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## At Long Last Marriage

Jack B. Harrison

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# AT LONG LAST MARRIAGE

JACK B. HARRISON\*

## ABSTRACT

*Over time, the Supreme Court has made clear its belief that marriage is one of the most significant and fundamental rights provided protection under the Constitution. In his opinion in Griswold v. Connecticut, Justice Douglas characterized marriage as a “coming together for better or for worse, hopefully enduring, and intimate to the [point] of being sacred[,]” describing it as “an association that promotes a way of life . . . a harmony in living . . . [and] a bilateral loyalty.” The Court in Griswold clearly found that marriage was deserving of protection not solely because it was the locus for procreation and the rearing of children, but rather that there was some protectable liberty interest inherent in the institution of marriage itself. As the Supreme Court stated in Zablocki v. Redhail, state regulation is limited to those “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.” The state may adopt more intrusive or limiting restrictions on the right to marry only if they are “supported by sufficiently important state interests and [are] closely tailored to effectuate only those interests.”*

*On May 30, 2015, a sweltering May day, I stood on the roof of the Bryant Park Grille in New York City officiating at the wedding of two wonderful young men,*

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*one of whom I have been close friends with for over fifteen years. As I looked out over Bryant Park prior to the start of the ceremony, I was overcome by joy at the momentous nature of the day and overwhelmed by the realization that we were in a historic moment that I never imagined I would live to see. Here I stood, a gay man in his fifties who had been toiling in the vineyard of the gay rights movement for over thirty years, as an activist and a teacher, bearing witness to a marriage between two loving men that was recognized as legal by the State of New York and by the United States. As one who lived through the horrid days of the early AIDS crisis and buried way too many friends along the way, I also could not help but think of all those too numerous to name who were not there to bear witness to such an amazing day. Throughout all these years, I have watched and represented loving gay and lesbian couples as they struggled to piece together some legal protections for their relationship and their children in the face of a hostile, if not indifferent, legal system. Some marvel at the rapidity with which the legal changes surrounding same sex marriage have occurred. But this marveling only ignores the blood, sweat, tears, and death over centuries that led us to this historic moment.*

*While this article is certainly about the legal process that led to the Supreme Court's decision in Obergefell, recognizing that state prohibitions on same sex marriages are unconstitutional, it is also deeply personal, in that all the stories that led us to this moment are somehow also my story. Part II of this article explores the development of Justice Kennedy's jurisprudence related to the application of the doctrines of equal protection and due process through Romer, Lawrence, and Windsor, the trilogy of gay rights cases in which he wrote for the Supreme Court prior to Obergefell. This discussion culminates in an analysis of Justice Kennedy's majority opinion in U.S. v. Windsor, which provided the basis for a vast expansion of the right of same sex couples to marry across the country, ultimately placing the issue squarely before the Supreme Court in Obergefell. Part III then examines the impact Justice Kennedy's analysis in Windsor had on the United States Courts of Appeals addressing the constitutionality of state bans prohibiting the recognition of same sex marriage, leading to the decision in Obergefell. Part IV then provides an extensive examination of the Supreme Court's decision in Obergefell. Part V, the conclusion, examines the aftermath of the Court's decision in Obergefell, placing Obergefell in its proper context in the journey for greater inclusion of and protection for gay and lesbian persons and identifying some of the very complex issues that still lay ahead in the journey toward a structural and institutional formal equality regime.*

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I. INTRODUCTION

We queers of Revelation hill, tucking our skirts about us so as not to touch our Mormon neighbors, died of the greed of power, because we were expendable. If you mean to visit any of us, it had better be to make you strong to fight that power. Take your languor and easy tears somewhere else. Above all, don’t pretty us up. Tell yourself: None of this ever had to happen. And then go make it stop, with whatever breath you have left. Grief is a sword, or it is nothing.<sup>1</sup>

On May 30, 2015, a sweltering Saturday, I stood on the roof of the Bryant Park Grille in New York City officiating at the wedding of two wonderful young men, one of whom I have been close friends with for over fifteen years.<sup>2</sup> As I looked out over Bryant Park prior to the start of the

1. PAUL MONETTE, LAST WATCH OF THE NIGHT: ESSAYS TOO PERSONAL AND OTHERWISE 115 (1st ed., Harcourt Brace 1994). This article is dedicated to my fellow Cincinnati, Jim Obergefell, Jim’s late husband, John Arthur, all of the brave plaintiffs and attorneys who stood tall and brought these cases, and most especially, all of those amazing gay and lesbian persons who emerged proudly from their closets and fought hard over decades, including those many – the queers of Revelation Hill—who are not here to bear witness.

2. *Weddings*, THE NEW YORK TIMES (May 31, 2015),

ceremony, I was overcome by joy at the momentous nature of the day and overwhelmed by the realization that we were in a historic moment that I never imagined I would live to see. Here I stood, a gay man in his fifties who had been toiling in the vineyard of the gay rights movement for over thirty years, as an activist, as an attorney, and as a teacher, bearing witness to a marriage between two loving men that was recognized as legal by the State of New York and by the United States.

As one who lived through the horrid days of the early AIDS crisis and buried too many friends along the way, I also could not help to think of all those too numerous to name who were not there to bear witness to such an amazing day. Throughout all these years, I have watched and represented loving gay and lesbian couples as they struggled to piece together some legal protections for their relationships and their children in the face of a hostile, if not indifferent, legal system. Some marvel at the rapidity with which the legal changes surrounding same sex marriage have occurred. But this marveling only ignores the blood, sweat, tears, and death over centuries that led us to this historic moment.

I certainly realize that beginning a law review article with such a bold personal reflection is not ideal, but on this specific issue, I would ask for a bit of indulgence. While this article is certainly about the legal process that led to the Supreme Court's decision in *Obergefell*, recognizing that state prohibitions on same sex marriages are unconstitutional,<sup>3</sup> it is also deeply personal because all the stories that led to this moment are somehow also my story.

Part II of this article explores the development of Justice Kennedy's jurisprudence related to the application of the doctrines of equal protection and due process through *Romer*,<sup>4</sup> *Lawrence*,<sup>5</sup> and *Windsor*,<sup>6</sup> the trilogy of gay rights cases in which he wrote for the Supreme Court prior to *Obergefell*.<sup>7</sup> This discussion culminates in an analysis of Justice Kennedy's majority opinion in *U.S. v. Windsor*,<sup>8</sup> which provided the basis for a vast expansion of the right of same sex couples to marry across the country, ultimately placing the issue squarely before the Supreme Court for decision in *Obergefell*. Part III then examines the impact Justice

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[http://www.nytimes.com/2015/05/31/fashion/weddings/jonathan-gregg-derek-mize.html?\\_r=0](http://www.nytimes.com/2015/05/31/fashion/weddings/jonathan-gregg-derek-mize.html?_r=0).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

4. *Romer v. Evans*, 517 U.S. 620 (1996).

5. *Lawrence v. Texas*, 539 U.S. 558 (2003).

6. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

7. *Obergefell*, 135 S. Ct. at 2584.

8. See discussion *infra* Part II-C.

Kennedy's analysis in *Windsor* had on the United States Courts of Appeals addressing the constitutionality of state bans prohibiting the recognition of same sex marriage, leading to the decision in *Obergefell*. Part IV then provides an extensive examination of the Supreme Court's decision in *Obergefell*, looking first at the oral arguments before the Court and then the decision itself. Part V, the conclusion, examines the aftermath of the Court's decision in *Obergefell*, placing *Obergefell* in its proper context in the journey for greater inclusion of and protection for gay and lesbian persons and identifying some of the very complex issues that still lay ahead.

## II. THE LEGAL ROAD TO OBERGEFELL: ROMER TO LAWRENCE TO WINDSOR

Since 1996, Justice Anthony Kennedy has authored three opinions that have formed the structure of his developing jurisprudence related to equal protection and due process. In these opinions, Justice Kennedy bypassed the Supreme Court's historical analysis of both equal protection and due process, focusing instead on an analysis that was rooted in the ideas of liberty, dignity, and equality.<sup>9</sup> While the analysis in this trilogy was anything but clear, it was consistent.

As this article explores, in *Windsor*, Justice Kennedy's analysis provided the basis for lower courts to almost universally strike down prohibitions

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9. An earlier version of this discussion of the development of Justice Kennedy's gay rights jurisprudence appeared in Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2600548](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600548) [hereinafter Harrison, *On Marriage and Polygamy*]. See generally Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014). See also, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) [hereinafter Sunstein, *Sexual Orientation and the Constitution*]; Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter Karst, *The Supreme Court*].

against the marriage of same sex couples. On January 16, 2015, the Court granted certiorari in four cases emanating from the United States Court of Appeals for the Sixth Circuit to determine whether prohibitions against same sex marriage were constitutional.<sup>10</sup> In answering this question in *Obergefell v. Hodges*,<sup>11</sup> Justice Kennedy had the deciding vote in a case involving the rights of gay and lesbian couples. Consistent with the analysis he developed in the trilogy of cases discussed below, in *Obergefell*, Justice Kennedy further expanded the analytical trajectory established through these prior cases.

A. *Romer v. Evans*<sup>12</sup>

*Romer* focused on a Colorado constitutional amendment, Amendment 2, designed to prohibit any statute, regulation, or ordinance that would prohibit discrimination based on sexual orientation.<sup>13</sup> As a result of the passage of Amendment 2, local and municipal laws and certain state regulations that prohibited discrimination based on sexual orientation were declared invalid.<sup>14</sup> Further, as a result of Amendment 2 and its concomitant prohibitions on political action that would address discrimination based on sexual orientation, gay and lesbian persons were, in effect, denied the opportunity to work through the political process to protect their interests.<sup>15</sup>

The Colorado Supreme Court declared Amendment 2 unconstitutional and held that the amendment violated the Equal Protection Clause because it violated “the fundamental right to participate equally in the political process.”<sup>16</sup> Since the court concluded that the Amendment violated a fundamental constitutional right, the court applied strict scrutiny in analyzing Amendment 2.<sup>17</sup>

On remand, while the state put forward six interests that it asserted were compelling, the trial court concluded that the state had failed to meet its burden to show a compelling interest supporting the Amendment and entered a permanent injunction prohibiting the enforcement of the

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10. Lyle Denniston, *Court Will Rule on Same-Sex Marriage (UPDATED)*, SCOTUSBLOG (Jan. 16, 2015, 3:39 PM), <http://www.scotusblog.com/2015/01/court-will-rule-on-same-sex-marriage/> [hereinafter Denniston, *Court Will Rule on Same-Sex Marriage*].

11. See discussion *infra* Part V.

12. *Romer v. Evans*, 517 U.S. 620, 618 (1996).

13. See *id.* at 623-24.

14. *Id.*

15. *Id.* at 624.

16. *Id.* at 629, 631.

17. *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993) (*en banc*).

amendment.<sup>18</sup> In the second appeal, the Colorado Supreme Court affirmed the trial court's decision, leading the Defendants to appeal to the United States Supreme Court.<sup>19</sup>

Writing for a six justice majority, Justice Kennedy rejected the interests that had been offered by the state to support Amendment 2: (1) that the amendment furthered freedom of association by protecting the interests of those in Colorado who had "personal or religious objections to homosexuality" and (2) that the amendment acted to "conserve resources to fight discrimination against other groups."<sup>20</sup>

Justice Kennedy began the opinion by quoting from Justice Harlan's dissent in *Plessy v. Ferguson*, stating "that the Constitution 'neither knows nor tolerates classes among citizens.'" In analyzing Amendment 2, Justice Kennedy nominally rejected the use of a strict scrutiny standard of review, opting instead to analyze the Amendment under a rational basis standard. As Justice Kennedy wrote:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271–272, 99 S. Ct. 2282, 2292, 60 L.Ed.2d 870 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561–562, 64 L.Ed. 989 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319–320, 113 S. Ct. 2637, 2642, 125 L.Ed.2d 257 (1993).<sup>21</sup>

However, what was not clear in the opinion was exactly what form of rational basis analysis Justice Kennedy was employing.<sup>22</sup>

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18. *Evans v. Romer*, 882 P.2d 1335, 1339-40, 1349 (Colo. 1994) (*en banc*).

19. *Romer*, 517 U.S. at 623.

20. *Id.*

21. *Id.* at 631.

22. See Robert C. Farrell, *Justice Kennedy's Idiosyncratic Understanding of Equal Protection and Due Process, and its Costs*, 32 QUINNIPIAC L. REV. 439, 452-53 (2014). As Farrell has written:

Kennedy's unwillingness to be forthright in conceding that he was applying a heightened standard of review is a longstanding problem with the Supreme Court's rational-basis-review decisions. Rational basis review purports to be one standard—that a classification be rationally related to a permissible purpose. But, in practice, this

In *Romer*, Justice Kennedy began his discussion of rational basis with a nod to his own prior opinion in *Heller v. Doe*,<sup>23</sup> suggesting that he intended to employ the much more deferential version of rational basis analysis. However, in the conclusion of his analysis, Justice Kennedy cited as authority for his analysis and for the ultimate decision regarding Amendment 2, the heightened rational basis review that the Court employed in *U.S. Department of Agriculture v. Moreno*.<sup>24</sup>

one standard is in fact two, with different methods that produce different results. Rationality review is, in most cases, so deferential as to amount to no review at all. This extreme deference results because, when applying the standard, the Court (1) does not look for evidence of actual purpose but will hypothesize purpose or accept the post hoc rationalizations of government attorneys as to purpose; (2) does not insist that there be an actual correlation between the challenged classification and purpose but only that the government could have plausibly believed that there was such a connection, even if the government is wrong in that belief; (3) places on the challenger the burden of attacking the legislative arrangement to negate every conceivable basis which might support it (an impossible burden); and (4) does not invalidate statutes on the basis of an impermissible purpose, since the Court is not looking for an actual purpose that might invalidate a statute but rather is hypothesizing a purpose that will validate it.

Occasionally and without explanation, the Court applies a heightened version of rational basis review where it puts aside the deferential techniques identified in the previous paragraph and, by contrast, (1) aggressively looks for evidence of the actual purpose of a statute and (2) having identified such actual purpose, rules out as impermissible the purpose of harming a particular group or (3) insists that the challenged classification actually advance a permissible state interest. Before *Romer*, the two most prominent cases in which the Court had applied this heightened rational basis review were *U.S. Department of Agriculture v. Moreno* and *Cleburne v. Cleburne Living Center*. In the first of these cases, the Court invalidated an amendment to the Food Stamp Act on the ground that the amendment had been motivated by a bare desire to harm a politically unpopular group (hippies). In the second, the Court invalidated a decision by city government that had denied a permit for a group home for the mentally disabled; the Court found that the denial was motivated by “an irrational prejudice against the mentally retarded . . .” In neither of these cases did the Court look to hypothetical purposes that might have justified the challenged classifications nor did it give the government defendant the benefit of the doubt as to whether it had acted reasonably even if wrongly.

*Id.*

23. *Heller v. Doe*, 509 U.S. 312, 318 (1993).

24. *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). In so doing, Kennedy wrote:

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826, 37 L.Ed.2d 782

In *Romer*, Justice Kennedy was clearly analyzing Amendment 2 under some form of heightened rational basis, assuming the standard of review is rational basis at all. However, in *Romer* and in the other two cases in the trilogy, Justice Kennedy never expressly stated what form of rational basis he was actually employing. However, *Romer* itself provides ample evidence that had Justice Kennedy not employed a heightened standard of review, the ultimate decision in the case would have been different.<sup>25</sup>

(1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462, 108 S. Ct. 2481, 2489–2490, 101 L.Ed.2d 399 (1988), and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . ." *Civil Rights Cases*, 109 U.S. at 24; 3 S. Ct. at 30.

*Romer*, 517 U.S. at 634-35.

25. As one commentator has noted:

[*Romer*], without doubt, applies the more demanding form of rationality review, but Kennedy neither acknowledges that fact nor concedes that the decision would have to come out differently if he were applying the traditional deferential version. If he had been using the deferential version, Kennedy would have had to consider other purposes that might have motivated Amendment 2, both those advanced by its proponents and those he might hypothesize on his own. It is clear that either of the purposes advanced by the proponents—protecting freedom of association and focusing on discrimination against other groups—is permissible and might have, in fact, been a purpose of the Amendment. Further, it would not matter whether Amendment 2 would actually have advanced these purposes, but only whether the Colorado voters might reasonably have perceived a connection. Finally, the challengers would have had to negative every conceivable basis that might have supported the Amendment, something that they did not do and could never do.

In a very strong dissent, Justice Scalia agreed with the majority that rational basis is the appropriate standard of review. However, Justice Scalia felt that there existed a clear justification for Amendment 2 under traditional rational basis review, stating:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” “homosexuals,” *ante*, at 1628, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion’s heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L.Ed.2d 140 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality, *ante*, at 1628, is evil.<sup>26</sup>

Justice Scalia clearly recognized that by placing homosexuality on an analytical footing more akin to race or religion, Justice Kennedy was employing some sort of heightened review under which majoritarian morality would not be seen as a legitimate basis or compelling reason to classify persons according to their disfavored status.<sup>27</sup>

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Farrell, *supra* note 22, at 454.

26. *Romer*, 517 U.S. at 640-43 (Scalia, J., dissenting).

27. For a discussion of Justice Kennedy’s judicial minimalism in *Romer*, see Cass R. Sunstein, *The Supreme Court, 1995 Term--Foreword: Leaving Things Undecided*,

*B. Lawrence v. Texas*<sup>28</sup>

*Lawrence* provided the Supreme Court with the opportunity to revisit its 1986 opinion in *Bowers v. Hardwick*, a decision in which the Court had upheld Georgia's statute prohibiting sodomy. In *Lawrence*, Houston police arrested two men in a private residence for a violation of a Texas criminal statute that prohibited "deviate sexual intercourse with another individual of the same sex."<sup>29</sup> Following their arrest and charge, the two men challenged the constitutionality of the Texas sodomy statute, asserting that the statute violated the equal protection clause.<sup>30</sup> The trial court did not accept this constitutional challenge, so the two men entered a plea of *nolo contendere*, resulting in a fine of \$200 each and the assessment of court costs for \$141.25.<sup>31</sup> On appeal, Texas state appellate courts rejected their constitutional challenge to the statute, thus leading the case to be heard by the Supreme Court.<sup>32</sup>

In writing for the Court, Justice Kennedy continued his focus on liberty, equality, and dignity, which had been at the heart of his opinion in *Romer* over ten years prior. Where Justice Kennedy had opened his opinion in *Romer* with reference to Justice Harlan's dissent in *Plessy*, here, in *Lawrence*, he opened the opinion with a sweeping description of "liberty," writing:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>33</sup>

Following this dramatic opening to the opinion, Justice Kennedy placed the question before the Court squarely in the Court's prior jurisprudence in the area of privacy, beginning with *Griswold v. Connecticut*.<sup>34</sup> His review

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110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *The Supreme Court*].

28. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

29. *Id.* at 562-63.

30. *Id.* at 563.

31. *Id.*

32. *Id.* (citing *Lawrence v. State*, 41 S.W.3d 349, 362 (Tex. App. 2001)).

33. *Id.* at 562.

34. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

of these cases clearly indicated that the liberty interest at stake in *Lawrence* was of the same fundamental nature as the liberty interests at stake in the Court's prior privacy cases.<sup>35</sup>

With this context established for the case, Justice Kennedy then turned to the specific liberty interest at stake in the case, necessitating a review of the Court's prior decision in *Bowers*.

Justice Kennedy made it clear that he believed that the Court had completely misunderstood the nature of the liberty interest at stake in

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35. As Justice Kennedy stated:

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L.Ed.2d 349 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.*, at 454, 92 S. Ct. 1029; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship . . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453, 92 S. Ct. 1029.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S. Ct. 2010, 52 L.Ed.2d 675 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

*Lawrence*, 539 U.S. at 564-566.

*Bowers*. As he wrote:

The Court began its substantive discussion in *Bowers* as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” *Id.*, at 190, 106 S. Ct. 2841. That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>36</sup>

As to the continuing validity of *Bowers*, Justice Kennedy articulated in great detail exactly how the Court’s opinion in *Bowers* misread both history and the evolving understanding and acceptance of homosexual persons.

Justice Kennedy addressed the question of whether his prior opinion in *Romer* formed the basis for striking down the Texas statute on equal protection grounds alone, since the statute at issue was homosexual specific. Justice Kennedy did not reject this argument, but rather asserted that there is a linkage between due process liberty interests and equality that cannot be ignored.<sup>37</sup> Justice Kennedy concluded that *Bowers* was

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36. *Id.* at 566-67.

37. *Id.* at 574-75. As Justice Kennedy wrote:

Were we to hold the statute invalid 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.

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. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. 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 both in the public

overruled, stating that “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”<sup>38</sup>

Again, Justice Kennedy was not explicit on the exact standard of review he used in his analysis. Language existed in the opinion pointing in the direction of a strict scrutiny standard of review as well as language pointing to rational basis.<sup>39</sup> This ambiguity has led some scholars and lower courts to read *Lawrence* as applying heightened scrutiny to a regulation of the fundamental right to sexual autonomy, while others read the decision as applying rational basis analysis.<sup>40</sup>

and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

*Id.*

38. *Id.* at 578.

39. See Farrell, *supra* note 22, at 469-71; Franklin, *supra* note 9, at 857-63.

40. Farrell, *supra* note 22, at 469-71. As Farrell notes:

Since the claim [in *Bowers*] was one of substantive due process, it might have been expected that the Court would have followed the traditional framework for substantive due process claims. The Court would have had to consider whether the governmental conduct infringed on an implied fundamental right, and if so, would have required the government to show that the infringement was necessary or narrowly tailored to a compelling interest. This is what the Court had done in *Roe v. Wade*, where it found that the implied fundamental right of privacy included within it a woman’s decision to terminate a pregnancy and thus required the state to show that its intrusion into that decision was necessary to a compelling interest. On the other hand, in *Bowers v. Hardwick*, the Court determined that the conduct regulated by the state—sodomy—was not a fundamental right and therefore upheld the challenged statute under the deferential test that it be rationally related to the state’s interest in promoting a traditional form of morality.

In *Lawrence*, Justice Kennedy’s opinion never aligned itself entirely with either of these standards, although it contained some measure of each. On the one hand, it seems that *Lawrence* must have identified a fundamental right and applied a heightened standard of scrutiny. Kennedy’s opinion focused throughout on the term “liberty” and found that the challenged statute interfered with a constitutionally protected liberty interest. Ordinarily, this finding would be enough to conclude that the conduct in question was an implied fundamental right. Further, Kennedy cited as support for his opinion both *Roe v. Wade* and *Carey v. Population Services*, cases that insisted that when the government infringes on a constitutionally protected liberty, that infringement must be narrowly tailored to a compelling interest. Kennedy’s opinion had overruled *Bowers v. Hardwick*, which had applied rational basis review in a similar factual setting. The result of *Lawrence* was to overturn the conviction of the petitioners, a result that would have been impossible if the Court had been applying traditional deferential rational basis review.

While this scholarly debate continues, it seems apparent, particularly in light of *Windsor* and *Obergefell*, that Justice Kennedy invoked some level of higher scrutiny in *Lawrence*, much as he had done in *Romer*. It appears that Justice Kennedy's evolving jurisprudence through these cases called for a heightened standard of review in those situations where the legitimate government interest presented was designed to support a classification or a prohibition rooted in majoritarian morality or its counterpoint, majoritarian animus.

*C. United States v. Windsor*<sup>41</sup>

In *Windsor*, the Supreme Court faced a challenge to the federal Defense of Marriage Act ("DOMA").<sup>42</sup> Factually, the case involved two women, Edith Windsor and Thea Spyer, who had been lawfully married in Ontario, Canada in 2007.<sup>43</sup> Subsequently, they returned to their home in New York, a state that recognized their marriage.<sup>44</sup> Two years later in 2009, Spyer died, leaving her entire estate to Windsor.<sup>45</sup> As a result of the inheritance, Windsor paid more than \$350,000 in federal income taxes because Section 3 of DOMA barred her from using the estate tax exemption for surviving spouses – the federal government simply could not recognize her marriage.<sup>46</sup> Thus, she was forced to pay taxes that she would not have had to pay if her deceased spouse had been a man.<sup>47</sup> In turn, Windsor sued in the United States District Court for the Southern District of New York,

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On the other hand, although Kennedy's opinion found that the private conduct forbidden by the government was within the realm of liberty protected by the Due Process Clause, it never expressly said that the conduct was part of an implied fundamental right. Further, the opinion made no reference to the "narrowly tailored to a compelling interest" test, which is the standard test the Court applies when government invades a fundamental right. In fact, in his concluding words, Kennedy found that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." At least part of this language—"legitimate state interest"—is the language of rational basis review, not strict scrutiny. Thus, both legal scholars and courts have concluded that it is quite plausible to read Kennedy's opinion as having applied rational basis review.

*Id.*

41. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

42. *Id.* at 2684.

43. *Id.* at 2682.

44. *Id.*

45. *Id.* at 2682.

46. *Id.* at 2683.

47. *Id.*

challenging Section 3 of DOMA,<sup>48</sup> which provided that:

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.<sup>49</sup>

The district court found for Windsor, holding that DOMA was unconstitutional because it discriminated based on sexual orientation and that DOMA was not rationally related to a legitimate government interest.<sup>50</sup> The district court indicated that DOMA was rooted in “a desire to harm a politically unpopular group” and, therefore, was subjected to a heightened review under the rational basis test.<sup>51</sup> On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court’s decision, but took a different analytical approach.<sup>52</sup> The Court of Appeals held that sexual orientation discrimination should be subject to heightened scrutiny, since gay and lesbian persons constituted a quasi-suspect class, and that DOMA could not pass this heightened scrutiny.<sup>53</sup> Subsequently, the Supreme Court granted certiorari.<sup>54</sup>

In *Windsor*, Justice Kennedy continued the trajectory from *Romer* and *Lawrence*, focusing on the inherent interplay among fundamental concepts of liberty, dignity, and equality that form the core of his jurisprudence. However, in what seemed to be a sleight of hand, Justice Kennedy began the opinion in *Windsor* with a nod to the federalism issues inherent in the issue before the Court, namely the intrusion of the federal government into the area of the definition of marriage, an issue historically left to the states.<sup>55</sup> After a fairly comprehensive analysis of federalism in this context, Justice Kennedy articulated the issue in *Windsor* as follows:

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48. *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

49. The Defense of Marriage Act, 1 U.S.C. § 7 (2012).

50. *Windsor*, 833 F. Supp. 2d at 402.

51. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring)) (internal quotation marks omitted).

52. *See Windsor v. United States*, 699 F.3d 169, 181, 188 (2d Cir. 2012) (affirming the District Court’s decision after applying heightened scrutiny to Windsor’s claim).

53. *Id.*

54. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

55. *United States v. Windsor*, 133 S. Ct. 2675, 2689-93 (2013).

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AT LONG LAST MARRIAGE

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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, 123 S.Ct. 2472, 156 L.Ed.2d 508 (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.<sup>56</sup>

Justice Kennedy then concluded that the Court's decision in *Windsor* did not turn on issues related to federalism at all. According to Justice Kennedy, the federalism issue present in this case had importance only in relationship to the dignity and liberty interests of the persons and couples impacted by DOMA.<sup>57</sup>

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56. *Id.* at 2692-93.

57. *Id.* at 2692. As stated by Justice Kennedy:

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, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38, 48 S. Ct. 423, 72 L.Ed. 770 (1928)).

The Federal Government uses this state-defined class for the opposite purpose—to impose injury and indignity is a deprivation of an essential part of the liberty protected

Having disposed of the federalism issue, Justice Kennedy moved to the fundamental analysis in the case focused on both equal protection and due process. Justice Kennedy's opinion in *Windsor* showcases the fundamental linkage between equal protection jurisprudence and due process jurisprudence that Justice Kennedy developed through this trilogy of cases. *Windsor* is neither a traditional equal protection case nor a traditional substantive due process case. *Windsor* represents an amalgam of both, squarely rooted in liberty as an analytical principle.<sup>58</sup>

*Windsor*, like *Romer* and *Lawrence*, is a case about liberty; the Court has borrowed "from either or both substantive due process and equal protection principles to decide whether a law improperly intrudes upon that sphere of autonomy belonging to every citizen and containing within its bounds life's most intimate decisions, actions, and relationships."<sup>59</sup> In this series of gay rights cases, Justice Kennedy has provided a dramatic example of what Laurence Tribe described in the wake of *Lawrence*, that "due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."<sup>60</sup>

Again, Justice Kennedy offered little guidance as to the level of scrutiny

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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.

*Id.*

58. Daniel J. Crooks III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 272-74 (2014). Crooks describes this dilemma further, stating:

Reasonable minds—including the Justices themselves—disagree about whether the "rooted in history and traditions" test applied in *Bowers* and *Glucksberg* is still the proper framework for evaluating a substantive due process claim. After all, *Casey*, with its focus on liberty, was decided in 1992. However, *Glucksberg*, returning to the *Bowers*-brand of "rooted in history and traditions," was decided a scant five years later, and yet it limited and distinguished *Casey*. Then, a mere six years after *Glucksberg*, *Lawrence* framed the issue in the broad liberty terms that *Casey* employed and *Glucksberg* was shunned—all without so much as a "see also" acknowledging *Glucksberg's* existence. Assuming, as this article does, that *Glucksberg* represents the traditional view of substantive due process, *Lawrence* is at least a non-traditional substantive due process case. Therefore, if *Windsor* is anything at all, it is either a non-traditional, *Lawrence*-brand substantive due process case or the newest addition to the Court's distinct lineage of liberty cases.

*Id.* at 273-74. See also discussion *supra* Part II, and accompanying citations.

59. *Id.* at 274.

60. Tribe, *supra* note 9, at 1898.

he was applying. The court below applied intermediate scrutiny to the issues in *Windsor* because it concluded that the gay couples impacted by DOMA were a quasi-suspect class. Justice Kennedy, however, simply chose to ignore this. Rather, he applied rational basis review, at least, nominally. However, as in both *Romer* and *Lawrence* before, Justice Kennedy's language and analysis points to the use of some elevated level of scrutiny.

In his dissent, Chief Justice Roberts tried to limit the holding in *Windsor* solely to the issue of federalism.<sup>61</sup> However, a careful reading of Justice Kennedy's opinion demonstrates that federalism was certainly not the determining factor in striking down Section 3 of DOMA.

In fact, in his very strong and vituperative dissent, Justice Scalia demolished the hope that the case could be limited to federalism. As Justice Scalia stated:

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.” *Ante*, at 2681. 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. *See, e.g., ante*, at 2681. 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.<sup>62</sup>

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61. *Windsor*, 133 S. Ct. at 2696-97 (Roberts, C.J., dissenting).

62. *Id.* at 2705 (Scalia, J., dissenting).

Justice Scalia set out a very strong attack on what he has continuously seen in the trilogy of opinions of Justice Kennedy outlined in this Part of this Article, namely that Justice Kennedy's melding of due process and equal protection analysis under the rubric of liberty places the Court on a dangerous path out of traditional constitutional analysis.<sup>63</sup>

As discussed below, Justice Scalia was indeed correct. The next Part of this Article addresses decisions by the United States Courts of Appeals following *Windsor*, analyzing how *Windsor* was read by these lower courts in determining the constitutionality of state prohibitions against same sex marriage.

### III. THE DROPPING OF THE "SECOND, STATE-LAW SHOE": THE JOURNEY TO *OBERGEFELL*

Many predicted, some perhaps hoped, that because of its seeming ambiguity and lack of clarity, Justice Kennedy's opinion in *Windsor* would provide an easy basis for lower courts to distinguish it when confronted with cases addressing the constitutionality of state bans on same sex marriage. However, this was not the case. While it is true that various cases addressing the constitutionality of state bans on same sex marriage post-*Windsor* did not all read the analysis in *Windsor* exactly the same, these lower courts have almost universally followed the construct of liberty, dignity, and equality developed by Justice Kennedy in the trilogy of cases discussed above.<sup>64</sup>

#### A. *The Seventh Circuit – Baskin v. Bogan & Wolf v. Walker*

*Baskin v. Bogan* was filed in United States District for the Southern District of Indiana and is the seminal case challenging Indiana's laws prohibiting same-sex marriage.<sup>65</sup> The Plaintiffs in *Baskin* challenged section 31-11-1-1 of the Indiana Code and all other Indiana laws precluding same-sex marriages and prohibiting their recognition.<sup>66</sup>

63. *Id.* at 2705-09 (Scalia, J., dissenting).

64. See Katie Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 566 (2014).

65. *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. 2014). The Plaintiffs in *Baskin* are: Rae Baskin and Esther Fuller, an unmarried couple that has been together for 24 years, Bonne Everly and Linda Judkins, an unmarried couple that has been together for 13 years, Dawn Lynn Carver and Pamela Eanes, a unmarried couple that has been together for 17 years, and Nikole Quasney and Amy Sandler, a couple that was married in Massachusetts but resides in Indiana. FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation/entry/indiana> (last visited Dec. 23 2014).

66. Section 31-11-1-1: (a) [o]nly a female may marry a male and only a male may marry a female; and (b) [a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized. *Baskin*, 12 F.

The district court found section 31-11-1-1(a) of the Indiana Code unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>67</sup> The district court found section 31-11-1-1(b) unconstitutional as a violation of the Equal Protection Clause.<sup>68</sup> In turn, the court granted the Plaintiffs' motion for summary judgment and permanently enjoined Indiana, its "[o]fficers, agents, servants, employees and attorneys," from enforcing Section 31-11-1-1 "[a]nd other Indiana laws preventing the celebration or recognition of same-sex marriages."<sup>69</sup> Subsequently, the Defendants appealed to the United States Court of Appeals for the Seventh Circuit.

*Wolf v. Walker* was filed in the United States District Court for the Western District of Wisconsin and is the seminal case challenging Wisconsin's prohibition of same-sex marriage.<sup>70</sup> The plaintiffs in *Wolf* challenged Article XIII, § 13 of the Wisconsin Constitution and other Wisconsin statutory provisions that limited marriage to a "husband" and a "wife."<sup>71</sup>

The district court held Wisconsin's laws prohibiting same-sex marriage unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>72</sup> In turn, the court granted the Plaintiffs' motion for summary judgment and enjoined the Defendants from enforcing laws prohibiting same-sex marriage.<sup>73</sup> Subsequently, the Defendants appealed to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit consolidated *Baskin* and *Wolf* for purposes of its opinion. In an opinion authored by Judge Richard Posner, the Seventh Circuit affirmed the district court and held both Indiana and Wisconsin's laws prohibiting same-sex marriage were unconstitutional as a violation of the Equal Protection Clause of the Fourteenth amendment.<sup>74</sup>

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Supp. 3d at 1150.

67. *Baskin*, 12 F. Supp. 3d at 1164.

68. *Id.*

69. *Id.* at 1164-65.

70. *Walker v. Wolf – Freedom to Marry in Wisconsin*, ACLU (Oct. 7, 2014), <https://www.aclu.org/lgbt-rights/wolf-and-schumacher-v-walker>.

71. WIS. CONST. art. 13 § 13 (“[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in [Wisconsin]. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in [Wisconsin].”); *Wolf v. Walker*, 986 F. Supp. 2d 982, 986 (W.D. Wis. 2014).

72. *Walker*, 986 F. Supp. 2d at 1028.

73. *Id.*

74. *Baskin*, 12 F. Supp. 3d at 656.

Overall, the Seventh Circuit allowed *United States v. Windsor* to frame its analysis of Indiana and Wisconsin's same-sex marriage bans.<sup>75</sup> The court noted that denial of state marital benefits to same-sex couples "[b]ring[s] to mind the Supreme Court's opinion *United States v. Windsor*, which held unconstitutional the denial of all federal marital benefits to same-sex marriages recognized by state law."<sup>76</sup> Further, the court averred that the Supreme Court's "[c]riticisms of such denial [in *Windsor*] apply with even greater force to Indiana [and Wisconsin's] law[s]."<sup>77</sup>

With *Windsor* on its mind, the Seventh Circuit turned to Indiana and Wisconsin's same-sex marriage bans. The court focused solely on equal protection.<sup>78</sup> It did not consider the Due Process Clause of the Fourteenth amendment to be a necessary part of its ultimate conclusion – that same-sex marriage bans are unconstitutional.<sup>79</sup> The court began its analysis by noting that Equal Protection applied because "[I]ndiana and Wisconsin, in refusing to authorize [same-sex marriage] . . . are discriminating against homosexuals by denying them a right that [Indiana and Wisconsin] grant to heterosexuals, namely the right to marry an unmarried adult of their choice."<sup>80</sup>

The court's Equal Protection analysis was relatively unconventional – but it sought to embrace conventional equal protection analysis by invoking a series of questions to guide its analysis.<sup>81</sup> Through this framework, the court sought to determine whether the costs imposed on homosexual couples by the Indiana and Wisconsin laws outweighed the benefits of those laws.<sup>82</sup>

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75. *Id.* at 659.

76. *Id.*

77. *Id.*

78. *Id.* at 656-67.

79. *Id.* at 656.

80. *Id.* at 657.

81. "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 . . .; (3) Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole; (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 . . ." *Id.* at 655.

82. *Id.* at 656 ("The difference between the approach we take in these two cases

At the outset, the court quoted Justice Thomas's encapsulation of Equal Protection analysis from *Beach Communications* – “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.”<sup>83</sup> In line with the *Beach* formula, the court stated that the Indiana and Wisconsin laws proceed “along suspect lines” because the laws discriminate against a minority defined by an immutable characteristic.<sup>84</sup> In turn, the court stated that more than a reasonable basis was required to uphold the laws.<sup>85</sup>

However, the court did not employ a conventional form of heightened scrutiny in reaching its holding.<sup>86</sup> The court found that the Indiana and Wisconsin did not even have a rational basis for prohibiting same-sex marriages.<sup>87</sup> The court opined that Indiana and Wisconsin's “[d]iscrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny.”<sup>88</sup> This conclusion allowed the court to “largely elide the more complex analysis found in more closely balanced equal-protection cases” and avoid the Plaintiff's argument that the states' ban on same-sex marriage violates a fundamental right protected by the Due Process Clause of the Fourteenth amendment.<sup>89</sup>

Seemingly, then, the court struck down the Indiana and Wisconsin laws because they bore no rational relationship to a legitimate state interest.<sup>90</sup> The court stated “[i]t 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

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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.”).

83. *Id.* at 654 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

84. *Id.*

85. *Id.*

86. *Id.* at 656.

87. *Id.* at 665, 671.

88. *Id.* at 654 (“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.”).

89. *Id.* at 656-57.

90. *Id.* at 654, 665.

offsetting governmental interest in that rejection.”<sup>91</sup> In turn, the court deemed the only issue to be whether Indiana and Wisconsin had established such an offsetting interest.<sup>92</sup>

The court focused solely on Indiana and Wisconsin’s arguments.<sup>93</sup> Indiana defended its same-sex marriage ban on one ground - its sole purpose in making marriage a legal relation is to “enhance child welfare.”<sup>94</sup> Indiana argued that the “[r]eason for its marriage law . . . is to try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility.”<sup>95</sup> The court did not accept Indiana’s argument for multiple reasons.<sup>96</sup> But, ultimately, it was a matter of costs and benefits – Indiana could not show how prohibiting same-sex marriage served its interest in channeling unintentional procreative sex into marriage.<sup>97</sup> Meanwhile, the costs that the same-sex marriage bans imposed on same-sex couples were, and are, considerable.<sup>98</sup> Therefore, the court found that Indiana’s same-sex marriage ban had no rational relationship to Indiana’s interest in ensuring that children are supported.<sup>99</sup>

Wisconsin defended its same-sex marriage ban on three main grounds.<sup>100</sup> The court invoked *Loving v. Virginia* to dispose of Wisconsin’s tradition argument and stated, “[i]f no social benefit is conferred by a tradition *and* it

91. *Id.* at 659.

92. *Id.* (“Whether [Indiana and Wisconsin have established a clearly offsetting government interest] is really the only the only issue before us . . .”).

93. *Id.* at 655 (“[o]ur main focus will be on the states’ arguments . . .”).

94. *Id.* at 660.

95. *Id.*

96. *Id.* at 661 (“[i]f channeling procreative sex into marriage were the only reason that Indiana recognizes marriage, the state would not allow an infertile person to marry.”).

97. *Id.* at 661-65 (positing that same-sex couples can actually alleviate the problem of accidental births through adoption and noting that the percentage of children born to unmarried women has actually risen since Indiana enacted its same-sex marriage ban – “[t]here is no indication that these states’ laws, ostensibly aimed at channeling procreating into marriage, have had any such effect.”).

98. *Id.* at 658 (discussing psychological harms imposed by same-sex marriage bans, such as: the denial of a coveted status (marriage) and the stigmatization of same-sex couples inherent in the denial of their marriage rights and tangible harms, such as denial of important state benefits that are accorded to married couples).

99. *Id.* at 665.

100. *Id.* at 666. (illustrating (1) “[l]imiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights”; (2) “[t]he consequences of allowing same-sex marriage cannot be foreseen and therefore a state should be permitted to move cautiously”; (3) “[t]he decision whether to permit or forbid same-sex marriage should be left to the democratic process.”).

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 . . . .”<sup>101</sup> The court was also unconvinced by Wisconsin’s “go-slow” argument – i.e. the state needs time to act cautiously to address the same-sex marriage issue because allowing same-sex marriage would altogether transform traditional marriage and could result in unforeseen consequences – because Wisconsin simply could not show how heterosexual couples would be harmed by same-sex marriage.<sup>102</sup> Last, the court dismissed Wisconsin’s political process argument by noting that same-sex couples represent a small percentage of the state’s population and thus have no real opportunity to invoke the political process in their favor.<sup>103</sup> Therefore, the court held that Wisconsin’s same-sex marriage ban had no rational relationship to a legitimate interest of Wisconsin.<sup>104</sup>

The court concluded its analysis by noting that “[m]ore than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children, or any other valid and important state interest is necessary to justify discrimination on the basis of sexual orientation.”<sup>105</sup> A state needs to show that there is some plausible benefit to prohibiting same-sex marriage that outweighs the costs imposed on same-sex couples.<sup>106</sup> If the state cannot provide such an argument, then, according to the Seventh Circuit, the law prohibiting same-sex marriage does not even meet rational basis review and is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>107</sup>

The Seventh Circuit likened its approach in *Baskin* to the Supreme Court’s approach in *Windsor*.<sup>108</sup> In *Windsor*, the Court did not invoke a conventional form of heightened scrutiny to invalidate section 3 of DOMA and the Court balanced DOMA’s harms (costs) to gays and lesbians against its benefits.<sup>109</sup> Although the Supreme Court did not invoke a conventional

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101. *Id.* at 667.

102. *Id.* at 668.

103. *Id.* at 671.

104. *Id.* (“As we have been at pains to explain, the grounds advanced by . . . Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible.”).

105. *Id.*

106. *See id.*

107. *See id.* at 656, 671.

108. *Id.* at 671 (“For completeness we note the ultimate convergence of our simplified four-step analysis with the more familiar, but also more complex, approach found in many cases.”).

109. However, courts interpreting the Supreme Court’s decisions in *Windsor* and

form of heightened scrutiny, “[n]otably 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 . . . .”<sup>110</sup>

Similarly, the Seventh Circuit did not invoke conventional forms of heightened scrutiny to strike down Indiana and Wisconsin’s same-sex marriage bans – although it indicated that heightened scrutiny should apply to laws that discriminate on the basis of sexual orientation.<sup>111</sup> The Seventh Circuit weighed the costs same-sex marriage bans imposed on same-sex couples in Indiana and Wisconsin against the benefits of the laws to each respective state.<sup>112</sup> Also, while the Seventh Circuit held that a heightened form was not necessary to invalidate Indiana and Wisconsin’s same sex marriage ban, the court did not follow the marks of conventional rational basis review – *i.e.* a strong presumption of validity and extreme deference toward government action.<sup>113</sup>

#### B. The Fourth Circuit – *Bostic v. Schaefer*

*Bostic v. Schaefer* was filed in the United States District Court for the Eastern District of Virginia and is the main case challenging Virginia’s laws prohibiting same-sex marriage.<sup>114</sup> The Plaintiffs in *Bostic* challenged the Marshall/Newman Amendment to the Virginia Constitution - which defines marriage as between a man and a woman and prohibits recognition of same-sex marriages performed in other states, Virginia Code Sections 20-45.2 and 20-45.3, and “any other Virginia Law that bars same-sex marriage or prohibits the States recognition of otherwise lawful same-sex marriages from other jurisdictions.”<sup>115</sup>

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*Lawrence v. Texas* have concluded that statutes that discriminate on the basis of sexual orientation are subject to heightened scrutiny. *Id.* (quoting *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)).

110. *Id.* (quoting *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)).

111. *Id.* at 654, 656.

112. *Id.* at 655-56.

113. *See e.g., id.* at 660-65 (engaging in a comprehensive and grueling analysis of Indiana’s arguments regarding its interest in banning same-sex marriage).

114. The case started in the Eastern District as *Bostic v. Rainey*. Timothy Bostic and Tony London, an unmarried couple from Virginia, have been together since 1989. Carol Schall and Mary Townley, a married couple from Virginia, later joined as plaintiffs to the case. Schall and Townley were married in California and want Virginia to recognize that marriage.

115. *Bostic v. Rainey*, 970 F. Supp. 2d. 456, 468 (E.D. Va. 2014); *see also* Justin Snow, *Federal Court Rules Virginia Same-Sex Marriage Ban Unconstitutional*, METRO WEEKLY (Feb. 13, 2014), <http://www.metroweekly.com/2014/02/federal-court-rules->

The district court found Virginia's same-sex marriage ban unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>116</sup> The district court enjoined Virginia's employees, officers, and agents from enforcing any Virginia laws that prohibit same-sex marriage or same-sex marriage recognition.<sup>117</sup> The district court stayed the injunction pending appeal to the Fourth Circuit.<sup>118</sup>

The Fourth Circuit affirmed the district court's ruling, with one justice dissenting.<sup>119</sup> The court held that Virginia's laws banning same-sex marriage were unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth amendment.<sup>120</sup> Unlike the Seventh Circuit, the Fourth Circuit's analysis hinged on its holding that the fundamental right to marry encompasses the right to same-sex marriage.<sup>121</sup> Overall, the Fourth Circuit engaged in a conventional due-process-fundamental-right analysis.<sup>122</sup>

The Fourth Circuit's analysis divided its analysis in two steps.<sup>123</sup> First, the court determined what level of constitutional scrutiny to apply – either rational basis review or some form of heightened scrutiny.<sup>124</sup> Second, the court determined whether Virginia's laws banning same-sex marriage met the applicable level of scrutiny.<sup>125</sup>

### *1. Applicable Level of Scrutiny*

At the outset, the court sought to determine whether Virginia's same-sex marriage ban infringed on a fundamental right.<sup>126</sup> Under both Due Process and Equal Protection, if a law infringes on a fundamental right, strict scrutiny applies.<sup>127</sup> If the right at issue is not fundamental, then, typically, rational basis review applies.<sup>128</sup>

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virginia-s/.

116. *Bostic*, 970 F. Supp. 2d. at 484.

117. *Id.*

118. *Id.*

119. *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014).

120. *Id.* at 384.

121. *Id.* at 376.

122. *Id.* at 375-77.

123. *Id.* at 375.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See id.*

The right to marry has long been established as a fundamental right.<sup>129</sup> In *Bostic*, both parties agreed that the right to marry is a fundamental right.<sup>130</sup> However, both parties disagreed about whether the right to marry encompasses same-sex marriage.<sup>131</sup> The Plaintiffs argued that the fundamental right to marry encompasses same-sex marriage.<sup>132</sup> On the other hand, the Defendants argued that the right to marry does not encompass same-sex marriage because “[t]raditionally states have only sanctioned man-woman marriages.”<sup>133</sup>

Ultimately, the court sided with the Plaintiffs, defined the right at issue as the right to marry - not the right to same-sex marriage, and held that the fundamental right to marry encompasses same-sex marriage.<sup>134</sup>

The court found that the right to marry is not a static liberty interest and noted that, “[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms.”<sup>135</sup> Further, the court recognized that, in past cases involving the right to marry, the Supreme Court did not define the right with any greater specificity – e.g., in *Loving v. Virginia*, the Court did not define the right at issue as the right to interracial marriage.<sup>136</sup> Rather, cases like *Loving*, *Zablocki v. Redhail*, and *Turner v. Safley*, “[s]peak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right.”<sup>137</sup> In line with past Supreme Court decisions, the Fourth Circuit averred that the fundamental right to marry is included within the fundamental right to privacy, which protects the right to make basic life choices.<sup>138</sup>

At the heart of the Fourth Circuit’s fundamental right analysis is a recurring theme forwarded by the Supreme Court – a majority of the Court is willing to protect a person’s freedom of choice in matters related to their personal relationships.<sup>139</sup> In the Fourth Circuit’s view, the Supreme

129. *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); and *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

130. *Id.*

131. *Id.* at 375.

132. *Id.*

133. *Id.*

134. *See id.* at 375-77.

135. *Id.* at 376.

136. *Id.*

137. *Id.*

138. *Id.* at 376-77.

139. Arguably, this theme began in *Griswold v. Connecticut*. But it was best

Court's protection of private, personal choices carried through to *Lawrence v. Texas* – where the Court “refused to narrowly define the right at issue as the right of ‘homosexuals to engage in sodomy,’ [and concluded] that doing so would constitute a failure to appreciate the extent of the liberty at stake.”<sup>140</sup> The Fourth Circuit's view also carried recently in *United States v. Windsor* – where the Court found that “section 3 of DOMA was unconstitutional, in part, on that provision's disrespect for the ‘moral and sexual choices’ that accompany a same-sex couples’ decision to marry.”<sup>141</sup> The Fourth Circuit used this recurring theme, and its presence in *Lawrence* and *Windsor* to conclude that, although cases like *Loving*, *Zablocki*, and *Turner* involved opposite sex couples, the Supreme Court “[w]ould grant the same level of constitutional protection to the choice to marry a person of the same sex.”<sup>142</sup> In turn, the Fourth Circuit held that strict scrutiny applied to Virginia's laws prohibiting same-sex marriage.<sup>143</sup>

## 2. *Is the Level of Scrutiny Met?*

First, the court laid out the standards for strict scrutiny, “under strict scrutiny, a law ‘may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.’”<sup>144</sup> Further, the court noted that the Defendants have the burden of proving that the challenged Virginia laws meet the strict scrutiny standard.<sup>145</sup> The Defendants forwarded five “compelling interests” behind the Virginia laws prohibiting same-sex marriage: “(1) Virginia's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal child rearing environment.”<sup>146</sup>

The court invoked *Windsor* to dispose of the Defendants' federalism

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articulated in *Planned Parenthood v. Casey*, when the Supreme Court stated that liberty includes “the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 375-77 (quoting *Planned Parenthood of Se. Pa. v Casey*, 505 U.S. 833, 851 (1992) and discussing Supreme Court precedent that involves protection of a person's freedom of choice in private, personal matters).

140. *Id.* at 377 (quoting *Lawrence v. Texas* 539 U.S. 558, 566-67 (2003)).

141. *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

142. *Id.*

143. *Id.*

144. *Id.* (quoting *Carey v. Population Servs. Int'l* 421 U.S. 678, 686 (1977)).

145. *Id.* (citing *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013)).

146. *Id.* at 378.

argument.<sup>147</sup> First, the court recognized that in *Windsor* the Supreme Court “emphasized states’ traditional authority over marriage.”<sup>148</sup> But noted that the Supreme Court also made clear that “state laws defining and regulating marriage . . . must respect the constitutional rights of persons.”<sup>149</sup> Therefore, according to the Fourth Circuit, “*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights.”<sup>150</sup> In turn, the court held that “Virginia’s federalism-based interest in defining marriage . . . cannot justify its encroachment on the fundamental right to marry.”<sup>151</sup>

The court quickly dismantled the Defendant’s history and tradition argument. The court looked to Supreme Court precedent and noted that “the Supreme Court has made it clear that, even under rational basis review, the “[a]ncient lineage of a legal concept does not give it immunity from attack.”<sup>152</sup> Therefore, the court held that the history and tradition of man-woman marriages is not a compelling state interest that justifies Virginia’s laws prohibiting same-sex marriage.<sup>153</sup>

The court was not persuaded by the Defendant’s contention that allowing same-sex marriage would somehow change the institution of marriage or discourage responsible procreation.<sup>154</sup> First, the Defendant’s argued that allowing same-sex marriage would “[s]ever the link between marriage and procreation.”<sup>155</sup> The court simply reiterated that, according to the Supreme Court, marriage is a unity that extends beyond procreation.<sup>156</sup> Next, the Defendant’s reiterated another familiar argument: Virginia sanctions heterosexual marriage to provide stability to the types of relationships that result in unintended pregnancies.<sup>157</sup> The court dismissed this argument by noting that “[i]f Virginia sought to ensure responsible procreation via [laws prohibiting same-sex marriage], the laws are woefully underinclusive.”<sup>158</sup> This is because same-sex couples are not the only group of couples “who cannot reproduce accidentally” – *e.g.* infertile opposite-couples cannot

147. *Id.* at 378-79.

148. *Id.* at 378-79 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)).

149. *Id.* at 379 (quoting *Windsor*, 133 S. Ct. at 2691).

150. *Id.*

151. *Id.*

152. *Id.* at 380 (quoting *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 326 (1993)).

153. *Id.*

154. *Id.* at 380-83.

155. *Id.* at 380.

156. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)).

157. *Id.* at 381.

158. *Id.*

reproduce accidentally.<sup>159</sup> Moreover, the court resisted the Defendant's attempt to distinguish infertile couples from same-sex couples because infertile couples and same-sex couples are similarly situated and thus "[t]he Equal Protection Clause counsels against treating [them] differently."<sup>160</sup>

Last, the court disposed of the state's argument that opposite-sex couples are better suited for childrearing.<sup>161</sup> The court found that the Defendant's argument failed "for at least two . . . reasons."<sup>162</sup> First, "[u]nder heightened scrutiny, states cannot support a law using 'overbroad generalizations about the different talents, capacities, or preferences of' the groups in question."<sup>163</sup> Second, the court reiterated that strict scrutiny requires congruity between a law's means and its ends.<sup>164</sup> Further, the court found no congruity between Virginia's laws prohibiting same-sex marriage and optimal childrearing.<sup>165</sup> Thus, the court held that optimal childrearing is not a compelling interest furthered by same-sex marriage bans.<sup>166</sup>

Therefore, strict scrutiny was not met because the court found that the state did not establish a compelling state interest behind its laws prohibiting same-sex marriage.<sup>167</sup> In turn, the court held that Virginia's laws prohibiting same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>168</sup>

### 3. Judge Niemeyer's Dissent

In Judge Niemeyer's view, the majority's analysis was fundamentally flawed.<sup>169</sup> He would not hold that the fundamental right to marry encompasses same-sex marriage because "[t]he 'marriage' that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a same-sex marriage."<sup>170</sup> Therefore, Judge Niemeyer would apply rational basis review to Virginia's laws prohibiting same-sex marriage.<sup>171</sup>

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159. *Id.*

160. *Id.*

161. *Id.* at 383-84.

162. *Id.* at 384.

163. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533-34 (1996)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 386 (Niemeyer, J., dissenting).

170. *Id.*

171. *Id.* at 393 (Niemeyer, J., dissenting).

According to Judge Niemeyer, the Virginia's aforementioned arguments in favor of its laws prohibiting same-sex marriage satisfy the rational basis requirement.<sup>172</sup> Likewise, "[b]ecause there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons for recognizing it," Judge Niemeyer would uphold Virginia's laws prohibiting same-sex marriage.<sup>173</sup>

*B. The Ninth Circuit – Latta v. Otter & Sevcik v. Sandoval*

*Latta v. Otter* was filed in the United States District Court for the District of Idaho and is the main case challenging Idaho's laws prohibiting same-sex marriage.<sup>174</sup> The Plaintiffs in *Latta* challenged Article III, § 28 of the Idaho Constitution, Idaho Code sections 32-201 and 32-209, and "[a]ny other [Idaho] laws or regulations to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho."<sup>175</sup> The district court found Idaho's laws prohibiting same-sex marriage unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>176</sup> The district court permanently enjoined Idaho and "[i]ts officers, employees, agents and political subdivisions from enforcing . . ." Idaho's laws prohibiting same-sex marriage.<sup>177</sup> Subsequently the Defendants appealed to the United States Court of Appeals for the Ninth Circuit.

*Sevcik v. Sandoval*, filed in the United States District Court for the District of Nevada, is the main case challenging Nevada's laws prohibiting same-sex marriage.<sup>178</sup> The Plaintiffs in *Sevcik* challenged Nevada's laws precluding same-sex marriage and prohibiting the recognition of otherwise

172. *Id.* at 398 (Niemeyer, J., dissenting).

173. *Id.*

174. *Latta v. Otter*, 19 F. Supp. 3d. 1054, 1062-63 (D. Idaho 2014).

175. A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state. IDAHO CONST. ART. III § 28. Idaho Code section 32-201 says that a marriage is between a man and a woman. *See* IDAHO CODE ANN. § 32-201 (2014). Idaho Code section 32-209 states that Idaho does not recognize lawful same-sex marriages performed in another state. *See* IDAHO CODE ANN. § 32-209 (2014). The Plaintiffs in *Latta* include: Susan Latta and Traci Ehlers, a married couple from Idaho that has been together since 2003; Lori Watsen and Sharene Watsen, a married couple from Idaho that has been together since 2009; Shelia Robertson and Andrea Altmayer, an unmarried couple that has been together for 16 years; and Amber Beierle and Rachael Robertson, an unmarried couple that has been together since 2010. *Latta*, 19 F. Supp. 3d. at 1062-64, 1087.

176. *Latta*, 19 F. Supp. 3d. at 1087.

177. *Id.*

178. *Sevcik v. Sandoval*, 911 F. Supp. 2d. 996, 997 (D. Nev. 2012).

valid same sex marriages performed in other states.<sup>179</sup> The district court applied rational basis review and upheld Nevada's laws prohibiting same-sex marriage.<sup>180</sup> Subsequently, the Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.

*Latta v. Otter* and *Sevcik v. Sandoval* were consolidated for purposes of the Ninth Circuit's opinion. The Ninth Circuit affirmed the district court's decision in *Latta v. Otter* and held that Idaho's laws prohibiting same-sex marriage were unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>181</sup> The Ninth Circuit reversed the district court's decision in *Sevcik v. Sandoval* and held that Nevada's laws prohibiting same-sex marriage were unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>182</sup>

The Ninth Circuit was in familiar territory when it heard *Latta v. Otter*. The court had already considered the effects of *United States v. Windsor* a few months prior to *Latta* in *SmithKline Beecham Corp. v. Abbott Labs.*<sup>183</sup> In *SmithKline*, the Ninth Circuit held that “[*W*]indsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review.”<sup>184</sup> In the Ninth Circuit's view, “[*W*]indsor requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”<sup>185</sup> Therefore, in *Latta*, the court applied “heightened scrutiny” to Idaho and Nevada's laws prohibiting same-sex marriage.<sup>186</sup>

The Ninth Circuit applied heightened scrutiny in *Latta* but, like the Seventh Circuit in *Baskin* and the Supreme Court in *Windsor*, the court did not apply a conventional form of heightened scrutiny – such as intermediate or strict.<sup>187</sup> According to the Ninth Circuit, “[l]aws that treat people differently based on sexual orientation are unconstitutional unless a ‘legitimate purpose . . . overcome[s]’ the injury inflicted by the law on lesbians and gays and their families.”<sup>188</sup> That sounds similar to rational

179. *Id.* at 998.

180. *Id.* at 997. *See also* *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014).

181. *Latta*, 771 F.3d at 476.

182. *Id.*

183. *Id.* at 468 (citing *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014)).

184. *Id.* (quoting *SmithKline*, 740 F.3d at 481).

185. *Id.* (quoting *SmithKline*, 740 F.3d at 481).

186. *Id.* (“Because Idaho and Nevada's laws discriminate on the basis of sexual orientation . . .” heightened scrutiny is applied).

187. *See id.* at 468 (stating that heightened scrutiny is applicable but not indicating that a conventional form of heightened, such as intermediate or strict is applicable).

188. *Id.* at 476 (quoting *SmithKline*, 740 F.3d at 481-82).

basis review but, like the Supreme Court in *Windsor*, the court “[d]eclined to adopt the strong presumption in favor of constitutionality and the heavy deference to legislative judgments characteristic of rational basis review.”<sup>189</sup> In turn, because the court invoked *Windsor*-esque heightened scrutiny, the Defendants bore the burden of proving that Idaho’s marriage laws should survive constitutional review.<sup>190</sup>

The Defendants’ main contention is that “their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting.”<sup>191</sup> Per usual, the Defendants’ argument was two pronged.<sup>192</sup> First, they made a “procreative channeling argument” – i.e. “[m]arriage is important because, [in the event of unintended pregnancies], it serves to bind [heterosexual] couples together and to their children.”<sup>193</sup> The court dismissed the Defendants’ procreative channeling argument by first concluding that “marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples.”<sup>194</sup> Next, the court noted that, in line with *Griswold*, marriage is not just about procreation.<sup>195</sup> Last, like the Seventh Circuit, the court found that “[I]daho and Nevada’s laws are grossly over-and under-inclusive with respect to procreative capacity.”<sup>196</sup> This is because - like Indiana and Virginia - Idaho and Nevada “[g]ive marriage licenses to many opposite-sex couples who cannot or will not reproduce” – e.g. sterile and elderly couples.<sup>197</sup>

Second, like Virginia in *Bostic*, some of the Defendants in *Latta* argued that opposite-sex couples are better suited for child rearing.<sup>198</sup> The court quickly disposed of this argument. First, the court noted that “*Windsor* ‘forbids state action from denoting the inferiority’ of same sex couples.”<sup>199</sup>

189. Francis Amendola, J.D. ET AL., 16 C.J.S. *Constitutional Law* § 1120 (2014) (“Rational basis standard . . . requires only that the classification rationally or reasonably further a legitimate governmental purpose.”); *Latta*, 771 F.3d at 468.

190. *Latta*, 771 F.3d at 468 (stating that “[d]efendants argue that their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting,” which indicates that the defendants had the burden).

191. *Id.* at 468, 476 (“Defendant’s essential contention is that bans on same-sex marriage promote the welfare of children . . .”).

192. *Id.* at 468.

193. *Id.* at 464, 468, 471.

194. *Id.* at 471.

195. *Id.*

196. *Id.* at 472.

197. *Id.* see *supra* note 96 (positing that Indiana allows infertile couples to marry).

198. *Id.* at 473.

199. *Id.* (quoting *SmithKline Beecham Corp. v Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954))).

Likewise, the court stated that “[*W*]indsor makes clear that the defendants’ explicit desire to express a preference for opposite-sex couples over same-sex couples is categorically inadequate justification for discrimination.”<sup>200</sup>

The Defendants forwarded a few additional arguments that the court was wholly unresponsive to, but briefly considered – such as federalism, religious liberty, and protecting the traditional institution of marriage.<sup>201</sup>

Overall, the court found that the Defendants’ arguments amounted to nothing more than speculation and conclusory assertions.<sup>202</sup> According to the court, “heightened scrutiny . . . demands more than speculation and conclusory assertions, especially when the assertions are of such little merit.”<sup>203</sup> Likewise, the court found that the Defendants did not establish a legitimate purpose behind its marriage laws that overcame the harm done to same-sex couples and their families.<sup>204</sup> Thus, the court held that “heightened scrutiny” was not met.<sup>205</sup> In turn, the court held that Idaho and Nevada’s laws prohibiting same-sex marriage were unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment.<sup>206</sup>

Judge Reinhardt, in addition to writing for the majority, wrote a separate concurrence.<sup>207</sup> In Judge Reinhardt’s view, like the Fourth Circuit held in *Bostic*, “[t]he fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as Loving, Zablocki, and Turner, is properly understood as including . . .” the right to same-sex marriage.<sup>208</sup> Therefore, in addition to violating the Equal Protection Clause, Judge Reinhardt would find Idaho and Nevada’s laws prohibiting same-sex marriage unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.<sup>209</sup>

Although Judge Berzon joined in the Ninth Circuit’s opinion, she also wrote a separate concurrence.<sup>210</sup> In Judge Berzon’s view, Idaho and Nevada’s laws prohibiting same-sex marriage are unconstitutional because “[t]hey are classifications on the basis of gender that do not survive the

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200. *Id.*

201. *Id.* at 474-76.

202. *Id.* at 476.

203. *Id.*

204. *Id.*

205. *See id.*

206. *Id.*

207. *Id.* at 477 (Reinhardt, J., concurring).

208. *Id.*

209. *Id.*

210. *Id.* at 479 (Berzon, J., concurring).

level of scrutiny applicable to such classifications.”<sup>211</sup>

Classifications made on the basis of gender are subject to intermediate scrutiny.<sup>212</sup> Meaning that, to withstand intermediate scrutiny, Idaho and Nevada’s laws prohibiting same-sex marriage must “[s]erve important governmental objectives and [be] substantially related to achievement of those objectives.”<sup>213</sup> Like *Windsor*-esque heightened scrutiny, intermediate scrutiny places the “burden of justification” on the state.<sup>214</sup> And, according to Judge Berzon, neither Idaho nor Nevada’s arguments saved Idaho or Nevada’s same-sex marriage prohibition from intermediate scrutiny.<sup>215</sup> Therefore, in addition to holding Idaho and Nevada’s same-sex marriage bans unconstitutional through an equal protection analysis guided by *Windsor*, Judge Berzon would have held the Idaho and Nevada laws unconstitutional through a more conventional equal protection analysis.<sup>216</sup>

### C. The Tenth Circuit – *Kitchen v. Herbert*

*Kitchen v. Herbert* was filed in the United States District Court for the District of Utah and is the main case challenging Utah’s same-sex marriage ban.<sup>217</sup> The Plaintiffs in *Kitchen* challenged Utah Code § 30-1-2(5), Utah Code § 30-1-4.1, and Utah Const. art. I § 29.<sup>218</sup>

The district court found Utah’s laws prohibiting and precluding same-sex marriage unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>219</sup> In turn, the court enjoined Utah from “[e]nforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent [those] laws

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211. *Id.*

212. *Id.* at 479-80.

213. *Id.* at 490 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

214. *Id.* at 480.

215. *Id.* at 495.

216. *Id.* at 495-96.

217. The Plaintiffs in *Kitchen* include: Derek Kitchen and Moudi Sbeity – Utah residents that have been in a committed relationship for many years; Laurie Wood and Kody Partridge – Utah residents in a committed relationship “[w]ho wish to confirm their life commitment and love through marriage”; and Karen Archer and Kate Call – Utah residents who were lawfully married in Iowa and demand that Utah recognize their marriage. *Kitchen v. Herbert*, 755 F.3d 1193, 1199-1200 (10th Cir. 2014).

218. Utah Code § 30-1-2(5) says that marriages between persons of the same-sex are prohibited and void; Utah Code § 30-1-4.1 says that Utah only recognizes legal unions between a man and woman and that it will not recognize same-sex marriages performed in other states; Utah Const. art. I § 29 says that marriage is between a man and a woman and that Utah will not recognize same-sex marriages performed in other states. *Id.* at 1200.

219. *Kitchen*, 755 F.3d at 1216.

prohibit [same-sex marriage].”<sup>220</sup> Subsequently, the Defendants appealed to the United States Court of Appeals for the 10<sup>th</sup> Circuit.

The Tenth Circuit affirmed the district court’s ruling, with one justice concurring in part and dissenting in part.<sup>221</sup> The court held that Utah’s laws banning same-sex marriage were unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth amendment.<sup>222</sup> Like the Fourth Circuit, the Tenth Circuit’s analysis hinged on its holding that the fundamental right to marry encompasses the right to same-sex marriage.<sup>223</sup> Overall, the Tenth Circuit engaged in a conventional due-process-fundamental-right analysis.<sup>224</sup>

The court quickly established that the right to marry is a fundamental right and noted that the Supreme Court has long recognized that marriage is “the most important relation in life.”<sup>225</sup> The court disregarded the Defendant’s urges and, like the Fourth Circuit, refused to hold that only opposite-sex marriage is a fundamental right.<sup>226</sup> The court stated that “[t]he right to marry is of fundamental importance for all individuals . . .” and recognized that the Supreme Court has refused to define the right based on the characteristics of the person asserting it.<sup>227</sup>

Similar to the Fourth Circuit, the court allowed the Supreme Court’s protection of privacy and personal autonomy, present in cases like *Lawrence* and *Windsor*, to frame its analysis.<sup>228</sup> The court highlighted the importance of a person’s freedom of choice in matters related to their personal relationships – especially in the context of marriage.<sup>229</sup> The court recognized that marriage and procreation are sometimes considered together, but it did not allow that notion to control its analysis.<sup>230</sup> Instead, the court gave great weight to the “personal elements inherent in the

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220. *Id.*

221. *Id.* at 1230.

222. *Id.* at 1229-30.

223. *Id.* at 1218.

224. *Id.* at 1209-18.

225. *Id.* at 1209 (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

226. *Id.* at 1209-10. *See also supra*, note 134 and accompanying text (discussing the Fourth Circuit’s refusal to define the right at issue as the right to same-sex marriage).

227. *Id.* at 1209 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

228. *Id.* at 1214, 1217 (discussing the effects of *Lawrence* and *Windsor* on its analysis).

229. *Id.* at 1211-13.

230. *Id.* at 1210-11 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“Marriage and procreating are fundamental to the very existence and survival of the race.”)).

institution of marriage,” rather than the ability to procreate.<sup>231</sup> And the court noted that defining the right at issue as the right to same-sex marriage would “[fail] to appreciate the extent of the liberty at stake . . . .”<sup>232</sup> Likewise, the court concluded that the “[p]laintiffs possess[ed] a fundamental right to marry and to have their marriages recognized.”<sup>233</sup>

The court applied strict scrutiny to Utah’s laws prohibiting same-sex marriage because the court held that such laws infringed upon the Plaintiff’s fundamental right to marriage.<sup>234</sup> The court analyzed whether Utah’s laws prohibiting same-sex marriage were “[n]arrowly tailored to serve a compelling state interest . . .” in order to determine whether strict scrutiny was met.<sup>235</sup>

The Defendant’s argued that Utah’s laws prohibiting same-sex marriage forwarded the state’s interest in: “(1) ‘fostering a child-centric marriage culture that encourages parents to subordinate their own interest to the needs of their children’; (2) ‘children being raised by their biologically mothers and fathers – or at least by a married mother and father – in a stable home’; (3) ‘ensuring adequate reproduction’; and (4) ‘accommodating religious freedom and reducing the potential for civic strife.’”<sup>236</sup>

The court assumed the Defendant’s first three justifications for Utah’s laws prohibiting same-sex marriage were compelling.<sup>237</sup> The court found, however, that those justifications did not meet “[t]he means prong of the strict scrutiny test . . . .”<sup>238</sup> In other words, the court found that Utah’s laws prohibiting same-sex marriage were not necessary to achieve any of the Defendant’s first three justifications.<sup>239</sup>

Overall, the court found that Utah’s laws prohibiting same-sex marriage were not “narrowly tailored” because they were vastly under-inclusive.<sup>240</sup> The court stated that Defendant’s first three justifications all rested on the notion that “[a]llowing same-sex couples to marry would break the critical conceptual link between marriage and procreating.”<sup>241</sup> However, the court

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231. *Id.* at 1212.

232. *Id.* at 1217 (citing *Lawrence v. Texas* 539 U.S. 558, 567 (2003)).

233. *Id.* at 1218.

234. *Id.*

235. *Id.*

236. *Id.* at 1219.

237. *Id.*

238. *Id.*

239. *See id.*

240. *Id.*

241. *Id.*

noted that Utah allows “[m]any other types of non-procreative couples to wed” and recognized that “[s]uch a mismatch between the class identified by a challenged law and the characteristic allegedly relevant to the state’s interest is precisely the type of imprecisions prohibited by heightened scrutiny.”<sup>242</sup> Second, the court dismissed the Defendant’s procreative channeling argument.<sup>243</sup> The court “agreed with the numerous cases decided since *Windsor*,” which indicate “[t]hat it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.”<sup>244</sup> Quite simply, like many other courts, the Tenth Circuit found that allowing same-sex marriage has nothing to do with how opposite-sex raise their children.<sup>245</sup> Third, the court disagreed with the contention that opposite-sex parents are better suited for parenting.<sup>246</sup> The court found that “[a] prohibition on same-sex marriage is not narrowly tailored toward the goal of encouraging gendered parenting styles . . .” because, among other things, Utah did not “[r]estrict the right to marry . . . based on compliance with any set of parenting roles, or even parenting quality.”<sup>247</sup> Last, the court quickly dismissed Defendant’s fourth justification because “[e]ven assuming that appellants are correct in predicting that some substantial degree of discord will follow state recognition of same-sex marriage, the Supreme Court has repeatedly held that public opposition cannot provide cover for a violation of fundamental rights.”<sup>248</sup>

Judge Kelly concurred with the majority’s view that the Plaintiffs had standing to challenge Utah’s laws prohibiting same-sex marriage.<sup>249</sup> However, Judge Kelly would have dismissed the Plaintiffs’ case - without reaching the merits – for lack of substantial federal question pursuant to *Baker v. Nelson*.<sup>250</sup> In *Baker*, “the [Supreme Court] dismissed an appeal asking whether the Constitution forces a state to recognize same-gender marriage ‘for want of substantial federal question.’”<sup>251</sup> In Judge Kelly’s view, *Baker* is binding precedent that lower federal courts must follow.<sup>252</sup>

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242. *Id.* at 1219-20.

243. *Id.* at 1223-24.

244. *Id.* at 1223.

245. *Id.*

246. *Id.* at 1224-25.

247. *Id.*

248. *Id.* at 1227.

249. *Id.* at 1230 (Kelly, J., dissenting).

250. *Id.* at 1231-32.

251. *Id.* at 1231 (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

Unlike his colleagues on the Tenth Circuit – and the Seventh, Fourth, and Ninth circuits – Judge Kelly did not believe that subsequent doctrinal developments had rendered *Baker* inapplicable.<sup>253</sup>

Regardless, Judge Kelly considered the merits of *Kitchen* and disagreed with the majority's holding that Utah's same-sex marriage ban infringed on the Plaintiffs' fundamental right to marriage.<sup>254</sup> According to Judge Kelly, there is no fundamental right guaranteed by the Fourteenth Amendment that "[r]equires Utah to extend marriage to same-gender couples and recognize same-gender marriages from other states."<sup>255</sup> In turn, Judge Kelly would not apply heightened scrutiny and would uphold Utah's laws prohibiting same-sex marriage as "[r]ationally related to (1) responsible procreating, (2) effective parenting, and (3) the desire to proceed cautiously in this evolving area."<sup>256</sup>

#### D. The Sixth Circuit – *DeBoer v. Snyder*

*DeBoer* was filed in the United States District Court for the Eastern District of Michigan and is the main case challenging Michigan's laws prohibiting same-sex marriage.<sup>257</sup> For purposes of appeal, the Sixth Circuit combined *DeBoer* with other cases challenging same-sex marriage from districts within the Sixth Circuit.<sup>258</sup> The United States District Court for the Eastern District of Michigan - as well as the Southern District of Ohio,

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252. *Id.* (citing *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("A summary dismissal is a merits determination and a lower federal court should not come to an opposite conclusion on the issues presented.")).

253. *Id.* at 1232. *Contra id.* at 1204-06 (positing that *Lawrence* and *Windsor* "[u]ndermine[] the notion that the question presented in *Baker* is insubstantial"); *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir. 2014) (stating that *Baker* is no longer authoritative); *Bostic v. Schaefer* 760 F.3d 352, 375 (4th Cir. 2014) (declining to recognize the view in *Baker* as binding precedent); *Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014) (stating that *Baker* no longer precludes review).

254. *Kitchen*, 755 F.3d at 1230 (Kelly, J. dissenting).

255. *Id.*

256. *Id.*

257. The Plaintiffs challenged the Michigan Marriage Amendment, which states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 759 (E.D. Mich. 2014) (quoting MICH. CONST. ART. I, § 25). April DeBoer and Jayne Rowse – an unmarried same-sex couple residing in Michigan – were the Plaintiffs in *DeBoer*. *DeBoer*, 973 F. Supp. 2d at 759.

258. *DeBoer v. Snyder*, 772 F.3d 388, 397-99 (6th Cir. 2014). Those cases included: *Bourke v. Beshear* – from the Western District of Kentucky; *Tanco v. Haslem* – from the Middle District of Tennessee; *Obergefell v. Wymyslo* – from the Southern District of Ohio; and *Henry v. Himes* – also from the Southern District of Ohio.

the Middle District of Tennessee, and the Western District of Kentucky, ruled that state laws prohibiting same-sex marriage are unconstitutional as a violation of the Fourteenth Amendment.<sup>259</sup>

The Sixth Circuit, in a 2-1 decision, disagreed with the district courts and upheld Michigan, Ohio, Tennessee, and Kentucky's laws prohibiting – and/or precluding the recognition of – same-sex marriage as constitutional.<sup>260</sup>

The majority allowed its views of judicial activism to frame its analysis.<sup>261</sup> Overarching the majority's constitutional analysis is the view that the people of each respective state, not a federal court applying the federal constitution, should decide the same-sex marriage issue.<sup>262</sup> Whether this line of thinking is correct is another issue, but it undoubtedly factored into the court's constitutional analysis of the legal question presented: whether the Fourteenth Amendment to the United States Constitution prohibits a State from defining marriage as a relationship between one man and one woman.<sup>263</sup> In the Sixth Circuit's view, it only had power to decide this straightforward, yet loaded, question.<sup>264</sup> The majority starkly repudiated its ability to resolve the question of whether gay marriage is a “good idea,” or the right thing to do.<sup>265</sup>

259. *DeBoer*, 973 F. Supp. 2d at 775 (holding Michigan's laws prohibiting same-sex marriage unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1062 (S.D. Ohio 2014) (holding Ohio's laws precluding the recognition of valid same-sex marriages from other states unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Tanco v. Haslem*, 7 F. Supp. 3d 759, 769 (M.D. Tenn. 2014) (holding that Plaintiffs were likely to succeed on merits of equal protection claim and granting Plaintiffs' motion for preliminary injunction, which enjoined Tennessee from enforcing its laws precluding the recognition of valid same-sex marriages); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014) (holding Kentucky's laws precluding the recognition of valid same-sex marriages unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment); *Obergefell v. Wymyslo*, 962 F Supp. 2d 968, 1000 (S.D. Ohio 2013) (holding Ohio's laws precluding the recognition of valid same-sex marriages from other states unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

260. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014).

261. *See id.* at 396 (“Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea.”). *See also* Lyle Denniston, *Sixth Circuit: Now, A Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50pm), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/> (detailing the majority's approach).

262. *See DeBoer*, 722 F.3d at 396.

263. *Id.*

264. *Id.*

265. *Id.*

The Sixth Circuit's analysis started in the same place as every other circuit to consider the same-sex marriage issue – *Baker v. Nelson*.<sup>266</sup> The Sixth Circuit, however, viewed *Baker* quite differently than the Fourth, Seventh, Ninth, and Tenth Circuits.<sup>267</sup> The majority found that *Baker* – a one-sentence summary dismissal, rendered by the Supreme Court in 1972, of a case challenging Minnesota's laws prohibiting same-sex marriage for “want of substantial federal question” – was still binding precedent.<sup>268</sup> In the majority's view, neither the Supreme Court's decision in *Lawrence, Romer v. Evans*, or *Windsor* represented subsequent doctrinal developments sufficient as grounds for not following *Baker*.<sup>269</sup> Therefore, in applying *Baker*, the majority would have dismissed *DeBoer* without reaching the merits.<sup>270</sup>

Nonetheless, the majority turned to the merits of the Plaintiffs' claim in *DeBoer*.<sup>271</sup> To determine whether same-sex marriage was protected by the Fourteenth Amendment, the majority looked to the original meaning of the Fourteenth Amendment and our nation's history and tradition.<sup>272</sup> The court stated, “[a]ll Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it.”<sup>273</sup> The majority found that “[n]obody . . . argue[d] that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.”<sup>274</sup> The majority cited a myriad of Supreme Court cases that applied the original meaning approach - ranging from *Marbury v. Madison* to *NLRB v. Noel Canning* - in order to support its analysis and concluded that the original meaning approach “[p]ermits today's marriage laws to stand until the democratic processes say they should stand no more.”<sup>275</sup>

266. *Id.* at 399-400.

267. *Compare id.* at 400-02 (stating that *Baker* is still binding Supreme Court precedent), *with Bostic v. Schaefer*, 760 F.3d 352, 373-75 (4th Cir. 2014) (declining to view *Baker* as binding Supreme Court precedent), *and Baskin v. Bogan*, 766 F.3d 648, 659-60 (7th Cir. 2014) (declining to view *Baker* as binding Supreme Court precedent), *and Latta v. Otter*, 771 F.3d 456, 466-67 (9th Cir. 2014) (declining to view *Baker* as binding Supreme Court precedent), *and Kitchen v. Herbert*, 755 F.3d 1193, 1205-06 (10th Cir. 2014) (declining to view *Baker* as binding Supreme Court precedent).

268. *See DeBoer*, 722 F.3d at 430.

269. *Id.* at 401-02.

270. *See id.* at 401.

271. *Id.* at 402-03.

272. *Id.* at 403-04.

273. *Id.* at 403.

274. *Id.*

275. *Id.* at 403-04.

Beyond its vast deference to political process, the majority refused to recognize the fundamental right to marriage as including the right to same-sex marriage and apply heightened scrutiny to the State laws prohibiting same-sex marriage.<sup>276</sup> The majority stated that, in order for the right to same-sex marriage to be considered a fundamental right, it “[m]ust turn on bedrock assumptions about liberty.”<sup>277</sup> The majority quickly dismissed this as implausible because “[t]he first state high court to redefine marriage to include gay couples did not do so until 2003.”<sup>278</sup> Next, the majority noted that “matters do not change because *Loving* held that ‘marriage’ amounts to a fundamental right.”<sup>279</sup> In the majority’s view, implicit in the *Loving* Court’s holding was the notion that “marriage” means only marriage between a man and a woman.<sup>280</sup>

Similarly, the majority refused to apply heightened scrutiny to the State laws prohibiting same-sex marriage in the context of the Plaintiffs’ Equal Protection claim.<sup>281</sup> The majority recognized that Supreme Court cases “call[] for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past.”<sup>282</sup> Unlike the Ninth Circuit, however, Sixth Circuit precedent counseled the majority to apply rational basis review to sexual orientation classifications.<sup>283</sup> Further, the majority found that Supreme Court precedent counseled against applying heightened scrutiny to sexual orientation classifications because the Court “has never held that legislative classifications based on sexual orientation receive heightened review and . . . has not recognized a new suspect class in more than four decades.”<sup>284</sup> Moreover, the majority admitted “[t]he lamentable reality that gay individuals have experienced prejudice in this country . . .”<sup>285</sup> But, ultimately, found that discrimination against gay individuals and the traditional definition of marriage were unrelated because “[t]he institution of marriage arose independently of [such] discrimination.”<sup>286</sup>

In turn, the majority applied rational basis review to the State laws

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276. *See id.* at 410-13.

277. *Id.* at 411.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 413.

282. *Id.*

283. *See id.*

284. *Id.*

285. *Id.*

286. *Id.*

prohibiting same-sex marriage.<sup>287</sup> The majority applied traditional rational basis review - rather than a more demanding form like that found in *Windsor* or *Baskin* - which is extremely deferential to the government.<sup>288</sup> The majority noted that rational basis review is met “[s]o long as judges can conceive of some ‘plausible’ reason for the law – any plausible reason, even one that did not motivate the legislators who enacted it – the law must stand, not matter how unfair, unjust, or unwise the judges may consider it as citizens.”<sup>289</sup>

At the outset, the majority made its position relatively obvious and stated, “a dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, our ancestors, and shared still today by a significant numbers of states.”<sup>290</sup> The majority made clear, however, that it would need some rational basis to uphold as constitutional the State laws prohibiting same-sex marriage.<sup>291</sup>

The majority found that there were at least two rational reasons for the State laws prohibiting same-sex marriage.<sup>292</sup> First, the majority found that procreative channeling was a rational reason for the State same-sex marriage bans.<sup>293</sup> The court stated, “[o]ne can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them.”<sup>294</sup> Further, the majority posited that by creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purpose of rearing offspring.<sup>295</sup> The majority then pointed out the obvious – same-sex couples cannot procreate and thus do not serve the state’s policy goals in this area.<sup>296</sup> In turn, the majority found that the state’s interest in procreative channeling was a rational reason for defining marriage as between a man and woman.<sup>297</sup> Second, the majority found that [a]nother rational explanation for the decision of many States not to expand the definition of marriage . . .” is to “[w]ait and see

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287. *See id.* at 404.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *See id.* at 404-06.

294. *Id.* at 405.

295. *Id.*

296. *Id.* at 404-05.

297. *See id.* at 405-06.

before changing a norm that our society . . . has accepted for centuries.”<sup>298</sup>

Therefore, because it found a rational basis for the traditional definition of marriage, the majority upheld the State laws prohibiting – and/or precluding the recognition of – same-sex marriage.<sup>299</sup>

Judge Daughtrey authored a vehement dissent to the majority’s opinion.<sup>300</sup> She would have upheld the district court’s ruling that state laws prohibiting same-sex marriage are unconstitutional as a violation of the Fourteenth Amendment.<sup>301</sup> Judge Daughtrey fundamentally disagreed with the majority’s constitutional analysis of state laws prohibiting same-sex marriage.<sup>302</sup> In her mind, given the district court’s analysis and the opinions of the Fourth, Seventh, Ninth, and Tenth Circuits, no thorough analysis would have been necessary to uphold the district court’s decision and rule that state laws prohibiting same-sex marriage are unconstitutional.<sup>303</sup>

Nonetheless, Judge Daughtrey briefly discussed how she would go about invalidating same-sex marriage bans.<sup>304</sup> First, she would give no effect to *Baker v. Nelson*.<sup>305</sup> In her mind, cases such as *Romer*, *Lawrence*, *Windsor*, *Kitchen*, *Bostic*, and *Baskin* represent the Supreme Court’s tacit overruling of *Baker*.<sup>306</sup> And, at the very least, she notes that these cases represent subsequent doctrinal developments sufficient to render *Baker* ineffective.<sup>307</sup> Further, Judge Daughtrey would find that same-sex marriage bans violate equal protection because they are a form of unconstitutional animus.<sup>308</sup> Specifically, she would apply Justice Stevens’ articulation of equal protection analysis from his concurrence in *City of Cleburne* and hold that same-sex marriage bans have no rational basis.<sup>309</sup>

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298. *Id.* at 406.

299. *Id.* at 407, 421.

300. *See id.* at 421 (Daughtrey, J., dissenting).

301. *Id.*

302. *See id.* at 421-22.

303. *Id.* at 428.

304. *See id.* at 430-37.

305. *Id.* at 430-31.

306. *See id.* at 431.

307. *Id.*

308. *Id.* at 435-36.

309. *Id.* at 436 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring)) (“In every equal protection case, we have to ask certain basic questions, What class is harmed by the legislation, and has it been subjected to a ‘tradition of disfavor by our laws’? What is the public purpose that I being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us

As demonstrated above, with the exception of the Sixth Circuit in *DeBoer*, Courts of Appeals addressing the constitutionality of state bans on same sex marriage post-*Windsor* applied Justice Kennedy's analysis in *Windsor* employing three basic analytical methodologies:

Marriage is a fundamental right that can only be infringed upon by a showing of a compelling state interest.<sup>310</sup>

*Windsor* calls for an equal protection analysis with a degree of heightened scrutiny in cases where the regulation is rooted in majoritarian morality of animus, assuming that such regulations begin with a taint of irrationality.<sup>311</sup>

*Windsor* calls for an unconventional equal protection rational basis analysis that rejects deference to the state's rationale for bans on same sex marriage and focuses on whether the costs imposed on gay couples by these bans outweigh benefits of those laws that are proven by the state.<sup>312</sup>

On January 16, 2015, the Supreme Court granted certiorari in the cases emanating from the Sixth Circuit discussed above.<sup>313</sup> The Court granted certiorari to answer the following questions:

- 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?<sup>314</sup>

What is quite striking is that the only Court of Appeals to uphold bans on same sex marriage, the Sixth Circuit, did so by relying on *Baker v. Nelson* – a 1972 one-sentence summary dismissal of a case challenging Minnesota's laws prohibiting same-sex marriage for "want of substantial federal question."<sup>315</sup> Contrary to virtually every court that addressed the issue post-*Windsor*, the Sixth Circuit concluded that *Baker* was still binding precedent remaining unchanged despite the Supreme Court's decisions in *Romer*, *Lawrence*, or *Windsor*.<sup>316</sup> Having explored the development of the Supreme Court's recognition of the fundamental right to marry,<sup>317</sup> the

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whether the statute has a 'rational basis.'").

310. See discussion *supra* Part III-B & D.

311. See discussion *supra* Part III-C.

312. See discussion *supra* Part III-A.

313. Denniston, *Court Will Rule on Same-Sex Marriage*, *supra* note 10, at 1.

314. *Id.*

315. *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014). See generally, *contra*, Andrew Janet, Note, *Eat, Drink, and Marry: Why Baker v. Nelson should have No Impact on Same-Sex Marriage Litigation*, 89 N.Y.U. L. REV. 1777 (2014).

316. *DeBoer*, 772 F.3d at 401-02.

317. See discussion *supra* Part V-A.

development by Justice Kennedy in the *Romer / Lawrence / Windsor* trilogy of a jurisprudential analysis focused on the fundamental concepts of liberty, dignity, and equality,<sup>318</sup> and the application of that jurisprudence to the constitutionality of state efforts to ban same sex marriage by the Courts of Appeals.<sup>319</sup> This Article now turns to an analysis of the Supreme Court's decision in *Obergefell*, looking first at the historical development of the Supreme Court's marriage jurisprudence and then at the decision itself. The conclusion of this Article then identifies the legal issues that will necessarily arise from the Supreme Court's decision finding state bans on same sex marriage unconstitutional.

#### IV. THE SUPREME COURT SPEAKS – *OBERGEFELL V. HODGES*<sup>320</sup>

##### A. *The Development of a Marriage Jurisprudence by the Supreme Court*<sup>321</sup>

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. . . . 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.<sup>322</sup>

The Supreme Court has made clear, time and again, that marriage is one of the most significant and fundamental rights provided protection under the Constitution.<sup>323</sup> This understanding formed the foundation for the majority opinion in *Obergefell*.<sup>324</sup> In *Griswold v. Connecticut*, Justice Douglas characterized marriage as a “coming together for better or for worse, hopefully enduring, and intimate to the [point] of being sacred[,]” describing it as “an association that promotes a way of life . . . a harmony

318. See discussion *supra* Part II.

319. See discussion *supra* Part III.

320. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

321. Harrison, *On Marriage, and Polygamy*, *supra* note 9, at 6 (presenting an earlier version of this discussion).

322. *Obergefell*, 135 S. Ct. at 2595-96.

323. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Turner v. Safley*, 482 U.S. 78, 94 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

324. *Obergefell*, 135 S. Ct. at 2598.

in living . . . [and] a bilateral loyalty.”<sup>325</sup>

The issue in *Griswold* was whether the state of Connecticut could prevent married couples from using contraception.<sup>326</sup> In other words, the question before the Supreme Court was whether actions taken within the marital relationship to prevent procreation deserved protection under the rubric of the privacy or liberty interest inherent in the marriage bond.<sup>327</sup> The Court found that the state’s interest in banning contraception for married persons, while perhaps encouraging procreation, was an impermissible interference in the intimate relationship of “bilateral loyalty” that created a marriage.<sup>328</sup> Thus, the Court in *Griswold* clearly found that marriage was deserving of protection not solely because it was the locus for procreation and the rearing of children, but rather because there was some protectable liberty interest inherent in the institution of marriage itself.<sup>329</sup>

In *Turner v. Safley*,<sup>330</sup> the Court faced a state policy that placed significant restrictions on the ability of inmates to marry. In striking down these restrictions as unconstitutional, the Court stated the following:

“[Marriages] are expressions of emotional support and public commitment . . . [which] are an important and significant aspect of the marital relationship.”<sup>331</sup>

“[M]any religions recognize marriage as having spiritual significance; . . . [therefore], the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”<sup>332</sup>

“[The] marital status often is a precondition of 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 (e.g., legitimation of children born out of wedlock).”<sup>333</sup>

As the Court described in *Obergefell*, the fundamental aspects of marriage described by the Court in *Turner*, including the spiritual

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325. *Griswold*, 381 U.S. at 486.

326. *Id.* at 480.

327. *Id.* at 485-86.

328. *Id.*

329. *Id.*

330. *Turner v. Safley*, 482 U.S. 78, 81 (1987).

331. *Id.* at 95-96.

332. *Id.* at 96.

333. *Id.*

significance of marriage, are equally important for same-sex couples as for different-sex couples.<sup>334</sup>

In *Zablocki v. Redhail*, the Court described the limits on the state regulation of marriage as those “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.”<sup>335</sup> Where a State seeks to impose more intrusive or limiting restrictions on the right to marry, those restrictions must be “supported by sufficiently important state interests and [be] closely tailored to effectuate only those interests.”<sup>336</sup>

At times, in developing its marriage jurisprudence, the Court has focused solely on the protected interests of the individual participants to the relationship.<sup>337</sup> Yet, at other times, the Court’s focus has been on the family unit as a whole, often particularly focused on the interests of children who may live within that family construct.<sup>338</sup> For example, in

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334. This certainly does not mean that civil recognition of same-sex marriage forces religious bodies to perform sacramental or quasi-sacramental ceremonies of spiritual recognition for such relationships, as some now seem to believe. Today, it seems inconceivable that for years many religious bodies in America would not perform the religious rite of marriage for couples of different races, even in locations where such relationships were recognized under the civil law. The Supreme Court’s decision in *Loving*, while striking down all prohibitions on the civil recognition of interracial marriage, did nothing to alter the right of religious bodies to refuse to perform religious ceremonies bestowing the religious rite of marriage upon interracial couples. U.S. CONST. amend. I. See also *State v. Barclay*, 708 P.2d 972, 977 (1985) (upholding an ordained Baptist minister’s right to be free from state coercion, including criminal prosecution, as a result of his refusal to perform interracial marriages because they violated his religious beliefs). For an interesting discussion of the history of marriage in America, see NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2d ed., Harvard U. Press 2000).

335. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

336. *Id.* at 386.

337. See, e.g., *Turner v. Safley*, 482 U.S. 78, 94-95 (1987) (holding that the fundamental right to marry extends to inmates); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“[T]he freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

338. *Zablocki*, 434 U.S. at 386-87 (recognizing the right to marry as a fundamental right and the foundation of family in society). See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”). See generally EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* (2004) (describing the different dimensions of marriage in the United States). But see *Lofton v. Sec’y of the Dept. of Children & Family Servs.*, 358 F.3d 804, 814 (11th Cir. 2004) (rejecting the appellant’s argument that foster families should be afforded the same protections as traditional “family units” by upholding Florida’s ban on adoption

*Zablocki*, the Court stated:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships . . . [since] it would make little sense 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.<sup>339</sup>

What is clear, however, in all of the Court's marriage jurisprudence is that the Court sees the fundamental right to marry as having a separate existence—independent from the fundamental rights to procreation, childbirth, child rearing, or family relationships. The right to marry does not exist solely to realize the rights to procreation, childbirth, child rearing, or family relationships.<sup>340</sup> In fact, the Court has held that a constitutionally protected right to sexual activity or to child rearing exists outside the sphere of marriage.<sup>341</sup>

The Court has articulated its understanding that the “composition of families varies greatly from household to household[.]” and that the “demographic changes of the past century make it difficult to speak of an average American family.”<sup>342</sup> In fact, when the Court discusses a fundamental interest in childrearing, it must assume all of the various ways in which persons become parents and create a parent/child relationship.<sup>343</sup>

Gay and lesbian individuals and couples have adopted children, some have had children that were biologically conceived through artificial

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by gay and lesbian individuals).

339. *Zablocki*, 434 U.S. at 386.

340. *Id.*; *Turner*, 482 U.S. at 94-95 (holding that the fundamental right to marry extends to inmates); *Loving*, 388 U.S. at 12 (“[T]he freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”). *See, e.g., Troxel*, 530 U.S. at 68-69.

341. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *See e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

342. *Troxel*, 530 U.S. at 63.

343. *Id.* at 66. Under existing Supreme Court precedent, it is clear that a child who is being raised by her biological mother and the mother's lesbian partner, who has legally adopted the child, or a child being raised by her biological mother and father in a polygamous relationship, has a constitutionally protected interest in the parent/child relationship. Likewise, no one could legitimately argue that the two legal parents of this child do not also have a constitutionally protected interest in child rearing or in the family relationship. Rather, a legally recognized parent/child relationship, by its very existence, implicates a fundamental interest that is provided constitutional protection, a fundamental interest that can be interfered with only for some compelling state interest.

insemination and surrogacy, and some have children that were the product of a previously existing marriage.<sup>344</sup> Little doubt should exist that these individuals and their children have a right to privacy and liberty with respect to matters of family life under the Court's prior decisions.<sup>345</sup> It makes "little sense 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."<sup>346</sup> It was within this context of the Court's marriage jurisprudence that the Court addressed the issue of same sex marriage presented in *Obergefell*.

*B. The Majority Opinion – Justice Kennedy Writes*<sup>347</sup>

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.<sup>348</sup>

On June 26, 2015, the anniversary date of Justice Kennedy's opinions in both *Lawrence* and *Windsor*, the Court issued its decision in *Obergefell*.<sup>349</sup>

344. See generally Wolfson, *supra* note 338; Molly Cooper, Note, *Gay And Lesbian Families In The 21st Century: What Makes a Family? Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 180-81 (2004). But see Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 808-09 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 869 (2005) (upholding Florida's ban on adoption by gay and lesbian individuals). The full 11th Circuit Court of Appeals voted 6-6 on whether to rehear the case *en banc*. The result of this tie vote was that the case was not reheard. Subsequently, the Supreme Court refused to hear an appeal of the case.

345. *Troxel*, 530 U.S. at 63. See, e.g., *Lawrence*, 539 U.S. at 573-74.

346. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1974).

347. Harrison, *On Marriage and Polygamy*, *supra* note 9 (manuscript at 58) (presenting an earlier version of this discussion of the majority opinion in *Obergefell* focused on the implications of the *Obergefell* decision on future challenges to state bans against the recognition of polygamous marriages and other polyamorous relationships).

348. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

349. *Id.* at 2584.

In a 5-4 decision, with Justice Kennedy writing for the Court, the Court answered the two questions presented in *Obergefell* as follows: “The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.”<sup>350</sup> As he had in his opinions in the three prior major gay rights cases decided by the Court, *Romer*, *Lawrence*, and *Windsor*, Justice Kennedy rooted his decision in concepts of liberty, equality, and dignity, extending his understanding that analysis rooted in due process and equal protection were inextricably bound together.<sup>351</sup>

Similar to his opinion in *Lawrence* where he attacked the Court’s prior framing of the homosexual sodomy question in *Bowers*, Justice Kennedy was first concerned with how the question before the Court in *Obergefell* was to be framed.<sup>352</sup> Justice Kennedy rejected the notion that the question before the Court was simply whether there was a constitutional right to gay marriage.<sup>353</sup> Rather, Justice Kennedy sought to frame the question before the Court within the context of the evolution of the understanding of marriage and the evolution of the Court’s marriage jurisprudence as described above.<sup>354</sup>

In *Obergefell*, Justice Kennedy concluded that marriage was a fundamental right under the Constitution, outlining four separate principles that were at the core of defining this fundamental right.<sup>355</sup> Justice Kennedy articulated these core principles as follows:

“the right to personal choice regarding marriage is inherent in the concept of individual autonomy” creating an “abiding connection between marriage and liberty;”<sup>356</sup>

marriage “supports a two-person union unlike any other in its importance to the committed individuals;”<sup>357</sup>

“protecting the right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and

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350. *Id.* at 2588. *See also id.* at 2593-2608.

351. *Id.* at 2594, 2597-98.

352. *Id.* at 2601-02.

353. *Id.*

354. *Id.* at 2595-2597.

355. *Id.* at 2593-2602.

356. *Id.* at 2599.

357. *Id.* at 2599-2600.

education,”<sup>358</sup> and

“marriage is a keystone of our social order.”<sup>359</sup>

With these core principles in mind, Justice Kennedy identified the question before the Court as being whether limiting marriage solely to opposite sex couples, to the exclusion of same-sex couples was manifestly inconsistent with the central meaning of the fundamental right to marry.<sup>360</sup> Justice Kennedy explicitly rejected the argument that gay and lesbian couples were not simply seeking “to exercise the right to marry,” but rather were asking for the recognition of “a new and nonexistent ‘right to same-sex marriage.’”<sup>361</sup> As Justice Kennedy wrote:

*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.<sup>362</sup>

Justice Kennedy did not explicitly state whether the case was being decided on due process or equal protection grounds. However, what is much clearer in *Obergefell*, as opposed to Justice Kennedy’s three prior gay rights opinions, is that no choice between due process and equal protection analysis need be made, because as he sees the Constitution, these two constitutional clauses are inextricably tied together under the umbrella of personal dignity.<sup>363</sup>

As in the *Romer / Lawrence / Windsor* trilogy, in *Obergefell*, Justice Kennedy employed some form of heightened scrutiny, but one not rooted in the traditional concerns about suspect groups or classifications.<sup>364</sup> In *Obergefell*, the analysis begins with the idea that marriage is a fundamental right under the due process clause, thus subjecting exclusions from that

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358. *Id.* at 2600-01.

359. *Id.* at 2601.

360. *Id.* at 2601-03.

361. *Id.* at 2602.

362. *Id.*

363. *Id.* at 2602-05. See also discussion *supra*, Part II; Elizabeth B. Cooper, *The Power of Dignity*, 84 *FORDHAM L. REV.* 3, 13-21 (2015) (discussing the concept of dignity in Justice Kennedy’s jurisprudence).

364. *Id.* at 2597-2605.

right to heightened scrutiny.<sup>365</sup> In *Obergefell*, therefore, the question was whether there existed a substantial or compelling, let alone rational, basis for the exclusion of same-sex couples from the fundamental right of marriage.<sup>366</sup> In the Court's analysis, the answer to this question was an unequivocal "No."

*C. The Dissents: More "Legalistic Argle Bangle"*<sup>367</sup>

The dissenting opinions were consistent with the dissents that had been authored in response to Justice Kennedy's prior gay rights opinions in the *Romer / Lawrence / Windsor* trilogy. Chief Justice Roberts's primary objection was on what he saw as the anti-democratic nature of the decision, cutting off the robust debate that had been taking place already in the states.<sup>368</sup> Justice Roberts also clearly saw this decision and the analysis employed by Justice Kennedy as reviving the often criticized substantive due process analysis employed during the *Lochner* era, a case he referenced some sixteen times in his dissent.<sup>369</sup> Chief Justice Roberts places the analysis employed by Justice Kennedy in the *Lochner*-ian substantive due process tent, offering a scathing criticism of *Lochner* and its approach to substantive due process analysis, which, according to Chief Justice Roberts, allows judges to turn "personal preferences into constitutional mandates."<sup>370</sup>

Additionally, Chief Justice Roberts, along with Justice Thomas and Justice Alito, challenged the assertion by the majority that the First Amendment would provide adequate protections for those who held religious objections to same-sex marriage.<sup>371</sup> Chief Justice Roberts expressed concern that certain religious institutions may be in danger of losing their tax-exempt status if they discriminate against married same-sex couples.<sup>372</sup> As Chief Justice Roberts noted, the Solicitor General acknowledged this possibility at oral argument.<sup>373</sup>

For his part, Justice Thomas, relying upon various amicus briefs, asserted that the decision would have "unavoidable and wide-ranging

365. *Id.* at 2598-99.

366. *Id.* at 2604-05.

367. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

368. *Obergefell*, 135 S. Ct. at 2611-12, 2624-26 (Roberts, C. J., dissenting).

369. *Id.* at 2615-22 (Roberts, C. J., dissenting).

370. *Id.* at 2618 (Roberts, C. J., dissenting).

371. *Id.* at 2625-26 (Roberts, C. J., dissenting).

372. *Id.* (Roberts, C. J., dissenting).

373. *Id.* at 2626 (Roberts, C. J., dissenting).

implications for religious liberty.”<sup>374</sup> Without any historical or legal support for the position, Justice Thomas nevertheless argued that it is “all but inevitable” that religious institutions will be confronted with demands to “participate in and endorse civil marriages between same-sex couples.”<sup>375</sup>

Writing separately, Justice Alito expressed his fear that while those who objected to same-sex marriage may be allowed to “whisper their thoughts in the recesses of their homes,” such persons and groups would be “labeled as bigots and treated as such by governments, employers, and schools.”<sup>376</sup> Further, Justice Alito argued that by placing laws denying recognition of same-sex marriage on equal footing with laws denying equal treatment for African Americans and women, the majority was simply providing ammunition for those who would seek to vilify those who objected to same-sex marriage.<sup>377</sup>

In dissent, Justices Scalia, Alito, and Thomas offer very little in the way of specific legal analysis. Rather, their approach is to simply attack the majority for what they see as a usurpation of power, or as Justice Scalia writes, ignoring the actual constitutional structure of the Federal government and the role of the Supreme Court in that structure: “Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”<sup>378</sup> Justice Alito joined in this attack, stating: “A lesson that some will take from today’s decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means.”<sup>379</sup> Further, rather than addressing the precedents established by the Court in both its marriage jurisprudence and in the *Romer / Lawrence / Windsor* gay rights trilogy, the dissenters simply ignored the Court’s precedents and resorted to *ad hominem* attacks on the majority, as exemplified by this statement from Justice Scalia’s dissent:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: ‘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,’ I would hide my head in a bag. The Supreme Court of the United States has

374. *Id.* at 2638-39 (Thomas, J., dissenting).

375. *Id.* at 2638 (Thomas, J., dissenting).

376. *Id.* at 2642-43 (Alito, J., dissenting).

377. *Id.* at 2642 (Alito, J., dissenting).

378. *Id.* at 2627 (Scalia, J., dissenting).

379. *Id.* at 2643 (Alito, J., dissenting).

descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.<sup>380</sup>

## V. CONCLUSION: WHAT NOW?

While much justifiable celebration occurred among gay and lesbian persons and their allies following the decision in *Obergefell*, it is critical to place this decision in its proper context along the journey toward greater inclusion of gay and lesbian persons within American society and toward greater protections from discrimination for gay and lesbian persons. In a recent essay in the Yale Law Journal Forum, Professor Katie Eyer smartly argues that while the decision in *Obergefell* may have many parallels with the decision in *Loving*, finding bans on interracial marriage unconstitutional, there is a profound and fundamental difference between where these two decision lie along the trajectory toward “the institutionalization of a formal equality regime (that is, a legal regime in which discrimination against a group is presumptively unlawful).”<sup>381</sup> As Professor Eyer points out:

Whereas *Loving* marked the endpoint of an era of the institutionalization of formal racial equality norms in constitutional Equal Protection doctrine and in federal statutory law, *Obergefell* stands much closer to the beginning of such a process. Indeed, although the L/G/B rights movement has achieved substantial success—in shifting public opinion, and in securing litigation victories— explicit guarantees of formal equality have—at least at the federal level— largely remained elusive.<sup>382</sup>

Given the reaction to the decision in *Obergefell*, it seems clear that

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380. *Id.* at 2630 n.22 (Scalia, J., dissenting).

381. See generally Katie Eyer, *Brown, Not Loving: Obergefell And The Unfinished Business Of Formal Equality*, 125 YALE L.J. Forum 1, 1-2 n.3 (2015) [hereinafter Eyer, *Not Loving: Obergefell*]. In her essay, Professor Eyer defines “formal equality” in the following manner: “‘formal equality’ signifies a legal regime in which invidious use of a particular classification is deemed presumptively unlawful. In the statutory domain, this generally takes the form of an explicit statutory proscription on discrimination on the basis of a particular characteristic, and, in the contemporary constitutional domain, generally takes the form of “protected class” status triggering heightened scrutiny.” *Id.* at n.3. See also Katie Eyer, *Have We Arrived Yet? L/G/B Rights and the Limits of Formal Equality*, 19 LAW & SEXUALITY 159, 160-63 (2010); Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 87-88 (2008); cf. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2719-21 (2014).

382. Eyer, *Not Loving: Obergefell*, *supra* note 381, at 2.

Professor Eyer is correct in her assessment of the historical placement of *Obergefell*. For the gay and lesbian rights movement, it seems clear that *Obergefell* is more akin to *Brown* than to *Loving* in the process toward greater inclusion and securing “explicit guarantees of formal equality.”<sup>383</sup>

*Obergefell* leaves gay and lesbian persons in the rather odd position of having their marriage legally protected in every state in the union and at the federal level, while at the same time being denied protections from discrimination in employment,<sup>384</sup> housing, and public accommodations<sup>385</sup> at both the federal level and in the twenty-nine states that do not have statewide protections based on sexual orientation or gender identity.<sup>386</sup> Thus, for example, gay and lesbian couples can be married and have their marriage legally recognized in Ohio or Kentucky today, and then be lawfully fired from their job or evicted from their home tomorrow simply for being gay or lesbian, a fact that might be revealed when an employee exercises his or her constitutional right to marry someone of the same gender.<sup>387</sup> Likewise, *Obergefell* does not answer whether it was unlawful for an employer to deny spousal benefits to gay and lesbian couples who were legally married in one state prior to *Obergefell*, on the basis that the couple’s state of residence and employment did not recognize their marriage.<sup>388</sup> This lack of institutional formal equality will define and drive

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383. *Id.*

384. *Id.* at 7-8 n.31 (providing a demonstrative list of employment cases brought under Title VII alleging discrimination based on sexual orientation wherein the disposition of the case in favor of the employer was based on the lack of any formal equality statutory scheme protecting against discrimination based on sexual orientation).

385. *Id.* at 7 n.30 (noting that public accommodations law, the body of antidiscrimination law governing access to services like restaurants hotels and service providers, is also largely governed by statute, rather than the Constitution. There is very little, if any, ability for L/G/B litigants to bring public accommodations claims under federal law, because federal law does not proscribe sex discrimination in public accommodations, and sex discrimination is the primary argument that L/G/B litigants have relied on in the absence of explicit protections for sexual orientation).

386. *Id.* at 7-11. *See also, e.g.,* David S. Cohen & Leonore Carpenter, *Anti-Gay Bias Legal in Indiana Before New Law*, USA TODAY (Mar. 31, 2015), <http://www.usatoday.com/story/opinion/2015/03/31/indiana-religious-freedom-restoration-act-discrimination-anti-gay-column/70723684> (noting that twenty-nine states do not prohibit sexual orientation discrimination, and that few protections exist under federal law).

387. *See Maps of State Laws and Policies*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Aug. 22, 2015) (showing information on state protections for individuals based on sexual orientation or gender identity).

388. This issue forms the crux of a lawsuit recently filed against Wal-mart, alleging that Wal-Mart’s pre-2014 policy of denying benefits to same-sex couples, unless required by state law, was unlawful. *See* Steven Nelson, *Wal-Mart Sued for Alleged Anti-Gay*

the next steps in the development of greater LGBT inclusion and the fashioning of institutional formal equality.

In an oddly prescient fashion, the concerns the dissenters raised in *Obergefell* regarding the protection of the religious liberties of those opposed to same-sex marriage may provide the battleground for the next steps for LGBT persons in attempting to achieve institutional formal equality. Can public officials, such as county clerks, charged by state law with issuing marriage licenses, opt out of the constitutional requirements for marriages between persons of the same sex recognized in *Obergefell* based on their own personal religious objections?<sup>389</sup> Can places of public accommodation, such as hotels, wedding venues, restaurants, or bakeries, in the absence of a state law prohibiting discrimination based on sexual orientation or gender identity in public accommodations, simply refuse to provide wedding services to gay and lesbian persons based on their own personal religious objections?<sup>390</sup>

These very real questions being played out across the country following the decision in *Obergefell* show clearly that in the context of the development of an institutional formal equality for gay and lesbian persons, *Obergefell* is the beginning, as *Brown* was for the development of such a regime in the context of race, rather than a culmination of the construction of an institutional formal equality regime, as *Loving* represented. Following *Loving*, federal and state structures were already in place that made it unlawful for public officials, such as county clerks, who are charged by state law with issuing marriage licenses, to opt out of the constitutional requirements for marriages of persons between different races based on their own personal religious objections or for places of public accommodation, such as hotels, wedding venues, restaurants, or bakeries, to simply refuse to provide wedding services for interracial couples based on their own personal religious objections. As Professor Eyer writes:

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*Discrimination*, U.S. NEWS & WORLD REPORT (July 14, 2015), <http://www.usnews.com/news/articles/2015/07/14/wal-mart-sued-for-alleged-anti-gay-discrimination>.

389. See, e.g., *Same-Sex Marriage Fight Turns to Clerks Who Refuse Licenses*, NEW YORK TIMES (June 30, 2015), <http://www.nytimes.com/aponline/2015/06/30/us/ap-us-gay-marriage.html>. See also *Clerk Prayed Over Decision to Stop Issuing Marriage Licenses*, NEW YORK TIMES (July 20, 2015) <http://www.nytimes.com/aponline/2015/07/20/us/ap-us-gay-marriage-county-clerks.html>.

390. See, e.g., Robert P. Jones, *After Same-Sex Marriage, Then What?*, THE ATLANTIC (June 24, 2015) <http://www.theatlantic.com/politics/archive/2015/06/after-same-sex-marriage-then-what/396659/>.

But marriage's political, cultural, and social significance should not be mistaken for its legal centrality. Unlike *Loving*, a favorable ruling for marriage equality in *Obergefell* is unlikely to establish a broader legal regime of formal equality in constitutional doctrine; and it is sure not to do so in the context of statutory rights. As such, while *Obergefell* will no doubt have real significance—social, political, and, in part, legal—it should not be mistaken for formal equality. For that unfinished business, as after *Brown*, much continuing work—in the courts, in the legislature, and among the people—lies ahead.<sup>391</sup>

What remains after *Obergefell* is much work to be done to build a regime of institutional formal equality that provides protection for gay and lesbian persons not just in the context of marriage, but also in the much wider context of where individuals work and where they live and where they choose to seek services.<sup>392</sup> This is critical and important work that will be

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391. Eyer, *Not Loving: Obergefell*, *supra* note 381, at 12.

392. See, e.g., EEOC Decision No. 0120133080, 14-15 (2015), available at <http://www.washingtonblade.com/content/files/2015/07/EEOC-gay-Title-VII-decision.pdf> (holding for the first time that the prohibition against discrimination based on “sex” contained in Title VII of the Civil Rights Act of 1964 includes a prohibition against discrimination based on sexual orientation). As the EEOC stated:

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 American Psychological Ass’n, “Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation” (Feb. 2011). 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.*

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carried out through lobbying at the state and federal level and through the courts as increased litigation is brought in these arenas. *Obergefell* provides the framework and impetus for much of this work, but it is merely the beginning of the work, not the end.

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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.*

*Id.* at 6-7 (emphasis added).