage were the only reason that Indiana recognizes marriage, the state would not allow an infertile person to marry. Indeed it would make marriage licenses expire when one of the spouses (fertile upon marriage) became infertile because of age or disease. The state treats married homosexuals as would-be “free riders” on heterosexual marriage, unreasonably reaping benefits intended by the state for fertile couples. But infertile couples are free riders too. Why are they allowed to reap the benefits accorded marriages of fertile couples, and homosexuals are not?

The state offers an involuted pair of answers, neither of which answers the charge that its policy toward same-sex marriage is underinclusive. It points out that in the case of most infertile heterosexual couples, only one spouse is infertile, and it argues that if these couples were forbidden to marry there would be a risk of the fertile spouse's seeking a fertile person of the other sex to breed with and the result would be “multiple relationships that might yield unintentional babies.” True, though the fertile member of an infertile couple might decide instead to produce a child for the couple by surrogacy or (if the fertile member is the woman) a sperm bank, or to adopt, or to divorce. But what is most unlikely is that the fertile member, though *desiring* a biological child, would have procreative sex with another person and then *abandon* the child—which is the state's professed fear.

The state tells us that “non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children.” That's a strange argument; fertile couples don't learn about child-rearing from infertile couples. And why wouldn't same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?

It's true that infertile or otherwise non-procreative heterosexual couples (some fertile couples decide not to have children) differ from same-sex couples in that it is easier for the state to determine whether a couple is infertile by reason of being of the same sex. It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile (although later we'll see Wisconsin flirting with such an approach with respect to another class of infertile couples). And often the couple wouldn't know in advance of marriage whether they were fertile. But then how to explain Indiana's decision to carve an exception to its prohibition against marriage of close relatives for first cousins 65 or older—a population guaranteed to be infertile because women can't conceive at that age? Ind.Code § 31-11-1-2. If the state's only interest in allowing marriage is to protect children, why has it gone out of its way to permit marriage of first cousins *only after* they are provably infertile? The state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage. And among non-

procreative couples, those that raise children, such as same-sex couples with adopted children, gain more from marriage than those who do not raise children, such as elderly cousins; elderly persons rarely adopt.

Indiana has thus invented an insidious form of discrimination: favoring first cousins, provided they are not of the same sex, over homosexuals. Elderly first cousins are permitted to marry because they can't produce children; homosexuals are forbidden to marry because they can't produce children. The state's argument that a marriage of first cousins who are past child-bearing age provides a "model [of] family life for younger, potentially procreative men and women" is impossible to take seriously.

At oral argument the state's lawyer was asked whether "Indiana's law is about successfully raising children," and since "you agree same-sex couples can successfully raise children, why shouldn't the ban be lifted as to them?" The lawyer answered that "the assumption is that with opposite-sex couples there is very little thought given during the sexual act, sometimes, to whether babies may be a consequence." In other words, Indiana's government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Which brings us to Indiana's weakest defense of its distinction among different types of infertile couple: its assumption that same-sex marriage cannot contribute to alleviating the problem of "accidental births," which the state contends is the sole governmental interest in marriage. Suppose the consequences of accidental births are indeed the state's sole reason for giving marriage a legal status. In advancing this as *the* reason to forbid same-sex marriage, Indiana has ignored adoption—an extraordinary oversight. Unintentional offspring are the children most likely to be put up for adoption, and if not adopted, to end up in a foster home. Accidental pregnancies are the major source of unwanted children, and unwanted children are a major problem for society, which is doubtless the reason homosexuals are permitted to adopt in most states—including Indiana and Wisconsin.

If the fact that a child's parents are married enhances the child's prospects for a happy and successful life, as Indiana believes not without reason, this should be true whether the child's parents are natural or adoptive. The state's lawyers tell us that "the point of marriage's associated benefits and protections is to encourage child-rearing environments where parents care for their biological children in tandem." Why the qualifier "biological"? The state recognizes that family is about raising children and not just about producing them. It does not explain why the "point of marriage's associated benefits and protections" is inapplicable to a couple's adopted as distinct from biological children.

Indiana permits joint adoption by homosexuals (Wisconsin does not). But an unmarried homosexual couple is less stable than a married one, or so at least the state's insistence that marriage is better for children implies. If marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents. The state should *want* homosexual couples who adopt children—as, to repeat, they are permitted to do—to be married, if it is serious in arguing that the only governmental interest in marriage derives from the problem of accidental births. (We doubt that it is serious.)

The state's claim that conventional marriage is the solution to that problem is belied by the state's experience with births out of wedlock. Accidental pregnancies are found among married couples as well as unmarried couples, and among individuals who are not in a committed relationship and have sexual intercourse that results in an unintended pregnancy. But the state believes that married couples are less likely to abandon a child of the marriage even if the child's birth was unintended. So if the state's policy of trying to channel procreative sex into marriage were succeeding, we would expect a drop in the percentage of children born to an unmarried woman, or at least not an increase in that percentage. Yet in fact that percentage has been rising even since Indiana in 1997 reenacted its prohibition of same-sex marriage (thus underscoring its determined opposition to such marriage) and for the first time declared that it would not recognize same-sex marriages contracted in other states or abroad. The legislature was fearful that Hoosier homosexuals would flock to Hawaii to get married, for in 1996 the Hawaii courts appeared to be moving toward invalidating the state's ban on same-sex marriage, though as things turned out Hawaii did not authorize such marriage until 2013.

In 1997, the year of the enactment, 33 percent of births in Indiana were to unmarried women; in 2012 (the latest year for which we have statistics) the percentage was 43 percent. The corresponding figures for Wisconsin are 28 percent and 37 percent and for the nation as a whole 32 percent and 41 percent. . . . There is no indication that these states' laws, ostensibly aimed at channeling procreation into marriage, have had any such effect.

A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws. One wouldn't know, reading Wisconsin's brief, that there is or ever has been discrimination against homosexuals anywhere in the United States. The state either is oblivious to, or thinks irrelevant, that until quite recently homosexuality was anathematized by the vast majority of heterosexuals (which means, the vast majority of the American people), including by most Americans who were otherwise quite liberal. Homosexuals had, as homosexuals, no rights; homosexual sex was criminal (though rarely prosecuted); homosexuals were formally banned from the armed forces and many other types of government work (though again enforcement was sporadic); and there were no laws prohibiting employment discrimination against homosexuals. Because homosexuality is more easily concealed than race, homosexuals did not experience the same economic and educational discrimination, and public humiliation, that African-Americans experienced. But to avoid discrimination and ostracism they had to conceal their homosexuality and so were reluctant to participate openly in homosexual relationships or reveal their

homosexuality to the heterosexuals with whom they associated. Most of them stayed “in the closet.” Same-sex marriage was out of the question, even though interracial marriage was legal in most states. Although discrimination against homosexuals has diminished greatly, it remains widespread. It persists in statutory form in Indiana and in Wisconsin’s constitution.

At the very least, “a [discriminatory] law must bear a rational relationship to a legitimate governmental purpose.” *Romer v. Evans, supra*, 517 U.S. at 635, 116 S.Ct. 1620. Indiana’s ban flunks this undemanding test.

Wisconsin’s prohibition of same-sex marriage, to which we now turn, is found in a 2006 amendment to the state’s constitution. The amendment, Article XIII, § 13, provides: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” Opponents of same-sex marriage in Indiana have tried for a number of years to insert a prohibition of such marriages into the state’s constitution, as yet without success. A number of large businesses in Indiana oppose such a constitutional amendment. With 19 states having authorized same-sex marriage, the businesses may feel that it’s only a matter of time before Indiana joins the bandwagon, and that a constitutional amendment would impede the process—and also would signal to Indiana’s gay and lesbian citizens, some of whom are employees of these businesses, that they are in a very unwelcoming environment, with statutory reform blocked. . . .

Wisconsin’s brief in defense of its prohibition of same-sex marriage adopts Indiana’s ground (“accidental births”) but does not amplify it. Its “accidental births” rationale for prohibiting same-sex marriage is, like Indiana’s, undermined by a “first cousin” exemption—but, as a statutory matter at least, an even broader one: “No marriage shall be contracted ... between persons who are nearer of kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile.” Wis. Stat. § 65.03(1). Indiana’s marriage law, as we know, authorizes first-cousin marriages if both cousins are at least 65 years old. But—and here’s the kicker—Indiana apparently will as a matter of comity recognize any marriage lawful where contracted, including therefore (as an Indiana court has held) marriages of first cousins contracted in Tennessee, a state that places no restrictions on such marriages. See Tenn.Code Ann. § 36–3–101; *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind.App.2002). Indiana has not tried to explain to us the logic of recognizing marriages of fertile first cousins (prohibited in Indiana) that happen to be contracted in states that permit such marriages, but of refusing, by virtue of the 1997 amendment, to recognize same-sex marriages (also prohibited in Indiana) contracted in states that permit them. This suggests animus against same-sex marriage, as is further suggested by the state’s inability to make a plausible argument for its refusal to recognize same-sex marriage.

But back to Wisconsin, which makes four arguments of its own against such marriage: First, limiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights. Second, the consequences of allowing same-sex marriage cannot be foreseen and therefore a state should be permitted to move cautiously—that is, to do nothing, for Wisconsin

does not suggest that it plans to take any steps in the direction of eventually authorizing such marriage. Third, the decision whether to permit or forbid same-sex marriage should be left to the democratic process, that is, to the legislature and the electorate. And fourth, same-sex marriage is analogous in its effects to no-fault divorce, which, the state argues, makes marriage fragile and unreliable—though of course Wisconsin *has* no-fault divorce, and it’s surprising that the state’s assistant attorney general, who argued the state’s appeal, would trash his own state’s law. The contention, built on the analogy to no-fault divorce and sensibly dropped in the state’s briefs in this court—but the assistant attorney general could not resist resuscitating it at the oral argument—is that, as the state had put it in submissions to the district court, allowing same-sex marriage creates a danger of “shifting the public understanding of marriage away from a largely child-centric institution to an adult-centric institution focused on emotion.” No evidence is presented that same-sex marriage is on average less “child-centric” and more emotional than an infertile marriage of heterosexuals, or for that matter that no-fault divorce has rendered marriage less “child-centric.”

The state’s argument from tradition runs head on into *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009). Tradition per se has no positive or negative significance. There are good traditions, bad traditions pilloried in such famous literary stories as Franz Kafka’s “In the Penal Colony” and Shirley Jackson’s “The Lottery,” bad traditions that are historical realities such as cannibalism, foot-binding, and suttee, and traditions that from a public-policy standpoint are neither good nor bad (such as trick-or-treating on Halloween). Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition. Holmes thought it “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Oliver Wendell Holmes, Jr., “The Path of the Law,” 10 *Harv. L.Rev.* 457, 469 (1897). Henry IV (the English Henry IV, not the French one—Holmes presumably was referring to the former) died in 1413. Criticism of homosexuality is far older. In Leviticus 18:22 we read that “thou shalt not lie with mankind, as with womankind: it is abomination.”

Wisconsin points out that many venerable customs appear to rest on nothing more than tradition—one might even say on mindless tradition. Why do men wear ties? Why do people shake hands (thus spreading germs) or give a peck on the cheek (ditto) when greeting a friend? Why does the President at Thanksgiving spare a brace of turkeys (two out of the more than 40 million turkeys killed for Thanksgiving dinners) from the butcher’s knife? But these traditions, while to the fastidious they may seem silly, are at least harmless. If no social benefit is conferred by a tradition *and* it is written into law *and* it discriminates against a number of people and does them harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause, as in *Loving*. See 388 U.S. at 8–12, 87 S.Ct. 1817.

The state's second argument is: "go slow": maintaining the prohibition of same-sex marriage is the "prudent, cautious approach," and the state should therefore be allowed "to act deliberately and with prudence—or, at the very least, to gather sufficient information—before transforming this cornerstone of civilization and society." There is no suggestion that the state has any interest in gathering information, for notice the assumption in the quoted passage that the state already *knows* that allowing same-sex marriage would transform a "cornerstone of civilization and society," namely monogamous heterosexual marriage. One would expect the state to have provided *some* evidence, *some* reason to believe, however speculative and tenuous, that allowing same-sex marriage will or may "transform" marriage. At the oral argument the state's lawyer conceded that he had no knowledge of any study underway to determine the possible effects on heterosexual marriage in Wisconsin of allowing same-sex marriage. He did say that same-sex marriage might somehow devalue marriage, thus making it less attractive to opposite-sex couples. But he quickly acknowledged that he hadn't studied how same-sex marriage might harm marriage for heterosexuals and wasn't prepared to argue the point. Massachusetts, the first state to legalize same-sex marriage, did so a decade ago. Has heterosexual marriage in Massachusetts been "transformed"? Wisconsin's lawyer didn't suggest it has been.

He may have been gesturing toward the concern expressed by some that same-sex marriage is likely to cause the heterosexual marriage rate to decline because heterosexuals who are hostile to homosexuals, or who whether hostile to them or not think that allowing them to marry degrades the institution of marriage (as might happen if people were allowed to marry their pets or their sports cars), might decide not to marry. Yet the only study that we've discovered, a reputable statistical study, finds that allowing same-sex marriage has no effect on the heterosexual marriage rate. . . .

Wisconsin's remaining argument is that the ban on same-sex marriage is the outcome of a democratic process—the enactment of a constitutional ban by popular vote. But homosexuals are only a small part of the state's population—2.8 percent, we said, grouping transgendered and bisexual persons with homosexuals. Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.

To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible.

The district court judgments invalidating and enjoining these two states' prohibitions of same-sex marriage are

AFFIRMED.

Comments and Questions

1. How many different justifications for excluding same-sex couples from marriage did Posner identify? Did you find any of them persuasive? What did you think were the strongest and the weakest?
2. What do you think about Posner's comment: "Married homosexuals are more likely to want to adopt than unmarried ones if only because of the many state and federal benefits to which married people are entitled. And so same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters?" Many feminist critics are skeptical about how governmental benefits are so often tied to marriage rather than being tied more directly to the parent and child relationship. If you agreed with these feminists, would you feel uncomfortable as a public interest lawyer making arguments in favor of marriage equality based on the claim that same-sex couples need to marry in order to obtain governmental benefits so that they may raise their children better? Does this mean that single parents should not get benefits unless they marry?

10. The Sixth Circuit rules against Marriage Equality and the Supreme Court Reverses

Marriage equality cases from the four states in the Sixth Circuit were consolidated at the appeals level. These were cases from Kentucky, Michigan, Ohio, and Tennessee. District Court opinions in these cases had all ruled in favor of marriage equality. But in *DeBoer v. Snyder*, 772 F.3d 388 (C.A.6 2014), the Court of Appeals reversed. This time the Supreme Court granted the cert petitions. The consolidated cases, reported as *Obergefell v. Herbert*, were decided on June 26, 2015. The Supreme Court reversed, thereby cementing the constitutional right of same-sex couples to marry.

Here are some things to think about regarding the ultimate success in *Obergefell*:

1. When Olson and Boies filed the *Perry* case, claiming that the federal constitution guaranteed the right to marry to same-sex couples, how many states actually recognized such marriages? And what was public opinion? The *Perry* complaint was filed on May 22, 2009.
2. *Windsor* reached the Supreme Court in 2013, challenging the Federal DOMA, but not state bans on marriage equality. How important is it that *Windsor* reached the Supreme Court first?
3. How many states recognized marriage equality by the time the *Obergefell* opinion was handed down? (And remember that when the Supreme Court decided *Loving v. Virginia* in 1967, only 16 states continued to ban interracial marriages.)

11. Questions Post-*Obergefell*

a. The Supreme Court ruled that state DOMA laws (bans on marriage equality) were unconstitutional under the Fourteenth Amendment. When do you suppose they became unconstitutional? Would it be correct to say that these laws were void ab initio?

b. If state DOMAs were void ab initio, then what do you think the legal answer is to the following questions:

- Assume A and B married in California in 2008 (when California allowed such marriages). But at the time they were domiciled in Texas (a nonrecognition state). Since 2008 they have acquired numerous pieces of real estate, mostly from A's earnings, including a very successful IPO that made A an instant millionaire. Note: If the marriage had been recognized by Texas in 2008, all of the post-2008 acquisitions would be characterized as community property. Should all of these acquisitions be considered community property of A and B?
- Suppose C and D live in Florida, a state that recognizes Tenancy by the Entirety property of spouses. (TBE property is protected from the creditors of individual spouses because both spouses are fully vested in the property and the survivorship feature cannot be unilaterally severed). C and B married in Massachusetts in 2008, bought joint property in Florida in 2009, and are now considered married in Florida. Florida has a rule that if spouses acquire property jointly, no matter how title is held, they are presumed to hold as TBE. Can C's creditor make any claim against the jointly owned property?
- E and F live in Alabama (a nonrecognition state before June 26, 2015). They marry in Iowa in 2009. Going forward they will file joint tax returns in Alabama. Can they file amended returns for prior years claiming retroactively that they were married?

c. Many employers have been providing certain benefits to the "domestic partners" of lesbian and gay employees (see discussion *infra*). One justification for doing so has been that since such individuals could not marry their partners, it would be discriminatory to prevent them from receiving the same benefits that married employees receive. Now that *Obergefell* authorizes marriage for all same-sex couples, is there any reason for employers to continue to offer domestic partner benefits? (Note: Some employers have already cancelled such benefits and are limiting them to spouses of employees.)

Lessons from Windsor

The *Windsor* case extended the marital deduction to a surviving same-sex spouse who was domiciled in the State of New York, a state which recognized their Canadian marriage. The Court decided only the case in front of it and did not offer an opinion as to which marriages ought to be recognized by the federal government.

Shortly after the *Windsor* decision was handed down, various federal agencies affected by this change in the law began handing down guidance as to which marriages would count under their federal agencies' rules.

Almost all agencies adopted a rule under which a marriage would be recognized if it was “celebrated” in a state that recognized the marriage. Domicile of the couple would not matter. A couple of agencies (most importantly the Social Security Administration) were hampered by statutory language that referred to state of domicile.

Now that Obergefell has extended marriage equality to all states, those agency concerns about place of celebration versus state of domicile are gone. But the post-Windsor experience with federal agencies and their rules can tell us something about what to expect from states that now have to deal with retroactive application of a marriage recognition rule.

The IRS announced its position on August 29, 2013 in a revenue ruling, Rev. Rul. 2013-17. After announcing that it would honor marriages so long as they were entered into in a recognition state, it addressed the retroactivity issue. The ruling specifically stated that it would become fully effective as of September 16, 2013, giving same sex married taxpayers who had not yet filed their 2012 tax returns and had been planning to file as single time to do so. But any original return filed after September 15 had to be filed either married filing jointly or as married filing separately. The Service also clarified that taxpayers were free to amend returns for prior years to file as married if they would benefit from that filing status, but taxpayers who would not benefit (e.g., two-earner couples who would pay a marriage tax penalty) did not have to file an amended return. In other words, the IRS said that the decision would be applied retroactively to recognize all valid marriages that existed in past years (so long as the year was not closed by the statute of limitations), but that it would be up to the taxpayer to claim the retroactive effect, at the taxpayer’s election. That seemed a very fair rule. Married taxpayers were prevented from filing as married under DOMA. Some married taxpayers would benefit from filing as married in prior years and some would not. The IRS essentially gave the married couple as much flexibility as possible in making that decision.

It remains to be seen how state agencies will deal with similar questions.

12. Marriage Developments in Other Countries

The federal government has primarily adopted a place of celebration rule to determine which same-sex couples are legally married. The rule applies to entitle federal employees to federal benefits, to determine filing status for tax purposes, and to determine marital status for immigration purposes. Place of celebration includes legal marriages in foreign jurisdictions. Here is a list of the countries that currently recognize same-sex marriages and those in which serious consideration or debate has arisen regarding the matter.

a. The Netherlands

In April 2001, the Netherlands became the first country to enact legislation authorizing same-sex marriage. As in the United States, same-sex marriage activists had pursued litigation asking the Dutch courts to recognize same-sex marriage. In the only case to reach the Dutch Supreme Court, the Court ruled that excluding same-sex couples from marriage was justified because the law presumes that a woman’s husband is the father of her children. That single special rule for married couples was inappropriate for same-sex couples and thus apparently the denial of all marriage benefits was justified. That decision was handed down in 1990. By 1994

the Dutch parliament was seriously studying the issues raised by state recognition of same-sex marriage, or, in the alternative, recognition of a form of domestic partnership. Ultimately, the parliament passed a domestic partnership law, known as the Dutch Registered Partnership Act, which went into effect in 1998. The act provided that registered partners enjoyed most of the same benefits and obligations as married couples. The primary exception was in the area of parenting. Partners were unable to adopt children jointly. If a person with a child entered into a registered partnership with another person, that person was accorded no parental status. In order to overcome these shortcomings, same-sex marriage activists continued to lobby the Dutch parliament. A bill recognizing same-sex marriages was adopted in early December 2000 and signed into law on December 1. The act took effect on April 1, 2001. To take advantage of the Dutch law, at least one of the partners must be either a Dutch national or domiciliary.

There are two differences between same-sex and opposite-sex marriages in the Netherlands. First of all, a same-sex partner will not be presumed to be the biological parent of any child born of the mother during the term of the marriage. The partner does not automatically obtain joint custody of the child by virtue of the marriage and the partner can easily adopt the child. Thus, the distinction is a minor one in practice. The other difference involves foreign adoptions. While opposite-sex couples are free to adopt children from other countries, a same-sex couple is more restricted. This distinction was thought necessary because it was not clear how foreign countries might respond to Dutch same-sex marriages. International treaties that speak of spouses and spousal rights were obviously adopted at a time when the only possible spouses were persons of the opposite sex. It will take some time to sort out questions regarding the extra-territorial effect of Dutch same-sex marriages.

See generally Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States*, pp. 114–29 (2002).

b. Belgium

In 2003, Belgium followed the lead of the Netherlands and enacted same-sex marriage legislation. See *Developments in the Law—The Law of Marriage and the Family, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 *Harv. L. Rev.* 2004 (2003). Belgium also provides couples an alternative form of recognition as registered partners.

c. Canada

During the summer of 2005, the Canadian Parliament enacted a bill legalizing same-sex marriages. By the time the new law was enacted, all but a handful of provinces were already providing marriage licenses to same-sex couples as a result of court decisions. A national parliamentary election that took place after enactment of the law swept the ruling Liberal Party from power. The Conservative Party leader, Stephen Harper, who formed the new government by achieving a working coalition with two smaller parties, had campaigned on a promise to give Parliament a free vote on the question of same-sex marriage. That vote was taken in late 2006 and it produced a decisive rejection of a proposal that Parliament reconsider this issue.

d. Spain

A new socialist government was elected in Spain on a platform that included support for same-sex marriage in 2004. During 2005, the Spanish Parliament approved a law opening up marriage to same-sex couples, and it actually went into effect before the Canadian statute. There

were several reports of disciplinary actions and fines imposed on dissenting magistrates who individually refused to perform same-sex marriages under the new law.

e. South Africa

On December 1, 2005, the Constitutional Court of South Africa ruled in *Minister of Home Affairs v. Fourie*, Case CCT 60/04, that the prohibition of discrimination on the basis of sexual orientation in the South African Constitution required the government to afford the legal rights of marriage to same-sex couples. The Court gave the government one year to enact appropriate legislation to implement this ruling. South Africa. The government took until the very last moment to implement the decision of the Constitutional Court. Internal deliberations extending into the late summer of 2006 produced a proposed Civil Union Bill that would make civil unions available to same-sex couples, but when this proposal was floated it drew vehement protests, both from supporters of same-sex marriage and from opponents, who argued that the government should have proposed a constitutional amendment to overrule the court's decision. The government ultimately conceded to the arguments of the marriage proponents and its own legal advisors that only opening up marriage to same-sex partners would comply with the court's mandate. Still acting under the rubric of a Civil Union Bill, and without repealing or amending the existing marriage law, the government then proposed that same-sex couples could choose between a civil union and a marriage under the new law, but the name given to the status would be irrelevant for all purposes of national law. With these changes, the measure passed both houses of the Parliament and was signed into law the day before the court's December 1 deadline. Same-sex couples have been entitled to marry in South Africa since December 1, 2006.

f. Norway and Sweden

Norway and Sweden had both recognized civil unions in the 1990s. In 2008, Norway became the sixth country to begin recognizing same-sex marriages and in 2009 Sweden became the seventh country to do so.

g. Iceland

A measure legalizing same-sex marriage passed the Icelandic legislature in June 2010. Public opinion polls prior to the vote indicated broad support for the measure, and no members of the country's legislature voted against it. Iceland had allowed same-sex couples to register as domestic partners since 1996.

h. Portugal

In June 2010, Portugal became the ninth country to legalize same-sex marriage. Its parliament had passed the measure legalizing gay marriage earlier in 2010. But following its passage, Portugal's president asked the Constitutional Court to review the measure. In April 2010, the Constitutional Court declared the law to be constitutionally valid.

i. Argentina

In July 2010, Argentina became the first country in Latin America to legalize same-sex marriage.

j. Denmark

In June 2012, Denmark's legislature passed a bill legalizing gay marriage. The measure was enacted into law a few days later when Queen Margrethe II gave her royal assent to the bill.

k. Uruguay

On April 10, 2013 the lower house of Uruguay's Congress passed legislation legalizing same-sex marriage, a week after the country's Senate did so. President José Mujica signed the bill into law on May 3, making Uruguay the second Latin American country to legalize same-sex marriage.

l. New Zealand

On April 17, 2013 the New Zealand Parliament gave final approval to a measure that legalizes same-sex marriage, making the Pacific island nation the first in the Asia-Pacific region to allow gays and lesbians to wed.

m. France

On May 18, 2013 French President Francois Hollande signed into law a measure legalizing same-sex marriage. Although the bill had passed the National Assembly and the Senate in April, Hollande's signature had to wait until a court challenge brought by the conservative opposition party, the UMP, was resolved. On May 17, France's highest court, the Constitutional Council, ruled that the bill was constitutional.

n. Brazil

On May 14, 2013, Brazil's National Council of Justice ruled that same-sex couples should not be denied marriage licenses. If this ruling is affirmed on appeal it will authorize same-sex marriages nationwide. (Previously, about half of Brazil's 27 jurisdictions had allowed same-sex marriage.)

o. England, Wales, and Scotland

On July 17, 2013, Queen Elizabeth II gave her "royal assent" to a bill legalizing same-sex marriage in England and Wales. The day before, the measure had won final passage in the British Parliament after months of debate. The law only applies to England and Wales because Scotland and Northern Ireland are semi-autonomous and have separate legislative bodies to decide many domestic issues, including the definition of marriage. While Northern Ireland's legislature in April 2013 voted down a measure that would have legalized same-sex marriage, the Scottish Parliament passed a bill to legalize same-sex marriage in February 2014.

p. Luxembourg

On June 18, 2014 Luxembourg's parliament, the Chamber of Deputies, overwhelmingly approved legislation that will allow gay and lesbian couples to wed and to adopt children. The bill will take effect in early 2015.

q. Mexico

On March 4, 2010 Mexico City's Legislative Assembly voted 39-20 to uphold the freedom to marry for same-sex couples on December 21, 2009. In August 2010, the Mexican Supreme Court ruled that the law honoring the freedom to marry in Mexico City is constitutional

and all states must honor same-sex marriages from other jurisdictions. In May 2012, the state of Quintana Roo declared that all marriages between same-sex couples would be legal. In December 2012, the Mexican Supreme Court declared that the Oaxaca civil code restricting marriage to different-sex couples is unconstitutional, but it only applied to the three couples who filed suit. Thus, Mexico is on its way to recognizing same-sex marriages nationally.

r. Australia

In 2004, Australia amended its marriage laws to ensure that marriage was limited to opposite sex couples. In May 2006, the Australian Capital Territory became the first of Australia's six states and two territories to enact legislation recognizing same-sex relationships. The new established civil unions, which would provide essentially the same rights and responsibilities as marriage. On June 13, 2006, Australia's federal government, led by conservative Prime Minister, John Howard, invoked a rarely used special power to invalidate the civil union law before it ever took effect. The claim was that the law created a status that was tantamount to marriage which had been banned for same-sex couples by the federal legislation.

In 2012 a marriage equality bill was introduced in Parliament but voted down. Then in 2013, the Australian Capital Territory (ACT) Parliament passed legislation validating same sex marriages performed within its boundaries regardless of where the couple might live. But in December of 2013 the High Court struck the law down because it conflicted with federal law. All of the marriages performed were declared invalid.

13. Transsexual Persons and the Right to Marry

Prior to *Obergefell*, transsexual persons might face a number of different issues regarding marriage. One issue was whether or not a post-operative male or female who identifies completely with the new gender and whose body is in alignment with the new gender could marry a person of the opposite sex? Or, is it possible that the state in which the couple might live might not recognize the new gender and instead would categorize the post-operative person as a member of his or her birth gender class. Any state that did so, and which also banned same-sex marriages, might refuse to recognize the otherwise apparently valid opposite-sex marriage. Consider the following case and consider whether it has been effectively overruled by *Obergefell*.

Littleton v. Prange

9 S.W.3d 223 (Tex. App. 1999)

PHIL HARDBERGER, Chief Justice.

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.

The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.

FACTUAL BACKGROUND

Christie is a transsexual. She was born in San Antonio in 1952, a physically healthy male, and named after her father, Lee Cavazos. At birth, she was named Lee Cavazos, Jr. (Throughout this opinion Christie will be referred to as “She.” This is for grammatical simplicity’s sake, and out of respect for the litigant, who wishes to be called “Christie,” and referred to as “she.” It has no legal implications.)

At birth, Christie had the normal male genitalia: penis, scrotum and testicles. Problems with her sexual identity developed early though. Christie testified that she considered herself female from the time she was three or four years old, the contrary physical evidence notwithstanding. Her distressed parents took her to a physician, who prescribed male hormones. These were taken, but were ineffective. Christie sought successfully to be excused from sports and physical education because of her embarrassment over changing clothes in front of the other boys.

By the time she was 17 years old, Christie was searching for a physician who would perform sex reassignment surgery. At 23, she enrolled in a program at the University of Texas Health Science Center that would lead to a sex reassignment operation. For four years Christie underwent psychological and psychiatric treatment by a number of physicians, some of whom testified in this case.

On August 31, 1977, Christie’s name was legally changed to Christie Lee Cavazos. Under doctor’s orders, Christie also began receiving various treatments and female hormones. Between November of 1979 and February of 1980, Christie underwent three surgical procedures, which culminated in a complete sex reassignment. Christie’s penis, scrotum and testicles were surgically removed, and a vagina and labia were constructed. Christie additionally underwent breast construction surgery.

Dr. Donald Greer, a board certified plastic surgeon, served as a member of the gender dysphoria team at UTHSC in San Antonio, Texas during the time in question. Dr. Paul Mohl, a board certified psychiatrist, also served as a member of the same gender dysphoria team. Both participated in the evaluation and treatment of Christie. The gender dysphoria team was a multi-disciplinary team that met regularly to interview and care for transsexual patients.

The parties stipulated that Dr. Greer and Dr. Mohl would testify that their background, training, education and experience is consistent with that reflected in their curriculum vitae, which were attached to their respective affidavits in Christie’s response to the motions for summary judgment. In addition, Dr. Greer and Dr. Mohl would testify that the definition of a transsexual is someone whose physical anatomy does not correspond to their sense of being or their sense of gender, and that medical science has not been able to identify the exact cause of this condition, but it is in medical probability a combination of neuro-biological, genetic and neonatal environmental factors. Dr. Greer and Dr. Mohl would further testify that in arriving at a diagnosis of transsexualism in Christie, the program at UTHSC was guided by the guidelines established by the Johns Hopkins Group and that, based on these guidelines, Christie was diagnosed psychologically and psychiatrically as a genuine male to female transsexual. Dr. Greer and Dr. Mohl also would testify that true male to female transsexuals are, in their opinion, psychologically and psychiatrically female before and after the sex reassignment surgery, and that Christie is a true male to female transsexual.

On or about November 5, 1979, Dr. Greer served as a principal member of the surgical team that performed the sex reassignment surgery on Christie. In Dr. Greer’s opinion, the anatomical and genital features of Christie, following that surgery, are such that she has the

capacity to function sexually as a female. Both Dr. Greer and Dr. Mohl would testify that, in their opinions, following the successful completion of Christie's participation in UTHSC's gender dysphoria program, Christie is medically a woman.

Christie married a man by the name of Jonathon Mark Littleton in Kentucky in 1989, and she lived with him until his death in 1996. Christie filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute in her capacity as Jonathon's surviving spouse. The sued doctor, appellee here, filed a motion for summary judgment. The motion challenged Christie's status as a proper wrongful death beneficiary, asserting that Christie is a man and cannot be the surviving spouse of another man.

The trial court agreed and granted the summary judgment. The summary judgment notes that the trial court considered the summary judgment evidence, the stipulation, and the argument of counsel. In addition to the stipulation, Christie's affidavit was attached to her response to the motion for summary judgment. In her affidavit, Christie states that Jonathon was fully aware of her background and the fact that she had undergone sex reassignment surgery.

THE LEGAL ISSUE

Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?

OVERVIEW OF ISSUE

This is a case of first impression in Texas. The underlying statutory law is simple enough. Texas (and Kentucky, for that matter), like most other states, does not permit marriages between persons of the same sex. In order to have standing to sue under the wrongful death and survival statutes, Christie must be Jonathon's surviving spouse. The defendant's summary judgment burden was to prove she is not the surviving spouse. Referring to the statutory law, though, does not resolve the issue. This court, as did the trial court below, must answer this question: Is Christie a man or a woman? There is no dispute that Christie and Jonathon went through a ceremonial marriage ritual. If Christie is a woman, she may bring this action. If Christie is a man, she may not.

Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms. If we look at other states or even other countries to see how they treat marriages of transsexuals, we get little help. Only a handful of other states, or foreign countries, have even considered the case of the transsexual. The opposition to same-sex marriages, on the other hand, is very wide spread. Public antipathy toward same-sex marriages notwithstanding, the question remains: is a transsexual still the same sex after a sex-reassignment operation as before the operation? A transsexual, such as Christie, does not consider herself a homosexual because she does not consider herself a man. Her self-identity, from childhood, has been as a woman. Since her various operations, she does not have the outward physical characteristics of a man either. Through the intervention of surgery and drugs, Christie appears to be a woman. In her mind, she has corrected her physical features to line up with her true gender.

"Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual orientation, but sexual identity. Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex." Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 U.C.L.A. WOMEN'S L. J. 219, 237 (1998).

Nor should a transsexual be confused with a transvestite, who is simply a man who

attains some sexual satisfaction from wearing women's clothes. Christie does not consider herself a man wearing women's clothes; she considers herself a woman wearing women's clothes. She has been surgically and chemically altered to be a woman. She has officially changed her name and her birth certificate to reflect her new status. But the question remains whether the law will take note of these changes and treat her as if she had been born a female. To answer this question, we consider the law of those jurisdictions who have previously decided it.

CASE LAW

The English case of *Corbett v. Corbett*, 2 All E.R. 33, 1970 WL 29661 (P.1970), appears to be the first case to consider the issue, and is routinely cited in later cases, including those cases from the United States. April Ashley, like Christie Littleton, was born a male, and like Christie, had undergone a sex-reassignment operation. *Id.* at 35–36. April later married Arthur Corbett. *Id.* at 39. Arthur subsequently asked for a nullification of the marriage based upon the fact that April was a man, and the marriage had never been consummated. *Id.* at 34. April resisted the nullification of her marriage, asserting that the reason the marriage had not been consummated was the fault of her husband, not her. *Id.* at 34–35. She said she was ready, willing, and able to consummate the marriage. *Id.*

Arthur testified that he was “mesmerised” by April upon meeting her, and he dated her for three years before their marriage. *Id.* at 37. He said that she “looked like a woman, dressed like a woman and acted like a woman.” *Id.* at 38. Arthur and April eventually married, but they were never successful in having sexual relations. *Id.* at 39. Several doctors testified in the case, as they did in the current case. *See id.* at 41.

Based upon the doctors' testimony, the court came up with four criteria for assessing the sexual identity of an individual. These are: (1) Chromosomal factors; (2) Gonadal factors (i.e., presence or absence of testes or ovaries); (3) Genital factors (including internal sex organs); and (4) Psychological factors. *Id.* at 44.

Chromosomes are the structures on which the genes are carried which, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-spring. *See id.* at 44. An individual normally has 23 pairs of chromosomes in his or her body cells; one of each pair being derived from each parent. *See id.* One pair of chromosomes is known to determine an individual's sex. *See id.* The English court stated that “[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex.” *Id.* at 47. The court then reasoned that since marriage is essentially a relationship between man and woman, the validity of the marriage depends on whether April is, or is not, a woman. *Id.* at 48. The court held that the criteria for answering this question must be biological and, having so held, found that April, a transsexual, “is not a woman for the purposes of marriage but is a biological male and has been so since birth,” and, therefore, the marriage between Arthur and April was void. *Id.* at 48–49. The court specifically rejected the contention that individuals could “assign” their own sex by their own volition, or by means of an operation. *Id.* at 49. In short, once a man, always a man.

The year after *Corbett* was decided in England, a case involving the validity of a marriage in which one of the partners was transsexual appeared in a United States court. This was the case of *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (N.Y.Sup.Ct.1971). This New York case had a connection with Texas. The marriage ceremony of the transsexual occurred in Belton, while the plaintiff was stationed at Fort Hood. *Id.* at 499.

The purpose of the suit was to declare that no marriage could legally have taken place. *Id.* The court pointed out that this was not an annulment of a marriage because a marriage contract must be between a man and a woman. *Id.* at 501. If the ceremony itself was a nullity, there would be no marriage to annul, but the court would simply declare that no marriage could legally have taken place. *Id.* The court had no difficulty in doing so, holding: “The law makes no provision for a ‘marriage’ between persons of the same sex. Marriage is and always has been a contract between a man and a woman.” *Id.* at 500.

Factually, the New York case was less complicated than *Corbett*, and the instant case, because there had been no sexual change operation, and the “wife” still had normal male organs. *Id.* at 499. The plaintiff made this unpleasant discovery on his wedding night. *Id.* The husband in *Anonymous* was unaware that he was marrying a transsexual. *Id.* In both *Corbett* and the instant case, the husband was fully aware of the true state of affairs, and accepted it. In fact, in the instant case, Christie and her husband were married for seven years, and, according to the testimony, had normal sexual relations. This is a much longer period of time than any of the other reported cases.

The next reported transsexual case came from New Jersey. This is the only United States case to uphold the validity of a transsexual marriage. In *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, 205 (1976), a transsexual wife brought an action for support and maintenance growing out of her marriage. The husband interposed a defense that his wife was male, and that their marriage was void (and therefore he owed nothing). *Id.* M.T., the wife, testified she was born a male, but she always considered herself a female. *Id.* M.T. dated men all her life. *Id.* After M.T. met her husband-to-be, J.T., they decided that M.T. would have an operation so she could “be physically a woman.” *Id.*

In 1971, M.T. had an operation where her male organs were removed and a vagina was constructed. *Id.* J.T. paid for the operation, and the couple were married the next year. *Id.* M.T. and J.T. lived as husband and wife and had sexual intercourse. *Id.* J.T. supported M.T. for over two years; however, in 1974, J.T. left the home, and his support of M.T. ceased. *Id.* The lawsuit for maintenance and support followed.

The doctor who had performed the sex-reassignment operation testified. *Id.* at 205–6. He described a transsexual as a person who has “a great discrepancy between the physical genital anatomy and the person’s sense of self-identity as a male or as a female.” *Id.* at 205. The doctor defined gender identity as “a sense, a total sense of self as being masculine or female; it pervades one’s entire concept of one’s place in life, of one’s place in society and in point of fact the actual facts of the anatomy are really secondary.” *Id.* The doctor said that after the operation his patient had no uterus or cervix, but her vagina had a “good cosmetic appearance” and was “the same as a normal female vagina after a hysterectomy.” *Id.* at 206.

The trial court, in ruling for M.T. by finding the marriage valid, stated:

It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.

Id. at 207. The appellate court affirmed, holding:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as

male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent the persons' identification at least for purposes of marriage to the sex finally indicated.

Id. at 210–11.

Ohio is the last state that has considered this issue. *See In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct.1987). *Ladrach* was a declaratory judgment action brought to determine whether a male who became a post-operative female was permitted to marry a male. *Id.* at 829–30. The court decided she may not. *Id.* at 832.

Like Christie, Elaine Ladrach started life as a male. *Id.* at 830. Eventually, she had the transsexual operation which removed the penis, scrotum and testes and constructed a vagina. *Id.* The doctor who performed the operation testified that Elaine now had a “normal female external genitalia.” *Id.* He admitted, however, that it would be “highly unlikely” that a chromosomal test would show Elaine to be a female. *Id.* The court cited a New York Academy of Medicine study of transsexuals that concluded: “...male to female transsexuals are still chromosomally males while ostensibly females.” *Id.* at 831. The court stated that a person's sex is determined at birth by an anatomical examination by the birth attendant, which was done at Elaine's birth. *Id.* at 832. No allegation had been made that Elaine's birth attendant was in error. *Id.* The court reasoned that the determination of a person's sex and marital status are legal issues, and, as such, the court must look to the statutes to determine whether the marriage was permissible. *Id.* The court concluded:

This court is charged with the responsibility of interpreting the statutes of this state and judicial interpretations of these statutes. Since the case at bar is apparently one of first impression in Ohio, it is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.

Id. The court denied the marriage license application. *Id.*

OTHER AUTHORITIES

In an unreported case, a court in New Zealand was convinced that a fully transitioned transsexual should be permitted to marry as a member of his new sex because the alternative would be more disturbing. *See Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 250 & n. 137 (1998) (citing *M. v. M.* (unreported) 30 May 1991, S.Ct. of NZ). That is, if a post-operative transsexual female was deemed a male, she could marry a woman, in what would to all outward appearances be a same-sex marriage. *Id.* The question would then become whether courts should approve seemingly heterosexual marriages between a post-operative transsexual female and a genetic male, rather than an apparent same-sex marriage between a post-operative transsexual female and a genetic female. *Id.*

DISCUSSION

In an appeal from a summary judgment, we must determine whether the movant has shown that no genuine issue of material facts exists and that the movant is entitled to judgment as a matter of law. As previously noted, this is a case of first impression in Texas. It involves important matters of public policy for the state of Texas. The involvement of juries in the judicial process provides an important voice of the community, but we do not ask a jury to answer questions without appropriate instructions or guidelines. In fact, cases are reversed when juries

have not been provided proper instructions.

In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case, where the claim being asserted is statutorily-based. The statute defines who may bring the cause of action: a surviving spouse, and if the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed. When or whether the legislature will choose to address this issue is not within the judiciary's control.

It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. Littleton has suggested we do so, perhaps using the surgical removal of the male genitalia as the test. As was pointed out by Littleton's counsel, "amputation is a pretty important step." Indeed it is. But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature. Our responsibility in this case is to determine whether, in the absence of legislatively-established guidelines, a jury can be called upon to decide the legality of such marriages. We hold they cannot. In the absence of any guidelines, it would be improper to launch a jury forth on these untested and unknown waters.

There are no significant facts that need to be decided. The parties have supplied them for us. We find the case, at this stage, presents a pure question of law and must be decided by this court. Based on the facts of this case, and the law and studies of previous cases, we conclude:

- (1) Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals.
- (3) Christie Littleton is a transsexual.
- (4) Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a women (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female.
- (5) The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.
- (7) Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.

We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is, as the court recognized in *Ladrach*, to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages, and prior judicial decisions are few.

Christie was created and born a male. Her original birth certificate, an official document of Texas, clearly so states. During the pendency of this suit, Christie amended the original birth certificate to change the sex and name. Under section 191.028 of the Texas Health and Safety Code she was entitled to seek such an amendment if the record was "incomplete or proved by satisfactory evidence to be inaccurate." Tex. Health & Safety Code Ann. §191.028 (Vernon

1992). The trial court that granted the petition to amend the birth certificate necessarily construed the term “inaccurate” to relate to the present, and having been presented with the uncontroverted affidavit of an expert stating that Christie is a female, the trial court deemed this satisfactory to prove an inaccuracy. However, the trial court’s role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented. No one claims the information contained in Christie’s original birth certificate was based on fraud or error. We believe the legislature intended the term “inaccurate” in section 191.028 to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth. At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court.

There are some things we cannot will into being. They just are.

CONCLUSION

We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse. We affirm the summary judgment granted by the trial court.

Notes and Questions

1. If this case arose after the Obergefell decision, what would be its outcome?
2. Does Christie Littleton have any remedy against anyone now that Obergefell has been decided? (Be mindful of Statutes of Limitations and Res Judicata.) What role should a birth certificate play in the question of whether spouses are of the opposite
3. State laws providing for sex changes on birth certificates vary quite a bit. Tennessee, for example, absolutely prohibits any change. Some states will allow a birth certification to be changed, but the change is either apparent on the face of the certificate or the new certificate references the old certificate. Still other will allow a changed birth certificate to be substituted for the old birth certificate. Which method best protects the rights of transsexual persons? Does society have an interest in knowing a person’s birth sex? See generally Dean Spade, Documenting Gender, 59 Hastings L. J. 731 (2008).
4. Which birth certificate should determine Christie’s sex for purposes other than marriage? For example, if the military draft were in effect only as to men, could Christie be drafted?
- 5 Why shouldn’t Christie be treated as a “putative spouse” for purposes of this law suit, even if she was not in fact a spouse for other purposes?

A putative marriage is one that was entered into in good faith by at least one of the parties, but which is invalid by reason of an existing impediment on the part of one or both parties. The effect of a putative marriage is to give the putative spouse, who acted in good faith, rights to property acquired during the marital relationship that are analogous to those rights given to a lawful spouse. Texas recognizes these rights for putative marriages in order to administer equity to those individuals who had a good faith belief that they were lawfully married. [In re Marriage of Sanger, 1999 WL 742607 (Tex. App—Texarkana 1999)(citations omitted).]

* * * * *

B. Relationships Other Than Marriage

1. Civil Unions and Domestic Partnerships

a. The early days

Domestic partnership is a term that was coined in San Francisco in the early 1980s. It had no fixed meaning as a legal term. It was a recognized relationship in numerous cities and counties, where ordinances set forth definitions and the accompanying benefits and obligations. While these ordinances resembled each other, they were not uniform.

Use of the term has become even more confusing when some states (e.g., California, Oregon, and Washington) began to recognize registered domestic partnerships at the state level and accord them spousal-like rights. The term is also used by states like Maryland, Maine, and Wisconsin where recognition at the state level is possible, but the benefits provided are only a handful.

Domestic partnership ordinances at the local level, i.e., municipal and county ordinances, tended to create a definition of domestic partner and then provide that employees of the city or county would be entitled to certain fringe benefits for their partners on a par with the benefits provided to spouses of married employees. But some ordinances, responding to political pressure from gay and lesbian constituencies, went further and allowed anyone who resided in the city or county to register their domestic partnership, whether it gained them any benefits or not. Many couples did register solely for the symbolic significance of making their relationship public and official.

The earliest attempts to establish a legally recognized relationship for same-sex couples were in California and Wisconsin. See Barbara J. Cox, “The Little Project:” From Alternative Families to Domestic Partnerships to Same-Sex Marriage, 15 *Wisc. Women’s L. J.* 77 (2000). These early attempts were always at the local level where lesbian and gay rights activists sometimes held some political influence with elected municipal officials. Civil rights movements have often met with success at the local level before gaining rights at the state or national level. For example, the first law banning racial discrimination in employment was enacted by the City of Chicago in 1945. Milwaukee, Minneapolis, and New York City soon followed. In the ensuing decades twenty states adopted state-wide laws banning race discrimination in employment, followed finally by the U. S Congress when it adopted Title VII of the Civil Rights Act in 1964. The lesbian and gay civil rights movement has similarly worked at a grassroots level to gain many important victories at the city and county level, before gaining success at the state level. The story of domestic partnership legislation follows this trend.

The first move toward a formally recognized new status for the unmarried occurred in the 1980s, when several politically liberal cities adopted ordinances that permitted same-sex couples and sometimes opposite-sex unmarried couples to register as “domestic partners.” To register, the couple typically was required to affirm that they were in a relationship of love and mutuality and that they lived together and shared expenses. In many cities, no benefits attached to the registration except the psychic benefit of the public affirmation of their relationship. A few cities, within the limited range of their municipal powers, did attach some legal consequences to the registration, such as rights of hospital visitation and access to health insurance for the partners of municipal employees.

David L. Chambers, *For the Best of Friends and for Lovers of all Sorts, a Status Other Than*

Marriage, 76 Notre Dame L. Rev. 1347 at (2001)

b. The challenges

Tyma v. Montgomery County
801 A.2d 148 (Md. App. 2002)

Bell, Chief Justice.

The question this case presents is whether Montgomery County, Maryland, (“the appellee” or “the County”), exceeded its authority under, or otherwise contravened, State and federal law by enacting an ordinance that extends employment benefits to the domestic partners of county employees. The trial court, the Circuit Court for Montgomery County, concluded that the Montgomery County Council had authority under the Maryland Constitution and laws to enact such benefits legislation and further, that the ordinance was a local law that did not conflict with, and, therefore, was not preempted by, State or federal law. We agree. Accordingly, we shall affirm the judgment of the trial court.

On November 30, 1999, the Montgomery County Council (the “Council”) enacted and the County Executive signed, Montgomery County Bill No. 29-99, the “Employee Benefits Equity Act of 1999 (the “Act”).” Generally, the Act, which became effective March 3, 2000 and applies to all active and retired County employees, extends benefits, such as health, leave, and survivor benefits comparable to those afforded the spouses of County employees, to the domestic partners of County employees. In enacting the ordinance, the Council noted the County’s “longstanding policy, in law and practice, against employment discrimination based on sexual orientation,” as well as its belief that “it is unfair to treat employees differently based solely on whether the employee’s partner is legally recognized as a spouse.” *See* §33-22(a). In addition, the Council found that “many private and public employers provide or plan to provide benefits for the domestic partners of their employees” and that “[p]roviding domestic partner benefits will significantly enhance the County’s ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity.” *Id.*

The Act amended the definitions of “immediate family” and “relative” in Chapter 19A, Ethics, of the County Code, expanding them to include domestic partners, *see id.* at §§19A-4(i) and (n), thus, extending to domestic partners “benefits equivalent to those available for an employee’s spouse or spouse’s dependent,” including those benefits available “under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), the federal Family and Medical Leave Act (“FMLA”), and other federal laws that apply to County employment benefits.” *Id.* at §33-22(b). To qualify as a domestic partner for purposes of the Act, the County employee and his or her partner must satisfy all of a number of specific requirements or, in the event a domestic partnership registration system exists in the jurisdiction in which the employee resides and the County’s Director of Human Resources determines that the legal requirements for registration are substantially similar, legally register the domestic partnership. *See* §33-22(c).⁶

⁶ Section 33-22(c)(1) of the County Code provides:

“(c) Requirements for domestic partnership. To establish a domestic partnership, the employee and the employee’s partner must...

“(1) satisfy all of the following requirements:

“(A) be the same sex;

“(B) share a close personal relationship and be responsible for each other’s welfare;

“(C) have shared the same legal residence for at least 12 months; “(D) be at least 18 years

A domestic partnership terminates, §33-22(e) instructs, by the death of a partner or its dissolution, *see* subsection (e)(1), or the occurrence of “any other change in circumstances that disqualifies the relationship as a domestic partnership,” *see* subsection (e)(2), either of which the employee is required to notify the County of within 30 days.

The appellants, employees and residents of Montgomery County, filed an action in the Circuit Court for Montgomery County, in which they requested the court to enter a declaratory judgment that the Act is invalid and an order enjoining its implementation. In their complaint, the appellants alleged, as they would later argue, that the Act exceeded the County’s authority to enact local laws, conflicted with State law, was preempted by federal law, and was unconstitutionally vague. The Circuit Court rejected all of these arguments. Thus, it granted the County’s motion for summary judgment, denied the appellants’ cross-motion, and declared the Act constitutional. As indicated, we shall affirm the judgment of the Circuit Court, holding that, despite the challenges presented by the appellants, the County’s action in passing the Act is authorized under the constitution and laws of this State and that it conflicts with neither State nor federal law.

Article XI-A of the State Constitution, known as the “Home Rule Amendment,” enabled counties, like Montgomery County, which chose to adopt a home rule charter, to achieve a significant degree of political self-determination. “Its purpose was to [] transfer the General Assembly’s power to enact many types of county public local laws to the Art. XI-A home rule counties.”

Section 3 [of Article XI-A] empowers any county adopting a charter form of government, “[f]rom and after the adoption of a charter,” to enact local laws upon all matters covered by the express powers the General Assembly was authorized to grant, “except that in the case of any conflict between said local law and any General Public Law now or hereafter enacted the General Public Law shall control.”...

The appellants start with the premise that “Maryland law expressly prohibits recognition of same-sex and common law ‘marriages,’ a fortiori, it expressly prohibits the granting of the rights of same-sex, common law marriage to same-sex partners of Montgomery County employees disguised as a domestic partners benefits ordinance.” In support of that premise, they rely on *Maryland Comm’n on Human Relations v. Greenbelt Homes*, 475 A.2d 1192 (1984), in which this Court observed:

old;

“(E) have voluntarily consented to the relationship, without fraud or duress

“(F) not be married to, or in a domestic partnership with, any other person;

“(G) not be related by blood or affinity in a way that would disqualify them from marriage under State law if the employee and partner were opposite sexes;

“(H) be legally competent to contract; and

“(I) share sufficient financial and legal obligations to satisfy subsection (d)(2).”

Section (d) addresses the acceptable evidence of domestic partnership. Pursuant to subsection (d)(1), such evidence consists of either “an affidavit signed by both the employee and the employee’s partner under penalty of perjury” or an official copy of the domestic partner registration, and under subsection (d)(2), evidence that the employee and partner share certain of several enumerated items, such as a joint lease, *see* §(d)(2)(A), or checking account, *see* §(d)(2)(C), that may document a domestic partnership.

“Only marriage as prescribed by law can change the marital status of an individual to a new legal entity of husband and wife. The law of Maryland does not recognize common law marriages or other unions of two or more persons—such as concubinage, syneisaktism, relationships of homosexuals or lesbians—as legally bestowing upon two people a legally cognizable marital status. Such relationships are simply illegitimate unions unrecognized, or in some instances condemned, by the law.”

Thus, the appellants assert that the County exceeded its authority under the constitution and laws of Maryland by extending employment benefits to the domestic partners of its employees because Maryland does not recognize either same-sex or common law marriages. They argue that “[t]he County’s actions are an unlawful, back-door attempt to circumvent State law which disallows same-sex unions” and “an attempt to legitimize illegitimate relationships under Maryland law by attempting to create, in the guise of a benefits ordinance, a legal equivalency between lawful spouses and same-sex domestic partners.” They further assert that the recognition of domestic partnerships, an *ultra vires* act, “affects the interests of the whole State as well as interests outside of the state” and, in addition, requires the expenditure of state funds. They conclude that the provision of such benefits to domestic partners is inconsistent with federal benefits laws that do not include domestic partners among the enumerated “qualified beneficiaries.”⁷

Contrary to the appellants’ position, the County maintains that “the Act does not create a marital relationship between domestic partners;” rather, “it merely extends to domestic partners many of the employment benefits currently available to County employees’ spouses.” Relying upon the Home Rule Amendment and the general welfare clause,...the County argues that it clearly is authorized to extend employment benefits “where those benefits serve a valid public purpose,” in this case, “recruiting and retaining qualified employees and promoting employee loyalty.” Citing decisions from other jurisdictions reviewing similar laws and rejecting the argument that such laws implicate the State’s interest in marriage, *see, e.g., Slattery v. New York*, 697 N.Y.S.2d 603 (1999), *appeal dismissed*, 727 N.E.2d 1253 (2000) (“there are enormous differences between marriage and domestic partnership, and, in light of those very substantial differences, the DPL cannot reasonably be construed as impinging upon the State’s exclusive right to regulate the institution of marriage”); *Crawford v. Chicago*, 710 N.E.2d 91, *petition to appeal denied*, 720 N.E.2d 1090 (1999) (“Nothing in the DPO purports to create a marital status or marriage as those terms are commonly defined. Rather, the DPO addresses only health benefits extended to City employees and those residing with them”); *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo. Ct. A00. 1998), *cert. denied* (April 12, 1999) (“The ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental insurance benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage”); *Lowe v. Broward County*, 766 So.2d 1199 (Fla. Dist.Ct. App. 2000) *review denied*, (“The Act does not create a legal relationship that, because of the interest of the state, gives rise to rights and obligations that survive the termination of the relationship. Unlike a traditional marriage, a domestic partnership is purely contractual, based on the mutual agreement of the parties”), it

⁷. The appellants cite, for example, sections of the Internal Revenue Code, pertaining to COBRA, that define “qualified beneficiaries” as the plan participant’s spouse and dependent children. *See generally* I.R.C. §152.

argues that because it “does not interfere with State interests,” the Act is a local law. The out-of-State cases have upheld these similar laws on the basis that the applicable constitutional provisions, as is the case here, delegate broad law-making authority to local governments. Only when “the enabling statute expressly limits a local government’s ability to grant employment benefits to ‘its employees and dependents,’ “ the County asserts, “have courts in some jurisdictions invalidated similar laws.” See, e.g., *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000); *Lilly v. Minneapolis*, 527 N.W.2d 107 (Minn. App. 1995).

The county also asserts that it is authorized to fund the Act with State monies, which the State generally provides for any valid public purpose. It further argues that federal benefits laws do not preempt the Act because “these laws represent federal minimum standards that the County is free to exceed at its choosing.”

We agree with the Circuit Court that the County had the authority, and clearly so, to enact the subject benefits legislation and that the Act is a local law that does not infringe upon the Legislature’s ability to regulate marriage on a statewide basis....

The Act at issue in this case does not, and does not purport to, define, redefine or regulate marriage in Maryland. Indeed, the Act itself includes the purpose for which the County enacted it, setting out the County’s specific findings that “many private and public employers provide or plan to provide benefits for the domestic partners of their employees” and that “[p]roviding domestic partner benefits will significantly enhance the County’s ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity.”...

The determination that the County has the authority to pass the subject Act...also disposes of the appellants’ argument that the Act is general, or non-local, legislation. Such benefits legislation, moreover, does not infringe upon the State’s interest in marriage. This Court has invalidated ordinances passed by Home Rule counties only when they have intruded on some well defined State interest....

To be sure, in the Act, the requirements for domestic partnership generally parallel those for marriage. On the other hand, the Act does not create “a legal equivalency between lawful spouses and same-sex domestic partners” or otherwise impinge upon the State’s interest in marriage. It simply provides that “[a]ny benefit the County provides for the spouse...of a County employee or the spouse’s dependent must be provided, in the same manner and to the same extent, for the domestic partner of a County employee and the partner’s dependents, respectively.” And that essentially is all that it does. Nothing in the Act purports to, or can be construed to, create an alternate form of marriage, authorize common law marriage or create any legal relationship. Nor does the Act, by its terms or implication, restrict, modify or alter any rights incident to a marriage recognized in this State or give one domestic partner rights, beyond the employment benefits enumerated, against the other. And, as the State of Maryland, as amicus curiae, points out:

“The partners gain no rights in property and income of the other that are earned during the marriage and have no legally protected share in each other’s estates. Termination of the relationship requires no legal process or judicial intervention, and can be done unilaterally by the filing of a notice with the county.”

As a matter of fact, therefore and in sum, the Act affects only the personnel policies of Montgomery County and does not implicate the State’s interest in marriage or affect the State’s ability to regulate marriage on a statewide basis. Moreover, the only employer the ordinance impacts is the County; it has no effect outside the County and, therefore, no statewide interests are affected. The ordinance simply has no resemblance to other enactments that we have held

were not local laws.

This conclusion is consistent with the results reached by our sister courts that have addressed the issue. *See, e.g., Schaefer v. City and County of Denver, supra* (“the ordinance does not adversely impact the integrity and importance of the institution of marriage”); *Lowe v. Broward County, supra* (“We disagree with Lowe’s contention that the Act has created a ‘new marriage-like relationship’ “); *Crawford v. Chicago supra* (the DPO “does not address the panoply of statutory rights and obligations exclusive to the traditional marriage,” “is purely contractual, based on the mutual agreement of the parties,” and does not “purport[] to create a marital status or marriage as those terms are commonly defined, and addresses only health benefits extended to City employees and those residing with them”)...

Finally,...the appellants contend that “[t]he Act provides for the ‘equivalent of’ Consolidated Omnibus Budget Reconciliation Act benefits, federal Family and Medical Leave Act benefits, as well as ‘other federal laws that apply to County employment benefits,’ specifically, the Public Health Services Act, and that because these “equivalents” are neither federally funded nor the result of the amendment of the federal programs, the Act “is an ultra vires legislative enactment to State funded benefits plans and implicates use of State monies without State legislative warrant.” We agree with the County and the Circuit Court that these laws represent minimum standards, which the County is permitted, and in this case elected, to exceed. Similarly, the regulations implementing the FMLA state, “an employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.”

A similar position has been taken by other courts that have considered the issue; they have overwhelmingly concluded that local domestic partnership legislation is not preempted by federal law. [citations omitted]

Thus, to the extent that its power to do so is challenged, we hold that a home rule county that provides benefits to the domestic partners of its employees does not exceed its local lawmaking authority or otherwise undermine State and federal law.

Notes and Questions

1. Cases in accord with this decision include *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. 1999) and *Schaefer v. City & County of Denver*, 973 P.2d 717 (Col. App. 1998).

2. Some cases on this issue have reached the opposite conclusion. *See, e.g., City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995). The Georgia court explained:

The Municipal Home Rule Act specifically grants cities the authority to provide insurance benefits for a city’s “employees, their dependents, and their survivors.” The issue here is whether the city impermissibly expanded the definition of dependent to include domestic partners. Although the home rule act does not define the term “dependent,” other state statutes define a dependent either as a spouse, child, or one who relies on another for financial support.

The Court then held that the City had exceeded its authority and struck down the benefit plan. *See also Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995).

3. Repeat of earlier question: Now that all same-sex couples have the right to marry under Obergefell, should employers cease providing domestic partner benefits?

c. State-wide recognition

Hawaii was the first state to accord state-wide recognition to same-sex partners, although the rights offered in the Reciprocal Beneficiary Law, enacted in 1997 in response to the marriage litigation, were very limited. The status was made available for any two people who were prevented from legally marrying. It was not restricted to same-sex gay couples. Thus, for example a mother and a son might register as Reciprocal Beneficiaries. Rights included for persons registered in this status included inheritance rights (intestacy), right to sue for wrongful death, and right to hold property as Tenants by the Entirety, which in Hawaii means that the asset is protected from the creditors of either tenant.

California came next in offering state-wide recognition to same-sex partners who registered as domestic partners (RDPs). The law became effective as of January 1, 2000. It did not provide full spousal equivalent benefits until January 1, 2005. And, in fact, there remained some minor distinctions between same-sex RDPs and opposite sex spouses until 2007. For example, RDPs were not allowed to file a joint return at the state level until statutory changes made that possible in 2007. In addition, even though RDPs were fully subject to California's community property regime as of January 1, 2005, they were not allowed to split their community income on their state income tax returns until 2007. Note: the operative statute did not say the earnings were not community. It merely provided that they would not be taxed under state law the same as community earnings for married couples. If a married person filed a return, as married filing separately, he or she would be required to report 50% of all community earnings on that return, regardless of who the earner was. This tax rule regarding reporting of community income is derived from a 1930 United States Supreme Court case, *Poe v. Seaborn*, 282 U.S. 101 (1930), a case that in its day was extremely important to married taxpayers in community property states. This case became similarly important to RDPs in community property states in 2010, a development which will be explained later in this chapter.

At about the same time that the California legislature was enacting its initial RDP legislation, the Vermont Supreme Court was considering the marriage equality case discussed earlier in this chapter, *Baker v. Vermont*. In 2000, the Vermont legislature, in response to the Vermont Supreme Court opinion, enacted Civil Union legislation, which for the first time would accord registered partners the exact same rights and responsibilities as spouses.

Much has changed since these early days. Many of the states which previously only accorded limited rights (e.g., Maryland and Maine) and also those which accorded spousal equivalency rights (e.g., Connecticut, California, and Washington) have now adopted same-sex marriage, either by case law or by statute. A question has arisen as to whether or not the state should retain the old status. Here is the array of possibilities:

1. States that accord marriage equality but also continue to offer an alternative such as RDPs or Civil Unions that provide spousal equivalent rights.

- D.C. offers both options, although a couple must choose between them, i.e., you cannot be both domestic partners and spouses
 - California is the only state that allows a couple to be both RDPs and spouses provided of course that you are married to and registered with the same person
 - Hawaii offers both marriage and civil unions (as well as “reciprocal beneficiary” status; if civil union partners marry in Hawaii the civil union is dissolved, but the rights and responsibilities continue
 - Illinois began officially offering marriage to same-sex couples on June 1, 2014. Couples in a civil union can use a process to “upgrade” their civil union to a marriage. Apparently civil unions remain an elective option for couples who do not wish to marry.
 - New Jersey has three levels of status: limited domestic partner rights (remain available to those who originally registered but only available to new couples if one is over age 62); civil unions which appear to remain fully viable; marriage equality.
 - Oregon appears to continue to recognize registered domestic partners even though marriage is now available to all via court decision. Some legislators in the state are considering whether or not to enact legislation that will end RDP status and recognize only marriage.
2. States that used to accord spousal equivalency statuses, but now only offer spousal status and civil unions are converted to marriages.
- Connecticut currently only allows marriage, civil union partners from the previous regime were automatically converted into spouses
 - Delaware is like Connecticut: only marriage and prior civil unions are converted to marriages as of applicable date
 - New Hampshire follows Connecticut and Delaware: existing civil unions at the time that marriage equality was enacted were subject to automatic conversion as of a certain date
3. States that used to accord spousal equivalency statuses, but now offer spousal status to all couples, and retain only civil unions or registered domestic partnerships of couples registered prior to marriage equality
- Rhode Island had adopted marriage equality and retain prior civil union status for anyone who does not want to convert but will not offer new registrations of civil union partners
 - Vermont similarly will allow no new civil union registrations after marriage equality became effective but will continue to recognize registered partners as such before that date
4. States that used to accord spousal equivalency statuses, but now recognize marriage equality, and to a limited extent allow and continue to recognize prior status
- Washington converted existing RDPs to marriage on June 30, 2014 except for those RDPs who meet the 62 or older requirement and will authorize new RDP status only for 62 or older couples
5. States that in the past accorded some recognition (but not spousal equivalency) and now offer marriage equality.
- Maine offers the old limited rights status (available to same and opposite sex couples) as well as full marriage equality

- Maryland, like Maine, continues to offer limited rights to domestic partners and now also recognizes full marriage equality

Questions

1. Why do you think there is a special rule for couples in which one partner is 62 or older? Note that Washington and California only allowed opposite sex couples to register as RDPs if one partner was 62 or older? Why? Hint: Read through the Social Security statutes and see what happens to a person who is receiving a spousal benefit from a prior marriage when that person remarries.
2. Which of the above rules would you support and why?
3. As the Supreme Court of the United States has ruled in *Obergefell* that all states must offer the marriage option to same-sex couples, do you see any reason to retain alternative recognition statuses?
4. There are a number of burdens associated with marriage. For example, a person who remarries might lose a prior benefit obtained through being a surviving spouse and that benefit might be lost upon remarriage. Also, some married couples, in particular two-earner couples, pay significantly more in federal income taxes than they would if they could file as two single persons. Should states be allowed to grant spousal state rights and benefits to registered couples and enable the couple to avoid the various marriage penalties that exist at the federal level? Why should married couples be treated differently from RDPs? In fact, why is marriage so determinative of federal rights and benefits? Should it be?

d. How should RDPs and CUPs be treated at the federal level?

Now that federal agencies (with the possible exception of Social Security) have announced the position that RDPs and CUPs (Civil Union Partners) will not be treated as spouses, a very serious question arises as to how such partners should be treated? In states where the registration status accords the couple all the same rights and benefits as spouses, does it make sense to treat them as legal strangers? Since same-sex couples have the option to marry in a recognition state in order to become eligible for many benefits (regardless of where they live), the exclusion of RDPs and CUPs from federal benefits generally is less harmful than it might otherwise be. But there are numerous statutory rules in the Internal Revenue Code that provide special rules for spouses. Many of these rules are in the Code to account for the fact that married taxpayers generally operate as a single economic unit. Absent rules for RDPs and CUPs, there is little guidance as to how transactions between them should be taxed. This is especially true in the case of divorce. Here are some issues to think about:

1. A case out of California, decided by a federal district court before the *Perry* and *Windsor* decisions, found that excluding RDPs from a benefit offered to spouses and other family members violated the Fourteenth Amendment. *See Dragovich v. U.S.*, 872 F.Supp.2d 944 (N.D. Cal. 2012). But upon rehearing after *Perry* and *Windsor*, the Court found there was no discrimination on the basis of sexual orientation since lesbians and gay men can marry and be

recognized by the federal government. See also *In re Fonberg*, 736 F.3d 901 (9th Cir. (Jud. Council), November 25, 2013)(Grievance body for 9th Circuit Court of Appeals holds that court employee is entitled to federal benefits for her Oregon registered domestic partner; distinction between spouses and domestic partners is not constitutionally consistent with *U.S. v. Windsor*).

2. In 2010, a letter out of Chief Counsel's office to H & R Block in Illinois concluded that opposite sex partners in a civil union should be treated as married for federal income tax purposes because they were treated the same as spouses under state law and DOMA did not prevent them from being recognized as married at the federal level. The IRS appears to have reversed its position in Revenue Ruling 2013-17. The letter is informal and has no authority, but is evidence that the agency at one time thought that DOMA was the only thing preventing them from treating RDPs and CUPs the same as spouses.

3. RDP and Civil Union status at the state level, if not recognized for federal tax purposes, is a way for couples to receive all the benefits of marriage at the state level and avoid bad tax rules like the marriage tax penalty, as well as certain anti-churning rules (e.g., transactions between spouses are a nullity for tax purposes and so a sale of loss property will not generate a deductible loss if it occurs between spouses).

4. Massachusetts will recognize an RDP relationship as a marriage. See *Hunter v. Rose*, 463 Mass. 488 (Mass. 2012)(upholding a probate court's dissolution of a California RDP relationship in the same manner as the court would divorce a married couple). Other marriage states have similar rules. See generally National Center for Lesbian Rights, Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples Within the United States posted on the Center's web page at www.nclrights.org

See http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf

Should domicile determine marital status for taxpayers in these states or must they marry to be recognized by IRS? So far, the IRS has provided no guidance on this issue.

5. RDPs and CUPs (Registered Domestic Partners and Civil Union Partners) dissolve their unions in the same way that spouses divorce. It would make sense to apply provisions such as §§71 and 215, as well as §1041 to the dissolution of such unions. Sections 71 and 215 clarify how alimony is taxed. Section 1041 makes property divisions a nontaxable event. QDROs should also be available. A QDRO is a "qualified domestic relations order" and was created by statute to allow the division of retirement accounts at divorce to be taxed in a fair way by taxing the recipient of the funds rather than the person who earned the funds. Non-spouses cannot acquire a QDRO and so a division of a retirement plan at dissolution of a an RDP or CU status will cause excess income taxes to be assessed against the earner of the fund. Should family lawyers be advising couples in dissolution to marry first so that they can "divorce" and take advantage of these divorce tax rules?

Note on Relationship Between Federal Tax Law and State Property and Marital Law

There is one federal tax principle that may benefit RDPs and CUPs even if they are not recognized as spouses. As a general rule, federal tax law respects state property law characterizations and definitions. This includes state property law regarding marital property

rights. In *Poe v. Seaborn*, 282 U.S. 101 (1930), the Supreme Court held that for federal income tax purposes a wife owned an undivided one-half interest in the income earned by her husband in Washington, a community property state, and was liable for federal income tax on that one-half interest. Accordingly, the Court concluded that husband and wife must each report one-half of the community income on his or her separate return regardless of which spouse earned the income. *United States v. Malcolm*, 282 U.S. 792 (1931), applied the rule of *Poe v. Seaborn* to California's community property law.

In May 2010, the IRS issued a Chief Counsel Advice Memorandum, CCA 201021050, 2010 WL 214782, holding that *Poe v. Seaborn* applies to all community income of California RDPs. This CCA is based on a private letter ruling released at the same time, PLR 201021048, 2010 WL 2147822. Application of this income-splitting principle can create significant tax benefits for couples with one-high earner because income that otherwise would be taxed at that earner's top marginal bracket will be shifted to the lower-earner's lower marginal bracket.

Notes

1. The PLR also held that the creation of community property, even if attributable to the earnings of only one of the partners, would not be treated as a taxable gift. This ruling creates a huge advantage for wealthy community property RDPs and same-sex spouses. If partner A earns \$800,000 a year as taxable income and supports partner B by providing him with high-priced assets, the "transfer" of assets worth at least \$400,000 will not be viewed as a "transfer" for gift tax purposes since it will be viewed as B's income from the very beginning. Of course if the partners marry, they can avoid gift taxes completely by claiming the marital deduction.

2. Although both the PLR and the CCA were directed at California RDPs, the same rules apply to RDPs in Washington and Nevada.

3. The IRS has released a Q & A document for RDPs who are required to report under community property income-splitting rules. It has recently updated it to include other questions dealing with the taxation of RDPs and CUPs. Here is the URL: <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions>

e. Dissolution of RDPs and Civil Unions.

The number of states that continue to recognize Registered Domestic Partnerships and Civil Unions is shrinking now that many of the states that initially adopted these alternative forms of recognition have recently adopted same-sex marriage. In states that no longer recognize these alternative relationship forms, registered partners will most likely have to seek a divorce in order to dissolve the relationship. If the couple is registered in California which allows a couple to be both married and registered as partners, it would be wise to seek dissolution of both the marriage and the partnership.

Couples registered as civil union partners in Vermont used to face serious problems in seeking a dissolution of that union. Vermont was the first state to offer Civil Unions and, at the time, no

state offered same-sex marriage. Many folks travelled to Vermont and entered into a civil union with no idea how that status might be treated in their home states.

An early New York case, *Langan v. St. Vincent's Hospital*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005) ruled that a Vermont Civil Union would not be recognized by New York for purposes of making a wrongful death claim. A New York court similarly ruled that a civil union partner could not be considered a spouse for purposes of workers' comp claims. See *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105 (Supreme Court, App Div. 2007).

New York courts fairly consistently ruled in favor of recognizing valid same-sex marriages entered into in other jurisdictions (except for purposes of state income and estate taxation). Why, then, were New York courts so reluctant to honor same-sex spousal equivalency statuses from other states and grant them the spousal rights that those other states were willing to grant them?

Three years after the *Langan v. State Farm* decision, the same Appellate Division (Third Department) recognized a Vermont civil union for purposes of dissolving it. See *Dickerson v. Thompson*, 897 N.Y.S.2d 298 (App. Div. 2010). The couple had to seek the dissolution in New York because that is where they were domiciled. At the time, Vermont would not dissolve a civil union unless the couple could satisfy its one year residency requirement.

In *Dickerson*, after determining that the court could, as a matter of comity, recognize the civil union, the question became whether the New York courts had jurisdiction to dissolve a civil union. The court held that it did because:

... while New York has not created a specific mechanism for dissolution of a civil union validly entered into in another state, neither has it exercised its power, by statute or other legislative enactment, to prohibit an action for dissolution of a civil union. Since Supreme Court's jurisdiction over the subject matter of this action has not been proscribed, and this matter involves a dispute for which "adequate relief by means of an existing form of action is [un]available to the plaintiff"... Supreme Court is competent to adjudicate the case.

Today a couple who enters into a Vermont civil union can obtain a dissolution of that union in Vermont. Vermont will now grant dissolutions, as well as divorces, to non-residents who can show that their state of residence will not grant them a dissolution.

A number of non-recognition states have refused to recognize civil unions. See *Burns v. Burns*, 560 S.E. 2d 47 (Ga. App. 2002)(Georgia court refused to recognize civil union as equivalent of marriage for purposes of restriction in visitation order for divorced female spouse/ she had joined in civil union with female partner but court order said no visitation if she cohabited with any adult to whom she was not legally married).

Massachusetts, which has never recognized civil unions or registered domestic partnerships, instead recognizes those unions as marriages. In order to dissolve the union or partnership, the couple must seek a divorce. See *Hunter v. Rose*, 463 Mass. 488, 975 N.E.2d 857 (Mass. 2012). See also *Elia-Warnken v. Elia*, 463 Mass. 29, 972 N.E.2d 17 (Mass. 2012) holding that same-sex

marriage was void ab initio because at time of marriage one partner was in a civil union with a different person. Since civil unions are treated as marriages under Massachusetts law, the same-sex marriage was bigamous.

2. Adult Adoption

In 1971, the Minnesota Supreme Court ruled against Jack Baker and Mike McConnell, who had sued for the right to marry each other. Unable to form a marital relationship, the couple sought alternatives. McConnell, the older of the two, petitioned to adopt Baker, thereby creating a family relationship of father and son. According to press reports at the time, the adoption was one of the first of its kind. While parent-child relationships do not carry many legal rights and responsibilities once the child becomes an adult, there are a few rights that are worth mentioning. First of all, in the absence of any other children [or spouses], a father and son inherit from each other as the nearest living heir. Ideally, one would have a duly executed will bequeathing one's property to one's partner. But wills can always be challenged by the nearest living heir. If Jack and Mike are each other's nearest living heir after the adoption, then family members arguably lose their standing to contest the will. Second, some housing statutes and ordinances protect families more than they protect an unrelated couple. Third, some states have an inheritance tax separate from the estate tax that will apply to any wealth that is inherited by someone other than a spouse or child or parent. These tax rates run from 10% to 15% depending on the state. Establishing a valid parent-child relationship would enable the couple to avoid the tax, no matter which partner died first. Finally, a parent-child relationship is sufficient in some states to bring a wrongful death claim, while unrelated persons are generally not entitled to bring such claims.

In Re Adoption of Robert Paul P.

471 N.E.2d 424 (N.Y. 1984)

JASEN, Judge.

We are asked to decide whether it was error for Family Court to deny the petition of a 57-year-old male to adopt a 50-year-old male with whom he shares a homosexual relationship. Appellants are two adult males who have resided together continuously for more than 25 years. The older of the two, who was 57 years of age when this proceeding was commenced, submitted a petition to adopt the younger, aged 50 at the time. The two share a homosexual relationship and desire an adoption for social, financial and emotional reasons. ...Family Court denied the petition. That court concluded that the parties were attempting to utilize an adoption for the purposes properly served by marriage, wills and business contracts and that the parties lacked any semblance of a parent-child relationship.... We now affirm for the reasons that follow.

Our adoption statute embodies the fundamental social concept that the relationship of parent and child may be established by operation of law. Despite the absence of any blood ties, in the eyes of the law an adopted child becomes "the natural child of the adoptive parent" with all the attendant personal and proprietary incidents to that relationship. Indeed, the adoption laws of New York, as well as those of most of the States, reflect the general acceptance of the ancient principle of *adoptio naturam imitatur*—i.e., adoption imitates nature, which originated in Roman jurisprudence, which, in turn, served as a guide for the development of adoption statutes in this country.

In imitating nature, adoption in New York, as explicitly defined in §110 of the Domestic Relations Law, is "the legal proceeding whereby a person takes another person into the relation

of child and thereby acquires the rights and incurs the responsibilities of parent.” It is plainly not a quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual. Moreover, any such sexual intimacy is utterly repugnant to the relationship between child and parent in our society, and only a patently incongruous application of our adoption laws—wholly inconsistent with the underlying public policy of providing a parent-child relationship for the welfare of the child—would permit the employment of adoption as the legal formalization of an adult relationship between sexual partners under the guise of parent and child.

While the adoption of an adult has long been permitted under the Domestic Relations Law, there is no exception made in such adoptions to the expressed purpose of legally formalizing a parent-child relationship. Adoption laws in this State, first enacted in 1873, initially only provided for the “adoption of minor children by adult persons.” As early as 1915, however, the statute was amended to allow adoption of “a person of the age of twenty-one years and upwards” and presently the law simply provides that an unmarried adult or married adults together “may adopt another person” without any restriction on the age of the “adoptive child” or “adoptee”. Despite these and other statutory changes since adoption came into existence in New York, the basic function of giving legal effect to a parent-child relationship has remained unaltered.

Indeed, although the statutory prerequisites may be less compelling than in the case of the adoption of a minor, an adult adoption must still be “in the best interests of the [adoptive] child” and “the familial, social, religious, emotional and financial circumstances of the adoptive parents which may be relevant” must still be investigated. Neither the explicit statutory purpose nor criteria have been diluted for adult adoptions, and this court has no basis for undoing what the Legislature has left intact.

Moreover, deference to the narrow legislative purpose is especially warranted with adoption, a legal relationship unknown at common law. It exists only by virtue of the legislative acts that authorize it. Although adoption was widely practiced by the Egyptians, Greeks and Romans, it was unknown in England until the Adoption of Children Act of 1926, more than 50 years subsequent to the enactment of adoption laws in New York. Adoption in this State is “solely the creature of, and regulated by, statute law” and “[t]he Legislature has supreme control of the subject.” Consequently, because adoption is entirely statutory and is in derogation of common law, the legislative purposes and mandates must be strictly observed.

Here, where the appellants are living together in a homosexual relationship and where no incidents of a parent-child relationship are evidenced or even remotely within the parties’ intentions, no fair interpretation of our adoption laws can permit a granting of the petition. Adoption is not a means of obtaining a legal status for a nonmarital sexual relationship—whether homosexual or heterosexual. Such would be a “cynical distortion of the function of adoption.” (Matter of Adult Anonymous II, 88 A.D.2d 30, 38 [Sullivan, J.P., dissenting].) Nor is it a procedure by which to legitimize an emotional attachment, however sincere, but wholly devoid of the filial relationship that is fundamental to the concept of adoption.

While there are no special restrictions on adult adoptions under the provisions of the Domestic Relations Law, the Legislature could not have intended that the statute be employed “to arrive at an unreasonable or absurd result.” Such would be the result if the Domestic Relations Law were interpreted to permit one lover, homosexual or heterosexual, to adopt the other and enjoy the sanction of the law on their feigned union as parent and child.

There are many reasons why one adult might wish to adopt another that would be entirely

consistent with the basic nature of adoption, including the following: a childless individual might wish to perpetuate a family name; two individuals might develop a strong filial affection for one another; a stepparent might wish to adopt the spouse's adult children; or adoption may have been forgone, for whatever reason, at an earlier date. But where the relationship between the adult parties is utterly incompatible with the creation of a parent-child relationship between them, the adoption process is certainly not the proper vehicle by which to formalize their partnership in the eyes of the law. Indeed, it would be unreasonable and disingenuous for us to attribute a contrary intent to the Legislature.

If the adoption laws are to be changed so as to permit sexual lovers, homosexual or heterosexual, to adopt one another for the purpose of giving a nonmatrimonial legal status to their relationship, or if a separate institution is to be established for the same purpose, it is for the Legislature, as a matter of State public policy, to do so. Absent any such recognition of that relationship coming from the Legislature, however, the courts ought not to create the same under the rubric of adoption.

MEYER, Judge (dissenting).

Having concluded in *People v. Onofre* that government interference with a private consensual homosexual relationship was unconstitutional because it would not “do anything other than restrict individual conduct and impose a concept of private morality chosen by the State,” the court now inconsistently refuses to “permit the employment of adoption as the legal formalization of an adult relationship between sexual partners under the guise of parent and child.” I write...essentially to emphasize the extent to which, in my view, the majority misconceives the meaning and purpose of article 7 of the Domestic Relations Law.

Under that article the relationship of parent and child is not a condition precedent to adoption; it is rather the result of the adoption proceeding. This is clear from the provisions of §§110 and 117. The second unnumbered paragraph of §110 defines “adoption” as “the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person,” and §117, which spells out the “effect of adoption,” provides in the third unnumbered paragraph of subdivision 1 that, “The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parents or parent.” From those provisions and the statement in the opening sentence of §110 that, “An adult unmarried person * * * may adopt another person,” no other conclusion is possible than that the Legislature has not conditioned adult adoption upon there being a parent-child relationship, but rather has stated that relationship to be the result of adoption. Indeed, had it intended to impose limitations of age, consent of others, sexual orientation, or other such condition upon adult adoption, it could easily have done so.

Nor will it do to argue...that because the Legislature that provided for adoption of adults continued the proscription against homosexuality, it did not envision adoption as a means of formalizing a homosexual relationship. The wording of §110 being sufficiently broad to permit such formalization once the prior criminal proscription has been declared unconstitutional, to deny it that effect is to ignore the rule that a court is “not at liberty to restrict by conjecture, or under the guise or pretext of interpretation, the meaning of” the language chosen by the Legislature. It is “incumbent upon the courts to give effect to legislation as it is written, and not

as they or others might think it should be written.”

Contrary to the suggestion of the majority that the adoption statute must be strictly construed, it “has been most liberally and beneficently applied.”...[T]here is no suggestion of undue influence and the relationship, which by the present decision is excised from the adoption statute’s broad wording, has, since the Onofre decision, been subject to no legal impediment. That it remains morally offensive to many cannot justify imposing upon the statute a limitation not imposed by the Legislature.

What leads to the majority’s conclusion that the relationship of the parties “is utterly incompatible with the creation of a parent-child relationship between them” is that it involves a “nonmarital sexual relationship.” But nothing in the statute requires an inquiry into or evaluation of the sexual habits of the parties to an adult adoption or the nature of the current relationship between them. It is enough that they are two adults who freely desire the legal status of parent and child. The more particularly is this so in light of the absence from the statute of any requirement that the adoptor be older than the adoptee, for that, if nothing else, belies the majority’s concept that adoption under New York statute imitates nature, inexorably and in every last detail.

Under the statute “the relationship of parent and child, with all the personal and property rights incident to it, may be established, independently of blood ties, by operation of law”; existence of a parent-child relationship is not a condition of, but a result of, adoption. The motives which prompt the present application are in no way contrary to public policy...Absent any contravention of public policy, we should be “concerned only with the clear, unqualified statutory authorization of adoption;” and should, therefore, reverse the Appellate Division’s order.

In re Adoption of James A. Swanson
623 A.2d 1059 (Delaware 1993)

MOORE, J.

Richard Sorrels appeals the denial of his petition in the Family Court to adopt James A. Swanson, a consenting adult. We confront an issue of first impression: Is a pre-existing parent-child relationship required under our adult adoption statutes in order for one adult to adopt another? Although the statutes do not contain that requirement, the Family Court implied such a condition in our law, and denied the adoption petition. Based on principles of statutory construction, and in the absence of any countervailing public policy, we conclude that it was an error of law to have appended the foregoing condition to an adult adoption. Accordingly, we reverse.

When Richard Sorrels sought to adopt, James Swanson, his companion of 17 years, they were, respectively, 66 and 51 years of age. The adoption had two purposes—to formalize the close emotional relationship that had existed between them for many years and to facilitate their estate planning. Apparently, they sought to prevent collateral claims on their respective estates from remote family members, and to obtain the reduced inheritance tax rate which natural and adopted children enjoy under Delaware law. Admittedly, there was no pre-existing parent-child relationship between them, and on that basis the Family Court denied the petition.

Adult adoptions in Delaware are governed by our Domestic Relations Law, 13 Del. C. §§951 through 956. Section 943 provides that “[i]f the petition complies with the requirements of §§951 and 952 of this title, and if the person or persons to be adopted appear in court and consent to the adoption, the Family Court may render a decree ordering the issuance of a certificate of

adoption to the petitioner.”⁸ Although the statute mentions no other requirements beyond those listed in §§951-952, the Family Court *sua sponte* concluded that approval of an adult adoption was contingent upon a pre-existing family relationship:

Indisputably, the legislature, by providing for adoption of minors, intended to allow for the creation and formalization of parent-child relationships between nonrelated adults and children. It is reasonable to infer that the legislature, by providing for adult adoptions, sought to extend this principle to those situations where no adoption occurred before the age of majority or where the parent-child relationship developed during adulthood. It is reasonable to infer that the legislature, by providing for adult adoptions, intended to allow for the formalization of the parent-child relationship where there is an existing parent-child relationship between nonrelated individuals....It is simply illogical that the legislature enacted the adult adoption statute to make familial inheritance rights available to all. Furthermore, it is unlikely that the legislature intended to extend adoption to all other kinds of relationships, including friendships and sexual relationships. Petitioner’s interpretation of the statute would lead to these results.

Thus, the Family Court implied a new requirement into the adult adoption process. As a result, we are faced with a simple question of statutory construction—did the Family Court err as a matter of law in formulating or applying legal principles when it interpreted §953 to require a preexisting parent-child relationship?

We begin with the basic rule of statutory construction that requires a court to ascertain and give effect to the intent of the legislature. If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court’s role is limited to an application of the literal meaning of those words. However, where, as here, the Court is faced with a novel question of statutory construction, it must seek to ascertain and give effect to the intention of the General Assembly as expressed by the statute itself.

There is no reference in §953 to any condition of a pre-existing parent-child relationship. Instead, the statute only compels a person seeking an adult adoption to sign and file a petition containing certain basic personal data. If, after having done so, the adoptee appears in court and consents to the adoption, the Family Court may grant the petition for adoption. When statutory language is clear, unambiguous, and consistent with other provisions of the same legislation, the court must give effect to its intent. Moreover, 13 Del. C. §953, the relevant adult adoption statute, has existed in equivalent form since 1915, without any material change by the General Assembly. That is indicative of legislative satisfaction with the provisions of the statute.

Regardless of one’s views as to the wisdom of the statute, our role as judges is limited to applying the statute objectively and not revising it. A court may not engraft upon a statute language which has been clearly excluded therefrom. Thus, where, as here, provisions are expressly included in one part of a statute, but omitted from another, it is reasonable to conclude that the legislature was aware of the omission and intended it. As a result, the omission from the

⁸. 13 Del. C. §951 provides that: Any person, or any husband and wife jointly, desiring to adopt any person or persons upwards of 18 years of age, shall file a petition in the Family Court of the county in which the petitioner or the person to be adopted resides. 13 Del. C. §952 describes the contents of the petition: The petition shall state the name, sex and date of be of the person or persons whose adoption is sought and that the petitioner or petitioners desire to adopt such person or persons. The petition shall be signed by the petitioner or petitioners.

adult adoption procedure for investigation and supervision of prospective placements, found in the requirements for adopting minors, persuades us that it was not the result of an accident. If anything, it is the best evidence of a legislative policy against imposing unnecessary conditions upon the adult adoption process.

Many jurisdictions limit inquiry into the motives or purposes of an adult adoption. However, most recognize that adult adoptions for the purpose of creating inheritance rights are valid. In one of the earliest cases, the Supreme Judicial Court of Massachusetts upheld an adoption of three adults, aged 43, 39 and 25 respectively, by a 70 year old person who intended the adoption to operate in lieu of a will. *Collamore v. Learned*, 50 N.E. 518 (Mass. 1898). The court ruled that motive, although proper in that case, had no effect on the validity of the adoption....Likewise, in *Ex parte Libertini*, 224 A.2d 443 (Md. 1966), the Maryland Court of Appeals permitted the adoption of an unmarried thirty-five year old woman by an unmarried fifty-six year old woman, initiated for reasons of inheritance and maternal feelings. The court rejected outright the lower court's conclusion that granting the adoption would pervert the entire adoptive process. The court noted that an adoption for the purpose of inheritance does not change the social or domestic relationship of the parties. Rather, its purpose and effect bestows on the adoptee the right of a natural heir to inherit property. This motive was not improper, the court concluded, and therefore had no bearing on a determination of the adoption's propriety. Cases upholding adoptions for the purpose of improving the adoptee's inheritance rights continue to grow....

The general disinclination to examine the motives of the petitioner has been extended beyond the area of inheritance rights. In *333 East 53rd Street Associates v. Mann*, 503 N.Y.S.2d 752 (App.Div., 1st Dept. 1986), a petitioner adopted an adult woman in order to ensure that she would succeed to the tenancy of a rent controlled apartment. The building's owner sought a declaratory judgment that the adoptee had no rights in the apartment. The appellate court found nothing inherently wrong with an adoption intended to confer an economic benefit on the adopted person.

On the other hand, the New York Court of Appeals ruled that a fifty-seven year old man could not adopt a fifty year old male with whom he shared a homosexual relationship. *Matter of Adoption of Robert Paul P.*, 481 N.Y.S.2d 652 (N.Y. 1984). The court reasoned that adoption is not a quasi-matrimonial device to provide unmarried partners with a legal imprimatur for their sexual relationship. The court also determined that New York's adult adoption process requires the adoption to be in the best interests of the adoptee, and thus, the financial and emotional condition of the petitioner must still be investigated. Delaware's adult adoption process clearly abandons the requirement for such an investigation. It suggests no corresponding need to determine that an adult adoption be in the best interests of the adoptee. We also note the compelling dissent in *Matter of Adoption of Robert Paul P.*, 481 N.Y.S.2d at 656 (Meyer, J. dissenting), taking the majority to task for imposing limitations on the process that are not found in New York's adult adoption statute.

There are, of course, common sense limitations on any adult adoption. That is why our statute appears to confer reasonable discretion upon the Family Court's approval of an adult adoption. Solely by way of example, no court should countenance an adoption to effect a fraudulent, illegal or patently frivolous purpose. See, e.g., *In re Jones*, 411 A.2d 910 (R.I.Supr. 1980), where an older married man sought to adopt his 20 year old paramour to the economic detriment of his wife and family. Delaware law is not necessarily inconsistent with the results in *Adoption of Robert Paul P.* and *In re Jones*. Adult adoptions intended to foster a sexual

relationship would be against public policy as violative of the incest statute. See 11 Del. C. §766(b), which defines the crime of incest to include sexual intercourse between a parent and child “without regard to...relationships by adoption.”

A statute cannot be construed to produce an absurd, meaningless or patently inane result. However, where, as here, the petition contemplates an adoption that is not only within the scope of the statute, but which is also widely recognized as a proper exercise of the authority granted by the statute, we can divine no reason why this petition should be denied....We have long held that our courts do not sit as a superlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Instead, each judge must take and apply the law as they find it, leaving any changes to the duly elected representatives of the people. Accordingly, the order of the Family Court dismissing the petition is REVERSED. The Family Court is directed to issue an appropriate decree of adoption.

Notes and Questions

1. Attorneys practicing in the Family Court in New York City reported that sympathetic judges continued to grant adoptions for same-sex adult couples after the Court of Appeals’ decision in *Robert Paul P.*, in cases where papers were drafted without reference to sexual relationships between the parties and emphasized the desire to create family ties for other purposes. Of course now that New York recognizes same-sex marriage the need for such adoptions has ended.

2. Are there reasons why an adult adoption proceeding is not a desirable alternative in the absence of the ability to formalize a relationship in any other manner? What are the possible downside consequences of adoption?

3. Many adult adoptions took place in California in the 1980s. Consider the case of Bill and Bo, a gay couple who through adoption became father and son. What do you advise them when they ask you about registering as domestic partners under California law? Can they marry each other?

4. The Supreme Court of Maine has recently recognized an adult adoption involving a lesbian couple. See *Adoption of Patricia S.*, 976 A.2d 966 (Me. 2009). The underlying issue in this litigation is whether Patricia Spado, as the adopted daughter of her prior lesbian partner, Olive Watson, will be entitled to inherit from the Watson family trust. Normally, such adoptions are not recognized under the “stranger to the adoption” rule, but that question was not before the Maine Supreme Court. The Maine court merely held that the adoption was valid and not against public policy. To determine whether Patricia is a Watson grandchild who is entitled to inherit, the appropriate probate court overseeing the trust would need to determine the trust creator’s intent in naming grandchildren as beneficiaries of the trust when the trust was drafted. It has been reported that, instead, the parties have entered into an undisclosed settlement. For a discussion of some of the issues that arise involving adult adoptions in the trust and estate context, see Terry L. Turnipseed, *Scalia’s Ship of Revulsion has Sailed: Will Lawrence protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?* 32 *Hamline Law Review* 95 (2009).

3. Legal Guardianship

Another context in which non-traditional families may seek legal recognition is the situation where one person in the relationship becomes incapacitated and incapable of making decisions or taking care of himself or herself. In such circumstances, a spouse would naturally act as guardian of the incapacitated person. What if this situation befalls an unmarried couple? Would parents necessarily take priority? Could the situation be affected by advanced planning, through the execution of contingent guardianship or power of attorney papers? Consider the following case:

In re Guardianship of Sharon Kowalski

478 N.W.2d 790 (Minn. Ct. App. 1991)

Review Denied Feb. 10, 1992.

DAVIES, Judge.

Appellant Karen Thompson challenges the trial court's denial of her petition for guardianship of Sharon Kowalski, and the court's award of guardianship to Karen Tomberlin. We reverse and remand for appointment of Karen Thompson as guardian.

FACTS

Sharon Kowalski is 35 years old. On November 13, 1983, she suffered severe brain injuries in an automobile accident which left her in a wheelchair, impaired her ability to speak, and caused severe loss of short-term memory. At the time of the accident, Sharon was sharing a home in St. Cloud with her lesbian partner, appellant Karen Thompson. They had exchanged rings, named each other as insurance beneficiaries, and had been living together as a couple for four years. Sharon's parents were not aware of the lesbian relationship at the time of the accident. Sharon's parents and siblings live on the Iron Range, where Sharon was raised.

In March of 1984, both Thompson and Sharon's father, Donald Kowalski, cross-petitioned for guardianship. Thompson, expecting that she would have certain visitation rights and input into medical decisions, agreed to the appointment of Mr. Kowalski as Sharon's guardian. The guardianship order, however, gave complete control of visitation to Kowalski, who subsequently received court approval to terminate Thompson's visitation rights on July 25, 1985. Kowalski immediately relocated Sharon from a nursing home in Duluth to one in Hibbing.

In May of 1988, Judge Robert Campbell ordered specialists at Miller-Dwan Medical Center to examine Sharon to determine her level of functioning and whether Sharon could express her wishes on visitation. The doctors concluded that Sharon wished to see Thompson, and the court permitted Thompson to reestablish visitation in January of 1989. The doctors also recommended in 1989 that Sharon be relocated to Trevilla at Robbinsdale, where she currently resides. After Sharon's move, Thompson was permitted to bring Sharon to her St. Cloud home for semi-monthly weekend visits.

In late 1988, Kowalski notified the court that, due to his own medical problems, he wished to be removed as Sharon's guardian. The court granted his request effective May 1990. After being notified of Kowalski's request to relinquish guardianship, Thompson, on August 7, 1989, filed a petition for appointment as successor guardian of Sharon's person and estate. No competing petition was filed. The court held a hearing on Thompson's petition on August 2, 1990. The court wished to conduct further evidentiary hearings, and evidence was taken in both Duluth and Minneapolis over the next several months.

Karen Tomberlin is a friend of the Kowalski family. She did not file a petition for guardianship. Rather, she contacted Sharon's attorney indicating that she wished to testify in opposition to Thompson's petition and submitted a letter to the court suggesting that she be considered as an alternative guardian. Sharon's attorney, in a letter to the trial court prior to the initial August 2, 1990, hearing on Thompson's petition, also included Tomberlin's name as a possibility for guardianship.

The evidentiary hearings in Minneapolis and Duluth were directed toward evaluating Thompson's petition. Thompson called approximately 16 medical witnesses, all of whom had treated Sharon and had firsthand knowledge of her condition and care. Thompson thus exercised little choice as to which medical witnesses were called from Miller-Dwan and Trevilla. The trial court appointed the Miller-Dwan evaluation team, and it was that team which recommended Sharon's transfer to Trevilla. The court also appointed the social worker who testified at the hearing. These witnesses testified about Thompson's interaction with Sharon and the medical staff, Sharon's recovery progress, and Sharon's ability reliably to express her preference in this matter.

The court also heard testimony from three witnesses in opposition to Thompson's petition: Debra Kowalski, Sharon's sister; Kathy Schroeder, a friend of Sharon and the Kowalskis; and Tomberlin. These witnesses had no medical training, each had visited Sharon infrequently in recent years, and none had accompanied Sharon on any outings from the institution. Sharon's parents chose not to attend the hearing.

On April 23, 1991, the trial court denied Thompson's petition for guardianship and simultaneously appointed Tomberlin as guardian without conducting a separate hearing into her qualifications. Thompson appeals to this court.

ISSUE

Did the trial court abuse its discretion in denying appellant's petition for guardianship of Sharon Kowalski?

ANALYSIS

The appointment of a guardian is a matter peculiarly within the discretion of the probate court. The reviewing court shall not interfere with the exercise of this discretion except in the case of clear abuse. In 1980, the legislature, to protect the rights and best interests of the ward, rewrote the guardianship statutes to require the probate court to make specific findings detailing both the necessity for the proposed guardianship of the ward and the qualifications of the proposed guardian. Minn.Stat. §525.551, subd. 5 (1990). The only issue on appeal is the court's choice of guardian and its findings and conclusions on the comparative qualifications of Thompson and Tomberlin.

Guardianship proceedings are governed by Minn.Stat. §§525.539—525.6198 (1990). Minn.Stat. §525.551, subd. 5, provides that after a hearing on a petition for guardianship, [t]he court shall make a finding that appointment of the person chosen as guardian or conservator is in the best interests of the ward. The statute defines the "best interests of the ward" to be:

[A]ll relevant factors to be considered or evaluated by the court in nominating a guardian or conservator, including but not limited to: (1) the reasonable preference of the ward or conservatee, if the court determines the ward or conservatee has sufficient capacity to express a preference; (2) the interaction between the proposed guardian or conservator and the ward or conservatee; and (3) the interest and commitment of the proposed

guardian or conservator in promoting the welfare of the ward or conservatee and the proposed guardian's or conservator's ability to maintain a current understanding of the ward's or conservatee's physical and mental status and needs.

In the case of a ward or conservatorship of the person, welfare includes: (i) food, clothing, shelter, and appropriate medical care; (ii) social, emotional, religious, and recreational requirements; and (iii) training, education, and rehabilitation. Kinship is not a conclusive factor in determining the best interests of the ward or conservatee but should be considered to the extent that it is relevant to the other factors contained in this subdivision. Minn.Stat. §525.539, subd. 7.

There is no language in the statute specifically directing that a guardian be a neutral, detached party. To the contrary, when taken as a whole, the statute's enumerated factors direct that a guardian be someone who is preferred by the ward if possible, has a positive interaction with the ward, and has high involvement with, and commitment to, promoting the ward's welfare. This necessarily entails a guardian with demonstrated understanding and knowledge of the ward's physical and emotional needs.

1. The Ward's Expressed Preference

The court heard testimony from its appointed evaluation team⁹ at Miller-Dwan about Sharon's ability to express a reliable preference as to where and with whom she wanted to be. After a four-month evaluation, the doctor overseeing the evaluation submitted the following recommendation to the court:

We believe Sharon Kowalski has shown areas of potential and ability to make rational choices in many areas of her life and she has consistently indicated a desire to return home. And by that, she means to St. Cloud to live with Karen Thompson again. Whether that is possible is still uncertain as her care will be difficult and burdensome. We think she deserves the opportunity to try. All the professional witnesses concurred in this conclusion, including Sharon's current treating physician. No contradictory evidence was provided from any professionals who worked with Sharon.

The three lay witnesses who opposed Thompson's petition were skeptical that Sharon could reliably express her wishes, saying that Sharon changed her mind too often to believe what she said, given her impaired short-term memory. Despite the uncontradicted medical testimony about Sharon's capability to make choices in her life, the trial court concluded that Sharon could not express a reliable preference for guardianship. This court finds that, in the absence of contradictory evidence about Sharon's decision-making capacity from a professional or anyone in daily contact with her, the trial court's conclusion was clearly erroneous.

A ward with sufficient capacity may express a wish as to a guardian under Minn.Stat. §525.539, subd. 7, and may also nominate a successor guardian under Minn.Stat. §525.59. If the ward has sufficient capacity, the ward's choices may only be denied by the court if found not to be in the ward's best interests. It is clear that Sharon's expressed preference to live with Thompson and to return home to St. Cloud is a significant factor that must be considered in the guardianship proceeding.

⁹. The evaluation team included personnel in physical therapy, occupational therapy, speech and language pathology, social work, psychology, and nursing.

2. Petitioner's Qualifications

The medical professionals were all asked about Thompson's qualifications with respect to the statutory criteria. The testimony was consistent that Thompson: (1) achieves outstanding interaction with Sharon; (2) has extreme interest and commitment in promoting Sharon's welfare; (3) has an exceptional current understanding of Sharon's physical and mental status and needs, including appropriate rehabilitation; and (4) is strongly equipped to attend to Sharon's social and emotional needs. Sharon's caretakers described how Thompson has been with Sharon three or more days per week, actively working with her in therapy and daily care. They described Thompson's detailed knowledge of Sharon's condition, changes, and needs. The doctors unanimously testified that their long-term goal for Sharon's recovery is to assist her in returning to life outside an institution. It is undisputed that Thompson is the only person willing or able to care for Sharon outside an institution. In fact, Thompson has built a fully handicap-accessible home near St. Cloud in the hope that Sharon will be able to live there. On the other hand, Sharon's sister testified that none of her relatives is able to care for Sharon at home, and that her parents can no longer take Sharon for overnight visits. Tomberlin testified that she is not willing or able to care for Sharon at home and is in a position only to supervise Sharon's needs in an institution. Sharon's doctors and therapists testified that care for Sharon on an outing and in a home setting could be provided by a person acting alone. While Thompson would certainly need assistance for bathing, therapy, and medical care, the doctors testified that this can be accomplished with the assistance of a home health care organization.

The medical witnesses also testified about Thompson's effectiveness with Sharon's rehabilitation. They all agreed that Sharon can be stubborn and will often refuse to cooperate in therapy. They testified, however, that Thompson is best able to get Sharon motivated to work through the sometimes painful therapy. Moreover, Thompson is oftentimes the only one who can clean Sharon's mouth and teeth, since Sharon is apparently highly sensitive to invasion of her mouth. Oral hygiene is crucial to prevent recurrence of a mouth fungus which can contribute to pain and tooth loss, further inhibiting Sharon's communication skills and her ability to eat solid foods.

Finally, the medical witnesses were asked how Thompson interacted with the staff and whether she was troublesome or overbearing in her demands for Sharon. No witness responded that Thompson caused trouble, but rather each said she is highly cooperative and exceptionally attentive to what treatments and activities are in Sharon's best interests. The court-appointed social worker also testified that Thompson was attentive to Sharon's needs, and would be a forceful advocate for Sharon's rehabilitation.

The trial court concluded that "[c]onstant, long-term medical supervision in a neutral setting, such as a nursing home * * * is the ideal for Sharon's long-term care," and that "Ms. Thompson is incapable of providing, as a single caretaker, the necessary health care to Sharon at Thompson's home in St. Cloud." These conclusions are without evidentiary support and clearly erroneous as they are directly contradicted by the testimony of Sharon's doctors and other care providers. The court is not in a position to make independent medical determinations without support in the record.

3. The Court's Choice of a "Neutral" Guardian

The trial court recognized Thompson and Sharon as a "family of affinity" and acknowledged that Thompson's continued presence in Sharon's life was important. In its guardianship decision, however, the court responded to the Kowalski family's steadfast

opposition to Thompson being named guardian. Debra Kowalski testified that her parents would refuse ever to visit Sharon if Thompson is named guardian. The trial court likened the situation to a “family torn asunder into opposing camps,” and concluded that a neutral third party was needed as guardian.

The record does not support the trial court’s conclusion that choosing a “neutral” third party is now necessary. Thompson testified that she is committed to reaching an accommodation with the Kowalskis whereby they could visit with Sharon in a neutral setting or in their own home. While acknowledging Thompson’s demonstrated willingness to facilitate all parties’ involvement with Sharon, the trial court failed to address any alternative visitation arrangements for the Kowalskis such as Thompson’s suggestion that Tomberlin be a neutral driver for Sharon on regular visits to the Iron Range. Thompson’s appointment as guardian would not, of itself, result in the family ceasing to visit Sharon. The Kowalskis are free to visit their daughter if they wish. It is not the court’s role to accommodate one side’s threatened intransigence, where to do so would deprive the ward of an otherwise suitable and preferred guardian.

The court seized upon Tomberlin as a neutral party in this case. This decision, however, is not supported by sufficient evidence in the record as to either Tomberlin’s suitability for guardianship or her neutrality. The record is clear that at all times, the focus of the evidentiary hearing was to evaluate Thompson’s qualifications to be guardian, not to evaluate the qualifications of Tomberlin. The medical and therapy staff were not questioned about Tomberlin’s interaction with Sharon, her knowledge and current understanding of Sharon’s medical and physical needs, or her ability to attend to Sharon’s other social and emotional needs. Sharon’s current treating physician testified that she had had no interaction with Tomberlin, and she was not asked to evaluate Tomberlin’s knowledge of, or interaction with, Sharon. In fact, given that Tomberlin rarely visited Sharon, it is unlikely that these witnesses would have been able to comment knowledgeably on Tomberlin’s qualifications.

The trial court’s written findings on Tomberlin’s qualifications are merely a recitation of the statutory criteria without reference to any evidence presented in court. Given that none of the witnesses except Debra Kowalski and Schroeder were questioned about Tomberlin, there was no substantive basis on which the court could make a reasoned determination that she is superior to Thompson.

There was equally little evidence establishing Tomberlin’s neutrality in this case. Tomberlin testified that all her information about Sharon’s situation has come directly from the Kowalskis and that she talks with them weekly. Tomberlin lives near the Kowalskis and helped facilitate the appearance at the hearing of Schroeder and Debra Kowalski in opposition to Thompson. Both in her deposition and at the hearing, Tomberlin testified that her first and primary goal as guardian was to relocate Sharon to the Iron Range, close to her family. This testimony undermines the one “qualification” relied on by the trial court in appointing Tomberlin—her role as an impartial mediator.

4. Court-Identified Deficiencies in Appellant’s Petition

Part of the court’s attempt to find a third party to act as Sharon’s guardian apparently stemmed from certain past decisions and actions of the parties. The court found fault with Thompson on several issues the court viewed as contrary to Sharon’s best interest. Specifically, the court suggested that Thompson’s statement to the family and to the media that she and Sharon are lesbians was an invasion of privacy, perhaps rising to the level of an actionable tort. The court also took issue with Thompson taking Sharon to public events, including some gay and

lesbian-oriented gatherings and other community events where Thompson and Sharon were featured guests. Finally, the court concluded that Thompson's solicitation of legal defense funds and her testimony that she had been involved in other relationships since Sharon's accident raised questions of conflicts of interest with Sharon's welfare.

The record does not support the trial court's concern on any of these issues. First, while the extent to which Sharon had publicly acknowledged her sexual preference at the time of the accident is unclear, this is no longer relevant. Since the accident, Sharon's doctors and therapists testified that Sharon has voluntarily told them of her relationship with Thompson. Moreover, Sharon's doctor testified that it was in Sharon's best interest for Thompson to reveal the nature of their relationship promptly after the accident because it is crucial for doctors to understand who their patient was prior to the accident, including that patient's sexuality.

Second, there was no evidence offered at the hearing to suggest that Sharon is harmed or exploited by her attendance at public events. In fact, the court authorized Sharon to travel with Thompson to receive an award at the National Organization for Women's annual convention. A staff person who accompanied Sharon to one of these events testified that Sharon "had a great time" and interacted well with other people. A doctor who observed Sharon at two different events testified that Sharon enjoyed herself and was happy to be in attendance. The only negative testimony about these outings consisted of speculation from Schroeder and Debra Kowalski that they did not think Sharon would enjoy the events, particularly those that were gay and lesbian-oriented in nature. They were, however, never in attendance and had no opportunity to evaluate Sharon's reaction firsthand.

Finally, there is no evidence in the record about a conflict of interest over Thompson's collection of defense funds or her other personal relationships. The evidence showed the money was raised in Thompson's own name to help defray the cost of years of litigation and that none of it was used for her personal expenses. Thompson testified that whatever extra money raised was used to purchase special equipment for Sharon, such as her voice machine, motorized wheelchair, hospital bed, and a special lift for transfers.

Only one doctor was questioned about the issue of Thompson's social life. The doctor routinely deals with families of brain-injured patients, and testified that each family deals with such a crisis in its own way. She said it is not uncommon for spouses to make changes in their personal lives while maintaining their commitment to the injured person. Thompson testified that anyone who is involved in her life understands that she and Sharon are "a package deal," and that nothing would interfere with her commitment to Sharon's well-being. The other witnesses who testified about Thompson's interaction with Sharon over the past seven years could find no reason to question Thompson's commitment to Sharon's best interests....

CONCLUSION

While the trial court has wide discretion in guardianship matters, this discretion is not boundless. The Minnesota guardianship statutes are specific in their requirement that factual findings be made on a guardian's qualifications. The statutes also consistently require the input of the ward where possible. Upon review of the record, it appears the trial court clearly abused its discretion in denying Thompson's petition and naming Tomberlin guardian instead.

All the medical testimony established that Sharon has the capacity reliably to express a preference in this case, and she has clearly chosen to return home with Thompson if possible. This choice is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded respect. Thompson's suitability for guardianship was

overwhelmingly clear from the testimony of Sharon's doctors and caretakers. At the same time, evidence of Tomberlin's qualifications was not in the record. Moreover, Tomberlin's status as a neutral party was undermined by evidence of her close ties to the Kowalskis and her expressed intention to relocate Sharon, contrary to the doctors' recommendations that Sharon have a less-restrictive environment near Thompson.

We reverse the trial court and grant Thompson's petition. While under Minn.Stat. §525.56, subd. 1, a guardian always remains subject to court control, it should be made clear that this court is also reversing specific restrictions on the guardian's decision-making power that might be read into the trial court order. She is free to make whatever decisions she and the doctors feel are necessary to achieve Sharon's best interests, including decisions regarding Sharon's location. Thompson is, however, directed to continue efforts at accommodating visitation between Sharon and the Kowalskis, without unreasonable restrictions....

Notes and Questions

1. The *Kowalski* case presents the situation of a lesbian couple who were not open about their sexuality or the nature of their relationship with other people, including their family members. Consequently, when it became necessary to prove the nature of the relationship in court, solid evidence was lacking. What steps might a couple take to create such evidence? Is it possible to do so without "coming out" to relatives, business associates, or neighbors?

2. Karen's legal battle to gain the right to see Sharon lasted over 8 years. During some of that period, Sharon's father, as guardian, prevented Karen from having any contact with Sharon. Many lawyers advise clients who are in committed same-sex relationships to execute a durable power of attorney for health care (sometimes called a health care proxy) naming the partner as the "attorney-in-fact," who is empowered to make medical decisions for a disabled partner. These durable power of attorney statutes co-exist in a state statutory scheme that continues to authorize a court to appoint a guardian for anyone who is incompetent. In other words, merely having a durable power of attorney will not prevent a court from appointing a guardian for an incapacitated person. What if Sharon had named Karen as her attorney in fact in a valid durable power of attorney for health care? Would that have prevented Sharon's father from asserting his rights over Karen's? What legal issue would need to be resolved to answer this question? See Minn. Stat. §524.5-315(c), which provides: "If a health care directive is in effect, absent an order of the court to the contrary, a health care decision of the guardian takes precedence over that of an agent."

As a matter of policy, once someone is incompetent, should their earlier choices regarding durable powers of attorney (for health care or for financial matters) be irreversible? If you were drafting a power of attorney statute, what provisions would you include to balance the interest of the principal in having the named attorney continue in office despite protests from family members, as against the interest in providing checks on attorneys who might abuse their incapacitated principals?

3. California's domestic partnership legislation, in its early phases, dictated a revision of standard forms used in California for guardian designation purposes, to make clear that same-sex partners could be designated as potential guardians.

C. Litigating for Spousal Benefits

1. The Putative Spouse Doctrine

State recognition of the marital relationship grants numerous benefits to the two spouses. Yet even when the state refuses to recognize the marital relationship, policy often dictates that two people who resemble a married couple ought to be treated by the state as though they were married. A common example of this situation is the case of the putative spouse. However, to claim “putative spouse” status, the person must believe in good faith that a valid marriage existed. In addition, the good faith belief in the marriage must generally be a reasonable belief.

Estate of Hall

707 N.E.2d 201 (Ill. App. 1998)

Justice RAKOWSKI delivered the opinion of the court:

Andrea Hall died intestate on November 16, 1996. Petitioner, Regina Pavone, Hall’s life-partner, filed a petition in the probate court seeking a surviving spouse share of Hall’s estate pursuant to section 2-1 of the Probate Act of 1975. Respondent, William Hall, is the administrator of Hall’s estate. Respondent filed a motion to dismiss petitioner’s claim contending that petitioner cannot be a surviving spouse because Illinois does not recognize same-sex marriages. The trial court granted respondent’s motion to dismiss, and petitioner appeals.

On appeal, as in the trial court, petitioner challenges the constitutionality of Illinois’ prohibition of same-sex marriages. Specifically, petitioner argues that the prohibition violates the equal protection provisions of the United States and Illinois Constitutions. Nevertheless, finding that this issue is not justiciable within the context of this case, we do not reach the merits of petitioner’s contentions. For the reasons that follow, we affirm.

I. Background

Petitioner made the following allegations in her third amended verified complaint. Hall and petitioner met each other in February 1988. Shortly after that, they began dating exclusively and ultimately moved in together. On October 17, 1991, their relationship was solidified when Hall quitclaimed to petitioner one half interest in the property at 321 Cherry Court in Glenview, Illinois.

In September 1993, Hall and petitioner sold the 321 Cherry Court property and used the proceeds to purchase a home located at 1107 West Pratt in Chicago. The financing for this property was secured by both Hall and petitioner.

On December 23, 1995, Hall and petitioner were “married” in a private ceremony. At that ceremony, they exchanged vows and wedding bands. Although Hall and petitioner wished to formalize their union by obtaining a marriage license, they did not apply for one, reasoning that any attempt would be futile in light of Illinois’ prohibition on same-sex marriages.

Nevertheless, from December 23, 1995, onward, Hall and petitioner considered themselves married. They shared the above mentioned home at 1107 West Pratt as well as a “special community of thoughts and deep emotional attachment.” They also held themselves out to the world as being “married,” including, but not limited to, friends and immediate family members. Moreover, they were dependent on each other for the maintenance and upkeep of their home as well as daily living expenses and necessities of life. They commingled their funds through joint bank accounts, joint lines of credit, and purchases such as boats and cars. Hall and petitioner’s obligations also included the financial support of Hall’s sister and Hall’s minor son.

In sum, petitioner contends that her relationship with Hall mirrored that of a heterosexual couple legally joined through marriage; it “exhibited all of the pertinent attributes associated with matrimony and a long term, enduring commitment between two consenting adults.”

II. Justiciability of Petitioner’s Constitutional Challenge

Petitioner’s third amended complaint sought a surviving spouse share of Hall’s estate pursuant to section 2-1 of the Probate Act. Section 2-1 provides in pertinent part:

“The intestate real and personal estate of a resident decedent * * * descends and shall be distributed as follows:

(a) If there is a surviving spouse and also a descendant of the decedent, 1/2 of the entire estate to the *surviving spouse* and 1/2 to the decedent’s descendants per stirpes.” (Emphasis added.)

Respondent, however, contended that petitioner cannot obtain surviving spouse status since Illinois law prohibits same-sex marriages. See 750 ILCS 5/212(a)(5) (West 1996) (prohibiting marriages between two individuals of the same sex); 750 ILCS 5/213.1 (West 1996) (declaring that “marriage between 2 individuals of the same sex is contrary to the public policy of [Illinois]”); 750 ILCS 5/201 (West 1996) (stating the formalities of a valid marriage as one that is between a man and a woman licensed, solemnized and registered). In turn, petitioner argued that the prohibition against same-sex marriages is unconstitutional. Thus, the parties redefined the issue from whether petitioner was entitled to a surviving spouse share of Hall’s estate to whether Illinois’ proscription on same-sex marriages is unconstitutional.

Unlike the former issue, we believe the latter issue is not justiciable in this case. Specifically, assuming we declare the proscription on same-sex marriages unconstitutional and void *ab initio*, the fact remains that petitioner and Hall were never legally married. Although the same-sex marriage prohibition explains why petitioner and Hall did not legally marry, a declaration that the same-sex marriage prohibition is unconstitutional and void *ab initio* will not change petitioner’s marital status. Because Illinois law and public policy preclude us from conferring “spouse status” upon petitioner, a necessary requisite for obtaining a surviving spouse share under the Probate Act, we find that the issue is moot because it does not affect the actual controversy between the parties. We also find that petitioner lacks standing to raise the issue in this case. Thus, because an adjudication of petitioner’s constitutional challenge brings her no closer to obtaining surviving spouse status, we must exercise judicial restraint and decline to address her challenge.

A. Mootness of Petitioner’s Constitutional Challenge

To save petitioner’s challenge from mootness, a declaration that the proscription is unconstitutional must have some bearing on the actual controversy of whether she is entitled to a spousal share of Hall’s estate. It is axiomatic that for one to be entitled to a surviving spouse share under the Probate Act that individual must be considered a spouse of the decedent. Thus, to determine whether petitioner’s constitutional challenge is a moot point, we must decide whether, assuming the prohibition on same-sex marriages is declared unconstitutional and void *ab initio*, the relationship between Hall and petitioner can be construed to be either a valid marriage or be of such nature that we can confer the rights of a “spouse” upon petitioner. See *In re Mac Harg*, 120 Ill.App.3d 753, 755, 76 Ill.Dec. 500, 458 N.E.2d 1154 (1983) (“‘spouse’ refers to a legal wife or husband”).

It is clear from the alleged facts that the relationship did not meet the statutory requirements for a valid marriage. Under the Illinois Marriage and Dissolution of Marriage Act

(Marriage Act), the formalities for a lawful marriage require “[a] marriage between a man and a woman licensed, solemnized and registered as provided in th[e] Act.” 750 ILCS 5/201 (West 1996). Notwithstanding the alleged unconstitutional requirement that the couple be a man and a woman, petitioner has failed to allege sufficient facts to establish a valid marriage. Petitioner and Hall did not obtain a license nor did they register their marriage. Petitioner’s pleadings also lack any allegation that the alleged solemnization was performed by someone authorized under the law. See 750 ILCS 5/209 (West 1996). Consequently, petitioner has failed to allege facts establishing a marriage that meets the requirements of the Marriage Act.

Although Illinois courts have conferred “spouse” status upon individuals where their marriages lacked compliance with one of the directory requirements of the Marriage Act, we find these cases inapplicable to the instant case. See, e.g., *Haderaski v. Haderaski*, 415 Ill. 118, 119–22, 112 N.E.2d 714 (1953) (lack of license in otherwise lawful marriage did not invalidate marriage, as the statute requiring a license was directory and not mandatory). All of these cases involved situations where the party seeking enforcement of the marriage believed in good faith that he or she was lawfully married and, but for the failure to comply with a directory requirement, was otherwise lawfully married. However, in the instant case, although petitioner and Hall may have subjectively believed that the ceremony and exchange of vows and rings constituted a marriage between themselves, they nonetheless knew that the marriage was not legally recognized. This is evidenced by their failure to seek a marriage license because of their belief that any effort would have been futile under Illinois law.

The fact that petitioner knew that she was not lawfully married also precludes her from obtaining spouse status through the putative spouse provision of the Marriage Act. Section 305 of the Marriage Act provides that:

“Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights.” 750 ILCS 5/305 (West 1996).

In this case, petitioner admits that she knew that she was not legally married to Hall. Consequently, the putative spouse provision fails to confer spouse status upon petitioner.

Because case law and the putative spouse provision fail to provide petitioner with spouse status, the only remaining option is to consider whether the relationship between petitioner and Hall is a legal equivalent to marriage. This proposition, however, must fail because treatment of their relationship as a legal equivalent to marriage would be tantamount to recognizing common law marriage, which Illinois outlawed in 1905....

[I]n this case the relationship between petitioner and Hall was, at all times, nothing more than a private contract terminable at will. Assuming *arguendo* that we were to address petitioner’s issue and declare Illinois’ proscription on same-sex marriages unconstitutional and void *ab initio*, the fact that petitioner and Hall never entered into a legally binding marriage would nevertheless remain. Thus, petitioner still would not be entitled to a surviving spouse share of Hall’s estate. Affirmed and remanded.

Notes and Questions

1. See also *In re Estate of Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993), appeal dismissed, 624 N.E.2d 696 (N.Y. 1993), similarly holding that a surviving gay partner is not a “spouse” for purposes of the spousal election statute under New York law. The plaintiff in *Cooper*, however, argued that applying such a limited definition of “spouse” violated equal protection. The court treated the claim as a challenge to the New York marriage law and, citing *Baker v. Nelson*, the 1971 Minnesota marriage case, held that there was no constitutionally-protected right for same-sex couples to marry. Does this adequately respond to the plaintiff’s argument? Might the exclusion of a surviving same-sex partner from the right of election violate equal protection, even if the equal protection is not construed to require the state to allow same-sex partners to marry? Is there a logical difference between a challenge to a state law that limits marriage to opposite-sex couples and a challenge to state laws that limit certain benefits to married couples?

2. What result in *Hall* and in *Cooper* if the same-sex couples had been married in Massachusetts after May 17, 2004? Illinois (*Hall* case) at the time had a statute providing that same-sex marriages were invalid., but New York (*Cooper* case) never had such a statute. Could Hall’s partner rely on the putative spouse doctrine to avoid the baby DOMA?

3. What result in *Hall* and in *Cooper* if the couples had been “married” in San Francisco or in New Paltz by public officials willing to perform marriage ceremonies for same-sex couples in the absence of licenses issued by the state? Would the putative spouse doctrine be available? See Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 *Tulane L. Rev.* 1 at 6 (1985):

If a marriage is declared to be null or void, that declaration is retroactive to the day that the null marriage was contracted....Thus, generally, a marriage declared null produces no effects of marriage whatsoever....

The putative marriage doctrine is a device developed to ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married. A putative marriage, therefore, is a marriage which is in reality null, but which allows the civil effects of a valid marriage to flow to the party or parties who contracted it in good faith. It is a marriage which has been solemnized in proper form and celebrated in good faith by one or both parties, but which, by reason of some legal infirmity, is either void or voidable. The doctrine developed as a canon law palliative to protect those persons who went through a marriage ceremony in the good faith belief that the marriage was valid and proper, when it was actually null due to some impediment. It provides that, notwithstanding its nullity, the civil effects of a legal marriage flow to the parties who, in good faith, contract an invalid marriage.

4. Can the “putative spouse” doctrine apply to domestic partnerships or civil unions? See *In re Domestic Partnership of Ellis and Arriaga*, 76 Cal. Rptr. 3d 401 (Cal. App. 2008)(partners had signed domestic partner affidavit and it was notarized, but the partner who was to mail the form in to the Secretary of State, Arriaga, never did so; in an action for dissolution, the other

partner, Ellis, claimed he reasonably relied in good faith on the belief that they were registered; court held that so long as Ellis can prove his claim he can proceed under a putative domestic partnership theory). See also *Ceja v. Rudolph & Sletten, Inc.*, 56 Cal.4th 1113 (2013)(putative spouse case clarifying that *subjective* good faith belief in marriage or partnership registration is sufficient and plaintiff need not prove that belief was objectively reasonable).

But see *Estate of Langman*, 2014 WL 2708758 (Cal. App.)(not reported and not citeable as authority under California rules). In this case, two men lived together and when one died the survivor tried to claim rights as the putative registered domestic partner of the deceased. The evidence was in dispute. Was the surviving partner paid \$3,000 a month as an allowance from his lover or as salary for taking care of the house and the deceased? The surviving partner offered declarations from various witnesses to support the nature of the relationship but none of those witnesses were called at trial. Witnesses must appear in person in a contested proceeding which this was. The surviving partner gave inconsistent statements about the nature of his relationship with the deceased, although some of this might be explained by the fact that, if they were in fact lovers, they were partially closeted. There was nothing in writing to support the claim regarding the relationship or the attempted registration. No witness ever saw a registration form and no witness was able to declare that he or she had been told by either man that a registration had been signed. The claimant testified that they both signed the form before a notary who came to the home. But he could not locate the notary and there was nothing other than his testimony to support the claim. The trier of fact discounted his testimony and found insufficient evidence of a good faith belief that they had registered as partners. The Court of Appeal affirmed. Regarding the question of subjective good faith belief as the standard, the Court of Appeal pointed out that on its reading of the record the trial court had determined that the claimant did not have any sort of belief that he was a registered domestic partner.

California Family Code

§2251. Status of putative spouse; division of community or quasi-community property

(a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:

(1) Declare the party or parties to have the status of a putative spouse.

(2) If the division of property is in issue, divide, in accordance with Division 7 (commencing with Section 2500), that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. This property is known as “quasi-marital property”.

2. Quasi-marriage

In a 1995 case involving an unmarried opposite-sex couple, the Supreme Court of Washington crafted a judicial rule recognizing the relationship. If a partner can prove the existence of a “meretricious” relationship, then certain property rights, similar to the rights spouses have in community property, arise. According to the court, a relationship must satisfy three elements to be meretricious: (1) it must be “stable,” (2) it must be “marital-like,” and (3) the parties must “cohabit with knowledge that a lawful marriage between them does not exist.” See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995). In *Connell*, and subsequent cases, proof

of a meretricious relationship meant that all property acquired during the relationship was presumed to be jointly owned and subject to equitable division when the parties separated. Although the presumption of joint ownership can be rebutted, the fact that legal title to the property is in one party's name is not sufficient to rebut the presumption.

In *Vasquez v. Hawthorne*, the question facing the court of appeals was whether the surviving partner in a same-sex couple could claim the rights accorded opposite-sex couples found to be in a meretricious relationship. The intermediate appellate court held that the surviving partner had no property rights, explaining:

We deduce from *Connell* and its predecessors that a “meretricious relationship” is one where the parties may legally marry. And it is clear that these courts implicitly assumed that a meretricious relationship can only exist between a man and a woman. In Washington, there are statutory limitations on who may marry. We hold that these limitations are relevant in determining whether a relationship is sufficiently “marital-like” to be meretricious. To marry, parties must be over the age of 18 and mentally competent. Further, neither party may be married to another person, the parties must be of the opposite sex, and the parties must not be nearer of kin than second cousins.

994 P.2d 240 at 242–43 (Wash. App. 2000).

Vasquez asked the Supreme Court of Washington to reverse the holding of the court of appeals.

Vasquez v. Hawthorne
33 P.3d 735 (Wash. 2001)

JOHNSON, J.

The issue in this case is whether the facts were sufficient to grant summary judgment based on the equitable doctrine of meretricious relationship. Granting summary judgment for the plaintiff, the trial court held Frank Vasquez (Vasquez) had proved he was involved in a long term, stable, cohabiting relationship with the decedent, Robert Schwerzler (Schwerzler). The trial court further found the property acquired during the relationship was the joint property of Vasquez and Schwerzler, and that it passed to Vasquez upon Schwerzler's death and was not part of the estate. Since Schwerzler died without a will, the trial court drew an analogy to community property laws and the probate statute governing intestate distribution in awarding property. The Court of Appeals reversed, reasoning that because meretricious relationships are marital-like and persons of the same sex cannot be legally married, a meretricious relationship cannot exist between members of the same sex. The Court of Appeals, however, remanded for trial on other equitable theories. We granted review.

We hold the trial court erred in resolving this case on summary judgment. The record on summary judgment is inadequate to reach the legal issue presented. It was further error for the Court of Appeals to reach the merits of the case. We vacate the decision of the Court of Appeals and remand this case to the superior court for trial.

FACTS

Upon Schwerzler's death, Vasquez filed a claim against the estate asserting he and Schwerzler had formed an economic community and he was entitled to an equitable share of the property. Joseph Hawthorne (Hawthorne), who was appointed personal representative of the

estate, denied the claim. Vasquez filed suit in superior court, asserting his claim under several equitable theories. Vasquez made a motion for partial summary judgment requesting relief under the meretricious relationship doctrine. To decide the motion, the trial court considered several conflicting affidavits of the parties. The trial court made two rulings relevant to this case. First, the trial court determined Vasquez and Schwerzler had a meretricious relationship and the property acquired during the course of their relationship was presumed jointly owned. Second, the trial court awarded some of the property to Vasquez by analogizing to our probate laws (i.e., community-like property goes to the survivor). Hawthorne appealed. The Court of Appeals reversed and remanded the case for trial on the theories of implied partnership and equitable trust, which had not been decided by the trial court. We granted Vasquez's petition for review.

ANALYSIS

A summary judgment motion can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

The facts of this case are contested through the affidavits of the parties. First, the nature of the relationship between Vasquez and Schwerzler is disputed. Vasquez presents affidavits asserting he and Schwerzler were a same sex couple. The estate offers affidavits contending Vasquez and Schwerzler were not a same sex couple and did not hold themselves out as such. Vasquez offers as proof of their relationship that he and Schwerzler lived together from April 1967 until October 1995, with the exception of two years in the early 1970s during which they lived in different apartments in the same building. The estate counters that no such relationship existed. Although they lived together, Vasquez and Schwerzler did not travel together on vacation and each had his own bedroom.

Similarly, the nature of Vasquez's and Schwerzler's business relationship is disputed. On the one hand, Vasquez contends the couple made their living recycling boxes and bags. Schwerzler managed their financial affairs and any remuneration Vasquez earned was contributed to their economic community. On the other hand, the estate argues that Schwerzler inherited the bag business from his father and any property he owned was derived from either his inherited wealth or through his separate businesses. Schwerzler placed all property acquired during their 28 years together in his own name, including the house he and Vasquez shared, a life insurance policy, two automobiles, and a checking account. The estate argues Vasquez was merely a handyman and any property found in Schwerzler's home should be included in his estate and pass to his legal heirs.

On review, we conclude the trial court did not have sufficient undisputed factual information to resolve this case on its merits. From the affidavits, the trial court could not determine what type of relationship existed between Vasquez and Schwerzler. Nor could it conclude what property acquired during the course of their relationship could be subject to equitable division. Without proof of the facts asserted, it was not possible for the trial court to know the character of the relationship between Schwerzler and Vasquez, the nature and extent of contribution to any property acquired by the parties, and what equitable theories are most appropriate. Therefore, we must remand this case for the trial court to review under the various theories Vasquez asserts.

Vasquez presented claims for equitable relief under several theories, including meretricious relationship, implied partnership, and equitable trust. When equitable claims are brought, the focus remains on the equities involved between the parties. Equitable claims are not dependent on the “legality” of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties. For example, the use of the term “marital-like” in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do. Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case. Even when we recognize “factors” to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment. In this case, the trial court must weigh the evidence to determine whether Vasquez has established his claim for equitable relief.

Because we remand this case for trial, we need not resolve the evidentiary issues raised by the estate concerning the deadman’s statute. Any objection to specific testimony will be resolved at trial.

CONCLUSION

We vacate the decision of the Court of Appeals, reverse the trial court’s granting of the motion for partial summary judgment, and remand this case for trial.

ALEXANDER, C.J. (concurring).

I agree with the majority that we should remand this case to the trial court so that it may consider whether Frank Vasquez can establish any of his claims for relief under the equitable doctrines of implied partnership and equitable trust. I write separately simply to indicate my agreement with Justice Sanders’ view that the meretricious relationship doctrine is unavailable to a party who seeks relief when, as is the case here, one party to the alleged meretricious relationship is deceased. I reach that conclusion because the meretricious relationship doctrine is limited in that the trial court is to apply, by analogy, the provisions of [Washington’s equitable division at divorce statutes] when it distributes the property of persons who have been living in a “marital-like relationship.” Indeed, we developed this equitable doctrine because the legislature has not provided a statutory means of resolving the property distribution issues that arise when unmarried persons, who have lived in a marital-like relationship and acquire what would have been community property had they been married, separate.

On the other hand, the laws of intestacy, RCW 11.04.015.290, dictate how property is to be distributed when an individual dies without leaving a will. Accordingly, we have held that the meretricious relationship doctrine does not apply when a relationship between unmarried cohabitants is terminated by death of one cohabitant. Thus, under the circumstances of this case, I would hold that the meretricious relationship doctrine is not an available form of equitable relief. The question of whether the doctrine has application when parties of the same sex separate after having lived together in a long-term stable relationship, we should leave to another day when that issue is properly before us.

SANDERS, J. (concurring)

For Vasquez to prevail on summary judgment it is necessary to establish, without

material factual dispute, the existence of a meretricious relationship. This requires the prima facie presence of several factors:

Relevant factors establishing a meretricious relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.

I agree with the majority that many of the traditional factors associated with the existence of a meretricious relationship, at least when considered in isolation, are certainly subject to material factual dispute in the record before us.

However there is one fact, that these individuals are of the same sex, which distinguishes this case from others preceding it. The legal consequence of this undisputed fact is central to the briefing of the parties as well as amici Northwest Women's Law Center and Lambda Legal Defense and Education Fund. Moreover, it is that fact which the Court of Appeals cited as determinative, prompting our review. Therefore the majority opinion, which avoids meaningful discussion of this issue, provides somewhat less satisfaction than can be obtained from kissing one's sister: the majority reverses the summary judgment in favor of Vasquez, remands for further proceedings consistent with its opinion, but fails to articulate potentially dispositive legal criteria to aid the trial court in its task.

As to the merits of the meretricious relationship claim, I can do no better than defer to the unanimous and thoughtful opinion of the Court of Appeals.

For any claim to be premised upon a meretricious relationship, there must first of course be such a relationship. Our previous case law, little of which is cited in the majority opinion, makes it abundantly clear that whether even uncontested facts satisfy the necessary requirements to establish such a relationship is a question of law subject to de novo review.

The necessary but not sufficient requirement that the cohabitating couple possess the requisite legal ability to wed is quite pronounced. No case holds that even a cohabiting heterosexual couple can successfully establish a meretricious relationship where either lacks the legal entitlement to marry. I therefore posit if that is the requirement for a heterosexual couple, it must equally be the requirement for a homosexual couple....

Notes and Questions

1. Rather than return to court, the parties, Vasquez and Hawthorne, entered into a settlement under which Vasquez was given the right to continue living in the home owned by the deceased until his own death.

2. If a same-sex couple is "breaking up," do you think they can rely on the *Vasquez* opinion to claim the right to equitable division? If so, what exactly would they have to prove in order to qualify as a meretricious relationship? What if one of the partners asserts that, although they have lived together for over 20 years, they have not had a sexual relationship for the past 17 years, did not share the same bedroom, but merely continued to live together out of convenience?

Gormley v. Robertson 83 P.3d 1042 (Wash. App. 2004)

KATO, J.

This appeal involves the division of property after the intimate domestic relationship ended between two single women, Lynn Gormley and Julia Robertson, who had cohabitated for

some 10 years. The trial court applied the meretricious relationship doctrine to this same-sex couple in dividing their assets and liabilities. We affirm.

Between July 1988 and August 1998, Ms. Gormley and Dr. Robertson lived together. Both were lieutenant commanders in the Navy when they met. Dr. Robertson is a physician; Ms. Gormley is a nurse and administrator. They began their relationship having nearly equal incomes, but Dr. Robertson earned significantly more by the time it ended. They pooled their resources and acquired property as well as debt. They had a joint banking account that was used to pay all monthly obligations, whether pre-existing or incurred separately or jointly. In 1992, the couple borrowed \$20,000 from Ms. Gormley's father. The money was used to consolidate debts, including paying off a debt of Dr. Robertson's that was incurred before their relationship began. The balance at separation was \$7,188. The last joint payment on the loan was made on September 17, 1998. In 1993, Ms. Gormley and Dr. Robertson bought a Yakima home that was put only in the doctor's name for convenience and financing. Payments were made from the joint account into which they both deposited their incomes. They used joint funds to improve, decorate, and furnish the home. The net equity in the home at the time of separation was \$35,255. They spent at least \$38,704 on improvements.

When they separated in 1998, a dispute over property arose. Seeking equitable relief based on constructive trust, implied partnership, joint tenancy, joint venture, conversion, implied contract, and joint acquisition, Ms. Gormley sued Dr. Robertson. Ms. Gormley was later permitted to add partition as another theory of recovery.

Judge F. James Gavin dismissed on summary judgment the implied partnership and joint venture claims. Based on the Court of Appeals decision in *Vasquez v. Hawthorne*, 99 Wash.App. 363, 994 P.2d 240 (2000), Judge Gavin also dismissed any claims based on the theories of marriage and meretricious relationship "because these theories do not apply in Washington to a same sex, life partnership relationship." After the summary judgment order but before trial, our Supreme Court, at 145 Wash.2d 103, 33 P.3d 735 (2001), reversed and vacated the Court of Appeals' decision. After additional briefing, the trial judge, Heather K. Van Nuys, determined she was not bound by Judge Gavin's decision and agreed with Ms. Gormley's position that the meretricious relationship doctrine applied to same-sex relationships.

Dr. Robertson contends the court erred by concluding the meretricious relationship doctrine was applicable to this same-sex couple.

The court's findings of fact are entitled to deference while conclusions of law are reviewed de novo. Here, Dr. Robertson assigns no error to any of the court's findings of fact relating to the factors it considered in determining whether a meretricious relationship existed. They are thus verities on appeal.

In *Connell v. Francisco*, 127 Wash.2d 339, 346, 898 P.2d 831 (1995), the court stated that "[a] meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." Non-exclusive factors establishing a meretricious relationship include "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."

The trial court made detailed findings of fact reflecting its consideration of these factors. Each weighs in favor of finding a meretricious relationship. Since these findings are unchallenged, the next inquiry is whether the court's conclusion that a meretricious relationship existed is supported by them. *Dumas v. Gagner*, 137 Wash.2d 268, 280, 971 P.2d 17 (1999). Had Ms. Gormley and Dr. Robertson not been a same-sex couple, the trial court could only conclude

that a meretricious relationship existed between them. But because they were not, the issue squarely presented, and undecided by our Supreme Court in *Vasquez*, is whether the meretricious relationship doctrine applies to same-sex couples.

Division Two of this court has held that “a same-sex relationship cannot be a meretricious relationship because such persons do not have a ‘quasi-marital’ relationship.” *Vasquez*, 99 Wash.App. at 369, 994 P.2d 240. Because persons of the same sex cannot legally marry, they are “not entitled to the rights and protections of a quasi-marriage, such as community property-like treatment.” But it is of no consequence to the cohabitating couple, same-sex or otherwise, whether they can legally marry. Indeed, one of the key elements of a meretricious relationship is knowledge by the partners that a *lawful* marriage between them does not exist.

Moreover, Division Two’s reliance on “*Connell* and its predecessors,” as indicating that a meretricious relationship can exist only between a man and a woman, is misplaced. *Id.* at 367–68, 994 P.2d 240. Those cases all addressed relationships between men and women simply because same-sex couples were not involved. Relying on this historical perspective not only ignores the present, but also makes too much of the past.

In refusing to find a meretricious relationship, Division Two also stated: “We find no legal basis for judicially extending the rights and protections of marriage to same-sex relationships. Such an extension of the law is for the Legislature to decide, not the courts.” *Vasquez*, 99 Wash.App. at 368–69, 994 P.2d 240.

Whether same-sex couples can legally marry is for the legislature to decide. But the rule that courts must “‘examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property’” is a judicial, not a legislative, extension of the rights and protections of marriage to intimate, unmarried cohabitants. See *In re Marriage of Lindsey*, 101 Wash.2d 299, 304, 678 P.2d 328 (1984) (quoting *Latham v. Hennessey*, 87 Wash.2d 550, 554, 554 P.2d 1057 (1976)); *Vasquez*, 145 Wash.2d at 109, 33 P.3d 735 (Alexander, C.J., concurring). We hold that the meretricious relationship doctrine should be extended to same-sex couples. The trial court is affirmed.

BROWN, C.J. (concurring).

I disagree with the meretricious relationship rationale as the basis for the majority’s decision. This case is best viewed as a property dispute filed as a civil suit, which it was, and decided in equity, not a domestic relations case. The parties were involved in a conceded 10-year, same-sex cohabitation relationship. With compassion for the parties and with the respect and dignity deserved by and accorded to all persons coming to courts for judicial dispute resolution, our duty remains to competently apply existing law to the facts presented and not venture into policy making best left to the legislature. In my view, based upon existing law, we should affirm based solely upon the facts and resulting equities between the parties, not the legal status of their relationship.

Our Supreme Court, *Vasquez v. Hawthorne*, 145 Wash.2d 103, 107, 33 P.3d 735 (2001) (*Vasquez* II), held the court in *Vasquez v. Hawthorne*, 99 Wash.App. 363, 994 P.2d 240 (2000) (*Vasquez* I) erred in reaching the merits of deciding whether a meretricious relationship existed in a same-sex couple context. But, the *Vasquez* II majority did not approve or disapprove the meretricious relationship rationale of *Vasquez* I. It left that decision for another time. For now, I would follow the existing guidance from *Vasquez* II, use a fact-equity analysis, and reject the meretricious relationship rationale for same-sex couples.

The *Vasquez* I court extensively analyzed the history of the meretricious relationship

doctrine before deducing that a meretricious relationship is one where the parties can legally marry. *Vasquez I*, 99 Wash.App. at 367, 994 P.2d 240. Our legislature has defined a marriage as a civil union between a man and woman. RCW 26.04.010(1). The *Vasquez I* court held a meretricious relationship is a “quasi-marital” relationship; as such “we accord some of the protections of marriages and community property law.” *Vasquez I*, 99 Wash.App. at 368, 994 P.2d 240. RCW 26.16.030 clearly limits the application of community property laws to opposite-sex relationships. No precedent exists for applying marital concepts, either rights or protections, to same-sex relationships. *Id.* “Such an extension of the law is for the Legislature to decide, not the courts.” *Id.* at 369, 994 P.2d 240.

Here, Judge F. James Gavin summarily, and in my view correctly, rejected Ms. Gormley’s meretricious relationship theories based upon the reasoning of *Vasquez I*. Judge Heather K. Van Nuys, the trial judge, incorrectly interpreted *Vasquez II* as giving her the authority to ignore Judge Gavin’s ruling before she decided a meretricious relationship can and did exist for this same-sex couple.

Significantly, the *Vasquez II* court vacated the court of appeals decision, but also reversed the trial court, concluding “the trial court did not have sufficient undisputed factual information to resolve this case on its merits.” *Vasquez II*, 145 Wash.2d at 107, 33 P.3d 735. However, the Supreme Court provided specific, pertinent guidance for us now:

When equitable claims are brought, the focus remains on the equities involved between the parties. Equitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties. For example, the use of the term ‘marital-like’ in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do. *In re Marriage of Pennington*, 142 Wash.2d 592, 601, 14 P.3d 764 (2000). Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case. Even when we recognize ‘factors’ to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence.

Id. at 107–8, 33 P.3d 735.

Chief Justice Alexander, concurring, noted the question of whether the meretricious relationship doctrine applies after a same-sex couple separates should be left “to another day.” Justice Sanders, in his concurrence, agreed with the *Vasquez I* rationale regarding the merits of the meretricious relationship claim and observed the majority “fails to articulate potentially dispositive legal criteria” on the subject.

Considering the *Vasquez II* majority guidance, together with the concurrences noted, and the persuasive reasoning of *Vasquez I*, I would hold the meretricious relationship doctrine does not directly or by analogy apply to same-sex couples. Thus, the other phrases coined by the trial court, “intimate domestic union” or “intimate domestic partnership,” to the extent they are meant by analogy to embody quasi-marital relationships, are equally inapt.

Although I reject an application of the meretricious relationship rationale here, the trial court properly acted within its fact-finding discretion and inherent equitable power by alternatively focusing upon the equities between the parties when resolving this civil property dispute; therefore, it did not err in this respect. Accordingly, I concur in the result.

Notes and Questions

1. The phrase “meretricious relationship” carries certain negative connotations. More recently, the court has used the phrase “committed intimate relationship.” See *Olver v. Fowler*, 168 P.3d 348 (2007)(holding quasi-community property rule applies at the moment of death so that half the couple’s property vests in each partner and is administered in each partner’s estate).

2. If the quasi-community property rule treats unmarried partners as equally vested in property acquired during the relationship, then how much of the property should be included in the taxable estate of the first partner to die?

3. In a recent Montana Supreme Court opinion, the court affirmed the lower court’s application of the state’s equitable distribution principles to divide the assets upon dissolution of a long-term same-sex relationship. See *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009), also discussed *infra* at recognition of parent-child relationships.

3. Rights of Unmarried Couples

When two people marry, they enter into a relationship that has legal consequences. Although there is no official civil “marriage contract” as such, being married is very like entering into a contractual relationship in which the state has provided all the terms. In effect, the “marriage contract” provides a set of default rules for married couples. Sometimes one can opt out of the state’s terms, sometimes one cannot. If the couple does not opt out of the intestacy statutes by executing wills, for example, the default rule will control and spouses will inherit from each other under the intestacy provisions of state law. But if one spouse opts out of the intestacy statutes by executing a will that totally disinherits a spouse, most states have default rules that will protect the disinherited spouse from complete loss. See *Estate of Hall, supra* (denying the elective share to a same-sex cohabitant). Similarly, when spouses divorce, absent a prenuptial agreement, the state’s default rules will determine such issues as division of property.

Unmarried couples experience the same changes in their relationships as married couples do. One partner might die unexpectedly, or become disabled. Alternatively, the relationship might turn sour and the partners might decide it is best for them to terminate their cohabitation. In that case, the single household that they shared as one economic unit will need to be transformed into two economic units. Issues of property ownership or use, and issues of child custody (covered in the following chapter) will arise in the same manner that such issues arise in the case of divorce. But for unmarried couples, the state provides no useful default rules.

To deal with these issues responsibly, committed couples are advised to execute legal documents in the form of contracts, directives, and wills that will take care of the tragedies of death, disability, and “divorce.” A typical set of documents for a couple who wants to create a committed relationship by contract include: (1) A relationship, or living together, agreement, sometimes called a domestic partnership agreement, (2) A will, or a revocable living trust and pourover will, (3) A durable power of attorney for health care (health care proxy), (4) A durable general power of attorney (for financial arrangements and property management), (5) Burial directives. In addition, some partners, when it is possible to do so under state law, nominate each other as a “standby” guardian or conservator. The advance nomination helps to ensure that the partner will be named as guardian of the person or conservator of the property if the nominator becomes disabled. When there are children living in the household, additional documents may be needed to ensure that each partner has a legal right to make decisions regarding the child.

Even though these documents may be executed by the parties, there is no guarantee that third parties will honor the documents. Most states do not have statutory remedies for failure to honor powers of attorney. But see Florida Stat. s. 709.08(11), providing:

In any action under this section, including, but not limited to, the unreasonable refusal of the third party to allow an attorney in fact to act pursuant to the power, and challenges to the proper exercise of authority by the attorney in fact, the prevailing party is entitled to damages and costs, including reasonable attorney's fees.

Written contracts dealing with property ownership and support are generally enforceable under contract law. The same is true for express oral contracts, which are generally enforceable, subject to the Statute of Frauds. Some states will also enforce implied contracts. Unmarried couples have often had to contend with the common law rule that a court could refuse to enforce the terms of a contract if the terms violated clearly established public policy. Contracts that were the product of a meretricious relationship have sometimes been held unenforceable, because cohabitation outside the bonds of marriage was against public policy. These cases generally involved opposite-sex couples.

In most situations, cohabitants did not bother to execute written contracts spelling out their understanding of the relationship. When a long-term cohabitation ended, the less powerful and poorer partner would have a difficult time proving any right to continued support, or to property rights, including the right to remain in the homestead if it was owned by the other partner. In 1976, the California Supreme Court, handed down a significant opinion that instituted a sea change in the enforcement of contracts between unmarried cohabitants. The case stemmed from a claim by Michelle Triola Marvin against the actor Lee Marvin.

Marvin v. Marvin
557 P.2d 106 (Cal. 1976)

TOBRINER, Justice.

During the past 15 years, there has been a substantial increase in the number of couples living together without marrying.¹⁰ Such nonmarital relationships lead to legal controversy when one partner dies or the couple separates. Courts of Appeal, faced with the task of determining property rights in such cases, have arrived at conflicting positions: two cases have held that the Family Law Act requires division of the property according to community property principles, and one decision has rejected that holding. We take this opportunity to resolve that controversy and to declare the principles which should govern distribution of property acquired in a nonmarital relationship.

We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.

¹⁰. "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabited ten years ago." (Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation* (1974) 25 *Hastings L.J.* 1226.)

The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant's name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship. Since the trial court denied plaintiff a trial on the merits of her claim, its decision conflicts with the principles stated above, and must be reversed. * * *

Note

On remand, the trial court ordered Lee to pay Michelle \$104,000, which the court determined she needed as a form of rehabilitative support. Lee appealed and the appellate court reversed the trial court, explaining that it had not found for Michelle on any of the grounds approved by the Supreme Court, i.e., implied contract, quantum meruit, or any other equitable theory. The appellate court noted that Lee had supported Michelle and she had benefited from the relationship so that there was no resulting unjust enrichment to support the award of damages. *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. App. 1981).

Hewitt v. Hewitt

394 N.E.2d 1204 (Ill. 1979)

UNDERWOOD, Justice:

The issue in this case is whether plaintiff Victoria Hewitt, whose complaint alleges she lived with defendant Robert Hewitt from 1960 to 1975 in an unmarried, family-like relationship to which three children have been born, may recover from him "an equal share of the profits and properties accumulated by the parties" during that period. * * *

Plaintiff [alleged] the following bases for her claim: (1) that because defendant promised he would "share his life, his future, his earnings and his property" with her and all of defendant's property resulted from the parties' joint endeavors, plaintiff is entitled in equity to a one-half share; (2) that the conduct of the parties evinced an implied contract entitling plaintiff to one-half the property accumulated during their "family relationship"; (3) that because defendant fraudulently assured plaintiff she was his wife in order to secure her services, although he knew they were not legally married, defendant's property should be impressed with a trust for plaintiff's benefit; (4) that because plaintiff has relied to her detriment on defendant's promises and devoted her entire life to him, defendant has been unjustly enriched.

The factual background alleged or testified to is that in June 1960, when she and defendant were students at Grinnell College in Iowa, plaintiff became pregnant; that defendant thereafter told her that they were husband and wife and would live as such, no formal ceremony being necessary, and that he would "share his life, his future, his earnings and his property" with her; that the parties immediately announced to their respective parents that they were married and thereafter held themselves out as husband and wife; that in reliance on defendant's promises she devoted her efforts to his professional education and his establishment in the practice of pedodontia, obtaining financial assistance from her parents for this purpose; that she assisted defendant in his career with her own special skills and although she was given payroll checks for these services she placed them in a common fund; that defendant, who was without funds at the

time of the marriage, as a result of her efforts now earns over \$80,000 a year and has accumulated large amounts of property, owned either jointly with her or separately; that she has given him every assistance a wife and mother could give, including social activities designed to enhance his social and professional reputation.

The...complaint was...dismissed, the trial court finding that Illinois law and public policy require such claims to be based on a valid marriage. The appellate court reversed, stating that because the parties had outwardly lived a conventional married life, plaintiff's conduct had not "so affronted public policy that she should be denied any and all relief"...and that plaintiff's complaint stated a cause of action on an express oral contract. We granted leave to appeal. Defendant apparently does not contest his obligation to support the children, and that question is not before us.

The appellate court, in reversing, gave considerable weight to the fact that the parties had held themselves out as husband and wife for over 15 years. The court noted that they lived "a most conventional, respectable and ordinary family life"...that did not openly flout accepted standards, the "single flaw" being the lack of a valid marriage....Noting that the Illinois Marriage and Dissolution of Marriage Act does not prohibit nonmarital cohabitation and that the Criminal Code of 1961 makes fornication an offense only if the behavior is open and notorious, the appellate court concluded that plaintiff should not be denied relief on public policy grounds.

In finding that plaintiff's complaint stated a cause of action on an express oral contract, the appellate court adopted the reasoning of the California Supreme Court in the widely publicized case of *Marvin v. Marvin* (1976). In *Marvin*, Michelle Triola and defendant Lee Marvin lived together for 7 years pursuant to an alleged oral agreement that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." In her complaint she alleged that, in reliance on this agreement, she gave up her career as a singer to devote herself full time to defendant as "companion, homemaker, housekeeper and cook." In resolving her claim for one-half the property accumulated in defendant's name during that period the California court held that "The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services" and that "In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case." The court reached its conclusions because:

"In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. * * *

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."

It is apparent that the *Marvin* court adopted a pure contract theory, under which, if the intent of the parties and the terms of their agreement are proved, the pseudo-conventional family relationship which impressed the appellate court here is irrelevant; recovery may be had unless the implicit sexual relationship is made the explicit consideration for the agreement. In contrast,

the appellate court here, as we understand its opinion, would apply contract principles only in a setting where the relationship of the parties outwardly resembled that of a traditional family. It seems apparent that the plaintiff in *Marvin* would not have been entitled to recover in our appellate court because of the absence of that outwardly appearing conventional family relationship.

The issue of whether property rights accrue to unmarried cohabitants can not, however, be regarded realistically as merely a problem in the law of express contracts. Plaintiff argues that because her action is founded on an express contract, her recovery would in no way imply that unmarried cohabitants acquire property rights merely by cohabitation and subsequent separation. However, the *Marvin* court expressly recognized and the appellate court here seems to agree that if common law principles of express contract govern express agreements between unmarried cohabitants, common law principles of implied contract, equitable relief and constructive trust must govern the parties' relations in the absence of such an agreement. In all probability the latter case will be much the more common, since it is unlikely that most couples who live together will enter into express agreements regulating their property rights. The increasing incidence of nonmarital cohabitation referred to in *Marvin* and the variety of legal remedies therein sanctioned seem certain to result in substantial amounts of litigation, in which, whatever the allegations regarding an oral contract, the proof will necessarily involve details of the parties' living arrangements.

Apart, however, from the appellate court's reliance upon *Marvin* to reach what appears to us to be a significantly different result, we believe there is a more fundamental problem. We are aware, of course, of the increasing judicial attention given the individual claims of unmarried cohabitants to jointly accumulated property, and the fact that the majority of courts considering the question have recognized an equitable or contractual basis for implementing the reasonable expectations of the parties unless sexual services were the explicit consideration. The issue of unmarried cohabitants' mutual property rights, however, as we earlier noted, cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships. There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment? Does not the recognition of legally enforceable property and custody rights emanating from nonmarital cohabitation in practical effect equate with the legalization of common law marriage at least in the circumstances of this case? And, in summary, have the increasing numbers of unmarried cohabitants and changing mores of our society...reached the point at which the general welfare of the citizens of this State is best served by a return to something resembling the judicially created common law marriage our legislature outlawed in

1905?

Illinois' public policy regarding agreements such as the one alleged here was implemented long ago in *Wallace v. Rappleye* (1882), 103 Ill. 229, 249, where this court said: "An agreement in consideration of future illicit cohabitation between the plaintiffs is void." This is the traditional rule, in force until recent years in all jurisdictions....Section 589 of the Restatement of Contracts (1932) states, "A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal." See also 6A Corbin, Contracts sec. 1476 (1962), and cases cited therein.

It is true, of course, that cohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration. (Restatement of Contracts secs. 589, 597 (1932); 6A Corbin, Contracts sec. 1476 (1962).) Those courts which allow recovery generally have relied on this principle to reduce the scope of the rule of illegality. Thus, California courts long prior to *Marvin* held that an express agreement to pool earnings is supported by independent consideration and is not invalidated by cohabitation of the parties, the agreements being regarded as simultaneous but separate. More recently, several courts have reasoned that the rendition of housekeeping and homemaking services such as plaintiff alleges here could be regarded as the consideration for a separate contract between the parties, severable from the illegal contract founded on sexual relations.

The real thrust of plaintiff's argument here is that we should abandon the rule of illegality because of certain changes in societal norms and attitudes. It is urged that social mores have changed radically in recent years, rendering this principle of law archaic. It is said that because there are so many unmarried cohabitants today the courts must confer a legal status on such relationships. If this is to be the result, however, it would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity....

In our judgment the fault in the appellate court holding in this case is that its practical effect is the reinstatement of common law marriage, as we earlier indicated, for there is no doubt that the alleged facts would, if proved, establish such a marriage under our pre-1905 law. "(T)he effect of these cases is to reinstitute common-law marriage in California after it has been abolished by the legislature." (Clark, *The New Marriage*, *Williamette L.J.* 441, 449 (1976).) "*Hewitt* is, if not a direct resurrection of common-law marriage contract principles, at least a large step in that direction." Reiland, *Hewitt v. Hewitt: Middle America, Marvin and Common-Law Marriage*, 60 *Chi.B.Rec.* 84, 88-90 (1978).

We do not intend to suggest that plaintiff's claims are totally devoid of merit. Rather, we believe that our statement in *Mogged v. Mogged* (1973), 55 Ill.2d 221, 225, 302 N.E.2d 293, 295, made in deciding whether to abolish a judicially created defense to divorce, is appropriate here:

"Whether or not the defense of recrimination should be abolished or modified in Illinois is a question involving complex public-policy considerations as to which compelling arguments may be made on both sides. For the reasons stated hereafter, we believe that these questions are appropriately within the province of the legislature, and that, if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change."

We accordingly hold that plaintiff's claims are unenforceable for the reason that they contravene

the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. The judgment of the appellate court is reversed and the judgment of the circuit court of Champaign County is affirmed.

Notes and Questions

1. Ms. Hewitt originally filed for a divorce, but when Mr. Hewitt averred they had never gone through a marriage ceremony or obtained a license, she changed her pleadings. While it is true that Illinois has abolished common law marriages, Iowa has not. “[W]here the parties reside in another state at the time of contracting a common law marriage that was valid in that state, such marriage will be considered valid here upon their removal to Illinois.” *Peirce v. Peirce*, 379 Ill. 185, 39 N.E.2d 990 (Ill. 1942). Is it possible that Ms. Hewitt was too quick to change her claim to one based on *Marvin* rather than developing the common law marriage argument? A common law marriage exists if the parties agreed to be husband and wife and held themselves out to others as husband and wife. The facts suggest that Ms. Hewitt could have met the test for a common law marriage under Iowa law.

2. Should the court’s reasoning apply to a same-sex couple who have agreed to live as though they were married and share income and property? Why or why not? What if the parties lived together in a state that did not allow same-sex couples to marry?

3. See *Blumenthal v. Brewer*, 24 N.E.3d 168 (Ill. App. 2014)(same-sex couple seeking a division of property and one argued that Hewitt should apply; court noted that primacy of marriage and negativity of illicit nonmarital cohabitation has changed in the decades since *Hewitt* was decided, citing to Illinois repeal of criminal prohibition on nonmarital cohabitation, the state’s now prohibited differential treatment of marital and nonmarital children, fact that the state has adopted no-fault divorce, established civil unions for both opposite-sex and same-sex partners, and extended other significant protections to nonmarital families. As a result Hewitt have been effectively “overruled.”)

4. New York courts will enforce express contracts between unmarried cohabitants, but view claims based on implied contract as violations of public policy. See *Soderholm v. Kosty*, 676 N.Y.S.2d 850 (Justice Court, Village of Horseheads 1998)(“Such a claim in the surrounding of a cohabiting relationship is not only against New York’s public policy (as evidenced by the 1933 abolition of common-law marriages) but runs into too great a risk of error for a court, in hindsight,...to sort out the intentions of the parties and to fix jural significance to conduct carried out within an essentially private and generally noncontractual relationship..., “ citing *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980).

Posik v. Layton

695 So.2d 759 (Fla. App. 1997)

review denied, 699 So.2d 1374 (Fla. 1997)

HARRIS, Judge.

Emma Posik and Nancy L.R. Layton were close friends and more. They entered into a support agreement much like a prenuptial agreement. The trial court found that the agreement was unenforceable because of waiver. We reverse.

Nancy Layton was a doctor practicing at the Halifax Hospital in Volusia County and Emma Posik was a nurse working at the same facility when Dr. Layton decided to remove her

practice to Brevard County. In order to induce Ms. Posik to give up her job and sell her home in Volusia County, to accompany her to Brevard County, and to reside with her “for the remainder of Emma Posik’s life to maintain and care for the home,” Dr. Layton agreed that she would provide essentially all of the support for the two, would make a will leaving her entire estate to Ms. Posik, and would “maintain bank accounts and other investments which constitute non-probatable assets in Emma Posik’s name to the extent of 100% of her entire non-probatable assets.” Also, as part of the agreement, Ms. Posik agreed to loan Dr. Layton \$20,000 which was evidenced by a note. The agreement provided that Ms. Posik could cease residing with Dr. Layton if Layton failed to provide adequate support, if she requested in writing that Ms. Posik leave for any reason, if she brought a third person into the home for a period greater than four weeks without Ms. Posik’s consent, or if her abuse, harassment or abnormal behavior made Ms. Posik’s continued residence intolerable. In any such event, Dr. Layton agreed to pay as liquidated damages the sum of \$2,500 per month for the remainder of Ms. Posik’s life.

It is apparent that Ms. Posik required this agreement as a condition of accompanying Dr. Layton to Brevard. The agreement was drawn by a lawyer and properly witnessed. Ms. Posik, fifty-five years old at the time of the agreement, testified that she required the agreement because she feared that Dr. Layton might become interested in a younger companion. Her fears were well founded. Some four years after the parties moved to Brevard County and without Ms. Posik’s consent, Dr. Layton announced that she wished to move another woman into the house. When Ms. Posik expressed strong displeasure with this idea, Dr. Layton moved out and took up residence with the other woman.

Dr. Layton served a three-day eviction notice on Ms. Posik. Ms. Posik later moved from the home and sued to enforce the terms of the agreement and to collect on the note evidencing the loan made in conjunction with the agreement. Dr. Layton defended on the basis that Ms. Posik first breached the agreement. Dr. Layton counterclaimed for a declaratory judgment as to whether the liquidated damages portion of the agreement was enforceable.

The trial judge found that because Ms. Posik’s economic losses were reasonably ascertainable as to her employment and relocation costs, the \$2,500 a month payment upon breach amounted to a penalty and was therefore unenforceable. The court further found that although Dr. Layton had materially breached the contract within a year or so of its creation, Ms. Posik waived the breach by acquiescence. Finally, the court found that Ms. Posik breached the agreement by refusing to continue to perform the house work, yard work and cooking for the parties and by her hostile attitude which required Dr. Layton to move from the house. Although the trial court determined that Ms. Posik was entitled to quantum meruit, it also determined that those damages were off-set by the benefits Ms. Posik received by being permitted to live with Dr. Layton. The court did award Ms. Posik a judgment on the note executed by Dr. Layton.

Although neither party urged that this agreement was void as against public policy, Dr. Layton’s counsel on more than one occasion reminded us that the parties had a sexual relationship. Certainly, even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement entered into by two parties that the state prohibits from marrying. But even though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship. In short, “the law of Florida creates no legal rights or duties between live-ins.” *Lowry v. Lowry*, 512 So.2d 1142 (Fla. 5th DCA 1987). (Sharp, J., concurring specially). This lack of recognition of the rights which flow naturally from

the break-up of a marital relationship applies to unmarried heterosexuals as well as homosexuals. But the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights.

Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations. Other states have approved such individual agreements. In *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106 (1976), the California Supreme Court held:

[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights....So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose....

In *Whorton v. Dillingham*, 202 Cal.App.3d 447, 248 Cal.Rptr. 405 (1988), the California Fourth District Court of Appeal extended this principle to same-sex partners. We also see no reason for a distinction....

Addressing the invited issue, we find that an agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services. Certainly prostitution, heterosexual or homosexual, cannot be condoned merely because it is performed within the confines of a written agreement. The parties, represented by counsel, were well aware of this prohibition and took pains to assure that sexual services were not even mentioned in the agreement. That factor would not be decisive, however, if it could be determined from the contract or from the conduct of the parties that the primary reason for the agreement was to deliver and be paid for sexual services. See *Bergen v. Wood*, 14 Cal.App.4th 854, 18 Cal.Rptr.2d 75 (1993). This contract and the parties' testimony show that such was not the case here. Because of the potential abuse in marital-type relationships, we find that such agreements must be in writing. The Statute of Frauds (section 725.01, Florida Statutes) requires that contracts made upon consideration of marriage must be in writing. This same requirement should apply to non-marital, nuptial-like agreements. In this case, there is (and can be) no dispute that the agreement exists.

The obligations imposed on Ms. Posik by the agreement include the obligation "to immediately commence residing with Nancy L.R. Layton at her said residence for the remainder of Emma Posik's life...." This is very similar to a "until death do us part" commitment. And although the parties undoubtedly expected a sexual relationship, this record shows that they contemplated much more. They contracted for a permanent sharing of, and participating in, one another's lives. We find the contract enforceable.

We disagree with the trial court that waiver was proved in this case. Ms. Posik consistently urged Dr. Layton to make the will as required by the agreement and her failure to do so was sufficient grounds to declare default. And even more important to Ms. Posik was the implied agreement that her lifetime commitment would be reciprocated by a lifetime commitment by Dr. Layton—and that this mutual commitment would be monogamous. When Dr. Layton introduced a third person into the relationship, although it was not an express breach of the written agreement, it explains why Ms. Posik took that opportunity to hold Dr. Layton to her express obligations and to consider the agreement in default.

We also disagree with the trial court that Ms. Posik breached the agreement by refusing to perform housework, yard work, provisioning the house, and cooking for the parties. This conduct did not occur until after Dr. Layton had first breached the agreement. One need not continue to perform a contract when the other party has first breached. *City of Miami Beach v. Carner*, 579 So.2d 248 (Fla. 3d DCA 1991). Therefore, this conduct did not authorize Dr. Layton to send the three-day notice of eviction which constituted a separate default under the agreement.

We also disagree that the commitment to pay \$2,500 per month upon termination of the agreement is unenforceable as a penalty. We agree with Ms. Posik that her damages, which would include more than mere lost wages and moving expenses, were not readily ascertainable at the time the contract was created. Further, the agreed sum is reasonable under the circumstances of this case. It is less than Ms. Posik was earning some four years earlier when she entered into this arrangement. It is also less than Ms. Posik would have received had the long-term provisions of the contract been performed. She is now in her sixties and her working opportunities are greatly reduced.

We recognize that this contract, insisted on by Ms. Posik before she would relocate with Dr. Layton, is extremely favorable to her. But there is no allegation of fraud or overreaching on Ms. Posik's part. This court faced an extremely generous agreement in *Carnell v. Carnell*, 398 So.2d 503 (Fla. 5th DCA 1981). In *Carnell*, a lawyer, in order to induce a woman to become his wife, agreed that upon divorce the wife would receive his home owned by him prior to marriage, one-half of his disposable income and one-half of his retirement as alimony until she remarried. Two years after the marriage, she tested his commitment. We held:

The husband also contends that the agreement is so unfair and unreasonable that it must be set aside..."The freedom to contract includes the right to make a bad bargain." (Citation omitted). The controlling question here is whether there was overreaching and not whether the bargain was good or bad.

398 So.2d at 506.

Contracts can be dangerous to one's well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously. Dr. Layton's comment that she considered the agreement a sham and never intended to be bound by it shows that she did not take it seriously. That is regrettable.

We affirm that portion of the judgment below which addresses the promissory note and attorney's fees and costs associated therewith. We reverse that portion of the judgment that fails to enforce the parties' agreement.

Notes and Questions

1. The *Posik* courts says that "[t]he Statute of Frauds (section 725.01, Florida Statutes) requires that contracts made upon consideration of marriage must be in writing. This same requirement should apply to non-marital, nuptial-like agreements." The court's statement is dictum since the validity of an oral agreement was not at issue in the case. Do you think the Florida statute should be applied to contractual claims by unmarried cohabitants? See *Brodie v. All Corporation of USA*, 876 So.2d 577 (Fla. App. 2004)(oral contract between opposite-sex cohabitants enforced and no Statute of Frauds issue raised).

2. Minnesota Statutes §513.075 provides:

If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms

concerning the property and financial relations of the parties only if:

- (1) the contract is written and signed by the parties, and
- (2) enforcement is sought after termination of the relationship.

What result in Minnesota if a same-sex couple splits up and one partner brings a *Marvin*-type claim, based on an oral contract?

3. The Texas Business and Commerce Code §26.01 provides:

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

- (1) in writing; and
- (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

...

- (3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

F. Equitable Property Rights of Same-Sex Partners

Marvin stands for the proposition that cohabitants may have rights in each other's property under theories other than express or implied contract. Equitable doctrines such as constructive or resulting trusts, quantum meruit, and unjust enrichment are all possible.

Bramlett v. Selman

597 S.W.2d 80 (Ark. 1980)

STROUD, Justice.

Appellee filed suit against his homosexual companion to require appellant to convey the title to a residence purchased with funds furnished by appellee. Appellant contended the purchase money was a gift from his paramour, but the trial court accepted appellee's position that the title was held by appellant as constructive trustee for appellee. We agree with the Chancellor.

In early 1977 appellant and appellee became involved in a homosexual relationship and appellee left his wife and children and moved in with appellant in his apartment. Shortly thereafter divorce proceedings were instituted between appellee and his wife. In April of 1977 appellee opened an account in a local savings and loan institution in appellant's name and deposited a total of \$7,000.00. These are the only material facts on which the parties agree. Appellant asserts that the appellee "lavished" him with a variety of gifts, including the \$7,000.00 used to purchase a residence on Spring Street which both parties occupied after the purchase was closed. However, appellee claims the money was not a gift, but was put into appellant's account for the sole purpose of having appellant purchase the Spring Street property in his name for the benefit of appellee. Appellee testified that there was a clear understanding of the scheme to conceal the acquisition of the property from his wife due to their pending divorce action. According to appellee, appellant had orally agreed to convey title to the property to him once the divorce was concluded. Various improvements were made by both parties to the structure on the property, although the evidence tended to show that the vast majority of them were either paid for by appellee and his father or were performed by appellee and his parents.

Appellee testified that he eventually felt guilty about hiding the property from his wife and, after discussing it with his attorney, had his attorney inform her of the situation. His

testimony is uncontroverted that by way of settlement, he paid his wife \$2,000 for her dower interest in the Spring Street property. Near the end of December of 1977, appellant and appellee had a falling out and a dispute ensued over the ownership of the property. Appellant claimed they “separated” because of appellee’s jealousy, but appellee said the quarrel was over appellant’s refusal to convey the property to him as previously agreed. At any rate, appellee moved out of the Spring Street residence, and on March 1, 1978, brought this action requesting the court to settle the ownership of certain personal property, to require appellant to vacate the Spring Street property, and compel appellant to convey the property to him. After hearing all the arguments and evidence offered by each party, the chancellor found that appellant held title to the property as constructive trustee for appellee, ordered appellant to vacate the premises, and ordered him to convey title to the property to appellee. The chancellor also settled the ownership of certain personal property, but ordered appellee to reimburse appellant in the amount of \$1,624.48 for his expenses incurred as constructive trustee. From the decision of the chancellor appellant brings this appeal...

Appellant alleges that the trial court erred in finding the existence of a constructive trust. He contends that the evidence was insufficient as there was no proof of positive fraud which appellant contends is required for a constructive trust. Such is not the case, as proof of fraud is not necessary for the imposition of a constructive trust. This court has often held that although a grantee’s oral promise to hold the title to land for a third person is unenforceable, a constructive trust will be imposed if it is shown by clear, cogent and convincing evidence that the grantee’s promise was intentionally fraudulent or that the parties were in a confidential relationship. The evidence in this case is not supportive of a finding that appellant took title to the property with an intent to permanently deprive appellee of the property. To the contrary, the evidence indicates that no such intent was evident until several months after the deed to appellant had been executed. The trial court undoubtedly believed the testimony of appellee that the dispute arose in December of 1977 when appellant refused to convey the property to appellee pursuant to their oral agreement. Therefore, for a constructive trust to be imposed by the court of equity in this case, it must rest not upon fraud but upon the existence of a confidential relationship.

Appellant claims that the trial court erred in holding as a matter of law that a fiduciary relationship existed between the parties based on their homosexual involvement. The trial court did not hold that all homosexual relationships as a matter of law involve a confidential relationship. Whether or not a confidential relationship exists depends upon the actual relationship between the parties. It is not surprising that this court held in *Walker v. Biddle*, that “The relation between brother and sister is, in the absence of estrangement or other unusual circumstances, one of confidence;...” The relation between aunt and niece would usually be less close, but in *Henry & Mullen v. Goodwin & Attaway*, a confidential relationship was found to exist when the niece lived near her aunt and visited with her on a daily basis. There the court adopted a definition of the term from the Restatement Second, Trusts, “A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise (with) the other’s interest in mind.” In the case on appeal, appellee clearly demonstrated confidence in appellant, and appellant certainly purported to act with appellee’s interest in mind at the time he purchased the property. A kinship is not necessary for a confidential relationship, as is apparent in *Kingrey v. Wilson*, 227 Ark. 690, 301 S.W.2d 23 (1957). There, a constructive trust was imposed when grantee was not related to the grantor, but was merely a friend and neighbor.

In the case now on appeal, the facts were sufficiently clear, cogent and convincing for the

chancellor to find that a confidential relation existed between appellant and appellee when the undisputed testimony indicated they had been homosexual lovers for approximately a year and had lived together for most of that year....

All homosexual involvements are not as a matter of law confidential relationships sufficient to support a constructive trust, but a court of equity should not deny relief to a person merely because he is a homosexual. This is the view adopted by the Georgia Supreme Court in 1979 in *Weekes v. Gay*, 243 Ga. 784, 256 S.E.2d 901 (1979). There, a house shared by homosexuals was destroyed by fire and the court imposed an implied trust on the proceeds. The proceeds were deemed held for the benefit of the party who furnished the purchase money, even though his name did not appear on the deed nor was he an insured under the insurance policy. Irrespective of the homosexual relationship, the court noted that equity will not allow a windfall to one party when the beneficial interest should flow to the other party. It can be said no clearer than it was said last year by this court in *Henry*, supra:

Equity, however, will impose a constructive trust when a grantee standing in a confidential relation to the grantor orally promises to hold land for the grantor and later refuses to perform his promise.

Affirmed.

Note

In *Spafford v. Coats*, an Illinois appellate court was faced with the question of whether the *Hewitt* decision prevented the recognition of all equitable claims to property that arise within the context of a cohabitation. Donna Spafford, like the appellee in *Bramlett*, had contributed her own funds to help purchase vehicles in her opposite-sex partner's name. In finding for Spafford on the constructive trust claim, the Illinois court explained:

We perceive the real and underlying concern of the supreme court in *Hewitt* was that judicial recognition of mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would in effect grant to unmarried cohabitants substantially the same marital rights enjoyed by married persons, resurrect the doctrine of common law marriage, and contravene the public policy enunciated by the Illinois legislature to strengthen and preserve the integrity of marriage. The plaintiff's claims in *Hewitt* for one-half of defendant's property were based primarily upon her services as housekeeper and homemaker and obviously fell afoul of the court's concerns. However, where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.

Unlike the plaintiff's claims in *Hewitt*, the claims of Donna Spafford are based on evidence that she furnished substantially all of the consideration for the purchase of several vehicles and that under the circumstances shown by the evidence adduced by the plaintiff, permitting the defendant to retain all of the vehicles would constitute an unjust enrichment which equity should not permit.

455 N.E.2d 241 at 245 (Ill.App. 1983).

Mitchell v. Moore

729 A.2d 1200 (Penn. Superior Ct. 1999)
appeal denied, 751 A.2d 192 (Penn. 2000)

CIRILLO, President Judge Emeritus:

William Moore, III (Moore), appeals from the order entered in the Court of Common Pleas of Chester County denying his post-trial motions and entering judgment on a jury verdict of \$130,000.00 awarded to Appellee, Thomas Mitchell (Mitchell). We affirm in part and reverse in part.

Thomas Mitchell and William Moore first met in 1980; the two men quickly developed a romantic relationship. Moore resided in Elverson, Pennsylvania and Mitchell in South Carolina. In the spring of 1981, Mitchell accepted Moore's invitation to spend his "off season"¹¹ at Moore's Chester County farm. By 1985, Mitchell had permanently moved to Elverson, where he resided at Moore's farm without paying rent, worked a full-time job with a company located in Lancaster, Pennsylvania, and assisted Moore in maintaining his house and farm. Among other things, Mitchell took care of the farm animals, which included aiding in the breeding of sheep and birds. In 1990, Mitchell enrolled at Penn State University for graduate studies. As a result of his academic schedule, he was unable to run the sheep and bird businesses or maintain the farm. Soon thereafter, the parties' relationship soured; Mitchell moved out of Moore's residence in June of 1994.

In 1995, Mitchell brought an action against Moore sounding in fraud, *quantum meruit*, and implied contract. Specifically, Mitchell sought compensation, in the form of restitution, for the services he rendered to Moore throughout the thirteen years the two men lived together on the farm. In his complaint, Mitchell alleged that Moore had: promised him compensation for his services rendered to maintain and operate his farm; agreed to compensate him for his help in running an antique cooperative (co-op) that Mitchell had purchased; promised him future compensation and the devise of property in a will and codicil; and failed to compensate him for monetary contributions he had made towards Moore's purchase of real estate on Amelia Island, Florida.

In response to Mitchell's action, Moore filed preliminary objections seeking a demurrer. The court granted the objections in part and denied the objections in part, striking Mitchell's claim of fraud for lack of specificity,...but granting Mitchell leave to file an amended complaint. Mitchell filed an amended complaint, now including only counts for quantum meruit /unjust enrichment¹² and implied contract. Moore filed a counterclaim seeking \$139,300.00 representing reasonable rent for the 139 months Mitchell lived on his farm rent-free and as compensation for various utility and telephone bills, taxes, car payments, and other miscellaneous expenses paid by

¹¹. Mitchell was a tobacco broker in South Carolina. He did not work during the winter months.

¹². A cause of action in quasi-contract for quantum meruit, a form of restitution, is made out where one person has been unjustly enriched at the expense of another. *Feingold v. Pucello*, 439 Pa.Super. 509, 654 A.2d 1093, 1095 (1995) (Beck, J., concurring) (citation omitted). Therefore, a claim of quantum meruit raises the issue of whether a party has been unjustly enriched, and in order to prove such claim a party must successfully prove the elements of unjust enrichment discussed infra.

Moore on Mitchell's behalf.

After a jury trial, a verdict was rendered in favor of Mitchell on the basis of unjust enrichment and against Moore on the counterclaim. [Moore appeals.]

"Unjust enrichment" is essentially an equitable doctrine. Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefit conferred.

The elements necessary to prove unjust enrichment are:

- (1) benefits conferred on defendant by plaintiff;
- (2) appreciation of such benefits by defendant; and
- (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

The application of the doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.

In its opinion, the trial court clearly determines that a benefit was conferred upon Moore as a result of the extensive labor and services Mitchell provided him on his farm and in his home. The critical question, with regard to whether as a result of this benefit Moore was unjustly enriched, was answered in the positive by the court as follows:

Assuming the jury established that a benefit had been conferred by Plaintiff [Mitchell] and received by Defendant [Moore], they only had to determine that Defendant's acceptance of these benefits and failure to compensate Plaintiff resulted in an unconscionable bargain. The jury was aware that Defendant [sic] moved hundreds of miles away from his job, house, friends and family to a different region of the country where he took on a new job and did work on Defendant's [Moore's] farm. It is not unreasonable to suggest that the jury believed Plaintiff [Mitchell] in that he made that life-altering change based on something besides his desire to develop his relationship with Defendant [Moore]. Given this potential scenario, it is likely that the jury could have found that the lack of compensation Plaintiff [Mitchell] received amounted to an unconscionable bargain and therefore, Defendant's [Moore's] unjust enrichment.

"It has been said, an intention to pay for work done will be assumed, except in the case of parent and child. Where, however, it is apparent that the parties, though not so related by blood, in reality bore like connection to each other, the implication does not arise." *Brown v. McCurdy*, 278 Pa. 19, 22, 122 A. 169, 170 (1923). While it has been held that the presumption of gratuitous services does not automatically arise in a daughter-in-law/mother-in-law context, where a claimant has become "part of the family" the contrary is true. *Id.*

Both parties concur that when Mitchell moved into Moore's home on a full-time basis, Moore paid many of Mitchell's bills, including car payments, VISA and SEARS card charges, and phone bills. Moreover, Moore claims that Mitchell became part of his own family; Mitchell, himself, admits to having celebrated all the major holidays with Moore's immediate family and received gifts from them on special occasions.

In *Brown, supra*, the law and facts centered around the issue of whether a presumption of payment, based upon an express contract to pay for services rendered by a daughter-in-law to her mother-in-law, had been successfully established based upon the evidence at trial. The court demanded strict proof of an express contract in order to overcome any presumption that the services were gratuitous. Although the instant case is not based upon either an express contract or written agreement, we find the principles espoused in *Brown* equally applicable, namely, in

order to prove that the defendant in the present case had been unjustly enriched by plaintiff's actions and services, there must be some convincing evidence establishing that plaintiff's services were not gratuitous.

We first note that Mitchell had complete access to a large farm house where he lived rent-free and virtually unencumbered by any utility expenses. The nature and amount of benefits that plaintiff received from living at Moore's farm rebuts any presumption that the benefit conferred upon Moore was unjust. In fact, the advantages plaintiff obtained were compensation enough for all the work he offered to do on the farm; further, Mitchell derived an obvious personal benefit by living with the defendant, his partner for thirteen years, at his farm.

Having found no evidence which would imply that Moore's services were anything but gratuitous, we cannot agree with the trial court that a theory of unjust enrichment has been proved. While defendant indisputably bequeathed plaintiff his farm (found within the provisions of two wills that were later supplanted by a codicil), the gift was exactly that, an intention to reward the plaintiff through a testamentary provision....Such bequest is not equivalent to a finding that the defendant intended to compensate the plaintiff for his services and that upon failure to remit such monies the defendant became unjustly enriched.

Furthermore, the defendant testified that the plaintiff himself suggested that he move in with the defendant because he could not afford to rent an apartment on his own at the time. He, as well as the defendant, thought such potential living arrangement would give the two men more time to foster their relationship. In fact, upon learning of plaintiff's potential job opportunity in nearby Lancaster, Pennsylvania, the defendant anticipated that the two parties would be able to grow closer in a permanent "live-in" situation—another indication that there existed no expectation of payment for plaintiff's voluntary work on the defendant's farm. Moreover, plaintiff testified that he never asked the defendant for compensation for his services and that the defendant never told him he would pay him for his help around the house and the farm.

To solidify the fact that the plaintiff's actions were gratuitous services rendered during a "close, personal" relationship, the plaintiff testified at trial that after he moved in and began to help around the farm, the defendant told him he "did a great job, that he appreciated what I [plaintiff] did, and it was for—it made the house much better looking, it kept it stable, and that we were building a future together and some day it would all be worth it for me [plaintiff]." While Mitchell would characterize the nature of the parties' relationship as a type of business venture between partners, the evidence at trial indicates a very different aspect of their lives. As Mitchell, himself, testified, he had a "romantic or sexual aspect to his relationship with Dr. Moore." Furthermore, the parties conducted themselves around the home like parties in a loving relationship; they shared household chores, cooked dinners for each other, bestowed gifts upon one another, attended events together, and shared holidays and special occasions with Moore's family. Most potent, however, is the following language used in a letter written by Mitchell to Moore sometime in 1993, "The time I have given you breaking my back with the house and grounds were just that, a gift to our relationship." Moore testified that Mitchell was "his lover and we were living together as partners, and I felt like anything I could do for him, you know, gave me pleasure." To find restitution (compensation) proper for services performed in such a relationship, we would curtail the freedom associated in forming new personal bonds based upon the important facet of mutual dependence.

After a review of the record in this case, including the pivotal testimony of both Mitchell and Moore, we cannot find that the defendant benefited unjustly from plaintiff's services. While we do not attempt to characterize the services rendered in all unmarried couple's relationships as

gratuitous, we do believe that such a presumption exists and that in order to recover restitution for services rendered, the presumption must be rebutted by clear and convincing evidence. The basis of this presumption rests on the fact that services provided by plaintiff to the defendant are not of the type for which one would normally expect to be paid, nor did they confer upon the defendant a benefit that is unconscionable for him to retain without making restitution to the plaintiff. See *Feingold, supra* (Beck, J., concurring).

The circumstances of this case do not require the law to imply a contract in order to avoid an injustice. See *Feingold*, 654 A.2d at 1095 (Beck, J., concurring) (“unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.”) Accordingly, we reverse the trial court’s verdict in favor of plaintiff; the plaintiff did not “wrongfully secure a benefit that is unconscionable for him to retain.”

Note

Other similar cases involving same-sex partners include: (1) *Ireland v. Flanagan*, 672 Ore Ct. App. 1981 (upholding oral agreement between lesbians to share property despite fact that property was held in sole name of one partner); *Jones v. Daly*, 176 Cal. Rptr 130 (Cal. App. 1981) (contract held to be unenforceable because the consideration for the contract was sexual services); *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. App. 1988) (contract enforceable because sexual services were severable from independent consideration); *Small v. Harper*, 638 S.W.2d 24 (Tex. Ct. App. 1982) (contract between lesbians to share property can be enforced if proved; public policy exception will not apply); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (written contract between lesbians to split proceeds on sale of home upheld, reversing court below that had held public policy considerations would prevent enforcement because the contract related to the home where presumably illegal sodomy took place); *Seward v. Metrup*, 622 N.E.2d 756 (Ohio App. 1993) (absent express agreement, lesbian partner has no claim to division of property at end of 9 year relationship).

CHAPTER FIVE – RECOGNITION OF THE PARENT-CHILD RELATIONSHIP

Page 467 – Add a new note 5 and 6:

5. Biological parents have relied on *Troxel* to argue that their same-sex partners should not be recognized as co-parents under de facto parentage and should not be awarded visitation or custody as such an award would deprive them of their constitutional right to bring up their own children. See *Smith v Guest*, 16 A.3d 920 (Del. 2011)(rejecting the *Troxel* argument and affirming a determination that the non-biological parent was a parent under Delaware’s de facto parentage statute; the court distinguished *Troxel* as involving a claim by a non-parent, whereas in this case the question was whether the non-biological parent was some other type of parent, in which case she would have equal legal claims as a legal parent with those of the biological parent). See also *In re A.M.K.*, 351 Wis.2d 223, 838 N.W.2d 865 (Wisc. App. 2013) (unpublished)(Court assumed for purposes of argument that *Troxel*’s presumption in favor of the biological parent applied, but nonetheless found it in the child’s best interest to award visitation rights to the non-biological co-parent in accord with that co-parent’s request).

6. See also *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013), holding that non-biological mother was a presumed parent under the Kansas version of the Uniform Parentage Act because she had signed a co-parenting agreement with the biological mother. That made her a sufficiently interested person to invoke the court’s jurisdiction in her petition seeking joint custody of the two children, when the women’s relationship ended. Goudschaal, the biological mother, argued that under *Troxel*, she should be protected from the claims of a person who was a mere unrelated individual. Failure to grant her request for custody, she argued, was an unconstitutional violation of her fundamental right to parent. The court responded in part as follows:

But what Goudschaal overlooks is the fact that she exercised her due process right to decide upon the care, custody, and control of her children and asserted her preference as a parent when she entered into the coparenting agreement with Frazier. If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children. Further, as Nelson recognized, parental preference can be waived and, as Frazier points out, the courts should not be required to assign to a mother any more rights than that mother has claimed for herself.

Looking at the coparenting agreement from the other side, the children were third-party beneficiaries of that contract. They would have a reliance interest in maintaining the inherent benefits of having two parents, and severing an attachment relationship formed under that contract would not only risk emotional and psychological harm, ... but also void the benefits to the children that prompted the agreement in the first instance. So what Goudschaal really wants is to renege on the coparenting agreement without regard to the rights of or harm to the children, all in the name of constitutionally protected parental rights. Surely, her constitutional rights do not stretch that far.

Page 486 – Add a new note 8, as follows:

8. A Pennsylvania court decision reversed the trial court’s application of an evidentiary presumption against a lesbian mother in its order affirming primary physical custody to the heterosexual father. To the extent the trial court had relied on earlier cases that appeared to adopt an evidentiary rule (i.e., burden on gay parent to prove no harm to child because of parent’s sexuality), the appeals court overruled those earlier cases. See *M.A.T. v. G.S.T.*, 989 A.2d 11 (Penn Super. 2010).

Page 490 – Add new notes, as follows:

3. A decision by the Georgia Supreme Court struck down a restriction on the father’s visitation that had prohibited him from “exposing the children to his homosexual partners and friends,” ruling that such a provision discriminated arbitrarily on the basis of sexual orientation and was thus against public policy. There was no evidence that the father’s partners or friends were a threat to the child or likely to cause harm in any way. See *Mongerson v. Mongerson*, 678 S.E.2d 891 (Ga. 2009).

4. On June 29, 2010, a Tennessee appeals court struck down a “paramour provision” that had been included by the trial court in a visitation order involving a lesbian mother. The father was married and so did not expose the children to a “paramour” in his home. But, since the mother and her partner were unable to marry, any overnight stay by the mother’s partner while the children were in the home was viewed as exposing them to a paramour and thus, in the trial court’s opinion, was presumptively not in the best interests of the children. The trial court cited the long history of automatically including such provisions in custody and visitation orders in the state of Tennessee, but cited no evidence to show that the presence of the mother’s partner overnight caused any negative impact. Because there was no evidence of harm, the appellate court ruled that the trial court’s automatic inclusion of the provision was an abuse of discretion. See *Barker v. Chandler*, 2010 WL 2593810 (Tenn. Ct. App. 2010).

Page 491: Replace In the Matter of the Adoption of John Doe and James Doe with the following case:

Florida Dept. of Children and Families v. Adoption of X.X.G
45 So.3d 79 (2010)
District Court of Appeal of Florida, Third District.

COPE, J.

This is an appeal of a final judgment of adoption, under which F.G. became the adoptive father of two boys, X.X.G. and N.R.G. (collectively, “the children”). The trial court found, and all parties agree, that F.G. is a fit parent and that the adoption is in the best interest of the children.

The question in the case is whether the adoption should have been denied because F.G. is a homosexual. Under Florida law, a homosexual person is allowed to be a foster parent. F.G. has successfully served as a foster parent for the children since 2004. However, Florida law states, “No person eligible to adopt under this statute [the Florida Adoption Act] may adopt if that person is a homosexual.” § 63.042(3), Fla. Stat. (2006). According to the judgment, “Florida is the only remaining state to expressly ban all gay adoptions without exception.” Judgment at 38. Judge Cindy Lederman, after lengthy hearings, concluded that there is no rational basis for the statute. We agree and affirm the final judgment of adoption.

The Department contends that the trial court erred by finding subsection 63.042(3) unconstitutional. The Department argues that there is a rational basis for the statute and that the trial court misinterpreted the law.

Under the Florida Constitution, each individual person has a right to equal protection of the laws. The constitutional provision states, in part:

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property....

Art. I, § 2, Fla. Const.

F.G. successfully argued in the trial court that the statute treated him unequally in violation of the constitutional provision because the statute creates an absolute prohibition on adoption by homosexual persons, while allowing all other persons—including those with criminal histories or histories of substance abuse—to be considered on a case-by-case basis.

When this case was pending in the trial court, the parties and trial court agreed that this case does not involve a fundamental right or suspect class, so the case was decided under the rational basis test. That being so, we have considered this appeal only under that test.⁵

Under the rational basis test, “a court must uphold a statute if the classification bears a rational relationship to a legitimate governmental objective.” *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So.2d 1090, 1095 (Fla.2005). The classification must be “based on a real difference which is reasonably related to the subject and purpose of the regulation.” *State v. Leicht*, 402 So.2d 1153, 1155 (Fla.1981) (emphasis added).

The question now before us—whether there is a rational basis for subsection 63.042(3)—was previously presented to the Supreme Court of Florida with inconclusive results. A constitutional challenge was brought in *Cox v. Florida Department of Health & Rehabilitative Services*, 656 So.2d 902 (Fla.1995), where the Second District Court of Appeal held the statute to be constitutional. Our Supreme Court upheld the Second District’s ruling, except with regard to the equal protection issue—the issue before us now.

With regard to the equal protection issue, the Cox Court noted that the parties had waived an evidentiary hearing in the trial court and allowed “the case to proceed to resolution with the parties simply submitting briefs and their own packets of research materials to the trial court.” 656 So.2d at 903. The Supreme Court said:

The record is insufficient to determine that this statute can be sustained against an attack as to its constitutional validity on the rational-basis standard for equal protection under article I, section 2 of the Florida Constitution. A more complete record is necessary in order to determine this issue. Upon remand, the proceeding is limited to a factual completion of the record as to this single constitutional issue and a decision as to this issue based upon the completed record.

Id. After the case was returned to the trial court, Cox abandoned the petition and the equal protection issue was never addressed. In light of the Cox decision, the trial court conducted an extensive evidentiary hearing in this case.

We next consider how the adoption statute works. The statute requires that there be individual studies which the judge must consider in order to decide whether the proposed adoption is in the best interest of the child. § 63.022(2), (4)(c), Fla. Stat.; Fla. Admin. Code R. 56C–16.005(2).

There must be a favorable preliminary home study, § 63.112(2)(b), Fla. Stat., followed by a final home investigation “to ascertain whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor.” Id. § 63.125(1); Fla. Admin. Code R. 65C–16.001(7), (8). . . .

Simply put, the statute calls for an individual, case-by-case evaluation to determine if the proposed adoption is in the best interest of the child. Except for homosexual persons, there is no automatic, categorical exclusion of anyone from consideration for adoption.

For example, “[a]doption applicants who have previous verified findings of abuse, neglect or abandonment of a child are subject to a special review before they can be approved to adopt, but are not automatically disqualified from adopting.” For a child who was privately placed (not placed by the Department or Department’s agent), there is no categorical exclusion for adoption by a person with a prior criminal history, although a special review is involved. . . .

A single adult is specifically allowed to adopt. § 63.042(2)(b), Fla. Stat. Florida “makes over a third of its adoptive placements with single adults.” “The percentage of adoptions of dependent children in Florida that were by single parents for the year 2006 was 34.47 %.”

The Department or its agents “have placed children in the permanent care of foster parents known by [the Department] and/or its agents to be lesbians or gay men.” Homosexual persons “are not prohibited by any state law or regulation from being legal guardians of children in Florida.” The Department or its agents have placed children in the care, including permanent care, of legal guardians known by the Department and/or its agents to be lesbians or gay men, and ceased Department supervision.

However, the Florida Adoption Act categorically excludes a homosexual person from adopting. The question is whether there is a rational basis for the difference in treatment.

Given a total ban on adoption by homosexual persons, one might expect that this reflected a legislative judgment that homosexual persons are, as a group, unfit to be parents.

No one in this case has made, or even hinted at, any such argument. To the contrary, the parties agree “that gay people and heterosexuals make equally good parents.” “The qualities that make a particular applicant the optimal match for a particular child could exist in a heterosexual or gay person.” Thus in this case no one attempts to justify the prohibition on homosexual adoption on any theory that homosexual persons are unfit to be parents.

Instead, the Department argues that there is a rational basis for the prohibition on homosexual adoption because children will have better role models, and face less discrimination, if they are placed in non-homosexual households, preferably with a husband and wife as the parents. But that is not what the statute does. . . .

The statute contains no prohibition on placing children with homosexual persons who are foster parents. The Department has placed children with homosexual foster parents in short-term placements, and long-term placements. The average length of stay in foster care before adoption is thirty months.

Florida also has a guardianship statute. Homosexual persons “are not prohibited by any state law or regulation from being legal guardians of children in Florida.” The Department has placed children in the legal guardianship of homosexual persons. This has included permanent guardianships in which the Department ceased supervision.

It is difficult to see any rational basis in utilizing homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons. The Department contends, however, that the basis for this distinction can be found in the social science evidence.

The trial court heard extensive expert testimony in this case. F.G. presented Dr. Letitia Peplau, Professor of Psychology at the University of California in Los Angeles; Dr. Susan Cochran, Professor of Epidemiology and Statistics at the University of California in Los Angeles; and Dr. Michael Lamb, Professor of Psychology at the University of Cambridge, London, England, and former research scientist at the National Institute of Child Health and Human Development (part of the National Institute of Health). F.G. also presented [7 additional experts, all with distinguished records].

The Department offered Dr. George A. Rekers, Distinguished Professor of Neuropsychiatry and Behavioral Science Emeritus, University of South Carolina School of Medicine; and Dr. Walter Schumm, Associate Professor of Family Studies, Kansas State University.

The court concluded as follows:

The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field. Many well renowned, regarded and respected professionals have [produced] methodologically sound longitudinal and cross-sectional studies into hundreds of reports. Some of the longitudinal studies have tracked children for six, ten and fourteen years. The starting ages of the children in the longitudinal studies has varied from birth, six to ten years old and followed them throughout childhood, adolescence and into adulthood. The studies and reports are published in many well respected peer reviewed journals including the Journal of Child Development, the Journal of Family Psychology, the Journal of Child Psychology, and the Journal of Child Psychiatry. Each of the studies and hundreds of reports also withstood the rigorous peer review process and were tested statistically, rationally and methodologically by seasoned professionals prior to publication.

In addition to the volume, the body of research is broad; comparing children raised by lesbian couples to children raised by married heterosexual couples; children raised by lesbian parents from birth to children raised by heterosexual married couples from birth; children raised by single homosexuals to children raised by single heterosexuals; and children adopted by homosexual parents to those raised by homosexual biological parents, to name a few. These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children. These conclusions have been accepted, adopted and ratified by the American Psychological Association, the American Psychiatry Association, the American Pediatric Association, the American Academy of Pediatrics, the Child Welfare League of America and the National Association of Social Workers. As a result, based on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption.

As we understand it, the Department maintains that the trial court should not have conducted an evidentiary hearing. We reject that argument. In the Cox decision, which considered the identical constitutional challenge, the Florida Supreme Court ruled that an evidentiary hearing must be held. 656 So.2d at 903.

The Department also appears to say that the trial court should not have made findings about the social science evidence. Again, we disagree. The Cox decision called for “a factual completion of the record as to this single constitutional issue and a decision as to this issue based upon the completed record.” Id.

The Department does not argue that the trial court’s judgment lacks support in the evidence.

Turning now to the remainder of the Department’s argument, we understand the Department to assert that if there is an alternative legitimate way to interpret the scientific data, then that alternative view can provide a rational basis for the statute’s blanket exclusion of homosexual adoption while allowing homosexual foster care and guardianships. The Department contends

that the alternative views expressed by its experts and F.G.'s experts support the existence of a rational basis for the statute. . . .

We consider first the Department's experts. One of the Department's witnesses was Dr. Schumm. Dr. Schumm is of no assistance to the Department's argument. That is so because Dr. Schumm did not agree "that homosexuals should be banned from adopting but rather states that gay parents can be good foster parents, and opines that the decision to permit homosexuals to adopt is best made by the judiciary on a case by case basis." . . .

The Department also called Dr. Rekers to testify as an expert. Dr. Rekers opined that "homosexuals are less able to provide a stable home for children than heterosexuals." He cited several studies indicating that homosexual adults have a higher lifetime prevalence of major depression, affective disorders, anxiety disorders and substance abuse. For that reason, Dr. Rekers believes that adoption (and foster parenting) should be ruled out for homosexual persons.

Unlike Dr. Schumm, Dr. Rekers sees no role for individual evaluation of the proposed adoptive parent, if that parent is a homosexual. He maintained that performing an individualized study of the proposed adoptive parent, like F.G., is not viable because even if F.G. is found to be entirely appropriate as an adoptive parent at the present time, it is possible that he may develop some sort of a disorder later in life.

By contrast, Dr. Cochran, one of F.G.'s witnesses, testified that the scientific data do not support Dr. Rekers' analysis:

As a general premise, elevated occurrences of psychiatric disorders and rates of depression and suicidality are associated with demographic characteristics, such as race, gender, age, socioeconomic status and sexual orientation. In terms of the specific demographic characteristic of sexual orientation, the witness [Dr. Cochran] cited to several population-based studies comparing the mental health of gay and heterosexual individuals including the 1996 National Survey on Drug Abuse, the National Comorbidity Survey (1990–1992) [other studies omitted] According to the witness [Dr. Cochran], taken as a whole, the research shows that sexual orientation alone is not a proxy for psychiatric disorders, mental health conditions, substance abuse or smoking; members of every demographic group suffer from these conditions at rates not significantly higher than for homosexuals. Therefore, based on the research, while the average rates of psychiatric conditions, substance abuse and smoking are generally slightly higher for homosexuals than heterosexuals, the rates of psychiatric conditions, substance abuse and smoking are also higher for American–Indians as compared to other races, the unemployed as compared to the employed and non-high school graduates as compared to high school graduates, for example. Poignantly, Dr. Cochran pointed out that if every demographic group with elevated rates of psychiatric disorders, substance abuse and smoking were excluded from adopting, the only group eligible to adopt under this rationale would be Asian American men.

. . . The trial judge was entitled to reach the conclusion, which she did, that the Department's experts' opinions were not valid from a scientific point of view.

The Department argues that homosexuals should be barred from adopting “because the homes of homosexuals may be less stable and more prone to domestic violence.” The Department maintains that in this part of its argument, it is relying on F.G.’s own experts. The Department has, however, read selectively from the expert testimony and the record does not support the Department’s position.

The Department claims that homosexual parents “support adolescent sexual activity and experimentations.” The Department claims to draw this from the testimony of F.G.’s experts, but the experts did not say this. Dr. Lamb testified that research showed no difference between children of gay parents and heterosexual parents with respect to the age at which they initiated sexual activity. . . .

The Department argues that placement of children with homosexuals presents a risk of discrimination and societal stigma. Here, too, the argument is misplaced. Florida already allows placement of children in foster care and guardianships with homosexual persons. This factor does not provide an argument for allowing such placements while prohibiting adoption. We reject the Department’s remaining arguments for the same reason: they do not provide a reasonable basis for allowing homosexual foster parenting or guardianships while imposing a prohibition on adoption. . . .

We affirm the judgment of adoption, which holds subsection 63.042(3), Florida Statutes, violates the equal protection provision found in article I, section 2, of the Florida Constitution.¹⁴

Page 507: Replace Note 1 with the following:

1. The trial court version of this case is in the text at page 491. When the State of Florida appealed, the adoptive parent, Frank Gill, asked to have the case appealed directly to the Florida Supreme court, arguing that a state-wide ruling on the issue as soon as possible was essential to protect many families across the state seeking similar adoptions. The Florida Supreme court declined the request.

2. On January 30, 2009, the Family Section of the State Bar was granted permission by the State Bar to file an amicus brief, supporting Frank Gill. Liberty Counsel objected, arguing that it violated the first amendment rights of certain members of the Florida Bar. Membership is mandatory and the filing of the brief took a position that some lawyers disagreed with, thereby enforcing them to engage in speech that it did not support. They asked the Florida Supreme Court to enjoin the filing of the brief. On Jun 4, 2009, the court denied the injunction. *Liberty Counsel v. Fla Bar Bd. of Govs.*, 12 So.3d 183 (Fla. 2009). The Section filed its brief and another amicus brief was filed by a “dissenting member of the Family Law Section.” At least twelve amicus briefs were filed in the case, on behalf of numerous national organizations.

After the decision was handed down striking the ban on adoptions by gay men and lesbians, the State elected not to appeal the decision. Under Florida law, the appellate decision is binding throughout the state. As a result adoptions by gay men and lesbians have been legal in Florida since 2010.

Omit note 2 at page 507

Page 463, notes and questions following *Michael H.* case, add note 7.

7. Gerald D. wins his claim to be parent because of the strength of the marital presumption, even though it is proved that someone else is in fact the biological father. Do you agree with the premises that support a strong marital presumption? Do you think the marital presumption should apply to same-sex spouses? Or perhaps only same-sex female spouses? The marital presumption has historically been summarized as presuming that the man married to the birth mother is the father of the child. If it is true that same-sex spouses are entitled to the same benefits and protections as opposite-sex spouses, then the “wife” of the birth mother should be presumed to be the second legal parent of the child. What arguments can you make pro and con? See *infra* at Section D for additional discussion of this point.

Page 467, add the following note after the *Troxel* case.

3A. The *Troxel* case involved biological parents who were recognized as legal parents. Adoptive parents are also legal parents who should be protected under *Troxel*. In the remaining parts of this chapter, you will discover a number of other ways that a person may become a legal parent, ways that benefit many same-sex parents. As you think about these alternative ways of becoming a parent, ask yourself whether *Troxel* applies to these parents as well. In other words, although most of the commentary about *Troxel* has involved biological or adoptive parents, shouldn't *Troxel* protections be available for anyone who can establish that he or she is a “legal” parent?

Page 477, add the following note after the *Schuster* case:

5. Note: Cases like *Schuster* and *In re Marriage of R.S.* (following the *Jarrett* case) were all litigated in an era when same-sex relationships were generally thought to be immoral, an attitude strengthened by the 1986 U.S. Supreme Court in *Bowers v. Hardwick* (see Chapter One of this text). Once *Bowers v. Hardwick* was overruled by *Lawrence v. Texas* (2003)(also in Chapter One), family lawyers hoped that this litigation would cease. But now that marriage is available, might a court consider it detrimental to a child to be raised by a mother who is merely cohabiting with her partner rather than marrying her? Even if the relationship is no longer viewed as immoral might it be viewed as less stable than a household where the father has remarried? Reconsider this question when you read Notes 1-3 at page 484 of the text, discussing two Alabama cases.

Page 490, add the following note:

3. Now that same-sex couples have the right to marry, is it possible a family law court might view cohabitation by one parent negatively because it creates a less stable household? See Note 5 above in this Supplement.

Page 508 – Replace note 4 with the following:

4. In Arkansas, the Child Welfare Agency Review Board issued regulations in 1999 forbidding gay and lesbian persons from becoming foster parents. In 2006, the Arkansas Supreme Court struck down the regulations essentially holding that the state agency did not have the power to prevent gay men and lesbians from becoming foster parents because that was not in the best interest of children. Thus, the regulations were an invalid exercise of the agency's power. See *Howard v. Dept. of Human Services*, 367 Ark. 55, 238 S.W.3d 1 (Ark. 2006).

The Arkansas Family Council, a conservative nonprofit group, responded by lobbying for legislation that would prohibit gay people from adopting or foster parenting. When they lost that battle, they turned to the people and in November 2008, the people voted to adopt legislation by initiative that prohibits persons (gay or nongay) from adopting or foster parenting if they were cohabiting with an unmarried partner. The ACLU filed suit in state court challenging the constitutionality of this new statutory provision under both state and federal constitutions.

On April 16, 2010, Pulaski County Circuit Judge Christopher C. Piazza struck down the act on state constitutional grounds, finding that the act burdened the right of privacy, which is more protected under the Arkansas constitution than under the federal constitution. Applying low-level scrutiny to the federal constitutional claims, he found no violation of the Fourteenth Amendment. But applying heightened scrutiny to the privacy claim, he found a violation of the state constitution. This holding fairly clearly answers the question as to why the ACLU filed in state court. The case is *Cole v. Arkansas Dept. of Human Services*. The Alliance Defense Fund announced several days later that it would appeal the decision. The appeal was direct to the Arkansas Supreme Court, which handed down its decision on April 7, 2011.

Arkansas Department of Human Services v. Cole
380 S.W.3d 429 (Ark. 2011)

ROBERT L. BROWN, Justice.

On November 4, 2008, a ballot initiative entitled “An Act Providing That an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old” was approved by fifty-seven percent of Arkansas voters. The ballot initiative is known as the Arkansas Adoption and Foster Care Act of 2008 or “Act 1.” Act 1 went into effect on January 1, 2009, and is now codified at Arkansas Code Annotated sections 9–8–301 to –305.

Under Act 1, an individual is prohibited from adopting or serving as a foster parent if that individual is “cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state.” Ark.Code Ann. § 9–8–304(a) (Repl.2009). This prohibition on adoption and foster parenting “applies equally to cohabiting opposite-sex and same-sex individuals.” Ark.Code Ann. § 9–8–304(b). Act 1 further provides that the “public policy of the state is to favor marriage as defined by the constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care.” Ark.Code Ann. § 9–8–302 (Repl.2009). Act 1 also declares that “it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage.” Ark.Code Ann. § 9–8–301 (Repl.2009).

On December 30, 2008, appellees Sheila Cole and a group which includes unmarried adults who wish to foster or adopt children in Arkansas, adult parents who wish to direct the adoption of their biological children in the event of their incapacitation or death, and the biological children of those parents (collectively “Cole”), filed a complaint against the State of Arkansas, the Arkansas Attorney General, the Arkansas Department of Human Services (DHS) and its Director, and the Arkansas Child Welfare Agency Review Board (CWARB) and its Chairman (collectively “the State”). In her complaint, Cole pled the following counts:

[12 separate counts were pled; they included a violation of the due process rights of the children who sought homes to live in; a violation of family integrity rights; a violation of a parent’s right to make decisions about how best to raise their children; a violation of a child’s right to be adopted; a burden on intimate relationship in violation of the right to privacy; these claims were asserted under both the federal and the state constitution – eds]

Fundamental Right

The State and FCAC first contend that adoption and fostering are not fundamental rights under the Arkansas Constitution. Cole counters and contends in her complaint that because Act 1 prohibits cohabiting sexual partners from adopting and fostering, this substantially burdens her right to engage in private acts of sexual intimacy with her partner in her home. Specifically, Cole contends that Act 1 forces her to choose between a relationship with a sexual partner on the one hand and adopting or fostering children on the other, thus burdening her right to sexual intimacy. Under Act 1, she claims, she cannot do both.

In *Jegley v. Picado*, this court considered a constitutional challenge to an Arkansas statute which criminalized acts of sodomy between homosexuals. The appellees in *Jegley* sought to have this sodomy statute declared unconstitutional insofar as it criminalized specific acts of private, consensual, sexual intimacy between persons of the same sex. The circuit court found the statute unconstitutional because Arkansas’s fundamental right to privacy, which is implicit in the Arkansas Constitution, encompasses the right of people to engage in private, consensual, noncommercial, sexual conduct without the burden of government intrusions.

In considering the appellees’ assertion in *Jegley* that the sodomy statute violated their right to privacy under the Arkansas Constitution, this court explored the rights granted to the citizens of Arkansas. We specifically found that no right to privacy is enumerated in the Arkansas Constitution. Nevertheless, we recognized that article 2, section 2 of the Arkansas Constitution does guarantee citizens certain inherent and inalienable rights, including the enjoyment of life and liberty and the pursuit of happiness, and section 15 guarantees the right of citizens to be secure in their own homes. *Jegley*, 349 Ark. at 627–28, 80 S.W.3d at 347; Ark. Const. art. 2, §§ 2, 15. We further noted that privacy is mentioned in more than eighty statutes enacted by the Arkansas General Assembly, thereby establishing “a public policy of the General Assembly supporting a right to privacy.” *Id.* at 628–29, 80 S.W.3d at 347–48.

In light of the language contained in the Arkansas Constitution, our statutes and rules, and our jurisprudence, this court concluded “that Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas

Constitution.” Id. at 632, 80 S.W.3d at 349–50. We went on to hold that “the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults.” Id. at 632, 80 S.W.3d at 350. Accordingly, because the sodomy statute burdened certain sexual conduct between members of the same sex, this court found that it impinged on the fundamental right to privacy guaranteed to all citizens of Arkansas. Furthermore, because the sodomy statute burdened a fundamental right, this court concluded that the constitutionality of the statute must be analyzed under strict or heightened scrutiny. *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350. The State conceded that it could offer no compelling State interest sufficient to justify criminalizing acts of sodomy. We held that the sodomy statute was unconstitutional as applied to private, consensual, noncommercial, same-sex sodomy.

The State and FCAC now contend in the case at hand that, unlike in *Jegley*, a fundamental right is not at issue in the instant case because Act 1 only proscribes cohabitation. That argument, however, is not altogether correct. The express language of Act 1 reads that “[a] minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state.” Ark.Code Ann. § 9–8–304(a) (emphasis added). Those words clearly make the ability to become an adoptive or foster parent conditioned on the would-be parent’s sexual relationship. Hence, Act 1 does not merely prohibit cohabitation. Instead, the act expressly prohibits those persons who cohabit with a sexual partner from becoming adoptive or foster parents.

The State and FCAC do not really contest the fact that cohabiting adults in Arkansas have a fundamental right under *Jegley* to engage in consensual, sexual acts within the privacy of their homes without government intrusion. Their bone of contention is whether this right is indeed burdened by Act 1, and they point to the fact that adopting and fostering children are privileges bestowed by state statutes and not rights in themselves.

The problem with the argument mounted by the State and FCAC is that under Act 1 the exercise of one’s fundamental right to engage in private, consensual sexual activity is conditioned on foregoing the privilege of adopting or fostering children. The choice imposed on cohabiting sexual partners, whether heterosexual or homosexual, is dramatic. They must chose either to lead a life of private, sexual intimacy with a partner without the opportunity to adopt or foster children or forego sexual cohabitation and, thereby, attain eligibility to adopt or foster.

The United States Supreme Court has rejected the concept that constitutional rights turn on whether a government benefit is characterized as a “right” or as a “privilege.” See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6 (1969) (invalidating a law that conditioned receipt of welfare benefits on a residency requirement as an unconstitutional burden on right to interstate travel, and noting that “[t]his constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’ “), overruled in part on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“[C]onstruction of the statute [cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s ‘right’ but merely a ‘privilege.’ It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”)

The State and FCAC maintain that unlike the sodomy statute in *Jegley* and the DHS regulation preventing homosexuals from being foster parents in *Department of Human Services & Child Welfare Agency Review Board v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006), Act 1 does not penalize anyone for having sexual relations. And yet, this is precisely what Act 1 does. It penalizes those couples who cohabit and engage in sexual relations by foreclosing their eligibility to have children, either through adoption or by means of foster care.

In addition, we fail to see a meaningful distinction between *Jegley*'s facts and the facts of the instant case with regard to the burden placed on the fundamental right to sexual privacy in the home. In *Jegley*, certain sexual acts, specifically acts of sodomy, were banned by criminal law. In the case before us, the entire privilege afforded by law to have children in the home, whether adopted or foster children, is denied to cohabiting sexual partners. In both situations, the penalty imposed is a considerable burden on the right to intimacy in the home free from invasive government scrutiny.

We hold that a fundamental right to privacy is at issue in this case and that, under the Arkansas Constitution, sexual cohabitators have the right to engage in private, consensual, noncommercial intimacy in the privacy of their homes. We further hold that this right is jeopardized by Act 1 which precludes all sexual cohabitators, without exception, from eligibility for parenthood, whether by means of adoption or foster care. ...

Thus, Act 1 directly and substantially burdens the privacy rights of "opposite-sex and same-sex individuals" who engage in private, consensual sexual conduct in the bedroom by foreclosing their eligibility to foster or adopt children, should they choose to cohabit with their sexual partner. The pressure on such couples to live apart, should they wish to foster or adopt children, is clearly significant. In *Jegley*, the burden perpetrated by the State was criminal prosecution for sodomy, although the act took place in the privacy of the bedroom. In the case before us, the burden dispensed by the State is either to remove the ability to foster or adopt children, should sexual partners live together, or to intrude into the bedroom to assure that cohabitators who adopt or foster are celibate. We conclude that, in this case as in *Jegley*, the burden is direct and substantial.

Heightened Scrutiny

Because Act 1 burdens a fundamental right, the circuit court applied heightened scrutiny rather than a rational-basis review in its analysis. *Jegley v. Picado*, *supra*; see also *Linder v. Linder*, *supra*. We defined heightened scrutiny in *Jegley*: "When a statute infringes upon a fundamental right, it cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (quoting *Thompson v. Ark. Social Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)).

According to the circuit court's April 16, 2010 order in the instant case, when viewed under this heightened-scrutiny standard, "Initiated Act 1 is facially invalid because it casts an unreasonably broad net over more people than is needed to serve the State's compelling interest. It is not narrowly tailored to the least restrictive means necessary to serve the State's interest in determining what is in the best interest of the child."

We first observe that the compelling interest of the State is to protect the children of the State and their best interests. All parties agree on that point. But the issue is, under heightened scrutiny, whether the least restrictive means was employed by the State and FCAC to accomplish this laudatory end. The State and FCAC dispute the fact that heightened scrutiny applies to this case. They advance, as an alternative, that no fundamental right is involved that is directly and substantially burdened and the test, therefore, is whether the State's action under Act 1 rationally serves a legitimate state interest.

We have held in this case that a fundamental right of privacy is at issue and that the burden imposed by the State is direct and substantial. We now hold, as an additional matter, that because of the direct and substantial burden on a fundamental right, the standard to be applied is heightened scrutiny and not a rational-basis standard. Using the heightened-scrutiny standard, because Act 1 exacts a categorical ban against all cohabiting couples engaged in sexual conduct, we hold that it is not narrowly tailored or the least restrictive means available to serve the State's compelling interest of protecting the best interest of the child.

In holding as we do, we first note that Act 1 says "[t]he people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage." Ark.Code Ann. § 9-8-301 (Repl.2009). Despite this statement in Act 1, several of the State's and FCAC's own witnesses testified that they did not believe Act 1 promoted the welfare interests of the child by its categorical ban.

Ed Appler, Child Welfare Agency Review Board (CWARB) member and President of Grace Adoptions, said in his deposition taken August 4, 2009, that, as a Review Board Member and as a social worker, he could not identify any child welfare interests that are advanced by Act 1. Sandi Doherty, Division of Children and Family Services (DCFS) Program Administrator and former DCFS Area Director and County Supervisor, in her deposition taken November 17, 2009, stated that in her personal view Act 1 is not consistent with the best practices because it bars placement of children with relatives who are cohabiting with a sexual partner. Marilyn Counts, DCFS Administrator of Adoptions, in her deposition taken December 9, 2009, agreed that she could not identify any child welfare interests that are furthered by categorically excluding unmarried couples from being assessed on an individual basis as to whether they would be a suitable adoptive parent. John Selig, Director of DHS, in his deposition taken December 16, 2009, stated that in his personal opinion, it is not in the best interest of children to have a categorical ban on any cohabiting couple from fostering or adopting children because the case workers should have as much discretion as possible to make the best placement. Moreover, counsel for the State and FCAC admitted at oral argument that some adults cohabiting with their sexual partners would be suitable and appropriate foster or adoptive parents, all of which militates against a blanket ban.

Furthermore, the concerns raised by the State and FCAC and used as justification for Act 1’s categorical ban of cohabiting adults, such as (1) unmarried cohabiting relationships are less stable than married relationships, (2) they put children at a higher risk for domestic violence and abuse than married relationships, and (3) they have lower income levels, higher infidelity rates, and less social support than married relationships, can all be addressed by the individualized screening process currently in place in foster and adoption cases. The CWARB has Minimum Licensing Standards that require it to “select the home that is in the best interest of the child, the least restrictive possible, and is matched to the child’s physical and emotional needs. The placement decision shall be based on an individualized assessment of the child’s needs.” Minimum Licensing Standards for Child Welfare Agencies § 200.1.

We conclude that the individualized assessments by DHS and our trial courts are effective in addressing issues such as relationship instability, abuse, lack of social support, and other factors that could potentially create a risk to the child or otherwise render the applicant unsuitable to be a foster or adoptive parent. These would be the least restrictive means for addressing the compelling state interest of protecting the welfare, safety, and best interest of Arkansas’s children. By imposing a categorical ban on all persons who cohabit with a sexual partner, Act 1 removes the ability of the State and our courts to conduct these individualized assessments on these individuals, many of whom could qualify and be entirely suitable foster or adoptive parents. As a result, Act 1 fails to pass constitutional muster under a heightened-scrutiny analysis. ***

* * * * *

Page 513 – add the following paragraph to “Notes and Questions”

Given the fact that full faith and credit means that every state is required to honor the final judgments of every other state, and given the fact that adoptions are final judgments, whenever adoption is available to create a legal parent relationship, family attorneys recommend that the parent go through an adoption even if the parent is otherwise recognized as a parent under the law of current residence or domicile. Alternatively, it is sometimes possible to get a final judgment of parentage. In that case, an adoption should not be necessary. It is the existence of a final judgment that triggers the full faith and credit clause. Consider this case from Texas dealing with a California judgment of paternity, finding both men to be fathers:

Berwick v. Wagner
--- S.W.3d ----, 2014 WL 4493470 (2014)
Court of Appeals of Texas,
Houston (1st Dist.)
Petition for Review filed

[The following factual background is taken from the initial action brought in this case and referenced in the current litigation.]

Appellant Jerry Berwick appeals the trial court's judgment appointing appellee Richard Wagner as sole managing conservator and Berwick as possessory conservator of their minor child, C.B.W. We affirm.

Berwick and Wagner, both men, were in a relationship with each other from 1994 through 2008. They were legally married in Canada in 2003 and registered as domestic partners in California in 2005. They lived together in Houston beginning in 1997.

In 2005, they entered into a gestational surrogacy agreement with a married woman in California for her to carry a child for them. She was implanted with embryos formed from Berwick's sperm and donated ova, which resulted in pregnancy and the birth of a son, C.B.W. A California court entered an order entitled "Judgment of Paternity" before C.B.W.'s birth, (1) declaring both Berwick and Wagner each to be a "legal parent" of C.B.W., (2) declaring the surrogate and her husband to not be C.B.W.'s legal parents, (3) ordering the hospital to list Berwick in the space provided for father on the original birth certificate, and (4) ordering the hospital to list Wagner in the space provided for mother on the original birth certificate. After C.B.W.'s birth, Berwick and Wagner brought him to Houston, where they lived together as a family for several years.

In 2008, Berwick ended his relationship with Wagner. In response, Wagner filed the underlying Suit Affecting the Parent Child Relationship (SAPCR) seeking an order naming Wagner and Berwick joint managing conservators of C.B.W. Berwick counterclaimed, seeking to be named sole managing conservator and arguing that Wagner lacked standing as a parent to seek custody because only Berwick, but not Wagner, was biologically related to C.B.W. through use of Berwick's sperm to conceive C.B.W.

In a separate proceeding, Wagner then registered, as a foreign judgment, the California "Judgment of Paternity," under section 152.305 of the Texas Family Code, which provides for registration and confirmation of child-custody determinations from other jurisdictions. Under that section, after proper notice and an opportunity to contest the registration are given to appropriate parties, a trial court is required to confirm the judgment. See TEX. FAM.CODE ANN. § 152.305(d) (Vernon 2013) . . .

Berwick timely contested registration, and the trial court combined—for purposes of briefing, evidence, and a hearing—the issues of (1) whether confirmation of the California judgment was proper under section 152.305 in the registration proceeding, and (2) whether Wagner had standing in the underlying SAPCR proceeding. The trial court concluded that confirmation was proper, and that Wagner had standing to bring the underlying SAPCR.

[Note: After an accelerated appeal from the trial court's conclusion in which all legal issues were confirmed, proceedings began in a jury trial to determining who should be name conservator of the child. The jury determined that Wagner be appointed sole managing conservator and Berwick possessory conservator. In Texas, unlike other jurisdictions, questions of custody are determined by a jury – eds.]

[There were six issues asserted on appeal. This edited version of the case will address onlyl the first issue:]

1. “The California Judgment of Paternity Cannot be Enforced.”

THE CALIFORNIA JUDGMENT

A. Parties’ Arguments

In his first issue, Berwick contends that registration of the California Judgment of Paternity in Texas “does not mean that it is enforceable.” He argues that the California judgment’s adjudication of Wagner as a parent should not be recognized because it “is contrary to Texas law.” Because “[e]stablishing the parentage of Texas children is a matter of great public importance” that Texas has elected to provide for statutorily, and because “Wagner does not meet the statutory requirements,” the California judgment “is against Texas public policy and, ... therefore, unenforceable in this matter.”

Specifically, Berwick points to the Texas Family Code’s provision defining “parent” as “an individual who has established a parent-child relationship under Section 160.201.” TEX. FAM.CODE § 160.102(11). Section 160.201 in turn states that the “father-child relationship” is established between a man and a child by un rebutted presumption, effective acknowledgment, adjudication of paternity, adoption, or the man’s consenting to assisted reproduction by his wife. Because, according to Berwick, Wagner does not meet the definition of a parent under section 160.102(11), the “conclusion is inescapable—under Texas law, Wagner is not a parent of C.B.W.,” and “[w]hether Wagner established a ‘parent-child relationship’ under ... the California Family Code is immaterial to this proceeding.”

Berwick acknowledges that the Texas Family Code provides that “[a] court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state,” but argues that because the California judgment “recognized two men as C.B.W.’s parents,” it is “a judgment that is not ‘normally available under the law of this state.’” Similarly, he contends that “while California may allow Wagner to occupy the legal space reserved for ‘mother,’ or a ‘second father’ in California [on a birth certificate], that same result is not available in Texas.”

Berwick asserts that, unlike Wagner, he is both C.B.W.’s actual father because C.B.W. was conceived with Berwick’s sperm and his “presumed father under Texas law because ‘during the first two years of the child’s life, he continuously resided in the household in which the child resided, and he represented to others that the child was his own.’” TEX. FAM.CODE § 160.204(a)(5). “In stark contrast,” he argues, “although Wagner resided in the home with the child for the first two years of the child’s life, Wagner could not genuinely represent to others that C.B.W. was his own because of Berwick’s undisputed paternity and Wagner’s confessed knowledge thereof.” According to Berwick, these facts leave this Court with only two options: (1) enforce the California judgment as establishing only a presumption of paternity for both men, and then adjudicate Berwick only as the actual father, because “[a] child can have only one legal father,” or (2) “enforce the California judgment as to only its adjudication of Berwick as the child’s ‘parent’ and ‘father.’”

In addition to arguing that Wagner cannot be C.B.W.’s parent under Texas law, Berwick argues that the “gestational surrogacy agreement that gave rise to the California judgment is void under Texas law.” He contends that “the California judgment is the regurgitation of the gestational

surrogacy agreement in the form of a judicial decree—nothing more,” and notes that, under Texas law, “the intended parents must be married to each other” for a gestational surrogacy agreement to be enforceable. TEX. FAM.CODE § 160.754(b). And, he notes, Texas law does not recognize his marriage to Wagner, despite their obtaining a marriage license in Canada. [Note: Of course this is no longer true under Obergefell – eds.] Because “[w]hat cannot come in the front door should not be permitted entrance through another,” Berwick argues that we should not allow Wagner to “rely upon the gestational surrogacy agreement to make him a parent under Texas law.” . . .

In response to Berwick’s first issue, Wagner contends that it is not “enforcement” of the California paternity judgment at issue, but instead “recognition” of that judgment. Wagner argues that “every final judgment rendered in a sister state, including the California parentage judgment that established Berwick and Wagner as C.B.W.’s legal parents, is entitled to full faith and credit in every other state as a matter of federal constitutional law.” See U.S. CONST. art. IV § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state.”).

Wagner notes that Berwick cites only choice-of-law cases in arguing that we must examine our State’s public policy in determining whether the trial court properly gave effect to California’s parentage judgment, rather than cases applying the full-faith-and-credit clause to other states’ final judgments. He contends that “Texas courts are not required to apply the laws of other states to adjudicate disputes in the first instances where no prior judgment has resolved the same issue between the parties.” Observing that “[e]ach of the pre-judgment cases cited by Berwick falls into this category, where the court is faced with the prospect of applying the substantive law of a different jurisdiction that conflicts with Texas law,” Wagner argues that the cases simply do not apply here. In other words, it is irrelevant whether his and Berwick’s surrogacy contract would have been enforceable if entered in Texas in the first instance because “[w]hen presented with a final judgment from another state, Texas may not first look behind the judgment to determine if Texas agrees with the law and application of that law giving rise to it before deciding whether Texas will recognize and enforce it.” [cites omitted] . . .

B. ANALYSIS

A. Texas Gives Full Faith and Credit to Foreign Paternity Adjudications.

The United States Constitution mandates that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1. Texas courts have thus consistently recognized that the “full faith and credit clause requires that a valid judgment from one state be enforced in other states regardless of the laws or public policy of the other states.” *Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 794 (Tex.1992). “In other words, a judgment rendered by a sister state is entitled to the same recognition and credit in this state as it would receive in the state where it was rendered and its validity is determined by the laws of the state where it was rendered.” *In re Dalton*, 348 S.W.3d 290, 294 (Tex.App.-Tyler 2011, no pet.).

This full faith and credit has been repeatedly applied in Texas to other state’s adjudication of parentage. See e.g., *Bjorgo v. Bjorgo*, 402 S.W.2d 143, 147 (Tex.1966) . . .

B. The California Judgment is entitled to full faith and credit

The California Judgment is entitled “Judgment of Paternity” and states “Petitioner Richard Thompson Wagner has judgment in that Petitioner Richard Thompson Wagner is declared to be a legal parent.” This Court has already held that the judgment was properly registered in Texas, and that the California court had jurisdiction to enter the judgment. . . . The trial court correctly decided that this final, unappealed judgment adjudicating Wagner as C.B.W.’s parent—a judgment entered at the request of Berwick, Wagner, and C.B.W.’s surrogate mother and her husband—is entitled to full faith and credit. And none of the arguments Berwick advances in support of his position that the trial court erred are supported under Texas law.

The bulk of Berwick’s argument is focused on public policy. He contends that we should consider the California judgment void because, he asserts, under Texas law, (1) “[a] child can have only one legal father,” and (2) surrogacy agreements are unenforceable unless the intended parents are married persons of opposite gender. Berwick cites no authority for deeming a foreign paternity judgment to be so repugnant to Texas policy to render it void and subject to collateral attack. And Berwick’s arguments ignore the strong state public policies favoring stability and finality in matters of parentage evidenced by numerous statutes. See e.g., TEX. FAM.CODE ANN. § 153.001 (“The public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.”); TEXAS FAM.CODE ANN. § 162.012 (“[T]he validity of an adoption order is not subject to attack after six months after the date the order was signed.”); TEX. FAMILY CODE ANN. § 160.307 (imposing restrictions on the ability of a party acknowledging paternity to rescind that acknowledgement).⁵

Because we conclude that the trial court correctly gave full faith and credit to the California judgment adjudicating Wagner’s status as C.B.W.’s parent, we overrule Berwick’s first issue.

* * * *

Page 513 – after Notes and Questions, insert the following case:

Adar v Smith
639 F.3d 146 (5th Cir. 2011)
Certiorari Denied 122 S. Ct. 400 (2011)
En banc

EDITH H. JONES, Chief Judge:

Mickey Smith and Oren Adar, two unmarried individuals, legally adopted Louisiana-born Infant J in New York in 2006. They sought to have Infant J’s birth certificate reissued in Louisiana supplanting the names of his biological parents with their own. According to LA.REV.STAT.

ANN. § 40:76(A), the Registrar “may create a new record of birth” when presented with a properly certified out-of-state adoption decree. Subsection C states that the Registrar “shall make a new record ... showing,” *inter alia*, “the names of the adoptive parents.” LA.REV.STAT. ANN. § 40:76(C). Darlene Smith, the Registrar of Vital Records and Statistics, refused their request. The Registrar took the position that “adoptive parents” in section 40:76(C) means married parents, because in Louisiana, only married couples may jointly adopt a child. LA. CHILD. CODE ANN. art. 1221. She offered, however, to place one of Appellees’ names on the birth certificate because Louisiana also allows a single-parent adoption. Smith and Adar sued the Registrar under 42 U.S.C. § 1983 for declaratory and injunctive relief, asserting that her action denies full faith and credit to the New York adoption decree and equal protection to them and Infant J.

The district court ruled in favor of Smith and Adar on their full faith and credit claim. Following the Registrar’s appeal, a panel of this court pretermitted the full faith and credit claim, concluding instead that Louisiana law, properly understood, required the Registrar to reissue the birth certificate. This panel opinion was vacated by our court’s decision to rehear the case *en banc*. *Adar v. Smith*, 622 F.3d 426 (5th Cir.2010).

I. FULL FAITH AND CREDIT

The questions at issue are the scope of the full faith and credit clause and whether its violation is redressable in federal court in a § 1983 action.

Appellees contend that their claim arises under the full faith and credit clause, effectuated in federal law by 28 U.S.C. § 1738. The Constitution’s Article IV, § 1 provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In pertinent part, the statute states:

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

...

Such Acts, records and judicial proceedings or copies thereof [of any State, Territory, or Possession of the United States], so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

Infant J was adopted in a court proceeding in New York state, as evidenced by a judicial decree. Appellees contend that Art. IV, § 1 and § 1738 oblige the Registrar to “recognize” their adoption of Infant J by issuing a revised birth certificate. The Registrar declined, however, to enforce the New York decree by altering Infant J’s official birth records in a way that is inconsistent with Louisiana law governing reissuance. See LA.REV.STAT. ANN. 40:76; LA. CHILD. CODE ANN. arts. 1198, 1221. Appellees argue that either the Registrar’s refusal to issue an amended birth certificate with both names on it, or the state law on which she relied, effectively denies

them and their child “recognition” of the New York decree. Thus, the Registrar, acting under color of law, abridged rights created by the Constitution and laws of the United States. 42 U.S.C. § 1983.

This train of reasoning is superficially appealing, but it cannot be squared with the Supreme Court’s consistent jurisprudential treatment of the full faith and credit clause or with the lower federal courts’ equally consistent approach. Simply put, the clause and its enabling statute created a rule of decision to govern the preclusive effect of final, binding adjudications from one state court or tribunal when litigation is pursued in another state or federal court. No more, no less. Because the clause guides rulings in courts, the “right” it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state. The forum’s failure properly to accord full faith and credit is subject to ultimate review by the Supreme Court of the United States. Section 1983 has no place in the clause’s orchestration of inter-court comity—state courts may err, but their rulings are not subject to declaratory or injunctive relief in federal courts.

Alternatively, even if the Supreme Court were inclined for the first time to find a claim of this sort cognizable under § 1983, the Registrar did not violate the clause by determining how to apply Louisiana’s laws to maintain its vital statistics records. As the Supreme Court has clarified, “Enforcement measures do not travel with the ... judgment.” *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235, 118 S.Ct. 657, 665, 139 L.Ed.2d 580 (1998). The Registrar concedes it is bound by the New York adoption decree, such that the parental relationship of Adar and Smith with Infant J cannot be relitigated in Louisiana. That point is not at issue here. There is no legal basis on which to conclude that failure to issue a revised birth certificate denies “recognition” to the New York adoption decree.

1. The full faith and credit clause imposes an obligation on courts to afford sister-state judgments res judicata effect.

To explain these conclusions, we begin with the history and purpose of the full faith and credit clause. Under the common law, the concept of “full faith and credit” related solely to judicial proceedings. In particular, “the terms ‘faith’ and ‘credit’ were generally drawn from the English law of evidence and employed to describe the admissibility and effect of items of proof.” Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 265 (1998). These terms were incorporated into the Constitution in the full faith and credit clause.

Early on, the phrase “full faith and credit,” when used in conjunction with a judgment, indicated either that a judgment would be given a conclusive, or res judicata, effect on the merits, or that the judgment, when properly authenticated, would “simply be admitted in to [sic] evidence as proof of its own existence and contents, leaving its substantive effect to be determined by other rules.” *Id.* at 267. The Supreme Court soon rejected the argument that full faith and credit obligations entailed a mere evidentiary requirement, and instead held that state courts would be obliged to afford a sister-state judgment the same res judicata effect which the issuing court would give it. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485, 3 L.Ed. 411 (1813) (Story, J.); *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235, 4 L.Ed. 378 (1818) (Marshall, C.J.). Since

then, adhering to the original purpose of the clause, the Court has interrelated the requirement of “full faith and credit” owed to judgments with the principles of *res judicata*.

According to the Court, the purpose of the clause was to replace the international law rule of comity with a constitutional duty of states to honor the laws and judgments of sister states. *Estin v. Estin*, 334 U.S. 541, 546, 68 S.Ct. 1213, 1217, 92 L.Ed. 1561 (1948) (the full faith and credit clause “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns”). With respect to judgments, this meant that other states’ courts were obliged “to honor” the “*res judicata* rules of the court that rendered an initial judgment.” 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403, at 44 (2d ed. 2002) [hereinafter “WRIGHT & MILLER”]; *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 64 S.Ct. 208, 214, 88 L.Ed. 149 (1943) (noting that “the clear purpose of the full faith and credit clause” was to establish the principle that “a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every court as in that where the judgment was rendered”). The clause thus became the “vehicle for exporting local *res judicata* policy to other tribunals.” 18B WRIGHT & MILLER § 4467, at 14; see also *Magnolia Petroleum Co.*, 320 U.S. at 438, 64 S.Ct. at 213 (stating that full faith and credit clause and implementing statute “have made that which has been adjudicated in one state *res judicata* to the same extent in every other”).

Without the clause, unsuccessful litigants could have proceeded from state to state until they obtained a favorable judgment, capitalizing on state courts’ freedom to ignore the judgments of sister states. But, as the Court put it, the full faith and credit clause brought to the Union a useful means of ending litigation by making “the local doctrines of *res judicata* ... a part of national jurisprudence.” ...

The Court still maintains that the clause essentially imposes a duty on state courts to give a sister-state judgment the same effect that the issuing court would give it. ... For this reason, a state satisfies its constitutional obligation of full faith and credit where it affords a sister-state judgment “the same credit, validity, and effect” in its own courts, “which it had in the state where it was pronounced.” The question, then, is whether this obligation gives rise to a right vindicable in a § 1983 action. We hold that it does not.

Appellees assert that plaintiffs may employ § 1983 against any state actor who violates one’s “right” to full faith and credit, since § 1983 provides remedies for the violation of constitutional and statutory rights. Only one federal case, to be discussed later, appears to support this proposition. See *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir.2007). Other federal courts, led by the Supreme Court, have uniformly defined the “right” as a right to court judgments that properly recognize sister-state judgments; they have confined the remedy to review by the Supreme Court; and they have held that lower federal courts lack jurisdiction to preemptively enforce full faith and credit claims. All of these principles are inconsistent with stating a claim remediable by § 1983.

The Supreme Court has described the full faith and credit clause as imposing a constitutional “rule of decision” on state courts. While the Court has at times referred to the clause in terms of individual “rights,” it consistently identifies the violators of that right as state courts. ...

The cases thus couple the individual right with the duty of courts and tether the right to res judicata principles. This explains the usual posture of full faith and credit cases: the issue arises in the context of pending litigation—not as a claim brought against a party failing to afford full faith and credit to a state judgment, but as a basis to challenge the forum court’s decision. Such cases begin in state court, and the Supreme Court intervenes only after the state court denies the validity of a sister state’s law or judgment. Consequently, since the duty of affording full faith and credit to a judgment falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors.

Fifth Circuit law confirms this point. See *White v. Thomas*, 660 F.2d 680, 685 (5th Cir.1981). In *White*, this court dismissed a § 1983 claim brought against a Texas sheriff who fired the plaintiff for allegedly lying on his employment application form by failing to disclose his involvement in a juvenile crime. *Id.* at 682. The plaintiff argued that because a California court had entered an order expunging his juvenile record, Texas state officials were obliged to treat his record as expunged. The court held that the sheriff could not have violated the full faith and credit clause because its function was “to avoid relitigation of the same issue in courts of another state.” *Id.* at 685. The clause did not “require a Texas sheriff to obey California law.” *Id.* (emphasis added).

Only one federal court decision has permitted a full faith and credit claim to be brought in federal court pursuant to § 1983. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir.2007). In *Finstuen*, a couple sued to invalidate an Oklahoma statute that officially denied recognition to out-of-state adoptions by same-sex couples. The Tenth Circuit not only granted relief under § 1983, but also ordered a new birth certificate to be issued bearing the names of the same-sex parents. 496 F.3d at 1156. The bulk of the opinion is devoted to analysis of the allegedly unconstitutional state non-recognition statute, a problem different from the one here. Moreover, the court did not discuss, nor does it appear to have been argued, that (1) the clause has hitherto been enforced only as to court decisions denying recognition of out-of-state judgments, and (2) Supreme Court authority, cited below, denies federal question jurisdiction to full faith and credit claims.

Finstuen however, acknowledges the principle that “[e]nforcement measures do not travel with the sister state judgment” for full faith and credit purposes, and it characterizes the birth certificate sought by the plaintiffs as an “enforcement mechanism”. See 496 F.3d at 1154. In the end, *Finstuen* is distinguishable not only because the Registrar here concedes the validity of Infant J’s adoption but because Louisiana law, unlike Oklahoma law, does not require issuing birth certificates to two unmarried individuals. The “enforcement measure”—issuance of a revised birth certificate—is thus critically different in the two states.

2. The Appellees’ request for a birth certificate is appropriately brought in state court.

That the clause affords a rule of decision in state courts is reinforced by the cases that hold reliance on the clause alone insufficient to invoke federal question jurisdiction. ... Although the full faith and credit clause is part of the Constitution within the meaning of 28 U.S.C. § 1331, “there is no jurisdiction because the relation of the constitutional provision and the claim is not sufficiently direct that the case ‘arises under’ the clause.” Absent an independent source of jurisdiction over such claims, federal district courts may not hear such cases. See, e.g., *Chicago & A.R. Co.*, 108 U.S. at 22, 1 S.Ct. at 615. Thus, the Fifth Circuit has stated that “a fight over

the enforcement of a state court judgment is not automatically entitled to a federal arena.” *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 n. 1 (5th Cir.1974).

To enforce the clause, Appellees might have sought to compel the issuance of a new birth certificate in Louisiana courts, for full faith and credit doctrine does not contemplate requiring an executive officer to “execute” a foreign judgment without the intermediary of a state court. *Riley v. N.Y. Trust Co.*, 315 U.S. 343 ... The Appellees concede in their brief that “most frequently judgments are enforced through further judicial proceedings, as reflected by the great body of full faith and credit jurisprudence.” As the Supreme Court once indicated, to give one state’s judgment “the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.” *Lynde v. Lynde*, 181 U.S. 183, 187 ... After Appellees’ case has been submitted to the state courts, the full faith and credit clause may provide the federal question to support Supreme Court review. See *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962) (reviewing South Carolina Supreme Court decision which rested upon its reading of the full faith and credit clause). ...

3. Alternatively, full faith and credit does not extend to enforcing the New York adoption decree. Even if we assume, contrary to all the above-cited cases, that § 1983 provides a remedy against non-judicial actors for violations of the full faith and credit clause, the Appellees still cannot prevail because the Registrar has not denied recognition to the New York adoption decree.

Supreme Court precedent differentiates the credit owed to laws and the credit owed to judgments. *Baker*, 522 U.S. at 232, 118 S.Ct. at 663. With regard to judgments, the Court has described the full faith and credit obligation as “exacting.” *Id.* at 233, 118 S.Ct. at 663. The states’ duty to “recognize” sister state judgments, however, does not compel states to “adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.” *Id.* at 235, 118 S.Ct. at 665. Rather, enforcement of judgments is “subject to the evenhanded control of forum law.” *Id.* “Evenhanded” means only that the state executes a sister state judgment in the same way that it would execute judgments in the forum court.

In this case, the Registrar has not refused to recognize the validity of the New York adoption decree. The Registrar concedes that the parental relationship of Adar and Smith with Infant J cannot be revisited in its courts. That question is not at issue. The Registrar in fact offered to comply with Louisiana law and reissue a birth certificate showing one of the unmarried adults as the adoptive parent. The Registrar acknowledged that even though she would not issue the requested birth certificate with both names, the Registrar recognizes Appellees as the legal parents of their adopted child. And the Appellees apparently agree, admitting that birth certificates are merely “identity documents that evidence ... the existing parent-child relationships, but do not create them.” Appellees affirm that “the child at the center of this case” is already “legally adopted—and nothing that happens in this case will change that.” In sum, no right created by the New York adoption order (i.e., right to custody, parental control, etc.) has been frustrated, as nothing in the order entitles Appellees to a particular type of birth certificate.

Appellees nevertheless assert that the full faith and credit clause entitles them to a revised birth certificate with both of their names. The Supreme Court has not expressly ruled on this claim, but the Court has never “require [d] the enforcement of every right which has ripened into a

judgment of another state or has been conferred by its statutes.” *Broderick v. Rosner*, 294 U.S. 629, 642, 55 S.Ct. 589, 592, 79 L.Ed. 1100 (1935). Importantly, in *Estin v. Estin*, the Supreme Court held that a divorce decree entered in Nevada effected a change in the couple’s marital status in every other state, but the fact “that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected.” 334 U.S. 541, 544–45, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948). The Court then enforced a New York alimony decree notwithstanding the Nevada divorce. Forum state law thus determines what incidental property rights flow from a validly recognized judgment. And it has long been recognized that while one state may bind parties with a judicial decree concerning real property in another state, that decree will not suffice to transfer title in the other state. *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909).

These principles applied in *Hood v. McGehee*, where children adopted in Louisiana brought a quiet title action concerning land in Alabama against their adoptive father’s natural children. 237 U.S. 611, 35 S.Ct. 718, 59 L.Ed. 1144 (1915). But Alabama’s inheritance law excluded children adopted in sister states. *Id.* at 615, 35 S.Ct. at 719. The adopted children argued that the Alabama inheritance statute violated the full faith and credit clause. The Supreme Court disagreed, holding that there was “no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another state.” *Id.* Justice Holmes wrote that Alabama “does not deny the effective operation of the Louisiana [adoption] proceedings” but only says that “whatever may be the status of the plaintiffs, whatever their relation to the deceased ... the law does not devolve his estate upon them.” *Id.*

Just as the Court in *Hood* did not find full faith and credit denied by Alabama’s refusing certain rights to out-of-state adoptions, so here full faith and credit is not denied by Louisiana’s circumscribing the kind of birth certificate available to unmarried adoptive parents. “The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’ “ ... *Hood* recognized that “Alabama is sole mistress of the devolution of Alabama land by descent.” *Hood*, 237 U.S. at 615, 35 S.Ct. at 719. Louisiana can be described as the “sole mistress” of revised birth certificates that are part of its vital statistics records. Louisiana has every right to channel and direct the rights created by foreign judgments. ... Obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.

...[T]he full faith and credit clause does not oblige Louisiana to confer particular benefits on unmarried adoptive parents contrary to its law. Forum state law governs the incidental benefits of a foreign judgment. In this case, Louisiana does not permit any unmarried couples—whether adopting out-of-state or in-state—to obtain revised birth certificates with both parents’ names on them. See LA.REV.STAT. ANN. § 40:76; LA. CHILD. CODE ANN. arts. 1198, 1221. Since no such right is conferred by either the full faith and credit clause or Louisiana law, the Registrar’s refusal to place two names on the certificate can in no way constitute a denial of full faith and credit. As in *Rosin* where Illinois had the right to force the sex offender to register even if the New York judgment provided to the contrary, Louisiana has a right to issue birth certificates in

the manner it deems fit. Louisiana is competent to legislate in the area of family relations, and the manner in which it enforces out-of-state adoptions does not deny them full faith and credit.

II. EQUAL PROTECTION

Appellees' alternative § 1983 theory contends that denying a revised birth certificate to children of unmarried couples violates the equal protection clause. Without doubt, Appellees have standing to pursue this claim under § 1983. Appellees do not appear to argue that unmarried couples are a suspect class, or that the Louisiana law discriminates based on sex. Their theory appears to be that Louisiana treats a subset of children—adoptive children of unmarried parents—differently from adoptive children with married parents, and this differential treatment does not serve any legitimate governmental interest. This theory is unavailing in the face of the state's rational preference for stable adoptive families, and the state's decision to have its birth certificate requirements flow from its domestic adoption law. To invalidate the latter would cast grave doubt on the former.

Appellees have not explained why adoptive children of unmarried parents is a suspect classification. While Appellees rely heavily upon the *Levy v. Louisiana* line of cases to support the inference that heightened scrutiny is nonetheless required here, the classification described in those cases relates to illegitimacy. See, e.g., *Pickett v. Brown*, 462 U.S. 1, 8, 103 S.Ct. 2199, 2204, 76 L.Ed.2d 372 (1983); *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S.Ct. 1459, 1463, 52 L.Ed.2d 31 (1977). Since Infant J's birth status is irrelevant to the Registrar's decision, these cases cannot support the conclusion that Infant J belongs to a suspect class protected by heightened scrutiny. And, since adoption is not a fundamental right, the Louisiana law will be upheld if it is rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996).

Louisiana has “a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children.” *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir.2004). Since such an end is legitimate, the only question is the means. In this case, Louisiana may rationally conclude that having parenthood focused on a married couple or single individual—not on the freely severable relationship of unmarried partners—further the interests of adopted children. In fact, research institution Child Trends released a report underscoring the importance of stable family structures for the well-being of children. In particular, the report noted that marriage, when compared to cohabitation, “is associated with better outcomes for children,” since marriage is more likely to provide the stability necessary for the healthy development of children. This fact alone provides a rational basis for Louisiana's adoption regime and corresponding vital statistics registry. Moreover, since the law here attempts neither to encourage marriage nor to discourage behavior deemed immoral (unlike laws invalidated by *Levy*), but rather to ensure stable environments for adopted children, the court has sufficient basis to hold that the Louisiana law does not run afoul of the equal protection clause. Consequently, Appellees' claim fails on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and remanded for entry of judgment of dismissal.

[concurring and dissenting opinions omitted]

Questions

1. Should the plaintiffs in this case have sued in state court rather than federal court? What are the pros and cons of each?
2. What about the equal protection argument? Who is the class being discriminated against? Is there any argument for heightened scrutiny for that class?
3. What do you think of the means/end analysis and the court's reliance on *Lofton*? How does failure to provide this child from another state with a birth certificate listing both adoptive parents further the state's interest in protecting its own families?
4. This couple was unable to marry in New York in 2006, the year they adopted their child. Assume they are now married and under *Obergefell*, the State of Louisiana must recognize their marriage. Would you advise them to return to court to request the inclusion of the second parent's name on the birth certificate? Should they go to state or federal court? Is the Fifth Circuit decision *res judicata* as to their claim?

Page 513 - Second Parent Adoptions

Note: The Florida adoption ban is currently inapplicable due to the Florida Court of Appeal's ruling included earlier in this Supplement.

Page 521 – Before Notes and Questions, add the following case:

Boseman v Jarrell
704 S.E.2d 494 (N.C. 2010)

NEWBY, Justice.

In this case we must determine the validity of an adoption decree entered in the Durham County District Court at the request of Wilmington residents. If the decree is invalid, we must also determine whether defendant acted inconsistently with her constitutionally protected, paramount parental status. Because the General Assembly did not vest our courts with subject matter jurisdiction to create the type of adoption attempted here, we hold that the adoption decree at issue is void ab initio. However, we also conclude that by intentionally creating a family unit in which defendant permanently shared parental responsibilities with plaintiff, defendant acted inconsistently with her paramount parental status. Thus, the District Court, New Hanover County, (“the trial court”) did not err by utilizing the “best interest of the child” standard to make its custody award. As such, we reverse the Court of Appeals’ decision that the adoption decree is valid and affirm as modified its conclusion leaving undisturbed the trial court’s decision that the parties are entitled to joint custody of the child.

Plaintiff and defendant (collectively, “the parties”) met in 1998. At that time, plaintiff lived in Wilmington, North Carolina, and defendant lived in Rhode Island. The first time they met, they “discussed their desires to have children.” Roughly one month later, the parties began a romantic relationship. From the outset, the parties continued to voice their desires to have a child. In the

spring of 1999, defendant moved from Rhode Island to Wilmington, and the parties began living together as domestic partners.

In May of 2000 the parties initiated the process of having a child. They decided that defendant would actually bear the child, but both parties would otherwise jointly participate in the conception process. The parties agreed to choose an anonymous sperm donor and researched and discussed the available options. They also attended the medical appointments necessary both to impregnate defendant and to address her prenatal care. Plaintiff read to the minor child “in the womb and played music for him.” Plaintiff also cared for defendant during the pregnancy and was present for the delivery. Defendant eventually gave birth to the minor child in October of 2002, and the parties jointly selected his first name.

Following the child’s birth, the parties held themselves out as the parents of the minor child. They gave the minor child a hyphenated last name composed of both their last names. They also “had a baptismal ceremony for the child at the plaintiff’s church during which they publicly presented themselves to family and friends as parents of the child.” Further, each of the parties integrated the minor child into their respective families and each family accepted the minor child.

Within the home, the parties shared “an equal role” in parenting. Plaintiff’s parenting skills were found to be “very attentive, very loving, hands on and fun.” Defendant was found to be “very hands-on and patient in parenting” and to “reprimand[] [the minor child] by talking to him in a nice way.” As a result of occupational responsibilities, each party was occasionally required to be temporarily away from their home. During such an absence, the party at home would care for the child. Moreover, the minor child treated each of the parties as a parent. The child refers to plaintiff as “Mom” and to defendant as “Mommy.” As the trial court stated, the minor child “shows lots of love and respect for both parties.” “Each party agrees that the other is and has been a good parent,” and defendant even “testified that she thinks it is important for the plaintiff to be in” the minor child’s life.

In 2004 the parties discussed the prospect of plaintiff adopting the minor child. The parties sought an adoption by which plaintiff would become a legal, adoptive parent while defendant would remain the minor child’s legal, biological parent. According to defendant, in 2005 plaintiff stated “that she had ‘found a way’ “ to adopt the minor child. Plaintiff informed defendant that the type of adoption they sought was “being approved in Durham County, NC.”

Shortly thereafter, in June of 2005, the parties asked the District Court, Durham County, (“the adoption court”) to make plaintiff an adoptive parent of the minor child while not also terminating defendant’s relationship with the child. To accomplish their goal, the parties requested in the petition and accompanying motions that the adoption court not comply with (1) the statutory requirement under N.C.G.S. § 48–3–606(9) that defendant’s written consent to the adoption contain an acknowledgment that the adoption decree would terminate her parental rights and (2) the statutory requirement of N.C.G.S. § 48–1–106(c) that an adoption decree “severs the relationship of parent and child between the individual adopted and that individual’s biological or previous adoptive parents.” Defendant’s consent to the adoption reiterated these conditions and was contingent on the non-enforcement of these statutory provisions.

On 10 August 2005, the adoption court agreed to the parties' request, determined defendant's limited consent was sufficient, and entered an adoption decree. The decree stated that it "effects a complete substitution of families for all legal purposes and establishes the relationship of parent and child ... between ... petitioner and the individual being adopted," while simultaneously "not sever[ing] the relationship of parent and child between the individual adopted and that individual's biological mother." After finding that the Division of Social Services would not index this type of adoption, the adoption court instructed the clerk "not ... to comply with" a statutory requirement that the clerk of court transmit a copy of the adoption decree to the Division, instead ordering that the clerk "securely maintain this file in the clerk's office."

In May of 2006, the parties ceased their relationship. Subsequently, plaintiff, without being ordered to do so, continued to provide "most of the financial support for the partnership" and for the minor child. Nonetheless, defendant limited plaintiff's contact with the minor child following the parties' separation. She did so while admitting "that the plaintiff is a very good parent who loves [the minor child] and that [the minor child] loves [plaintiff]."

Relying in part on the adoption decree, plaintiff filed in the trial court a complaint and an amended complaint seeking custody of the minor child. In response, defendant attacked the adoption decree, arguing that it was void ab initio, and contended that plaintiff otherwise could not seek custody of the minor child.

The trial court ultimately awarded the parties joint legal custody of the minor child. That court did not reach the merits of defendant's contention regarding the validity of the Durham County adoption decree. The trial court reasoned that it did "not have jurisdiction to declare void" another District Court Judge's order entered in another judicial district in North Carolina. Thus, the court determined that plaintiff "is a parent of the minor child ... in that the aforementioned Decree of Adoption has not been found to be void by this court or any other court." The court also concluded that "defendant has acted inconsistent with her paramount parental rights and responsibilities." Then, after determining that the "parties are fit and proper persons to have custody of their minor son," the court applied the "best interest of the child" standard to conclude that the parties should have "joint legal custody of the minor child." Defendant appealed.

The Court of Appeals concluded that the adoption decree in this case is valid and left intact the trial court's custody determination. ... The Court of Appeals stated that N.C.G.S. § 48-2-607(a) prevents defendant from otherwise challenging the adoption decree's propriety, and, therefore, the decree causes plaintiff to be a legal parent of the minor child. ... The Court of Appeals also determined that plaintiff's status as a parent and the trial court's conclusion that the parties "are fit and proper persons for custody of the child, fully support [the trial court's] custody award." ... On 28 January 2010, we allowed defendant's petition for discretionary review of the Court of Appeals' decision.

The law governing adoptions in North Carolina is wholly statutory. *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950). "Adoption is a status unknown to common law...." *Id.* Thus, to determine whether a court may proceed under Chapter 48 while choosing not to enforce

the [statutory requirement that requires the rights of the biological parent be terminated at time of adoption], we must examine the text of our adoption statutes.

[After examining the statutes, the court determined that it was not possible under North Carolina law to grant an adoption to one partner without requiring the legal parent to terminate her parental rights.]

Plaintiff was not seeking an adoption available under Chapter 48. In her petition for adoption, plaintiff explained to the adoption court that she sought an adoption decree that would establish the legal relationship of parent and child with the minor child, but not sever that same relationship between defendant and the minor child. As we have established, such relief does not exist under Chapter 48. ...

... The adoption petition filed in this case explained that plaintiff was seeking relief unknown to our adoption law. As the petition sought relief that does not exist under our statutes, the petition did not invoke the adoption court's subject matter jurisdiction. All actions in the proceeding before the adoption court, including the entry of the decree, were therefore taken without subject matter jurisdiction. See *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) (determining that a court did not have subject matter jurisdiction over a subsequent custody review hearing since the court's subject matter jurisdiction was not invoked at the outset of a juvenile case). Accordingly, the adoption decree at issue in this case is void ab initio.

Plaintiff contends that the legality of the adoption decree notwithstanding, defendant may no longer contest its validity. In support of this contention, plaintiff cites N.C.G.S. § 48-2-607(a), which states in part that "after the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order." ... We note that the Court of Appeals rejected this argument in its opinion below, recognizing that this statute does not preclude a challenge to a court's subject matter jurisdiction. ... As we have long held, a void judgment has no legal effect; it is a legal nullity that may be challenged at any time.

We are now left with a custody dispute between a parent and a third party. The Court of Appeals did not pass upon this issue. The trial court, however, concluded that defendant "has acted inconsistent with her paramount parental rights and responsibilities" before determining that the parties "are fit and proper persons to have custody" of the minor child "and it is in the best interest of the child for the parties to have joint legal custody of him," providing an alternative basis for its custody decision. Defendant contends that the trial court erred by concluding that she has acted inconsistently with her constitutionally protected, paramount parental status. As defendant does not challenge the findings on which this decision is based, we review this conclusion de novo, see *Adams v. Tessener*, 354 N.C. 57, 65, 550 S.E.2d 499, 504 (2001), and determine whether it is supported by "clear and convincing evidence," *id.* at 63, 550 S.E.2d at 503 (citation omitted).

A parent has an “interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution.” *Price v. Howard*, 346 N.C. 68, 73, ... So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the “best interest of the child” standard. *Price*, 346 N.C. at 79 ...

A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently “with his or her constitutionally protected status.” *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). However, there is no bright line beyond which a parent’s conduct meets this standard. See *Price*, 346 N.C. at 79, 484 S.E.2d at 534–35. As we explained in *Price*, conduct rising to the “statutory level warranting termination of parental rights” is unnecessary. *Id.* at 79, 484 S.E.2d at 534. Rather, “[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct ... can also rise to this level so as to be inconsistent with the protected status of natural parents.” *Id.* at 79, 484 S.E.2d at 534–35.

As the trial court found, this is not a case in which the natural parent is unfit, or has abandoned or neglected the child. The trial court found that defendant is a fit parent with whom the minor child has a “very loving and respectful relationship.” Accordingly, we must determine whether defendant has engaged in some other conduct inconsistent with her paramount parental status. Though determining whether the trial court erred is a fact-sensitive inquiry, we are guided in our analysis by decisions of this Court and the Court of Appeals.

In *Price v. Howard* we observed a custody dispute between a natural mother and a nonparent. The child in that case was born into a family unit consisting of her natural mother and a man who the natural mother said was the child’s father. *Id.* at 83, 484 S.E.2d at 537 (“Knowing that the child was her natural child, but not plaintiff’s, she represented to the child and to others that plaintiff was the child’s natural father.”). The mother “chose to rear the child in a family unit with plaintiff being the child’s de facto father.” *Id.*

After illustrating the creation of the family unit in *Price*, we focused our attention on the mother’s voluntary grant of nonparent custody. *Id.* We stated:

This is an important factor to consider, for, if defendant had represented that plaintiff was the child’s natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.

However, if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status.

Id. (citation omitted). Thus, under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the

nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.

The record in the case sub judice indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child’s first name together, and gave the child a last name that “is a hyphenated name composed of both parties’ last names.” The parties also publicly held themselves out as the child’s parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even “agrees that [plaintiff] ... is and has been a good parent.”

Moreover, the record indicates that defendant created no expectation that this family unit was only temporary. Most notably, defendant consented to the proceeding before the adoption court relating to her child. As defendant envisioned, the adoption would have resulted in her child having “two legal parents, myself and [plaintiff].” In asking the adoption court to create such a relationship, defendant represented that she and plaintiff “have raised the [minor child] since his birth and have jointly and equally provide[d] said child with care, support and nurturing throughout his life.” Defendant explained to the adoption court that she “intends and desires to co-parent with another adult who has agreed to adopt a child and share parental responsibilities.” Thus, defendant shared parental responsibilities with plaintiff and, when occurring in the family unit defendant created without any expectation of termination, acted inconsistently with her paramount parental status. The record contains clear and convincing evidence in support of that conclusion.

The Court of Appeals erred in determining that the adoption decree at issue in this case is valid. We hold that the decree is void ab initio and that plaintiff is not a legally recognized parent of the minor child. However, because defendant has acted inconsistently with her paramount parental status, the trial court did not err by employing the “best interest of the child” standard to reach its custody decision. Thus, we reverse the Court of Appeals’ decision regarding the validity of the adoption decree and affirm as modified its conclusion leaving undisturbed the trial court’s custody award. ...

Justice TIMMONS–GOODSON dissenting.

[A]fter the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order. N.C.G.S. § 48–2–607(a) (2009) (emphasis added).

Because Melissa Ann Jarrell is statutorily barred from challenging the adoption decree, I dissent.

Justice HUDSON dissenting.

Today a majority of this Court acts contrary to explicit statutory language and legislative intent in order to achieve this outcome. Because I am not willing to read into statutes language that simply is not there, I dissent.

By its unambiguous language, the General Assembly has emphasized the overriding legislative goals of promoting the finality of adoptions and making primary the best interests of the child when construing Chapter 48. N.C.G.S. § 48-1-100 (2009). To that end, a final adoption decree that was not appealed may be set aside at a date as late as the one here only if the natural parent shows by clear and convincing evidence within six months of the reasonable date of discovery that his or her consent was obtained by fraud or duress. Id. § 48-2-607(c) (2009). Defendant Melissa Ann Jarrell has made no such allegations, and indeed, the record plainly shows her active, informed, and voluntary consent to plaintiff Julia Boseman's adoption of the minor child. As such, defendant can present no serious argument that any provision in Chapter 48 would authorize a court to set aside the adoption after the passage of so much time.

* * * * *

Page 524— Add new notes after note 7, as follows:

7A. Should a second parent be allowed to adopt the child after the relationship has ended? In *In the Interest of M.K.S.-V.*, 301 S.W.3d 460 (Tex. Ct. App. 2010), the second parent sought to adopt the child years after her relationship with the birth mother had ended. The two had decided together to have the child, had raised the child jointly until the relationship ended (approximately 1.5 years), and the birth mother arranged for the second parent to spend time with the child in her own home after the separation. The second parent tried to prove that there was an agreement to adopt, but the court found the evidence insufficient and held that without the consent of the birth mother there was no standing to assert adoption rights. The court did find that since the second parent had spent custodial time with the child that she had standing to sue for joint conservatorship.

7B. In *Boseman v. Jarrell*, the plaintiff is entitled to joint custody but not to legal parental status. What result if she is killed by a tortfeasor? Can the child sue under North Carolina wrongful death statutes? (Note: Under North Carolina law, the estate of the decedent sues for wrongful death, but ultimately the damages are paid, not to the beneficiaries of the estate, but to the intestate heirs. If there is no spouse, the intestate heir is the child of the decedent. Thus the question is whether the parent-child relationship can be recognized under other North Carolina statutes once the adoption has been set aside.)

7C. Note that the effect of *Boseman v. Jarrell* is to ban second parent adoption for all unmarried couples, including past adoptions. In June 2012, the ACLU filed suit in federal court challenging the North Carolina ban on second parent adoption. The case is *Fisher-Borne v. Smith*. On July 9, 2013 the ACLU submitted a request asking North Carolina Attorney General Roy Cooper to agree to allow an additional claim challenging the state's ban on marriage for same sex couples to be added to the case. A similar suit was filed in federal court in Michigan challenging Michigan's ban on second parent adoption. That complaint was also amended to include a challenge to Michigan's ban on same-sex marriage. The Fourth Circuit's ruling in the

Virginia marriage case, *Bostic v. Schaefer*, 760 F.3d 352 (C.A.4 2014), became final on October 6, 2014, and affirmed the right to marry in North Carolina. As a result the claim for the right to second-parent adoption was dismissed in the North Carolina case as moot. Since the couple can now marry they can go through a stepparent adoption.

Is the adoption claim really moot? What if an unmarried couple wants to do a second-parent adoption? Should that right be constitutionally protected?

What about North Carolina couples who were married at the time they did a second-parent adoption? In retrospect, should their adoptions be viewed as legal step-parent adoptions or do they have to go through another adoption process to confirm their legal parentage?

The same questions arise in the Michigan litigation, which started out as a challenge to Michigan's ban on second-parent adoption, but became subsumed by the marriage equality claim. And now, under *Obergefell*, Michigan couples can marry and seek stepparent adoptions. But what about those couples who want to adopt outside of marriage? Is the final result of all this litigation a new rule: you *must* marry in order to receive benefits like the right to adopt?

At page 524, also add new notes 9 and 10.

9. In 2013, the California legislature enacted SB 274, which provides, in part as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.

(b) The purpose of this bill is to abrogate *In re M.C.* (2011) 195 Cal.App.4th 197 insofar as it held that where there are more than two people who have a claim to parentage under the Uniform Parentage Act, courts are prohibited from recognizing more than two of these people as the parents of a child, regardless of the circumstances.

(c) This bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act. It only clarifies that where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents.

(d) It is the intent of the Legislature that this bill will only apply in the rare case where a child truly has more than two parents, and a finding that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents.

The bill amends California Family Code Section 7612. Family Code Section 3040 sets forth the order of preference for custody in cases involving more than two parents.

10. See *S.M. v. E.C.*, 2014 WL 2921905 (Cal. App 2014)(unpublished). This case involves a child of two lesbians who were registered domestic partners. They planned the birth of the child together and the non-biological mom participated in the insemination of semen, which had been obtained from a friend/ co-worker of the birth mother. It turns out that the semen donor was something more than a friend. About six months after the birth, the birth mother moved in with the sperm donor. The two women eventually sought to dissolve their domestic partnership. The birth mother and sperm donor stated that they intended to marry as soon as the RDP status was

dissolved. The sperm donor intervened in the dissolution proceeding to protect his claim to parental status. The trial judge felt constrained by a two-parent rule and ruled that the two women were the only legal parents. The new statute was enacted while the case was pending at the appellate level. The Court of Appeal, thinking this might be the rare case when a three parent rule might be beneficial, remanded the case for the trial court to determine whether the new statute should be applied. Otherwise, the Court affirmed the decision of the trial court finding that the two women were legal parents. Justice Poochigian dissented. He would have reversed the decision below and ruled that the two biological parents were the only legal parents.

Page 526, Part D. 1. Common Law Theories That Can Help Establish Parenthood, add the following:

Part A: Common Law Presumption of Parentage on Basis of Marriage

One of family law's most venerable doctrines, the presumption of legitimacy, has reached a critical crossroads. On the one hand, this doctrine, which recognizes a woman's husband as the father of her children, has been eroding in recent years, thanks to both the decreasing disadvantages of illegitimacy and the increasing ability to determine genetic paternity. On the other hand, this doctrine is getting a "second wind" as one of the traditional (and gendered) benefits of marriage that some states have newly made available to same-sex couples.

Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B. U. L. Rev. 227 (2006).

This article provides an excellent discussion of the various issues for gay and lesbian parents who use AID or ART to produce children, but it focuses primarily on the presumption of parenthood, used by some courts to determine that the nonbirth mother is a mother. See, e.g., *In the Matter of the Parentage of the Child of Kimberly Robinson*, reproduced in the text at page 581. [Review this case now including the notes following the case at page 585.]

Appleton asks whether the rule can be applied to two men who wish to parent. It's a bit of a stretch because the statute, derived from the common law, presumes that the husband of a wife who gives birth during the marriage is the presumed other parent. For two men, the rule would have to be interpreted to say that when a man becomes a natural parent, the man's partner is the presumed other parent. Because of real differences in biology, it is likely possible to argue for such a rule of presumption only when a woman is the natural or biological parent (e.g., because there is much clearer evidence of the connection between the birth mother and the baby). But if two married women are able to benefit from the presumption (despite the biological certainty that the non-birth mother is not the "father") how much of a stretch is to give the same benefit to two married men? And would failure to do so create a claim of sex discrimination?

Iowa Case: Two Moms on the Birth Certificate?

The State of Iowa refused to put the non-biological second mother's name on the birth certificate of a child born during the marriage and Lambda filed suit challenging the decision on behalf of

both mothers. The District Court (Polk County) ruled in favor of the mothers by construing Iowa's birth certificate statute in a gender-neutral way. The court cited *Varnum v. Brien* (the Iowa marriage case) in support.

Iowa Code §144.13 provides as follows:

2. If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.

The Department insisted that the use of the words "husband" and "father" meant that Iowa only recognized males as fathers and thus a mother could not rely on this provision. Its position was that the second mother could only formalize her parental status through adoption. The Department appealed the District Court's decision to the Iowa Supreme Court. That Court agreed with the Department that the statute used words that the legislature intended to be used in a gendered way. As a result, the Court held that it could not construe them in a gender neutral manner. But, the Court went on to uphold the result in favor of the mothers, explaining that the statute, as construed and as applied to this same-sex couple, was unconstitutional under the Iowa Constitution. It cited *Varnum v. Brien* and applied a heightened level of scrutiny when analyzing whether or not the statute was justified. The Court concluded that failure to apply the statute to a same-sex couple was not justified and so ordered the Department to issue a birth certificate with the names of both mothers. *Gartner v. Iowa Department of Public Health*, 830 N.W.2d 335 (2013).

Notes and Questions

1. While it is emotionally satisfying for both parents to be named on the birth certificate, exactly what legal effect do you think that has? In Iowa? Typically, being named as a parent on a birth certificate creates a presumption of parentage, but that presumption can be rebutted. It likely cannot be rebutted for this Iowa couple because they used an anonymous sperm donor. In fact the Iowa Supreme Court's ruling is limited to cases where the lesbian couple has used an anonymous sperm donor.

2. What is the effect of the Iowa birth certificate in other states? Remember that to be certain of legal parental status in states other than Iowa, the parents would be advised to obtain a final judgment of parentage. How about this Iowa Supreme Court opinion? Is it a final judgment of parentage or only a final judgment as to whether the non-biological mother should be named on the birth certificate? Reread the Iowa statute above. The issue in the case was about how to construe this statute, or, at the Supreme Court level, how the state constitution might affect the application of this statute. Iowa's parentage statutes were not discussed in the case. Birth Certificates are only state records, not final judgments. Full faith and credit does not apply to state records.

3. Even though (technically) the state of Iowa does not apply the marital presumption to lesbian couples (but does require the non-birth mother to be named on the birth certificate under the

State Supreme Court’s constitutional analysis), other states do apply the marital presumption directly. See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 *Stan. J. C.R. & C.L.* 201, 247 (2009) (“[T]en states and the District of Columbia have extended (or are set to extend) the ‘marital’ parentage presumption to same-sex couples in the formalized relationship of marriage, civil union, or domestic partnership.”)

4. Would you advise a lesbian couple who benefits from the marital presumption to nonetheless go through a second parent adoption? See Polikoff, *supra*, 5 *Stan. J. C.R. & C.L.* at 216-217.

5. In July 2015, relying on Obergefell, lesbian couples asked the Arkansas Department of Health to include the non-biological mothers on their children’s birth certificates. The Department refused and three lesbian couples have filed suit in Pulaski County.

New York Litigation:

McKinney’s Family Court Act § 417

§ 417. Child of ceremonial marriage

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.

McKinney’s Domestic Relations Law § 24

§ 24. Effect of marriage on legitimacy of children

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Wendy G-M. v. Erin G-M.

985 N.Y.S.2d 845

Supreme Court, Monroe County, New York.

May 7, 2014.

RICHARD A. DOLLINGER, J.

In this divorce action, a child conceived from artificial insemination was born during the marriage. The court must now determine whether the spouse who did not give birth to the child (the non-biological spouse), is a parent of the child under New York’s longstanding presumption that a married couple are both parents of a child born during their marriage.

The birth mother and her spouse were married in a civil ceremony in Connecticut, before New York enacted its Marriage Equality Act (“MEA”). The couple decided to have a child and in October 2011, they both signed a consent form agreeing to artificial insemination procedures. In

the consent form, the birth-mother authorized the physician to perform artificial insemination on her, and the spouse requested the doctor to perform the procedure. The document also reads:

We declare that any child or children born as a result of a pregnancy following artificial insemination shall be accepted as the legal issue of our marriage.

The document is signed by the birth-mother, the spouse, and the physician, but there is no acknowledgment to the signatures. [i.e., no notary notarized the signatures and even though the physician signed the document, there is no indication that the physician witnessed the signatures of the two women – ED] The spouse paid for the sperm donation and executed a consent form that allowed the purchased sperm to be used for the artificial insemination of the birth-mother. Both parties underwent artificial insemination for almost two years, until the procedure succeeded on the birth-mother; the spouse then discontinued her treatments.

The fertility clinic records demonstrate that the birth-mother and the spouse were both involved in appointments. The spouse attended the pre-birth classes, including breast feeding, baby care, and CPR classes. The spouse participated in the baby showers. The birth-mother celebrated the impending birth through a Facebook posting which said:

This is our year!!! Our daughter will lawfully have two mommies when she arrives and a family that's recognized wherever we go in the U.S. I love you!

When you go through fertility and have a partner, they have to sign off and agree to the fertility treatments so that there is NO question that you've both agreed to have a child.

The spouse was present at the birth of the child and the couple jointly decided the name of the child. When the hospital officials asked for information on the parents, both participated in the discussions and the birth mother acknowledged that the spouse was the parent of the child. The child was given a hyphenated surname of the two women, with the spouse's name listed first. The birth certificate for the child lists both as the parents of the child. ...

After the birth of the child, citing marital trouble, the spouse left the household, in her words, to "not cause undue stress or potential other problems." The child only lived in the same household with the two women for one week before they established separate households. The action for divorce was commenced by the birth-mother in December 2013, less than then three months after the birth of the child. Before and after commencement, the birth-mother would not permit her spouse to visit with the child. The spouse then filed the instant request for a variety of relief, including access to the child, maintenance, and attorney fees.

In resolving this dispute, there are two paths to be followed, each with intriguing twists and turns. The first runs through the state Legislature and the various threads of the Domestic Relations Law and the Family Court Act. The second runs through the common law, with a lengthy stop over at the Court of Appeals opinion *Debra H. v. Janice R.*, 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010), which confronts the issue of children of same sex relationships albeit in a different, pre-Marriage Equality Act context. At the intersection of these two paths, one bright light illuminates both: New York's public policy strongly favors the

legitimacy of children, and that “the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law.” In re Estate of Fay, 44 N.Y.2d 137, 141, 404 N.Y.S.2d 554, 375 N.E.2d 735 (1978) (there is an established legal presumption that every person is born legitimate); . . .

. . . Section 24 of the Domestic Relations Law is titled: “Effect of marriage on legitimacy of children.” The statute provides that a child born to married parents “is the legitimate child of both parents.” DRL § 24(1). Section 417 of the Family Court Act, demarcated as the “child of ceremonial marriage” provides:

A child born of a parent who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.

Both of these statutes, the former enacted in 1969, and the later in 1962, pre-date the increasing availability of artificial insemination and the existence of legally-recognized same sex unions and marriages. Both statutes were designed as tools to link reluctant married fathers to their offspring, regardless of whether the subject marriage was technically invalid under the strictures of New York law. The statutes only have applicability in opposite sex marriages as evidenced by the fact that the usual technique to confirm parentage is a genetic test of the putative father which establishes an irrefutable genetic link between the child and the father. . . . The presumption of paternity under both the Family Court Act and the Domestic Relations Law may be rebutted by clear and convincing evidence excluding the husband as the father or otherwise tending to disprove legitimacy. . . .

One other section of the Domestic Relations Law provides further guidance in deciding parental status in this case. DRL § 70(a) permits only a “parent” to apply for custody of a child. The term is undefined in § 70 and, as the later course of this opinion indicates, the Court of Appeals has refused to interpret that term in a sweeping manner, as Matter of Findlay might suggest. Four years ago, the Court of Appeals in Debra H. v. Janice R., 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010) cautioned not to overstep common law prerogatives in dealing with any alteration of the definition of parenthood. The court directed that “any change in the meaning of parent’ under our law should come by way of legislative enactment rather than judicial revamping of precedent.” Furthermore, the court reiterated that “parentage under New York law derives from biology or adoption.” . . . What was left unsaid by the Court of Appeals in Debra H. v. Janice R. is whether the marriage presumption—one of the most powerful in the legal lexicon—should be added to the list of circumstances in which “parentage” arises, even though the only putative “parents,” recognized by New York’s past jurisprudence under the statutes and the common law, were members of opposite sexes.

While never defining the word “parent” in any pertinent statute, the Legislature, more than 40 years ago, did anticipate the impact of artificial insemination on the determination of parenthood. Section 73 of the Domestic Relations Law, enacted in 1974, addresses the status of a parent when, as a result of artificial insemination by an anonymous donor, there would be no genetic link between the child and one of the two parents. The statute provides:

Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.

Aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.

. . . When all the statutory conditions are met, the statute operates to create an “irrebuttable presumption of paternity.” *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 856 N.Y.S.2d 258 (3rd Dept.2008). [The effect of the statute is to make the child the legitimate child of both spouses.] [The Court next discussed various cases holding that the statutory presumption would not apply if the husband did not consent properly to the insemination as required by the statute. In some cases there was no writing signed by anyone and in other cases the signatures were not acknowledged by a notary.]

* * *

Prior to 2010, even if a party did not strictly comply with the requirements of DRL § 73, New York courts held that the non-biological spouse may still be declared a parent of the AID child under the common law marital presumption of legitimacy. *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 856 N.Y.S.2d 258 (3rd Dept.2008) (holding that while husband could not be presumed to be the parent of a child born to his wife via AID under § 73 because he did not consent in writing to the procedure, he could still be declared the child’s parent under the common law); . . . In *Laura G. v. Peter G.*, there was no signed consent, of any type, much less an acknowledged consent, and yet the court concluded that the husband’s consent could be proved by other means. *Id.* at 170, 830 N.Y.S.2d 496. The proof established that the husband not only knew of the procedure, but was a full participant. While holding that the lack of a written consent obviated any statutory finding of parentage, the court, to give effect to “one of the strongest and most persuasive [presumptions] known to the law,” concluded that in the cases in which artificial insemination of a married woman occurs, a rebuttable presumption of spousal consent, disproved only by clear and convincing evidence, exists. *Id.* at 217, 856 N.Y.S.2d 258. This common law presumption, even in artificial insemination cases, reaffirmed New York’s public policy. It eliminated the possibility that parental status could be adversely affected by something as simple a failure of medical personnel to meet statutory procedural requirements. Especially because as one court noted, “medical personnel who conduct AID procedures are not always aware of statutory consent requirements.” *Id.* at 217, 856 N.Y.S.2d 258; *Anonymous v. Anonymous*, 1991 WL 57753 (Sup.Ct., New York Cty.1991). . . .

. . .New York’s Marriage Equality Act extended to same-sex couples the recognition of their marriages. Section 2 of the Act provides:

No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all

gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

DRL § 10–a.

Importantly, the statute specifically directs that no “common law” provisions relating to marriage “shall differ” because the married couple have the same sex. The implication of the MEA is unmistakable: wherever the words “husband” or “wife” exist in statute or common law, the MEA requires the courts to read the terms as gender non-specific and extend the same rights to same-sex couples as exist for opposite-sex couples. The MEA eradicates any distinction between the sexes, but it does not address the definition of parenthood—it does not include a definition of “parent.” Despite glimmers of instruction from a number of statutes, the lack of a statutory definition of parent in a post-MEA context requires this court to examine the Court of Appeals determination in *Debra H. v. Janice R.* 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010), to provide a definitive answer to the non-birthing spouse’s parental rights in this case.

As noted earlier, the Court of Appeals, in *Debra H. v. Janice R.*, articulated a strong preference that biology and adoption alone define a “parent” in an AID case. The court held that equitable estoppel, in the form of proof of post-birth interaction with the child, did not give a spouse in a civil union any parental rights to a child born by artificial insemination. . . .

However, *Debra H v. Janice R.* does recognize, in a bright light, through the principles of comity, that a child, born of artificial insemination to a couple in a civil union in Vermont, has a parent in each party to the civil union. The Court of Appeals majority quoted, with approval, the Vermont Supreme Court opinion in *Miller–Jenkins v. Miller–Jenkins*, 180 Vt. 441, 912 A.2d 951 (2006), which held that a partner in a civil union was the parent of a child born during the civil union. . . .

. . . In short, the Court of Appeals decision in *Debra H. v. Janice R.* opens the door for New York to recognize a partner, in a civil union, as a parent of a child born by AID during the civil union. The only remaining question for this court is whether to recognize a spouse, in a marriage, as a presumed parent of a child born by AID during the marriage. . . .

In this court’s view, the Court of Appeals would not mandate that compliance with DRL § 73 [i.e., with consent by affidavit] is the only means for a married, non-biological spouse to acquire parental status for a child born by artificial insemination of their spouse. A contrary finding would make a child’s parentage for their entire life depend on a notary public being present when the parties signed the consent. The absence of the notary alone, would then deny the non-biological spouse one of the primary benefits of marriage. The Court of Appeals would be reluctant to cast such a disquieting eye on a claim for parenthood, founded on the centuries-old marital presumption of legitimacy. The presumption of parental status for children born into a marriage should not be so easily discarded because the married couple, who planned for the child and celebrated its arrival, then encounter marital troubles.

The clinching argument that suggests that the Court of Appeals would follow this well-trod path is found in *Debra H v. Janice R.*’s final conclusion. The court, seemingly with all seven judges in

concurrence, held that when a child is born in a recognized civil union in Vermont (where they would recognize the child as having two parents—the two individuals in the civil union), New York would in comity, accept that determination. Because the Marriage Equality Act has sanctioned same-sex marriage in New York, this state no longer needs to afford comity to other jurisdictions on resolving issues relating to parenthood in same sex marriages. . . .

Here, applying *Laura WW. v. Peter WW.* and the logic of cases from sister jurisdictions, the spouse is presumed, by virtue of the marriage and the rule in *Matter of Findlay*, to be a “parent” of the child. There is no dispute that the couple consented to be parents at the time of commencement of the AID procedure, albeit two years before the child was born. There is no evidence before the court to suggest that the birth mother, while embarking on the AID procedure two years before the birth, did not consent to her spouse’s status as a parent. In fact, there is no evidence, prior to the onset of marital troubles between the couple, that the birth mother did not intend and consent to her spouse’s status as a parent. As in *Laura WW. v. Peter WW.*, the marital presumption of legitimacy created a presumption of consent in the AID context for this couple. . . .

The only thing that distinguishes petitioner here from the husband in *Laura WW. v. Peter WW.* is the fact that the spouse and birth mother share the same sex. The Marriage Equality Act now eliminates that distinction. . . . In *Laura WW. v. Peter WW.*, the Third Department predicated the husband’s parental status on the fact of marriage, without regard to the husband’s biological connection to the child or to his fertility in general. To impose the presumption of consent to AID for couples in a heterosexual marriage, but not for those in a same-sex one, when both are similarly situated, but for sexual orientation, would reverse the gender-neutral approach to New York’s families canonized in the MEA. . . . This court holds that the non-biological spouse is a parent of this child under the common law of New York as much as the birth-mother.

Questions

1. The court’s opinion mentions many different presumptions. Which presumption does it ultimately apply?
2. Is the presumption that was applied in this case rebuttable or irrebuttable?
3. But see a later New York case, below:

Paczkowski v. Paczkowski
128 A.D.3d 968 (2015)
Supreme Court, Appellate Division, Second Department, New York.

The Family Court properly dismissed the petition for lack of standing. A nonparent may have standing to seek to displace a parent’s right to custody and control of his or her child, but only upon a showing that “the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances” . . . Here, the petitioner, who is neither an adoptive parent nor a biological parent of the subject child, failed to allege the existence of extraordinary circumstances that would establish her standing to seek custody . . .

Contrary to the petitioner's contention, Family Court Act § 417 . . . do[es] not provide her with standing as a parent, since the presumption of legitimacy [it] create[s] is one of a biological relationship, not of legal status . . . and, as the nongestational spouse in a same-sex marriage, there is no possibility that she is the child's biological parent

Maine Law:

MAINE PARENTAGE ACT
PRESUMED PARENTAGE

§1881. Presumption of parentage

1. Marital presumption established. A person is presumed to be the parent of a child if:

- A. The person and the woman giving birth to the child are married to each other and the child is born during the marriage;
- B. The person and the woman giving birth to the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, divorce or declaration of invalidity or after a decree of separation; or
- C. Before the birth of the child, the person and the woman giving birth to the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, divorce or declaration of invalidity or after a decree of separation.

2. Equivalent status in other jurisdictions. The marital presumption in subsection 1 applies to a legal relationship that provides substantially the same rights, benefits and responsibilities as marriage and is recognized as valid in the state or jurisdiction in which it was entered.

3. Nonmarital presumption established. A person is presumed to be a parent of a child if the person resided in the same household with the child and openly held out the child as that person's own from the time the child was born or adopted and for a period of at least 2 years thereafter and assumed personal, financial or custodial responsibilities for the child.

4. Rebuttal of presumption. A presumption established under this subchapter may be rebutted only by a court determination.

QUESTION: Would you be willing to rely on the Maine presumption of parenthood statute to argue in favor of presumption for a lesbian spouse who is not the birth mother? Even if you could rely on this statute, would you also advise your client to do a second parent adoption or obtain a final judgment of parenthood from a court? [Remember our earlier discussion of full faith and credit.] Read Adoption of Sebastian on this point. See textbook at page 574.

At page 526, Add a Subheading before the **Nancy S** case, as follows:

Part B: De Facto Parenthood and other Common Law Theories

1. De Facto Parenthood

Page 533 – Add new note 4, as follows:

4. In 2010, two related cases, considered by the New York Court of Appeals, were thought to be prime candidates for overruling the decision in *Alison D.* While several judges agreed that *Alison D.* should be overruled, the majority reaffirmed the holding in the case, noting that it would be up to the legislature to adopt any new methods for creating legal parenthood. At the same time, the court ruled narrowly in one of the cases to find that the non-biological mother was in fact a parent under New York law. The couple had registered as civil union partners in Vermont before the child was born and thus under Vermont law the second parent was presumed to be a parent. Applying principles of comity, the Court held that New York should recognize the parental status as well. See *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010).

In the second case, the birth mother was seeking child support from the second parent years after the relationship had ended. The claim had been filed in Canada and was transferred to New York under the Uniform Interstate Family Support Act. The second parent claimed that because she had never adopted, and because *Alison D.* was binding precedent, she was not a parent and thus the New York court had no jurisdiction to hear the claim. The New York Court of Appeals ruled narrowly that the court did have jurisdiction but it also reaffirmed *Alison D.*, and said nothing about the possible parental status of the alleged second parent in this case. See *H.M. v. E.T.*, 14 N.Y.3d 521 (2010).

Page 549 – Add a new note after note 3, as follows:

3A. Under Montana statutory law, a non-parent may seek parental status (described as a “parental interest” in the statutes) in the courts if she has established a parent-child relationship. Upon the termination of long-term lesbian relationship, the non-legal parent sought judicial determination of her parental status under these statutes and the legal parent challenged, claiming that the statutes, as applied to her, would violate her fundamental right to parent under *Troxel*. The Supreme Court of Montana disagreed, upheld the application of the statute and of the decision below which had awarded a “parental interest” to the non-legal parent. See *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009)

Page 550 – Add a final note after discussion of the Utah case

7. The new Maine Uniform Parentage Act includes a definition de facto parent as follows:

DE FACTO PARENTAGE

§1891. De facto parentage

1. De facto parentage. The court may adjudicate a person to be a de facto parent.

2. Standing to seek de facto parentage. A person seeking to be adjudicated a de facto parent of a child under this subchapter must establish standing to maintain the action in accordance with the following.

A. A person seeking to be adjudicated a de facto parent of a child shall file with the initial pleadings an affidavit alleging under oath specific facts to support the existence of a de facto parent relationship with the child as set forth in subsection 3.

The pleadings and affidavit must be served upon all parents and legal guardians of the child and any other party to the proceeding.

B. An adverse party, parent or legal guardian who files a pleading in response to the pleadings in paragraph A shall also file an affidavit in response, serving all parties to the proceeding with a copy.

C. The court shall determine on the basis of the pleadings and affidavits under paragraphs A and B whether the person seeking to be adjudicated a de facto parent has presented prima facie evidence of the requirements set forth in subsection 3. The court may in its sole discretion, if necessary and on an expedited basis, hold a hearing to determine disputed facts that are necessary and material to the issue of standing.

D. If the court's determination under paragraph C is in the affirmative, the party claiming de facto parentage has standing to proceed to adjudication under subsection

3. Adjudication of de facto parent status. The court shall adjudicate a person to be a de facto parent if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life. Such a finding requires a determination by the court that:

A. The person has resided with the child for a significant period of time;

B. The person has engaged in consistent caretaking of the child;

C. A bonded and dependent relationship has been established between the child and the person, the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child;

D. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and

E. The continuing relationship between the person and the child is in the best interest of the child.

4. Orders. The court may enter the following orders as appropriate.

A. The court may enter an interim order concerning contact between a person with standing seeking adjudication under this subchapter as a de facto parent and the child.

B. Adjudication of a person under this subchapter as a de facto parent establishes parentage, and the court shall determine parental rights and responsibilities in accordance with section 1653. The court shall make appropriate orders for the financial support for the child in accordance with the child support guidelines under chapter 63. An order requiring the payment of support to or from a de facto parent does not relieve any other parent of the obligation to pay child support unless otherwise ordered by a court.

5. *Other parents. The adjudication of a person under this subchapter as a de facto parent does not disestablish the parentage of any other parent.*

Note the last paragraph of this statute (emphasis added). This language allows a Maine Court to adjudicate more than two legal parents. The Delaware de facto parent statute does so as well.

Page 551: Amend the Heading at the Top of the Page to read:

2. Intentional Parenthood: Applying relevant Case Law

At page 555, before *Elisa B.*, insert a new heading:

3. Parenthood under Certain State Law Versions of the Uniform Parentage Act: Holding Out.

Page 563 – Add a new note 1A, after note 1

1A. In a case similar to *Elisa B.*, the New Mexico Supreme Court applied New Mexico’s version of the Uniform Parentage Act to find that the second mother was a legal mother under the “holding out provision” in that Act. The New Mexico Court cited the California decision in *Elisa B.* with approval. The difference between the two cases is that the child in the New Mexico case had been adopted by the first mother. *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012). The California Court of Appeal has also applied the “holding out provision” to find that the second mother is a presumed parent of her partner’s adopted child. See *S.Y. v. S.B.*, 201 Cal.App.4th 1023 (2011).

Page 564: Delete the *Leonard v. Commissioner* case

Page 568: Change heading number from 3 to 4.

Page 574 – Adoption of Sebastian should have been reviewed and discussed in connection with the question following the Maine Parentage Act Provision on Presumed Parenthood.

Page 577: Change number in heading from 4 to 5.

Page 581 – Omit Parentage of the Child of Kimberly Robinson here. It should have been considered with materials at the beginning of this Section on Common Law Theories that Support Parenthood.

Page 600 – replace notes 2 and 3 with the following new notes:

2. In early 2011, the Connecticut Supreme Court finally clarified Connecticut law on who can be named as parents in births involving surrogacy. See *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011). The facts in *Raftopol* are very similar to the facts in *Cunningham*. The plaintiffs were a gay male couple from Bucharest, Romania who entered into an agreement with a gestational surrogate. They requested a pre-birth order that the male partner who was not the biological father was nonetheless the other legal parent of the child. The lower court agreed but the State appealed. The Supreme Court of Connecticut affirmed the decision below declaring that both men were the legal parents of the child. As a result of this decision, there is no need for the non-genetic parent in a gestational surrogacy arrangement to go through an adoption process to

become a legal parent. Instead the “intended parent” may establish his legal parental rights by obtaining a Pre-Birth Court Order. Similar Pre-Birth Orders are available for lesbians who have a child together using a sperm donor. Note, that this new rule only applies to “gestational surrogacy,” i.e., arrangements in which the birth mother is not the genetic mother. In cases involving “traditional surrogacy,” the birth mother is the legal mother at the time of birth.

3. Litigation over these issues could be avoided if state legislatures would enact statutes to determine parental rights in cases like this. If you were asked to draft a Uniform Law on this subject, what sort of provisions would you want to include? See the recently enacted Maine Parentage Act, available in full at http://www.mainelegislature.org/legis/bills/bills_127th/billtexts/SP035801.asp.

CHAPTER SIX – DISCRIMINATION, FAIRNESS AND EQUALITY

Page 604 – Add after the first full paragraph on page 604:

On November 7, 2013, the Senate approved a version of the Employment Non-Discrimination Act (ENDA) that would ban discrimination because of sexual orientation or gender identity by employers subject to Title VII of the Civil Rights Act of 1964. Enforcement would be placed in the Equal Employment Opportunity Commission. In common with prior versions of ENDA, the 2013 bill would *exclude* disparate impact claims, and it contained a very broad religious exemption that was deemed necessary by its sponsors to secure sufficient votes to overcome a filibuster by Senate Republicans and allow the measure to come to the floor for a vote on the merits. The measure was approved by a vote of 64-32. However, the House never brought the measure to a vote prior to the adjournment of that session of Congress. During 2015, bowing to criticisms from LGBT rights advocates that the Employment Non-Discrimination Act was too narrowly targeted on employment and had too broad a religious exemption, gay rights supporters in the House and the Senate announced that they would introduce more comprehensive bills addressing discrimination because of sexual orientation or gender identity in housing, employment, public accommodations and service, and any other forms of discrimination prohibited by federal law, and with a more narrowly tailored religious exemption provision.

During his 2008 president campaign, Senator Barack Obama had pledge to issue an Executive Order banning discrimination because of sexual orientation or gender identity by federal contractors. No such executive order was forthcoming during Obama's first term, as the president's spokespersons repeatedly asserted that the preferable way to deal with discrimination was to enact ENDA. Once the Senate had approved ENDA and it appeared that the Republican majority in the House would refuse to take it up, President Obama bowed to the persistent lobbying efforts of LGBT rights advocates. On July 21, 2014, he signed Executive Order 13672, which amended two existing executive orders: Executive Order 11478 (which forbids employment discrimination in the executive branch of the federal government) to add "gender identity" to prohibited grounds of discrimination, and Executive Order 11246, which forbids discrimination by federal contractors, to add "sexual orientation" and "gender identity" as prohibited grounds of discrimination by government contractors. The contractor non-discrimination requirements would subsequently be included in new federal contracts made after the Labor Department published final regulations implementing the amendments in 2015. Only new contracts entered after that date would be affected by the amendment. Most federal contracts have termination dates, so eventually all contractors whose contracts were large enough to come within the executive order would be subject to this non-discrimination requirement. Press reports of the executive order signing ceremony estimated that about 20% of private sector employees work for employers that contract with the federal government, many of them in states that do not forbid sexual orientation and/or gender identity discrimination, so the order would extend a new form of protection from such discrimination to a significant number of previously unprotected people. Some LGBT rights advocates had feared that the President might include broad religious exemption language in his Executive Order to exempt from compliance religious organizations that contracted with the federal government to provide social services, but an intensive lobbying campaign persuaded the White House to refrain from doing so.

Page 622 – Add new material after note 5:

The phenomenon of harassment and bullying of sexual minority students in schools has led to legislation in several jurisdictions. During 2010 and 2011, bills were passed in Illinois, New York, New Jersey and Colorado, all intended to alleviate the problem by requiring public school systems to adopt appropriate policies and make appropriate educational efforts. One example, which was passed after several years of lobbying efforts by LGBT and safe schools groups, is the “Dignity for All Students Act” in New York, signed into law in 2010, to take effect July 1, 2012. Here are salient provisions of the Act, which is codified in New York State Education Law, Article 2, Sections 10-18.

DIGNITY FOR ALL STUDENTS ACT

Section 10. Legislative intent. The legislature finds that students’ ability to learn and to meet high academic standards, and a school’s ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation. It is hereby declared to be the policy of the state to afford all students in public schools an environment free of discrimination and harassment. The purpose of this article is to foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school’s educational mission.

Section 11. Definitions. For the purposes of this article, the following terms shall have the following meanings:

1. “School property” shall mean in or within any building, structure, athletic playing field, playground, parking lot, or land contained within the real property boundary line of a public elementary or secondary school; or in or on a school bus, as defined in section one hundred forty-two of the vehicle and traffic law.
2. “School function” shall mean a school-sponsored extra-curricular event or activity.
3. “Disability” shall mean disability as defined in [the State’s Human Rights Law].
4. “Employee” shall mean employee as defined in subdivision three of section eleven hundred twenty-five of this title.
5. “Sexual orientation” shall mean actual or perceived heterosexuality, homosexuality or bisexuality.
6. “Gender” shall mean actual or perceived sex and shall include a person’s gender identity or expression.
7. “Harassment” shall mean the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; or conduct, verbal threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

Section 12. Discrimination and harassment prohibited.

1. No student shall be subjected to harassment by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function. Nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under [New York state laws authorizing certain single-sex education programs] and title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et. seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

2. An age-appropriate version of the policy outlined in subdivision one of this section, written in plain-language, shall be included in the code of conduct adopted by boards of education and the trustees or sole trustee . . . and a summary of such policy shall be included in any summaries required [by this chapter].

Section 13. Policies and guidelines. The board of education and the trustees or sole trustee of every school district shall create policies and guidelines that shall include, but not be limited to:

1. Policies intended to create a school environment that is free from discrimination or harassment;

2. Guidelines to be used in school training programs to discourage the development of discrimination or harassment and that are designed: a. to raise the awareness and sensitivity of school employees to potential discrimination or harassment, and b. to enable employees to prevent and respond to discrimination or harassment; and

3. Guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring that at least one staff member at every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex.

Section 14. Commissioner's responsibilities. The [State Education Commissioner] shall:

1. Provide direction, which may include development of model policies and, to the extent possible, direct services, to school districts related to preventing discrimination and harassment and to fostering an environment in every school where all children can learn free of manifestations of bias;

2. Provide grants, from funds appropriated for such purpose, to local school districts to assist them in implementing the guidelines set forth in this section; and

3. Promulgate regulations to assist school districts in implementing this article including, but not limited to, regulations to assist school districts in developing measured, balanced, and age-

appropriate responses to violations of this policy, with remedies and procedures focusing on intervention and education.

Section 15. Reporting by commissioner. The commissioner shall create a procedure under which material incidents of discrimination and harassment on school grounds or at a school function are reported to the department at least on an annual basis. Such procedure shall provide that such reports shall, wherever possible, also delineate the specific nature of such incidents of discrimination or harassment, provided that the commissioner may comply with the requirements of this section through use of the existing uniform violent incident reporting system. In addition the department may conduct research or undertake studies to determine compliance throughout the state with the provisions of this article.

Section 16. Protection of people who report discrimination or harassment. Any person having reasonable cause to suspect that a student has been subjected to discrimination or harassment by an employee or student, on school grounds or at a school function, who, acting reasonably and in good faith, either reports such information to school officials, to the commissioner, or to law enforcement authorities or otherwise initiates, testifies, participates or assists in any formal or informal proceedings under this article, shall have immunity from any civil liability that may arise from the making of such report or from initiating, testifying, participating or assisting in such formal or informal proceedings, and no school district or employee shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings.

Section 17. Application. Nothing in this article shall:

1. Apply to private, religious or denominational educational institutions; or
2. Preclude or limit any right or cause of action provided under any local, state or federal ordinance, law or regulation including but not limited to any remedies or rights available under the Individuals With Disabilities Education Act, Title VII of the Civil Rights Law of 1964, section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990.

Section 18. Severability and construction. The provisions of this article shall be severable, and if any court of competent jurisdiction declares any phrase, clause, sentence or provision of this article to be invalid, or its applicability to any government agency, person or circumstance is declared invalid, the remainder of this article and its relevant applicability shall not be affected. The provisions of this article shall be liberally construed to give effect to the purposes thereof.

* * * * *

Do you think this law is likely to make a significant dent in the problem? Is it vulnerable to constitutional attack on grounds of vagueness or freedom of speech or free exercise of religion? What other steps might be taken legislatively or administratively to deal with the problem of harassment and bullying in schools? Several cases of harassment and bullying in public schools have been brought to the New York State Division of Human Rights as discrimination claims,

but in *North Syracuse Central School District v. N.Y.S. Division of Human Rights*, 2012 N.Y. Slip Op. 04668, 2012 WL 2092954 (N.Y. 2012), the court ruled that public schools are not subject to suit under the state's ban on discrimination in places of public accommodation. In regulations implementing the Dignity for All Students Act, the State Education Department proposed a significant exemption for religiously-affiliated private schools. In June 2015, reacting to reports that the State Education Department's regulations were not been effectively implemented, Governor Andrew Cuomo sent a letter to the Department expressing "outrage" at the failure of adequate enforcement and demanding that the Department step up its efforts.

Page 632 – add to note 2:

On remand, the District Court found that the government failed to sustain its burden showing that the dismissal of Major Witt would significantly advance any of the policy justifications stated for the Don't Ask, Don't Tell Policy, and ordered that she be offered reinstatement. *Witt v. U.S. Department of the Air Force*, 739 F.Supp.2d 1308 (W.D.Wash. 2010). The government quickly got the ruling stayed pending appeal, but in the meantime another district court (see Note 4, below) ruled the policy facially unconstitutional, and this combination of rulings was helpful to the Obama Administration in seeking repeal of the policy. After Congress passed the DADT Repeal Act of 2010, the Justice Department entered into a settlement agreement with Witt.

Page 632: Add a new Note 4:

4. In a case brought by an organization of gay Republicans, a federal district judge in California ruled that the "Don't Ask, Don't Tell" policy was facially unconstitutional. *Log Cabin Republicans v. United States*, 716 F.Supp.2d 884 (C.D.Cal. 2010). The opinion relied on an expansive view of the 9th Circuit's Witt ruling, and the inconsistency between military policy and practice, especially the practice of retaining lesbian and gay personnel in active duty if they were found to be gay while serving overseas. The judge reasoned that if military commanders found it appropriate to hold up on discharging gay troops until their normal rotation out of combat zones, it was not credible to continue arguing that their presence was significantly adversely affecting unit morale and cohesion, which was the lynchpin justification for the DADT policy. District Judge Virginia Phillips issued an injunction against enforcement of the policy, which she was not willing to stay pending appeal, but a 9th Circuit motions panel issued a stay in response to a petition by the Justice Department. Secretary of Defense Robert Gates cited this litigation in arguing to Congress that an orderly repeal of the policy through legislation would be preferable to leaving the matter to the courts, which might order the Department to abandon the policy immediately.

On December 22, 2010, President Obama signed the "Don't Ask, Don't Tell Repeal Act," Pub. L. 111-321, which authorized repeal of the contested military policy conditioned on written certification from the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that such repeal would not impair the ability of the military to execute its mission. However, neither this statute nor the regulations drawn up by the Defense Department to implement the change in policy provided any affirmative protection against discrimination on the basis of sexual orientation for military personnel, and the Repeal Act incorporated by reference the Defense of Marriage Act, to ensure that military personnel who married their same-sex

partners in a jurisdiction authorizing such marriages would not be entitled to any of the benefits and privileges accorded to married service members, setting up future Equal Protection litigation. How likely is it that lesbians and gay men can safely serve in the military without a formal non-discrimination policy in place? The DADT Repeal Act was passed by the lame-duck session of the Congress, in which Democrats controlled both houses. In September 2012, the Defense Department implemented the Act, ending the ban on military service by openly lesbian, gay and bisexual individuals. The 9th Circuit subsequently ruled that the case, still pending on appeal, was mooted by the implementation of the Repeal Act, and ordered the District Court's decision vacated. See, 658 F.3d 1162 (9th Cir. 2011).

Page 632 – Add to Note on Military Recruitment: As a result of repeal of the DADT military policy, the issue of Defense Department access to campuses for recruitment purposes was essentially mooted. After the Defense Department implemented the DADT Repeal Act on September 20, 2011, on-campus policies banning recruitment activities by employers that formally discriminate based on sexual orientation no longer applied to military recruiters. Thus, the subject matter of this Note is now of primarily historical interest.

Page 636. Add the following two cases prior to the Notes and Questions that now appear on page 636 of the casebook:

STRODER v. KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES
2012 WL 1424496 (W.D. Ky. 2012)

Heyburn, D. J.

Milton Elwood Stroder brings this action against his former employer, the Commonwealth of Kentucky Cabinet for Health and Family Services (“CHFS” or the “Cabinet”), alleging that he was terminated because of his sexual orientation, in violation of his state and federal equal protection rights. Acting as the trier of fact and for the reasons explained herein, the Court concludes that Stroder was terminated from his employment because of his sexual orientation.

I.

In late 2008, a former CHFS employee, Bader Ali, filed a racial discrimination and sexual harassment lawsuit against his supervisor, Perry Puckett. Although the substance of that lawsuit is unrelated to the instant one, document production in the Ali case prompted a CHFS staff attorney at the time, Amber Arnett, to review e-mail and internet traffic of all Cabinet employees. Arnett's review revealed rampant violations of the Cabinet's Internet Usage Policy within Stroder's department. That review began a chain of events which ultimately led to Stroder's termination.

Arnett began by reviewing e-mails of employees who frequently communicated with Puckett because these messages were already available as a result of document production for the Ali case. Based on these e-mails, she identified four employees, including Stroder, who appeared

to have violated the Internet Usage Policy. Arnett transmitted a list of these employees to Michelle Kent, former Executive Staff Advisor, who was charged with recommending employment actions within the Cabinet. Arnett advised Kent to investigate these four employees, beginning with those on probation in light of the Cabinet's "zero-tolerance" policy toward misconduct by probationary employees.

The two probationary employees on the list were Stroder and Shannon Duncan. Their one-year probationary periods ended on precisely the same day, July 31, 2009. Both Stroder, an openly homosexual male, and Shannon Duncan, a heterosexual married female, were employed as an Adjudicator I within CHFS. Arnett's review of e-mails between these two and Puckett revealed that the two both sent and received inappropriate materials. Next, on July 20, 2009, Kent submitted a request for "snapshots" of both employees' e-mail accounts. Such a request would include all sent, received, and deleted e-mails currently in their accounts. According to Defendants' witnesses at trial, Cabinet policy requires that an employee's snapshot be received and reviewed before any adverse action is pursued.

On July 30, 2009, just one day before Stroder and Duncan's probationary periods would end, Kent had not received either of their e-mail snapshots. Nevertheless, that morning, Kent initiated a conversation with Arnett about whether Stroder's e-mails that had surfaced during the review of Puckett's account contained violations sufficient to justify termination. The Puckett–Stroder e-mails contained several messages which referenced Puckett's homosexual partner and included homosexual slang. Kent and Arnett exchanged e-mails identifying specific messages that constituted violations of the Internet Usage Policy. Kent and Arnett exchanged no communication and took no action regarding Duncan's e-mails or her separation.

The next day, Stroder's final day of probation, Kent drafted a memo recommending separation based solely upon the inappropriate Puckett–Stroder e-mails. That same day, she received Stroder's snapshot, but it is unclear whether she actually reviewed it prior to recommending termination. In any event, her memo recommending termination referenced those e-mails discovered during the Puckett investigation. Kent's supervisor reviewed the memo and decided to terminate Stroder. Later that day, Stroder received a letter stating his termination, effective immediately. He subsequently filed this action alleging that he was discriminated against because of his sexual orientation.

II.

Stroder's claim asserts a denial of his equal protection rights under § 1983. Allegations of discrimination on the basis of sexual orientation are analyzed under the rational basis standard because no suspect or quasi-suspect class is concerned. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997). The familiar *McDonnell Douglas* framework provides the preliminary basis for analyzing such a claim. *Brewer v. Cleveland Mun. Sch. Dist.*, 84 F. App'x 570, 572 (6th Cir.2003). (This is the same framework for analyzing Title VII disparate treatment cases. However, Title VII does not recognize a claim for disparate treatment based on sexual orientation.) A plaintiff must show that (1) he belongs to a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) he was treated differently than a similarly-situated member of the unprotected class. 2010 WL

2961186, at *2 (W.D.Ky. July 26, 2010). Here, Stroder established his prima facie case of discrimination. This merely shifts the burden on the defendant to “articulate some legitimate, nondiscriminatory reason” for taking the challenged action.” *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003).

Defendants say that violating the Internet Usage Policy could be a very legitimate nondiscriminatory reason for terminating a probationary employee. They are undoubtedly correct about this. And, thus, Plaintiff faces the daunting task of proving, by a preponderance of the evidence, that the proffered legitimate reason was actually a pretext to hide unlawful discrimination. He can do this only by showing that the proffered reason “did not actually motivate the defendant’s challenged conduct.” (The other two potential avenues; that the proffered reason has no basis in fact or that it was insufficient to warrant the challenged activity, do not provide such a showing here.) Thus, the determination of this case rests entirely on whether Stroder has shown by a preponderance of the evidence that his termination was actually based upon his sexual orientation, rather than his admitted violation of the Internet Usage Policy.

III.

The Court focuses its analysis on Defendants’ treatment of Stroder and Susan Duncan. Duncan and Stroder’s situations were factually similar in several ways: they were hired at the same time; they shared the same training group; they held the same position within the same department; they were accountable to the same manager; and their probationary periods would end on the exact same day. Perhaps most significant of the similarities between Duncan and Stroder was the nature of their violations of the Cabinet’s Internet Usage Policy.

Stroder’s inappropriate e-mails mostly discussed non-work-related subjects like social engagements and contained references to his homosexual partner, as well as what witnesses describe as common homosexual terms (such as references to other homosexual men as “princess,” “queen,” and “bitch”). Duncan’s e-mails similarly discussed social and personal topics like wedding planning and “thirsty Thursday.” She also introduced a chain e-mail to other CHFS employees titled “Pampered Chef,” which depicted numerous suggestively posed naked men, save only the pots, pans, and other kitchen items strategically placed to conceal their genitals. All parties agreed that one cannot distinguish between the quantity or context of the inappropriate e-mail usage by Stroder and Duncan.

According to Stroder, Duncan, and other witnesses at trial, casual and personal use of the internet and e-mail within CHFS was typical and tolerated. The Puckett investigation inspired more rigid enforcement. As a result, the Cabinet eventually terminated Puckett and Stroder, and investigated three other employees, including Duncan. Aside from Duncan, all four of these other employees were openly homosexual. Nevertheless, no direct evidence at trial revealed a blatant animus towards homosexuals within the Cabinet.

The Cabinet, of course, is entitled to enforce its own internal policies. No doubt, countless Cabinet employees regularly used their computers for non-work-related matters. What is striking is that the Cabinet’s sudden enforcement of the Internet Usage Policy focused disproportionately on homosexual employees and, more particularly, friendly homosexual

bantering within e-mails. Of course, Stroder was not similarly situated to the other three homosexual men investigated by the Cabinet, because these others were not probationary employees. Therefore, while the Court finds insightful that implementation of the Cabinet's policy seemingly focused on homosexuals, the more important question concerns whether the Court can draw any conclusions as to Kent's motives by a comparison of her actions toward Stroder and Duncan.

Despite the strikingly similar actions of Stroder and Duncan, the Cabinet handled their potential violations of the Internet Usage Policy in dramatically different ways. Although Arnett advised Kent to investigate all probationary employees on the list of individuals identified for violating the Internet Usage Policy, Kent focused her efforts on Stroder. Among the four people Arnett identified, only Stroder and Duncan were probationary employees. Kent began her investigation by requesting both employees' snapshots on July 20, 2009. Kent testified that she did not know when Stroder and Duncan's requests would be processed or when she would receive their snapshots. However, she was aware of both individuals' last day as probationary employees and hoped the files would arrive before then.

On July 30, 2009, despite not knowing whether the snapshot files would arrive in the next 24 hours, Kent began discussing Stroder's termination with Arnett. In a series of e-mails they exchanged that day, Kent sought legal advice from Arnett, who was charged with reviewing personnel actions before Kent submitted recommendations to her supervisor. Arnett identified a series of inappropriate e-mail messages, purportedly to provide Kent with support to justify disciplinary action. Had Kent made the same inquiry regarding Duncan's known e-mails, the response would no doubt have been the same.

Kent never adequately explained why she contacted Arnett only concerning Stroder. Kent was unaware when either snapshot file would arrive. Supposedly, snapshots must be received and reviewed before disciplinary action is pursued. Kent nonetheless sought legal advice from Arnett to prepare Stroder's termination recommendation. In theory, Kent could have received both snapshots the following day, but she would have been prepared to terminate only Stroder. She failed to consult Arnett about Duncan, even though Arnett specifically counseled her to proceed quickly with probationary employees first, and instead pursued action only regarding Stroder.

Later that day, the e-mails, marked "high importance," explained that Stroder's "data is needed immediately because the state would like to be able to terminate the employee while in his probation period which ends July 31, 2009." Kent was copied on these messages, which illustrate a relatively prompt exchange between various state employees, resulting in Stroder's snapshot file being created on 10:00 PM that evening. No similarly urgent correspondence was produced regarding Duncan. In fact, it was not until the next morning, on her last day as a probationary employee, that e-mails indicate her request was being processed. Duncan's snapshot request was referenced within an e-mail which also requested snapshots of two other non-probationary homosexual employees. The e-mail was not marked with any indication of high importance or urgency and made no mention of her probationary period ending that day. At trial, Defendants offered no explanation for the imperative nature of e-mails regarding Stroder, which contrast starkly to those addressing Duncan.

The next morning, on July 31, Kent began preparing a memo recommending Stroder's termination. At some point that morning, she also received Stroder's snapshot, but it is unclear whether she actually had time to review it. Her final memo, which she later submitted to her supervisor, recited, almost verbatim, the e-mail she received the day before from Arnett. She could have done the same for Duncan based only on the Puckett e-mails. For example, Duncan's e-mail entitled "Pampered Chef" blatantly violated the Cabinet's Internet Usage Policy and easily surpasses in indecency the e-mails shared by Stroder. Kent's different approaches to the Stroder and Duncan violations is inexplicable and seems beyond mere coincidence.

In the context of a court trial, different treatment of similarly situated employees permits but does not require a finder of fact to conclude that an employment decision was based on discriminatory animus. It is difficult to reconcile, however, that two employees, in such strikingly similar circumstances, could be treated so differently. The evidence suggests that Kent was determined to act on Stroder based upon the homosexual nature of his e-mail interactions, leaving the Court to disbelieve that Kent decided to proceed with Stroder's termination first as a matter of mere happenstance. The Court therefore finds by a preponderance of the evidence that Defendants discriminated against Stroder because of his sexual orientation. As a consequence, Stroder was terminated; another who did the same things was spared. This is unfair and unequal treatment. The Court will enter an order consistent with this Memorandum Opinion and as necessary to resolve all remaining issues in this case.

GLENN v. BRUMBY
663 F.3d 1312 (11th Cir. 2011)

BARCKETT, Circuit Judge:

Vandiver Elizabeth Glenn was born a biological male. Since puberty, Glenn has felt that she is a woman, and in 2005, she was diagnosed with GID, a diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Starting in 2005, Glenn began to take steps to transition from male to female under the supervision of health care providers. This process included living as a woman outside of the workplace, which is a prerequisite to sex reassignment surgery. In October 2005, then known as Glenn Morrison and presenting as a man, Glenn was hired as an editor by the Georgia General Assembly's OLC. Sewell Brumby is the head of the OLC and is responsible for OLC personnel decisions, including the decision to fire Glenn.

In 2006, Glenn informed her direct supervisor, Beth Yinger, that she was a transsexual and was in the process of becoming a woman. On Halloween in 2006, when OLC employees were permitted to come to work wearing costumes, Glenn came to work presenting as a woman. When Brumby saw her, he told her that her appearance was not appropriate and asked her to leave the office. Brumby deemed her appearance inappropriate "[b]ecause he was a man dressed as a woman and made up as a woman." Brumby stated that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and that a male in women's clothing is "unnatural." Following this incident, Brumby met with Yinger to discuss Glenn's appearance on Halloween of 2006 and was informed by Yinger that Glenn intended to undergo a gender transition.

In the fall of 2007, Glenn informed Yinger that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name. Yinger notified Brumby, who subsequently terminated Glenn because “Glenn’s intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn’s coworkers uncomfortable.”

Glenn sued, alleging two claims of discrimination under the Equal Protection Clause. First, Glenn alleged that Brumby “discriminat[ed] against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex Defendant[] perceived her to be.” Second, Glenn alleged that Brumby “discriminat[ed] against her because of her medical condition, GID[,]” because “[r]eceiving necessary treatment for a medical condition is an integral component of living with such a condition, and blocking that treatment is a form of discrimination based on the underlying medical condition.”

Glenn and Brumby filed cross-motions for summary judgment. The District Court granted summary judgment to Glenn on her sex discrimination claim, and granted summary judgment to Brumby on Glenn’s medical discrimination claim. Both sides timely appealed to this Court. We first address Glenn’s sex discrimination claim.

I. Equal Protection and Sex Stereotyping

In any section 1983 action, a court must determine “whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws’ “ of the United States. *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. sec. 1983). Here, the question is whether Glenn’s termination violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause requires the State to treat all persons similarly situated alike or, conversely, to avoid all classifications that are “arbitrary or irrational” and those that reflect “a bare ... desire to harm a politically unpopular group.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985). States are presumed to act lawfully, and therefore state action is generally upheld if it is rationally related to a legitimate governmental purpose. However, more than a rational basis is required in certain circumstances. In describing generally the contours of the Equal Protection Clause, the Supreme Court noted its application to this issue, referencing both gender and sex, using the terms interchangeably:

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.

Id. at 440-41. In *United States v. Virginia*, the Supreme Court reaffirmed its prior holdings that sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. 518 U.S. 515, 555 (1996). This standard requires the government to show that its “gender

classification . . . is substantially related to a sufficiently important government interest.” *Cleburne*, 473 U.S. at 441. Moreover, this test requires a “genuine” justification, not one that is “hypothesized or invented post hoc in response to litigation.” *Virginia*, 518 U.S. at 533. In *Virginia*, the state’s policy of excluding women from the Virginia Military Institute failed this test because the state could not rely on generalizations about different aptitudes of males and females to support the exclusion of women. “State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *Id.* at 541 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

The question here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause. For the reasons discussed below, we hold that it does.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination. In that case, the Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered “macho,” and “overcompensated for being a woman. Six members of the Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender. The Court noted that “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group....” *Id.* at 251.

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 *Cal. L. Rev.* 561, 563 (2007); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum. L.Rev.* 392, 392 (2001) (defining transgender persons as those whose “appearance, behavior, or other personal characteristics differ from traditional gender norms”). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. Indeed, several circuits have so held. For example, in *Schwenk v. Hartford*, the Ninth Circuit concluded that a male-to-female transgender plaintiff who was singled out for harassment because he presented and defined himself as a woman had stated an actionable claim for sex discrimination under the Gender Motivated Violence Act because “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like one.’” 204 F.3d 1187, 1198-1203 (9th Cir.2000). The First Circuit echoed this reasoning in *Rosa v. Park West Bank & Trust Co.*, where it held that a transgender plaintiff stated a claim by alleging that he “did not receive [a] loan application because he was a man, whereas a similarly situated woman

would have received [a] loan application. That is, the Bank ... treat[s] ... a woman who dresses like a man differently than a man who dresses like a woman.” 214 F.3d 213, 215-16 (1st Cir.2000). These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*.

The Sixth Circuit likewise recognized that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir.2004). The court concluded that a transsexual firefighter could not be suspended because of “his transsexualism and its manifestations,” *id.* at 569, because to do so was discrimination against him “based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.” *Id.* at 572; see *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.2005) (holding that transsexual plaintiff stated a claim for sex discrimination “by alleging discrimination ... for his failure to conform to sex stereotypes”).

District courts have recognized as well that sex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms. See *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 659-661 (S.D.Tex.2008) (“Title VII and *Price Waterhouse* ... do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] ‘macho’ female who ... is perceived by others to be in nonconformity with traditional gender stereotypes.”); *Schroer v. Billington*, 424 F.Supp.2d 203, 211 (D.D.C.2006) (“[I]t may be time to revisit [the] conclusion ... that discrimination against transsexuals because they are transsexuals is literally discrimination because of sex.”); *Mitchell v. Axcan Scandipharm*, 2006 WL 456173, 2006 U.S. Dist. LEXIS 6521 (W.D.Pa. Feb. 21, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by “showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions”); *Kastl v. Maricopa Cnty. Comm. College Dist.*, 2004 WL 2008954, at *2-3, 2004 U.S. Dist. LEXIS 29825, at *8-9 (D. Ariz. June 3, 2004), *aff’d* 325 Fed.Appx. 492 (9th Cir.2009) (“[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.”); *Tronetti v. Healthnet Lakeshore Hosp.*, 2003 WL 22757935, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII “based on the alleged discrimination for failing to ‘act like a man’”).

All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that was considered too effeminate (*Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir.1997), vacated on other grounds by 523 U.S. 1001 (1998)), carrying a serving tray too gracefully (*Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864, 874 (9th Cir.2001)), or taking too active a role in child-rearing (*Knussman v. Maryland*, 272 F.3d 625, 642-43 (4th Cir.2001)). An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject

to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.

In *Frontiero v. Richardson*, the Court struck down legislation requiring only female service members to prove that their spouses depended upon them financially in order to receive certain benefits for married couples. See 411 U.S. 677, 691 (1973) (plurality opinion). The plurality applied heightened scrutiny to sex-based classifications by referring to the pervasiveness of gender stereotypes (noting a tradition of “romantic paternalism” that “put women [] not on a pedestal, but in a cage”), and held that gender-based classifications are “inherently suspect,” *id.* at 688, because they are often animated by “stereotyped distinctions between the sexes,” *id.* at 685. Two years later, the Court applied this heightened level of scrutiny to a Utah statute setting a lower age of majority for women and concluded that the statute could not be sustained by the stereotypical assumption that women tend to marry earlier than men. See *Stanton v. Stanton*, 421 U.S. 7, 14 (1975). The Court again rejected gender stereotypes, holding that “old notions” about men and women’s behavior provided no support for the State’s classification. *Id.* at 14. That same year, the Court confronted a provision of the Social Security Act that allowed certain benefits to widows while denying them to widowers. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637 (1975). The Court again used heightened scrutiny to strike at gender stereotype, concluding that “the Constitution also forbids gender-based differentiation” premised on the stereotypical assumption that a husband’s income is always more important to the wife than is the wife’s to the husband. *Id.* at 645.

In each of these foundational cases, the Court concluded that discriminatory state action could not stand on the basis of gender stereotypes. See also *Craig v. Boren*, 429 U.S. 190, 199, (1976) (explaining that “the weak congruence between gender and the characteristic or trait that gender purported to represent” necessitated applying heightened scrutiny); *Orr v. Orr*, 440 U.S. 268, 282 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the risk of reinforcing stereotypes about the ‘proper place’ of women...”). The Court’s more recent cases reiterate that the Equal Protection Clause does not tolerate gender stereotypes. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (explaining that “the purpose” of heightened scrutiny is to ensure that sex-based classifications rest upon “reasoned analysis rather than ... traditional, often inaccurate, assumptions about the proper roles of men and women.”); see also *Virginia*, 518 U.S. at 533 (“[The government] must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”); cf. *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (holding that Congress may enact remedial measures under Section Five of the Fourteenth Amendment to counteract sex-based stereotypes). Accordingly, governmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex-- must be subjected to heightened scrutiny because they embody “the very stereotype the law condemns.” *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (declaring unconstitutional a government attorney’s use of preemptory juror strikes based on the presumption that potential jurors’ views would correspond to their sexes).

We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because

of his or her gender non-conformity.

II. Glenn's Termination

We now turn to whether Glenn was fired on the basis of gender stereotyping. The first inquiry is whether Brumby acted on the basis of Glenn's gender-nonconformity. If so, we must then apply heightened scrutiny to decide whether that action was substantially related to a sufficiently important governmental interest. A plaintiff can show discriminatory intent through direct or circumstantial evidence. In this case, Brumby testified at his deposition that he fired Glenn because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that Glenn would appear wearing women's clothing. Brumby testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and Brumby admitted that his decision to fire Glenn was based on "the sheer fact of the transition." Brumby's testimony provides ample direct evidence to support the district court's conclusion that Brumby acted on the basis of Glenn's gender non-conformity.

If this were a Title VII case, the analysis would end here. However, because Glenn's claim is based on the Equal Protection Clause, we must, under heightened scrutiny, consider whether Brumby succeeded in showing an "exceedingly persuasive justification," that is, that there was a "sufficiently important governmental interest" for his discriminatory conduct. This burden "is demanding and it rests entirely on the State." The defendant's burden cannot be met by relying on a justification that is "hypothesized or invented post hoc in response to litigation."

On appeal, Brumby advances only one putative justification for Glenn's firing: his purported concern that other women might object to Glenn's restroom use. However, Brumby presented insufficient evidence to show that he was actually motivated by concern over litigation regarding Glenn's restroom use. To support the justification that he now argues, Brumby points to a single statement in his deposition where he referred to a speculative concern about lawsuits arising if Glenn used the women's restroom. The district court recognized that this single reference, based on speculation, was overwhelmingly contradicted by specific evidence of Brumby's intent, and we agree. Indeed, Brumby testified that he viewed the possibility of a lawsuit by a co-worker if Glenn were retained as unlikely and the record indicates that the OLC, where Glenn worked, had only single-occupancy restrooms. Brumby advanced this argument before the district court only as a conceivable explanation for his decision to fire Glenn under rational basis review. The fact that such a hypothetical justification may have been sufficient to withstand rational-basis scrutiny, however, is wholly irrelevant to the heightened scrutiny analysis that is required here.

Brumby has advanced no other reason that could qualify as a governmental purpose, much less an "important" governmental purpose, and even less than that, a "sufficiently important governmental purpose" that was achieved by firing Glenn because of her gender non-conformity. We therefore AFFIRM the judgment of the district court granting summary judgment in favor of Glenn on her sex-discrimination claim. In light of this decision, which provides Glenn with all the relief that she seeks, there is no need to address Glenn's cross-appeal.

NOTES AND QUESTIONS

(in addition to those on page 636 of the casebook)

4. The Stroder decision shows how a court may infer the necessary discriminatory intent where an employer acts against a gay employee whose work record and rule infractions are similar to those of a non-gay employee. Was it appropriate for the court to rule on the merits for Stroder based entirely on circumstantial evidence of discriminatory intent, when his misuse of his email account in violation of the employer's rules would clearly justify his discharge on non-discriminatory grounds? What sort of relief should the court fashion in such a case? (Under Title VII of the Civil Rights Act of 1964, there is a statutory limitation on the remedy when a court finds that an employer's asserted non-discriminatory reason for a discharge would have independently supported the discharge.)

5. Has the court in *Glenn v. Brumby* correctly characterized the precedential effect of *Romer v. Evans* in determining the plaintiff's constitutional claim? Is *Lawrence* relevant to the equal protection claim? Is *Windsor*? *Obergefell*? Does it make sense that justifications for a state action may be held to violate equal protection but not due process?

6. In *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, petition for rehearing en banc denied, 759 F.3d 990 (9th Cir. 2014), the 9th Circuit held that all claims of sexual orientation discrimination are reviewed using "heightened scrutiny," having concluded that it was appropriate to abandon existing circuit precedent in light of *U.S. v. Windsor*, and that the Supreme Court's approach in *Windsor* mandated heightened scrutiny. Three members of the circuit, dissenting from a rejection of one judge's suggestion that the case be reheard en banc, charged that the panel (and consequently the circuit) had misconstrued *Windsor*, which was narrowly focused on marriage equality and not precedential on sexual orientation discrimination claims, as such. An edited text of the case and the dissent can be found in the Supplement for Chapter 2. Many federal courts have ruled that if a public employee has a cause of action under federal or state employment discrimination statutes, the statutory remedy is exclusive and they may not bring a constitutional claim based on the same theory of discrimination.

Page 644 – Add new Note 5:

The problem of governmental immunity was raised in a very different context in *M.C. by Crawford v. Amrhein*, 598 Fed. Appx. 143 (4th Cir. 2015). This lawsuit was brought against state employees (including doctors) who had participated in performing sex assignment surgery on an infant who was in state custody. The infant, M.C., identified at birth as having an intersex condition and being effectively abandoned by his birth parents, was placed in the custody of the South Carolina Department of Social Services. The Department agreed with state doctors that M.C.'s intersexual condition should be "corrected" by operating to make him genitally "female." Such an operation renders the individual incapable of procreative activity. Several months after the operation M.C. was adopted. As frequently occurs in such cases, as M.C. progressed towards adolescence, he came to reject a female identity and his adoptive parents, supporting his gender identity determination, sued on his behalf, claiming that his constitutional right of reproductive freedom had been violated by the state officials and doctors when they performed the surgery without his informed consent. He alleged violations of substantive and procedural due process,

and the federal district court rejected the defendants' qualified immunity defense. The Court of Appeals reversed, finding that the cases cited by the plaintiff would not have put state officials and doctors on notice that their action could be held to violate M.C.'s constitutional rights. M.C. relied on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Avery v. County of Burke*, 660 F.2d 211 (4th Cir. 1981), all of which had ruled as to the fundamental right to procreate. The 4th Circuit panel wrote in *M.C.*: "Although we acknowledge the broad statements in these cases about reproductive rights, we cannot say that a reasonable official would understand them as clearly establishing an infant's constitutional right to delay sex assignment surgery." The court said that the district court's framing of the constitutional right at issue as the "right to procreation" was too broad "for purposes of assessing the defendants' entitlement to qualified immunity. . . . In our view, the alleged right at issue is that of an infant to delay medically unnecessary sex assignment surgery. By 'medically unnecessary,' we mean that no imminent threat to M.C.'s health or life required state officials to consent to the surgery, or doctors to perform it. Viewed in that light, we do not think that *Casey*, *Skinner*, or *Avery* put reasonable officials on notice that they were violation M.C.'s constitutional rights. As we have repeatedly emphasized, 'officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.' *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). We hold that the defendants did not transgress such a bright line in this case." Thus, the constitutional suit was dismissed. However, M.C. had also brought tort claims in state court that were scheduled to go to trial in the fall of 2015.

Page 674 – Add before *Smith v. City of Salem, Ohio*:

During the Obama Administration, the Equal Employment Opportunity Commission began to reexamine its former position that sexual orientation and gender identity discrimination claims were not cognizable under the sex discrimination provision of Title VII. Following the new trend in federal courts, the EEOC opined in the *Macy* case (see below) that gender identity discrimination is a form of sex discrimination, while continuing to study the matter of sexual orientation discrimination, which it finally resolved in favor of coverage in July 2015. An important contributor to that process was the rulings by federal district courts on motions to dismiss sexual orientation claims asserted in Title VII lawsuit. Several federal district courts jumped out in front of the EEOC on the sexual orientation discrimination issue. Here is one example:

TERVEER v. BILLINGTON
34 F. Supp. 3d 100 (2014)
United States District Court, District of Columbia.

KOLLAR–KOTELLY, J.

In February 2008, Plaintiff was hired as a Management Analyst in the Auditing Division of the Library of Congress Office of the Inspector General ("OIG"). Plaintiff's first-level supervisor was John Mech ("Mech"), a religious man who was accustomed to making his faith known in the workplace. On June 24, 2009, Mech told Plaintiff that "putting you ... closer to God is my effort to encourage you to save your worldly behind."

Plaintiff became close with Mech and Mech's family, including his daughter. In August 2009, Mech's daughter learned that Plaintiff is homosexual. Shortly thereafter, Plaintiff received an email from Mech mentioning his daughter and containing photographs of assault weapons along with the tagline "Diversity: Let's Celebrate It." Mech also began engaging in religious lectures "at the beginning of almost every work-related conversation" "to the point where it became clear that Mech was targeting [Plaintiff] by imposing his conservative Catholic beliefs on [Plaintiff] throughout the workday." Plaintiff further alleges that after learning that Plaintiff was homosexual, Mech no longer gave Plaintiff detailed instructions for assignments, but would instead give Plaintiff ambiguous instructions without clear communication of what Mech or OIG management expected. In December 2009, Mech began assigning Plaintiff assignments related to a large audit project that Plaintiff alleges were beyond his experience level. Normally, Plaintiff alleges, a project of such size and complexity would be staffed with six employees, take more than a year to complete, and be initiated by a New Project Memorandum. Instead, Mech held a brief meeting to discuss the format of the project and assigned Plaintiff as the sole employee on the project. Mech also began assigning Plaintiff more work in addition to the audit project.

On June 21, 2010, Mech called an unscheduled meeting, lasting more than an hour, for the stated purpose of "educating [Plaintiff] on Hell and that it is a sin to be a homosexual ... [, that] homosexuality was wrong[,] and that [Plaintiff] would be going to Hell." Mech began reciting Bible verses to Plaintiff and told Plaintiff "I hope you repent because the Bible is very clear about what God does to homosexuals." Four days later, on June 25, 2010, Plaintiff received his annual review from Mech. Plaintiff found the review did not accurately reflect the quality of his work and believed the review was motivated by Mech's religious beliefs and sexual stereotyping. That day, Plaintiff confronted Mech regarding the purpose of his religious lecturing and "the unfair treatment that began after Mech learned [Plaintiff] was homosexual." Mech was greatly angered by Plaintiff's questioning, vehemently denied that Plaintiff's homosexuality and personal religious views had impacted his impartiality with regard to Plaintiff's work and performance, and accused Plaintiff of trying to "bring down the library."

On June 29, 2010, Plaintiff met with Nicholas Christopher ("Christopher"), Mech's immediate supervisor, and told Christopher that "Mech had been lecturing him about religion and that he believed he was the victim of discrimination in the workplace because his sexual orientation did not conform to Mr. Mech's religious beliefs." Christopher told Plaintiff that, in his opinion, employees do not have rights. Christopher did not take any remedial action, did not contact the Library's Equal Employment Opportunity Office—the Office of Opportunity Inclusiveness and Compliance ("OIC")—and did not advise Plaintiff of appropriate complaint procedures.

Plaintiff alleges that in response to his allegations of discrimination, Mech placed Plaintiff directly under his supervision for the audit project and informed Plaintiff that he would be subjected to heightened scrutiny. Mech also began verbally assaulting Plaintiff whenever Plaintiff sought clarification on his work assignments. In December 2010, Mech prepared an evaluation of the audit project, which Plaintiff alleges broke with standard operating procedure because the project was not complete. Mech's review of the project was "extremely negative in every category." Plaintiff discussed the review with Mech and asked Mech if he continued to refuse to accept Plaintiff's homosexuality. In response, Plaintiff alleges Mech stated: "I don't care, I had a conversation with you—that is my business—but this has put you in a position

where you are under a closer watch, and you are not to question me—this is how it is. Regardless, you do not question management.” Plaintiff further alleges that Mech stated that he was “damn angry” at Plaintiff for threatening to bring a claim for wrongful discrimination and harassment and said to Plaintiff: “You were going to string me out to dry, made accusations, put me in a position risked (sic) my job and position, and now this is the result. You are to do as you are told and not question me or management in this office. You do not have rights, this is a dictatorship.”

In February 2011, Mech issued another negative performance evaluation based upon allegedly incorrect facts and mischaracterizations. On March 9, 2011, Mech notified Plaintiff that he was being placed on a “90–day written warning.” A negative report following the review period would result in a denial of Plaintiff’s level GS–11 within-grade-increase. On March 16, 2011, Plaintiff met with Naomi Earp (“Earp”), Director of the OIC, and initiated the Equal Employment Opportunity (“EEO”) complaint process. Earp, who was familiar with Plaintiff’s work, believed Plaintiff would benefit from a transfer from his current office, OIG, to the OIC. Earp asked Christopher if OIG would approve the transfer, but Christopher responded that Plaintiff was on track to be terminated within six months and that he would not approve the transfer. Plaintiff does not now claim this denial of transfer as an adverse employment action.

On June 24, 2011, Mech submitted his report following the 90–day written warning period finding Plaintiff’s work to be only minimally successful and denied his within-grade-increase. Plaintiff informed Christopher, who in turn informed Mech, that Plaintiff was intending to appeal Mech’s denial of his within-grade-increase. Shortly thereafter, Mech convened a meeting with Plaintiff and his co-workers and demanded that Plaintiff disclose to his co-workers that he intended to appeal the denial of his within-grade-increase, subjecting Plaintiff to a “hostile and abusive interrogation” until Plaintiff disclosed the details regarding his intent to appeal. Plaintiff’s appeal of the denial of his within-grade-increase was subsequently denied by Christopher on July 21, 2011.

Plaintiff alleges that the stress of his work environment caused him to require medical assistance and counseling. Plaintiff took paid sick leave from August 19, 2011, to September 23, 2011. *Id.* On September 28, 2011, upon returning to work, Plaintiff filed an informal complaint of discrimination with the OIC Office. On Plaintiff’s informal complaint, Plaintiff marked “sex” and “reprisal” as the basis of the alleged discrimination. Plaintiff alleges that following the filing of his discrimination complaint, Mech and Christopher prevented Plaintiff’s access to documents and other data, and continued to “harass, intimidate, and retaliate” against Plaintiff. Specifically, Plaintiff was criticized and penalized at work for taking time to prosecute his administrative action. Christopher also demanded that Plaintiff request permission from the supervisors against whom he had filed his complaint before working on his administrative action during the workday. In addition, Plaintiff alleges that “on numerous occasions, Christopher followed and/or filmed [Plaintiff] while he was off-duty and away from the [Library of Congress].”

On October 12, 2011, Plaintiff took additional leave to continue medical treatment “to deal with the emotional stress created by Mech and Christopher’s discriminatory treatment.” Plaintiff filed his formal complaint alleging discrimination with the OIC on November 9, 2011. Plaintiff’s formal complaint alleged discrimination based on religion, sex, sexual harassment, and reprisal.

Plaintiff qualified for Family Medical Leave from October 12, 2011, to January 3, 2012. Shortly after January 3, 2012, Plaintiff received a letter from Christopher declaring Plaintiff to be Absent Without Leave from work and directing him to return to duty. Christopher's letter stated: "... regardless of any health-related issue that you may be experiencing, your prolonged absence has had a negative impact on the Office of Inspector General.... Therefore, you are directed to immediately report for duty or contact me immediately to discuss your return to duty status. You are also advised that any further request for LWOP (leave without pay) will not be considered at this time." Plaintiff responded to Christopher that he would follow up with his doctors regarding his medical status. On March 29, 2012, Library of Congress Inspector General Karl Schornagel informed Plaintiff that he was considered Absent Without Leave and would be terminated from the Library of Congress on April 6, 2012, due to his failure to return to duty. Plaintiff alleges he was constructively terminated on April 4, 2012, because he was unable to return to a workplace where he had to confront constant discriminatory treatment from Mech and Christopher. On April 5, 2012, Plaintiff appealed through the Library of Congress's Adverse Actions appeals process Defendant's decision to terminate him. Plaintiff, however, does not now plead his actual termination by Defendant as an adverse employment action under Title VII, only his constructive termination.

On May 8, 2012, the Library of Congress issued its final agency decision denying Plaintiff's claims of discrimination. On August 3, 2012, Plaintiff filed the present lawsuit alleging eight counts against Defendant. Counts I through III allege, respectively, that Defendant violated Title VII by discriminating against Plaintiff based on sex, religion, and in retaliation for Plaintiff's protected activities. Specifically, Plaintiff alleges that Defendant subjected him to "harsh and discriminatory working conditions" and "constructively terminated" him from his position because Plaintiff, "as a homosexual male[,] did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC." In Count II, Plaintiff's religious discrimination claim, Plaintiff alleges that Defendant subjected him to "harsh and discriminatory working conditions" and "constructively terminated" him from his position by discriminating against him for holding "religious beliefs that could not be reconciled with [Mech's] fundamentalist religious beliefs that refuse to embrace LGBT individuals." Finally, in Count III, Plaintiff alleges that he was constructively terminated and subjected to a hostile work environment in retaliation for confronting Mech about discriminating against him "based upon his sexual orientation and religious beliefs." Plaintiff also pleads an independent claim of constructive discharge (Count IV).

Defendant now moves the Court to dismiss all . . . Counts of Plaintiff's Complaint. . . .

III. DISCUSSION

Defendant's second overarching argument is that Plaintiff's three Title VII claims—sex discrimination, religious discrimination, and retaliation—should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court shall address each Title VII claim in turn.

i. Title VII: Sex Discrimination

Defendant moves the Court to dismiss Plaintiff's sex discrimination claim because Plaintiff has insufficiently pled that he was the victim of sex stereotyping, a form of sex discrimination recognized as cognizable under Title VII by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Defendant contends that "courts have generally required plaintiffs [alleging sex stereotyping] to set forth specific allegations regarding the particular ways in which an employee failed to conform to such stereotypes—and allegations to support the claim that this non-conformity negatively influenced the employer's decision." Plaintiff's Complaint, Defendant argues, falls short of this pleading standard because it does not indicate that his "supervisor's conduct was motivated by judgments about plaintiff's behavior, demeanor or appearance, and there are no facts to support an allegation that the employer was motivated by his views about Plaintiff's conformity (or lack thereof) with sex stereotypes."

Courts in this Circuit have emphasized that a plaintiff alleging employment discrimination faces a "relatively low hurdle at the motion to dismiss stage." *Jones v. Bernanke*, 685 F.Supp.2d 31, 40 (D.D.C.2010). Indeed, the Court of Appeals for the District of Columbia has held that to survive a motion to dismiss under Rule 12(b)(6), all a complaint need state is: 'I was turned down for a job because of my race.' *Potts v. Howard Univ. Hosp.*, 258 Fed.Appx. 346, 347 (D.C.Cir.2007) Title VII prohibits an employer from discriminating "against any individual ... because of such individual's ... sex." Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC," and that "his orientation as homosexual had removed him from Mech's preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies Defendant's Motion to Dismiss Plaintiff's sex discrimination claim (Count I) for failure to state a claim.

ii. Title VII: Religious Discrimination

Defendant next argues that Plaintiff's religious discrimination claim must be dismissed because it is no more than a recasting of Plaintiff's sex discrimination claim. Defendant relies on *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir.2009), in which the Third Circuit held that a plaintiff who alleged that he failed to conform to his employer's religious beliefs by virtue of his status as a gay man had not pled a religious discrimination claim because "he was harassed not 'because of religion,' but because of his sexual orientation." Defendant contends that, likewise, the allegations in Plaintiff's Complaint only show a supervisor taking issue with Plaintiff's sexual orientation, not his religious beliefs.

Plaintiff responds that he sufficiently pled a claim of religious discrimination because he alleged

facts showing that he was discriminated against because he failed to live up to his supervisor's religious expectations. The Court agrees with Plaintiff. Title VII seeks to protect employees not only from discrimination on the basis of their religious beliefs, but also from forced religious conformity or adverse treatment because they do "not hold or follow [their] employer's religious beliefs." *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1038 (10th Cir.1993). In order to establish a prima facie case in actions where the plaintiff claims that he was discriminated against because he did not share certain religious beliefs held by his supervisors, the plaintiff must show (1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs. *Shapolia*, 992 F.2d at 1038.

In light of the "low hurdle" a plaintiff alleging employment discrimination must overcome at the motion to dismiss stage, the Court finds that Plaintiff has alleged sufficient facts to establish a claim of religious discrimination for failure to follow his employer's religious beliefs. In his Complaint, Plaintiff alleges that prior to learning of Plaintiff's sexual orientation, Mech told Plaintiff that "putting you ... closer to God is my effort to encourage you to save your worldly behind." Plaintiff further alleges that after Mech's daughter learned of Plaintiff's sexual orientation, "at the beginning of almost every work-related conversation [with Plaintiff], Mech would engage in a religious lecture to the point where it became clear that Mech was targeting [Plaintiff] by imposing his conservative Catholic beliefs on [Plaintiff] throughout the workday." Plaintiff also alleges that "Mech confronted [Plaintiff] directly regarding his homosexuality and its non-conformance with Mech's conservative religious beliefs." The Court finds that Plaintiff has sufficiently pled facts suggesting that the religious harassment he endured was not due exclusively to his homosexual status. Plaintiff's allegations show that Mech's religious proselytizing began before Mech learned of Plaintiff's sexual orientation. Moreover, a fact finder could infer from Plaintiff's allegation that Mech repeatedly engaged in religious lectures targeted at imposing Mech's "conservative Catholic beliefs" on Plaintiff that religion (and not simply homosexuality) played a role in Defendant's employment decisions regarding Plaintiff and contributed to the hostility of the work environment. As a result, at this stage, this case is distinguishable from *Prowel* where the plaintiff alleged religious proselytizing focused exclusively on the plaintiff's sexual orientation.

iii. Title VII: Retaliation and Retaliatory Hostile Work Environment

Defendant challenges Plaintiff's allegation that he engaged in "protected activity" on June 25, 2010, when Plaintiff confronted Mech about his discriminatory treatment of Plaintiff. As to Plaintiff's retaliation claim, Defendant argues that Plaintiff has failed to establish a causal link between his protected activity and any allegedly adverse action. Finally, as to Plaintiff's retaliatory hostile work environment claim, Defendant contends that Plaintiff's allegations of harassment and mistreatment are not severe or pervasive enough to constitute a retaliatory hostile work environment. The Court shall address Defendant's arguments in turn.

Title VII's anti-retaliation provision makes it unlawful for an employer "to discriminate against [an] employee ... because he has opposed any practice" made an unlawful employment practice

by [Title VII].” “[A]n employee seeking the protection of the opposition clause [must] demonstrate a good faith, reasonable belief that the challenged practice violates Title VII.” Defendant contends that since Plaintiff failed to put forth any factual allegations that would support his claim of sex or religious discrimination prohibited by Title VII, Plaintiff’s opposition to Defendant’s allegedly discriminatory conduct on June 25, 2010, is not sufficient to support a retaliation claim. However, the Court found that Plaintiff’s Complaint alleges facts sufficient to state a claim of sex-stereotyping and religious discrimination cognizable under Title VII. Consequently, the Court now finds that Plaintiff’s June 25, 2010, meeting with Mech in which Plaintiff confronted Mech about his belief that Mech was discriminating against him based on “his religious beliefs and sexual stereotyping” constituted protected opposition conduct under Title VII.

Defendant next argues that Plaintiff’s retaliation claim must be dismissed because Plaintiff has failed to connect his protected activity to the denial of his within-grade-increase on June 24, 2011. In making this argument, Defendant only recognizes Plaintiff’s March 16, 2011, meeting with an EEO counselor as protected activity since, as discussed above, Defendant does not believe Plaintiff’s June 25, 2010, opposition conduct was protected by Title VII. Proceeding on this understanding, Defendant argues that the denial of Plaintiff’s within-grade-increase cannot be evidence of retaliatory motive because, on March 9, 2011, before Plaintiff engaged in protected activity, Defendant gave Plaintiff a 90-day written warning that a negative report following the 90-day review period would result in the denial of Plaintiff’s within-grade-increase. In other words, since Defendant contemplated taking an adverse action against Plaintiff before Plaintiff engaged in protected activity, the adverse action following the protected activity cannot be viewed as retaliatory. Defendant is correct that an adverse employment action that was already contemplated before a plaintiff engaged in protected activity cannot be evidence of retaliation. However, the Court has found that Plaintiff also engaged in protected activity on June 25, 2010. Thus, the denial of Plaintiff’s within-grade-increase—which took place entirely after the June 25, 2010 protected activity—remains a viable retaliatory adverse action. Of course, the temporal proximity between Plaintiff’s June 25, 2010, protected activity and the date on which Defendant began contemplating the denial of Plaintiff’s within-grade-increase—March 9, 2011—is substantial, undermining an inference of causation. However, “a close temporal connection is not the only way to prove causation. ‘A plaintiff may also put forward direct evidence and disregard the presumption and its time limitations. ‘ Here, Plaintiff has alleged that in December 2010, when Plaintiff confronted Mech about a negative evaluation that he prepared of Plaintiff, Mech responded that he was “‘damn angry’ at [Plaintiff] for threatening to bring a claim for wrongful discrimination and harassment” and stated: “[Y]ou were going to string me out to dry, made accusations, put me in a position risked (sic) my job and position, and now this is the result.... You are to do as you are told and not question me or management in this office. You do not have rights, this is a dictatorship.” These statements are strongly probative of retaliation. On February 2011, Plaintiff alleges he received another negative performance evaluation based upon incorrect facts and mischaracterizations. Then on March 9, 2011, Mech notified Plaintiff that he was being placed on a 90-day “written warning” period at the end of which he would be denied his within-grade-increase if he received a negative review. On June 24, 2011, Mech submitted yet another negative evaluation of Plaintiff and denied Plaintiff’s within-grade-increase. The Court finds that from Mech’s probative statements and the series of negative reviews that followed, a fact finder could infer that Defendant denied Plaintiff’s within-

grade-increase in retaliation for Plaintiff's protected activity. Accordingly, in light of the "low hurdle" retaliation plaintiffs must overcome at the motion to dismiss stage, the Court denies Defendant's Motion to Dismiss Plaintiff's retaliation claim (Count III) for failure to state a claim.

As for Plaintiff's retaliatory hostile work environment claim, Defendant argues that this claim must be dismissed because Plaintiff has not pled sufficient facts showing that Defendant subjected him to "discriminatory intimidation, ridicule, and insult of such sever[ity] or pervasive[ness] [as] to alter the conditions of [his] employment and create an abusive working environment." However, in analyzing Plaintiff's hostile work environment allegations, Defendant only relies on allegations relating to actions Defendant took after March 16, 2011, the date Plaintiff first contacted the OIC Director to discuss his discrimination claims since Defendant disagrees that Plaintiff's June 25, 2010, confrontation with Mech constitutes protected activity. As the Court has found the June 25, 2010, confrontation constitutes protected opposition activity, the Court shall consider all of the alleged hostile actions Defendant took after that date. Title VII prohibits an employer from creating or condoning a hostile or abusive work environment that is discriminatory. As Defendant noted, a workplace becomes "hostile" for purposes of Title VII only if the allegedly offensive conduct "permeate[s] [the workplace] with 'discriminatory [or retaliatory] intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, (1993). This standard, occasionally referred to as the Meritor-Harris standard, has an objective component and a subjective component: the environment must be one that a reasonable person in the plaintiff's position would find hostile or abusive, and the plaintiff must actually perceive the environment to be hostile or abusive. While the subjective test may be readily satisfied in employment discrimination claims, the objective test requires examination of the "the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C.Cir.2008) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)).

The Court finds that Defendant's alleged actions following Plaintiff's June 25, 2010, protected opposition activity are sufficient to support a claim of a retaliatory hostile work environment. Among other things, Plaintiff alleges that after he confronted Mech, Mech informed Plaintiff that he would be subject to heightened scrutiny, verbally assaulted Plaintiff whenever Plaintiff sought clarification on his work assignments, prepared an "extremely negative" evaluation of Plaintiff's work on a project before the project was complete in contravention of standard operating procedure, created another negative performance evaluation based upon incorrect facts and mischaracterizations, placed Plaintiff on a 90-day written warning, and subjected Plaintiff to a "hostile and abusive interrogation" in front of his coworkers. Plaintiff also alleges that once he filed an informal complaint with the Library of Congress OIC Office on September 28, 2011, Christopher and Mech "prevented [Plaintiff's] access to documents and other data, while continuing to harass, intimidate, and retaliate against [Plaintiff]," and "criticized and penalized [Plaintiff] at work for taking time ... to prosecute his administrative action." Plaintiff alleges that the stress of this work environment required him to seek medical assistance and counseling and take two leaves of absence from work.

Courts in this Circuit have held that “a motion to dismiss is not the appropriate vehicle for evaluating the character or consequences of acts alleged to create a hostile work environment.” *Perry v. Snowbarger*, 590 F.Supp.2d 90, 92 (D.D.C.2008); see also *Holmes–Martin v. Leavitt*, 569 F.Supp.2d 184, 193 (D.D.C.2008) (denying the defendant’s motion to dismiss the plaintiff’s hostile work environment claim because notice pleading only requires that the plaintiff plead facts that “support” a claim, not those that “establish” it). In *Holmes–Martin*, the district court denied a motion to dismiss a hostile work environment claim where the plaintiff alleged her employer created a hostile work environment through “isolation, subjection to public ridicule and harmful treatment that was so severe it caused psychological illness [including changing the locks on plaintiff’s office, manipulating performance reviews, and hostile emails]” and that this treatment became “more hostile and hurtful” after the plaintiff filed her first formal EEO complaint. The Court finds that the facts alleged in the present case are substantially similar to those the district court found sufficient to survive a motion to dismiss in *Holmes–Martin*. Accordingly, the Court denies Defendant’s Motion to Dismiss Plaintiff’s retaliatory hostile work environment claim (Count III) because Plaintiff has pled facts that would plausibly entitle him to relief.

Note and Questions

1. *TerVeer* might be seen as an outgrowth of the developing case law on gender identity discrimination under Title VII, illustrated by *Smith v. City of Salem, Ohio*, on page 674 in the casebook and subsequent opinions. *TerVeer* may be the first district court opinion to adapt the reasoning of the gender identity cases to a sexual orientation discrimination case. Is it convincing? Do these cases violate the interpretive principle that statutes should be construed to effectuate the intent of the enacting legislature? Or is legislative intent irrelevant if the statute adopts concepts that lend themselves to more expansive interpretation over time? Has the court in *TerVeer* virtually amended Title VII to expand the definition of “sex”? In a subsequent ruling, another federal district court took an even broader approach to the gender non-conformity basis for finding jurisdiction under Title VII for a sexual orientation discrimination claim in *Deneffe v. Skywest, Inc.*, 2015 U.S. Dist. LEXIS 62019, 2015 WL 2265373 (D. Colo., May 11, 2015) (ruling by Magistrate Judge on motion to dismiss for failure to state a claim). In *Bennefield v. Mid-Valley Healthcare*, 2014 U.S. Dist. LEXIS 116554, 2014 WL 4187529 (D. Or., Aug. 21, 2014) (not officially published), the court refused to dismiss a Title VII retaliation claim brought by a lesbian who claimed that she suffered adverse consequences because she complained to management about homophobic harassment. The court reasoned that the employee could have believed in good faith that her act of complaining about the harassment was protected activity under Title VII. Public opinion polls show that most people believe, incorrectly, that federal law already prohibits discrimination because of sexual orientation. At present, however, most district courts are unlikely to rule favorably on Title VII claims by gay litigants in the absence of at least some plausible attempt to use a sex-stereotyping theory. See, e.g., *Wolf v. Linatex Corp. of America*, 2014 U.S. Dist. LEXIS 153132 (M.D. Tenn., Oct. 29, 2014); *Gordineer v. Chuy’s Opc, Inc.*, 2015 U.S. Dist. LEXIS 9633 (W.D. Okla., Jan. 28, 2015); *Hively v. Ivy Tech Community College*, 2015 U.S. Dist. LEXIS 25813, 2015 WL 926015 (N.D. Ind., March

3, 2015); *Dollinger v. New York State Insurance Fund*, 2015 U.S. Dist. LEXIS 40044 (N.D.N.Y., March 30, 2015); *Walters v. BG Foods, Inc.*, 2015 U.S. Dist. LEXIS 54385, 2015 WL 1926224 (E.D. Tex., April 27, 2105); c.f., *Kirby v. North Carolina State University*, 2015 U.S. Dist. LEXIS 30135, 2015 WL 1036946 (E.D.N.C., March 10, 2105) (rejecting lesbian’s discrimination claim under Title IX, a statute that forbids sex discrimination by educational institutions, where plaintiff failed to allege facts supporting a sex-stereotyping theory). In *Thomas v. Osegueda*, 2015 U.S. Dist. LEXIS 77627, 2015 WL 3751994 (N.D. Ala., June 16, 2015), the court held that a sexual orientation discrimination claim involving plausible allegations of sex stereotyping could be actionable under the sex discrimination ban in the federal Fair Housing Act. However, the court dismissed the case because the heterosexual male plaintiff was alleging that he was discriminate against because he conformed to gender stereotypes, which the court held could not sustain a sexual orientation discrimination claim.

2. The EEOC informed its District Directors in a memo dated February 3, 2015, that they should accept discrimination charges from individuals who believe they have been discriminated against because of their gender identity or sexual orientation. “Complaints of discrimination on the basis of transgender status or gender-identity-related discrimination should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent,” wrote Nicholas M. Inzeo, Director of the EEOC’s Office of Field Programs. Inzeo continued: “Individuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charge should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent.” Both of these directives relied heavily on the Commission’s application of the sex-stereotyping-theory.
3. An attempt by a transgender student who was expelled from the university after insisting on using restroom and locker room facilities consistent with his gender identity was unsuccessful in persuading a federal court to construe Title IX, a federal statute banning sex discrimination by educational institutions, to extend to gender identity discrimination claims. *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa., March 31, 2015). The court opined that employment and student participation presented different issues so that Title VII rulings were not persuasive in construing Title IX. The court placed particular emphasis on the university’s concern for student safety and privacy in the use of such facilities. At around the same time, however, a different federal court found that a sexual orientation discrimination against a school subject to Title IX might be actionable, in *Videckis v. Pepperdine University*, 2015 U.S. Dist. LEXIS 51140, 2015 WL 1735191 (C.D. Cal. Apr. 16, 2015).
4. In *Cummings v. Greater Cleveland Regional Transit Authority*, 2015 WL 410867 (N.D. Ohio, Jan. 29, 2015), the court held that a transgender woman who had been issued a new birth certificate after completing sex-reassignment surgery could assert sex discrimination charges under the state’s civil rights law without any need to assert a sex-stereotyping theory, because the plaintiff would be deemed a woman for all legal

purposes. She could maintain the sex discrimination claim if she could allege sufficient facts to meet pleading standards to show that she had encountered discrimination because she was a woman. The court also refused to dismiss Equal Protection and 1st Amendment claims.

5. In *Fowlkes v. Ironworkers Local 40*, 2015 WL 3796386 (2nd Cir., June 19, 2015), the court identified another statutory source of protection against discrimination for some sexual minority employees: the “duty of fair representation” under the National Labor Relations Act of 1935, as amended. The Supreme Court has held that because unions are granted the right of an exclusive representative of all the employees in an “appropriate unit for collective bargaining” under the Act, the union must represent all the employees in the bargaining unit fairly. The duty can be enforced administratively by filing an “unfair labor practice” charge with the National Labor Relations Board, or through litigation by filing a federal lawsuit under 42 U.S.C. Section 1983 for a violation of rights under federal law. In this case, a transgender man who is a member of Local 40 complained that the union’s hiring hall was discriminating against him in making job referrals because of his gender identity. The court found that this could state a claim for breach of the duty of fair representation. Quoting the leading Supreme Court decision of *Vaca v. Sipes*, 386 U.S. 171 (1967), the court wrote: “The duty of fair representation is a ‘statutory obligation’ under the NLRA, requiring a union ‘to serve the interests of all members without hostility or discrimination . . . , to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.’ This duty applies in the hiring hall setting. . . . A union breaches its duty of fair representation if its actions with respect to a member are arbitrary, discriminatory, or taken in bad faith. . . . In his amended complaint, Fowlkes alleges that the Local refused to refer him for work for which he was qualified because of his transgender status and in retaliation for instituting legal proceedings against the Local. Allegations that a union abused its hiring hall procedures to undermine a member’s employment opportunities warrant particularly close scrutiny when a union wields special power as the administrator of a hiring hall.”

* * * * *

Add after Notes & Question, at page 681:

After a considerable body of cases in the lower federal courts had accumulated employing variants on the sex stereotyping theory to allow lesbian or gay plaintiffs to proceed with their Title VII claims, the EEOC issued a decision going beyond the case law, holding that “sexual orientation is inherently a ‘sex-based classification,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” It drew upon several lines of reasoning to support this conclusion, ruling on the viability of a discrimination filed by a gay air traffic controller against the Department of Transportation. References in the opinion to “the Agency” are to the Department of Transportation. References to “the Commission” are to the EEOC.

**Complainant v. Anthony Foxx, Secretary, Department of Transportation
(Federal Aviation Administration), Agency.**

Appeal No. 0120133080

2015 WL 4397641

Agency No. 2012-24738-FAA-03

July 15, 2015

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e-2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida. On August 28, 2012, Complainant contacted an EEO counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC administrative judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as

well as his familiarity with this Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor who was involved in the selection process for the permanent position made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was 'a distraction in the radar room' when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO counselor, as required by EEOC regulations. . . . The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]." Complainant appealed the Agency's decision to the Commission.

[In a portion of the decision omitted here, the Commission found that the complaint had been raised in a timely fashion, as the Complainant brought his claim to an Agency EEOC officer within 45 days after the Complainant learned he was not selected for the permanent position.]

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See

Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241-42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).[FN3] This applies equal in claims brought by lesbian, gay, and bisexual individuals under Title VII.

[FN3] As used in Title VII, the term “sex” “encompasses both sex- that is, the biological differences between men and women - and gender.” See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination”). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.” As such, the terms “gender” and “sex” are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) (“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”)(plurality opinion). We do the same in this decision.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.[FN4]

[FN4] As we observed in Macy, 2012 WL 1435995 at *6:

“Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.” Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, “the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring) “The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her.” Price Waterhouse, 490 U.S. at 242.

In the case before us, we conclude that Complainant’s claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. The Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily

alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass’n, “Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation” (Feb. 2011), available at <http://www.apa.org/pi/lgbt/resources/sexuality-definiticms.pdf> (“Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted.”) It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22, 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he “experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit.” M. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee’s sex. See also *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (“One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller’s manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”) [FN5]

[FN5] Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See *Videckis v. Pepperdine Univ.*, 2015 WL 1735191 (CD. Cal., 2015) (“[Discrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.”); *Lawson v. Kelly*, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) (“The State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification,” and it violates the Equal Protection Clause); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1QS2 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *cf. Obergefell v. Hodges*, 576 U.S. ___, 2015 WL 2473451,*19 (2015) (“[I]t must be further acknowledged that [laws prohibiting same-sex marriage] abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.”).

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII’s prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee’s association with a person of another race, such as an interracial marriage or friendship. See, e.g., *Floyd v. Amite County School Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (“This court has recognized that. . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race.”). . . This analysis is not limited to the context of race discrimination. Title VII “on its face treats each of the enumerated categories”—race, color, religion, sex, and national origin—“exactly the same.” *Price Waterhouse*, 490 U.S. at 243 n.9.

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, “by definition,” discrimination because of the

employee or applicant's sex. Cf *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII]."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.").

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In *Price Waterhouse*, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). In the wake of *Price Waterhouse*, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently "masculine" or "feminine." [FN7] But as the Commission [FN8] and a number of federal courts [FN9] have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

[FN7] See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) ("It follows [from *Price Waterhouse* that employers who discriminate against men because they . . . act femininely are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *EEOC V. Boh Brothers*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because — at least in Wolfe's view — Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII).

[FN8] See *Veretto v. United States Postal Service*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC, July 1, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC, Dec. 20, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); *Baker v. Social Security Administration*, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC, January 11, 2013) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender nonconforming behavior); *Dupras v. Dep't of Commerce*, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC, March 15, 2013) (complainant's allegation that she was subjected to stereotyping on the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); *Culp v. Dep't of Homeland Security*, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC, May 7, 2013) (complainant's allegation of sexual orientation

discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); *Brooker v. U.S. Postal Service*, EEOC Request No. 0520110680, 2013 WL 4041270 (EEOC, May 20, 2013) (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); *Complainant v. Dep't of Homeland Security*, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC, August 19, 2014) (reaffirming the analysis in the cases cited above).

[FN9] See *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Heller*, 195 F. Supp. 2d at 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle’s stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”); *Koren v. Ohio Bell*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (“And here, Koren chose to take his spouse’s surname—a “traditionally” feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he ‘alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under Mech’s supervision or at the LOC, and that his orientation as homosexual had removed him from Mech’s preconceived definition of male.”); *Boutiltier v. Hartford Public Schools*, 2014 WL 4794527 (D. Conn. 2014) (denying an employer’s motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); *Deneffe v. Sky West, Inc.*, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer’s motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male “braggadocio” about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights); cf. *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant’s theory.”); *Id.* at 495, (Berzon., J., concurring) (“[It] bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”).

Sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The *Centola* court continued:

In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real” men should date women, and not other men.

Those deeper assumptions and stereotypes about “real” men and “real” women were similarly noted by the court in *Terveer v. Library of Congress* in rejecting the government’s motion to dismiss:

Under Title VII, allegations that an employer is discriminating against an employee based on the employee’s non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See *Price Waterhouse v. Hopkins*, 490 U.S. 228,251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their gender.”). Here, Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,” that his “status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under [his supervisor’s] supervision or at the LOC,” and that “his orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male.” As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”

Terveer v. Billington. 34 F. Supp. 3d 100, 116 (D.D.C. 2014)(first quoting Pl.’s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.” [NF10] Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on “sex” from adverse employment actions based on “sexual orientation.” The stated justification for such intricate parsing of language has been the bare conclusion that “Title VII does not prohibit . . . discrimination because of sexual orientation.” *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the “borders [between the two classes] are . . . imprecise.” *Id.* [FN11]

[FN10] A review of erases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. . .

[FN11] We do not view the borders between sex discrimination and sexual orientation as “imprecise.” As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (“Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII and those “traditional notions” did not include sexual orientation or sexual preference.), abrogated by *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). [FN12]

[FN12] Indeed, the Equal Employment Opportunity Commission’s own understanding of Title VII’s application to sexual orientation discrimination has developed over time. Compare *Johnson v. U.S. Postal Service*, EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC, Dec. 19, 1991) (holding that Title VII’s prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and *Morrison v. Dep’t of the Navy*, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII’s discrimination prohibition does not include sexual preference or orientation as a basis), with *Morris v. U.S. Postal Service*, EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing *Johnson* and *Morrison* and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections to protect LGBT employees and explained that federal decisions have been inconsistent in this area. See *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009)* (statement of Stuart J. Ishimaru, Acting Chairman, U. S. Equal Employment Opportunity Commission).

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Services, Inc.*, “statutory prohibitions often go beyond the principal evils [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included. [FN13] Nothing in the text of Title VII “suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone.” *Heller v. Columbia Edgewater Country Club*, 195 F.Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.”). [FN14] But the Supreme Court has ruled that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

[FN13] Title VII prohibits discrimination on the basis of “sex” without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, “[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress’s province.” *EEO v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. (2015), 135 S. Ct 2028, 2033, 2015 WL 2464053, *4 (2015).

[FN14] See also *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (citing *Bibby and Simonton* (see *infra*) with approval); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) (“Title VII n has not been amended to prohibit discrimination based on sexual orientation.”); *Simonton V. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000) (“Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent.”).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms that is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of “people in interracial relationships.” See e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, *Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of “masculine women.” See *Price Waterhouse*, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of “non-believers.” See, e.g., *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles of race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word “mothers” in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See *Phillips v. Martin-Marietta*, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant’s allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or expectation that individuals should be attracted only to those of the opposite sex. Agencies should treat claims of sexual orientation discrimination as complaints of sex

discrimination under Title VII and process such complaints through the ordinary Section 1614 process. . . .

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII. Furthermore, we conclude that Complainant's initial EEO counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing to determine its validity on the merits.

NOTES & QUESTIONS

1. The EEOC rendered its decision in *Complainant v. Foxx* in its appellate capacity in cases involving Title VII discrimination claims by federal employees. The procedures in such cases are set out in 29 C.F.R. Part 1614. Employees complain about discrimination initially to the designated department within their employing agency, usually an Office for Civil Rights, which makes an initial determination. Employees can request a hearing before an administrative law judge, or can appeal an adverse ruling to the EEOC.
2. Decisions by the EEOC are not binding on the courts. The EEOC's interpretation of the statute is entitled to judicial deference, but the amount of deference varies, and the courts will most likely reject EEOC interpretations that appear to contradict the "plain meaning" of the statute. Where there is room for interpretation of broad or vague statutory language, the courts will examine whether the EEOC's interpretation is reasonable in light of the legislative purpose and the overall statutory scheme. More deference is likely when the EEOC is deciding an issue that has not been the subject of numerous past court decisions and has not previously been decided by the Commission. Deference is much less likely when the EEOC has previously staked out a position on an issue, adhered to it for many years, and then changed its mind. In the case of this ruling on sexual orientation, one would expect the amount of deference paid by the courts as a matter of administrative law and practice to be relatively slight, as the EEOC and the courts have repeatedly rejected this interpretation until quite recently. However, the care taken by the Commission to draw analogies from recent (and not-so-recent) case law and to situate its interpretation within several lines of precedent might bolster the degree of deference the opinion receives.
3. How persuasive is the Commission's reasoning in support of its conclusion that allegations of sexual orientation discrimination are "necessarily" allegations of sex discrimination? Identify the lines of precedent cited by the Commission, and evaluate the weight of the analogies it draws from those precedents.
4. The Commission's quotation from *Oncale v. Sundowner Offshore Services* is to a comment by Justice Antonin Scalia, writing for the unanimous Court, to the effect that the actual words of a statute are controlling in determining whether it applies to new fact patterns that weren't explicitly considered by the legislators. In *Oncale*, the Court

resolved a circuit split over whether a male employee could bring a claim of hostile environment harassment against his employer because of mistreatment by male supervisors and co-workers, when there were no female comparators employed in that workplace. The 5th Circuit had ruled that Title VII's ban on sex discrimination could not be stretched that far. The Supreme Court held that so long as a person is singled out for harassment "because of sex," it doesn't matter whether the harassers are of the same sex as the victim. Title VII's text asks *why* the victim is being harassed, not the identity of *who* is harassing him or her. The Court deemed it irrelevant that Congress never discussed same-sex harassment in 1964 when the statute was being considered. Indeed, at the time, Congress did not discuss sexual harassment of any sort, yet the Supreme Court has erected an impressive edifice of case law about sexual harassment under Title VII, finding that when such harassment is sufficiently "severe" or "pervasive" to affect an employee's terms or conditions of employment, it may be a form of discrimination when the victim is selected based on one of the forbidden grounds of discrimination listed in Title VII.

Page 681 - Add to Note 3

In *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009), the court remanded for trial a gay employee's claim of sex stereotyping harassment under Title VII. However, in *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464 (6th Cir. 2012), the court upheld summary judgment for the employer where the record supported a finding that the harassment suffered by a gay employee was due to his sexual orientation, as there was no evidence of gender non-conformity by the plaintiff; to similar effect, see *Wasek v. Arrow Energy Services*, 682 F.3d 463 (6th Cir. 2012). A straight male employee suffering homophobic harassment by a male supervisor could not state a Title VII claim where he was not effeminate and there was no evidence the supervisor was gay, according to the 5th Circuit in *EEOC v. Boh Brothers Construction Co. LLC*, 689 F.3d 458 (2012). In *Deneffe v. Skywest, Inc.*, 2015 U.S. Dist. LEXIS 62019, 2015 WL 2265373 (D. Colo., May 11, 2015), a U.S. Magistrate Judge refused to dismiss a Title VII retaliation claim by a gay airline pilot, accepting as sufficient to plead a Title VII sex discrimination allegations that the pilot failed to comport with male gender stereotypes by holding himself aloof from the "macho" conversation of other male pilots, as well as taking advantage of the airline's policy on partner flying privileges for his same-sex partner. See, also, *Boutillier v. Hartford Public Schools*, 2014 WL 4794527 (D. Conn., Sept. 25, 2014) (lesbian schoolteacher). However, in *Thomas v. Osegueda*, 2015 U.S. Dist. LEXIS 77627, 2015 WL 3751994 (N.D. Alabama, June 16, 2015), a federal Fair Housing Act case, while endorsing the agency's sex-stereotyping extension of jurisdiction to some sexual-orientation housing discrimination claims, the court held that a heterosexual man could not bring a sex-discrimination claim based on the assertion that he suffered discrimination for comporting with male sex stereotypes allegedly held by the housing facility!

Page 681 – Add to Note 5:

On April 20, 2012, the Equal Employment Opportunity Commission (EEOC) announced in *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, that the Commission had reconsidered its old precedents and decided consistent with *Smith v. City of Salem* and the cases

cited in this Note that gender identity discrimination is a form of sex discrimination prohibited by Title VII. As a result of this change in agency policy, the EEOC's regional offices will accept complaints alleging sex discrimination by transgender individuals (and those perceived as transgender by others), and may initiate court actions in cases where conciliation does not achieve a settlement or authorize complainants to sue on their own behalf in federal court. The Justice Department ultimately ruled for the complainant on the merits in this case: *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Complaint No. ATF-2011-00751 (July 8, 2013). Subsequently, both the EEOC and the Justice Department have initiated litigation on behalf of transgender complainants under Title VII, seeking to establish further appellate precedents supporting the contention that anti-transgender discrimination is forbidden sex discrimination under Title VII. In one such case, the U.S. District Court denied an employer's motion to dismiss, but held that the case was only actionable on a sex-stereotyping theory, rejecting the EEOC's argument that discrimination because of gender identity is always sex discrimination. *EEOC v. R.G. & G.R. Harris Funeral Homes*, 2015 WL 1808308, 2015 U.S. Dist. LEXIS 53270 (E.D. Mich., April 21, 2015). The Supreme Court has yet to address the issue.

Page 681 – Add new Note 6:

The Equal Employment Opportunity Commission takes the position that Title VII's ban on sex discrimination means that an employer must allow a transgender employee to use the restroom facilities consistent with the employee's gender identity. Ruling in *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756 (April 1, 2015), the EEOC held that a transgender woman who is a civilian employee of the United States Department of the Army suffered unlawful discrimination when she was not allowed to use restroom facilities designated for women. The EEOC stated:

Here, the Agency acknowledges that Complainant's transgender status was the motivation for its decision to prevent Complainant from using the common women's restroom. The Deputy Program Manager testified that the restriction was imposed due to the Agency's belief that a significant number of women in the building would be "extremely uncomfortable having an individual [use the common female restroom because], despite the fact that she is conducting herself as a female, [the individual] is still basically a male, physically." Likewise, the Agency acknowledges that it restricted Complainant from the common women's restroom because of concerns about employee reaction to Complainant as a transgender individual. S1, for example, testified that management limited Complainant to the front executive restroom because it otherwise would have been a "real shocker for everyone in the workplace." This constitutes direct evidence of discrimination on the basis of sex.

The Agency defends its actions in part by pointing out that the Complainant agreed to use the "single shot" restroom while other employees adjusted to her transition. In this case, the "agreement" in question was a one-page memorandum from the Complainant to the management team. It outlined the reasons for Complainant's transition and a tentative list of next steps under the heading "Path Forward." The first step, starting in mid-November, was for Complainant to start dressing consistent with her gender identity. During this

time, her plan said she would “use [the] single shot restroom.” The next step, set to occur about a month later, was for Complainant to undergo an undefined “Surgical Procedure” and then put in a request to use the common facility. In accordance with her plan, Complainant used the single-shot restroom in the period following her change in dress. She apparently did not undergo a surgical procedure in December and did not submit a formal request to use the common facility exclusively. On two occasions, however, she found that the single-shot restroom was out-of-order or closed and decided to use the common facility. She was confronted by S2 after each time she used the common facility. He told her that she could not use those facilities until she had undergone “final surgery.” Complainant asserted in response that she was “legally female” and entitled to use the women’s restroom if needed.

This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.

On this record, there is no cause to question that Complainant—who was assigned the sex of male at birth but identifies as female—is female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women’s restrooms. . . .

Agencies are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions. For a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one.

Circumstances can change, however and an employee is never in a position to prospectively waive Title VII rights. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (“[W]e think it clear that there can be no prospective waiver of an employee’s rights under Title VII.”); see also *Vigil v. Dep’t of the Army*, EEOC Request No. 05960521 (June 22, 1998) (“ . . . [an] agreement that waives prospective Title VII rights is invalid as violative of public policy.”) Agencies should, as the OPM Guidance suggests, view any plan with a transitioning employee related to facility access as a “temporary compromise” and understand that the employee retains the right under Title VII to use the facility consistent with his or her gender. OPM Transgender Guidance.

The Agency states that it would not allow Complainant to use the common female restroom because co-workers would feel uncomfortable with this approach. We recognize that certain employees may object—some vigorously—to allowing a transgender individual to use the restroom consistent with his or her gender identity. Some, like the Agency decision makers in this case, may not believe a transgender woman is truly female, and thus entitled or eligible to use a female bathroom, unless she has had gender reassignment surgery. Some co-workers may be confused or uncertain about what it

means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker.

But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.

Finally, the Agency maintains that it is unclear whether restricting Complainant from using the common restrooms is even an adverse employment action. The Commission has long held that an employee is aggrieved for purposes of Title VII if she has suffered a harm or loss with respect to a term, condition, or privilege of employment. Equal access to restrooms is a significant, basic condition of employment. See e.g., OSHA, Interpretation of 20 C.F.R. 1910.141 § (c)(1)(i): Toilet Facilities (Apr. 4, 1998) (requiring that employers provide access to toilet facilities so that all employees can use them when they need to do so). Here the Agency refused to allow the Complainant to use a restroom that other persons of her gender were freely permitted to use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment.

But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a "single shot" restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect. The Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse.

In sum, we find that the Agency's decision to restrict Complainant's access to the common women's restroom on account of her gender identity violated Title VII. We further find that the record contains direct evidence that the decision was based on the gender identity of the Complainant. The Agency, therefore, erred when it found that Complainant was not subjected to sex-based disparate treatment.

After this decision was issued, the Occupational Safety and Health Administration (OSHA) issued new guidance under 20 C.F.R. 1910.141 § (c)(1)(i): Toilet Facilities, providing that employees are entitled to use restroom facilities consistent with their gender identity. See, A Guide to Restroom Access for Transgender Workers, OSHA Publication 3795 (<https://www.osha.gov/Publications/OSHA3795.pdf>). The cited regulation provides that employers are required to provide employees with access to suitable toilet facilities as a matter of employee health and safety. The EEOC and OSHA positions on this issue conflict with the Minnesota Supreme Court's 2001 decision in *Goins v. West Group*, 635 N.W.2d 717, on page 704 in the casebook.

Page 681- Add new Note 7:

6. Would it be unlawful sexual harassment for an employer to place a non-gay employee into a situation where he would suffer harassment based on misperceived sexual orientation? Consider the following case: A City Fire Department orders the members of an engine company to operate their equipment representing the Fire Department in the municipality's annual gay pride parade. Along the parade route, the firemen are the object of sexually salacious comments and invitations from members of the public watching the parade, and they claim to have suffered emotional distress as a result. Assuming that the jurisdiction bans employment discrimination based on sexual orientation, would these firemen have a statutory sexual harassment cause of action against their employer for putting them into that situation? Should they? See *Ghiotto v City of San Diego*, 2010 WL 4018644 (Cal. 4th Dist. 2010) (not officially published).

Page 682 - Add Delaware and Utah to the list of states banning sexual orientation discrimination by statute. Add Hawaii, Connecticut, Maryland, Nevada, Utah and Massachusetts to the list of states banning gender identity discrimination by statute. When Utah enacted its law in 2015, it was the first state to add both of these categories to its state anti-discrimination law since 2009. However, the Utah statute—the result of an intricate “compromise” worked out by legislators, LGBT rights leaders, and representatives of the Mormon Church—covered employment and housing but not public accommodations, and provided a broad religious exemption that appeared to excuse any business or facility connected in any way with a religious organization from complying. Thus, the Mormon Church's representatives were willing to support enactment of the law provided that it didn't apply to the Church or any of its numerous facilities and businesses.

Page 683 - Add the following paragraph just before 1. The Enforcement of Discrimination Laws

In *Romer v. Evans*, 517 U.S. 620 (1996), presented in Chapter 1, the Supreme Court found an equal protection violation under the 14th Amendment when the state of Colorado amended its constitution to prohibit the state or any political subdivision, department or agency from adopting a policy under which gay people would be protected from discrimination. The Court found that the amendment rendered gay people “unequal” for no particular reason than animus against them. Would the 14th Amendment be similarly violated if a state, responding to a local government's adoption of a law banning sexual orientation or gender identity discrimination, adopted a statute providing that no political subdivision could adopt any law that prohibited forms of discrimination that are not prohibited under state law?

In April 2011, the Metropolitan Government of Nashville and Davidson County, Tennessee, amended an ordinance providing that contractors doing business with the Metropolitan Government were prohibited from discriminating on various grounds to add the terms “sexual orientation and gender identity.” The state of Tennessee did not have any statutory prohibition on discrimination due to sexual orientation or gender identity. The state legislature reacted swiftly to the passage of the local law by adopting the “Equal Access to Intrastate Commerce Act,” which provided: “No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change or

vary in any manner from (A) the definition of “discriminatory practices” in Section 4-21-102 or deviate from, modify, supplement, add to, change, or vary any term used in such definition and also as defined in such section; or (B) other types of discrimination recognized by state law but only to the extent recognized by the state.” This was passed and signed into law less than two months after the local law was adopted. Its purported purpose was to ensure that businesses operating in Tennessee would not be subjected to varying regulation of their practices depending upon where in the state they were operating. The effect of the Act was that so long as the state did not ban sexual orientation or gender identity discrimination, local governments were prohibited from doing so, and any such non-discrimination policies in existence were automatically nullified. Various individuals and organizations represented by the National Center for Lesbian Rights filed suit alleging violation of the state and federal constitutions, most specifically in terms of equal protection of the laws, relying heavily on the legislative history showing that the intention was to disempower localities from banning discrimination based on sexual orientation or gender identity in particular, and relying heavily on the logic of *Romer v. Evans*. Is the statute vulnerable to challenge based on such arguments?

Page 691 - **Replace** *Shelton v. City of Manhattan Beach* (691-704) with the following case:

COOKSON v. BREWER SCHOOL DEPARTMENT
974 A.2d 276 (Maine Supreme Judicial Court 2009)

SAUFLEY, C.J.

Kelly Jo Cookson appeals from a summary judgment entered in the Penobscot County Superior Court (Cuddy, J.) in favor of the defendants, Brewer School Department and Superintendent Daniel Lee, on Cookson’s complaint alleging (1) sexual orientation employment discrimination, in violation of the Maine Human Rights Act, for the school’s failure to rehire her as a high school softball coach, see 5 M.R.S. sections 4571-4572 (2008), and (2) slander per se regarding certain statements made by Lee to parents who supported Cookson. We affirm in part and vacate in part. [Omitted here is the part of this decision in which the court explains why it affirms the superior court’s summary judgment on the slander per se claim.]

I. BACKGROUND

Viewing the evidence in the light most favorable to Cookson as the nonprevailing party, the following facts are supported in the summary judgment record.

Cookson was the head coach of the Brewer High School varsity softball team from 1993 until 2005. During her tenure, the team was considered to be successful and made the playoffs in all but one of those years. Cookson is a lesbian. During the 2005 season, a player on Cookson’s team quit, and that player’s mother made a complaint to Betsy Webb, who was then the superintendent. Among other things, the complaint accused Cookson of subjecting her players to verbal abuse and hazing, and specifically referenced an incident before the 2005 season during which players were brought to a farm where, in Cookson’s presence, they touched and walked in sheep feces. Webb investigated the allegations contained in the complaint and discovered that a

similar incident had occurred prior to the 2004 season. As a result of her investigation, Webb issued a letter of reprimand to Cookson.

Lee succeeded Webb as superintendent for the Brewer School Department in September 2005. The following month, Lee received a notice of tort claim from the same family that had made the previous complaint to Webb. The tort claim was based on many of the same allegations as that complaint, and referenced the sheep farm incidents in 2004 and 2005. Immediately after receiving the notice of tort claim, Lee met with Cookson and the athletic director, Dennis Kiah. During that meeting, Cookson told Lee that she would not resign, and he replied, "We're not even thinking along those lines." Also at that meeting, Cookson brought to Lee's attention alleged hazing incidents on other teams. While Lee was considering whether to recommend Cookson as coach for the 2006 season, he conducted an investigation into the tort claim and learned about the earlier complaint and resulting letter of reprimand. (During his investigation, Lee received a copy of a report from a private investigator hired by the family who sent the notice of tort claim, detailing other alleged controversial incidents involving Cookson.)

At some point before he made his hiring recommendation to the School Committee in late January or early February, Lee was made aware of Cookson's sexual orientation. During that time, Lee also met with parents who expressed support for Cookson. Lee told those parents that he had knowledge of items in Cookson's personnel file that he could not share with them and that Cookson may not have been entirely truthful with them. Lee also told them about a staff member at another school where he had worked who had been involved in a nudist colony and implied that there were similarities to Cookson's situation.

Lee ultimately decided not to nominate Cookson as the head softball coach for the 2006 season. Lee asserts that this decision was based primarily on Cookson's involvement in hazing activities in 2004 and 2005, in violation of the school's anti-hazing policy, and Lee's belief that Cookson was not providing a "balanced" sports program for the team. Lee nominated Skip Estes to replace Cookson. Estes, who had been the junior varsity softball coach for one year while Cookson was the head coach, and who had coached summer softball for several years, is married to a woman. The School Committee accepted Lee's recommendation and hired Estes as the head softball coach.

When Cookson's contract was not renewed, she filed a complaint in the Superior Court alleging (1) employment discrimination, in violation of sections 4571 and 4572 of the MHRA, for the School Department's failure to rehire her as a high school softball coach, and (2) slander per se for Lee's statement to parents that there were things in Cookson's personnel file that he could not discuss with them. After filing an answer, the School Department and Lee jointly moved for summary judgment. . . . The court entered summary judgment in favor of the School Department and Lee on both the discrimination and slander per se claims. For the purposes of its summary judgment analysis, the Superior Court accepted that Cookson had demonstrated the elements of a prima facie case of discrimination and determined that the School Department and Lee had articulated a legitimate, nondiscriminatory reason for declining to rehire Cookson. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The court then concluded, viewing the evidence in Cookson's favor, that she had failed to present sufficient evidence that the stated reason she was not rehired was a pretext for illegal discrimination based on her sexual

orientation. Regarding the slander per se count of Cookson's complaint, the court determined that the statement Lee had made regarding Cookson's personnel file was true and therefore not defamatory because he was required to keep employee information confidential, including evaluations of employee performance, complaints, and charges of misconduct. Cookson timely appealed from the judgment.

II. DISCUSSION

The Maine Human Rights Act provides that it is illegal for an employer to fail or refuse to hire a person based on that person's sexual orientation. 5 M.R.S. sec. 4572. Sexual orientation is defined as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." The Act provides that "a person who has been subject to unlawful discrimination may file a civil action in the Superior Court against the person or persons who committed the unlawful discrimination."

Federal law guides our construction of the MHRA. *Currie v. Indus. Sec., Inc.*, 2007 ME 12, P 13, 915 A.2d 400, 404. Accordingly, we apply the burden-shifting analysis first described in *McDonnell Douglas*, 411 U.S. at 802-05. See *Doyle v. Dep't of Human Servs.*, 2003 ME 61, P 14, 824 A.2d 48, 53-54. First, the employee must establish a prima facie case by demonstrating that (1) the employee is a member of a protected class; (2) the employee applied for and was qualified for the job that the employer was seeking to fill; (3) the employee was not hired for the job; and (4) the job was later filled by a person who was not in the protected class. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *McDonnell Douglas*, 411 U.S. at 802. If the employee makes this showing, a presumption of illegal discrimination is established, and the burden shifts to the employer to produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. If the employer produces such evidence, the presumption of discrimination is rebutted, and the inquiry shifts to the ultimate burden of persuasion on the issue of intentional discrimination, which remains at all times with the employee. To meet this burden, the employee must demonstrate that the reason asserted by the employer was a pretext and that the true reason was illegal discrimination. *Id.*

Cookson has generated issues of fact regarding her prima facie case by offering evidence that (1) she is a lesbian; (2) she applied for and was qualified for the job of softball coach; (3) she was not rehired for the job; and (4) the job was later filled by a person who is not in the suspect class. The School Department then articulated legitimate, nondiscriminatory reasons for refusing to rehire Cookson: that she was involved in hazing in violation of the school's anti-hazing policy and failed to provide a balanced sports program. Thus, the burden then shifted back to Cookson to present facts that could demonstrate that the reasons asserted by Lee were a pretext for illegal discrimination. This is the central issue on appeal.

Although the plaintiff in an employment discrimination case retains at all times the ultimate burden of persuading the fact-finder that the employer was motivated by discriminatory animus, the "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr.*, 509 U.S. at 511; see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the

defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”). Thus, once an employer has articulated a legitimate, nondiscriminatory explanation for the employment decision, an employee can survive a motion for summary judgment by presenting sufficient evidence from which a jury could reasonably conclude that either (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. See *Stanley v. Hancock County Comm'rs*, 2004 ME 157, P 23, 864 A.2d 169, 177. (Because a demonstration that the circumstances proffered by the employer were not the actual reason for the employment decision allows the inference at trial that the true reason was discriminatory animus, the generation of an issue of fact regarding the Veracity of the employer's explanation is sufficient to repel a motion for summary judgment. However, this does not lessen the plaintiff's ultimate burden, and at trial the employee is required to demonstrate not only that the employer's asserted reasons were untrue, but also that the actual reasons were discriminatory.)

Although trial courts should exercise caution in resolving issues of pretext on summary judgment in employment discrimination cases, see *Billings v. Town of Grafton*, 515 F.3d 39, 56 (1st Cir. 2008), “the presence of the issue of motivation or intent does not relieve the plaintiff of her or his burden of producing evidence sufficient to create a question of fact on that issue,” *Stanley*, 2004 ME 157, P 25, 864 A.2d at 178. One way to meet this burden is to demonstrate through affirmative evidence “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and ... infer that the employer did not act for the asserted non-discriminatory reasons.” *Billings*, 515 F.3d at 55-56.

With these legal principles in mind, we examine the facts set forth in the parties' statements of material facts in the light most favorable to Cookson, the nonprevailing party, to determine whether the summary judgment record evidences a genuine issue of material fact on the issue of pretext.

Cookson concedes that the conduct in the sheep pen constituted hazing. Thus, she does not assert that the factual circumstances underlying Lee's proffered explanation for the decision not to rehire her are false. She argues, rather, that illegal discrimination based on her sexual orientation-and not concerns arising from the incidents of hazing-caused that decision. The parties agree that, although Lee made the recommendation to the School Committee to hire Skip Estes instead of Cookson, it was ultimately the Committee's decision whether to accept or reject that recommendation. In this circumstance, Cookson can meet her burden of proof on the issue of pretext by presenting evidence that (1) the Committee harbored or demonstrated Discriminatory animus towards her, either existing independently or conveyed to it by Lee; or (2) Lee's decision not to recommend Cookson was motivated by discriminatory animus and he participated in or directly influenced the ultimate decision not to rehire her. See *Webber v. Int'l Paper Co.*, 417 F.3d 229, 236-37 (1st Cir. 2005). Although Cookson appears to argue that the Committee did harbor discriminatory bias against her, there are insufficient facts in the summary judgment record to support this assertion. However, the record does support the fact that the

Committee deferred to Lee's recommendation regarding her contract renewal and did not conduct its own investigation into the matter. See *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 178 (1st Cir.2008) (holding that an independent decision by a neutral decision-maker breaks the causal connection between a supervisor's discriminatory animus and an adverse employment action). Thus, Cookson's discrimination claim survives if she can demonstrate that Lee's motivations were discriminatory.

Viewed in the light most favorable to Cookson, the facts could be understood as follows: In early 2005, the parent of one of Cookson's former players registered a complaint with Betsy Webb, Lee's predecessor as superintendent, accusing Cookson of hazing. After investigating the allegations in the complaint, Webb issued a letter of reprimand to Cookson. Later that year, the same family that had made the previous complaint to Webb sent a notice of tort claim to Lee based on many of the same allegations contained in that complaint, and before Lee began his own investigation, he indicated that he was not thinking along the lines of requesting Cookson's resignation. During Lee's investigation, Cookson reported incidents of hazing on other teams to Lee, but he did not initiate an investigation into them. After learning of Cookson's sexual orientation, Lee recommended Estes and not Cookson for the coaching position, ostensibly because of the same hazing incidents for which she had already been reprimanded and which he had suggested previously would not result in a decision not to rehire her.

The Superior Court concluded that these facts were simply insufficient to generate a challenge to Lee's assertion of a legitimate, nondiscriminatory reason for declining to rehire Cookson. We recognize that pretext is difficult to assess at the summary judgment stage, particularly given that direct evidence of discriminatory animus will rarely be available. (In an affidavit submitted to the Superior Court on summary judgment, Lee indicated that he had, on another occasion, hired an administrator whom he knew to be gay because he considered her to be the best candidate for the job.) There is no "mechanical formula" for identifying pretext, and the issue of whether an employee has generated an issue of fact regarding an employer's motivation or intent is one heavily dependent on the individual facts before the court.

In these circumstances, an employee's assertion of discriminatory animus on the part of an employer will not survive summary judgment if she or he relies on mere "conclusory allegations, improbable inferences, and unsupported speculation." *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir.2000); see also *LaFrenier v. Kinirey*, 550 F.3d 166, 167-68 (1st Cir.2008) (holding that a party cannot defeat a motion for summary judgment merely by asserting, without affirmative contradictory evidence, that the moving party's version of events is not believable).

However, an employee need not convince the court on summary judgment that she was subjected to an adverse employment decision because of her protected status, or even that her version of events is more plausible. See *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 47 n. 11 (1st Cir.2009). Rather, the employee need only assert sufficient facts, supported in the summary judgment record, from which a reasonable fact-finder could disbelieve the employer's proffered rationale and conclude that illegal discrimination was the true motivating factor. See *Reeves*, 530 U.S. at 146-47; *Stanley*, 2004 ME 157, PP 12, 24, 864 A.2d at 174, 177-78.

Applying this standard, and viewing the summary judgment record in the light most favorable to Cookson, we conclude that she has generated a genuine issue of material fact on the issue of pretext. We recognize that a fact-finder could ultimately determine that Cookson failed to establish that Lee's offered rationale was a pretext for illegal discrimination and that the serious nature of the hazing and other alleged incidents, the parental concerns and complaints, and the need for a more balanced program were the actual motivating factors behind the decision not to nominate her as head coach. Indeed, Lee asserts that his final decision not to recommend Cookson could not have been motivated by discriminatory animus because he made that decision on January 17, 2006, prior to discovering that Cookson is a lesbian. However, he met with parents supportive of Cookson three days later and suggested that he had not yet ruled out Cookson for the position at that time. Further, his decision to recommend Estes was not communicated to the Committee until after January 23, 2006, the date that he asserts he learned of her sexual orientation.

Thus, the timing of Lee's ultimate decision, relative to when he knew of Cookson's sexual orientation, is, on the record before us, a material disputed fact inappropriate for resolution at the summary judgment stage. Considered in conjunction with evidence of Lee's initial impulse not to request Cookson's resignation, his alleged failure to fully investigate Cookson's reports of hazing on other teams, and his reliance on hazing incidents for which Cookson had already been punished, a fact-finder could reasonably conclude that Lee's decision was not based on Cookson's conduct but instead was motivated by her sexual orientation.

Accordingly, a fact-finder is the proper entity to determine whether this and other evidence demonstrates that Lee's asserted legitimate, nondiscriminatory reasons were a pretext for illegal discrimination, and we vacate the summary judgment on Cookson's MHRA claim.

NOTES AND QUESTIONS

1. The Maine court's use of federal precedents under Title VII of the Civil Rights Act in deciding issues of proof in cases under the Maine human rights law is commonly followed in many, but not all, jurisdictions. Thus, in the absence of direct evidence of discriminatory intent, courts generally follow the federal approach of allowing a plaintiff to raise an inference of discriminatory intent by proving the elements of a "prima facie case" of intentional discrimination as described in the *McDonnell Douglas* case cited and quoted in *Cookson*, above. When the plaintiff has met this requirement, a burden is placed on the defendant to "articulate" a non-discriminatory reason for its actions. If it does so, the inference of discriminatory intent has been rebutted, but the plaintiff can still prevail by discrediting the employer's alleged reason or showing that the employer also had a discriminatory motive.

2. In *Patino v. Birken Manufacturing Company*, 304 Conn. 67941, A.3d 1013 (2012), the Supreme Court of Connecticut ruled that an employee who claimed to suffer severe hostile environment harassment on account of his sexual orientation could bring a claim under Connecticut's Human Rights Law, which forbids employment discrimination because of an employee's sexual orientation. The court held that the ban on "sexual orientation" discrimination in the state's Human Rights Law should be construed consistently with the ban on "sex" discrimination, which had been applied by federal courts under Title VII to ban hostile environment harassment on account of an employee's sex. By analogy, the ban on "sexual

orientation” discrimination would similarly ban hostile environment harassment on account of an employee’s sexual orientation.

3. The New York City Council decided that the federal approach to employment discrimination under Title VII, which was also followed by New York State courts in construing the state’s Human Rights Law, was inadequately protective of employee rights, and mandated that courts take a “broad approach” to construing the city law. Title 8, New York City Administration Code, provides:

§ 8-130 Construction. The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.

Page 708 – Add the following text and case before the Notes and Questions:

DOE v. REGIONAL SCHOOL UNIT 26
86 A.3d 600 (2014)
Supreme Judicial Court of Maine

SILVER, J.

John and Jane Doe, parents of Susan Doe, and the Maine Human Rights Commission appeal from a summary judgment entered in the Superior Court (Penobscot County, Anderson, J.) in favor of Regional School Unit 26 on the Does’ complaint pursuant to the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4592(1), 4602(4) (2013). RSU 26 argues that the public accommodations section of the MHRA conflicts with a statutory provision regarding sanitary facilities in schools, 20-A M.R.S. § 6501 (2013). We are called upon for the first time to interpret the MHRA, and particularly several amendments enacted by the Maine Legislature in 2005, as it applies to transgender students in schools. We vacate the Superior Court’s judgment.

I. BACKGROUND

Susan Doe is a transgender girl. She was born male, but began to express a female gender identity as early as age two. Beginning in the first grade, she attended Asa Adams School in Orono. Susan generally wore gender-neutral clothing to school until her third-grade year, when her identity as a girl became manifest. At that time, the school principal first became aware that Susan was transgender. All third and fourth grade students at Asa Adams used single-stall bathrooms. Susan used the single-stall girls’ bathroom with the support and encouragement of school staff. In third grade, teachers and students began referring to Susan as “she.” By fourth grade, Susan was dressing and appearing exclusively as a girl.

In early 2007, midway through Susan’s fourth-grade year, school personnel implemented an educational plan, commonly referred to as a “504” plan, to address Susan’s gender identity issues and her upcoming transition to the fifth grade, where students used communal bathrooms

separated by sex. The 504 process is generally designed to identify impediments to learning for individual students and to implement steps to help those students succeed in school.

By the time she was preparing to enter the fifth grade, Susan had received a diagnosis of gender dysphoria, which is the medical term for psychological distress resulting from having a gender identity different from the sex that one was assigned at birth. School officials recognized that it was important to Susan's psychological health that she live socially as a female. They did not interpret 20–A M.R.S. § 6501, or any other law, as prohibiting a person with Susan's diagnosis from using the girls' bathroom.

A team consisting of Susan's mother, her teachers, the school guidance counselor, and the director of special services met in March 2007 to develop the 504 plan. The team agreed that school staff should refer to Susan, and encourage students to refer to Susan, by her female name. The school counselor expressed to the group that, for a transgender girl like Susan, using the communal girls' bathroom was the best practice. The team agreed that requiring Susan to use the boys' bathroom was not an acceptable option; the principal later testified that it would not have been safe for Susan to do so. The minutes of the 504 meeting reflected the team's recommendation that Susan use the girls' bathroom. The minutes also reflected the team's awareness that a unisex staff bathroom was available for Susan to use in the event that her use of the girls' bathroom became "an issue."

Susan began the fifth grade in September 2007. Her use of the girls' bathroom went smoothly, with no complaints from other students' parents, until a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls' bathroom. The student was acting on instructions from his grandfather, who was his guardian and was strongly opposed to the school's decision to allow Susan to use the girls' bathroom. The controversy generated significant media coverage. As a result of the two incidents, the school, over the Does' objections, terminated Susan's use of the girls' bathroom, requiring her instead to use the single-stall, unisex staff bathroom. That year, Susan was the only student instructed to use the staff bathroom.

The 504 team met again in December 2007 to discuss Susan's upcoming transition to middle school. Over the Does' objections, school officials determined that Susan would not be permitted to use the girls' bathroom at the middle school. Again, Susan was required to use a separate, single-stall bathroom. As a result, at the end of Susan's sixth-grade year at Orono Middle School, the Doe family moved to another part of the state.

On April 10, 2008, while Susan was still in elementary school, Jane Doe filed a complaint with the Commission alleging that the superintendent and other school district entities violated the MHRA by excluding Susan from the communal girls' bathroom at Asa Adams. The Commission unanimously found reasonable grounds to believe discrimination had occurred. The Does, as parents and next friends of Susan, and the Commission filed a complaint in the Superior Court on September 23, 2009, asserting claims for unlawful discrimination in education (Count I) and unlawful discrimination in a place of public accommodation (Count II) on the basis of sexual orientation. [The Maine Human Rights Law expressly covers discrimination because of gender identity through its statutory definition of "sexual orientation."]

After the Superior Court denied the defendants' motion to dismiss all counts, the Does and the Commission filed an amended complaint on May 11, 2011, adding facts to Counts I and II based on Susan's exclusion from the girls' bathroom at Orono Middle School. The Superior Court granted RSU 26's motion for summary judgment on all counts on November 20, 2012. The Does and the Commission appeal the Superior Court's entry of summary judgment on Counts I and II.

II. DISCUSSION

This is the first case that has required us to interpret the Legislature's 2005 amendments to the MHRA that prohibit discrimination based on sexual orientation in public accommodations, educational opportunities, employment, housing, and other areas. Particularly where young children are involved, it can be challenging for a school to strike the appropriate balance between maintaining order and ensuring that a transgender student's individual rights are respected and protected. Many of the school officials involved in Susan's education exhibited tremendous sensitivity and insight over several years. The record reveals that her counselors and teachers strove to provide her with a supportive environment and were largely successful. As a result of its efforts, the school came under intense public scrutiny, which caused it to reconsider the propriety of the steps it had taken up to that point and ultimately to reverse course. We appreciate the difficulty of the situation in which the school found itself; nevertheless, we must assess schools' obligations pursuant to the Legislature's amendments to the MHRA without regard to the public's potential discomfort with the result. It is for the Legislature, not this Court, to write laws establishing public policy, and we must respect that constitutional division of authority, absent the Legislature adopting a law violative of the Maine Constitution or the United States Constitution. There is no issue of the Legislature exceeding its constitutional authority in this case.

This case requires us to examine the relationship between the public-accommodations provision of the MHRA and a provision of the Sanitary Facilities subchapter of title 20–A, which regulates education. “[O]ur first task when interpreting a statute is to ascertain the real purpose of the legislation.” *State v. Niles*, 585 A.2d 181, 182 (Me.1990). Seemingly contradictory provisions should not be viewed as irreconcilable when they serve different purposes. *Trask v. Pub. Utils. Comm’n*, 1999 ME 93, ¶ 18, 731 A.2d 430. We give effect to the Legislature's intent, avoiding results that are inconsistent or illogical “if the language of the statute is fairly susceptible to such a construction.” *Cote v. Georgia–Pacific Corp.*, 596 A.2d 1004, 1005 (Me.1991). We must presume that the Legislature did not intend inconsistent results. *Woodcock v. Atlss*, 393 A.2d 167, 170 (Me.1978). In construing a statute, we may properly consider its “practical operation and potential consequences.” *Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 738 (Me.1976). When one construction would lead to a result that is inimical to the public interest, and a different construction would avoid that result, the latter construction is to be favored unless the terms of the statute absolutely forbid it. Moreover, “[w]e have the power and duty ... to interpret statutes so as to avoid absurd results.” *State v. Hopkins*, 526 A.2d 945, 950 (Me.1987). “A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective.” *Niles*, 585 A.2d at 182. Such an approach “is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression.” *State v. Day*, 132 Me. 38, 41, 165 A. 163 (1933).

Section 4592(1) of the MHRA provides, in relevant part:

It is unlawful public accommodations discrimination, in violation of this Act ... [f]or any public accommodation or any person who is the ... superintendent, agent, or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of ... sexual orientation ... any of the accommodations ... [or] facilities ... of public accommodation....

Section 4602(4) of the MHRA extends the same prohibition against discrimination based on sexual orientation to educational institutions and educational opportunities, subject only to an exception in section 4553(10)(G)(3) for religious institutions and programs that do not receive public funds.

The MHRA defines a “public accommodation” to include a public entity that “operates a place of public accommodation.” An elementary school is a place of public accommodation. The definition of “discriminate” “includes, without limitation, [to] segregate or separate.” The definition of “sexual orientation” includes “a person’s actual or perceived gender identity or expression.” The MHRA provides no definition of “sex.”

On the other hand, 20–A M.R.S. § 6501 requires that sanitary facilities be provided as follows:

1. Toilets. A school administrative unit shall provide clean toilets in all school buildings, which shall be:

....

B. Separated according to sex and accessible only by separate entrances and exits[.]

Section 6501 is located in the “Sanitary Facilities” subchapter of the “Health, Nutrition, and Safety” chapter of title 20–A. It has not been amended since 1983. Its purpose is to establish cleanliness and maintenance requirements for school bathrooms, as well as requirements for the physical layout of toilet facilities. It does not purport to establish guidelines for the use of school bathrooms. Nor does it address how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities. In contrast, the sole purpose of the public-accommodations and educational-opportunities provisions of the MHRA is to ensure equal enjoyment of and access to educational opportunities and public accommodations and facilities. The public-accommodations and educational-opportunities provisions were amended in 2005 to prohibit discrimination against transgender students in schools.

Because these statutes serve different purposes, they are not irreconcilable; one makes it a violation of the Maine Human Rights Act to discriminate in providing access to school bathrooms based on sexual orientation and the other requires schools to provide children with “clean toilets” separated according to sex. Although school buildings must, pursuant to section 6501, contain separate bathrooms for each sex, section 6501 does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA.

RSU 26 argues that the sanitary-facilities provision preemptively created an exception to the MHRA's prohibition on sexual orientation discrimination twenty-two years in advance of the passage of the relevant sections of the MHRA. However, we must presume that the Legislature did not intend the MHRA to be construed as inconsistent with section 6501. See *Woodcock*, 393 A.2d at 170. In this case, a consistent reading of the two statutes avoids conflicting, illogical results and comports with the legislative intent by giving effect to both provisions. Therefore, we adopt a consistent reading of the two provisions.

Because section 6501 does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-separated facilities, each school is left with the responsibility of creating its own policies concerning how these public accommodations are to be used. Those policies must comply with the MHRA. Here, RSU 26 agreed with Susan's family and counselors that, for this purpose (as for virtually all others), Susan is a girl. Based upon its determination that Susan is a girl, and in keeping with the information provided to the school by Susan's family, her therapists, and experts in the field of transgender children, the school determined that Susan should use the girls' bathroom. In so doing, the school provided her with the same access to public facilities that it provided other girls. In this regard, RSU 26 complied with both section 6501 and the MHRA.

RSU 26's later decision to ban Susan from the girls' bathroom, based not on a determination that there had been some change in Susan's status but on others' complaints about the school's well-considered decision, constituted discrimination based on Susan's sexual orientation. She was treated differently from other students solely because of her status as a transgender girl. This type of discrimination is forbidden by the MHRA, and it is not excused by the school's compliance with section 6501. We vacate the Superior Court's entry of summary judgment and remand for entry of summary judgment in favor of the Does and the Commission.

In vacating this judgment, we emphasize that in this case the school had a program carefully developed over several years and supported by an educational plan designed to sensitively address Susan's gender identity issues. The determination that discrimination is demonstrated in this case rests heavily on Susan's gender identity and gender dysphoria diagnosis, both of which were acknowledged and accepted by the school. The school, her parents, her counselors, and her friends all accepted that Susan is a girl.

Thus, we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case. Our opinion must not be read to require schools to permit students casual access to any bathroom of their choice. Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.

MEAD, J., dissenting.

I agree with the broad principle confirmed in the Court's decision: the Maine Human Rights Act prohibits discrimination in access to public accommodations based upon sexual orientation. "Public accommodations" include multiple-user public bathrooms. "Sexual orientation" includes gender identity. Accordingly, a transgendered individual has the right to use a public bathroom that is designated for use by the gender with which he or she identifies. I depart and dissent, however, from the Court's final conclusion that RSU 26 has committed an act of illegal discrimination upon the facts of this case because well-established principles of statutory construction require a different result.

A civilized society protects its citizens from discrimination that is based on petty prejudices and mean-spirited exclusionary practices. The MHRA identifies classes of persons who are entitled to specific protections from such discrimination. The Legislature has included sexual orientation as one of the categories entitled to protection, and rightfully so. Considering the issue presented here, transgendered persons who live their lives as a member of the sex with which they identify face unique challenges with regard to public multiple-user bathrooms. It is simply unreasonable to expect a transgendered person to enter a bathroom designated for use by the sex with which they do not identify. Doing so is likely to provoke confrontation, or even violence. If transgendered people are prohibited from using bathrooms designated for the sex with which they identify, they are left with no practical recourse in most public settings. This result is simply untenable.

The Court's decision concludes, and I agree, that elementary schools are places of public accommodation. The MHRA provides that it is unlawful to withhold "facilities" in places of public accommodation, including bathrooms, from any person on account of "race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin."

The broad principle established by the Court's interpretation of the MHRA is that access to multiple-user public bathrooms may not be denied based upon sexual orientation. That principle, by implication, applies equally to the other categories enumerated in the MHRA. Specifically, it means that no person may be denied access to a public bathroom in a school or other place of public accommodation on the basis of their race, color, physical or mental disability, religion, ancestry, national origin, or sex. Thus, the MHRA, as construed by the Court today, prevents the denial of access to any public bathroom on the basis of a person's sex. Obviously this result is an extraordinary departure from the well-established custom that public bathrooms are typically segregated by sex.

The understandable response by those opposed to this inescapable result is: the Legislature would never have intended that! I do not disagree. But the plain language of the MHRA and the unavoidable implications of the Court's decision set a well-established societal custom (segregation of public bathrooms by sex) and the MHRA on a collision course.

I repeat that the right of transgendered individuals to access public accommodations consistent with their gender identity must be protected. It falls to the Legislature to reconcile the plain language of the MHRA as it is currently written and interpreted by the Court with society's longstanding expectation of having multiple-user bathrooms segregated by sex.

I realize that this issue at its broadest is not specifically presented by the facts of this case. I address it to highlight the scope and potential ramifications of the Court's decision, to invite the Legislature to clarify its intent concerning this anomaly in the law, and to provide context for the statutory construction analysis required by this case that follows.

RSU 26 is not guilty of unlawful public accommodations discrimination if the Legislature has approved segregating school bathrooms by sex in a way that supersedes the MHRA. Applying well-established rules of statutory construction, I conclude that it did so by purposely leaving 20–A M.R.S. § 6501 (2013) in its current form after amending the MHRA in 2005. At the very least, this circumstance raises enough of a question to require us to defer to the Legislature to resolve the uncertainty created by section 6501's apparent tension with the MHRA. Section 6501 provides:

1. Toilets. A school administrative unit shall provide clean toilets in all school buildings, which shall be:

....

B. Separated according to sex and accessible only by separate entrances and exits[.]

Section 6501, in the specific case of school bathrooms, thus establishes, and indeed mandates, an exception to the MHRA's general rule forbidding the segregation of facilities in schools by sex. We recently reaffirmed "the fundamental rule of statutory construction that we favor the application of a specific statutory provision over the application of a more general provision when there is any inconsistency." *Cent. Me. Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 22, 68 A.3d 1262.

Furthermore, the Legislature is "presumed to be aware of the state of the law ... when it passes an act." *Stockly v. Doil*, 2005 ME 47, ¶ 14, 870 A.2d 1208 (quotation marks omitted). Notwithstanding the Court's assertion that the purpose of section 6501 is merely "to establish ... requirements for the physical layout of toilet facilities," and not to "address how schools should monitor which students use which bathroom," I presume as I must that the Legislature was aware of the interplay between section 6501 and the public accommodations discrimination provision of the MHRA. It would make little sense for the Legislature to require that school bathroom facilities be "[s]eparated according to sex and accessible only by separate entrances and exits," and at the same time mandate that schools allow the use of those sex-segregated facilities by students of either sex.

The Court states: "[Section 6501] does not purport to establish guidelines for the use of school bathrooms." I vigorously disagree. The statutory directive to segregate bathrooms in schools by sex, and providing for separate entrances and exits for those bathrooms, clearly anticipates that the use of a bathroom would be restricted to the sex for which it has been designated. The statute is susceptible to no other reading. Thus I also disagree with the Court's announcement that Section 6501 somehow vests schools with the prerogative of "creating its own policies concerning how these public accommodations are to be used."

Accordingly, I depart from the Court's casual dismissal of the fact that the plain language of a specific statute explicitly requires segregating school bathrooms by sex. The plain language of

the provisions of section 6501 and the MHRA are in conflict, and I believe that principles of comity require us to defer to the representative branch of government to resolve the issue.

I would therefore affirm the judgment of the Superior Court.

Page 708 – Add the following Notes

3. The Maine school case arises under a statute that forbids discrimination in places of public accommodation as well as employment discrimination. Do you think the result would have been different if plaintiff Doe were a teacher rather than a student and the action for discrimination in restroom access was brought as an employment discrimination claim rather than a public accommodations claim? Is there any reason to treat gender identity discrimination claims differently when they arise in the employment context than from when they arise in the public accommodations context?
4. The Minnesota Supreme Court's decision is out of step with more recent positions articulated by the Equal Employment Opportunity Commission under Title VII and the Occupational Safety and Health Administration under its interpretation of regulations concerning provision of adequate toilet facilities to employees. See *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756 (April 1, 2015) (extensive portions of the decision quoted above in new Note 6 for page 681).
5. Laws forbidding discrimination frequently include provisions making it a violation to discriminate against somebody because they have opposed discrimination, filed a charge of discrimination, or participated in a discrimination case by giving evidence. The extent of coverage of such "anti-retaliation" provisions has been much argued and litigated. Courts have generally held that a person who has a good faith belief that the conduct they are opposing is unlawfully discriminatory will be protected by the anti-retaliation provision, even if the court concludes that the underlying conduct did not violate the statute. Not surprisingly, given such rulings, there are many cases in which defendants are held not to have discriminated directly, but are held to have violated the anti-retaliation provisions. In some cases, people who are not themselves members of a sexual minority group may have a cause of action if they suffer adverse consequences for protesting about discrimination against their gay or transgender colleagues. See, e.g., *Albunio v. City of New York*, 16 N.Y.3d 472, 947 N.E.2d 135 (2011), upholding a substantial verdict against the City of New York on behalf of non-gay police officers who suffered retaliation after they protested what they believed to be the discriminatory denial of an assignment requested by a gay officer.

Page 710 – Add to the section on Discrimination in Employee Benefits

During the spring of 2013, the Obama Administration began working on a policy change that would allow recognition of same-sex partners of federal employees for purposes of employee benefits plans. Recognition of those relationships that had been formalized in state-sanctioned same-sex marriages was effectively blocked by the Defense of Marriage Act, but the

Administration hoped that a policy that was not premised on a marital relationship could provide a “work-around” of the DOMA restrictions. When the Supreme Court struck down Section 3 of DOMA in *U.S. v. Windsor* on June 26, 2013, the government quickly announced that legally-married same-sex spouses of federal employees would be treated the same as different-sex spouses for purposes of federal employee benefits programs, using the place of celebration rule to determine whether a particular marriage would be recognized, thus giving the policy nationwide effect at a time when only a minority of states recognized same-sex marriages. However, the government announced that it could not recognize same-sex civil union partners or domestic partners for this purpose, as the *Windsor* decision applied only to marriages. Since states that allow same-sex marriages do not have residency requirements, federal employees living in non-recognition states could marry their partners in one of the marriage equality states and have their marriage recognized for federal employee benefits purposes. This was not a complete solution to the problem, however, because those employees living in states that impose income taxes would have to pay state income tax on the imputed value of the insurance benefits because their domicile states did not recognize the marriages. The place of celebration rule could not be adopted, however, for a handful of important federal benefits statutes that directly incorporated a place of residence rule for determining the validity of a marriage. However, the Supreme Court’s ruling in *Obergefell v. Hodges* obviated this problem for individuals living in states that formerly had not recognized their out-of-state same-sex marriages, by requiring all states to recognize lawfully contracted same-sex marriages.

In Oregon, which provided domestic partnerships for same-sex couples, a federal court employee who was in a domestic partnership with her same-sex partner applied to have her partner covered and was turned down. She appealed this decision to the internal appellate process for the 9th Circuit. An administrative panel of 9th Circuit judges determined that the failure of the court system to provide coverage for the employee’s domestic partner was sex discrimination in violation of the Circuit non-discrimination policy, and ordered that she be compensated for the cost of providing the insurance. In the Matter of Margaret Fonberg, 736 F.3d 901 (9th Cir. Admin. Panel 2013).

Private sector employee benefit plans are subject to regulation under the federal Employee Retirement Income Security Act (ERISA). ERISA has various provisions pertaining to spouses of employees covered by such benefit plans. Retirement plans and other employee savings plans must provide that plan balances in existence at the death of an employee become the property of the employee’s spouse, unless the surviving spouse had waived their right to the benefits in writing. After the *Windsor* decision, a federal court ruled that if a married same-sex couple lived in a jurisdiction that recognized their spousal relationship for inheritance purposes, the ERISA spousal inheritance requirement applied and surviving blood family members of the employee could not claim entitlement to the fund balance over the surviving same-sex spouse. Cozen O’Connor, P.C. v. Tobits, 2013 WL 3878688 (E.D. Pa., July 29, 2013). Subsequently the Department of Labor announced that the “place of celebration” rule would be used to construe the spousal requirements under ERISA, so it would no longer matter whether the domicile of the employees recognized the marriage.

Does the decision in *Boy Scouts v. Dale* cut two ways? In a jurisdiction that prohibited sexual orientation discrimination, could an organization adopt a rule limiting membership or participation by non-gay people on the ground that allowing non-gay people to become a significant presence in the organization would undermine its expressive purpose or group identity? Consider the case of a “gay softball league” that places a limit on the number of non-gay individuals who can participate as players on any team in the league. If a non-gay athlete is disqualified from competing on this basis in a jurisdiction that bans sexual orientation discrimination by places of public accommodation and files a discrimination claim, could the softball league have a 1st Amendment defense under *Dale*? See *Apilado v. North American Gay Amateur Athletic Alliance*, 792 F.Supp.2d 1151 (W.D.Wash. 2011), and 2011 WL 5563206 (W.D. Wash. 2011) (not reported in F.Supp.2d.).

Page 751: Add the following new matter at the end of Section D.

May individuals or groups holding religiously-based objections to homosexuality which are not themselves churches claim a constitutional exemption from complying with general non-discrimination policies that include sexual orientation and gender identity? This issue was put to the test in several cases in which state institutions of higher education that had adopted such general policies concluded that religiously-based student organizations could not claim a First Amendment free exercise exemption from complying with general non-discrimination policies that include sexual orientation and, in some cases, gender identity. In the law school context, the situation usually involved a state university law school which denied official student organization status to a chapter of the Christian Legal Society, and one such case finally reached the Supreme Court in 2010.

CHRISTIAN LEGAL SOCIETY v. MARTINEZ
Supreme Court of the United States
130 S. Ct. 2971 (2010)

Justice GINSBURG delivered the opinion of the Court.

In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups’ viewpoints. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group – and the attendant use of school funds and facilities – on the organization’s agreement to open eligibility for membership and leadership to all students?

I

Founded in 1878, Hastings was the first law school in the University of California public-school system. Like many institutions of higher education, Hastings encourages students to form extracurricular associations that “contribute to the Hastings community and experience.” These groups offer students “opportunities to pursue academic and social interests outside of the

classroom [to] further their education” and to help them “develo[p] leadership skills.”

Through its “Registered Student Organization” (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School’s facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

In exchange for these benefits, RSOs must abide by certain conditions. Only a “non-commercial organization whose membership is limited to Hastings students may become [an RSO].” A prospective RSO must submit its bylaws to Hastings for approval, and if it intends to use the Law School’s name or logo, it must sign a license agreement. Critical here, all RSOs must undertake to comply with Hastings’ “Policies and Regulations Applying to College Activities, Organizations and Students.”

The Law School’s Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

“[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings]’s policy on nondiscrimination is to comply fully with applicable law.

“[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.”

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.” Other law schools have adopted similar all-comers policies. From Hastings’ adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, “no student organization at Hastings ... ever sought an exemption from the Policy.”

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization - -which had been an RSO at Hastings for a decade – formed CLS by affiliating with the national Christian Legal Society (CLS-National). CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. CLS chapters must adopt bylaws that, inter alia, require members and officers to sign a “Statement of Faith” and to conduct their lives in accord

with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in “unrepentant homosexual conduct.” CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

The Statement of Faith provides:

“Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God’s only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God.” App. 226.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. Several days later, the Law School rejected the application; CLS’s bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.

CLS formally requested an exemption from the Nondiscrimination Policy, but Hastings declined to grant one. “[T]o be one of our student-recognized organizations,” Hastings reiterated, “CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation.” If CLS instead chose to operate outside the RSO program, Hastings stated, the school “would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities.” CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS’s endeavors, but neither would it lend RSO-level support for them.

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004-2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. It also hosted a beach barbeque, Thanksgiving dinner, campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet, and other informal social activities.

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings’ refusal to grant the organization RSO status violated CLS’s First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief. The District Court allowed respondent Hastings Outlaw, an RSO committed to “combating discrimination based on sexual orientation,” to intervene in the suit.

The U.S. District Court for the Northern District of California ruled in favor of Hastings. The Law School’s all-comers condition on access to a limited public forum, the court held, was

both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech. Nor, in the District Court's view, did the Law School impermissibly impair CLS's right to expressive association. "Hastings is not directly ordering CLS to admit [any] studen[t]," the court observed; "[r]ather, Hastings has merely placed conditions on" the use of its facilities and funds. "Hastings' denial of official recognition," the court added, "was not a substantial impediment to CLS's ability to meet and communicate as a group."

The court also rejected CLS's Free Exercise Clause argument. "[T]he Nondiscrimination Policy does not target or single out religious beliefs," the court noted; rather, the policy "is neutral and of general applicability." "CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation," the court explained, "but that does not convert the reason for Hastings' [Nondiscrimination Policy] to be one that is religiously-based."

On appeal, the Ninth Circuit affirmed in an opinion that stated, in full: "The parties stipulate that Hastings imposes an open membership rule on all student groups – all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir.2008)."

We granted certiorari and now affirm the Ninth Circuit's judgment.

II

CLS urges us to review the Nondiscrimination Policy as written – prohibiting discrimination on several enumerated bases, including religion and sexual orientation – and not as a requirement that all RSOs accept all comers. The written terms of the Nondiscrimination Policy, CLS contends, "targe[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior," and leave other associations free to limit membership and leadership to individuals committed to the group's ideology. For example, "[a] political ... group can insist that its leaders support its purposes and beliefs," CLS alleges, but "a religious group cannot."

CLS's assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. In that filing, the parties specified:

"Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization."

Under the District Court's local rules, stipulated facts are deemed "undisputed." Civil Local Rule 56-2 (ND Cal.2010). This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000).

In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement, as described in the parties' accord. We reject CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written. This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.

III

A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, e.g., *Rosenberger*, 515 U.S., at 829.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas" – interests that cannot be advanced "through ... significantly less restrictive [means]." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). See also, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S., at 623. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." *Dale*, 530 U.S., at 659.

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: Who speaks on its behalf, CLS reasons, colors what concept is conveyed. It therefore makes little sense to treat CLS's speech and association claims as discrete. Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums – the State may “reserv[e] [them] for certain groups.” *Rosenberger*, 515 U.S., at 829.

An example sharpens the tip of this point: Schools, including *Hastings*, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students – even if those groups wish to associate with nonstudents. The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university’s ability to “confine a [speech] forum to the limited and legitimate purposes for which it was created.” *Rosenberger*, 515 U.S., at 829.

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out. See, e.g., *Dale*, 530 U.S., at 648 (regulation “forc[ed] [the Boy Scouts] to accept members it [did] not desire”); *Roberts*, 468 U.S., at 623 (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than” forced inclusion of unwelcome participants.). In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits.

In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS’s speech and expressive-association rights, and fairly balance those rights against *Hastings*’ interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

B

As earlier pointed out, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). Characterizing SDS’s mission as violent and disruptive, and finding the organization’s philosophy repugnant, the college completely banned the SDS chapter from campus; in its effort to sever all channels of communication between students and the group, university officials went so far as to disband a meeting of SDS members in a campus coffee shop. The college, we noted, could require “that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law,” including “reasonable standards respecting conduct.” But a public educational institution exceeds constitutional bounds, we held, when it “restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.”

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. 454 U.S., at 264-265. “A university’s

mission is education,” we observed, “and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.” But because the university singled out religious organizations for disadvantageous treatment, we subjected the university’s regulation to strict scrutiny. The school’s interest “in maintaining strict separation of church and State,” we held, was not “sufficiently compelling to justify ...[viewpoint] discrimination against ... religious speech.”

Most recently and comprehensively, in *Rosenberger*, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. 515 U.S., at 825-827. By “select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints,” we held, the university had engaged in “viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. “Once it has opened a limited [public] forum,” we emphasized, “the State must respect the lawful boundaries it has itself set.” The constitutional constraints on the boundaries the State may set bear repetition here: “The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, ... nor may it discriminate against speech on the basis of ... viewpoint.”

C

We first consider whether Hastings’ policy is reasonable taking into account the RSO forum’s function and “all the surrounding circumstances.” Our inquiry is shaped by the educational context in which it arises: “First Amendment rights,” we have observed, “must be analyzed in light of the special characteristics of the school environment.” This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist “substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.”

A college’s commission – and its concomitant license to choose among pedagogical approaches – is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. Schools, we have emphasized, enjoy “a significant measure of authority over the type of officially recognized activities in which their students participate.” We therefore “approach our task with special caution,” mindful that Hastings’ decisions about the character of its student-group program are due decent respect.

With appropriate regard for school administrators’ judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy “ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students.” Just as “Hastings does not allow its professors to host classes open only to those

students with a certain status or belief,” so the Law School may decide, reasonably in our view, “that the ... educational experience is best promoted when all participants in the forum must provide equal access to all students.” RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO’s motivation for membership restrictions. To bring the RSO program within CLS’s view of the Constitution’s limits, CLS proposes that Hastings permit exclusion because of belief but forbid discrimination due to status. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”)

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, “encourages tolerance, cooperation, and learning among students.” And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings’ policy, which incorporates – in fact, subsumes – state-law proscriptions on discrimination, conveys the Law School’s decision “to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.” State law, of course, may not command that public universities take action impermissible under the First Amendment. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school’s educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum’s purposes.

The Law School’s policy is all the more creditworthy in view of the “substantial alternative channels that remain open for [CLS-student] communication to take place.” If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those

barriers. In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Although CLS could not take advantage of RSO-specific methods of communication, the advent of electronic media and social-networking sites reduces the importance of those channels.

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation. Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. “The variety and type of alternative modes of access present here,” in short, “compare favorably with those in other [limited public] forum cases where we have upheld restrictions on access.” *Perry Ed. Assn.*, 460 U.S., at 53-54. It is beyond dissenter’s license constantly to maintain that non-recognition of a student organization is equivalent to prohibiting its members from speaking.

CLS nevertheless deems Hastings’ all-comers policy “frankly absurd.” “There can be no diversity of viewpoints in a forum,” it asserts, “if groups are not permitted to form around viewpoints.” This catchphrase confuses CLS’s preferred policy with constitutional limitation – the advisability of Hastings’ policy does not control its permissibility. Instead, we have repeatedly stressed that a State’s restriction on access to a limited public forum “need not be the most reasonable or the only reasonable limitation.” *Cornelius*, 473 U.S., at 808.

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum’s function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO-hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join – let alone seek leadership positions in – groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization’s objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group’s vitality, not its demise. Several RSOs at Hastings limit their membership rolls and officer slates in just this way. Hastings, furthermore, could reasonably expect more from its law students than the disruptive behavior CLS hypothesizes – and to build this expectation into its educational approach. A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

Finally, CLS asserts that the Law School lacks any legitimate interest – let alone one reasonably related to the RSO forum’s purposes – in urging “religious groups not to favor co-religionists for purposes of their religious activities.” CLS’s analytical error lies in focusing on

the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership.

D

We next consider whether Hastings' all-comers policy is viewpoint neutral. Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." The Law School's policy aims at the act of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases."

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims. For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

(Justices Stevens and Kennedy filed concurring opinions which do not depart from the reasoning of Justice Ginsburg's opinion for the Court.)

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups – groups to which, as Hastings candidly puts it, these institutions “do not wish to ... lend their name[s].”

I

A

The Court bases all of its analysis on the proposition that the relevant Hastings' policy is the so-called accept-all-comers policy. This frees the Court from the difficult task of defending the constitutionality of either the policy that Hastings actually – and repeatedly – invoked when it denied registration, i.e., the school's written Nondiscrimination Policy, or the policy that Hastings belatedly unveiled when it filed its brief in this Court. Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began.

The events that gave rise to this litigation began in 2004, when a small group of Hastings students sought to register a Hastings chapter of CLS, a national organization of Christian lawyers and law students. All CLS members must sign a Statement of Faith affirming belief in fundamental Christian doctrines, including the belief that the Bible is “the inspired Word of God.” In early 2004, the national organization adopted a resolution stating that “[i]n view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.” The resolution made it clear that “a sexually immoral lifestyle,” in CLS's view, includes engaging in “acts of sexual conduct outside of God's design for marriage between one man and one woman.” It was shortly after this resolution was passed that the Hastings chapter of CLS applied to register with the law school.

Hastings sponsors an active program of “registered student organizations” (RSOs) pursuant to the law school's avowed responsibility to “ensure an opportunity for the expression of a variety of viewpoints” and promote “the highest standards of ... freedom of expression.” During the 2004-2005 school year, Hastings had more than 60 registered groups, including political groups (e.g., the Hastings Democratic Caucus and the Hastings Republicans), religious groups (e.g., the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students), groups that promote social causes (e.g., both pro-choice and pro-life groups), groups organized around racial or ethnic identity (e.g., the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus on gender or sexuality (e.g.,

the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings).

Not surprisingly many of these registered groups were and are dedicated to expressing a message. For example, Silenced Right, a pro-life group, taught that “all human life from the moment of conception until natural death is sacred and has inherent dignity,” while Law Students for Choice aimed to “defend and expand reproductive rights.” The American Constitution Society sought “to counter ... a narrow conservative vision of American law,” and the UC Hastings Student Animal Defense Fund aimed “at protecting the lives and advancing the interests of animals through the legal system.”

Groups that are granted registration are entitled to meet on university grounds and to access multiple channels for communicating with students and faculty—including posting messages on designated bulletin boards, sending mass e-mails to the student body, distributing material through the Student Information Center, and participating in the annual student organizations fair. They may also apply for limited travel funds, which appear to total about \$4,000 to \$5,000 per year—or less than \$85 per registered group. Most of the funds available to RSOs come from an annual student activity fee that every student must pay.

When CLS applied for registration, Judy Hansen Chapman, the Director of Hastings’ Office of Student Services, sent an e-mail to an officer of the chapter informing him that “CLS’s bylaws did not appear to be compliant” with the Hastings Nondiscrimination Policy, a written policy that provides in pertinent part that “[t]he University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” As far as the record reflects, Ms. Chapman made no mention of an accept-all-applicants policy. A few days later, three officers of the chapter met with Ms. Chapman, and she reiterated that the CLS bylaws did not comply with “the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization.” About a week later, Hastings sent CLS a letter to the same effect. On both of these occasions, it appears that not a word was said about an accept-all-comers policy. When CLS refused to change its membership requirements, Hastings denied its request for registration – thus making CLS the only student group whose application for registration has ever been rejected.

In October 2004, CLS brought this action under 42 U.S.C. § 1983 against the law school’s dean and other school officials, claiming, among other things, that the law school, by enacting and enforcing the Nondiscrimination Policy, had violated CLS’s First Amendment right to freedom of speech. In May 2005, Hastings filed an answer to CLS’s first amended complaint and made an admission that is significant for present purposes. In its complaint, CLS had alleged that the Nondiscrimination Policy discriminates against religious groups because it prohibits those groups “from selecting officers and members dedicated to a particular set of religious ideals or beliefs” but “permits political, social and cultural student organizations to select officers and members dedicated to their organization’s ideals and beliefs.” In response, Hastings admitted that its Nondiscrimination Policy “permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.” The Court states that “Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers.” But this admission in Hastings’ answer

shows that Hastings had not adopted this interpretation when its answer was filed.

Within a few months, however, Hastings' position changed. In July 2005, Mary Kay Kane, then the dean of the law school, was deposed, and she stated: "It is my view that in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." In a declaration filed in October 2005, Ms. Chapman provided a more developed explanation, stating: "Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization."

Hastings claims that this accept-all-comers policy has existed since 1990 but points to no evidence that the policy was ever put in writing or brought to the attention of members of the law school community prior to the dean's deposition. Indeed, Hastings has adduced no evidence of the policy's existence before that date. And while Dean Kane and Ms. Chapman stated, well after this litigation had begun, that Hastings had such a policy, neither they nor any other Hastings official has ever stated in a deposition, affidavit, or declaration when this policy took effect.

Hastings' effort to portray the accept-all-comers policy as merely an interpretation of the Nondiscrimination Policy runs into obvious difficulties. First, the two policies are simply not the same: The Nondiscrimination Policy proscribes discrimination on a limited number of specified grounds, while the accept-all-comers policy outlaws all selectivity. Second, the Nondiscrimination Policy applies to everything that Hastings does, and the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty.

In an effort to circumvent this problem, the Court writes that "Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers." This puts Hastings in the implausible position of maintaining that the Nondiscrimination Policy means one thing as applied to the RSO program and something quite different as applied to all of Hastings' other activities. But the Nondiscrimination Policy by its terms applies fully to all components of the law school, "including administration [and] faculty."

Third, the record is replete with evidence that, at least until Dean Kane unveiled the accept-all-comers policy in July 2005, Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints. For example, the bylaws of the Hastings Democratic Caucus provided that "any full-time student at Hastings may become a member of HDC so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization as stated in Article 3, Section 1." The constitution of the Association of Trial Lawyers of America at Hastings provided that every member must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." A student could become a member of the Vietnamese American Law Society so long as the student did not "exhibit a consistent disregard and lack of respect for the objective of the organization," which centers on a "celebrat[ion][of] Vietnamese culture." Silenced Right limited voting membership to students who "are committed" to the group's "mission" of "spread [ing] the pro-life message." La Raza limited voting membership to "students of Raza background." Since Hastings requires any student group applying for registration to submit a copy of its bylaws, Hastings cannot claim that it was unaware of such provisions. And as noted, CLS was

denied registration precisely because Ms. Chapman reviewed its bylaws and found them unacceptable.

We are told that, when CLS pointed out these discrepancies during this litigation, Hastings took action to ensure that student groups were in fact complying with the law school's newly disclosed accept-all-comers policy. For example, Hastings asked La Raza to revise its bylaws to allow all students to become voting members. These belated remedial efforts suggest, if anything, that Hastings had no accept-all-comers policy until this litigation was well under way.

Finally, when Hastings filed its brief in this Court, its policy, which had already evolved from a policy prohibiting certain specified forms of discrimination into an accept-all-comers policy, underwent yet another transformation. Now, Hastings claims that it does not really have an accept-all-comers policy; it has an accept-some-comers policy. Hastings' current policy, we are told, "does not foreclose neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Hastings' brief goes on to note with seeming approval that some registered groups have imposed "even conduct requirements." Hastings, however, has not told us which "conduct requirements" are allowed and which are not – although presumably requirements regarding sexual conduct fall into the latter category.

When this case was in the District Court, that court took care to address both the Nondiscrimination Policy and the accept-all-comers policy. On appeal, however, a panel of the Ninth Circuit, like the Court today, totally ignored the Nondiscrimination Policy. CLS's argument in the Ninth Circuit centered on the Nondiscrimination Policy, and CLS argued strenuously, as it had in the District Court, that prior to the former dean's deposition, numerous groups had been permitted to restrict membership to students who shared the groups' views. Nevertheless, the Ninth Circuit disposed of CLS's appeal with a two-sentence, not-precedential opinion that solely addressed the accept-all-comers policy. Like the majority of this Court, the Ninth Circuit relied on the following Joint Stipulation, which the parties filed in December 2005, well after Dean Kane's deposition:

"Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs."

Citing the binding effect of stipulations, the majority sternly rejects what it terms "CLS's unseemly attempt to escape from the stipulation and shift its target to [the Nondiscrimination Policy]."

I agree that the parties must be held to their Joint Stipulation, but the terms of the stipulation should be respected. What was admitted in the Joint Stipulation filed in December 2005 is that Hastings had an accept-all-comers policy. CLS did not stipulate that its application had been denied more than a year earlier pursuant to such a policy. On the contrary, the Joint Stipulation notes that the reason repeatedly given by Hastings at that time was that the CLS bylaws did not comply with the Nondiscrimination Policy. Indeed, the parties did not even stipulate that the accept-all-comers policy existed in the fall of 2004. In addition, Hastings itself

is now attempting to walk away from this stipulation by disclosing that its real policy is an accept-some-comers policy.

The majority's insistence on the binding effect of stipulations contrasts sharply with its failure to recognize the binding effect of a party's admissions in an answer. As noted above, Hastings admitted in its answer, which was filed prior to the former dean's deposition, that at least as of that time, the law school did not follow an accept-all-comers policy and instead allowed "political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs."

B

The Court also distorts the record with respect to the effect on CLS of Hastings' decision to deny registration. The Court quotes a letter written by Hastings' general counsel in which she stated that Hastings "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." Later in its opinion, the Court reiterates that "Hastings offered CLS access to school facilities to conduct meetings," but the majority does not mention that this offer was subject to important qualifications. As Hastings' attorney put it in the District Court, Hastings told CLS: "Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations'. We offered that."

The Court also fails to mention what happened when CLS attempted to take advantage of Hastings' offer. On August 19, 2005, the local CLS president sent an e-mail to Ms. Chapman requesting permission to set up an "advice table" on a campus patio on August 23 and 24 so that members of CLS could speak with students at the beginning of the fall semester. This request – merely to set up a table on a patio – could hardly have interfered with any other use of the law school's premises or cost the school any money. But although the request was labeled "time sensitive," Ms. Chapman did not respond until the dates in question had passed, and she then advised the student that all further inquiries should be made through CLS's attorney.

In September 2005, CLS tried again. Through counsel, CLS sought to reserve a room on campus for a guest speaker who was scheduled to appear on a specified date. Noting Ms. Chapman's tardy response on the prior occasion, the attorney asked to receive a response before the scheduled date, but once again no answer was given until after the date had passed.

Other statements in the majority opinion make it seem as if the denial of registration did not hurt CLS at all. The Court notes that CLS was able to hold Bible-study meetings and other events. And "[a]lthough CLS could not take advantage of RSO-specific methods of communication," the Court states, "the advent of electronic media and social-networking sites reduces the importance of those channels."

At the beginning of the 2005 school year, the Hastings CLS group had seven members, so there can be no suggestion that the group flourished. And since one of CLS's principal claims is that it was subjected to discrimination based on its viewpoint, the majority's emphasis on CLS's ability to endure that discrimination – by using private facilities and means of

communication – is quite amazing.

This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.

C

Finally, I must comment on the majority's emphasis on funding. According to the majority, CLS is "seeking what is effectively a state subsidy," and the question presented in this case centers on the "use of school funds." In fact, funding plays a very small role in this case. Most of what CLS sought and was denied – such as permission to set up a table on the law school patio – would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. As CLS notes, "[t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen."

[The remainder of Justice Alito's dissent builds on his contrary understanding of the facts to argue that this case is like the other cases in which the Court found that a student group's First Amendment speech and association rights had been violated. He particularly emphasized the religious freedom aspects of the case, and concluded as follows:]

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Our First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction. Even those who find CLS's views objectionable should be concerned about the way the group has been treated – by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.

NOTES AND QUESTIONS

1. The majority of the Court and the dissenters in this 5-4 ruling clearly had very different perspectives on the facts. To the majority, this case fit within the class of cases involving the application of a neutral, across-the-board policy to a religiously-oriented organization that was seeking to have the same privileges and status as organizations that were willing to comply with the policy. To the dissenters, the school was applying a policy that on its face treats religiously-oriented organizations differently from other organizations with respect to their ability to restrict their membership and leadership to individuals who share the particular goals and requirements of the organization, thus implicating the requirement that government be at least neutral in dealing with religion. How would you resolve this dispute? The omitted portion of Justice Alito's dissent plays out the legal analysis based on his characterization of the

facts in the case, producing results diametrically opposed to those of the majority’s analysis.

2. Responding to this decision, the state of Arizona enacted a statute specifically allowing public universities to recognize student groups that exclude individuals from membership on religious grounds.

* * * * *

May a business whose owner has religious or moral objections to providing particular services to gay people claim a 1st Amendment privilege to do so, as a defense against charges of discrimination in violation of public accommodation laws? Or would such a business have a statutory defense under the federal Religious Freedom Restoration Act (RFRA) or analogous state laws? These issues have arisen in response to the spread of civil unions, domestic partnerships and same-sex marriages, as same-sex couples have sought to acquire goods and services from wedding-oriented businesses, such as catering halls, bakeries, florists, and photographers, in connection with their relationship celebrations. Some business owners’ objections are stated in terms of free speech or association rights, while others may raise the religious beliefs of the owners or employees. The issue took on enhanced visibility with the U.S. Supreme Court’s decision in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (June 30, 2014), holding that a closely-held business corporation could assert religious free exercise rights under the federal RFRA. The New Mexico Supreme Court addressed these questions during 2013, finding that a business providing wedding photography services could not claim such a defense:

ELANE PHOTOGRAPHY, LLC v. WILLOCK
309 P.3d 53 (2013), cert. denied, 134 S. Ct. 1787 (2014)
Supreme Court of New Mexico

CHÁVEZ, Justice.

By enacting the New Mexico Human Rights, the Legislature has made the policy decision to prohibit public accommodations from discriminating against people based on their sexual orientation. Elane Photography, which does not contest its public accommodation status under the NMHRA, offers wedding photography services to the general public and posts its photographs on a password-protected website for its customers. In this case, Elane Photography refused to photograph a commitment ceremony between two women. The questions presented are (1) whether Elane Photography violated the NMHRA when it refused to photograph the commitment ceremony, and if so, (2) whether this application of the NMHRA violates either the Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution, or (3) whether this application violates the New Mexico Religious Freedom Restoration Act (NMRFRA), NMSA 1978, §§ 28-22-1 to -5 (2000). . . . In this case, we are concerned with discrimination by a public accommodation against a person because of that person’s real or perceived homosexuality — that person’s propensity to experience feelings of attraction and romantic love for other members of the same sex.

Vanessa Willock contacted Elane Photography, LLC, by e-mail to inquire about Elane Photography’s services and to determine whether it would be available to photograph her commitment ceremony to another woman. Elane Photography’s co-owner and lead

photographer, Elaine Huguenin, is personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs. Huguenin responded to Willock that Elane Photography photographed only “traditional weddings.” Willock e-mailed back and asked, “Are you saying that your company does not offer your photography services to same-sex couples?” Huguenin responded, “Yes, you are correct in saying we do not photograph same-sex weddings,” and thanked Willock for her interest.

In order to verify Elane Photography’s policy, Willock’s partner, Misti Collinsworth, e-mailed Elane Photography and inquired about its willingness to photograph a wedding, without mentioning the sexes of the participants. Huguenin sent Collinsworth a list of pricing information and an invitation to meet with her and discuss her services. A few weeks later, Huguenin again e-mailed Collinsworth to follow up.

Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation in violation of the NMHRA. The Commission concluded that Elane Photography had discriminated against Willock in violation of Section 28-1-7(F), which prohibits discrimination by public accommodations on the basis of sexual orientation, among other protected classifications. It awarded Willock attorneys’ fees, which Willock later waived. No other monetary or injunctive relief was granted. Elane Photography appealed to the Second Judicial District Court for a trial de novo pursuant to Section 28-1-13(A). The parties filed cross-motions for summary judgment, and the district court granted summary judgment for Willock. Elane Photography again appealed, and the Court of Appeals affirmed.

Elane Photography argues before this Court that: (1) it did not discriminate on the basis of sexual orientation, and therefore it did not violate the NMHRA; or, alternatively, (2) by requiring Elane Photography to accept clients against its will, the NMHRA violates the protection of the First Amendment against compelled speech; (3) the NMHRA violates Elane Photography’s First Amendment right to freely exercise its religion; and (4) the NMHRA violates Elane Photography’s right under the NMRFRA to freely exercise its religion. For the reasons that follow, we reject Elane Photography’s arguments and affirm summary judgment for Willock.

DISCUSSION

I. ELANE PHOTOGRAPHY REFUSED TO SERVE WILLOCK ON THE BASIS OF HER SEXUAL ORIENTATION IN VIOLATION OF THE NMHRA

Elane Photography argues that it did not violate the NMHRA because it did not discriminate on the basis of sexual orientation when it refused service to Willock. Instead, Elane Photography explains that it “did not want to convey through [Huguenin]’s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners’] beliefs.” Elane Photography argues that it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings. However, Elane Photography’s owners testified that they would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other. Elane Photography also argues in its brief that

it would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage. For example, Elane Photography states that it “would have declined the request even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual.” Therefore, Elane Photography reasons that it did not discriminate “because of ... sexual orientation,” § 28-1-7(F), but because it did not wish to endorse Willock’s and Collinsworth’s wedding.

Elane Photography’s argument is an attempt to distinguish between an individual’s status of being homosexual and his or her conduct in openly committing to a person of the same sex. It was apparently Willock’s e-mail request to have Elane Photography photograph Willock’s commitment ceremony to another woman that signaled Willock’s sexual orientation to Elane Photography, regardless of whether that assessment was real or merely perceived. The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual’s sexual orientation on the individual’s conduct. To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA.

The United States Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971, 2980 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society and sought formal recognition from the school. The Christian Legal Society required its members to affirm their belief in the divinity of Jesus Christ and to refrain from “unrepentant homosexual conduct.” Hastings refused to recognize the organization on the ground that it violated Hastings’ nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. The Christian Legal Society argued that “it [did] not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” The United States Supreme Court rejected this argument, stating:

Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”); *id.*, at 583 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

We agree that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the NMHRA as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.

We are not persuaded by Elane Photography’s argument that it does not violate the NMHRA because it will photograph a gay person (for example, in single-person portraits) so long as the photographs do not reflect the client’s sexual preferences. The NMHRA prohibits public

accommodations from making any distinction in the services they offer to customers on the basis of protected classifications. Section 28-1-7(F). . . .

II. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FIRST AMENDMENT RIGHTS

A. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FREE SPEECH RIGHTS

Specifically regarding its free speech rights, Elane Photography argues that the NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs. We disagree.

Elane Photography observes that photography is an expressive art form and that photographs can fall within the constitutional protections of free speech. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (observing that abstract art and instrumental music are "unquestionably shielded" by the First Amendment). Elane Photography also states that in the course of its business, it creates and edits photographs for its clients so as to tell a positive story about each wedding it photographs, and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage. Elane Photography concludes that by requiring it to photograph same-sex weddings on the same basis that it photographs opposite-sex weddings, the NMHRA unconstitutionally compels it to "create and engage in expression" that sends a positive message about same-sex marriage not shared by its owner.

The compelled-speech doctrine on which Elane Photography relies is comprised of two lines of cases. The first line of cases establishes the proposition that the government may not require an individual to "speak the government's message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). The second line of cases prohibits the government from requiring a private actor "to host or accommodate another speaker's message." Elane Photography argues that by requiring it to photograph same-sex weddings on the same basis as opposite-sex weddings, the NMHRA violates both prohibitions. We address each argument in turn.

1. The NMHRA does not compel Elane Photography to speak the government's message

The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), in which the United States Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require "affirmation of a belief and an attitude of mind," and that the state had impermissibly "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Similarly, in *Wooley*, 430 U.S. at 717, the United States Supreme Court held that the State of New Hampshire could not constitutionally punish a man for covering the state motto on the

license plate of his car. The Wooley plaintiffs considered “Live Free or Die,” the state motto, “repugnant to their moral, religious, and political beliefs,” *id.* at 707, and they raised a First Amendment challenge to the state’s law forbidding residents to hide or alter the motto. The Wooley Court framed the question presented as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his [or her] private property in a manner and for the express purpose that it be observed and read by the public” and concluded that the measure was unconstitutional.

Elane Photography reads Wooley and Barnette to mean that the government may not compel people “to engage in unwanted expression.” However, the cases themselves are narrower than Elane Photography suggests; they involve situations in which the speakers were compelled to publicly “speak the government’s message.” In Wooley and Barnette, the respective states impermissibly required their residents to affirm or display a specific government-selected message: “Live Free or Die” in Wooley, 430 U.S. at 707, and allegiance to the flag in Barnette, 319 U.S. at 632-33. Both cases stand for the proposition that the First Amendment does not permit the government to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” However, unlike the laws at issue in Wooley and Barnette, the NMHRA does not require Elane Photography to recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.

Furthermore, the laws at issue in Wooley and Barnette had little purpose other than to promote the government-sanctioned message. That is not the case here, where Elane Photography’s asserted right not to serve same-sex couples directly conflicts with Willock’s right under Section 28-1-7(F) of the NMHRA to obtain goods and services from a public accommodation without discrimination on the basis of her sexual orientation. Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm.

The fact that compliance with the NMHRA will require Elane Photography to produce photographs for same-sex weddings to the extent that it would provide those services to a heterosexual couple does not mean that the NMHRA compels speech in the manner of the laws challenged in Wooley and Barnette. Elane Photography’s argument here is more analogous to the claims raised by the law schools in *Rumsfeld*. In that case, a federal law made universities’ federal funding contingent on the universities allowing military recruiters access to university facilities and services on the same basis as other, non-military recruiters. A group of law schools that objected to the ban on gays in the military challenged the law on a number of constitutional grounds, including that the law in question compelled them to speak the government’s message. In order to assist the military recruiters, schools had to provide services that involved speech, “such as sending e-mails and distributing flyers.”

The United States Supreme Court held that this requirement did not constitute compelled speech. The Court observed that the federal law “neither limits what law schools may say nor requires them to say anything.” Schools were compelled only to provide the type of speech-related

services to military recruiters that they provided to non-military recruiters. “There [was] nothing ... approaching a Government-mandated pledge or motto that the school [had to] endorse.”

The same situation is true in the instant case. Like the law in *Rumsfeld*, the NMHRA does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. The fact that these services may involve speech or other expressive services does not render the NMHRA unconstitutional. Elane Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple.

2. The NMHRA does not compel Elane Photography to host or accommodate the message of another speaker

a. State laws prohibiting discrimination by public accommodations do not constitute compelled speech

The second line of compelled-speech cases deals with situations in which a government entity has required a speaker to “host or accommodate another speaker’s message.” Elane Photography argues that a same-sex wedding or commitment ceremony is an expressive event, and that by requiring it to accept a client who is having a same-sex wedding, the NMHRA compels it to facilitate the messages inherent in that event. Elane Photography argues that there are two messages conveyed by a same-sex wedding or commitment ceremony: first, that such ceremonies exist, and second, that these occasions deserve celebration and approval. Elane Photography does not wish to convey either of these messages.

The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. See *Hurley*, 515 U.S. at 572 (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.... [T]he focal point of [such statutes is] rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.”). The United States Supreme Court has found constitutional problems with some applications of state public accommodation laws, but those problems have arisen when states have applied their public accommodation laws to free-speech events such as privately organized parades, *id.* at 566, 573, 580-81, and private membership organizations, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Elane Photography, however, is an ordinary public accommodation, a “clearly commercial entit[y],” that sells goods and services to the public.

The NMHRA does not, nor could it, regulate the content of the photographs that Elane Photography produces. Like all public accommodation laws, the NMHRA regulates “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.” Elane Photography argues that because the service it provides is photography, and because photography is expressive, “some of [the] images will

inevitably express the messages inherent in [the] event.” In essence, then, Elane Photography argues that by limiting its ability to choose its clients, the NMHRA forces it to produce photographs expressing its clients’ messages even when the messages are contrary to Elane Photography’s beliefs.

Elane Photography has misunderstood this issue. It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work. If Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography’s choice of whom to photograph or not. The difference in the present case is that the photographs that are allegedly compelled by the NMHRA are photographs that Elane Photography produces for hire in the ordinary course of its business as a public accommodation. This determination has no relation to the artistic merit of photographs produced by Elane Photography. If Annie Leibovitz or Peter Lindbergh worked as public accommodations in New Mexico, they would be subject to the provisions of the NMHRA. Unlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, Elane Photography sells its expressive services to the public. It may be that Elane Photography expresses its clients’ messages in its photographs, but only because it is hired to do so. The NMHRA requires that Elane Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require photography stems from the nature of Elane Photography’s chosen line of business.

The cases in which the United States Supreme Court found that the government unconstitutionally required a speaker to host or accommodate another speaker’s message are distinctly different because they involve direct government interference with the speaker’s own message, as opposed to a message-for-hire. In two cases, the Court found a compelled-speech problem where the government explicitly required a publisher to distribute an opposing point of view. In the first of these cases, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974), the United States Supreme Court invalidated Florida’s “right of reply” statute. The law provided that if a candidate for public office was criticized in a Florida newspaper, the candidate could demand that the newspaper print his or her reply, free of cost, in as conspicuous a location as the criticism that had appeared. The Court expressed concern that the statute might deter editors from printing criticism of candidates, thereby chilling political news coverage and commentary in the state. Furthermore, the statute unconstitutionally wrested control over editorial decisions about “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials” away from the editors and into the hands of the state.

Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), a plurality of the United States Supreme Court held unconstitutional a decision by the California Public Utilities Commission to allow a third-party group to send out messages with a utility’s billing statements. The utility had traditionally distributed a newsletter to its customers with its monthly billing statements. The Public Utility Commission decided that the space in the billing envelopes belonged to the customers, not to the utility, and it allowed an intervenor in a ratemaking proceeding involving the utility to send out messages in the utility’s billing

envelopes four times per year. Citing *Tornillo*, the United States Supreme Court held that this decision unconstitutionally compelled the utility to accommodate the intervenor's speech. The Court noted that the Commission's ruling required the utility to disseminate messages that were hostile to the utility's own interests, and, depending on what the intervenors said, the utility might "be forced either to appear to agree with [the intervenors'] views or to respond," when it would have preferred to remain silent on an issue.

In both *Pacific Gas* and *Tornillo*, the government commandeered a speaker's means of reaching its audience and required the speaker to disseminate an opposing point of view. Nothing analogous occurred in the present case. *Elane Photography* is not required to print the names and addresses of rival photographers in its albums, nor does *Elane Photography* distribute a newsletter in which the government has required it to print someone else's ideas. Instead, the allegedly compelled message is *Elane Photography*'s own work on behalf of its clients, which it distributes only to its clients and their loved ones. The government has not interfered with *Elane Photography*'s editorial judgment; the only choice regulated is *Elane Photography*'s choice of clients.

In addition, although *Elane Photography* raises concerns that its speech will be chilled, there is no risk of a chilling effect in this case. In *Tornillo*, the "right of reply" statute could have discouraged newspapers from printing criticism of political candidates. By contrast, the relevant choice facing *Elane Photography* and similar businesses is not whether to publish a story, as in *Tornillo*, but whether to operate as a public accommodation. If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the antidiscrimination provisions of the NMHRA. If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. *Elane Photography*'s choice to offer its services to the public is a business decision, not a decision about its freedom of speech.

In *Pacific Gas* and *Tornillo*, a government entity overtly required a speaker to publicize an opposing message. *Elane Photography* cites a third case, *Hurley*, in which the compelled-speech violation was more subtle. In *Hurley*, the private organizers of the Boston St. Patrick's Day parade denied the application of a group of gay, lesbian, and bisexual Irish-Americans (known as GLIB) to march as a unit in the parade. Massachusetts courts held that this constituted discrimination on the basis of sexual orientation. The United States Supreme Court reversed, holding that the parade did not discriminate against gay participants; instead, the issue was "the admission of GLIB as its own parade unit carrying its own banner," which had unquestionable expressive content.

Hurley is different from the instant case in two significant ways. First, the Massachusetts courts appear to have erroneously classified the privately organized parade as a public accommodation. Second, parades by their nature express a message to the public. By requiring the parade organizers to include GLIB, the Massachusetts courts directly altered the expressive content of the parade. The presence of a group in a parade carries expressive weight, and *Hurley* implicated associational rights as well as free-speech rights. *Elane Photography* argues that photographs are also inherently expressive, so *Hurley* must apply to this case as well. However, the NMHRA applies not to *Elane Photography*'s photographs but to its business operation, and in particular,

its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not. By way of analogy, the NMHRA could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the NMHRA would prohibit that business from refusing to offer parade-planning services to persons because of their sexual orientation. Thus, Elane Photography's reliance on Hurley is misplaced.

Elane Photography's situation is actually clearer than that of our hypothetical business that organized parades, because even a parade for hire would still be a public event. By contrast, Elane Photography does not routinely publish for or display its wedding photographs to the public. Instead, it creates an album for each customer and posts the photographs on a password-protected website for the customers and their friends and family to view. Whatever message Elane Photography's photographs may express, they express that message only to the clients and their loved ones, not to the public.

We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio. However, if Elane Photography offers its services to the public, the NMHRA requires Elane Photography to provide those same services to clients who are members of a protected class under the NMHRA.

b. Observers are unlikely to believe that Elane Photography's photographs reflect the views of either its owners or its employees

Elane Photography also argues that if it is compelled to photograph same-sex weddings, observers will believe that it and its owners approve of same-sex marriage. The United States Supreme Court incorporates the question of perceived endorsement into its analysis in cases that involve compulsion to host or accommodate third-party speech. In contrast to *Pacific Gas and Tornillo*, the United States Supreme Court has not found compelled speech violations where the government has not explicitly required a publisher to disseminate opposing points of view and where observers are unlikely to mistake a person's compliance with the law for endorsement of third-party messages, as in *Hurley*.

Elane Photography makes an argument very similar to one rejected by the *Rumsfeld* Court: by treating customers alike, regardless of whether they are having same-sex or opposite-sex weddings, Elane Photography is concerned that it will send the message that it sees nothing wrong with same-sex marriage. Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom). Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable

antidiscrimination laws.

c. Elane Photography's allocation of its work time does not raise First Amendment concerns

Elane Photography next argues that when its employees spend time taking and editing photographs of same-sex weddings, they have less time to spend doing their preferred work of photographing opposite-sex weddings. Elane Photography's complaint is based on its staff's limited time. Elane Photography argues that if it accepts same-sex couples as clients, its employees must "spend a day shooting pictures and three to four weeks selecting, editing, and arranging images" of the clients' weddings, when they would prefer to spend this time working on images of heterosexual weddings. Therefore, it argues, the NMHRA interferes with Elane Photography's own speech.

We disagree because the allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected. By their nature, laws prohibiting discrimination in public accommodations require businesses and their employees to spend time and energy serving customers whom they might prefer not to serve. These laws apply even when the businesses provide skillful or physically intimate services. See *Bragdon v. Abbott*, 524 U.S. 624, 628-29 (1998) (applying public accommodations provisions of the Americans with Disabilities Act to dental practice). This is the purpose of antidiscrimination laws: they force businesses to treat customers alike, regardless of their race, religion, or other protected status. These laws are necessary precisely because some businesses would otherwise refuse to work with certain customers whom the laws protect. Antidiscrimination laws have been consistently upheld as constitutional. Elane Photography's desire to work with heterosexual rather than homosexual couples does not give it license to violate the NMHRA.

3. There is no exemption from antidiscrimination laws for creative or expressive professions

There are no cases from either New Mexico jurisprudence or that of the United States Supreme Court that would compel a conclusion that the NMHRA violates Elane Photography's freedom of speech because it is engaged in a creative and expressive profession. We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively "expressive," but florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.

Elane Photography also suggests that enforcing the NMHRA against it would mean that an African-American photographer could not legally refuse to photograph a Ku Klux Klan rally. This hypothetical suffers from the reality that political views and political group membership, including membership in the Klan, are not protected categories under the NMHRA. Therefore,

an African-American could decline to photograph a Ku Klux Klan rally. However, the point is well-taken when the roles in the hypothetical are reversed — a Ku Klux Klan member who operates a photography business as a public accommodation would be compelled to photograph an African-American under the NMHRA. This result is required by the NMHRA, which seeks to promote equal rights and access to public accommodations by prohibiting discrimination based on certain specified protected classifications.

However, adoption of Elane Photography’s argument would allow a photographer who was a Klan member to refuse to photograph an African-American customer’s wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as the photographer’s endorsement of African-Americans. A holding that the First Amendment mandates an exception to public accommodations laws for commercial photographers would license commercial photographers to freely discriminate against any protected class on the basis that the photographer was only exercising his or her right not to express a viewpoint with which he or she disagrees. Such a holding would undermine all of the protections provided by antidiscrimination laws.

In short, we conclude that the NMHRA’s prohibition on sexual-orientation discrimination does not violate Elane Photography’s First Amendment right to refrain from speaking.

B. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY’S FIRST AMENDMENT FREE EXERCISE RIGHTS

Elane Photography argues that enforcement of the NMHRA against it for refusing to photograph Willock’s wedding violates its First Amendment right to freely exercise its religion. It is an open question whether Elane Photography, which is a limited liability company rather than a natural person, has First Amendment free exercise rights. Several federal courts have recently addressed this question with differing outcomes. However, it is not necessary for this Court to address whether Elane Photography has a constitutionally protected right to exercise its religion. Assuming that Elane Photography has such rights, they are not offended by enforcement of the NMHRA.

Under established law, “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In order to state a valid First Amendment free exercise claim, a party must show either (a) that the law in question is not a “neutral law of general applicability,” or (b) that the challenge implicates both the Free Exercise Clause and an independent constitutional protection, or possibly (c) that the law operates “in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct.” Elane Photography does not claim that the individualized assessment situation is applicable to the present case. We address its claims under the other two categories below.

1. The NMHRA is a neutral law of general applicability

The United States Supreme Court elaborated on the rule concerning “law that is neutral and of

general applicability” in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). A law is not neutral “if [its] object ... is to infringe upon or restrict practices because of their religious motivation.” It is not generally applicable if it “impose[s] burdens only on conduct motivated by religious belief” while permitting exceptions for secular conduct or for favored religions. These inquiries are related; the Court observed that improper intent could be inferred if the law was a “religious gerrymander” that burdened religion but exempted similar secular activity. If a law is neither neutral nor generally applicable, it “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”

In *Lukumi Babalu Aye*, the city of Hialeah had passed several ordinances that prohibited religious sacrifice of animals but exempted secular slaughterhouses, kosher slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests. The Court held that this was a “religious gerrymander,” the result of which was “that few if any killings of animals [were] prohibited other than Santeria sacrifice.” The Court concluded that “[t]he ordinances had as their object the suppression of religion” and were therefore nonneutral. The Court then examined whether the ordinances were generally applicable and whether the government was selectively burdening only religiously motivated conduct. The Court did not precisely define the standard for assessing general applicability, but it did observe that the Hialeah ordinances were grossly under-inclusive with respect to the laws’ stated goals, and it concluded that the laws burdened “only ... conduct motivated by religious belief.” The Court applied strict scrutiny to the ordinances and found them unconstitutional.

Elane Photography argues that the NMHRA is not generally applicable and that this Court therefore should apply strict scrutiny to the application of the NMHRA to Elane Photography. Elane Photography identifies several exemptions from the antidiscrimination provisions of the NMHRA and argues that these exemptions make it not generally applicable. Specifically, Elane Photography points to Section 28-1-9(A)(1), which exempts sales or rentals of single-family homes if the owner does not own more than three houses, and Section 28-1-9(D), which exempts owners who live in small multi-family dwellings and rent out the other units. Elane Photography argues that these exemptions, like those in *Lukumi Babalu Aye*, “impermissibly prefer the secular to the religious.”

This is a misreading of Section 28-1-9. Unlike the exemptions in *Lukumi Babalu Aye*, the exemptions in Section 28-1-9(A) and (D) apply equally to religious and secular conduct. Neither subsection discusses motivation; homeowners who meet the criteria of Section 28-1-9(A) and (D) are permitted to discriminate regardless of whether they do so on religious or nonreligious grounds. Therefore, the NMHRA does not target only religiously motivated discrimination, and these exemptions do not prevent the NMHRA from being generally applicable. These exemptions also do not indicate any animus toward religion by the Legislature that might render the law nonneutral; similar exemptions commonly appear in housing discrimination laws, including the federal Fair Housing Act.

Elane Photography also argues that the exemptions to the NMHRA for religious organizations undercut the purpose of the statute. In particular, Elane Photography highlights Section 28-1-9(B) and (C), which in its reading permits religious organizations to “decline same-sex couples

as customers.”

Once again, Elane Photography’s interpretation rests on a distorted reading of the statute. Section 28-1-9(B) allows religious organizations to “limit[] admission to or giv[e] preference to persons of the same religion or denomination or [to make] selections of buyers, lessees or tenants” that promote the organization’s religious principles. In the context of “buyers, lessees or tenants,” “buyers” clearly refers to purchasers of real estate rather than retail customers. Subsection (C) exempts religious organizations from provisions of the NMHRA governing sexual orientation and gender identity, but only regarding “employment or renting.” If a religious organization sold goods or services to the general public, neither subsection would allow the organization to turn away same-sex couples while catering to opposite-sex couples of all faiths. Subsection (B) permits religious organizations to serve only or primarily people of their own faith, as well as to discriminate in certain limited real estate transactions; Subsection (C) applies only to employment and, again, to real estate.

In other words, neither of the religious exemptions in Section 28-1-9 would permit a religious organization to take the actions that Elane Photography did in this case. Furthermore, these exemptions do not prevent the NMHRA from being generally applicable. Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion.

The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.

III. ENFORCEMENT OF THE NMHRA DOES NOT VIOLATE THE NMRFRA BECAUSE THE NMRFRA IS NOT APPLICABLE IN A SUIT BETWEEN PRIVATE PARTIES

Finally, Elane Photography argues that the Commission’s enforcement of the NMHRA against it violates the New Mexico Religious Freedom Restoration Act.

The NMRFRA states that “[a] person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency.” Section 28-22-4(A). Elane Photography argues that the phrase “against a government agency” modifies “appropriate relief,” rather than “a judicial proceeding.” In other words, Elane Photography argues that although the relief available is limited, the NMRFRA can be invoked even when the government is not a party. However, the statute is violated only if a “government agency” restricts a person’s free exercise of religion. Section 28-22-3. A “government agency” includes “the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.” Section 28-22-2(B). The list of government agencies does not include the Legislature or the courts. It could be expected that the Legislature would have included itself and the courts in Section 28-22-2(B) if it meant the NMRFRA to apply in common-law disputes or private enforcement actions. Instead, the examples of government agencies are exclusively administrative or executive entities.

CONCLUSION

Elane Photography's refusal to serve Vanessa Willock violated the New Mexico Human Rights Act, which prohibits a public accommodation from refusing to offer its services to a person based on that person's sexual orientation. Enforcing the NMHRA against Elane Photography does not violate the Free Speech or the Free Exercise clause of the First Amendment or the NMRFRA. For these reasons, we affirm the grant of summary judgment in Willock's favor.

* * * * *

Questions and Comments

1. On June 30, 2014, the United States Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, holding that the federal Religious Freedom Restoration Act could protect a privately-held family-owned business corporation from having to provide contraception insurance coverage to female employees when the corporation's owners had a religiously-based objection to providing the coverage. Rejecting the argument that a business corporation could not engage in an "exercise of religion," the Court held that even if the government had a compelling interest to ensure that women have access to the contraceptives in question, a mandate in regulations enforcing the Affordable Care Act (ACA) that they be provided through employer-purchased health insurance was not the "least restrictive" method of providing the benefit. Thus, the employer was entitled to a religious exemption from complying with the mandate, without incurring any penalty under the ACA for providing coverage that did not meet all the requirements of the regulations. Dissenting from the 5-4 ruling, Justice Ruth Bader Ginsburg cited *Elane Photography v. Willock* as an example of a ruling that might be affected. Would the Supreme Court's statutory ruling require New Mexico to allow Elane Photography to decline to provide photographic services for a lesbian commitment ceremony based on the company's religious disapproval of formal same-sex relationships, under the analogous provisions of New Mexico's version of RFRA discussed in the court's opinion? Note that the Supreme Court's Hobby Lobby decision was not a 1st Amendment ruling. Under the Supreme Court's prevailing 1st Amendment doctrine articulated in *Employment Division v. Smith*, the government is not required to provide religious exemptions from complying with neutral laws of general application. The U.S. Supreme Court rejected a petition to review the New Mexico Supreme Court's ruling on the photographer's constitutional 1st Amendment claim.
2. Another case Justice Ginsburg cited in her Hobby Lobby dissent was *In re Minnesota ex rel. McClure*, 370 N.W 844 (Minn. 1985), in which the court refused to recognize a religious exemption from compliance with the state's public accommodation law for a health club owned by "born-again Christians" who sought to deny membership to, among others, "homosexuals" whose lifestyles were "antagonistic to the Bible." Although Justice Alito, writing for the Court in Hobby Lobby, asserted that the Court was rendering a narrow ruling dealing solely with the question of contraceptive coverage under the ACA, Justice Ginsburg observed in dissent that the reasoning of the majority would logically extend to all religious objections by business owners to providing goods

and services to particular groups of people. As Hobby Lobby’s attorney conceded at oral argument, under the Respondent’s view of the case, each such religious objection would have to be analyzed pursuant to the terms of RFRA, under which the exemption is available unless the government can show that the challenged requirement is necessary to achieve a compelling state interest. What is the likelihood that a state law banning sexual orientation discrimination would be seen as effectuating a “compelling state interest”? The Supreme Court seemed dubious about that proposition in *Boy Scouts of America v. Dale*, found on page 729 in the casebook.

3. The federal Religious Freedom Restoration Act (RFRA) was enacted in 1993 in response to the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the 1st Amendment did not compel government to exempt religious objectors from complying with neutral laws of general application. Many states, including New Mexico, enacted laws patterned on RFRA. Their intent was to revive the legal analysis that the Supreme Court had previously employed to determine whether an individual could claim a religious exemption from complying with a law. Under that analysis, the state could demand compliance only if the law was enacted to achieve a compelling state interest that could not be achieved through less restrictive means. Would a state civil rights law that prohibits discrimination in employment, housing or public accommodations because of sexual orientation or gender identity meet this test?
4. Reacting to the 7th Circuit’s decision in the fall of 2014 holding that Indiana’s ban on same-sex marriage was unconstitutional, and to the U.S. Supreme Court’s refusal to grant review of that ruling or of the New Mexico Supreme Court’s ruling in *Elane Photography*, Indiana legislators approved a Religious Freedom Restoration Act for their state that to critics of the bill to sanction discrimination against LGBT couples. Ironically, since Indiana state law does not forbid sexual orientation and gender identity discrimination by businesses, such entities were free to discriminate against LGBT individuals or couples without any liability under state law, although a handful of Indiana municipalities do ban such discrimination. The governor’s signing of the law on March 26, 2015, in a ceremony attended mainly by representatives of anti-gay religious groups, caused an uproar in the media, threats to cancel business expansion, conventions, and major sporting events in Indiana, and led to a strategic retreat by the state government, as the legislature passed and the governor approved an addition to the law stating that it could not be raised as a defense to a discrimination charge. The governor also indicated that he might be open to adding sexual orientation or gender identity to the state’s civil rights law, but the legislature was unwilling to consider that. Thus, the entire controversy seemed to be as much about symbolism as law.

In order to be licensed as a counselor in most states, an individual needs to complete a graduate program in counseling. Accredited graduate programs in counseling adopt the ethical code of the American Counseling Association, which includes a non-discrimination policy encompassing sexual orientation and requirement that counselors offer non-judgmental guidance, refraining from imposing their personal beliefs on their clients. Should a counseling graduate student with

religious objections to homosexuality be required to keep quiet about her views or risk expulsion from the program? Graduate counseling programs usually include a practice component in which the graduate students counsel undergraduates about relationship issues. Should a graduate student enrolled in such a practicum be entitled to refuse to offer counseling to lesbian or gay students who are seeking guidance about navigating the difficulties of a same-sex relationship? If they tell their “clients” why they will not provide them with relationship counseling, should they be dismissed from the graduate program? Courts have begun to address these issues. Compare, *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). Would a public employer be violating the 1st Amendment if it discharged a counselor who, due to religious beliefs, would not provide non-judgmental counseling to clients who were in same-sex relationships? See, *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012).

At page 751, prior to Section E, insert the following subsection:

6. Prohibitions on Sexual Orientation Change Efforts (SOCE)

Although associations of mental health professionals began to abandon the view that sexual orientation was a mental illness that could be “cured” beginning in the 1970s, there always remained dissenters from this consensus, and some practitioners continued to employ a variety of methodologies to attempt to “change” or “redirect” the sexual orientation of individuals who were unhappy about their homosexual or bisexual orientation. Eventually leading professional associations condemned such practices, finding that they were ineffective and could be harmful to patients. In recent years, responding to reports of parents forcing their children to undergo such treatment, a movement began to get states to ban licensed health care professionals from providing such treatments to minors. California was the first state to enact such a law, soon to be followed by New Jersey and then Oregon. The Illinois legislature also approved such a bill, which had not been signed by the governor when this supplement was prepared. These laws were challenged by some practitioners, who argued that it violated their free speech. They also attacked the laws on grounds of vagueness, and sought to assert the right of parents to decide what therapy to provide for their children or the children themselves to obtain such treatment. The 9th Circuit, the first to rule on such claims, soundly rejected them. Then the 3rd Circuit also rejected the claims, but on somewhat different grounds. Which approach more accurately reflects your understanding of the limits of protection for speech under the 1st Amendment?

PICKUP v. BROWN

740 F.3d 1208, cert. denied, 134 S. Ct. 2871 (2014)

United States Court of Appeals, Ninth Circuit

GRABER, Circuit Judge:

The California legislature enacted Senate Bill 1172 to ban state-licensed mental health providers from engaging in “sexual orientation change efforts” (“SOCE”) with patients under 18 years of age. Two groups of plaintiffs sought to enjoin enforcement of the law, arguing that SB 1172 violates the First Amendment and infringes on several other constitutional rights. . . .

FACTUAL AND PROCEDURAL BACKGROUND

A. Sexual Orientation Change Efforts (“SOCE”)

SOCE, sometimes called reparative or conversion therapy, began at a time when the medical and psychological community considered homosexuality an illness. SOCE encompasses a variety of methods, including both aversive and non-aversive treatments, which share the goal of changing an individual’s sexual orientation from homosexual to heterosexual. In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used. Today, some non-aversive treatments use assertiveness and affection training with physical and social reinforcement to increase other-sex sexual behaviors. Other non-aversive treatments attempt “to change gay men’s and lesbians’ thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation.” American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation* 22 (2009). The plaintiff mental health providers in these cases use only non-aversive treatments.

In 1973, homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders. Shortly thereafter the American Psychological Association declared that homosexuality is not an illness. Other major mental health associations followed suit. Subsequently, many mental health providers began questioning and rejecting the efficacy and appropriateness of SOCE therapy. Currently, mainstream mental health professional associations support affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma. But a small number of mental health providers continue to practice, and advocate for, SOCE therapy.

B. Senate Bill 1172

Senate Bill 1172 defines SOCE as “any practices by mental health providers [‘] that seek to change an individual’s sexual orientation[... includ[ing] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.” Cal. Bus. & Prof.Code § 865(b)(1). SOCE, however, does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation. Id. § 865(b)(2). A licensed mental health provider’s use of SOCE on a patient under 18 years of age is “considered unprofessional conduct,” which will subject that provider to “discipline by the licensing entity for that mental health provider.” Id. § 865.2.

Importantly, SB 1172 does not do any of the following:

- Prevent mental health providers from communicating with the public about SOCE
- Prevent mental health providers from expressing their views to patients, whether children or

adults, about SOCE, homosexuality, or any other topic

- Prevent mental health providers from recommending SOCE to patients, whether children or adults
- Prevent mental health providers from administering SOCE to any person who is 18 years of age or older
- Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders
- Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults
- Prevent minors from seeking SOCE from mental health providers in other states

Instead, SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in “practices ... that seek to change a [minor’s] sexual orientation” either to wait until the minor turns 18 or be subject to professional discipline. Thus, SB 1172 regulates the provision of mental treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.

The legislature’s stated purpose in enacting SB 1172 was to “protect[] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[] its minors against exposure to serious harms caused by sexual orientation change efforts.” 2012 Cal. Legis. Serv. ch. 835, § 1(n). The legislature relied on the well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it. Specifically, the legislature relied on position statements, articles, and reports published by the following organizations: the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization.

In particular, the legislature relied on a report created by a Task Force of the American Psychological Association. That report resulted from a systematic review of the scientific literature on SOCE. Methodological problems with some of the reviewed studies limited the conclusions that the Task Force could draw. Nevertheless, the report concluded that SOCE practitioners have not demonstrated the efficacy of SOCE and that anecdotal reports of harm raise serious concerns about the safety of SOCE.

C. Procedural History

Plaintiffs in *Welch* include two SOCE practitioners and an aspiring SOCE practitioner. Plaintiffs in *Pickup* include SOCE practitioners, organizations that advocate SOCE, children undergoing

SOCE, and their parents. All sought a declaratory judgment that SB 1172 is unconstitutional and asked for injunctive relief to prohibit enforcement of the law. [Federal district courts ruling on the two cases reached opposite conclusions about the plaintiffs' 1st Amendment arguments.]

DISCUSSION

A. Free Speech Rights

At the outset, we must decide whether the First Amendment requires heightened scrutiny of SB 1172. As explained below, we hold that it does not.

The first step in our analysis is to determine whether SB 1172 is a regulation of conduct or speech. “[W]ords can in some circumstances violate laws directed not against speech but against conduct....” *R.A. V. v. City of St. Paul*, 505 U.S. 377, 389 (1992). “Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR II”), 547 U.S. 47, 62 (2006). The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not “inherently expressive.” In identifying whether SB 1172 regulates conduct or speech, two of our cases guide our decision: *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (“NAAP”), 228 F.3d 1043 (9th Cir.2000), and *Conant v. Walters*, 309 F.3d 629 (9th Cir.2002).

In *NAAP*, 228 F.3d at 1053, psychoanalysts who were not licensed in California brought a First Amendment challenge to California’s licensing scheme for mental health providers. The licensing scheme required that persons who provide psychological services to the public for a fee obtain a license, which in turn required particular educational and experiential credentials. The plaintiffs alleged that the licensing scheme violated their First Amendment right to freedom of speech because the license examination tested only certain psychological theories and required certain training; plaintiffs had studied and trained under different psychoanalytic theories. We were equivocal about whether, and to what extent, the licensing scheme in *NAAP* implicated any free speech concerns. “We conclude that, even if a speech interest is implicated, California’s licensing scheme passes First Amendment scrutiny.”; “Although some speech interest may be implicated, California’s content-neutral mental health licensing scheme is a valid exercise of its police power....”. We reasoned that prohibitions of conduct have “‘never been deemed an abridgement of freedom of speech ... merely because the conduct was in part initiated, evidenced, or carried out by means of language.’” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). And, importantly, we specifically rejected the argument that “‘because psychoanalysis is the ‘talking cure,’ it deserves special First Amendment protection because it is ‘pure speech.’” We reasoned: “[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, not speech. That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.”

Nevertheless, we concluded that the “communication that occurs during psychoanalysis is

entitled to constitutional protection, but it is not immune from regulation.” But we neither decided how much protection that communication should receive nor considered whether the level of protection might vary depending on the function of the communication. Given California’s strong interest in regulating mental health, we held that the licensing scheme at issue in NAAP was a valid exercise of its police power.

We went on to conclude that, even if the licensing scheme in NAAP regulated speech, it did not trigger strict scrutiny because it was both content neutral and viewpoint neutral. We reasoned that the licensing laws did not “dictate what can be said between psychologists and patients during treatment.” Further, we observed that those laws were “not adopted because of any disagreement with psychoanalytical theories” but for “the important purpose of protecting public health, safety, and welfare.” We again concluded that the laws were a valid exercise of California’s police power.

In *Conant*, 309 F.3d at 633–34, we affirmed a district court’s order granting a permanent injunction that prevented the federal government from revoking a doctor’s DEA registration or initiating an investigation if he or she recommended medical marijuana. The federal government had adopted a policy that a doctor’s “recommendation” of marijuana would lead to revocation of his or her license. But the government was “unable to articulate exactly what speech [the policy] proscribed, describing it only in terms of speech the patient believes to be a recommendation of marijuana.” Nevertheless, the demarcation between conduct and speech in *Conant* was clear. The policy prohibited doctors from prescribing or distributing marijuana, and neither we nor the parties disputed the government’s authority to prohibit doctors from treating patients with marijuana. Further, the parties agreed that “revocation of a license was not authorized where a doctor merely discussed the pros and cons of marijuana use.”

We ruled that the policy against merely “recommending” marijuana was both content- and viewpoint-based. It was content-based because it covered only doctor-patient speech “that include[d] discussions of the medical use of marijuana,” and it was viewpoint-based because it “condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient.” We held that the policy did not withstand heightened First Amendment scrutiny because it lacked “the requisite narrow specificity” and left “doctors and patients no security for free discussion.”

We distill the following relevant principles from NAAP and *Conant*: (1) doctor-patient communications about medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive some constitutional protection, but it is not immune from regulation.

Because those principles, standing alone, do not tell us whether or how the First Amendment applies to the regulation of specific mental health treatments, we must go on to consider more generally the First Amendment rights of professionals, such as doctors and mental health providers. In determining whether SB 1172 is a regulation of speech or conduct, we find it

helpful to view this issue along a continuum.

At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine. See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) (“Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment’s command that ‘Congress shall make no law ... abridging the freedom of speech, or of the press.’”). Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.

At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), the plurality upheld a requirement that doctors disclose truthful, nonmisleading information to patients about certain risks of abortion:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

(Citations omitted; emphasis added.) Outside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech. Cf. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that a state could not require a person to display the state motto on his or her license plate).

Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care.

At the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech. Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment. When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug. Were it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech. Such

an application of the First Amendment would restrict unduly the states' power to regulate licensed professions and would be inconsistent with the principle that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502.

Senate Bill 1172 regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors. It is the limited reach of SB 1172 that distinguishes the present cases from *Conant*, in which the government's policy prohibited speech wholly apart from the actual provision of treatment. Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. Under *Giboney*, 336 U.S. at 502, the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech. In fact, the *Welch* Plaintiffs concede that the state has the power to ban aversive types of SOCE. And we reject the position of the *Pickup* Plaintiffs—asserted during oral argument—that even a ban on aversive types of SOCE requires heightened scrutiny because of the incidental effect on speech. Here, unlike in *Conant*, 309 F.3d at 639, the law allows discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.

Plaintiffs contend that *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), supports their position. It does not.

As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. The statute does not restrain Plaintiffs from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic. And an act that "symbolizes nothing," even if employing language, is not "an act of communication" that transforms conduct into First Amendment speech. *Nev. Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2350 (2011). Indeed, it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").

In sharp contrast, *Humanitarian Law Project* pertains to a different issue entirely: the regulation of (1) political speech (2) by ordinary citizens. The plaintiffs there sought to communicate information about international law and advocacy to a designated terrorist organization. The federal statute at issue barred them from doing so, because it considered the plaintiffs' expression to be material support to terrorists. As the Supreme Court held, the material support statute triggered rigorous First Amendment review because, even if that statute "generally functions as a regulation of conduct ... as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." Again, SB 1172 does not prohibit Plaintiffs from "communicating a message." It is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere. Plaintiffs may express their views to anyone, including minor patients and their parents, about

any subject, including SOCE, insofar as SB 1172 is concerned. The only thing that a licensed professional cannot do is avoid professional discipline for practicing SOCE on a minor patient.

This case is more akin to FAIR II. There, the Supreme Court emphasized that it “extended First Amendment protection only to conduct that is inherently expressive.” 547 U.S. at 66. The Court upheld the Solomon Amendment, which conditioned federal funding for institutions of higher education on their offering military recruiters the same access to campus and students that they provided to nonmilitary recruiters. The Court held that the statute did not implicate First Amendment scrutiny, even as applied to law schools seeking to express disagreement with military policy by limiting military recruiters’ access, reasoning that the law schools’ “actions were expressive only because the law schools accompanied their conduct with speech explaining it.” Like the conduct at issue in FAIR II, the administration of psychotherapy is not “inherently expressive.” Nor does SB 1172 prohibit any speech, either in favor of or in opposition to SOCE, that might accompany mental health treatment. Because SB 1172 regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.

We further conclude that the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone. As we have already held in NAAP, talk therapy does not receive special First Amendment protection merely because it is administered through speech. 228 F.3d at 1054. That holding rested on the understanding of talk therapy as “the treatment of emotional suffering and depression, not speech.” Thus, under NAAP, to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment. Senate Bill 1172 is subject to deferential review just as are other regulations of the practice of medicine.

Our conclusion is consistent with NAAP’s statement that “communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation.” Certainly, under *Conant*, content- or viewpoint-based regulation of communication about treatment must be closely scrutinized. But a regulation of only treatment itself—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all. To read NAAP otherwise would contradict its holding that talk therapy is not entitled to “special First Amendment protection,” and it would, in fact, make talk therapy virtually “immune from regulation.”

Nor does NAAP’s discussion of content and viewpoint discrimination change our conclusion. There, we used both a belt and suspenders. In addition to holding that the licensing scheme at issue was a permissible regulation of conduct, we reasoned that even if California’s licensing requirements implicated First Amendment interests, the requirements did not discriminate on the basis of content or viewpoint. But here, SB 1172 regulates only treatment, and nothing in NAAP requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination.

Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest.

According to the statute, SB 1172 advances California’s interest in “protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.” 2012 Cal. Legis. Serv. ch. 835, § 1(n). Without a doubt, protecting the well-being of minors is a legitimate state interest. And we need not decide whether SOCE actually causes “serious harms”; it is enough that it could “reasonably be conceived to be true by the governmental decisionmaker.” NAAP, 228 F.3d at 1050.

The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18.8 The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. Each of those organizations opposed the use of SOCE, concluding, among other things, that homosexuality is not an illness and does not require treatment (American School Counselor Association), SOCE therapy can provoke guilt and anxiety (American Academy of Pediatrics), it may be harmful (National Association of Social Workers), and it may contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association). Although the legislature also had before it some evidence that SOCE is safe and effective, the overwhelming consensus was that SOCE was harmful and ineffective. On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.

Plaintiffs argue that the legislature acted irrationally when it banned SOCE for minors because there is a lack of scientifically credible proof of harm. But, under rational basis review, “[w]e ask only whether there are plausible reasons for [the legislature’s] action, and if there are, our inquiry is at an end.” *Romero–Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir.2013) (internal quotation marks omitted).

Therefore, we hold that SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.

B. Expressive Association

We also reject the Pickup Plaintiffs’ argument that SB 1172 implicates their right to freedom of association because the First Amendment protects their “choices to enter into and maintain the intimate human relationships between counselors and clients.”

First, SB 1172 does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships. It prohibits only “practices ... that seek to change [a minor] individual’s sexual orientation.” Cal. Bus. & Prof.Code § 865(b)(1). Therapists are free, but not obligated, to provide therapeutic services, as long as they do not “seek to change [the] sexual orientation” of minor clients.

Moreover, the therapist-client relationship is not the type of relationship that the freedom of association has been held to protect. The Supreme Court’s decisions “have referred to

constitutionally protected ‘freedom of association’ in two distinct senses.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). The first type of protected association concerns “intimate human relationships,” which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like. That type of freedom of association “receives protection as a fundamental element of personal liberty.” The second type protects association “for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” Plaintiffs in *Pickup* claim an infringement of only the first type of freedom of association.

Although we have not specifically addressed the therapist-client relationship in terms of freedom of association, we have explained why the therapist-client relationship is not protected by the Due Process Clause of the Fourteenth Amendment: “The relationship between a client and psychoanalyst lasts only as long as the client is willing to pay the fee. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right.” *NAAP*, 228 F.3d at 1050. Because the type of associational protection that the *Pickup* Plaintiffs claim is rooted in “personal liberty,” *U.S. Jaycees*, 468 U.S. at 618, and because we have already determined that the therapist-client relationship does not “implicate the fundamental rights associated with ... close-knit relationships,” *NAAP*, 228 F.3d at 1050, we conclude that the freedom of association also does not encompass the therapist-client relationship.

C. Vagueness

We next hold that SB 1172 is not void for vagueness. . . . Although the *Pickup* Plaintiffs argue that they cannot ascertain where the line is between what is prohibited and what is permitted—for example, they wonder whether the mere dissemination of information about SOCE would subject them to discipline—the text of SB 1172 is clear to a reasonable person. Discipline attaches only to “practices” that “seek to change” a minor “patient [‘s]” sexual orientation. Cal. Bus. & Prof.Code §§ 865–865.1. A reasonable person would understand the statute to regulate only mental health treatment, including psychotherapy, that aims to alter a minor patient’s sexual orientation. . . .

Neither is the term “sexual orientation” vague. Its meaning is clear enough to a reasonable person and should be even more apparent to mental health providers. In fact, several provisions in the California Code—though not SB 1172 itself—provide a simple definition: “heterosexuality, homosexuality, or bisexuality.” Cal. Educ.Code §§ 212.6, 66262.7; Cal. Gov’t Code § 12926®; Cal.Penal Code §§ 422.56(h), 11410(b)(7). Moreover, courts have repeatedly rejected vagueness challenges that rest on the term “sexual orientation.” E.g., *United States v. Jenkins*, 909 F.Supp.2d 758, 778–79 (E.D.Ky.2012); *Hyman v. City of Louisville*, 132 F.Supp.2d 528, 546 (W.D.Ky.2001), vacated on other grounds, 53 Fed.Appx. 740 (6th Cir.2002) (unpublished).

D. Overbreadth

We further hold that SB 1172 is not overbroad. . . . Senate Bill 1172’s plainly legitimate sweep includes SOCE techniques such as inducing vomiting or paralysis, administering electric shocks,

and performing castrations. And, as explained above, it also includes SOCE techniques carried out solely through words. As with any regulation of a particular medical or mental health treatment, there may be an incidental effect on speech. Any incidental effect, however, is small in comparison with the “plainly legitimate sweep” of the law. Thus, SB 1172 is not overbroad.

E. Parents’ Fundamental Rights

The Pickup Plaintiffs also argue that SB 1172 infringes on their fundamental parental right to make important medical decisions for their children. The state does not dispute that parents have a fundamental right to raise their children as they see fit, but argues that Plaintiffs “cannot compel the State to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views.” Because Plaintiffs argue for an affirmative right to access SOCE therapy from licensed mental health providers, the precise question at issue is whether parents’ fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21(1997) (holding that courts should precisely define purported substantive due process rights to direct and restrain exposition of the Due Process Clause).

Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is “not without limitations.” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir.2005). States may require school attendance and mandatory school uniforms, and they may impose curfew laws applicable only to minors. In the health arena, states may require the compulsory vaccination of children (subject to some exceptions), see *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and states may intervene when a parent refuses necessary medical care for a child, see *Jehovah’s Witnesses v. King Cnty. Hosp.*, 278 F.Supp. 488, 504 (W.D.Wash.1967) (three judge panel) (per curiam), aff’d, 390 U.S. 598 (1968) (per curiam). “[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.” *Parham v. J.R.*, 442 U.S. 584, 603).

We are unaware of any case that specifically addresses whether a parent’s fundamental rights encompass the right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful, but courts that have considered whether patients have the right to choose specific treatments for themselves have concluded that they do not. For example, we have held that “substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.” *NAAP*, 228 F.3d at 1050. Thus, we concluded that “there is no fundamental right to choose a mental health professional with specific training.”

KING v. GOVERNOR OF THE STATE OF NEW JERSEY
767 F.3d 216 (3rd Cir. 2014), cert. denied, 135 S. Ct. 2048 (2015)

SMITH, Circuit Judge.

A recently enacted statute in New Jersey prohibits licensed counselors from engaging in “sexual

orientation change efforts” with a client under the age of 18. Individuals and organizations that seek to provide such counseling filed suit in the United States District Court for the District of New Jersey, challenging this law as a violation of their First Amendment rights to free speech and free exercise of religion. Plaintiffs also asserted claims on behalf of their minor clients under the First and Fourteenth Amendments. The District Court rejected Plaintiffs’ First Amendment claims and held that they lacked standing to bring claims on behalf of their minor clients. Although we disagree with parts of the District Court’s analysis, we will affirm.

Plaintiffs describe sexual orientation change efforts (“SOCE”) counseling as “talk therapy” that is administered solely through verbal communication. SOCE counselors may begin a session by inquiring into potential “root causes” of homosexual behavior, such as childhood sexual trauma or other developmental issues, such as a distant relationship with the same-sex parent. A counselor might then attempt to effect sexual orientation change by discussing “traditional, gender-appropriate behaviors and characteristics” and how the client can foster and develop these behaviors and characteristics. Many counselors, including Plaintiffs, approach counseling from a “Biblical perspective” and may also integrate Biblical teachings into their sessions.

On August 19, 2013, Governor Christopher J. Christie signed Assembly Bill A3371 (“A3371”) into law.³ A3371 provides:

- a. A person who is licensed to provide professional counseling ... shall not engage in sexual orientation change efforts with a person under 18 years of age.
- b. As used in this section, “sexual orientation change efforts” means the practice of seeking to change a person’s sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:
 - (1) provides acceptance, support, and understanding of a person or facilitates a person’s coping, social support, and identity exploration and development, including orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
 - (2) does not seek to change sexual orientation.

N.J. Stat. Ann. § 45:1–55.

Though A3371 does not itself impose any penalties, a licensed counselor who engages in the prohibited “sexual orientation change efforts” may be exposed to professional discipline by the appropriate licensing board. See N.J. Stat. Ann. § 45:1–21.

A3371 is accompanied by numerous legislative findings regarding the impact of SOCE counseling on clients seeking sexual orientation change. The New Jersey legislature found that “being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming” and that “major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.” The legislature also cited reports, articles, resolutions, and position statements from reputable mental health organizations

opposing therapeutic intervention designed to alter sexual orientation. Many of these sources emphasized that such efforts are ineffective and/or carry a significant risk of harm. According to the legislature, for example, a 2009 report issued by the American Psychological Association (“APA Report”) concluded:

[S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Finally, the legislature declared that “New Jersey has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.”

B.

The District Court considered whether Plaintiffs possessed standing to pursue claims on behalf of their minor clients and their parents. It reasoned first that “Plaintiffs’ ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371.” It then held that because, as it would explain later in its opinion, A3371 did not violate Plaintiffs’ constitutional rights, Plaintiffs did not suffer an “injury in fact” sufficient to confer third-party standing. The Court also held that Plaintiffs failed to demonstrate that these third parties were sufficiently hindered in their ability to protect their own interests. Accordingly, the Court granted summary judgment for Defendants on Plaintiffs’ third-party claims.

Relying heavily on the Ninth Circuit’s decision upholding a similar statute in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir.2013), the Court concluded that A3371 regulates conduct, not speech. The Court also determined that A3371 does not have an “incidental effect” on speech sufficient to trigger a lower level of scrutiny under *United States v. O’Brien*, 391 U.S. 367 (1968). Having determined that A3371 regulates neither speech nor expressive conduct, the District Court rejected Plaintiffs’ free speech challenge. The District Court also concluded that A3371 is not unconstitutionally vague or overbroad. The District Court rejected Plaintiffs’ free exercise claim. It was not convinced by Plaintiffs’ arguments that A3371 engaged in impermissible gerrymandering, and concluded instead that A3371 was a neutral law of general applicability subject only to rational basis review. The District Court then held that A3371 is rationally related to New Jersey’s legitimate interest in protecting its minors from harm and, accordingly, granted Defendants’ motions for summary judgment on Plaintiffs’ free exercise claim. This timely appeal followed.

III.

We first turn to the issue of whether A3371, as applied to the SOCE counseling Plaintiffs seek to provide, violates Plaintiffs' First Amendment right to free speech. The District Court held that it does not, reasoning that SOCE counseling is "conduct" that receives no protection under the First Amendment. We disagree, and hold that the verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment. Because Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, however, this level of protection is diminished. Accordingly, A3371 survives Plaintiffs' free speech challenge if it directly advances the State's substantial interest in protecting its citizens from harmful or ineffective professional practices and is not more extensive than necessary to serve that interest. We hold that A3371 meets these requirements.

A.

The parties agree that modern-day SOCE therapy, and that practiced by Plaintiffs in this case, is "talk therapy" that is administered wholly through verbal communication. Though verbal communication is the quintessential form of "speech" as that term is commonly understood, Defendants argue that these particular communications are "conduct" and not "speech" for purposes of the First Amendment because they are merely the "tool" employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become "conduct" when they are used as a vehicle for mental health treatment.

We hold that these communications are "speech" for purposes of the First Amendment. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as "conduct" based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705 (2010). In that case, plaintiffs claimed that a federal statute prohibiting the provision of "material support" to designated terrorist organizations violated their free speech rights by preventing them from providing legal training and advice to the *Partiya Karkeran Kurdistan* ("PKK") and the *Liberation Tigers of Tamil Eelam* ("LTTE"). Defendants responded that the "material support" statute should not be subjected to strict scrutiny because it is directed toward conduct and not speech.

The Supreme Court, however, expressly rejected the argument that "the only thing actually at issue in [the] litigation [was] conduct." It concluded that while the material support statute ordinarily banned conduct, the activity it prohibited in the particular case before it—the provision of legal training and advice—was speech. It reached this conclusion based on the straightforward observation that plaintiffs' proposed activity consisted of "communicating a message." In concluding further that this statute regulated speech on the basis of content, the Court's reasoning was again simple and intuitive: "Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say." Notably, what the Supreme Court did not do was reclassify this communication as "conduct" based on the nature or function of what was communicated.

Given that the Supreme Court had no difficulty characterizing legal counseling as "speech," we

see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are “conduct.” . . .

In reaching a contrary conclusion, the District Court relied heavily on the Ninth Circuit’s recent decision in *Pickup*. . . . The Ninth Circuit concluded that “SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors” and, accordingly, rejected the plaintiffs’ free speech claim. The Ninth Circuit’s denial of a petition for rehearing en banc drew a spirited dissent from Judge O’Scannlain. Joined by two other Ninth Circuit judges, he criticized the *Pickup* majority for merely “labeling” disfavored speech as “conduct” and thereby “insulat[ing] [SB 1172] from First Amendment scrutiny.” Judge O’Scannlain further explained: The panel provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly “speech,” on the one hand, and those that are, on the other hand, somehow “treatment” or “conduct”? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.

Judge O’Scannlain’s dissent also relied heavily upon Humanitarian Law Project. Judge O’Scannlain argued that Humanitarian Law Project “flatly refused to countenance the government’s purported distinction between ‘conduct’ and ‘speech’ for constitutional purposes when the activity at issue consisted of talking and writing.” He explained that Humanitarian Law Project stood for the proposition that “the government’s ipse dixit cannot transform ‘speech’ into ‘conduct’ that it may more freely regulate.”

While *Pickup* acknowledged that SB 1172 may have at least an “incidental effect” on speech and subjected the statute to rational basis review, here the District Court went one step further when it concluded that SOCE counseling is pure, non-expressive conduct that falls wholly outside the protection of the First Amendment. The District Court’s primary rationale for this conclusion was that “the core characteristic of counseling is not that it may be carried out through talking, but rather that the counselor applies methods and procedures in a therapeutic manner.” The District Court derived this reasoning in part from *Pickup*, in which the Ninth Circuit observed that the “key component of psychoanalysis is the treatment of emotional suffering and depression, not speech.” On this basis, the District Court concluded that “the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct.”

As we have explained, the argument that verbal communications become “conduct” when they are used to deliver professional services was rejected by Humanitarian Law Project. Further, the enterprise of labeling certain verbal or written communications “speech” and others “conduct” is unprincipled and susceptible to manipulation. Notably, the *Pickup* majority, in the course of establishing a “continuum” of protection for professional speech, never explained exactly how a court was to determine whether a statute regulated “speech” or “conduct.” And the District Court’s analysis fares no better; even a cursory inspection of the line it establishes between utterances that “communicate information or a particular viewpoint” and those that seek “to apply methods, practices, and procedures” reveals the illusory nature of such a dichotomy.

For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not “conduct” merely because it seeks to apply “principles” the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become “conduct” when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into “conduct.” As another example, a law student who tries to convince her friend to change his political orientation is assuredly “speaking” for purposes of the First Amendment, even if she uses particular rhetorical “methods” in the process. To classify some communications as “speech” and others as “conduct” is to engage in nothing more than a “labeling game.”

Lastly, the District Court’s classification of counseling as “conduct” was largely motivated by its reluctance to imbue certain professions—i.e., clinical psychology and psychiatry—with “special First Amendment protection merely because they use the spoken word as therapy.” According to the District Court, the “fundamental problem” with characterizing SOCE counseling as “speech” is that “it would mean that any regulation of professional counseling necessarily implicates fundamental First Amendment speech rights.” This result, reasoned the District Court, would “run[] counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.”

As we will explain, the District Court’s concern is not without merit, but it speaks to whether SOCE counseling falls within a lesser protected or unprotected category of speech—not whether these verbal communications are somehow “conduct.” Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment. Certain categories of speech receive lesser protection or even no protection at all. But these categories [commercial advertising; obscenity] are deeply rooted in history, and the Supreme Court has repeatedly cautioned against exercising “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” *United States v. Alvarez*, 132 S.Ct. 2537 (2012). By labeling certain communications as “conduct,” thereby assuring that they receive no First Amendment protection at all, the District Court has effectively done just that.

Thus, we conclude that the verbal communications that occur during SOCE counseling are not “conduct,” but rather “speech” for purposes of the First Amendment. We now turn to the issue of whether such speech falls within a historically delineated category of lesser protected or unprotected expression.

B.

The District Court’s focus on whether SOCE counseling is “speech” or “conduct” obscured the important constitutional inquiry at the heart of this case: the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession. In addressing this question, we first turn to whether such speech is fully protected by the First Amendment. We conclude that it is not.

The authority of the States to regulate the practice of certain professions is deeply rooted in our nation's jurisprudence. Over 100 years ago, the Supreme Court deemed it "too well settled to require discussion" that "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health." *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910). See also *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."). The Court has recognized that States have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). See also *Ohrlik*, 436 U.S. at 460 ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."). The exercise of this authority is necessary to "shield[] the public against the untrustworthy, the incompetent, or the irresponsible." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

When a professional regulation restricts what a professional can and cannot say, however, it creates a "collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment." *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result). Justice Jackson first explored this area of "two well-established, but at times overlapping, constitutional principles" in *Thomas* 323 U.S. at 544–48 (1945) (Jackson, J., concurring). There, he explained:

A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor.... Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

Id. at 544–45. Ultimately, Justice Jackson concluded that the speech at issue—which encouraged a large group of Texas workers to join a specific labor union—"fell] in the category of a public speech, rather than that of practicing a vocation as solicitor" and was therefore fully protected by the First Amendment.

Justice White expounded upon Justice Jackson's analysis in *Lowe*. He and two other justices agreed that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech" but also recognized that "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press." 472 U.S. at 228, 230 (White, J., concurring in the result). Building on Justice Jackson's concurrence, Justice White defined the contours of First Amendment protection in the realm of professional speech:

"One who takes the affairs of a client personally in hand and purports to exercise

judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession.... Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press."

The Supreme Court addressed the issue of professional speech most recently in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion). Though the bulk of the plurality's opinion was devoted to a substantive due process claim, it addressed the plaintiffs' First Amendment claim briefly in the following paragraph:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The Ninth Circuit also embraced the idea of professional speech in *Pickup*. Although the District Court focused primarily on *Pickup*'s discussion of whether SOCE counseling is "speech" or "conduct," the Ninth Circuit also relied heavily on the constitutional principle that a licensed professional's speech is not afforded the full scope of First Amendment protection when it occurs as part of the practice of a profession. In recognizing a "continuum" of First Amendment protection for licensed professionals, *Pickup* relied heavily on Justice White's concurrence in *Lowe* and the plurality opinion in *Casey*.

Most recently, the Eleventh Circuit also recognized that professional speech is not fully protected under the First Amendment. *Wollschlaeger*, 760 F.3d 1195. While the Eleventh Circuit would afford "speech to the public by attorneys on public issues" with "the strongest protection our Constitution has to offer," it held that the full scope of First Amendment protection did not apply to a physician speaking "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Wollschlaeger* explained that "the key to distinguishing between occupational regulation and abridgment of First Amendment liberties is in finding a personal nexus between professional and client."

We find the reasoning in these cases to be informative. Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. Indeed, the value of the professional's services stems largely from her ability to apply this specialized knowledge to a client's individual circumstances. Thus, clients ordinarily

have no choice but to place their trust in these professionals, and, by extension, in the State that licenses them. It is the State's imprimatur and the regulatory oversight that accompanies it that provide clients with the confidence they require to put their health or their livelihood in the hands of those who utilize knowledge and methods with which the clients ordinarily have little or no familiarity.

This regulatory authority is particularly important when applied to professions related to mental and physical health. The practice of most professions, mental health professions in particular, will inevitably involve communication between the professional and her client—this is, of course, how professionals and clients interact. To handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm.

Thus, we conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession. We believe a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment. By contrast, when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment.

With these principles in mind, it is clear to us that speech occurring as part of SOCE counseling is professional speech. SOCE counselors provide specialized services to individual clients in the form of psychological practices and procedures designed to effect a change in the clients' thought patterns and behaviors. Importantly, A3371 does not prevent these counselors from engaging in a public dialogue on homosexuality or sexual orientation change—it prohibits only a professional practice that is, in this instance, carried out through verbal communication. While the function of this speech does not render it “conduct” that is wholly outside the scope of the First Amendment, it does place it within a recognized category of speech that is not entitled to the full protection of the First Amendment.

C.

That we have classified Plaintiffs' speech as professional speech does not end our inquiry. While the cases above make clear that such speech is not fully protected under the First Amendment, the question remains whether this category receives some lesser degree of protection or no protection at all. We hold that professional speech receives diminished protection, and, accordingly, that prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest.

In explaining why this level of protection is appropriate, we find it helpful to compare professional speech to commercial speech. For over 35 years, the Supreme Court has recognized that commercial speech—truthful, non-misleading speech that proposes a legal economic transaction—enjoys diminished protection under the First Amendment. Though such speech was at one time considered outside the scope of the First Amendment altogether, the Supreme Court reversed course in *Bigelow v. Virginia*, 421 U.S. 809, 818–26 (1975), and recognized that

commercial speech enjoys some degree of protection. The Court has since explained that commercial speech has value under the First Amendment because it facilitates the “free flow of commercial information,” in which both the intended recipients and society at large have a strong interest. In fact, the Court has recognized that a consumer’s interest in this information “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”

Despite recognizing the value of commercial speech, the Court has “not discarded the ‘common-sense’ distinction” between commercial speech and other areas of protected expression. Instead, the Court has repeatedly emphasized that commercial speech enjoys only diminished protection because it “occurs in an area traditionally subject to government regulation.” Because commercial speech is “linked inextricably with the commercial arrangement it proposes, ... the State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.” Accordingly, a prohibition of commercial speech is permissible when it “directly advances” a “substantial” government interest and is “not more extensive than is necessary to serve that interest.” The Supreme Court later dubbed this standard of review “intermediate scrutiny.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24(1995). We believe that commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category.

In so holding, we emphasize that a regulation of professional speech is spared from more demanding scrutiny only when the regulation was, as here, enacted pursuant to the State’s interest in protecting its citizens from ineffective or harmful professional services. Because the State’s regulatory authority over licensed professionals stems from its duty to protect the clients of these professionals, a state law may be subject to strict scrutiny if designed to advance an interest unrelated to client protection. We recognize that our sister circuits have concluded that regulations of professional speech are subject to a more deferential standard of review or, possibly, no review at all. *Pickup*, for example, cited *Casey*, 505 U.S. at 884, 967–68(plurality opinion), as support for its decision to apply rational basis review to a similar statute. To the extent *Casey* suggested rational basis review, we do not believe such a standard governs here. While the plurality opinion noted in passing that speech, when part of the practice of medicine, is “subject to reasonable licensing and regulation by the State,” the regulation it addressed fell within a special category of laws that compel disclosure of truthful factual information. In the context of commercial speech, the Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny. Thus, to the extent *Casey* applied rational basis review, this facet of the opinion is inapplicable to the present case because the law at issue is a prohibition of speech, not a compulsion of truthful factual information.

Additionally, we have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech. Without sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation. This possibility is particularly disturbing when the suppressed ideas concern specialized knowledge that is unlikely to reach the general public through channels other than the professional-client relationship. Intermediate scrutiny is necessary to ensure that State legislatures are regulating professional speech to prohibit the provision of harmful or

ineffective professional services, not to inhibit politically-disfavored messages.

Lastly, we reject Plaintiffs’ argument that A3371 should be subject to strict scrutiny because it discriminates on the basis of content and viewpoint. First, although we agree with Plaintiffs that A3371 discriminates on the basis of content, it does so in a way that does not trigger strict scrutiny. Ordinarily, content-based regulations are highly disfavored and subjected to strict scrutiny. And this is generally true even when the law in question regulates unprotected or lesser protected speech. Nonetheless, within these unprotected or lesser protected categories of speech, the Supreme Court has held that a statute does not trigger strict scrutiny “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”

The New Jersey legislature has targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients. Thus, the reason professional speech receives diminished protection under the First Amendment—i.e., because of the State’s longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted SOCE counseling with A3371. Therefore, we conclude that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner.

Nor do we agree that A3371 triggers strict scrutiny because it discriminates on the basis of viewpoint. Plaintiffs argue that A3371 prohibits them from expressing the viewpoint “that [same sex attractions] can be reduced or eliminated to the benefit of the client.” That is a misreading of the statute. A3371 allows Plaintiffs to express this viewpoint, in the form of their personal opinion, to anyone they please, including their minor clients. What A3371 prevents Plaintiffs from doing is expressing this viewpoint in a very specific way—by actually rendering the professional services that they believe to be effective and beneficial. Arguably, any time a professional engages in a particular professional practice she is implicitly communicating the viewpoint that such practice is effective and beneficial. The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First Amendment is concerned. If it were, State legislatures could never ban a particular professional practice without triggering strict scrutiny. Thus, a statute banning licensed psychotherapists from administering treatments based on phrenology would be subject to strict scrutiny because it prevents these therapists from expressing their belief in phrenology by putting it into practice. Such a rule would unduly undermine the State’s authority to regulate the practice of licensed professions.

Accordingly, we believe intermediate scrutiny is the applicable standard of review in this case. We must uphold A3371 if it “directly advances” the government’s interest in protecting clients from ineffective and/or harmful professional services, and is “not more extensive than necessary to serve that interest.”

D.

Our analysis begins with an evaluation of New Jersey’s interest in the passage of A3371. As we have previously explained, the State’s interest in protecting its citizens from harmful professional

practices is unquestionably substantial. Here, New Jersey's stated interest is even stronger because A3371 seeks to protect minor clients—a population that is especially vulnerable to such practices.

Our next task, then, is to determine whether A3371 directly advances this interest by prohibiting a professional practice that poses serious health risks to minors. To survive heightened scrutiny, the State must establish that the harms it believes SOCE counseling presents are “real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

We conclude that New Jersey has satisfied this burden. The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric Association, and the Pan American Health Organization have warned of the “great” or “serious” health risks accompanying SOCE counseling, including depression, anxiety, self-destructive behavior, and suicidality. N.J. Stat. Ann. § 45:1–54 (collecting additional position statements and articles from the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatry warning of the health risks posed by SOCE counseling). Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective.

We conclude that this evidence is substantial. Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject. Such evidence is a far cry from the “mere speculation or conjecture” our cases have held to be insufficient.

Plaintiffs do not dispute the views of the professional community at large concerning the efficacy and potential harmfulness of SOCE counseling. Instead, they fault the legislature for passing A3371 without first obtaining conclusive empirical evidence regarding the effect of SOCE counseling on minors. To be sure, the A PA Report suggests that the bulk of empirical evidence regarding the efficacy or harmfulness of SOCE counseling currently falls short of the demanding standards imposed by the scientific community. Yet a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm. This is particularly true when a legislature's empirical judgment is highly plausible, as we conclude New Jersey's judgment is in this case. It is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition. Further, if SOCE counseling is ineffective—which, as we have explained, is supported by substantial evidence—it would not be unreasonable for a legislative body to conclude that a minor would blame herself if her counselor's efforts failed. Given the substantial evidence with which New Jersey was presented, we cannot say that these fears are unreasonable. We therefore conclude that A3371 “directly advances” New Jersey's stated interest in protecting minor citizens from harmful professional practices.

Lastly, we must determine whether A3371 is more extensive than necessary to protect this

interest. To survive this prong of intermediate scrutiny, New Jersey “is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest.” Thus, New Jersey must establish “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served”).

Plaintiffs argue that A3371’s ban is overly burdensome, and that New Jersey’s objectives could be accomplished in a less restrictive manner via a requirement that minor clients give their informed consent before undergoing SOCE counseling. We are not convinced, however, that an informed consent requirement would adequately serve New Jersey’s interests. Minors constitute an “especially vulnerable population,” and may feel pressured to receive SOCE counseling by their families and their communities despite their fear of being harmed. Thus, even if SOCE counseling were helpful in a small minority of cases—and the legislature, based on the body of evidence before it, was entitled to reach a contrary conclusion—an informed consent requirement could not adequately ensure that only those minors that could benefit would agree to move forward. As Plaintiffs have offered no other suggestion as to how the New Jersey legislature could achieve its interests in a less restrictive manner, we conclude that A3371 is sufficiently tailored to survive intermediate scrutiny. Accordingly, we conclude that A3371 is a permissible prohibition of professional speech.

F.

Plaintiffs argue that A3371 is unconstitutional on its face because the term “sexual orientation change efforts” is impermissibly vague.²³ We disagree. Under A3371, this term is defined as: [T]he practice of seeking to change a person’s sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:

- (1) provides acceptance, support, and understanding of a person or facilitates a person’s coping, social support, and identity exploration and development, including orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
- (2) does not seek to change sexual orientation.

While this statutory definition may not provide “perfect clarity,” its list of illustrative examples provides boundaries that are sufficiently clear to pass constitutional muster. Further, counseling designed to change a client’s sexual orientation is recognized as a discrete practice within the profession. Such counseling is sometimes referred to as “reparative” or “conversion” therapy and has been the specific target of public statements by recognized professional organizations.

Plaintiffs themselves claim familiarity with this form of counseling and acknowledge that many counselors “specialize” in such practices. To those in the field of professional counseling, the meaning of this term is sufficiently definite “in the vast majority of its intended applications.” Thus, we reject Plaintiffs’ argument that A3371 is unconstitutionally vague.

As to overbreadth, a statute that impinges upon First Amendment freedoms is impermissibly overbroad if “a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.” Plaintiffs’ only argument on this front is that A3371 prohibits SOCE counseling even when, in Plaintiffs’ view, such counseling would be especially beneficial. This argument, however, is nothing more than a disagreement with New Jersey’s empirical judgments regarding the effect of SOCE counseling on minors. As we have already concluded, New Jersey’s reasons for banning SOCE counseling were sufficiently supported by the legislative record. Thus, we hold that A3371 is not unconstitutionally overbroad.

IV.

Plaintiffs’ second constitutional claim is that A3371 violates their First Amendment right to the free exercise of religion. For the reasons that follow, we conclude that this claim also lacks merit. Under the Religion Clauses of the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The right to freely exercise one’s religion, however, is not absolute. If a law is “neutral” and “generally applicable,” it will withstand a free exercise challenge so long as it is “rationally related to a legitimate government objective.” This is so even if the law “has the incidental effect of burdening a particular religious practice” or group.

The issue before us, then, is whether A3371 is “neutral” and “generally applicable.” “A law is ‘neutral’ if it does not target religiously motivated conduct either on its face or as applied in practice.” “A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.”

As a preliminary matter, A3371 makes no explicit reference to any religion or religious beliefs, and is therefore neutral on its face. Nevertheless, Plaintiffs argue that A3371 covertly targets their religion by prohibiting counseling that is generally religious in nature while permitting other forms of counseling that are equally harmful to minors. Specifically, Plaintiffs contend that A3371 operates as an impermissible “religious gerrymander” because it provides “individualized exemptions” for counseling:

- (1) for minors seeking to transition from one gender to another,
- (2) for minors struggling with or confused about heterosexual attractions, behaviors, or identity,
- (3) that facilitates exploration and development of same-sex attractions, behaviors, or identity,
- (4) for individuals over the age of 18, and
- (5) provided by unlicensed counselors.

None of these five “exemptions,” however, demonstrate that A3371 covertly targets religiously motivated conduct. Plaintiffs’ first and third “exemptions” are not compelling because nothing in the record suggests that these forms of counseling are equally harmful to minors. Plaintiffs’

second “exemption,” which implies that A3371 would permit heterosexual-to-homosexual change efforts, misinterprets the statute; A3371 prohibits all “sexual orientation change efforts” regardless of the direction of the desired change. Lastly, Plaintiffs’ fourth and fifth “exemptions” are simply irrelevant because they have nothing to do with religion. Plaintiffs fail to explain how A3371’s focus on the professional status of the counselor or the age of the client belies a concealed intention to suppress a particular religious belief. Accordingly, we conclude that A3371 is neutral and generally applicable, and therefore triggers only rational basis review. .

NOTE and COMMENT

1. Have the courts correctly characterized the 1st Amendment issues at stake in the cases challenging statutory bans on the performance of sexual orientation change efforts (SOCE)? Plaintiffs are claiming that performing such therapy is a form of expressive conduct that happens to employ speech. Are the courts correct in suggesting that the expressive component in this activity is so slight that the state can easily trump it by exercising a paternalistic judgment that the therapy in question is harmful to minors when, as the court finds, the evidence as to any such harm is contradictory and unsettled?
2. The characterization of SOCE as merely “talk therapy” was exposed as inaccurate, at least as practiced by some therapists (if not the plaintiffs who were challenging the state law in New Jersey), in parallel state court litigation in New Jersey brought by former patients and their parents against an organization that arranged for such therapy in the context of the Orthodox Jewish community. *Ferguson v. JONAH*, 2015 N.J. Super. Unpub. LEXIS 236 (N.J. Super. Ct., Hudson Co., Feb. 5, 2015) (granting partial summary judgment to plaintiffs on issue of whether homosexuality is an illness that can be cured, leaving to the jury the question whether JONAH’s assertions defrauded the plaintiffs). The evidence submitted by the plaintiffs on the summary judgment motion, and expanded upon at trial, showed that SOCE as practiced by the defendants went beyond speech to conduct, including nude encounters, massages, beating a mattress with a tennis racket as symbolic of destroying a mother’s purported effect on the sexuality of her son, and snapping a rubber band around their wrists to suppress thoughts of same-sex activity. A jury concluded in June 2015 that the defendant organization had violated New Jersey’s law against consumer fraud by marketing itself as providing treatment that could alter a person’s sexual orientation through these methods.
3. The 3rd Circuit’s position was reaffirmed in *Doe v. Governor of New Jersey*, 783 F.3d 150 (2015), which rejected a separate constitutional challenge to the SOCE prohibition brought on behalf of young people seeking the therapy. The state, said the court, has a legitimate interest in denying minors a “therapy” that would be harmful to them.

E. Immigration and Asylum (page 751)

Page 751 – Substitute the following for the text at the beginning of Section E(1), through page 752.

Under what circumstances are same-sex partners of U.S. citizens recognized as immediate family members for purposes of the immigration law? Legal spouses and other immediate family members have a preferred status under the law for purposes of being allowed to stay in the United States and eventually to become citizens and a shortened time to apply for citizenship under a general policy encouraging unification of families. Under Section 3 of the Defense of Marriage Act, the federal government was prohibited from recognizing married same-sex couples for purposes of these policies. After the Supreme Court declared Section 3 of DOMA unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that impediment was removed, but it was up to the administrative structures within the Department of Homeland Security and the Justice Department to determine how to proceed, as only thirteen states and the District of Columbia would then issue marriage licenses to same-sex couples, and most of the remaining 37 states had constitutional amendments or statutes providing that they would not recognize the validity of same-sex marriages celebrated elsewhere.

The day after the Windsor decision, U.S. Secretary of Homeland Security Janet Napolitano announced that her department would determine whether a couple was married by reference to the law of the place in which their marriage was celebrated, regardless of their place of residence at the time they applied for recognition. A few weeks later, the Board of Immigration Appeals, an agency within the Department of Justice, issued a ruling on the issue adopting this view, *Matter of Oleg B. ZELENIAK*, 26 I&N Dec. 158 (BIA 2013) (July 17, 2013). Between July 2013 and June 2015, legislative and judicial action brought the number of states issuing marriage licenses to same-sex couples and recognizing same-sex marriages up to 37. On June 26, 2015, the Supreme Court rendered the distinction between the place of celebration and place of recognition rules irrelevant by holding in *Obergefell v. Hodges* that all states were required to treat same-sex couples the same as different-sex couples when it came to issuing marriage licenses and recognizing marriages.

2. Marriages contracted in non-U.S. jurisdictions are usually recognized by United States officials on the basis of the doctrine of “comity” discussed in Chapter 4. Numerous other countries have adopted laws opening up marriage to same-sex couples, beginning with the Netherlands at the beginning of the 21st century. Those laws tend to have similar qualifications to the marriage equality laws in effect in the United States, so it is likely that such same-sex marriages will be recognized for U.S. immigration purposes. As of the summer of 2015, same-sex marriages were available in the two major countries sharing borders with the United States, Canada and Mexico, as well as several countries in South America, a substantial portion of Western Europe, South Africa, and New Zealand. Some other countries provide registered partnerships or other forms of legal recognition for same-sex couples. To the extent these are not marriages, they would probably not be recognized by U.S. immigration officials.

3. Domestic partners and civil unions. As noted in Chapter 4, several U.S. states have provided domestic partnerships or civil unions for same-sex couples, but not marriage, prior to the *Obergefell* decision. In most of those states, these alternative family forms were supposed to provide same-sex couples with a status that provided virtually all the state law rights that are provided to married couples. They did not, however, purport to confer any federal rights or marital status for purposes of federal law. In the immediate aftermath of the *Windsor* decision, it appeared that civil unions and domestic partnerships, whether formed in the U.S. or in other

countries that provide similar structures for same-sex families, would not be recognized for purposes of U.S. immigration spousal rights. However, under practices adopted by the Obama Administration prior to the *Windsor* decision, such relationships might be taken into account in limited circumstances. Consider the following policy guidance adopted by the Department of Homeland Security in 2011:

Policy Number: 10075.1 Office of the Director
FEA Number: 306•112•0026
U.S. Department of Homeland Security 500 12th Street, SW Washington, D.C. 20536
U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered. . .

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the

ordinary course of enforcement

1. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case. In the civil immigration enforcement context, the term “prosecutorial discretion” applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director² and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency, of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or

close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative; ;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and

- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities. That said, there are certain classes of individuals that warrant particular care. ... There are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence; trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing communication with represented individuals and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

* * * * *

During the summer and fall of 2011, Homeland Security Secretary Janet Napolitano and White House spokespersons indicated that the intent of this guidance was to authorize ICE and other Homeland Security officials to exercise discretion to avoid breaking up bi-national LGBT long-term couples (including, but not limited to, those who had formed domestic partnerships, civil unions, or same-sex marriages under state law), but that such discretion was to be exercised in individual cases based on all the facts. Thus, this was not by itself a categorical policy of recognizing all such relationships for purposes of withholding deportation. Discretion was being exercised in some individual cases to allow foreign nationals without criminal records to remain in the United States based on their same-sex relationships with U.S. citizens, but not consistently so. These policies would undoubtedly be affected were Congress to take final action on a comprehensive immigration reform measure, but as of July 2015 it was doubtful that this would happen. Meanwhile, the new availability of same-sex marriage nationwide after June 26, 2015, opened up the possibility that same-sex couples in relationships could take advantage of the freedom to marry and seek recognition of those marriages under U.S. immigration law.

Page 774 – In place of casebook pages 774-782, use the following text and case:

Once immigration authorities and the courts had generally accepted the proposition that LGBT people should be considered a “particular social group” for purposes of claims for asylum, the focus of litigation turned towards the circumstances that would qualify for treating an individual as a refugee entitled to remain in the United States. The following recent decision by the U.S. Court of Appeals for the 9th Circuit discusses this issue in some detail, in the context of an asylum petition of a gay man from Russia who entered the U.S. lawfully under a student visa and

then was threatened with deportation when he dropped out of school but did not return voluntarily to Russia, instead seeking asylum in the United States. The Supreme Court has yet to address these issues in the context of a gay asylum claim, and has generally left these issues to be developed by the federal courts of appeals in the context of judicial review of decisions by the Board of Immigration Appeals, an administrative agency. Many (but not all) gay asylum applicants seek and obtain permission to proceed anonymously as “John Doe” or “Jane Roe,” based on concern for their safety if they were to be deported to their home country.

DOE v. HOLDER
736 F.3d 871 (2013)
U.S. Court of Appeals, 9th Circuit

ALARCÓN, Senior Circuit Judge:

John Doe has petitioned for a review by this Court of the Board of Immigration Appeals’ (“BIA”) dismissal of his appeal from the denial of his applications for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”). He contends that he has a well-founded fear of future persecution if he is removed to Russia because he is a homosexual. An immigration judge (“IJ”) found, and the BIA did not disagree, that Doe had been subjected to past persecution in Russia by nongovernmental forces because he is a homosexual. The IJ concluded, however, that Doe failed to carry his burden of demonstrating that the Russian government was unable or unwilling to control his nongovernmental persecutors.

The BIA dismissed Doe’s appeal from the IJ’s decision based on the BIA’s conclusion that Doe “failed to demonstrate that the government was unable or unwilling to control the nongovernmental actors who attacked the Respondent in Russia” or prove that “there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government.”

We grant the petition in this matter because we conclude that Doe met his burden of presenting evidence that the Russian government was unable or unwilling to control the nongovernmental actors who persecuted him because he is a homosexual. We also hold that in order to obtain the relief he requested, Doe was not required to demonstrate that the Russian government sponsored or condoned the persecution of homosexuals or was unwilling for that reason to control persecution of Doe. We remand with directions that the BIA determine whether the Government can meet by a preponderance of the evidence its burden of demonstrating either that changed circumstances in Russia overcome the presumption that Doe has a well-founded fear of future persecution based on the past persecution he was subjected to because he is a homosexual or that Doe reasonably can relocate to an area of safety within Russia.

I
A

Doe is a Russian citizen who was born in Ulan-Ude, the capital of the Republic of Buryatia, and is ethnically a Buryat. Doe identifies his sexual orientation as homosexual or bisexual.

After high school, Doe attended East Siberian Technological University in Ulan-Ude for two years. During his first year, Doe joined a club for homosexuals, called Kletka. Members of Kletka socialized and supported each other when they had problems. In April 2002, when he was eighteen years old, some of Doe's classmates from the university saw him socializing with members of Kletka and surmised that Doe was a homosexual. When Doe returned to school the following Monday, almost "everybody [he] knew" — classmates, persons from Doe's wrestling club, students from his former school — began mocking him.

In his testimony, Doe described two violent attacks. The first occurred in September 2002 while he was walking in a park with his partner, Mark. A group of five persons, some of whom were Doe's classmates, approached Doe and Mark and asked what they were doing. Doe at first remained silent or gave short answers. The group then became enraged, pushing Mark and knocking Doe to the ground where they beat and kicked him. Doe attempted to defend himself, but he could not. His attackers' assaults injured his eye and bruised his body, but he was able to go home unassisted.

Following the attack, Doe went to the police station and filed "an application for a complaint" describing the attack and naming his assailants. The police officer on duty told Doe that he did not want to receive the report and that Doe's injuries were "just bruises, nothing." The officer then discussed Doe's complaint with his supervisor and told Doe "to wait for the boss." When the officer returned, he told Doe that "maybe [he could] come back later" and that his "case is not so serious." The officer further commented that Doe was a man and asked why he had not defended himself. Doe testified that the police were "really busy and physically [could] not exam[in]e [his] report." Doe eventually left, because "[t]hey simply clearly let [him] know that they d[id]n't want to consider it at all."

After the first incident, Doe continued to suffer harassment and was pushed and hit "[a]lmost constantly." During a second attack in April 2003, Doe was beaten severely while he was at a restaurant with Mark. Between five and ten persons, three of whom Doe knew, entered the restaurant and sat near Doe and Mark. A man named Timur spoke to him in a kind tone at first, but then began to speak more rudely. Timur then hugged Doe, stuck his tongue out at him, and asked Doe, "[D]o you like this? Do you like this?" Timur then "started to say dirty words." Doe pushed Timur away. Timur hit Doe, and the group joined in, beating both Doe and Mark. Doe was beaten until he lost consciousness. He regained consciousness in the ambulance on the way to the hospital. Doe suffered internal brain hemorrhaging and a concussion as a result of the attack. He was hospitalized for three weeks.

While Doe was in the hospital, his father reported the attack on his son to the police. Law enforcement officers interviewed Doe at the hospital. Doe told the police officers what happened and provided the names of some of his attackers. Doe does not believe that police took any further action aside from conducting this initial interview, because his attackers "were just walking free."

Doe introduced into evidence a "Confirmation Paper" he received from law enforcement officers. The Confirmation Paper states that his father's application for the prosecution of Doe's persecutors "was rejected on the basis of Criminal Code of the Russian Federation, Regulation

24 Chapter 1 Paragraph 2.” The Confirmation Paper did not set forth the text of the regulation. No evidence was presented to the BIA by Doe or the Government regarding the contents of Regulation 24.

After Doe was released from the hospital, he saw some of his attackers. At first, they ignored him, but they soon began harassing him again.

In July 2003, Doe moved to Moscow, where he lived for approximately four months, until November 2003. Doe testified that while he was in Moscow, he was discriminated against based on his ethnicity. Doe testified that persons he encountered said things like, “[Y]ou narrow slanted eye person.” He could not find work. In addition, police stopped Doe on several occasions to check his registration, but did not stop people near Doe who were ethnically Russian. On one occasion, a police officer detained Doe for several hours because the officer suspected that Doe’s registration documents were false. The officer eventually released Doe after concluding that his documents were genuine. Doe believed the police stopped him because he is not ethnically Russian and he does not “look like the typical Russian person.”

Doe moved from Moscow to the United States on November 11, 2003, to attend American Language Communications Center in New York on a nonimmigrant student visa.

On February 14, 2005, the Department of Homeland Security filed a notice to appear, which initiated removal proceedings against Doe because he violated the conditions of his nonimmigrant status when he stopped attending school. Doe admitted the factual allegations at the notice to appear hearing and conceded his removability as charged.

Doe applied for asylum, under § 208 of the Immigration and Nationality Act (“INA”), and withholding of removal, under INA § 241(b)(3). Doe also sought relief under the Convention Against Torture. Alternatively, Doe requested voluntary departure. Doe argued he was eligible for asylum because he suffered past persecution on account of his membership in a particular social group, specifically, “gay people, or homosexuals,” and had a well-founded fear of facing future persecution if returned to Russia. He also argued that he could not reasonably relocate to Moscow, because of ethnic discrimination, including harassment and inability to find work, that he faced there. The IJ found that Doe “testified credibly and his application was credible.”

B

On October 29, 2007, the IJ denied Doe’s application for asylum, withholding of removal, and relief under CAT. The IJ concluded that Doe suffered physical injury and persecution in April 2003 on account of a “cognizable particular social group consisting of homosexuals.” The IJ found, however, that “the record does not support the conclusion that the government was unable or unwilling to protect the respondent.”

In finding that Doe failed to prove that the Russian government was unable or unwilling to protect him, the IJ stated that “the comments of the officer at the time of the first incident do indeed reflect societal prejudices.” The IJ also commented, however, that while he did “not condone the police reaction to the first incident,” the two incidents were “best considered

together.” The IJ noted that the police officers responded to Doe’s father’s report regarding the second violent attack by coming to the hospital to interview Doe. The IJ observed that the police rejected that report on the basis of a specific provision of Russian law, but that the record did not contain evidence of what the cited code section said. The IJ stated, “Without more the Court is unable to conclude that the police decision was based on an improper motive,” because the Russian police had taken “affirmative action in response to the complaint and appeared not to have rejected the complaint out of hand.” As a result, the IJ held, “[T]he record does not support the conclusion that the government was unable or unwilling to protect the respondent.”

The IJ also determined that Doe “was apparently able to relocate to Moscow.” While noting that Moscow was “inhospitable in certain ways” to ethnic minorities, the IJ reasoned that Doe should be able to relocate to Moscow because he “had no serious problems during his time there.” The IJ stated that he had taken notice of the “background evidence submitted regarding the difficulties that gay people have in Russia,” but determined that Doe’s experiences in Moscow “demonstrate that it is possible for gay people to live there without having these things happen to them.”

The IJ further concluded that, because Doe did not meet the lower burden of proof that is applicable to an application for asylum, he failed to meet the higher burden required for withholding of removal. The IJ also denied Doe’s relief under CAT, concluding that he failed to prove that it was “more likely than not” that he would be tortured if he was removed to Russia. Finally, the IJ granted Doe’s application for voluntary departure.

C

Doe filed a notice of appeal with the BIA on November 23, 2007. In his appeal, he contended that the IJ erred in concluding that the police were [not] unable or unwilling to protect him, and in finding that he could relocate to Moscow in light of his homosexuality and ethnicity. The BIA agreed with the IJ that Doe “failed to establish his eligibility for asylum and withholding of removal.” The BIA held that Doe failed to prove that the Russian government was unable or unwilling to control his attackers. The BIA reasoned that Doe’s “claim is based on isolated hate crimes which, while deplorable, do not establish his eligibility for asylum or withholding of removal.” It concluded that Doe had “not shown that there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government.”

The BIA held that Doe had not demonstrated that “the police, who interviewed [him] after he was attacked in 2003, failed to conduct adequate investigations due to [his] homosexuality.” The BIA stated that “the 2003 complaint was ultimately rejected based on a specific Russian law.” It emphasized that Doe “failed to explain the Russian law cited in the certificate” and bore “the burden of establishing foreign law on which he ... relie[d].” The BIA also reasoned that Doe “did not establish that the cited law was merely a pretext for ignoring [his] complaint because of his sexual orientation.” The BIA concluded that, as a result, Doe had “failed to establish that he was persecuted in the past on account of his sexual orientation, or that he faces an objectively reasonable risk of persecution on account of the same if he returns to Russia, at the hands of individuals whom the government is unable or unwilling to control.”

The BIA further held that Doe did not demonstrate a “well-founded fear of [future] persecution

on account of his ethnicity,” because the problems Doe experienced in Moscow related to his ethnicity did not rise to the level of persecution. The BIA also concluded that the evidence in the record “of discrimination as well as isolated incidents of violence against individuals of non-Russian ethnicity does not demonstrate that the respondent faces a realistic probability of experiencing harm rising to the level of persecution, as opposed to harassment or discrimination, upon return to Russia.”

Doe timely petitioned for review of the IJ’s decision on July 13, 2009.

A

We first address the question whether the BIA erred in concluding that Doe failed to carry his burden of demonstrating that the Russian government was unable or unwilling to protect him from past persecution by nongovernmental actors. Doe seeks asylum and withholding of removal on the ground that he suffered past persecution in Russia on account of his homosexuality.

[1] Where, as here, “the BIA conducted an independent review of the record and provided its own grounds for affirming the IJ’s decision,” we review only the BIA’s opinion, except to the extent the BIA expressly adopted portions of the IJ’s decision. We review the BIA’s construction and application of the law *de novo*. “We review the BIA’s findings of fact for substantial evidence” and “grant the petition only if the evidence compels a contrary conclusion from that adopted by the BIA.” *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir.2010) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir.1995)); see 8 U.S.C. § 1252(b)(4)(B) (in reviewing an order of removal, “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary”).

B

To qualify for asylum and withholding of removal, a person who is outside the country of his or her nationality must establish that he is unable or unwilling to return to it “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). An applicant can make this showing, and be eligible for asylum, in two ways. First, the applicant can show past persecution on account of a protected ground. 8 C.F.R. § 208.13(b)(1). Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that “there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution,” or “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country.” 8 C.F.R. § 208.13(b)(1)(i) & (ii). *Deloso v. Ashcroft*, 393 F.3d 858, 863–64 (9th Cir.2004).

We have previously held that “homosexuals are a ‘particular social group,’ and therefore that homosexuality is a protected ground.” *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir.2013) (citing *Karouni v. Gonzales*, 399 F.3d 1163, 1171–72 (9th Cir.2005)).

[2] To demonstrate entitlement to asylum or withholding of removal on the basis of past persecution, an applicant must present substantial evidence of “(1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds;

and (3) is committed by the government or forces the government is either unable or unwilling to control.” *Afriyie*, 613 F.3d at 931 (internal quotation marks omitted); see *id.* at 936 (“As with asylum, to show past persecution, an applicant for withholding of removal must show that government forces have either directly persecuted him or were unable or unwilling to control private persecutors.”). The only nexus required to establish a past-persecution asylum claim is that the applicant’s persecution be “on account of” one of the statutorily enumerated grounds. See 8 U.S.C. § 1101(a)(42)(A); *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir.1997) (holding that the applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of a protected ground). In other words, the second (“on account of”) element modifies the “persecution” clause in the first element. The third element, however, independently specifies that the source of the persecution must be the government itself or persons that the government is unable or unwilling to control. Thus, where a nongovernmental actor is the source of the persecution, an applicant must present evidence (1) that the nongovernmental actor persecuted the applicant on account of a protected ground, and (2) that the government is unable or unwilling to control that nongovernmental actor.

[3] Neither this Court nor the Supreme Court has required (or implied) a direct nexus between the government’s inability or unwillingness to control nongovernmental persecutors and a statutorily-protected ground. The only nexus requirement is that the actual persecutors, whether governmental or nongovernmental, act on a protected ground. Indeed, we have held that “[i]t does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution. What matters instead is that the government ‘is unwilling or unable to control those elements of its society’ committing the acts of persecution.” *Avetova–Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir.2000) (quoting *Mgoian v. INS*, 184 F.3d 1029, 1036 (1999)).

This Court has recognized that unwillingness or inability to control persecutors is not demonstrated simply because the police ultimately were unable to solve a crime or arrest the perpetrators, where the asylum applicant failed to provide the police with sufficiently specific information to permit an investigation or an arrest. See, e.g., *Truong v. Holder*, 613 F.3d 938, 941 (9th Cir.2010) (declining to conclude that the Italian government was “complicit in or unwilling to stop” the applicants’ persecution, where the police dutifully made reports after each incident and indicated that they would investigate, but where the attackers’ identities were completely speculative); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir.2005) (holding that the applicant had not demonstrated the government was unable or unwilling to control the perpetrators where he contended that the police failed to investigate his reports, but “admitted that he did not give the police the names of any suspects because he did not know any specific names” and his wife testified “that the police investigated the complaints, but were ultimately unable to solve the crimes”).

[4] In contrast, in *Mashiri v. Ashcroft*, 383 F.3d 1112, 1115, 1121 (9th Cir.2004), we held that evidence compelled the conclusion that the government was unable or unwilling to protect the applicant where police investigated but made no arrests after the applicant’s husband was beaten and “quickly closed their investigation into the attack on [her family’s] apartment as simple theft, despite evidence that the attack was motivated by anti-foreigner hatred.” Similarly, here, Doe presented evidence that the Russian police rejected his first complaint out of hand, questioning why he did not simply defend himself, and subsequently dismissed his second complaint without

doing anything more than interviewing him at the hospital where he was being treated for his injuries. The police did so even though Doe did identify his attackers both times, and there was substantial evidence that the assaults were motivated by anti-homosexual bias.

We are persuaded, after reviewing this record, that the BIA erred in concluding that Doe failed to demonstrate that the Russian government was unable or unwilling to control the persons he identified as having persecuted him on account of his homosexuality. The Government failed to present any evidence to rebut Doe's undisputed testimony that he suffered serious assaults at the hands of individuals on account of his homosexuality or to show that the Russian government was able and willing to control nongovernmental actors who attack homosexuals.

Because the evidence demonstrated that Doe was subjected to past persecution on account of his homosexuality and that the Russian government was unable or unwilling to control his persecutors, the BIA should have presumed that Doe has a well-founded fear of future persecution. It should then have required the Government to meet its burden to show by a preponderance of the evidence that "there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" or "the applicant could avoid future persecution by relocating to another part of the applicant's country." *Deloso*, 393 F.3d at 864 (alteration omitted) (quoting 8 C.F.R. § 208.13(b)(1)(i)-(ii)). Because of these errors, we remand this matter to the BIA for further evidentiary proceedings to determine whether the Government can meet this burden.

III

The BIA addressed Doe's arguments regarding the discrimination and mistreatment that he suffered in Moscow on the basis of his ethnicity as a separate claim for asylum. This was error. Doe raised these issues to support his contention that he could not reasonably relocate to Moscow, not as a separate ground for asylum.

[5] Moreover, although the BIA and IJ found that Doe had not suffered persecution in Moscow, a different standard applies with regard to the purpose for which Doe actually raised the ethnic discrimination issue, the reasonableness of relocation. For that purpose, it is not enough for the government to establish "that applicants could escape persecution by relocating internally." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir.2003). Instead, it also "must be reasonable to expect them to do so." The applicable regulation, 8 C.F.R. § 1208.13(b)(3), sets forth a nonexhaustive list of factors that the adjudicators should consider in determining whether internal relocation is reasonable, including "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." To establish such factors, it is not necessary to establish persecution on account of a protected ground; difficulties short of persecution can suffice. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir.2005) (holding that the government had not carried its burden to show that internal relocation was reasonable where the evidence showed that the petitioner "would face significant social and cultural constraints as a gay man with AIDS in Mexico, as hostility towards and discrimination against HIV/AIDS patients is common in Mexico," and would not be able to "obtain his required

medication”); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir.2004) (finding age, inability to find work, lack of family connections and “abysmal” quality of life to weigh against a finding of reasonableness).

The BIA did not address the reasonable feasibility of relocation at all, with respect to ethnicity or sexual orientation, as it held that Doe had not suffered cognizable past persecution on any protected ground. We remand so that it may do so, leaving it to the agency to consider the evidence of ethnic discrimination and discrimination based on sexual orientation in Moscow under the standard applicable to the relocation question.

Conclusion

We GRANT the petition for review of the BIA’s decision that Doe is not entitled to asylum or withholding of removal because he failed to demonstrate that he met his burden of presenting substantial evidence that he has a well-founded fear of future persecution if he is removed to Russia. We REMAND for further proceedings regarding whether there has been a change in Russia regarding the persecution of homosexuals and whether it would be reasonable for Doe to relocate within Russia.

Page 782 – Pick up with Notes and Questions, and add to Note 5:

In *Todorovic v. U.S. Attorney General*, 621 F.3d 1318 (11th Cir. 2010), the court held that an Immigration Judge and the BIA had improperly relied upon stereotypical conceptions of gay men in rejecting an asylum claim on grounds that the applicant did not appear to the I.J. to be gay.

Page 784 – add new Note 6:

6. As the situation for LGBT people has improved in many parts of the world where they had previously faced unremitting hostility, individual asylum applicants are having more difficulty meeting the test of showing reasonable fear of official persecution. Importantly, social persecution from family and co-workers is usually held not to “count” for this purpose, as asylum is a political doctrine concerned primarily with persecution by government actors as a matter of public policy. See, as an example, the case of *Patel v. Holder*, 457 Fed. Appx. 606 (7th Cir. 2012), where all the persecution alleged by the Indian applicant involved private actors – family, schoolmates – and the court noted the then-recent action by the High Court of Delhi declaring the colonial era sodomy law to be unconstitutional. Query whether the outcome would have been different had the court been deciding it several months later after the Supreme Court of India reversed the decision by the High Court of Delhi and revived the sodomy law?

Page 784 – add new Note 7:

7. In *H.J. (Iran) & H.T. (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, the Supreme Court of the United Kingdom rejected the argument that asylum seekers should be sent back to their home countries because they could avoid persecution by concealing their sexual orientation and refraining from engaging in gay social and sexual

relationships. The court affirmed the contention that being required to conceal one's sexual identity and live a life of hiding was itself a form of severe persecution.

CHAPTER SEVEN – SEXUAL EXPRESSIONS, FREE SPEECH AND ASSOCIATION

Page 813 – Case name should be corrected to read: *United States v. Extreme Associates, Inc.*

Page 815. - Add Note 3:

In *United States v. Little*, 365 Fed.Appx. 159 (11th Cir. 2010), the court rejected on the merits the claim that federal obscenity laws were rendered unenforceable under *Lawrence v. Texas*, holding that the scope of the precedent in *Lawrence* was limited to the facts of that case, i.e., private consensual sexual activity between adults. The court refused to credit the broader argument that *Lawrence* rendered laws premised primarily on moral judgments to be constitutionally suspect.

Page 820 - Addition to note 1:

Seizing on dicta in *Garcetti v. Cebalos*, some lower federal courts have found protection for speech by employees of public colleges and universities made in the course of their employment, in order to protect academic freedom, but the existence and scope of such an exception to the rule of *Garcetti* is contested. See, e.g., *Sheldon v. Dhillon*, 2009 WL 4282086 (U.S. Dist. Ct., N.D. Cal. Nov 25, 2009); *Nichols v. University of Southern Mississippi*, 669 F.Supp.2d 684 (S.D. Miss. Oct. 26, 2009); *Savage v. Gee*, 716 F.Supp. 2d 709 (S.D. Ohio 2010).

Page 820 – Add new Note 3:

Responding to the wave of judicial decisions requiring states to allow same-sex couples to marry, culminating in *Obergefell v. Hodges* in June 2015, some religiously-inspired opponents of same-sex marriage argued that low-level government officials – county clerks, court clerks, registrars, probate judges – should be exempted from issuing marriage licenses or officiating at ceremonies for same-sex couples in order to protect the officials’ free exercise of religion. Is a public employee entitled, either under the 1st Amendment or under a state religious freedom restoration act, to refuse to perform the duties of their office because of their personal religious beliefs? Is there a parallel here to the limited protection for public employee speech under *Garcetti v. Cebalos*? When a county clerk is acting as a private citizen, her free exercise of religion is protected. When she is acting as a functionary of the government, is her desire to practice her religion while “on the clock” still protected? North Carolina’s legislature enacted a statute in response to the federal marriage decision in their state, authorizing local officials to exempt themselves from any involvement in the marriage business if they had religious objections, without prejudice to their employment or compensation. Is this statute consistent with the state’s constitutional obligations?

Page 839 – Add after Note 2.

Can the federal government condition funding of programs to be administered by private organizations (also frequently referred to as non-governmental organizations, or NGOs) on those organizations adopting the government’s position on the lawfulness or desirability of particular sexually-oriented conduct?

When Congress appropriated substantial funds to be awarded to non-governmental organizations for use in the fight against the spread of HIV/AIDS in foreign countries, it placed two conditions on the money: that it not be used to advocate for legalizing prostitution and that the recipient organization affirmatively adopt a policy opposing prostitution. Congress analogized to the restrictions that it had placed in the past on recipients of federal money for family planning activities, which required that no federal funds be used to advocate the use of abortion for family planning purposes, and this had led to regulations banning recipients from counseling clients about abortion, which were upheld by the Supreme Court. The Court had taken the position in challenges to those rules that the government was entitled to determine what it will promote using federal funds, and private parties who disagree can refuse to take federal money for their programs. Clearly, under the abortion precedent, Congress could require funding recipients to refrain from *promoting* prostitution or advocating for its legalization. But could Congress require these organizations to adopt formal policies against prostitution if they wanted to receive federal funding?

**AGENCY FOR INTERNATIONAL DEVELOPMENT v. ALLIANCE FOR OPEN
SOCIETY INTERNATIONAL, INC.
133 S. Ct. 2321
United States Supreme Court (2013)**

Chief Justice ROBERTS delivered the opinion of the Court.

The United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. § 7601 et seq., outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” § 7631(e). And second, no funds may be used by an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.” § 7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient’s First Amendment rights.

I

... The Act “make[s] the reduction of HIV/ AIDS behavioral risks a priority of all prevention efforts.” § 7611(a)(12); see also § 7601(15) (“Successful strategies to stem the spread of the HIV/AIDS pandemic will require ... measures to address the social and behavioral causes of the problem”). The Act’s approach to reducing behavioral risks is multifaceted. The President’s strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, “educat[e] men and boys about the risks of procuring sex commercially” as well as “promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers.” § 7611(a)(12). Congress found that the “sex industry, the trafficking of individuals into such industry, and sexual violence” were factors in the spread of the HIV/AIDS epidemic, and determined that “it should be the policy of the United States to

eradicate” prostitution and “other sexual victimization.” § 7601(23).

The United States has enlisted the assistance of nongovernmental organizations to help achieve the many goals of the program. Such organizations “with experience in health care and HIV/AIDS counseling,” Congress found, “have proven effective in combating the HIV/AIDS pandemic and can be a resource in ... provid[ing] treatment and care for individuals infected with HIV/AIDS.” § 7601(18). Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations’ fight against HIV/AIDS around the world. § 2151b-2(c); § 7671.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” § 7631(e). Second, no funds made available may “provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except ... to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.” § 7631(f). It is this second condition — the Policy Requirement — that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.” 45 CFR § 89.1(b) (2012); USAID, Acquisition & Assistance Policy Directive 12-04, p. 6 (AAPD 12-04).

II

Respondents are a group of domestic organizations engaged in combating HIV/ AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government’s policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61

(2006) (citing *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994); see *Knox v. Service Employees*, 132 S.Ct. 2277, 2288 (2012) (“The government may not ... compel the endorsement of ideas that it approves.”). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

A

The Spending Clause of the Federal Constitution [Art. I, § 8, cl. 1] provides Congress broad discretion to tax and spend for the “general Welfare,” including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*, 500 U.S. 173, 195, n. 4 (1991) (“Congress’ power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.”).

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights. See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries’ installing filtering software violated their First Amendment rights, explaining that “[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983) (dismissing “the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State” (internal quotation marks omitted)).

At the same time, however, we have held that the Government “may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.” *Forum for Academic and Institutional Rights*, *supra*, at 59, 126 S.Ct. 1297 (quoting *American Library Assn.*, *supra*, at 210, 123 S.Ct. 2297). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. See *Forum for Academic and Institutional Rights*, *supra*, at 59, 126 S.Ct. 1297 (the First Amendment supplies “a limit on Congress’ ability to place conditions on the receipt of funds”).

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program — those that specify the activities Congress wants to subsidize — and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We

have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547 (2001).

A comparison of two cases helps illustrate the distinction: In *Regan v. Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, “ha[d] much the same effect as a cash grant to the organization.” 461 U.S., at 544. And by limiting § 501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely “chose[n] not to subsidize lobbying.” *Ibid.* In rejecting the nonprofit’s First Amendment claim, the Court highlighted — in the text of its opinion, but see post, at 2326 — the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a “dual structure” it had used in the past — separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization — the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. *Ibid.* Maintaining such a structure, the Court noted, was not “unduly burdensome.” *Id.*, at 545, n. 6, 103 S.Ct. 1997. The condition thus did not deny the organization a government benefit “on account of its intention to lobby.” *Id.*, at 545, 103 S.Ct. 1997.

In *FCC v. League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. 468 U.S. 364, 399-401 (1984). Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was “barred absolutely from all editorializing.” *Id.*, at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds “to make known its views on matters of public importance.” 468 U.S., at 400. The prohibition thus went beyond ensuring that federal funds not be used to subsidize “public broadcasting station editorials,” and instead leveraged the federal funding to regulate the stations’ speech outside the scope of the program. *Id.*, at 399 (internal quotation marks omitted).

Our decision in *Rust v. Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations “to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services.” 500 U.S., at 178 (internal quotation marks omitted). The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being “used in programs where abortion is a method of family planning.” *Ibid.* (internal quotation marks omitted). To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were “physically and financially separate” from their other projects that engaged in the prohibited activities. *Id.*, at 180-181 (quoting 42 CFR § 59.9 (1989)). A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim.

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds [are] spent for the purposes for which they were authorized.” Rust, 500 U.S., at 193, 196.

In making this determination, the Court stressed that “Title X expressly distinguishes between a Title X grantee and a Title X project.” Id., at 196. The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” Ibid. “The Title X grantee can continue to ... engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” Ibid. Because the regulations did not “prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment. Id., at 197.

B

As noted, the distinction drawn in these cases — between conditions that define the federal program and those that reach outside it — is not always self-evident. As Justice Cardozo put it in a related context, “Definition more precise must abide the wisdom of the future.” Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first — unchallenged in this litigation — prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C. § 7631(e). The Government concedes that § 7631(e) by itself ensures that federal funds will not be used for the prohibited purposes.

The Policy Requirement therefore must be doing something more — and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. See AAPD 12-04, at 12. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, 22 U.S.C. § 7601(23), and it wants recipients to adopt a similar stance.” Brief for Petitioners 32 (emphasis added). This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt — as their own — the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the

scope of the federally funded program.” Rust, 500 U.S., at 197. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. See *ibid.* (“our `unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program”).

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain “objective integrity and independence” from the unfettered affiliates. 45 CFR § 89.3. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby “cabin[ing] the effects” of the Policy Requirement within the scope of the federal program. Brief for Petitioners 38-39, 44-49.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. See Rust, *supra*, at 197-198. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR § 89.3 (allowing funding recipients to work with affiliates whose conduct is “inconsistent with the recipient’s opposition to the practices of prostitution and sex trafficking” (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient’s private funds “to be used to promote prostitution or sex trafficking.” Brief for Petitioners 27 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)). That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government’s argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

Pressing its argument further, the Government contends that “if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public or private funds, it would undermine the government’s program and confuse its message opposing prostitution and sex

trafficking.” Brief for Petitioners 37 (emphasis added). But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S., at 642.

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed. It is so ordered.

Page 877. - Add Note 3.

3. Would First Amendment rights be implicated if a high school cancelled its senior prom rather than to allow a lesbian graduating senior to attend dressed in a tuxedo accompanied by her same-sex date? Would the student’s choice of male-identified formal wear, certainly a fashion statement, also be considered a political statement? See *McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (U.S. Dist. Ct., N.D. Miss., March 23, 2010).

Page 889. Add the following opinion **prior** to the Notes and Comments on this page:

ZAMECNIK v. INDIAN PRAIRIE SCHOOL DISTRICT # 204
636 F.3d 874 (7th Cir. 2011)

POSNER, Circuit Judge.

The plaintiffs, two students at Neuqua Valley High School, a large public high school in Naperville, Illinois, had sued the school district for infringing their right of free speech by forbidding them to make a specific negative statement about homosexuality. They moved for a preliminary injunction, which the district judge denied. They appealed, and we reversed, directing the district judge to enter forthwith a preliminary injunction that would permit plaintiff Nuxoll (Zamecnik having graduated) to wear during school hours a T-shirt that recites “Be Happy, Not Gay.” Nuxoll’s right to wear it outside of school is not questioned.

A private group called the Gay, Lesbian, and Straight Education Network promotes an annual event called the Day of Silence that is intended to draw critical attention to harassment of homosexuals; the idea behind the name is that homosexuals are silenced by harassment and other discrimination. Students participate in the Day of Silence by remaining silent throughout the day except when called upon in class, though some teachers, as part of their own observance of the Day of Silence, will not call on students that day. Some students and faculty wear T-shirts on the Day of Silence that display slogans such as “Be Who You Are.” None of the slogans criticizes heterosexuality or advocates homosexuality, though “Be Who You Are” carries the suggestion that persons who are homosexual should not be ashamed of the fact or try to change it.

The plaintiffs, who disapprove of homosexuality on religious grounds, participated with other like-minded students in a Day of Truth held on the first school day after the Day of Silence. Plaintiff Zamecnik wore a shirt that read “My Day of Silence, Straight Alliance” on the front and “Be Happy, Not Gay” on the back. A school official inked out the phrase “Not Gay” and has banned display of the slogan as a violation of a school rule forbidding “derogatory comments,” spoken or written, “that refer to race, ethnicity, religion, gender, sexual orientation, or disability.” He did not object to the slogan on the front of the shirt.

The plaintiffs assert a constitutional right to make negative statements about members of any group provided the statements are not inflammatory—that is, are not “fighting words,” which means speech likely to provoke a violent response amounting to a breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942). They concede that they could not inscribe “homosexuals go to Hell” on their T-shirts because those are fighting words, at least in a high-school setting, and so could be prohibited despite the fact that they are speech, disseminating an opinion. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

When last this case was here, we expressed (and we repeat our expression of) sympathy (thought excessive by Judge Rovner in her concurring opinion, 523 F.3d at 676–80) for an expansive interpretation of the “fighting words” doctrine when the speech in question is that of students. We noted that the contribution that kids can make to the marketplace of ideas and opinions is modest (Judge Rovner disagreed) and we emphasized (overemphasized, in her view) a school’s countervailing interest in protecting its students from offensive speech by their classmates that would interfere with the learning process—though we added that because 18-year-olds can now vote, high-school students should not be “raised in an intellectual bubble,” *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir.2001), which would be the tendency of forbidding all discussion of public issues by such students during school hours. (Hence the younger the children, the more latitude the school authorities have in limiting expression. *Muller ex rel. Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538–39 (7th Cir.1996).)

Thus a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality. The school argued (and still argues) that banning “Be Happy, Not Gay” was just a matter of protecting the “rights” of the students against whom derogatory comments are directed. But people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life. *R.A.V. v. City of St. Paul*, supra, 505 U.S. at 394; *Boos v. Barry*, 485 U.S. 312, 321 (1988). Although tolerance of homosexuality has grown, gay marriage remains highly controversial. Today’s high school students may soon find themselves, as voters, asked to vote on whether to approve gay marriage, or to vote for candidates who approve of it, or ones who disapprove.

In asking for a preliminary injunction Nuxoll acknowledged that “Be Happy, Not Gay” was one of the “negative comments” about homosexuality that he thought himself entitled to make. But we said that unlike “homosexuals go to Hell,” which he concedes are “fighting words” in the context of a school (and unlike “I will not accept what God has condemned” and “homosexuality is shameful”—terms held, perhaps questionably—unless euphemism is to be the

only permitted mode of expressing a controversial opinion—to be fighting words in *Harper v. Poway Unified School District*, 445 F.3d 1166, 1171 (9th Cir.2006), vacated as moot, 549 U.S. 1262 (2007)), “Be Happy, Not Gay” is not an instance of fighting words. To justify prohibiting their display the school would have to present “facts which might reasonably lead school officials to forecast substantial disruption.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969). Such facts might include a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—but the school had presented no such facts in response to the motion for a preliminary injunction.

In this factual vacuum, we described “Be Happy, Not Gay” as “only tepidly negative,” saying that “derogatory” or “demeaning” seemed too strong a characterization. As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students. But we thought it speculative that allowing the plaintiff to wear a T-shirt that said “Be Happy, Not Gay” “would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.”

Not that *Tinker*’s “substantial disruption” test has proved a model of clarity in its application. The cases have tended to rely on judicial intuition rather than on data, and the intuitions are sometimes out of date. For example, although it’s been ruled that “lewd, vulgar, obscene, or plainly offensive speech” can be banned from a school, *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 442 (5th Cir.2001), the authority for the ruling—*Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 680–82 (1986)—involved student speech that, from the perspective enabled by 25 years of erosion of refinement in the use of language, seems distinctly lacking in shock value (e.g., “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm,” *id.* at 687 (concurring opinion)). An example of school censorship that courts have authorized on firmer grounds is forbidding display of the Confederate flag, as in *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 333–36 and n. 6 (6th Cir.2010); *Scott v. School Board of Alachua County*, 324 F.3d 1246, 1248–49 (11th Cir.2003) (per curiam), and *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1361, 1365–66 (10th Cir.2000)—cases in which serious racial tension had led to outbursts of violence even before the display of the flag, which is widely regarded as racist and incendiary. *Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 467, 469–71 (6th Cir.2000), involved T-shirts that depicted a three-faced Jesus, accompanied by the words “See No Truth. Hear No Truth. Speak No Truth” and advocated, albeit obliquely, the use of illegal drugs, a form of advocacy in the school setting that can be prohibited without evidence of disruption. *Morse v. Frederick*, 551 U.S. 393, 406–10 (2007).

These cases, more extreme than ours, do not establish a generalized “hurt feelings” defense to a high school’s violation of the First Amendment rights of its students. “A particular form of harassment or intimidation can be regulated ... only if ... the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.” *Sypniewski v. Warren Hills Regional Bd. of Education*, 307 F.3d 243, 264–65 (3d Cir.2002). The same court, in *Saxe v. State College Area School District*, 240 F.3d 200, 209 (3d Cir.2001), found “little basis for the District Court’s sweeping assertion that ‘harassment’—at least when it consists of speech

targeted solely on the basis of its expressive content—‘has never been considered to be protected activity under the First Amendment.’ Such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech.” Severe harassment, however, blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth. School authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences.

As Judge Rovner explained in her concurring opinion in the previous appeal, “the statement [‘Be Happy, Not Gay’] is clearly intended to derogate homosexuals. Teenagers today often use the word ‘gay’ as a generic term of disparagement. They might say, ‘That sweater is so gay’ as a way of insulting the look of the garment. In this way, Nuxoll’s statement is really a double-play on words because ‘gay’ formerly meant ‘happy’ in common usage, and now ‘gay,’ in addition to meaning ‘homosexual’ is also often used as a general insult. Nuxoll’s statement easily fits the school’s definition of ‘disparaging’ and would meet that standard for most listeners.... [T]here is no doubt that the slogan is disparaging.... [But] it is not the kind of speech that would materially and substantially interfere with school activities. I suspect that similar uses of the word ‘gay’ abound in the halls of [Neuqua Valley High School] and virtually every other high school in the United States without causing any substantial interruption to the educational process.” 523 F.3d at 679. Judge Rovner warned that the fact that schools “are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source.... The First Amendment ... is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive. Nuxoll’s slogan-adorned t-shirt comes nowhere near that standard.” *Id.* at 679–80.

The preliminary injunction issued on remand permitted Nuxoll to wear during school hours a T-shirt that recites “Be Happy, Not Gay.” Pretrial discovery ensued. Eventually the district judge granted summary judgment in favor of the plaintiffs, awarded each of them \$25 in damages for the infringement of their constitutional rights, and later entered a permanent injunction, which differs from the preliminary one in running in favor of any student and in not being limited to the display of the slogan on a T-shirt; for “T-shirt” the permanent injunction substitutes “clothing or personal items.”

The judge had granted summary judgment against the school district on April 29, 2010, after classes had ended but before final exams. By the time he entered the permanent injunction, on May 20, Nuxoll was about to graduate. (Zamecnik was long gone.) All that remained for graduating seniors to do was to participate in a few ceremonial events culminating in the graduation ceremony on May 23. The school argues that injunctive relief was moot on May 20 because Nuxoll had no occasion to wear his “Be Happy, Not Gay” T-shirt at the ceremonial events, and did not. But remember that the injunction had been broadened to permit the display of the slogan on other clothing as well, and so he could by virtue of the injunction have displayed it on his graduation gown had he wanted to.

The school points out that the graduation wasn't held on school grounds and that the injunction doesn't apply to the display of the slogan elsewhere; that's because the school has never asserted a right to control speech off school property. But it would very much like to control it at the graduation ceremony, and so treats the venue of the ceremony as temporary school grounds, as by imposing a dress code on the graduating students and enforcing its school rules against drunkenness and other disruptive behavior—and it regards the display of the slogan “Be Happy, Not Gay” as disruptive.

The claim of mootness evaporates completely when one notes that the permanent injunction runs in favor of any student at the high school, not just Nuxoll; it is not unlikely that one or more of its 4,000-plus students may someday want to display the slogan. Injunctions often run in favor of unnamed members of a group, and this is proper as long as the group is specified.

The school's main argument is that the district judge entered summary judgment prematurely. He did if the school presented enough evidence to warrant an evidentiary hearing to determine whether the school had had a reasonable belief that it faced a threat of substantial disruption. To carry its burden it presented three types of evidence: incidents of harassment of homosexual students; incidents of harassment of plaintiff Zamecnik; and the report of an expert which concluded that the slogan “Be Happy, Not Gay” was “particularly insidious.”

The first type of evidence was negligible: a handful of incidents years before the T-shirt was first worn, in a school with thousands of students. The evidence consists, moreover, of just the affidavit and deposition of a single school district official, which merely repeats statements by other, unidentified school officials repeating statements by unidentified students. The deponent described but could not confirm the details of the incidents—and admitted that because the allegations of harassment had not been confirmed, no students had been disciplined.

The second type of evidence was barred by the doctrine, unmentioned by the school, of the “heckler's veto.” *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966). Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.

Two of the cases that endorse the doctrine of the heckler's veto are school cases, but *Tinker* is also the source of the substantial disruption test of permissible school censorship. See 393 U.S. at 509. A city can protect an unpopular speaker from the violence of an angry audience by deploying police, but that is hardly an apt response to students enraged by a T-shirt. A school has legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists of its students, including the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours.

But the anger engendered by Zamecnik's wearing a T-shirt that said “Be Happy, Not

Gay” did not give rise to substantial disruption. It was not her wearing the shirt, but her filing this lawsuit, that engendered the creation of a Facebook group entitled “Be Happy! Not Heidi” (Zamecnik’s first name) in which hundreds of comments were posted, many hostile to her. But only one was a threat (“someone tells me where she lives, i will fuck up her house, car, and whatever else i can find”), and it provoked a sensible comment from another student: “you sound [when making threats] just as stupid as she does.” Many of the comments addressed substantial issues involving First Amendment claims, school policies, treatment of homosexual students, and the role of the media in the dispute; and apart from the obsessive use of expletives—a defining feature of modern American culture, by no means limited to teenagers—the discussion of the issues was substantive, and even, to a degree, thoughtful. Here are typical comments: “The social studies teachers are going to be having a department meeting right after Spring Break in order to be able to discuss this whole law suit in an educational way, to bring up some really meaningful discussion. More than anything, this case boils down to an issue of constitutional rights. And frankly, school rules override the constitutional rights of minors in the public school system. The school has the right to search and seizure at any time, despite constitutional law. Similarly, ‘free speech’ doesn’t apply in public schools, because school rules are more specific”; “I’m very glad that so many people are banding together against discrimination, just please go about it in a classy and mature way; just like Ana said on the message board, don’t stoop to her [Zamecnik’s] level”; “Heidi isn’t suing because she hates gays, she’s suing because she was harassed for being active in what she believes in. I also think that if you were put in her situation, you’d fight tooth and nail to get whatever fucking point it is you are trying to get across. With every good, there is the bad. You have to take it in stride, not make up some stupid community making fun of someone. Heidi is actually a really nice person who is just misguided by religion and a closed mind.”

Zamecnik’s parents asked the school to allow a bodyguard to accompany her to class on the 2007 Day of Silence. Her mother said she was worried by the “threats that these particular students had made against Heidi expressing her view.” The school did not allow the bodyguard but did have a female staff member escort Zamecnik from class to class on that day. She decided not to wear her “Be Happy, Not Gay” shirt. There were no serious incidents, though it is possible that a water bottle that was thrown and struck one of her friends had been aimed at her.

That leaves for consideration the expert’s report. Stephen T. Russell has a Ph.D. in sociology and is a professor of family and consumer sciences at the University of Arizona. His 38–page report, 29 pages of which are devoted to his impressive curriculum vitae, establishes that he’s qualified to give expert testimony on matters relating to the attitudes and behavior of teenagers, with special reference to teenagers who belong to minorities, including sexual minorities—including therefore homosexual high-school students. Yet the “analysis and opinions” section of his report, minus its bibliographical references, is less than two and a half pages long and can satisfy none of the requirements for admissible expert testimony that are set forth in Rule 702 of the Federal Rules of Evidence: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

All that the report says, in seven numbered paragraphs, is that: (1) harassment, particularly verbal, of homosexual students is common in schools; (2) schools should therefore

have anti-harassment policies; (3) harassed students “are at risk for negative educational and health outcomes”; (4) “homophobic slurs and derogatory remarks” create a risk of “disruptive behavior including student victimization and violence”; (5) school districts can lose state funding “when students miss school because of feeling unsafe due to anti-gay bullying”; (6) the Day of Silence does not “promote homosexual conduct” or “promote the idea that homosexual conduct should be endorsed by society”; (7) “the phrase ‘be happy, not gay’ is not ‘tepid’ in a public school setting” and indeed “is particularly insidious because it references a long-standing stereotype that gay people are unhappy, yet appears to be a simple play on words.” Points 1 through 6 are plausible inferences from the research that Dr. Russell has either conducted or cites in his report, or so at least we’ll assume, though he does not discuss any of that research—just lists citations.

Point 7, however, which is the punchline, comes out of nowhere. There is nothing in the report to indicate that Russell knows anything about Neuqua Valley High School, for there is no reference to the school in the report. No example is given of “particularly insidious” statements about homosexuals. No example is given of a “homophobic slur” or “derogatory remark” about them that has ever been uttered in any school, or elsewhere for that matter. Though the report calls “be happy, not gay” particularly insidious, it does not indicate what effects it would be likely to have on homosexual students. It gives no indication of what kind of data or study or model Russell uses or other researchers use to base a prediction of harm to homosexual students on particular “negative comments.” No methodology is described. No similar research is described.

In the idiom of Rule 702, the expert’s report contains no indication of the “facts or data” relied on, no indication that testimony based on the report would be “the product of reliable principles and methods,” and no indication that in formulating his opinion the expert “applied the principles and methods reliably to the facts of the case.” Dr. Russell is an expert, but fails to indicate, however sketchily, how he used his expertise to generate his conclusion. Mere conclusions, without a “hint of an inferential process,” are useless to the court. Russell’s is as thin an expert-witness report as we’ve seen.

One issue remains: the school challenges the award of damages to the plaintiffs, despite the modesty of the award. The award was justified. Both plaintiffs were injured, though only slightly (but \$25 does not exaggerate the harm), by the school’s violation of their constitutional rights. Zamecnik’s shirt was defaced and Nuxoll’s desire to wear the T-shirt on multiple occasions in 2007 was thwarted by fear of punishment.

The district judge was right to grant summary judgment in favor of the plaintiffs, and the relief ordered is justified by the record. Affirmed.

QUESTION

In place of Note 2 on pages 889-90, substitute the following:

2. Are the 9th and 7th Circuit decisions reconcilable? Judge Posner, for the 7th Circuit, insists that the slogans on the T-shirts in Harper, the 9th Circuit case, fit the “fighting words” doctrine,

while the slogan on the T-shirts in the case before his court, *Zamecnik*, does not. What is the basis for distinguishing between them? Do the distinctions suffice to justify the different outcomes in the two cases? Are you convinced that the First Amendment requires school districts to allow “both sides” to be communicated on controversial issues if students have a right to wear T-shirts bearing political slogans? How are school officials to anticipate whether a reviewing court will consider a controversial slogan to constitute “fighting words”?

Page 890 – Add at the end of Note 2:

In subsequent litigation, the federal district court granted a permanent injunction against the school district, restraining it from prohibiting students from wearing the “Be Happy, Not Gay,” slogan, and awarded nominal damages to the plaintiffs. This ruling was affirmed on appeal, *Zamecnik v. Indian Prairie School District #204*, 636 F.3d 874 (7th Cir. 2011).

Page 890 – Add new Note 4.

4. Would a public university be violating the First Amendment rights of an administrator if it discharged the administrator for publishing comments about gay people that were inconsistent with the university’s published human rights policy? In *Dixon v. University of Toledo*, 702 F.3d 269 (6th Cir. 2012), cert. denied, 134 S. Ct. 119 (2013), a community newspaper had published remarks critical of the university for failing to extend its domestic partnership benefits policy to the campus of a newly acquired division. Dixon wrote an op-ed article defending the university’s decision and sent it to the newspaper, without clearing it with higher administration. The president of the university concluded that the op-ed included statements inconsistent with the university’s human rights policy, and discharged Dixon. Should she have a freedom of speech claim against the university?

Page 890 – Add new Note 5.

5. Would a public university be violating the 1st Amendment if it refused to allow an anti-gay student group to distribute leaflets on campus? Wayne Lela and John McCartney were students at Waubensee Community College and members of a student-run organization called Heterosexuals Organization for a Moral Environment (H.O.M.E.). They contacted WCC for permission to distribute flyers on campus titled “The Uncensored Truth About Homosexuality” and “Gay’ Activism and Freedom of Speech and Religion.” In response, Lela received a letter from WCC’s Executive Vice President of Finance and Operations denying her request, stating that WCC “is not an open public forum” and that “the college consistently limits campus activities to events that are not disruptive of the college’s educational mission, also referencing violation to WCC’s Solicitation Policy and Use of College Facilities and Services Policy.” The Facilities Policy provides that the facilities on campus may be made available for college and non-college programs, provided the use does not interfere with normal operations and is consistent with the philosophy and goals of the college. Is this the kind of content-based suppression of speech that would mandate strict scrutiny under the 1st Amendment? See *Lela v. Board of Trustees of Community College District No. 516*, 2015 WL 351243 (N.D. Ill., Jan. 27, 2015), appeal pending, 7th Circuit.

Page 890. - Add new Note 6.

6. After California voters passed Proposition 8 during the 2008 general election, amending their state constitution to forbid performance or recognition of same-sex marriages in the state, some angry same-sex marriage proponents allegedly harassed financial supporters of the Proposition 8 campaign, whose names they obtained through the list of donors published online by the state. Subsequently, after Washington State passed a law expanding its domestic partnership statute to include virtually all the state law rights of marriage, opponents of the legislation undertook a petition campaign to put a repeal question on the ballot. After they obtained sufficient signatures, opponents of the ballot question sought to get copies of the petitions from the Secretary of State's office, so they could publish the names and addresses of petition signers on the internet. A state law authorized disclosure of the petitions. Proponents of the ballot question sued in federal court, claiming that disclosure of the names and addresses of petition signers would violate their First Amendment rights, because it would have a deterrent effect on people signing petitions in support of ballot questions on controversial issues, thus burdening the political process. The federal district court agreed, issuing an injunction, but was reversed by the 9th Circuit. The ballot question proponents applied to the U.S. Supreme Court, seeking emergency relief pending a review on the merits of their First Amendment claim. The Supreme Court barred release of the petitions prior to the election. The ballot question was then defeated at the polls. Subsequently, the Supreme Court ruled in *Doe v. Reed*, 130 S. Ct. 2811 (June 24, 2010), that petition signers generally do not have a First Amendment right to remain anonymous, but might be able to preserve their anonymity by persuading the trial court that theirs was an unusual case where serious threats to petition signers existed. Members of the Court were divided about what standard should be used to determine that a First Amendment exception should be made to the general procedure of disclosure in a particular case.

Page 895. – Add to the text about hate crimes laws on the top of the page:

On October 28, 2009, President Obama signed into law “The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.” Among other things, this law amends 18 U.S.C. Section 249 to add federal penalties for certain crimes committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of the victim. To come within federal jurisdiction, the offense requires that the defendant crossed state or national lines or used an instrumentality of interstate or international commerce (including a weapon that has traveled interstate) or is interfering with commercial activity affecting interstate or foreign commerce. This is the first federal statute to provide any specific protection to individuals on account of their gender identity.

The first criminal prosecution under this law took place in 2013 in the U.S. District Court for the Eastern District of Kentucky. Prosecutors presented evidence that Jason and Anthony Jenkins kidnapped and assaulted a gay man, Kevin Pennington, using a car and traveling part of the way on a highway, and that there was evidence that his sexual orientation was a motivation for the crime. The court determined that the use of the car on the highway brought the case within the jurisdictional requirements of the Hate Crimes Prevention Act. The trial judge charged the jury that they could convict the defendants on the hate crimes charge if they found that Pennington's sexual orientation was “the substantial factor” in the defendants' decision to attack Pennington. The jury found the defendants guilty of kidnapping and assaulting

Pennington, but acquitted the defendants on the hate crime charges, evidently not being persuaded beyond reasonable doubt that Pennington's sexual orientation was "the substantial factor" in his victimization.

After imposing sentences, the judge issued a written opinion explaining why he had rejected the prosecutor's request that the jury be instructed to convict if it found that Pennington's sexual orientation was "a motivating factor," and instead imposed the higher standard of "the substantial factor" in his instructions to the jury. The judge explained that the Supreme Court and several federal appeals courts had interpreted a variety of statutes that use the phrase "because of" as requiring that the prosecutor or plaintiff show that the specified factor was "a necessary prerequisite," which the court characterized as "a status reserved only for the most substantial of the motivating factors." See *United States v. Jenkins*, 2013 U.S. Dist. LEXIS 92945, 2013 Westlaw 3338650 (E.D.Ky., July 2, 2013).

One exception to this requirement, specifically enacted by Congress in response to court rulings, is included in 1991 amendments to Title VII of the Civil Rights Act of 1964, which provides that if race or color, religion, national origin or sex is "a motivating factor" for an employment decision, the employer shall be held to be in violation of the statute. See Sec. 703(m) of Title VII, codified as 42 U.S.C. Section 2000-e-2(m). The 1991 amendments also provide, however, that if the employer can prove as an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor, the remedy imposed for the violation would be limited to declaratory and equitable relief (not including reinstatement or any damages or other payment) and attorney fees and costs. See Sec. 706(g)(2)(B), codified at 42 U.S.C. Section 2000e-5(g)(2)(B). Cases in which both plaintiff and defendant meet these standards of proof are called "mixed motive" cases. The Supreme Court has ruled that this mixed-motive concept applies only to "status discrimination" cases under Title VII, because Congress did not specify a broader disagreement with the Court's construction of the phrase "because of" when it amended Title VII. See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (mixed motive theory not applicable to age discrimination claims); *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013) (mixed motive theory not applicable to retaliation claims asserted under Title VII).

Page 901 – Add the following note 3:

In *State of New Jersey v. Pomianek*, 110 A.3d 841 (N.J. 2015), the New Jersey Supreme Court struck down a part of the state's bias intimidation law as unconstitutionally vague because it allowed a conviction based on the victim's perception of the defendant's intent in a case where the defendant's intent was not proven. The court held that it would violate the constitution to convict somebody of performing an act with a particular intent without proof beyond a reasonable doubt that they had such intent. The court identified the statutory language in question as "unique among bias-crime statutes in this nation" because "[i]t is the only statute that authorizes a bias-crime conviction based on the victim's perception that the defendant committed the offense with the purpose to intimidate, regardless of whether the defendant actually had the purpose to intimidate."

Page 901 - Add the following new matter after the above note:

In 2011, the Supreme Court confronted the question whether a group that had picketed hundreds of military funerals to protest what it claimed to be the pro-gay policies of the United States government was immunized by the First Amendment from liability for emotional distress that might be caused to the surviving family members of a military member whose funeral was picketed. If state tort law recognizing an action for damages for intentional infliction of emotional distress would otherwise apply to the situation, would the picketers nonetheless enjoy immunity from damages because of the political nature of the anti-gay message they sought to communicate?

SNYDER v. PHELPS
Supreme Court of the United States
131 S.Ct. 1207 (2011)

Chief Justice ROBERTS delivered the opinion of the Court.

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

I
A

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder's father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service. Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The

picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing. The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.

B

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. Westboro filed several post-trial motions, including a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on First Amendment grounds. The District Court remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact. In the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. . . . Like the court below, we proceed on the unexamined premise that respondents' speech was tortious.

II

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. The Free Speech Clause of the First Amendment – “Congress shall make no law ... abridging the freedom of speech” – can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. “[S]peech on matters of public concern is at the heart of the First Amendment's protection.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (opinion of Powell, J.). The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64 (1964). Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138 (1983).

Not all speech is of equal First Amendment importance, however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.

That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that “the boundaries of the public concern test are not well defined.” *San Diego v. Roe*, 543 U.S. 77(2004). Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors. Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378 (1987).

Deciding whether speech is of public or private concern requires us to examine the content, form, and context of that speech as revealed by the whole record. . . . The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of purely private concern. The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” While these messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed to reach as broad a public audience as possible. And even if a few of the signs – such as “You’re Going to Hell” and “God Hates You” – were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

Apart from the content of Westboro’s signs, Snyder contends that the “context” of the speech – its connection with his son’s funeral – makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is “fairly characterized as constituting speech on a matter of public concern,” *Connick*, 461 U.S., at 146, and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to “immunize their conduct by claiming that they were actually protesting the United States’ tolerance of homosexuality or the supposed evils of the Catholic Church.” We are not concerned in this case that Westboro’s speech on public matters was in any

way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its honestly believed views on public issues. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter.

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection not only because of the words but also because the church members exploited the funeral as a platform to bring their message to a broader audience. There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views – in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies.

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term – emotional distress – fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” *United States v. Grace*, 461 U.S. 171 (1983). “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,” noting that “[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” *Frisby v. Schultz*, 487 U.S. 474 (1988).

That said, even protected speech is not equally permissible in all places and at all times. Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach – it is subject to reasonable time, place, or manner restrictions that are consistent with the standards announced in this Court's precedents. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Maryland now has a law imposing restrictions on funeral picketing, Md. Crim. Law Code Ann. § 10-205 (Lexis Supp.2010), as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing “before or about” a particular residence, 487 U.S., at 477. In *Madsen v. Women's Health Center, Inc.*, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. 512 U.S. 753 (1994). The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities. Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision

some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S., at 55, 108 S.Ct. 876. In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of vehement, caustic, and sometimes unpleasant" expression. *Bose Corp.*, 466 U.S., at 510 (quoting *New York Times*, 376 U.S., at 270). Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312 (1988). What Westboro said, in the whole context of how and where it chose to say it, is entitled to special protection under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

III

The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy. The Court of Appeals did not examine these torts independently of the intentional infliction of emotional distress tort. Instead, the Court of Appeals reversed the District Court wholesale, holding that the judgment wrongly attached tort liability to constitutionally protected speech.

Snyder argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion

because Snyder was a member of a captive audience at his son's funeral. We do not agree. In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). As a result, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15 (1971).

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby*, 487 U.S., at 484-485.

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here. Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion – the alleged unlawful activity Westboro conspired to accomplish – we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.

IV

Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and-as it did here-inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course-to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case. **AFFIRMED.**

Justice BREYER, concurring.

. . . As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has

reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict. That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers' signs as he drove to the funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro. As I read the Court's opinion, it holds no more.

Justice ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

I

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, "most if not all jurisdictions" permit recovery in tort for the intentional infliction of emotional distress (or IIED). *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

This is a very narrow tort with requirements that "are rigorous, and difficult to satisfy." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 12, p. 61 (5th ed.1984). To recover, a plaintiff must show that the conduct at issue caused harm that was truly severe. See *Figueiredo-Torres v. Nickel*, 321 Md. 642 (1991) ("[R]ecovery will be meted

out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves”); *Harris v. Jones*, 281 Md. 560 (1977) (the distress must be “so severe that no reasonable man could be expected to endure it” (quoting Restatement (Second) of Torts § 46, Comment j (1963-1964))).

A plaintiff must also establish that the defendant’s conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.*, at 567 (quoting Restatement (Second) of Torts § 46, Comment d).

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. They did not dispute that Mr. Snyder suffered “wounds that are truly severe and incapable of healing themselves.” *Figueiredo-Torres*, *supra*, at 653. Nor did they dispute that their speech was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Harris*, *supra*, at 567. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.

NOTES AND QUESTIONS

1. In the remainder of his lengthy dissent, omitted here, Justice Alito argued that Westboro’s conduct placed them within the sphere of speech/conduct subject to tort liability under the Court’s precedents. The dissent turns on a view of the facts somewhat different from that taken by the Court, which emphasized that the picketing was peaceful, carried out in a location authorized in advance by the police, and that the picket signs were not visible to the plaintiff when he was driving to and from the funeral, but only came to his attention later when he viewed television reports. The dissent emphasized that the advance publicity by Westboro concerning its intention to picket turned the funeral from a private, family event into a public occasion, and that the hateful statements on the picket signs caused severe emotional distress to the plaintiff when he learned of them, and were calculated to do so. Whose account of the facts strikes you as more persuasive in considering whether Westboro could be held to have gone beyond the sphere of protected speech under the First Amendment?

2. It does not appear to have mattered to the Court that this was not a case of the government restricting speech in advance or imposing criminal penalties or fines, but rather of a private plaintiff seeking vindication for personal (emotional) injury that he suffered. Should it make a difference, for purposes of the constitutional analysis, whether the case involves state action, directly restricted by the First Amendment, or private pursuit of a remedy after-the-fact, where First Amendment concerns might be seen as tangential? It was long thought that the First Amendment was not relevant to private suits for damages for defamation or invasion of privacy, for example, and only relatively recently has the Supreme Court ruled that the role of the judiciary in assessing and enforcing damage claims in such cases implicates First Amendment concerns. This doctrine was developed primarily in cases involving press coverage of newsworthy events, where the defendant was a media organization.

**APPENDIX A – CHRONOLOGY OF SAME-SEX MARRIAGE DEVELOPMENTS
AFTER *U.S. V. WINDSOR***

As of July 15, 2014 – 19 marriage equality states + D.C. = almost 44% of the US population living in marriage equality jurisdictions.

As of January 6, 2015 – 36 marriage equality jurisdictions + D.C. = more than 70% of U.S. population living in marriage equality jurisdictions.

On June 26, 2015 – U.S. Supreme Court ruling extends marriage equality all U.S. states and territories.

Chronology:

2013:

June 26, 2013 – *U.S. v. Windsor*, 133 S. Ct. 2675 – DOMA Section 3 invalidated, ending statutory ban on federal government recognizing same-sex marriages; *Hollingsworth v. Perry*, 133 S. Ct. 2652 – Prop 8 appeal dismissed because Intervenor lacked Article III standing to appeal (vacating 9th Circuit decision and leaving District Court decision holding Prop 8 same-sex marriage ban unconstitutional in place).

June 28, 2013 – 9th Circuit lifted stay of Prop 8 ruling; same-sex marriages resumed in California – attempts by Proponents of Prop 8 to cabin district court’s decision are rejected by state

July 1 – Michigan - *DeBoer v. Snyder*, 2013 WL 3466719, 2013 U.S. Dist. LEXIS 98382 (E.D. Mich.) – Judge Friedman – refuses to dismiss marriage equality lawsuit – first federal court decision to cite *Windsor*

June-July - Obama Administration announces that “place of celebration” rule will be used to determine federal recognition of same-sex marriages except where existing statutes and regulations require otherwise (including for Internal Revenue Code, federal employee benefits, military benefits, diplomatic corps). Major exception for social security, where statutory definition requires amending that hasn’t been done yet, although bill has been introduced.

July 17 - *Matter of Oleg B. Zeleniak*, Beneficiary of a visa petition filed by Serge V. Polajenko, 26 I&N Dec. 158, 2013 WL 3777692 (BIA) – same-sex marriages

will be recognized under place of celebration rule for purposes of immigration and naturalization law, citing Windsor

Summer 2013 – New Mexico Marriage Clerks began to issue marriage licenses as trial judges issued marriage equality orders. Eventually clerks asked New Mexico Supreme Court to take direct review in pending marriage equality cases. Clerks in several counties continue to issue licenses as cases rose to the state supreme court.

July 22 - Obergefell v. Kasich, 2013 WL 3814262, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio, W. Div.) – US District Judge Timothy Black – TRO requiring Ohio to recognize out-of-state same-sex marriage for purposes of death certificate

July 29 - Cozen O'Connor v. Tobits, 2013 U.S. Dist. LEXIS 105507, 2013 WL 3878688 (E.D. Pa.) – District Judge Jones held ERISA must be construed to include same-sex spouses for purposes of inheritance rights to retirement accounts

August 1 – Rhode Island marriage equality statute went into effect (enacted prior to Windsor)

September 27 - Garden State Equality v. Dow, 2013 WL 5397372 (N.J. Superior Ct., Mercer County) – Judge Jacobson, grants summary judgment for plaintiffs in marriage equality case, to go into effect Oct. 21.

September 27 - Darby v. Orr; Lazaro v. Orr, Case No. 12 CH 19718 (IL Circuit Ct., Cook County) – Judge Hall, rejects motions to dismiss marriage equality claims.

September – By December all state National Guard units acceded to Defense Department's requirement for recognition of same-sex spouses using place-of-celebration rules – some states with strong anti-recognition laws allowed work-arounds where sign-up for benefits was conducted by federal officials – process was gradual, with most states falling in line in September after DOJ announcement.

October 16 – Oregon Attorney General announces that state will recognize same-sex marriages from other jurisdictions, despite state constitution Marriage Amendment, in light of Windsor ruling

October 18 – N.J. Supreme Court unanimously affirmed Judge Jacobson’s ruling denying a stay, *Garden State Equality v. Dow*, 2013 WL 5687193, 2013 N.J. LEXIS 1091, and Governor Chris Christie withdraws appeal – marriage equality goes into effect on October 21, as originally ordered by the trial judge.

October 22 – Illinois “Veto Session” of legislature convenes to consider marriage equality bill pending from spring session

October 28 – Hawaii Gov. Neil Abercrombie convenes special session of legislature to consider marriage equality bill he introduced. Abercrombie took the position that after *Windsor*, the state could not win a pending marriage equality lawsuit, so the legislature should act.

November 1 - *Obergefell v. Wymyslo*, 2013 U.S. Dist. LEXIS 156934, 2013 WL 5934007 (D. Ohio, Nov. 1, 2013) – Judge Black held that marriage recognition case survived the death of original plaintiffs, adding a gay funeral director as a co-plaintiff representing the interests of his potential customers

November 5 – Illinois legislature enacts marriage equality law, to take effect June 1, 2014. Critical vote followed a refusal by a state trial judge to dismiss pending marriage equality lawsuits.

November 12 – Hawaii legislature enacts marriage equality law, to take effect December 2, 2013.

November 14 – Missouri Governor Jay Nixon orders state tax authorities to accept joint returns filed by same-sex couples who married out of state, construing state’s tax law to incorporate federal marriage definition post-*Windsor*

November 25 – Citing *Windsor*, 9th Circuit administrative panel rules that Oregon must provide benefits to same-sex domestic partner of state employee. In the *Matter of Margaret Fonberg*, 2013 WL 6153265, 2013 U.S. App. LEXIS 23826, EDR No. 13-002.

November 25 - *Gray v. Orr*, Case No. 1:13-cv-8449 (U.S. Dist. Ct., N.D. Ill., Nov. 25, 2013) – Judge Durkin – federal court orders clerk to issue license to same-sex couple due to medical emergency, presaging partial breakdown of delayed implementation of Illinois marriage equality law.

December 10 - *Edwards v. Orr*, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577 (N.D. Ill.) – District Judge Coleman adopts general directive that Illinois issue marriage licenses to same-sex couples in the event of medical emergencies – adopts a methodology for determining who qualifies, to avoid constitutional issues

December 19 - *Greigo v. Oliver*, 2013 WL 6670704, 2013 N.M. LEXIS 414 (New Mexico Supreme Court) – unanimous pro-marriage equality ruling that goes into effect immediately

December 20 - *Kitchen v. Herbert*, 2013 WL 6697874, 2013 U.S. Dist. LEXIS 179331 (D. Utah) – District Judge Shelby – pro-marriage equality ruling, stay denied by Judge Shelby & by the 10th Circuit – couples start marrying – first district court marriage equality ruling on the merits post-Windsor

December 23 - *Obergefell v. Wymyslo*, 2013 WL 6726688, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio) – Judge Black issues permanent injunction requiring Ohio recognition of same-sex marriages for purposes of death certificates

2014

January 6 – Utah - U.S. Supreme Court stays Utah district court marriage ruling, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah Dec. 20, 2013), without explanation, pending appeal to the 10th Circuit. See 134 S. Ct. 893. During 2014, the U.S. Supreme Court will grant every stay motion in a pending marriage equality case until October 6, when it denies petitions for certiorari in marriage equality cases from three circuits, after which it will deny every stay motion in a pending marriage equality case, even after granting certiorari to review the 6th Circuit's November 2014 decision.

January 14 – Oklahoma - *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla.) – District Judge Kern rules ban on same-sex marriage unconstitutional, but stays decision pending 10th Circuit appeal in light of S. Ct. stay in *Kitchen v. Herbert*.

January 21 – 9th Circuit - *Smithkline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir.) – in case involving peremptory challenge to gay juror, 9th Circuit panel rules that *Windsor* established a heightened scrutiny standard for

sexual orientation discrimination claims, requiring that any strike against a gay juror must be for cause

January 29 – West Virginia - *McGee v. Cole*, 993 F. Supp. 2d 639 (S.D. W.Va. 2014) – District Judge Chambers denies motion to dismiss marriage equality suit in West Virginia

February 10 – Attorney General Holder announces that Justice Department will recognize same-sex marriages using place of celebration rule for all purposes, including testimonial privileges.

February 10 – Nevada—Governor Brian Sandoval and state attorney general announce that they will not defend the state’s marriage ban on the merits in pending 9th Circuit appeal by plaintiffs in *Sevcik v. Sandoval*, leaving defense to Intervenors.

February 12 – Kentucky - *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky.) – Judge John Heyburn rules state ban on recognition of same-sex marriages unconstitutional, decision eventually stayed pending appeal to 6th Circuit.

February 13 – Virginia - *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D.Va., Feb. 13, 2014, amended Feb. 14, 2014) – Judge Allen rules Virginia same-sex marriage ban unconstitutional, decision stayed pending appeal to the 4th Circuit.

February 20 – Oregon Attorney General announces that in light of *Windsor*, the state will make no substantive defense in pending marriage equality lawsuit.

February 21 - *Lee v. Orr*, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill.) – Judge Coleman rules that Cook County Clerk must immediately begin issuing marriage licenses, regardless of medical necessity, due to likely constitutional infirmity of existing marriage ban in light of *Windsor* and enactment of marriage equality law.

February 26 – Texas - *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex.) – Judge Garcia rules Texas same-sex marriage ban unconstitutional, stayed pending appeal to 5th Circuit.

March 14 – Tennessee - *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn.) – Judge Trauger found Tennessee’s ban on recognition of same-sex marriages

unconstitutional; her denial of stay for plaintiff couples was reversed by 6th Circuit pending appeal on April 25.

March 21 – Michigan - DeBoer v. Snyder, 973 F.Supp.2d 757 (E.D. Mich.) – Judge Friedman finds Michigan same-sex marriage ban unconstitutional after full bench trial, finds state’s expert witnesses not credible, decision stayed by 6th Circuit pending appeal.

April 10 – Indiana - Baskin v. Bogan, 12 F. Supp. 3d 1137 (S.D. Indiana) – Judge Young issue temporary restraining order requiring state to recognize same-sex marriage contracted out of state of one of the plaintiff couples in pending marriage equality suit, due to medical emergency; state is seeking stay and appeal to 7th Circuit.

April 10 – 10th Circuit hears oral argument in Utah marriage equality case

April 14 – Ohio - Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio) – Judge Black rules Ohio must recognize same-sex marriages for purposes of birth certificates and all other purposes; stayed in part pending 6th Circuit appeal.

May 8 – Indiana – Baskin v. Bogan, 983 F.Supp.2d 1021 (S.D. Ind.) – U.S. District Judge J Richard L. Young – Preliminary injunction for plaintiffs in marriage recognition case – state is seeking stay from 7th Circuit.

May 9 – Arkansas — Wright v. State of Arkansas (not officially published) - Pulaski County Cir. Judge Chris Piazza (elected in non-partisan election 1990) – holds same-sex couples have right to marry and to recognition of marriages - stayed by Arkansas Supreme Court after hundreds of couples had married

May 13 – Virginia - 4th Circuit argument in Bostic v. Schaefer & Harris v. Rainey – Virginia marriage appeal by county court clerks, as state was not defending the marriage ban.

May 13 – Idaho – Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho) – US Magistrate J Candy Wagahoff Dale (appointed by District Court in 2008) – ruled for recognition & right to marry - Stayed by 9th Circuit pending appeal – Gov. Otter subsequently petitioned 9th Circuit to go directly to en banc review, which was denied.

May 14 – Arkansas—State Supreme Court denies motion for emergency stay of Judge Piazza’s ruling in *Wright v. State*

May 19 – Oregon – *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Ore.) – USDJ Michael McShane (Obama appointee, 2013) – rules for right to marry and marriage recognition –No appeal by state – National Organization for Marriage, denied Intervenor status, is appealing and seeking stay from S. Ct. after 9th Cir. turned them down, 2014 WL 2566885 (9th Cir.) – couples began marrying the same day.

May 19 – Utah – *Evans v. State of Utah*, 21 F.Supp.3d 1192 (D. Utah) - USDJ Dale Kimball (Clinton appointee 1997 – senior status) – State must recognize marriages performed before S. Ct. issued stay on Jan. 6 --temporary 21-day stay pending state’s appeal to 9th Circuit.

May 20 – Pennsylvania – *Whitewood v. Wolf*, 992 F.Supp.2d 410 (M.D. Pa.) – USDJ John E. Jones (GW Bush appointee, 2002) – right to marry and marriage recognition - No appeal by state, decision went into effect quickly.

June 1 – Illinois marriage equality law officially took effect statewide (marriages already available in Cook County under federal court order and some other clerks had been issuing licenses)

June 4 – Oregon – *National Organization for Marriage v. Geiger*, 134 S. Ct. 2722 – Supreme Court denied motion by National Organization for Marriage to stay the Oregon marriage ruling while it appealed the district court’s denial of its motion to intervene to defend the state’s marriage ban.

June 6 – Wisconsin – *Wolf v. Walker*, 9 F. Supp. 3d 889 (W.D. Wis.) – Senior USDJ Barbara B. Crabb (Jimmy Carter appointee, 1979) – right to marry and marriage recognition – fundamental right, but would not survive rational basis review – decision stayed on June 13 after hundreds of couples had married, 2014 U.S. Dist. LEXIS 82242 – State appealed to 7th Circuit

June 24 – 9th Circuit – No en banc review in *SmithKline Beecham v. Abbott Laboratories*, 759 F.3d 990 – heightened scrutiny established as circuit precedent for 9th Circuit, applicable to pending appeals from Hawaii, Nevada and Idaho, and pending lawsuits in Montana, Alaska and Arizona; Dissent bemoans significance for pending marriage cases and claims circuit has misconstrued *US v. Windsor*

June 25 – Indiana – Baskin v. Bogan, 12 F.Supp.3d 1144 (S.D. Ind.) – Chief USDJ Richard L. Young (Bill Clinton appointee, 1998) – right to marry and marriage recognition – fundamental right and equal protection – decision stayed pending appeal – State appealed to 7th Circuit

June 25 – 10th Circuit – Utah – Kitchen v. Herbert, 755 F.3d 1193 – right to marry and marriage recognition – 14th Amendment fundamental rights case – staying pending S. Ct. appeal – Attorney General Reyes announced he would file a cert petition

July 1 – Kentucky – Love v. Beshear, 989 F.Supp.2d 536 (W.D. Ky.) – USDJ John G. Heyburn II – expands prior recognition ruling to full right to marry – equal protection case, class-based discrimination – sexual orientation is suspect classification, but court find no rational basis for ban – decision stayed pending appeal - State to appeal to 6th Circuit

July 9 – Colorado – Brinkman v. Long, 2014 WL 3408024 (D. Colo., not officially published) – Colorado Adams Co. District Ct., Judge C. Scott Crabtree – fundamental right to marry found, no compelling state interest advanced – no rational basis so there is also equal protection violation – no injunction issued, but declaratory judgment stayed pending appeal.

July 9 – Colorado – Boulder Clerk Hillary Hall started issuing licenses upon 10th Circuit ruling – People ex rel Suthers v. Hall – Colorado Boulder Co. District Ct. – Judge Andrew Hartman refuses to enjoin issuance of licenses – state to appeal to Colorado S. Ct. – following ruling, clerks in Denver and Pueblo Counties also started issuing licenses

July 11 – Utah - 10th Circuit – Evans v. State of Utah – 10th Circuit refuses to grant stay pending appeal of district court order requiring Utah to recognize marriages contracted prior to Supreme Court stay in Kitchen v. Herbert, gives state until July 21 to petition Supreme Court for stay. State petitioned Supreme Court on July 16.

July 17 – Florida – Monroe County Circuit Court – Huntsman v. Heavilin, 21 Fla. L. Weekly Supp. 916a - Judge Luis M. Garcia found Florida marriage ban unconstitutional in suit for marriage license by same-sex couple.

July 18 – Utah – Herbert v. Evans, 135 S. Ct. 16 – Supreme Court stays 10th Circuit’s decision requiring Utah to recognize same-sex marriages performed prior to Jan. 6 stay, pending state’s cert petition seeking review in the Supreme Court.

July 18 – Oklahoma - 10th Circuit – Bishop v. Smith, 760 F.3d 1070 – 10th Circuit rules that Oklahoma marriage ban violates fundamental right in violation of 14th Amendment, but stayed effect pending appeal to Supreme Court.

July 23 – Colorado – U.S. District Court – Burns v. Hickenlooper, 2014 WL 3634834 (D. Colo., not published in F. Supp.) – U.S. District Judge Raymond P. Moore found that Colorado’s marriage ban violates the 14th Amendment and temporarily stayed ruling to give state an opportunity to apply to 10th Circuit for a stay.

July 23 – Colorado – Boulder County District Court – State of Colorado v. Hall, No. 2014CV30833 - Judge Andrew Hartman denied state’s motion to order county clerk to stop issuing marriage licenses, affirmed July 24 by Colorado Court of Appeals.

July 25 – Florida – Miami-Dade Circuit Court – Pareto v. Ruvin, 21 Fla. L. Weekly Supp. 899a - Judge Sarah Zabel found Florida marriage ban unconstitutional in suit for marriage licenses by same-sex couples

July 28 – 4th Circuit – Bostic v. Schaefer, 760 F.3d 352 – 4th Circuit rules that Virginia marriage ban violates fundamental right in violation of 14th Amendment, but stayed effect pending motion for stay.

July 29 – Colorado Supreme Court – State of Colorado v. Hall – Ordered county clerk to stop issuing marriage licenses pending state Supreme Court’s review of trial court marriage equality rulings.

August 4 – Florida – Broward County Circuit Court – Brassner v. Lade, 21 Fla. L. Weekly Supp. 920a - Judge Dale Cohen found Florida ban on recognizing out-of-state same-sex marriages unconstitutional in case seeking dissolution of Vermont civil union. (Opinion subsequently vacated for reconsideration after state moved to intervene.)

August 5 – Supreme Court – Herbert v. Kitchen – Utah files petition for certiorari to review 10th Circuit ruling.

August 5 – Florida – Palm Beach County – Estate of Frank C. Bangor, Case No. 50214CP001857XXXXMB – Judge Diana Lewis – Recognition ban was unconstitutional as applied to appointment of Estate Representative based on out-of-state same-sex marriage

August 5 – Tennessee – Roane County Circuit Court – Borman v. Pyles-Borman, No. 2014CV36 (not officially published) – Circuit Judge Russell E. Simmons, Jr., held Baker v. Nelson controls and court may not assert jurisdiction in divorce action due to state’s ban on marriage recognition; no equal protection violation because Tennessee statute denies recognition to all marriages that could not have been performed within state, not just same-sex marriages, so there is no disparate treatment and disparate impact is not a recognized cause of action under the EP clause

August 6 – 6th Circuit Court of Appeals heard oral argument in marriage equality cases from Ohio, Michigan, Kentucky and Tennessee

August 8 – Supreme Court – Petition for certiorari filed by State of Virginia in Bostic v. Schaefer (4th Circuit Virginia case).

August 13 – 4th Circuit – 2-1 vote to deny motion for stay pending further appellate review in Bostic v. Schaefer (Virginia).

August 19 – Indiana – U.S. District Court – Bowling v. Pence, 2014 WL 4104814 (S.D. Ind.) – District J. Richard L. Young ruled state refusal to recognize out-of-state marriage was unconstitutional and restored Governor Pence as a defendant, characterizing as “troubling” the governor’s representation that he had nothing to do with enforcing marriage laws in order to get dismissed in this and other cases

August 19 – Idaho - 9th Circuit Court of Appeals – Latta v. Otter – Denied motion by Idaho Governor Butch Otter to bypass panel and hold en banc hearing in marriage equality case.

August 20 – Supreme Court – Supreme Court issues stay of mandate in Bostic v. Schaefer, sub nom McQuigg v. Bostic, 135 S. Ct. 32 (Virginia).

August 21 – Florida—Brenner v. Scott, 999 F.Supp.2d 1278 (N.D. Fla.) - Judge Robert L. Hinkle ruled that Florida marriage ban violates 14th Amendment, but stayed ruling for state’s anticipated appeal to the 11th Circuit

August 21 – 10th Circuit Court of Appeals – Stayed Colorado District Court’s ruling in Burns v. Hickenlooper to be consistent with stays issued in Utah and Oklahoma cases.

August 22 – Supreme Court – Petition for certiorari filed by Norfolk Clerk George Schaefer in Bostic v. Schaefer (4th Circuit Virginia case).

August 26 – 7th Circuit Court of Appeals heard marriage equality arguments in cases from Indiana and Wisconsin.

August 27 – Florida – 2nd District Court of Appeal – Shaw v. Shaw, 2014 WL 4212771 (not officially published) – Certifying to Florida Supreme Court question whether Florida Marriage Amendment deprives trial court of jurisdiction to hear divorce action for same-sex couple married out-of-state.

August 29 – 9th Circuit Court of Appeals – Geiger v. Kitzhaber – Rejected motion by National Organization for Marriage to intervene as defendant-appellant in Oregon marriage equality case.

August 29 – Supreme Court – Petition for certiorari filed by Prince William Clerk McQuigg in Bostic v. Schaefer (4th Circuit Virginia case)

September 3 – Louisiana – Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D. La.) – Judge Martin Feldman – rejected marriage equality challenge applying rational basis review, finding rational the state’s interest in connecting children with their biological parents but mainly emphasizing federalism concerns and respect for democracy

September 4 – 7th Circuit (Indiana & Wisconsin) – Baskin v. Bogan, 766 F.3d 648 – Opinion by Judge Richard Posner – marriage and recognition bans violate Equal Protection Clause; heightened scrutiny applies, but states have provided no rational basis for refusing to let same-sex couples marry or to recognize their marriages from elsewhere.

September 5 – Florida Supreme Court refuses to take a direct appeal certified by the 2nd District Court of Appeal in a marriage equality case. Several appeals from state court marriage equality rulings are pending before the 3rd District Court of Appeal, and Attorney General Pam Bondi wants them to remain “on hold” until the Supreme Court decides on pending cert petitions from the 4th and 10th Circuits.

September 8 – 9th Circuit hears oral argument in marriage equality cases from Idaho (appeal by state), Nevada (appeal by plaintiffs) and Hawaii (appeal by plaintiffs); Hawaii issue is whether case is moot and district court opinion should be vacated due to enactment of Hawaii marriage equality law that went into effect in December 2013).

September 9 – U.S. Supreme Court – Petitions for certiorari filed by Indiana and Wisconsin in *Baskin v. Bogan*

September 12 – Arizona – U.S. District Court – *Majors v. Jeanes*, 2014 WL 4541173 (D. Ariz., not officially published) – District Judge John Sedwick – Temporary restraining order issued requiring Arizona officials to issue a death certificate recording George Martinez as married to Fred McQuire at the time of his death. Same-sex couple married in California in July 2014 and Martinez died August 28.

September 22 – Louisiana - *Costanza v. Caldwell*, No. 2013-0052 D2 (15th Judicial Dist.) – State District Court Judge Edward B. Rubin rules that Louisiana must recognize a California same-sex marriage in order to approve a same-sex co-parent adoption of a child conceived through donor insemination, state to appeal.

Oct. 3 – Missouri (8th Cir.) – *Barrier v. Vasterling*, 2014 WL 4966467—State Circuit Judge J. Dale Youngs (Jackson County) rules state must recognize out of state same-sex marriages, and state says it won’t appeal. Several right-to-marry cases are still pending in Missouri at the end of the month.

Oct. 6 – U.S. Supreme Court denies certiorari in marriage equality cases from Utah & Oklahoma (10th Circuit), Virginia (4th Circuit), Wisconsin & Indiana (7th Circuit). All stays lifted in those states, increasing marriage equality states from 19 to 24. No publicly registered dissents from denials of cert.

Oct. 7 – Colorado Supreme Court (in 10th Circuit) lifts stay of state court’s marriage equality decision at request of Attorney General John Suthers, ruling goes into effect, State #25.

Oct. 7 – 9th Circuit—Latta v. Otter, 771 F.3d 456—strikes marriage bans in Nevada and Idaho – stays denied by end of the week, including by U.S. Supreme Court, States #26 & #27. Coalition to Protect Marriage in Nevada and state of Idaho subsequently filed petitions for en banc review, but the 9th Circuit panel ruling was not stayed. Judge Stephen Reinhardt for the panel: sexual orientation discrimination applying heightened scrutiny; Concur by Reinhardt on due process grounds; Concur by Marsha Berzon on sex discrimination grounds.

Oct. 7 – Kansas – Chief Judge Kevin P. Moriarty in the Kansas Tenth Judicial District state court issued Administrative Order 14-11 directing that District Court Clerk Sandra McCurdy issue marriage licenses to same-sex couples. Attorney General Derek Schmidt rushes to state Supreme Court for an order halting licenses.

Oct. 7 – W. Va. (4th Circuit)— District Judge Robert Chambers lifts stay of proceedings in pending case, McGee v. Cole, leading Attorney General and Governor to concede that ban is unconstitutional on Oct. 9 and licenses started issuing on Oct. 10. State #28

Oct. 8 – South Carolina – District Judge J. Michelle Childs lifts stay on proceedings in Bradacs v. Hailey and sets things in motion for consideration of s.j. motions.

Oct. 9 – South Carolina Supreme Court– orders a local magistrate to stop issuing licenses while pending federal marriage cases in South Carolina are being decided

Oct. 10 – Kansas—State ex rel. Schmidt v. Moriarity, No. 112,590 – Kansas Supreme Court halts issuance of licenses temporarily upon application of attorney general, while indicating likelihood of ruling for respondent clerk, who wants to issue licenses.

Oct. 10 – North Carolina – General Synod of the United Church of Christ v. Resinger, 12 F.Supp.3d 790—District Judge Max O. Cogburn, Jr., on his own motion, grants s.j. to plaintiffs. Attorney General Roy Cooper, who had previously

announced that after the 4th Circuit's ruling he would not defend the state ban, announced statewide effect of Cogburn's decision, making N.C. State #29.

Oct. 10 – 9th Circuit (Hawaii) – Jackson v. Abercrombie, 585 Fed. Appx. 413—Hawaii's enactment of a marriage equality law in 2013 mooted the pending appeal of a 2012 adverse district court decision, ordering the decision vacated and the appeal dismissed.

Oct. 12 – Alaska—Hamby v. Parnell, 2014 U.S. Dist. LEXIS 145876, 2014 WL 5089399—District Judge Timothy M. Burgess granted a surprise Sunday summary judgment to plaintiffs, temporarily stayed by 9th Circuit while the state unsuccessfully sought a stay from the Supreme Court.

Oct. 14 – North Carolina – Fisher-Borne v. Smith, 14 F.Supp.3d 695 (M.D. N.C.)—District Judge William L. Osteen, Jr. grants summary judgment to plaintiffs and allows state legislative leaders to intervene if they want to appeal in separate opinion, 14 F.Supp.3d 699. Legislative leaders would presumably seek en banc review in the 4th Circuit, since any 3-judge panel would be bound by prior ruling.

Oct. 16 – Arizona – Connolly v. Jeanes, 2014 WL 5320642 (D. Ariz.); Majors v. Horne, 14 F.Supp.3d 1313 (D. Ariz.)—District Judge John W. Sedwick grants summary judgment to plaintiffs in two pending marriage cases; Attorney General Tom Horne announces that appeal to 9th Circuit would be futile and so state complies; State #30.

Oct. 17 – Alaska – U.S. Supreme Court denies stay in Hamby v. Parnell, 135 S. Ct. 399; ruling goes into effect, but state files an appeal without a stay in the 9th Circuit; State #31.

Oct. 17 – Colorado – Burns v. Hickenlooper, 2014 WL 5312541(D. Colo.), made preliminary injunction requiring marriage equality permanent in light of Supreme Court's denial of certiorari in Herbert v. Kitchen.

Oct. 17 – Wyoming – Guzzo v. Mead, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797—District Court Scott Skavdahl grants summary judgment to plaintiffs, stayed until Oct. 23 or until state certifies it won't appeal to the 10th Circuit (which appeal would be futile).

Oct. 17 – Attorney General Holder announces federal government will recognize same sex marriages in Utah, Oklahoma, Colorado, Virginia, Indiana, Wisconsin, and Nevada.

Oct. 21 – Wyoming certifies it will not appeal decision in *Guzzo v. Mead*, and stay is lifted, State #32

Oct. 21 – Puerto Rico—*Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. LEXIS 150487, 2014 WL 5361987 (D. P.R.), – District Judge Juan M. Perez-Gimenez dismisses marriage equality case, claiming to be bound by *Baker v. Nelson*, whose continuing viability as precedent had been asserted by 1st Circuit in its 2012 DOMA opinion. Lambda Legal announced appeal to 1st Circuit.

Oct. 22 – Lambda Legal sues Social Security Administration, *Murphy v. Colvin* (D.D.C.), for refusing to recognize legal same-sex marriages in non-equality states for purposes of spousal death and survivor benefits.

Oct. 25 – Attorney General Holder announces federal government will recognize same-sex marriages in Alaska, Arizona, Idaho, North Carolina, West Virginia, and Wyoming.

Nov. 4 – Kansas—*Marie v. Moser*, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 (D. Kansas)—U.S. District Judge Daniel Crabtree held that Kansas' ban on same-sex marriage violates the 14th Amendment, staying his decision until November 11 to give the state a chance to seek a stay from the 10th Circuit or the Supreme Court pending appeal. The Kansas Supreme Court put off its hearing in *State ex rel. Schmidt v. Moriarty*, leaving a stay in place while the federal case was appealed to the 10th Circuit and/or the Supreme Court.

Nov. 5 – Missouri - *State of Missouri v. Florida*, 2014 WL 5654040 (November 5, 2014)—*City of St. Louis, Missouri*, Circuit Judge Rex M. Burlison ruled that Missouri's ban on same-sex marriage violates the 14th Amendment and refused to stay his decision. Attorney General Chris Koster announced that the state would appeal, but that he would not seek a stay. The decision directly affected only St. Louis, whose recorder of deeds was the defendant in a separate case brought by the state to stop her from issuing licenses.

Nov. 5 – U.S. District Judge Robert Hinkle ruled that the stay of his ruling on the Florida marriage ban, *Brenner v. Scott*, would remain in effect until January 5 to give the state a chance to appeal to the 11th Circuit and seek a stay pending decision from that court.

Nov. 6 – 6th Circuit—*DeBoer v. Snyder*, 772 F.3d 388— Ruled 2-1 that the same-sex marriage bans and/or denials of recognition of same-sex marriages in Ohio, Michigan, Tennessee and Kentucky were constitutional, reversing rulings by six federal district courts. Majority opinion by Judge Jeffrey Sutton said that *Baker v. Nelson* remains controlling, but then in dicta stated that the states had a rational basis for not extending the right to marry to same-sex couples. A dissent by Judge Martha Daughtrey argued that the court should follow the rulings by the 4th, 7th and 10th Circuits that had been denied review by the Supreme Court on Oct. 6. Counsel for all plaintiffs conferred on Nov. 7 and agree not to file motions for rehearing en banc, instead seeking direct Supreme Court review.

Nov. 7 – West Virginia – *McGee v. Cole*, 2014 WL 5802665—U.S. District Judge Robert C. Chambers ruled that West Virginia’s ban on same-sex marriage violates the 14th Amendment, finding the decision dictated by the 4th Circuit’s ruling in *Bostic*. Because the state had already begun issuing marriage licenses shortly after the Supreme Court denied review of the Virginia case on Oct. 6, this ruling was mainly a formality.

Nov. 7 – Kansas—10th Circuit denied state’s petition for a stay in *Marie v. Moser*, Kansas marriage equality case, but Kansas refused to issue marriage licenses or recognize same-sex marriages until there was a ruling from the U.S. Supreme Court.

Nov. 7 – Missouri – *Lawson v. Kelly*, 2014 U.S. Dist. LEXIS 157802, 2014 WL 5810215—U.S. District Judge Ortrie Smith ruled that Missouri’s ban on same-sex marriage violated the Due Process and Equal Protection clauses, and that the 8th Circuit’s 2006 ruling rejecting a challenge to the Nebraska marriage amendment, *Citizens for Equal Protection v. Bruning*, was not precedential on the 14th Amendment questions presented, because the plaintiffs in that case brought their challenge on a different theory and were not asking the court in that case to declare a right of same-sex couples to marry. Judge Smith’s order was directed only to the

Jackson County Recorder. Thus, Missouri became only a partial marriage equality state, as licenses were available in two counties and one city as a result of state and federal decisions as to which the state did not request a stay.

Nov. 12 – Kansas—Supreme Court denied motion for a stay in *Marie v. Moser*, 135 S.Ct. 511. Controversy ensued about the scope of the district court’s order as the state noticed a frivolous appeal on the merits to the 10th Circuit (which had already issued two marriage equality rulings that were denied review by the Supreme Court).

Nov. 12 – South Carolina – *Condon v. Haley*, 2014 WL 5897175 (D. S. Car.)—U.S. District Judge Richard Mark Gergel ruled that South Carolina’s ban on same-sex marriage violates the 14th Amendment, but stayed his decision until Nov. 20 to give the state an opportunity to seek a stay from the 4th Circuit or the Supreme Court. Neither the 4th Circuit nor the Supreme Court would grant the state’s request for a stay, so the decision went into effect a few days later, although the state filed an appeal with the 4th Circuit on November 13. This completed the sweep of the 4th Circuit for marriage equality.

Nov. 14 – South Dakota - *Rosenbrahn v. Daugaard*, 2014 U.S. Dist. LEXIS 160340, 2014 WL 6386903 (D.S.D.)—denied the state’s motion to dismiss marriage equality case, finding that plaintiffs’ challenge to South Dakota’s ban of same-sex marriage was not precluded by *Baker v. Nelson* or *Citizens for Equal Protection v. Bruning*, and otherwise stated a valid claim under the 14th Amendment.

Nov. 14 – Petition for Certiorari filed in Supreme Court by plaintiffs in *Henry v. Hodges & Obergefell v. Hodges*, Ohio marriage equality cases, seeking review of 6th Circuit’s decision in *DeBoer v. Snyder*.

Nov. 14 – Petition for Certiorari filed in Supreme Court by plaintiffs in *Tanco v. Haslam*, Tennessee marriage equality case, seeking review of 6th Circuit’s decision in *DeBoer v. Snyder*.

Nov. 17 – Petition for Certiorari filed in Supreme Court by plaintiffs in *DeBoer v. Snyder*, seeking review of 6th Circuit’s decision.

Nov. 17 – Petition for Certiorari filed in Supreme Court by plaintiffs in *Love v. Beshear*, seeking review of 6th Circuit’s decision in *DeBoer v. Snyder*.

Nov. 18 – South Carolina – *Bradacs v. Haley*, 2014 WL 5840153 - U.S. District Judge Michelle Childs ruled that South Carolina’s refusal to recognize the plaintiffs’ out-of-state same-sex marriage violated the 14th Amendment.

Nov. 18 – Alaska - 9th Circuit denied Alaska’s request to take its appeal of *Hamby v. Parnell* directly to an en banc panel and set a briefing schedule that would put off oral argument until February 2015 at the earliest.

Nov. 19 – Montana – *Rolando v. Fox*, 2014 WL 6476196, 2014 U.S. Dist. LEXIS 164112 (D. Mont.)—U.S. District Judge Brian Morris ruled that Montana’s ban on same-sex marriage was unconstitutional, providing that his injunction would take effect immediately. The state did not seek a stay from the 9th Circuit, but noticed its appeal on the same date. Montana completed the sweep of the 9th Circuit for marriage equality.

Nov. 20 – Louisiana - Lambda Legal files certiorari petition in Supreme Court in *Robicheaux v. George*, asking the Court to bypass the 5th Circuit and reverse the district court’s adverse marriage equality decision in Louisiana.

Nov. 24 – Utah – *Evans v. State of Utah* - U.S. District Judge Dale Kimball made permanent his injunction requiring the state to recognize marriages contracted prior to the U.S. Supreme Court’s January 6, 2014, stay in *Kitchen v. Herbert*, which was lifted by the denial of certiorari in that state.

Nov. 25 – Arkansas - U.S. District Judge Kristine G. Baker ruled in *Jernigan v. Crane*, 2014 WL 6685391 (E.D. Ark.), that Arkansas’s ban on same-sex marriage was unconstitutional, but stayed her ruling pending the state’s anticipated appeal to the 8th Circuit.

Nov. 25 – Mississippi – *Campaign for Southern Equality v. Bryant*, 2014 WL 6680570 (S.D. Miss.)—U.S. District Judge Carlton W. Reeves ruled that Mississippi’s ban on same-sex marriage was unconstitutional, granting the state a two-week temporary stay to appeal to and obtain a stay from the 5th Circuit Court of Appeals.

Nov. 26 – Kansas - ACLU of Kansas filed an amended complaint in *Marie v. Moser*, adding several state-wide department heads seeking to broaden district court’s order to make marriage equality available throughout the state. Although Kansas is in the 10th Circuit and thus its federal courts bound by that circuit’s affirmative marriage equality rulings in cases from Utah and Oklahoma, the district court had limited its affirmative relief to the county clerks sued by the plaintiffs, and the state resisted applying the ruling statewide while it sought to appeal to the 10th Circuit.

Nov. 26 – Missouri - District Judge Smith in Missouri refused to lift the stay of his decision in *Lawson v. Kelly*, noting the pendency of the state’s appeal to the 8th Circuit, which had not yet ruled in a marriage equality case.

Dec. 2 – Louisiana – State officials respond to petition for certiorari before judgment in *Robicheaux v. George* by telling the Supreme Court that they believe the district court’s ruling against marriage equality was correct but that the petitioners “are right that the extraordinary mechanism of cert-before-judgment is appropriate here,” contending that the Louisiana ruling would provide the best vehicle for the Supreme Court to consider the marriage equality issue.

Dec. 2 – Kansas - 10th Circuit denies a motion by Kansas defendants for direct en banc review of the district court’s marriage equality ruling in *Marie v. Moser*. The state had argued that because a three-judge panel would be bound by the Circuit’s prior rulings on marriage equality, it made no sense to have their appeal heard by the usual three-judge panel.

Dec. 3 – Florida - 11th Circuit denies a motion by Florida to stay the district court’s injunction in *Brenner v. Armstrong* pending a decision of Florida’s appeal, announcing that the injunction would go into effect at the end of the day on January 5, 2015.

Dec. 4 – Mississippi – *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (5th Circuit) - grants Mississippi’s motion for a stay of the district court’s order pending appeal, and also grants appellee’s motion to expedite appeal by assigning the case to the same panel that would hear the Texas and Louisiana appeals on January 9, 2015.

Dec. 8 - Florida – Broward County Circuit Court – Brassner v. Lade - Judge Dale Cohen ruled for the second time that Florida must recognize a same-sex marriage performed out-of-state for purposes of a divorce proceeding. Cohen had rescinded his earlier ruling when the Attorney General argued that it had not been properly notified that the state’s marriage ban was being challenged in the case and afforded an opportunity to intervene. Cohen subsequently granted the requested divorce.

Dec. 8 – Kentucky—Governor Steve Beshear files a brief supporting plaintiff’s petition for certiorari in DeBoer v. Snyder, arguing that the case presents a question of “exceptional importance” and pointing out that trial courts in 44 states have now ruled that bans on same-sex marriage are unconstitutional.

Dec. 9 – Missouri—Jackson County Circuit Judge J. Dale Youngs rejected a motion by state legislative rulers seeking a stay of his earlier ruling requiring the state to recognize same-sex marriage performed in other jurisdictions.

Dec. 10 – Missouri - Plaintiffs’ counsel in marriage equality cases pending before the 8th Circuit from Missouri, Lawson v. State of Missouri and Lawson v. Kelly, ask the 8th Circuit to lift the federal district court’s stay, noting that same-sex couples are obtaining marriage licenses in some counties due to state court rulings and that the U.S. Supreme Court has not stayed any marriage equality rulings since Oct. 6, when it denied cert petitions in marriage equality cases from three other circuits.

Dec. 12 – Supreme Court - Arguing that “the present status quo is unsustainable,” Ohio responds to petitions for certiorari by plaintiffs in the Ohio marriage recognition case by notifying the Supreme Court that it agrees that the petition for certiorari should be granted in DeBoer v. Snyder.

Dec. 15 – Florida—Attorney General Pam Bondi applies to the Supreme Court for an extension of the district court’s temporary stay in Brenner v. Scott, which expires at 5 pm on January 5.

Dec. 15 – Tennessee – State files an opposition to the petition for certiorari in Tanco v. Haslam, one of the cases consolidated with DeBoer v. Snyder in the 6th Circuit, arguing that the Supreme Court need not review the 6th Circuit’s ruling despite the split with other circuits.

Dec. 15 – Idaho—Governor Butch Otter filed an “amicus brief” in response to the pending petitions for certiorari that seek review of *DeBoer v. Snyder*, asking the Court to refrain from making a decision on certiorari until Idaho has filed its petition for review of the 9th Circuit’s ruling in *Latta v. Otter*, which it will do if the 9th Circuit denies his petition for en banc reconsideration of that case. By the end of December, both Otter and Idaho’s Attorney General, also a named defendant, had filed petitions asking the Supreme Court to grant certiorari to review the 9th Circuit’s marriage equality decision, even though the 9th Circuit had not yet announced its decision to deny en banc review.

Dec. 15 – North and South Carolina - The 4th Circuit Court of Appeals consolidates appeals by the attorneys general of North and South Carolina from district court marriage equality rulings in *Bleckley v. Wilson* and *Bradacs v. Wilson*, and puts both cases “in abeyance” pending a ruling by the Supreme Court on the petitions for certiorari seeking review of the 6th Circuit’s decision in *DeBoer v. Snyder*.

Dec. 18 – Kansas - U.S. District Judge Daniel Crabtree denies a renewed motion to intervene in the pending marriage equality case, *Marie v. Moser*, by the Westboro Baptist Church. Judge Crabtree reiterated his conclusion that the defendants and the prospective Intervenor “share an ultimate objective” and thus intervention is not necessary to defend Westboro’s interest in preventing same-sex couples from marrying in Kansas.

Dec. 19 – Florida – *Armstrong v. Brenner*, 2014 WL 7210190—U.S. Supreme Court denied motion by Florida Attorney General Pam Bondi to extend the stay issued by U.S. District Judge Robert Hinkle in *Brenner v. Scott* past 5 pm on January 5. This is the first time that the Supreme Court has refused to stay a marriage equality ruling by a district court within a circuit that has not yet ruled on marriage equality.

Dec. 19 – Idaho - U.S. Magistrate Judge Candy W. Dale awards plaintiffs \$397,300.00 in attorney fees and \$4,363.08 in expenses against defendants in the Idaho marriage equality case, *Latta v. Otter*. Otter filed a motion for en banc review by the 9th Circuit of the magistrate’s order, and asked the Supreme Court to

wait for Idaho's petition for certiorari before deciding whether to grant cert in *DeBoer v. Snyder*.

Dec. 20 – Missouri - Advising the 8th Circuit of the Supreme Court's denial of a stay in the Florida marriage equality case, counsel for plaintiffs in pending Missouri marriage appeal argues in letter to the court that "a stay of final judgment in this case, where no stay has been requested [by the state], is inappropriate." The federal district court had stayed its ruling on its own motion pending appeal.

Dec. 30 – Idaho – State defendants petition Supreme Court for review of 9th Circuit's decision in *Latta v. Otter*.

2015:

January 1 – Florida - U.S. District Judge Robert Hinkle issued an Order in *Brenner v. Scott*, clarifying that all county clerks in the state are bound by the Constitution to issue marriage licenses to same-sex couples when the District Court's stay expires.

January 5 - Florida – Miami-Dade Circuit Court – *Pareto v. Ruvin* - Judge Sarah Zabel ended the stay she had issued of her decision holding the Florida same-sex marriage ban unconstitutional, and the Miami-Dade County Clerk began issuing licenses to same-sex couples.

January 5/6 – Florida – County clerks throughout Florida began issuing marriage licenses to same-sex couples, although some counties ceased holding any marriage ceremonies at courthouses to avoid requiring objecting employees from performing same-sex marriages, making Florida the 36th marriage equality state.

January 8 – Georgia – U.S. District Judge William S. Duffey, Jr., denied the state's motion to dismiss the Equal Protection claim in *Inniss v. Aderhold*, 2015 WL 300593 (N.D. Ga., Atlanta Div.), but granted the motion to dismiss the Due Process claim, finding that Supreme Court precedents did not recognize a fundamental right of "same-sex marriage;" ruled that state's motion to dismiss Equal Protection claim did not allege facts that would necessarily meet rational basis test.

January 9 – 5th Circuit Court of Appeals—Held oral arguments in *Robicheaux v. Caldwell* (Louisiana), *Campaign for Southern Equality v. Bryant* (Mississippi), and *DeLeon v. Perry* (Texas).

January 9 – Idaho – 9th Circuit denied Idaho’s motion for en banc review of *Latta v. Otter*, 2015 WL 128117, with extensive dissenting opinion by Judge O’Scannlain joined by two other circuit judges.

January 12 – Louisiana - Supreme Court denied petition for certiorari before judgment in *Robicheaux v. George*, 2015 WL 133500, which was argued before the 5th Circuit on January 9.

January 12 – South Dakota – *Rosenbrahn v. Daugaard*, 2015 WL 144567, 2015 U.S. Dist. LEXIS 4018 (D. S.D.) – U.S. District Judge Karen E. Schreier held that the state’s ban on same-sex marriage is unconstitutional for depriving same-sex couples of access to a fundamental right. Decision stayed pending appeal to the 8th Circuit.

January 15 – Michigan – *Caspar v. Snyder*, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741 (E.D. Mich.) – U.S. District Judge Mark Goldsmith holds that plaintiffs are entitled to injunction ordering the state to recognize same-sex marriages contracted during the brief time that the state government and courts were in turmoil about the issue of marriage equality. Order stayed 21 days to allow state to appeal. State subsequently announced it would not appeal.

January 16 – Supreme Court – Granting petitions for certiorari to review the 6th Circuit’s decision in *DeBoer v. Snyder*, 772 F.3d 388 (Nov. 6, 2014). Cases granted review from Ohio, Tennessee, Kentucky, and Michigan.

January 22 – Missouri – The 8th Circuit denied a motion to lift the stay in *Lawson v. Kelly*, but granted plaintiffs’ motion to expedite decision of the state’s appeal on the merits.

January 23 – Alabama – *Searcy v. Strange*, 2015 WL 328728 (S.D. Alabama) - U.S. District Judge Callie V. S. Granade ruled Alabama’s ban on recognizing same-sex marriages was unconstitutional. Case sought recognition of an out-of-state marriage for purposes of adoption. On January 25, Judge Granade stayed the ruling until February 9 to allow the state to seek an appellate stay.

January 26 – Alabama - Strawser v. Strange (S.D. Alabama) – Judge Granade reiterated her ruling from Searcy, in a separate case seeking a right to marry in-state, and stated injunctive relief more broadly, to clarify that opinion bound all Alabama officials. Stayed until February 9. On January 27, Alabama Chief Justice Roy Moore sent a letter to Governor Robert Bentley denouncing the decision and calling on the governor to defy the court’s order.

February 3 – Alabama – 11th Circuit consolidates Searcy v. Strange and Strawser v. Strange for appeal, but denies the state’s motion to stay the district court orders in those cases.

February 8 – Alabama Chief Justice Moore issued an order to all probate judges in the state, forbidding them from issuing marriage licenses to same-sex couples.

February 9 – United States Supreme Court denied a stay to the state of Alabama in Strange v. Strawser, with Justices Thomas and Scalia dissenting in an opinion by Thomas, who identified the constitutional question at issue as “important” and observed that people might construe the Court’s action as signaling how it will rule on the merits in the pending marriage equality case. Some probate judges subsequently issue marriage licenses.

February 11 – Alabama Supreme Court rejected a petition by a probate judge for an advisory opinion on whether the judge was required to or could issue marriage licenses. *Ex parte Don Davis*, Judge of Mobile County Probate Court, 2015 WL 567479.

February 12 – Alabama – U.S. District Judge Granade issued an order in Strawser v. Strange, 2015 WL 589917, 2015 U.S. Dist. LEXIS 17200 (S.D. Ala.), ordering Judge Davis to issue marriage licenses to plaintiffs.

February 17 – Texas – Travis County Probate Judge Guy Herman found Texas bans on same-sex marriage unconstitutional in the context of a proceeding involving a claim of a surviving common law wife of a Texas woman, which inspired Travis County District Judge David Wahlberg to issue an order to the county clerk to issue a marriage license to Suzanne Bryant and Sarah Goodfriend, who quickly became the first same-sex couple to marry in Texas. Attorney

General Ken Paxton quickly got the Texas Supreme Court to stay the two Travis County rulings on an emergency basis.

February 25 – U.S. Department of Labor – Final rule published in Federal Register, 80 FR 9989-01, changing the eligibility rules for Family and Medical Leave Act family leave to recognize legally-married same-sex spouses under the place of celebration rule rather than the prior place of residence rule.

March 2 – Nebraska – U.S. District Judge Joseph F. Bataillon ruled in *Waters v. Ricketts*, 2015 WL 852603, 2015 U.S. Dist. LEXIS 25869, that the state's ban on same-sex marriage violates the 14th Amendment. Decision stayed pending state's appeal to the 8th Circuit, which subsequently announced that it would add this case to the argument calendar for May 12 when marriage equality appeals would be argued from other states in the circuit.

March 3 – Alabama – In *Ex parte State of Alabama ex rel. Alabama Policy Institute & Alabama Citizens Action Program*, No. 1140460, 2015 WL 892752, 2015 Ala. LEXIS 33, the Alabama Supreme Court ordered all probate judges in the state (except, provisionally, Judge Davis in Mobile County) not to issue marriage licenses to same-sex couples. Subsequently, the court extended its order to Judge Davis on March 11, finding no conflict with the federal district court's order under which he issued licenses to the named plaintiffs in the Strawser case. Meanwhile, U.S. District Judge Granade accepted a third amended complaint in Strawser and pondered a motion to certify a plaintiff and defendant class that would extend her Order statewide.

March 20 – Puerto Rico – 1st Circuit. The Solicitor General of Puerto Rico, filing a brief responding to plaintiff's appeal of the district court's dismissal of a marriage equality case, informed the 1st Circuit that in light of the Supreme Court's grant of certiorari to review the 6th Circuit's decision and subsequent denials of stays, the Commonwealth was changing its position and no longer defended its ban on same-sex marriage on the merits, although it would not allow same-sex couples to marry until ordered to do so by a court. Puerto Rico conceded that the cert grant in the 6th Circuit *Obergefell* case had rendered obsolete the Supreme Court's statement in *Baker v. Nelson* that same-sex marriage did not present a substantial federal question.

March 26 – Texas – U.S. District Judge Reed O’Connor - *State of Texas v. United States of America*, 2015 U.S. Dist. LEXIS 38264, 2015 WL 1378752 (N.D. Texas). Ordering a stay of the Labor Department’s FMLA regulation on recognition of same-sex spouses, finding it potentially invalid due to Section 2 of the Defense of Marriage Act, which provides that states are not required to recognize same-sex marriages performed in other states, and this statutory policy could not be changed by regulation. The stay extended also to Arkansas, Nebraska and Louisiana, which had joined the case as co-plaintiffs. The stay was likely to last until the Supreme Court ruled on the appeal from the 6th Circuit’s decision in *DeBoer v. Snyder*.

April 14 – Puerto Rico - 1st Circuit Court of Appeals – Announces that appeal in *Conde-Vidal v. Ruis-Armendariz* will be put “on hold” until Supreme Court issues its decision in *Obergefell v. Hodges*.

April 16 – Kentucky – *Hardee v. Beshear* – Franklin County Circuit Judge Thomas Wingate found Kentucky ban on same-sex marriage violates the 14th Amendment. Opinion on hold pending Supreme Court ruling in *Obergefell v. Hodges*.

April 20 – Oregon – U.S. Supreme Court denies petition for certiorari in *National Organization for Marriage v. Geiger*, 2015 WL 849786 (No. 14-1048), rejecting an attempt by NOM to appeal the district court’s refusal to allow it to intervene to defend Oregon’s ban on same-sex marriage. The state had declined to appeal the district court’s order striking down the ban, so its decision went into effect shortly after it was issued on May 19, 2014.

April 23 – Alabama – *Strawser v. Strange*, 2015 WL 1880605 & 1880615 – District Judge Granade denies motions to dismiss proposed class action marriage equality lawsuit filed by probate judges and Attorney General Strange.

April 24 – Florida – 2nd District Court of Appeals – *Brandon-Thomas v. Brandon-Thomas*, 2015 Fla. App. LEXIS 6051, 2015 WL 1874457 – Florida courts must accord full faith and credit to out-of-state same-sex marriages for purposes of jurisdiction over divorce petitions.

April 28 –Supreme Court argument in the consolidated appeals from the 6th Circuit’s decision in *DeBoer v. Snyder*, with the expectation that a ruling would be issued by the end of June 2015, under the name *Obergefell v. Hodges*.

April 29 – 8th Circuit cancels scheduled oral argument in pending appeals from several states in the circuit, announcing that appeals will be placed on hold until after Supreme Court’s decision in *Obergefell* is announced.

May 21 – Alabama – *Strawser v. Strange* (S.D. Alabama), 2015 U.S. Dist. LEXIS 66397 & 66399. U.S. District Judge Callie Granade certifies class action and issues preliminary injunction requiring all probate judges in Alabama to issue marriage licenses to same-sex couples on the same basis as they issue licenses to different-sex couples. Order stayed pending U.S. Supreme Court ruling in *Obergefell v. Hodges*.

June 5 – Guam – *Aguero v. Calvo* (D. Guam), 2015 WL 3573989. Guam District Judge Frances M. Tydingco-Gatewood ruled from the bench on June 5, following up with a written opinion on June 8, stating that pursuant to 9th Circuit precedent (*Latta v. Otter*), the government of Guam was required to allow same-sex couples to marry, granting the plaintiffs’ motion for summary judgment and ordering that the territory begin issuing marriage licenses on June 9.

June 9 – Arkansas - *Frazier-Henson v. Walther* (Pulaski Co. Cir. Ct.). Arkansas Circuit Judge Wendell Lee Griffen ruled that the 500+ same-sex marriages performed during the period between Circuit Judge Chris Piazza’s May 9, 2014, ruling in *Wright v. State* and the subsequent stay issued by the Arkansas Supreme Court were valid and must be recognized by the state.

June 26 – *Obergefell v. Hodges*, 135 S. Ct. 1039 – U.S. Supreme Court rules, 5-4, that same-sex couples have the right to marry and to have their marriages recognized by the states under the 14th Amendment. Opinion by Kennedy, signed by Ginsburg, Breyer, Sotomayor and Kagan. Dissents by Roberts, Scalia, Thomas, and Alito. The decision was premised on a fundamental right to marry which same-sex couples were entitled to exercise. The opinion blended due process and equal protection concerns, by reference to the fundamental rights strand of equal protection theory, harking back to *Loving v. Virginia* and subsequent cases striking down state restrictions on marriage.

July 1 – 5th Circuit Court of Appeals – Ruling on appeals of marriage equality cases from Texas, Louisiana and Mississippi, the court held that under *Obergefell v. Hodges* the bans on same-sex marriage in all three state were unconstitutional, and directed the respective district courts to put appropriate orders into effect. *Robicheaux v. Caldwell*, 2015 WL 4032118, 2015 U.S. App. LEXIS 11375 (Louisiana); *De Leon v. Abbott*, 2015 WL 4032161, 2015 U.S. App. LEXIS 11505 (Texas); *Campaign for Southern Equality v. Bryant*, 2015 WL 4032186, 2015 U.S. App. LEXIS 11581 (Mississippi).

July 8 – 1st Circuit Court of Appeals – Vacated district court’s ruling in Puerto Rico and held ban on same-sex marriage unconstitutional pursuant to *Obergefell*.