12-2018

The Adoption of Federal Scrutiny by State Supreme Courts in Same-Sex Marriage Jurisprudence

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Chapter 1: Introduction

It would be logical to assume state supreme courts, when reviewing state constitutional challenges, interpret their state constitutions in unique and independent ways. This is not true in same-sex marriage cases. Counterintuitively, state supreme courts use a non-independent standard of review created by the federal government. My research shows that state courts are shaped by federal scrutiny standards in same-sex marriage cases. I will show how Washington, Connecticut, and California all adopted federal scrutiny. I will also show how Vermont did not adopt the federal scrutiny, yet was still shaped by the standard.

This idea – that state courts mimic federal court frameworks – is not novel; however, little literature has been devoted to state courts adopting the three levels of scrutiny in same-sex marriage jurisprudence. As Scott Dodson states in *The Gravitational Force of Federal Law,* state judicial systems have mimicked the federal judiciary across a spectrum of instances. This mimicry can be seen when state rules are similar to federal rules, also in some instances when rules are dissimilar, and under both procedural and substantive laws (University of Pennsylvania Law Review, 165 L. Rev. 703).

State courts often follow federal courts when the applicable state rule mirrors the federal rule. Although rules may be textually similar, a federal court's interpretation of the federal rule is not preemptive of the state rule or binding on a state courts interpretation of the analogous state rule. Yet the typical state court tends to treat a federal appellate opinion as presumptively controlling, or at least as highly persuasive authority, without regard for any state policy reason for adherence or divergence. As Oakley and Coon found, "a substantial number of state courts reiterate that they give, ipso facto, great weight to federal court interpretations of analogous federal rules." The Federal Rules in State Courts: A Survey of State Court Systems of Civil

Procedure, 61 Wash. L. Rev. 1367, 1378 (1986). For example, the Rhode Island Supreme Court stated: "[W]here the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule." Hall v. Kuzenka, 843 A.2d 474, 476 (R.I. 2004).

Pleading standards present a useful illustration. A pleading is a formal written statement of a party's claims or defenses to another party's claims in a civil action. The parties' pleadings in a case define the issues to be adjudicated in the action. Rule 8 of the Federal Rules, which states that a claimant need set out only "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2) was designed to liberalize pleading away from the old code-pleading standard requiring that the allegation of facts state a cause of action Scott Dodson, New Pleading in the Twenty-First Century: Slamming the federal Courthouse Doors?,19-23 (2013). The Supreme Court in Conley v. Gibson 355 U.S. 41 (1957) decided Rule 8 was a strongly liberalizing force and directed lower courts to abide by it. Conley interpreted Rule 8 to require only "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley at, 557. States also have pleading rules, but Conley interpreted only Federal Rule 8. The states with replica rules universally adopted the Conley construction for their own pleading rules (Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (2007). (Stevens, J., dissenting)).

In 2007, the Supreme Court abruptly changed course. In a pair of decisions, Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Court embraced a different normative model for pleading (one of restriction rather than access), imposing two new pleading requirements (plausibility and nonconclusoriness), and abrogated Conley's famous "no set of facts" standard. Federal courts quickly got the memo after Iqbal and began applying the new

pleading standard relentlessly, as required. But the Supreme Court's new interpretation does not control state courts, which are free to interpret their rules independent of federal interpretation.

Several state supreme courts have followed Twombly or Iqbal for no apparent reason. In Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), the Massachusetts Supreme Judicial Court simply quoted the Supreme Court's decisions and summarily adopted the new federal standard. The Wisconsin Supreme Court, in a case called Data Key Partners v. Permira Advisors LLC., 350 wis.2d 347 (2014), also adopted the Twombly "plausibility" standard, despite Wisconsin's long previous adherence to the Conley "no set of facts" standard. *See* Doe v. Archdiocese of Milwaukee, 700 N.W.2d 180, 186-87 (Wis. 2005). As in Iannacchino, the Wisconsin court recited the Twombly opinion and adopted it without engaging in a state-specific policy analysis. *see id*. The Supreme Court of South Dakota adopted the Twombly pleading standard merely because the federal rule and the state rule both require a "showing" of entitlement to relief but offered no reasoning based on state policy. *see* Sisney v. Best Inc., 754 N.W.2d 804, 808-09 (S.D. 2008).

Mimicry of federal law can be so forceful that state courts follow federal courts even when the language of their state rules is different from the language of federal rules. Pleading standards again present a useful example, for Rule 8 and how its federal interpretation has exerted a strong pull even on states that retained code pleading.

A useful 2001 study by Thom Main illustrates this phenomenon. Main studied the way state courts in code-pleading states reacted to federal court interpretations of federal rules on pleading and summary judgment. Illinois state courts followed the Supreme Court's interpretive gloss on pleading and summary judgment under the Federal Rules. In both federal and state courts a uniform "standard of notice" pleading dominated in 1966 before the Supreme Court's

interpretation. However, after the ruling in Twombly and Iqbal, the pleading standard under Federal Rule of Civil Procedure 8(a), "notice of fact" – instead of notice pleading -- arose in both court systems. Main also found a similar change in "notice" in the Pennsylvania court system. State appellate courts in New York—a code pleading state—are using the Supreme Court's "plausibility" standard even though it applies only to pleadings in federal court (Edward D. Cavanagh, Making Sense of Twombly, 63 S.C. L. REV. 97, 125–26 (2011)).

States mimic other procedural rules established by the federal court. More than forty states mimic the Federal Rules of Evidence (Jack B. Weinstein & Margaret A Berger, Weinstein's Federal Evidence, Joseph McLaughlin ed., 2d ed. (2011)). States often follow the Supreme Court's gloss on those rules, such as its controversial Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) decision regarding the admissibility of expert testimony. Before Daubert, almost all the states followed the seventy-year-old federal standard articulated in Frye v. United States, 315 F. 2d 491 (1963). Within six years, nineteen states had switched — although not required -- to the standard articulated in Daubert (The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony: With Applications to Securities Litigation, FLA. B.J., Mar. 1999, at 3, 36). California's propensity-evidence bar for sex-crime prosecutions is interpreted similarly to the Federal Rules of Evidence, despite textual dissimilarities (Alex Stein, Constitutional Evidence Law, 61 Vand. L. Rev. 65, 105-24 (2008)). Likewise, roughly half the states have modeled their own rules of criminal procedure on the Federal Rules of Criminal Procedure (Wayne R. Lafave et al., Criminal Procedure § 1.2(f), at 50 (2d ed. 1999)).

This mimicry extends beyond procedure and into the substantive area of law. Statutes: Federal Employment-Discrimination law—primarily Title VII of the Civil Rights Act, the Age

Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA)—has inspired copycat state statutory regimes, and developments in federal case law quickly echo in state jurisprudence (Alex B. Long If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statues, 40 GA. L.REV. 469 (2006)). After Title VII, most states swiftly and successfully enacted laws substantially mirroring Title VII's provisions. After Title VII was enacted, all of the states that previously lacked antidiscrimination laws adopted them (Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 Fordham L. Rev. 57, 91 (2002)).

The extent of the similarities is striking. "[F]ederal and state antidiscrimination laws typically ran parallel to one another. Indeed, in many instances, a state's antidiscrimination statute was based upon or used language almost identical to federal law" (Long, at 473) Aside from isolated pockets of novelty, states have approached antidiscrimination lawmaking principally by plagiarizing the federal statutes (Dodson at, 721). State appellate courts would often interpret their own state antidiscrimination statutes in the same manner that federal courts had interpreted the parallel federal statute (Long at 482). For example, in 1973, the Supreme Court interpreted Title VII to require a unique burden-shifting framework for establishing a prima facie case of employment discrimination in McDonnell Douglas Corp v. Green 411 U.S. 792 (1973). Despite the fact that the Court's framework was pure judicial gloss on a federal statute, state courts promptly adopted the burden-shifting framework for their own state statutes.

Similarly, Dodson states "As with pleading rules, the lure of statutory following is powerful even when the text of the state statute differs meaningfully from the federal statute. California's Fair Employment and Housing Act (FEHA) defines 'disability' in a significantly different way than the federal ADA: the ADA requires that a disability 'substantially limit[]' an

individual while the FEHA requires only a limitation. Federal courts concluded that the term 'substantially' in the ADA imposed a meaningful restriction on the type of disability eligible under the ADA. Yet despite the absence of "substantially" in the FEHA, California courts repeatedly interpreted the FEHA the same as the ADA, even relying on federal ADA cases for support.104 Eventually, the California legislature had to pass a 'we really meant it' amendment to the statute to make the proper standard—no substantiality was needed— clear." (Dodson, at 792).

Federal constitutional law has long exerted a pervasive pull on state constitutional law. State constitutional law often involves sensitive and important policy matters, on which local preferences tend to be stronger, more unified, and more extreme than national preferences. Justin Long theorized "that state constitutions are the repositories of the authoring community's fundamental values" *see* Justin Long, Intermittent State Constitutionalism, 34 Pepp. L. Rev. 41, 52 (2006). Further, state constitutions have a different history and erect a different governmental structure than the federal Constitution. Finally, constitutional governance is the most prominent feature of popular sovereignty, a cherished American ideal. *see* Gordon Wood, The Creation of the American Republic, 1776-1787, at 340-80 (1969). Yet with these factors state constitutional autonomy has not materialized. Instead, all states have declarations of rights that track the federal Bill of Rights, sometimes with a startling degree of mimicry. *see* Joseph Blocher, Reverse Incorporation of State Constitutional Law, 84 S. CAL. L. REV. 323, 332-33 (2011)

In analyzing the nature and function of state constitutions by contrast to the federal Constitution, including the judicial interpretation issues that arise under state constitutions and the processes for their amendment and revision, Robert Williams found state court interpretations of state constitutions have tended to follow federal court interpretations of the

U.S. Constitution (Robert F. Williams, The Law of American State Constitutions, 194-95 (2009)). Despite their formal interpretive independence, state courts have generally followed the Supreme Court's lead, adopting its tests, doctrines, and interpretive methodologies as their own (Blocher, at 332-33)

Some state courts even follow the U.S. Supreme Court's reasoning as an express matter of course. For example, the Nebraska Supreme Court has stated that the guarantee of freedom of speech is the same under both the Nebraska Constitution and the U.S. Constitution, and it adopted the policy of following the reasoning and analytical framework of the Supreme Court to interpret the guarantee under its own state constitution. Pick v. Nelson, 528 N.W.2d 309, 317 (Neb. 1995).

Washington presumptively follows nonbinding federal court decisions unless contrary considerations override that presumption, such as differing text, differing history, differing structure, preexisting state law, and matters of particular state or local concern (Linda White Atkins, Note, Federalism, Uniformity, and the State Constitution—State v. Gunwall, 106 Wn. 2d 54, 720 P.2d 808 (1986), 62 Wash. L. Rev. 569, 578-80 (1987)).

Lastly, in discussing states' application of "the federal model of equality" Jeffrey M. Shaman noted states have interpreted their equal protection guarantees to incorporate the same tiers of scrutiny that the U.S. Supreme Court has developed for the federal Equal Protection Clause (Jeffrey M. Shaman, Equality and Liberty in the Golden Age of State Constitutional Law, 15-44 (2008)). Yet, the story I present here is novel in the scholarly world; state-same sex jurisprudence has been shaped by the federal three tiered levels of scrutiny.

A search of scholarly journal articles and law reviews of this strange mimicry between the states and federal government in relation to same-sex marriage yielded little to no results.

There is some research that suggests states do mimic the federal government, as I highlighted above, however, no article mentions the explicit relationship in same-sex marriage cases. Below I will discuss the multitude of articles I found that somewhat suggests that states mimic the federal government by using the standard of scrutiny, or conversely and more specifically, that in same-sex marriage case, states adopted federal scrutiny.

The scholarly article *Recent Experience with Intermediate Scrutiny Under the North Carolina Constitution: Blankenship v. Bartlett and King ex rel. Harvey- Barrow v. Beaufort County Board of Education,* places North Carolina's constitutional adjudication model in the context of nationwide trends and models of state constitutional adjudication. The article catalogues the potential benefits and drawbacks of intermediate scrutiny and concludes that intermediate scrutiny may represent a viable alternative in resolving state constitutional dilemmas. This article highlights that state courts use tiers of scrutiny, but does not reference states adopting this from the federal government.[1]

In *The Origin of the Compelling State Interest Test and Strict Scrutiny,* Stephen Sigel highlights the origin and use of strict scrutiny, but says nothing about how states' courts adopted the standard of review.[2]

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[1] The generally accepted schema for constitutional decisions of state appellate courts consists of four interrelated models—primacy, interstitial, dual sovereignty, and lockstep—that characterize a state's interpretation of its constitution relative to federal interpretations of identical or analogous provisions of the U.S. Constitution. The primacy model recognizes the state constitution as a fundamental source of rights and accordingly begins analysis with provisions from the state constitution. The interstitial model views U.S. constitutional rights as minimal and seeks supplementation from the interstices when the federal right does not resolve the claim or where the state constitution has more expansive language. Under the dual-sovereignty model, both constitutions are analyzed more or less simultaneously. The lockstep model construes state constitutional provisions identically with analogous provisions in the U.S. Constitution.

[2] The whole regime of varying the tiers of scrutiny is itself but one of the techniques by which the modern Court gives differential protection to constitutional norms. Most frequently, the

In *Comment: The Conflict between State and Federal Constitutionality Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, the article categorizes the situations which may arise when state courts interpret their own constitutions more expansively than the Supreme Court has interpreted analogous provisions in the federal Constitution. After reviewing several possible solutions formulated to determine the "Winner" in such conflicts, the author concluded that only a flexible, sliding scale -- tiers of scrutiny-- approach is adequate to resolve the array of federalism problems likely to be presented to the court. Yet this still does not highlight the adoption of scrutiny in same-sex marriage cases.

In *Tiers of Scrutiny in a Hierarchical Judiciary*, Tara Leigh Grove reviews how the standard of scrutiny is of relatively recent vintage.[3] She offers an explanation-and partial justification-for the creation of the standards of scrutiny in the early-to-mid twentieth century. The Supreme Court established these standards in the wake of major changes to its structural relationship with the inferior federal and state courts. Yet, there is no mention of how the lower state courts adopted that standard.

Reverse Incorporation of State Constitutional Law, is a first effort to systematically consider the costs and benefits of using state constitutional doctrine to address problems arising

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Court gives heightened protection to favored constitutional values simply by adopting a stringent standard or rule to adjudicate cases burdening those value

[3] The Supreme Court did not begin to develop these standards until the early-to-mid twentieth century-and even then, the Court did not settle on the rigid rules that we know today for several more decades. Prior to that time, the Court generally subjected government regulations to a single "reasonableness" test, examining whether a given law was a reasonable means of fulfilling a legitimate government purpose. This lack of historical pedigree might alone raise questions about the validity of the current tiers of scrutiny.

under the federal Constitution. The author argues that State constitutions and the federal Constitution overlap to a considerable degree, and state courts have relied heavily—at times completely and explicitly—on federal constitutional doctrine when interpreting their own charters, even when the language, history, and intent of the latter are distinct. The opposite, however, is not even remotely true. With a few notable exceptions, the Supreme Court has largely ignored state doctrine when constructing federal constitutional rules, even in areas in which the states have a widely shared and well-articulated constitutional doctrine addressing an issue on which the Supreme Court itself has never ruled. This argument takes the completely opposite approach of this thesis, that the federal government should adopt state standards.

Formalism: From Racial Integration to Same-Sex Marriage, exclusively tries to distinguish between formal and substantive inquiries in equal protection analyses. The article explains how the distinction relates to the sex discrimination argument and courts' rejections of the argument that same-sex marriage is analogous to Loving v. Virginia. This article however already assumes that states are using the tiered scrutiny system.

Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny, by Christopher R. Leslie, discusses the flux in the level of scrutiny between courts when ruling on gender specific laws. This article makes the general assumption that states courts will apply some level of federal scrutiny. The article goes on to discuss how intermediate scrutiny should be uniformly applied to all gender based cases.

Lastly, in *The Gravitational Force of Federal Law*, *Dodson*, makes explicit mention of states mimicking the federal government. He states “Yet state constitutional autonomy has not materialized. Instead, all states have declarations of rights that track the federal Bill of Rights,

sometimes with a startling degree of mimicry. Likewise, state court interpretations of state constitutions have tended to follow federal court interpretations of the U.S. Constitution, even to the point of adopting the Supreme Court's tests and interpretive methodologies. For example, nearly all states have interpreted their equal protection guarantees to incorporate the same tiers of scrutiny that the U.S. Supreme Court has developed for the federal Equal Protection Clause." Dodson, at 722. However, this brief paragraph is the only mention that states do so, with no specific examples.

To make this project manageable, I focused exclusively on state supreme courts. Vermont, Washington, Connecticut, and California, each had a state supreme court same-sex marriage case. These states serve an additional point, as each reviewed its respective same-sex marriage case using a different level of scrutiny. Washington ruled via the rational basis test, Connecticut used intermediate scrutiny, California used strict scrutiny, and Vermont, used its own form of review, an enhanced rational basis test. As stated earlier, it is peculiar that these states adopt this federal standard of review when is wasn't required. Each state was shaped because of the federal levels of scrutiny, and each one reacted in a different way, all using different forms of scrutiny to review its same-sex marriage case.

The case law analyzed herein regarding the right of same-sex couples to marry — based on state statute and case law arising thereunder, not federal legislation nor federal case law — involves the doctrines of substantive due process and equal protection under the law. Substance due process places various restrictions on how state action (governmental conduct and laws, whether federal, state, municipal, etc.) can limit individual freedoms. Similarly, state action that treats one group of people more or less favorably than others is subject to scrutiny under the

doctrine of equal protection. Most states have equal protection clauses in their state constitutions, as well as due process clauses.

Pursuant to the doctrines of substantive due process or equal protection, determining the constitutionality of state action (typically in the form of a statute) first requires a preliminary determination of whether the law implicates a fundamental right or involves the suspect classification of certain persons. *See* United States v. Carolene Products Company, 304 U.S. 144 (1938)[4]

Because most states employ a variation of the three standards of review used by federal courts to adjudicate whether a law impermissibly burdens an individual's constitutional rights — whether under the aegis of federal or state law -- an understanding of the three standards of review is required. As a threshold matter, the prerequisite to employing the proper standard of review, also called the level of scrutiny, is ascertaining whether the alleged right is a fundamental right and/or the litigant is a member of a suspect classification.

A fundamental right, from a federal perspective, is a right almost always specifically enumerated in the first eight amendments to the U.S. constitution or a right implied by the Ninth Amendment.[5] Typically, the Ninth Amendment is implicated when governmental action

[4] United States v. Carolene Products Company, was an April 25, 1938 decision by the United States Supreme Court. The case affirmed the presumption of constitutionality and deferential review for most legislation, but in "Footnote Four," the Court indicated that a higher level of scrutiny should apply to cases involving: (1) a specific constitutional prohibition such as the Bill of Rights, (2) legislation restricting the political process, and (3) legislation directed at discrete and insular minorities. Modern substantive due process and equal protection analysis using strict scrutiny all some have some DNA from this famous footnote, considered by constitutional legal giants, such as Harvard Law School's professor, Lawrence Tribe, as probably the most famous footnote in American law.

[5] First Amendment provides the freedom to choose any kind of religious belief and to keep that choice private. Third Amendment protects the privacy of the home. Fourth Amendment protects privacy against unreasonable searches and seizures by the government. Fifth Amendment provides for the right against self-incrimination, which justifies the protection of private

impinges upon the right to privacy. First recognized in Griswold v. Connecticut, 381 U.S. 479 (1965), the fundamental right of privacy has been used to invalidate laws outlawing contraception among unmarried persons, and sex among consenting adults of the same sex. The Ninth Amendment is a central underpinning of Roe v. Wade 410. U.S. 113 (1974), and its progeny, which hold that the government must have a "compelling" interest in any laws burdening an adult woman's desire to terminate her pregnancy — and the law must, in addition, be "narrowly tailored" (or the "least drastic means") of effectuating the putative compelling governmental interest. Fundamental rights include speech, assembly, religion (First Amendment), the right to bear arms (Second Amendment), freedom from unreasonable search and seizure (Fourth Amendment), right against self-incrimination and right to due process (Fifth Amendment), right to counsel and a fair trial (Sixth Amendment), right to sue for damages under common law and to a jury trial (Seventh Amendment), right against cruel and unusual punishment (Eighth Amendment) and right to privacy (contraception, pregnancy termination, sex among same-sex partners, and as the esteemed future Supreme Court Justice Louis Brandeis wrote in The Right to Privacy, Harvard Law Review, 4 L.R. 193 (Dec. 15, 1890) -- "the right to

information. Ninth Amendment is interpreted to justify a broad reading the Bill of Rights to protect privacy in ways not provided for in the first eight amendments. The Fourteenth Amendment prohibits states from making laws that infringe upon the protections provided for in the first nine amendments (this is call the incorporation doctrine and makes the first nine amendments applicable to non-governmental federal action; whereas before enactment of the Fourteenth Amendment, the first nine amendments of the Bill of Rights were considered protective against federal governmental conduct only). Prior to the Fourteenth Amendment, a state could make laws that violated freedom of speech, religion, etc.

be left alone …."[6] A single fundamental right acknowledged by the federal judiciary that is not in the Bill of Rights is the right to interstate travel.[7]

Central to determining the applicable standard of review is the threshold determination of whether the governmental action implicates a fundamental right or whether the group impacted by the legislation or governmental conduct is a "suspect" classification. Suspect classifications typically have three characteristics: immutability of the class (e.g., race or gender), lack of political power exercisable by the class for a variety of reasons (race, socio-economic factors, etc.), and a history of systemic discrimination against the class. Once a right has been construed as a "fundamental" right or a classification has been interpreted to be a "suspect" classification, federal courts and their state-court counterparts employ heightened scrutiny called "strict scrutiny" to determine whether the governmental action (typically legislation) improperly impinges upon that fundamental right or suspect classification. In order for the government's action to be constitutionally permissible under strict scrutiny analysis, the governmental conduct must first be based on a "compelling" state interest. Almost always, there must be a consensus among experts in the subject matter of legislation/conduct that the same is, in fact, compelling. For example, in Roe, the U.S. Supreme Court held that there was not a consensus among members of the scientific and medical communities as to when a fetus becomes viable. Accordingly, the Court held that Texas did not have a compelling interest in protecting a fetus during the first trimester because there was not a consensus within the scientific/medical

[6] Seventy-five years later, U.S. Supreme Court Justice Douglas would use identical language — the right to be left alone — in the landmark decision of Griswold, which recognized the Ninth Amendment's implied right to privacy.).

[7] The U.S. Supreme Court in Crandall v. Nevada, 73 U.S. 35 (1868) declared that freedom of movement is a fundamental right and therefore a state cannot inhibit people from leaving the state by taxing them.

communities as to when viability made a fetus a life form that Texas had a compelling interest in protecting. In other words, if there were not a consensus about when viability occurred — and hence when life began -- there could not be compelling interest in protecting it.

Under strict scrutiny analysis, once the government can demonstrate it has a compelling interest for its conduct or legislation, it must further establish that its conduct is narrowly tailored to effectuate that compelling interest. Legal scholars and courts often define "narrowly tailored" to mean that the governmental action impinging upon a fundamental right or suspect class is the "least drastic" means to effectuate the government's compelling interest. Typically, when a court finds a statute (even one premised on a compelling interest) to *not* be narrowly tailored to the government's objective, it is because the statute or governmental conduct is overly broad. The government, for example, has a compelling interest in public safety and crime prevention. Accordingly, the government may prohibit a "convicted felon" or "mentally incompetent" person from possessing/owning a firearm, despite the Second Amendment's right to bear arms, because that statutory prohibition is based on a compelling interest and said law is narrowly tailored to effectuate the government's goal of public safety. However, if the government passed a law saying anyone who has been convicted of any crime cannot own a firearm or anyone charged but acquitted of a felony cannot own a firearm, the reviewing courts would almost certainly find such laws to be overly broad and not narrowly tailored to fostering public safety. The citizen acquitted of a felony or the citizen convicted of littering typically does not pose a threat to public safety; therefore, prohibiting such individuals from possessing/owning a firearm, although based on a compelling interest in public safety, would not be the least drastic means to attain the government's objective. Accordingly, such law would be violative of the Second Amendment.

The vast majority of cases declaring governmental action to be unconstitutional are the result of strict scrutiny analysis or a heightened standard of review.

If a statute impairs rights based on gender or the statute affects the rights of minors, an intermediate standard of review called "intermediate scrutiny" is employed by federal courts and the vast majority of state courts.[8] Under the intermediate scrutiny standard of review, the government must show two things in order for the statute to pass constitutional muster. First, the government must demonstrate that the law or conduct in question is based upon an "important" governmental interest, and secondly, the law be "substantially" related to achieving that goal.[9] When a law limits one's freedom based on gender, for example, the government must establish that its suspect classification is important and the law is substantially related to achieving that interest. For example, a blanket prohibition on hiring women firefighters because men are generally stronger, would not pass constitutional muster because, although fire rescue/safety is an important governmental interest, the blanket prohibition is not substantially related to hiring qualified firefighters because many women are physically able to perform the essential functions of a firefighter and some men are not physically able to perform those same functions.

Another common issue involving intermediate scrutiny involves a minor's right to an abortion. Some states require parental consent or waiting a minimum amount of time after consultation with a physician, before being allowed to terminate the pregnancy. These restrictions are often viewed as substantially related to an important interest and thus held

[8] Intermediate scrutiny is sometimes employed in age classifications, such mandatory retirement ages issued by the Federal Aviation Agency for commercial pilots.
[9] *See e.g.*, Craig v. Boren, 429 U.S. 190 (1976), wherein the U.S. Supreme Court first applied intermediate scrutiny to gender-based classifications."

constitutional.[10] Conversely, when an adult is required to first consult with a doctor and then wait a minimum amount of time before having an abortion, these restrictions are typically declared unconstitutional. Moreover, older laws that required the consent of the woman's husband have been universally declared invalid by U.S. federal courts.[11] Other than a minor's fundamental rights or classifications involving gender, intermediate scrutiny is infrequently used. It is worth noting that subjecting a law to intermediate scrutiny will often allow it to pass constitutional muster whereas the same law might be invalidated if strict scrutiny were applied. Restrictions that are constitutionally permissible with respect to a minor's right to abortion (third-party consent, waiting periods, etc.) would almost certainly not be permissible under the standard of strict scrutiny applicable to an adult seeking an abortion. The Casey Court placed parental involvement firmly within a broader set of legal principles governing a woman's constitutional right to an abortion. Parental involvement and similar regulations were constitutional so long that they did not place an "undue burden" on a woman's ability to acquire an abortion. In other words, the level of scrutiny utilized is very often outcome-determinative as to whether the governmental action is constitutionally permissible.

When a law or governmental conduct does not implicate a fundamental right or impinge upon a suspect classification, the applicable standard of review is called low-level and uses the "rational relationship" test. Using this rubric, the government merely has to show two things: the

[10] Thirty-seven states require parental involvement in a minor's decision to have an abortion. Twenty-one states require parental consent; only three of which require both parents to consent. Eleven states require parental notification; only two of which require that both parents be notified. Five states require both parental consent and notification. Eight states require the parental consent documentation to be notarized. "Parental Involvement in Minors' Abortions." *Guttmacher Institute*, 8 Aug. 2018

[11] Planned Parenthood v. Casey, 505 U.S. 833 (1996): spousal notification laws place an "undue burden" on a woman's ability to get an abortion, whereas parental involvement laws do not.

governmental action (statute) serves a legitimate interest and the action (statute) is rationally related to attaining the same. As a general proposition, a statute evaluated under this low-level standard of review is nearly always upheld. If a city prohibited owning certain animals or dog breeds based on public safety, (because there is no fundamental constitutional right to own such animals) the statute would almost certainly be upheld under low-level scrutiny.

Turning now to the issue and right of same-sex marriage, this article will explore case law arising at the state level and how these courts have been shaped by federal scrutiny standards.

Chapter 2: Vermont

Introduction

Vermont was a leader among U.S. jurisdictions in protecting the rights of gays and lesbians in the 1990s. In 1990, it was one of the first states to enact hate crimes legislation that included sexual orientation. In 1992, it added sexual orientation to its anti-discrimination statute. In 1993, the Vermont Supreme Court, in a unanimous ruling, established second-parent adoption rights allowing someone in a same-sex relationship to adopt his or her partner's biological children. When the Vermont Legislature reformed the state's adoption statute in 1995, it made same-sex couples eligible to adopt.

In 1999 the state supreme court case Baker v. Vermont, 170 Vt. 194, 744 A.2d 864, 811 A.L.R. 5th 67 (1999) legalized same-sex unions. In this case, the ban on same-sex marriage was challenged under the Vermont Common Benefits Clause (CBC). The CBC is somewhat analogous to the Equal Protection Clause of the Federal Constitution, although the Vermont Constitution and the CBC were written before the U.S Constitution. Unlike the federal Equal

Protection Clause, the CBC is reviewed under a different process then the federal three-tiered system. The Baker court invalidated the ban on same-sex marriage based on an enhanced rational basis test. This enhanced rational basis review evolved from the cases, In re Property of One Church Street City of Burlington, 152 Vt. 260, 565 A.2d 1349 (1989), Lorrain v. Ryan, 160 Vt. 202, 628 A.2d 543 (1993), MacCallum v. Seymour, 165 Vt. 452, 686 A.2d 935 (1996), L'Esperance v. Town of Charlotte, 167 Vt. 162, 704 A.2d 760 (1997), and Brigham v. State, 166 Vt. 246, 692 A.2d 384, 117 Ed. Law Rep. 667 (1997).

To understand how the ourt was impacted both by its preceding cases and the federal three-tiered system, it will be necessary to explore both the Baker decisions and the cases preceding Baker. (An endeavor that will be conducted in every chapter.)

Preceding case prior to Baker Holding

This enhanced rational basis test can be traced back to State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 448 A.2D 791 (1982). In Ludlow, a case which invalidated a Sunday closing law that discriminated among classes of commercial establishments on the basis of size — the Court accentuated that "unlike federal counterparts, this court is not constrained by consideration of federalism and the impact of its decision on fifty carrying jurisdictions." Ludlow, at 268. The Ludlow Court declared that Article 7 of the Vermont constitution "only allows the statutory classifications ... if a case of necessity can be established overriding the prohibition of Article 7 by reference to the "common benefit, protection, and security of the people." Ludlow, at 268. This unique phrasing is different from the traditional requirement under Article 7 that legislative classification must reasonably relate to a legitimate public purpose. What this case did establish

was a more stringent standard of reasonableness than was associated with the rational basis review under federal analysis. Specifically, the Ludlow Court enhanced the requirement of a legitimate governmental interest (typically used in low-level scrutiny) with the requirement that Vermont currently balance "the nature and importance of the benefits and protections affected by the legislation; indeed, this is implicit in the weighing process. It did establish that Article 7 would require a "more stringent" reasonableness inquiry than was generally associated with rational basis review under the federal constitution." Baker, at 6.

This enhanced rational basis, founded by Ludlow, was continued in In re Property of One Church Street City of Burlington. In In re Property of One Church Street City of Burlington, a Vermont taxpayer sought review of a city taxation scheme imposing higher rates of taxation on nonresidential property. The Supreme held that the tax scheme did not violate the CBC of Vermont's Constitution.[12]

In this case, transpiring 10 years before Baker, the Vermont Supreme Court's definition of the CBC was more philosophical than was articulated in Baker. The Court defined the common benefit clause as follows:

> *"The emphasis in the Common Benefits Clause is the obverse – what is required to protect the polity from the granting of privilege to the few. The*

[12] The taxpayer was a business partnership owning a six-story brick building. The building, previously a Masonic Temple, was renovated for commercial use in 1985. In 1986 the Legislature amended the Burlington City Charter as follows:

> *"all personal and real property set out in the grad list which is not used as residential property, farmland, and vacant land zoned 'recreation, conservation and open space (RCO)' shall be classified as nonresidential property and shall be assessed at 120% of fair market value."*

The taxpayer did not contest the fairness of the initial appraisal of the property, but contended that the assessment at 120% of fair market value was invalid under the Common Benefit Clause of the Vermont Constitution.

Common Benefit Clause is to protect the state from favoritism to individuals and to remind citizens of the sense of compact that lies at the heart of constitutional government."

In In re Property of One Church Street City of Burlington, the Court established its standard of review. In doing so, it explained: "A preferential standard will be invalidated unless a compelling public need is demonstrated… The purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny." In re Property of One Church Street City of Burlington, at 515. This is a salient point. The Court was underscoring that legal challenges under the Common Benefits Clause will be reviewed via a preferential standard or what the federal courts call rational basis or low-level scrutiny. However, although it said "preferential," the Court went on to say a "compelling public need" is required, which is strikingly similar to the language used by federal courts in high-level or strict scrutiny analysis, which demands "a compelling state interest." By linking a preferential standard with a compelling public need, the Court leaves open the possibility to review cases with a more stringent standard of scrutiny than used with the rational basis test. In practice, Vermont courts appear to be looking through a rational basis lens but in reality, reviewing with stricter, more demanding scrutiny. This gray area between the tiers of analysis will be adopted in later CBC cases.[13]

[13] In In re Property of One Church Street City of Burlington, the Court went on to hold: "The amended Burlington Charter creates classifications of taxpayers; its goal is to raise total city revenues and benefit the city's inhabitants as a whole. The underlying purposes for the classification challenged in this case are clear on the face of the Act and were presented to the Legislature during its consideration. 'It is not a revenue neutral provision. It is a revenue raising issue. It was developed upon recommendation of a business person's task force within the city and was developed with the notion to [sic] softening the blow of the loss of federal revenue

A second case that adhered to a rational basis standard was the Lorrain Court. In Lorrain v. Ryan, an injured employee sued third-party tortfeasors (a person who commits a tort or civil wrong justifying monetary compensation) for damages arising out of a work-related accident, causing back and neck injuries. Employee's wife, Patricia Lorrain, then sued for loss of consortium (the right of association or companionship). The Supreme Court held that the workers' compensation statute's exclusivity provision, to the extent it denied the wife's right to recover for loss of consortium, violated the Common Benefit Clause of Vermont's State Constitution. In essence, the Plaintiff argued it was irrational to allow an injured worker to recover from a third-party tortfeasor while concurrently denying the spouse loss-of-consortium damages from that same party.[14]

The Lorrain Court set forth Chapter 1 Article 7 of the Vermont Constitution, stating, "… The Common Benefits Clause of Article 7, and applies when no fundamental right or suspect class is involved. Under Article 7, the test is 'whether the law is reasonably related to the promotion of a valid public purpose.' The test is the same under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Lorrain, at 212. Four years after In re Property of One Church Street City of Burlington, the Lorrain Court had a different interpretation of the CBC. The Lorrain Court believed that the CBC was identical to the Equal Protection Clause of the Fourteenth Amendment, a sentiment which was not seen in early cases,

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sharing that the city could expect.'" The Court further explained, "It surely will benefit some taxpayers more than others, but so long as the public purpose is paramount and the enactment reasonably related to that purpose, the statute is not made invalidated." Lorrain, at 213.

[14] It should be understood that the exclusivity provision of workers' compensation statutes in every state pertain to injuries to employees arising out of and in the course of their employment, and Patricia Lorrain was never an employee.

such as Ludlow. In sum, the Vermont Supreme Court took careful note of federal equal protection jurisprudence and opted to fashion its own unique framework for analyzing the CBC.

The Lorrain Court, while adhering to the rational basis standard of review, said the exclusivity provision of Vermont's workers' compensation law was inapplicable, stating, "Plaintiff challenges her distinction because the injured employee does not receive workers' compensation. The obvious rationale is that it is reasonable to extend the tort immunity of the employer to dependents who normally will benefit from the workers' compensation. However, no public purpose is fostered by immunizing them from any part of their normal liability. Further, there is no rational basis for allowing the injured party's tort claim while denying his spouse's loss-of-consortium claim." Lorrain, at 213.

This rational basis review mantra was propounded by the MacCallum Court. In MacCallum v. Seymour,[15] Plaintiff MacCallum challenged the denial of her right to inherit from her uncle under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Chapter I, Article 7 of the Vermont Constitution. The Court adjudicated the case under Article 7, stating, "Unless a fundamental right or suspect class is involved, the inquiry under Article 7 is whether the statute is reasonably related to the promotion of a valid public purpose. The, 'statute is unconstitutional, as applied, if it treats similarly situated persons differently and the different treatment does not rest upon some reasonable consideration of legislative policy.' Here the two sisters are treated differently; the question is whether the difference rests on a reasonable consideration of legislative policy." MacCallum, at 457. Similar

[15] In MacCallum v. Seymour, a person adopted as a child brought suit to enforce her right to inherit from the brother of her adopted father. The Vermont Supreme Court held that statute denying an adopted person's right to inherit from collateral kin violated the CBC provision of Vermont Constitution.

to Lorrain, the standard of review is the rational basis test with the caveat, "reasonably related to the promotion of a valid public purpose."

This relevant language used -- "historically been a target of discrimination" and "invidious and discriminatory" — is rhetoric developed under the U.S. Constitution's Equal Protection Clause and employed in cases involving strict scrutiny. Yet the MacCallum Court reviewed this case under rational basis review, once again an interesting amalgam of these multi-tiered analyses.

The Court concluded, "After examining the two rationales proffered to validate the statute, they conclude that it is not reasonably related to a valid public purpose, at least with respect to persons who are adopted during the minority. We recognize that the situation may be 'entirely different in the case of one adopted after attaining the age of majority,' and expressly do not rule on the constitutionality of the statute in that context." MacCallum at, 392. This case, although based on a rational basis standard of review, used a more stringent level of scrutiny and applied the dicta and rhetoric of invidious discrimination.

MacCallum and L'Esperance v. Town of Charlotte, had similar rational basis reviews. In L'Esperance, Plaintiffs sued to compel a town to renew a lease for lakefront property under the same terms as the original lease. The Vermont Supreme Court held that the town received adequate and reasonable benefits from plaintiffs in connection with the lease, and the lease, therefore, could not be invalidated by the Common Benefits Clause, as argued by the government.

The L'Esperance Court strays from the similarities perceived between the CBC and Equal Protection Clause of the Fourteenth Amendment as articulated in Lorrain. Although in L'Esperance the Court concluded that although not the same, the CBC provides the same

benefits as the Equal Protection Clause. The standard of review is identical to that of MacCallum and past CBC cases – "enhanced" rational basis review. Although the L'Esperance Court specifies the standard of review, there is no mention of the preferential standard, nor of more stringent scrutiny from the past cases of MacCallum or Ludlow. The Court then holds, "We cannot allow a town to enforce a lease when it is economically productive and repudiate it when the assumed risks made less productive. We are reluctant to hold the common practice of long-term, fixed-rent leases violate Article 7 if the financial terms become less advantageous to the town over time. With these principles in mind, we conclude that the town receives adequate and reasonable benefits from plaintiffs in connection with the lease. We hold that the lease terms in this case served a public purpose and were reasonably related to the promotion of that purpose." L'Esperance, at 715.

Lastly, even regarding fundamental rights the Court in Brigham v. State, used an enhanced rational basis review. In Brigham, students, property owners, and school districts filed claims against the state of Vermont seeking declaratory relief with respect to alleged disparities in the quality of public education resulting from a statewide system of public school funding. [16] [17]

[16] The Supreme Court granted motion and held: (1) the state's system of financing public education did not satisfy the requirements of the Education Clause of State Constitution; (2) the state's system of financing public education violated the Common Benefits Clause of the state constitution; and (3) the education and common benefits clauses require the state to ensure substantial, rather than absolute, equality of educational opportunity throughout state. The plaintiffs contended that disparities in the quality of public education resulting from a statewide system of public school funding violated the Common Benefits Clause.

[17]In Brigham v. State, students, property owners, and school districts filed claims against the state of Vermont seeking declaratory relief with respect to alleged disparities in the quality of public education resulting from a statewide system of public school funding. Public schools in Vermont are financed principally by two means: funds raised by cities and towns solely through assessments on property within their jurisdiction, as authorized by 16 V.S.A. 511, and funds

Unlike the cases previously analyzed earlier in this article, here we have a fundamental right at stake – namely, education. Although the other cases were decided on a rational basis standard of review, this case should certainly have had a more exacting scrutiny.

In a *Per Curiam* Opinion[18] the justices wrote, "As a general rule, challenges under the Equal Protection Clause are reviewed by the rational basis test …. This is not a case, however, that turns on the particular constitutional test to be employed. We are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record." Brigham, at 265. The Court seemed to jump ahead of itself. It never explicitly said what type of scrutiny it was using. Instead, it jumped head-first into the decision, stating it is "unable to fathom a governmental purpose to justify the gross inequities." Brigham, at 265. Thus, the school revenue law did not pass muster under even low-level or rational relationship test scrutiny. Brigham was the last major case involving the CBC before the Vermont Supreme Court heard Baker. These five cases built the foundation and framework of the ruling in Baker.

In summary the precedent set by Ludlow was continued by In re Property of One Church Street City of Burlington, where the Court linked a "preferential standard" that the law further advance a "compelling state interest," and in so doing, fosters and the precedent of increased or enhanced rational basis scrutiny. Lorrain v. Ryan, where the Court invalidated a law based on the rational basis test, making clear it employed a more stringent standard of scrutiny than used by

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distributed by the state under a complex aid formula, known as the Foundation Plan. The purpose of a foundation formula is to enable each school district to spend an amount per pupil that will provide at least a minimum-quality education, known as the foundation cost. Basically, state aid is calculated as the difference between the foundation cost for all students in a district and the amount the district can raise itself at the foundation tax rate.

[18] The entire court participated in the opinion.

federal courts in matters not involving a fundamental right/suspect classification. MacCallum v. Seymour, employed its version of enhanced rational basis review. It did so by using rhetoric such as "invidious discrimination" and "history of discrimination," terms commonly used in federal strict-scrutiny-standard cases. L'Esperance v. Town of Charlotte, was the only Vermont Supreme Court decision not to mention a heightened level of scrutiny; however, that decision affected only property rights. Brigham v. State, the Court was able to use Vermont's unique enhanced standard of review to get the same result — that is, invalidation of the state's statute even with a fundamental right at stake -- education.

It is evident from past cases, that Vermont has adopted to use its own type of review. However, the Baker Court still oddly mentions the federal standard, even though it didn't have to. The Baker Court explicitly said, "this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7." Baker, at 12. The Baker and the courts before all make explicit reference to the federal equal protection clause although they weren't required. Courts also borrowed federal language in requiring a "compelling public need."With this is mind we will review the Baker decision analyzing it with the backdrop of these precedential cases.

Baker v. Vermont Decision

The right to same-sex marriage — that is, the right for legal-age adults of the same sex to be married under Vermont state law — was first recognized by the Vermont Supreme Court in Baker v. Vermont. The premise for the Court's holding was the Common Benefits Clause, V.T. Const. Chap. I, art. 7. found in Vermont's constitution, which reads in relevant part:

> *That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of*

> *persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.*

Two statutes governed marriage in Vermont during the time before Baker. First, Chapter 1 of Title 15, entitled "Marriage," defined the requirements and eligibility for entering into a marriage as "the union of one man and one woman as husband and wife."[19] Second, Chapter 105 of Title 18 of the Vermont statutes, entitled "Marriage Records and Licenses," defined marriage license eligibility. The statute mandates the following:

> *… the issuance of marriage licenses, which provides, in part, that the license "shall be issued by the clerk of the town where either the bride or bridegroom resides."* 18 V.S.A. § 5131(a).

The Baker Court relied on the definition of "bride" and "bridegroom" in Black's Law Dictionary, concluding that the Vermont marriage statute prohibited nuptial parties of the same gender, given that a bride is defined as female and a bridegroom is defined as male.
The Baker Court ultimately held that the Common Benefits Clause of the state constitution was violated because the relevant Vermont statute defined marriage as between opposite-sex partners and that definition (and hence prohibition) on same-sex marriage was not rationally related to the government's purported legitimate interest in promoting "the link between procreation and child rearing." Baker, at 15.

The CBC has an "affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community …." Baker, at 9. This assumption of equal benefits for everyone is reflected in the second section: "this prohibits

[19] *See also* Webster's New International Dictionary 1506 (2d ed. 1955) (marriage consists of the state of "being united to a person ... of the opposite sex as husband or wife").

not the denial of rights to the oppressed but rather the conferral of advantages or emoluments upon the privileged." Baker, at 9. Chief Justice Amestoy, writing for the majority, stated: "{the words of the common benefits clause} do not set forth a fully formed standard of analysis for determining the constitutionality of a given statue, they do express broad principles … chiefly is the principle of inclusion." Baker, at 9. At its core, the CBC expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage. This can be seen in W. Adams, The First American Constitutions 188 (1980), in which he claims the overarching goal of the framers using the CBC was, "not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have an equal share in the fruits of the common enterprise."

The Baker Court concluded that the proper approach in reviewing this case would not involve "the rigid, multi-tiered analysis used by the federal courts under the Fourteenth Amendment …." Baker, at 12, instead using its own particularized analysis of enhanced low-level scrutiny as explained above.

The Court began with a two-tiered analysis, first defining the "part of the community" disadvantaged by law, and next, the statutory basis that distinguishes those protected from those excluded by law. The Court declared that it would deviate again from the federal analysis of "suspect classification," stating: "The artificiality of suspect-class labeling should be avoided where, as here, the plaintiffs are afforded the common benefits and protections of Article 7, not because they are part of a "suspect class," but because they are part of the Vermont community" Baker, at 13.

The "part of the community" that is disadvantaged by 18 V.S.A. § 5131(a). is indisputable — the homosexual community. The second aspect of this two-tiered analysis is the

government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law while excluding others. To ascertain if the challenged law bears a reasonable and just relation to the governmental purpose, the Court found that "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." Baker, at 13.

The government's purported principle purpose for excluding same-sex couples from the legal benefits of marriage is ostensibly "furthering the link between procreation and child rearing" Baker, at 13. The State contended, further, that the legislature could reasonably believe that sanctioning same-sex unions "would diminish society's perception of the link between procreation and child rearing ... [and] advance the notion that fathers or mothers ... are mere surplusage to the functions of procreation and child rearing." Baker, at 15. The State argued that since same-sex couples cannot conceive a child on their own, state-sanctioned same-sex unions "could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children." Baker, at 15.

In response to the State's claim, the Court stated, "It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children" Baker, at 16. Also, "with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children." Baker, at 17 the Court concluded that, "If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks

that the State argues the marriage laws are designed to secure against ….” Baker, at 17. The question thus became whether the exclusion of a relatively small but significant number of otherwise qualified same-sex couples from the same legal benefits and protections afforded their opposite-sex counterparts contravened the mandates of Article 7.

As noted, in determining whether a statutory exclusion reasonably relates to the governmental purpose, it is appropriate to consider the history and significance of the benefits denied. In Loving v. Virginia, 388 U.S. 1 (1967), the U.S. Supreme Court's point was unequivocally clear: access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society. Accordingly, for the first time, the U.S. Supreme Court struck down a state law (Virginia’s) banning interracial marriage. The benefits and protections incident to a marriage license under Vermont law are robust. They include, “for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. § § 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903l.” Baker, at 17.

The most substantive of the State's remaining claims, said the Baker Court, related to the issue of child-rearing. It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although the Court noted that child-development experts disagreed and the answer was decidedly uncertain (note the lack of consensus referenced above in Roe as to when life begins). The argument, however, contains a more fundamental flaw, and that is the Legislature's endorsement of a policy diametrically is at odds with the government’s claim. “In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. At the same

time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship." In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance." Baker, at 18.

Finally, it is suggested that the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship. The Baker Court responded by quoting it decision in Brigham v. State, which held as follows: "[E]qual protection of the laws cannot be limited by eighteenth-century standards." Baker, at 19. Thus, to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. Second, "whatever claim may be made in light of the undeniable fact that federal and state statutes--including those in Vermont--have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention." Baker, at 19.

Thus, viewed in the light of history, logic, and experience, the court concluded that none of the interests asserted by the State provided a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.

The Baker Court held that the plaintiffs were entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. However, they stated, "We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional

mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partner." Baker, at 19. It is noteworthy that in 2000, the Vermont legislature responded by legalizing civil unions for same-sex couples.

Conclusion

Relying upon an eclectic amalgam of case law and precedent, the Baker Court invalidated the statutory ban on same-sex marriage while using the CBC to bludgeon Vermont's opposite-sex marital requirement into the constitutional graveyard. In its analysis, the Court reviewed precedent, noting the case law history of "enhanced" rational basis review. This enhanced rational basis review had a more stringent standard of reasonableness than was associated with the rational basis review under federal analysis. More specifically, the enhancement was the product of augmenting the requirement that the state's interest be more than merely legitimate, which under federal law is sufficient to pass scrutiny under the rational relationship test or a low-level standard of review. At first blush, this move by the Baker Court to articulate a heightened standard of review seems novel. This more stringent level of scrutiny, however, was born twenty years earlier in Ludlow. Between Ludlow in 1982 and Baker in 1999, there is a visible evolution and process by which Vermont courts reviewed CBC cases. One fundamental thread throughout is the enhanced scrutiny set forth in Ludlow.

In Baker, the Court did not cite or rely upon In re Property of One Church Street City of Burlington. However, there are similarities in how the two decisions view the CBC. As Chief

Justice Allen, writing for the majority in In re Property of One Church Street City of Burlington, said, "to remind citizens of the sense of compact that lies at the heart of constitutional government" In re Property of One Church Street City of Burlington, at 89, is congruent with Chief Justice Amestoy's textual analysis and the founders' intent in Baker. Both Justices reference the "community" of Vermont. Similarly, in describing the CBC, both cases describe its purpose as limiting favoritism of any kind. Justice Allen, however, emphasized that the CBC was to prevent state action from hurting individuals. This is a marked difference from Baker. In Baker, the Court describes the CBC as protecting proscription against governmental favoritism toward not only groups or "set[s] of men," but also toward any particular "family" or "single man," Baker, at 9. Although both Vermont Supreme Court opinions reference protection from state favoritism, the CBC, according to Baker, is designed to protect the people; whereas in, In re Property of One Church Street City of Burlington, the CBC is to about protecting the government from any wrongdoings of favoritism.

Baker and previous Vermont appellate case law strayed from using the "fundamental right" and "suspect classification" terminology, described earlier. Similar to the Lorrain Court.[20]

Baker has many striking similarities to the MacCallum decision. Even before the MacCallum Court addressed the definition of the Common Benefits Clause, it set the backdrop by reviewing the statutory scheme and the changing nature of adoption within Vermont and the United States as a whole. This in-depth look at the classification of adopted people, history, and language of the statute is analogous to reasoning employed in Baker. Similarly, both courts make

[20] It appears that the Lorrain Court was not adhering to any strict precedential value or standard of review, but rather concerned with coming to the "right" result.

the point that they are not constrained by the language or ideas prevalent at the time the law or statute was written.

In MacCallum, the Plaintiff brought claims under both the federal Equal Protection Clause and the CBC. It would seem that the rigid framework of federal equal protection analysis would be more easily navigable for the Justices; yet the Court choose to use Vermont's CBC. This suggests that, although both have multi-tiered standards of analysis, both entities have different thresholds for laws to be invalidated. Additionally, common sense suggests that the Vermont Supreme Court had the objective of protecting someone similarly situated to Ms. MacCallum, and the CBC provided the optimal remedy to achieve that result.[21] This inquiry by the MacCallum Court involving historical discrimination against adopted people shares striking similarities to the concerns expressed by the Baker Court, which carefully scrutinized the discrimination waged against same-sex couples and gay people, more generally.

This case, although based on a rational basis standard of review, used a more stringent level of scrutiny and applied the dicta and rhetoric of invidious discrimination. Baker, as stated above, cited this case as a blueprint for using rational basis review, while exacting a more stringent scrutiny. Vermont's appellate courts are essentially saying that under the CBC the government must show something akin to a compelling state interest and a statute — that in practice — is rationally related to its attainment. This requirement by Vermont's Supreme Court makes it much more likely that a law will be declared unconstitutional.

[21] It is worth noting from the Court's ruling that, although Vermont employed an enhanced low-level standard of review (because the right to inherit is not a fundamental right nor are putative beneficiaries of an inheritance thereby a suspect class) if this adjudication involved a fundamental right or suspect classification, it would trigger strict scrutiny under *both* federal and Vermont law. Conversely, without the protections afforded by the CBC, Ms. MacCallum's claims would fail under alternate legal theories.

Similar to MacCallum and Baker, the Brigham Court relied heavily on both the founders' intent and legislative history, similar to Baker. The Brigham Court warned, "While history must inform our constitutional analysis, it cannot bind it." We see this similar mantra in Baker, "Although historical research yields little direct evidence of the framers' intentions, an examination of the ideological origins of the Common Benefits Clause casts a useful light upon the inclusionary principle at its textual core." (9). Brigham was the last major case involving the CBC before the Vermont Supreme Court heard Baker.

Although Baker relied on these precedential cases, the court still felt obliged to explain itself as to why it didn't use the federal standard of review[22] The Baker Court, does not need to refer to the federal levels of scrutiny; it is interpreting its own constitution, with no obligation to federal jurisprudence. Furthermore, the Court and did not need to mention the federal Equal Protection Clause at all. A trend with we see in previous courts, referencing federal equal protection but ruling based off the CBC. Although the Baker did not adopt federal scrutiny, the Court was shaped in its opinion because it qualified itself on the type of review; the Court needed to explain its rationale.

Chapter 3: Washington

Introduction

Unlike Vermont's singular same-sex marriage case, with its singular statutory challenge to the ban on same-sex marriage, Washington State has multiple statutory challenges spanning

[22] "this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7" Baker, at 12.

multiple cases encompassing the prohibition of same-sex marriage. The first of these challenges came in Singer v. Hara, 11 Wn.App. 247, 522 P.2d 1187 (1974), when a same-sex couple was denied a marriage license from the State. The couple filed suit claiming this violated their rights under Washington State's Equal Rights Amendment. The Court upheld the ban on same-sex marriage, and it took over thirty years for another challenge to arise before the Washington Supreme Court. In Andersen v. King County, 138 P.3d 963 (2006), gay and lesbian couples who sought marriage licenses sued the county seeking to invalidate Washington State's Defense of Marriage Act (DOMA) as unconstitutional insofar as it prohibited same-sex marriage on the basis of the Privileges and Immunities Clause of the state constitution, the Due Process Clause of the state constitution, the Privacy Clause of the state constitution, and the state's Equal Rights Amendment.

For analysis purposes, Washington possess a unique organizational issue. With two different cases spanning multiple constitutional challenges, the first section of this chapter will highlight the influence of the federal level of scrutiny in Singer, then review the Court's decision. The second half will discuss the preceding cases in relation to the specific constitutional challenges raised in Andersen, then discuss the Andersen Court's decision.

Singer v. Hara

Singer was one of the earliest same sex marriage cases to be adjudicated in the U.S. The Court upheld Washington statute RCW 26.04.010 limiting the right of marriage to opposite-sex adults. The same-sex couple argued the ban violated Washington State's Equal Rights Amendment which reads in relevant part: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." W.A. Const. art. XXXI, cl. 1.

The ERA Prior to Singer

Washington State's ERA was passed and ratified in 1972. That same year, Mr. Singer filed suit in late April. This was the first ERA case in Washington. The Court had no state or federal precedent to rely upon. Due to the novelty of this ERA case, the Court had no framework for review, evident by the lack of organization in the opinion highlighted below. The Court reviewed each side's arguments without a firm grasp of the standard of review, legislative intent, or prevailing political sentiment. The Court acknowledged this case of first impression, stating, "To our knowledge, no court in the nation has ruled upon the legality of same-sex marriage in light of an equal rights amendment." Singer, at 250.

The primary purpose of Washington's ERA was to overcome discriminatory treatment between men and women on account of sex. The popular slogan at the time was "Equal Pay for Equal Work," expressing the notion that a qualified female be treated no less favorably than an equally qualified man.[2324] The Singer Court explained, "Prior to the adoption of the [Washington State] ERA, the proposition that women were to be accorded a position in the law inferior to that of men had a long history. Thus, in this context, the purpose of the ERA is to provide the legal

[23] The House approved the measure in 1970, and the Senate did likewise in 1972. The fight was then taken to the states. ERA-supporters had the early momentum. Public opinion polls showed strong favorable support. Thirty of the necessary thirty-eight states ratified the amendment by 1973. But then the tide turned. From nowhere came a highly organized, determined opposition that suggested that ratification of the ERA would lead to the complete unraveling of traditional American society. "The Equal Rights Amendment.*" U.S. History Online Textbook, 4, Sept, 2018.*

[24]American society has always confined women to a different and, by most standards, inferior status. The discrimination has been deep and pervasive. Emerson, Thomas I.; Brown, Barbara A.; Falk, Gail; and Freedman, Ann E., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women" (1971). Faculty Scholarship Series. Paper 2799.

protection, as between men and women, that apparently is missing from the state and federal Bills of Rights, and it is in light of that purpose that the language of the ERA must be construed." Singer, at 258.

Singer Decision

The Washington Supreme Court highlighted that an individual of Washington State is afforded no greater protection under the ERA unless "he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex." Singer, at 258. The ERA did not create any new rights or responsibilities, it merely "insures that existing rights and responsibilities or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other will be equally available to members of either sex." Singer, at 259. The Appellants' first argument rested on the fact that RCW 26.04.010 authorized marriages by "persons of the age of eighteen years, who are otherwise capable." Singer, at 249. The legislature had not defined the competency of marriage but only the competency of individuals seeking marriage. In other words, the statute did not define marriage as between opposite-sex parties but rather as between non-biologically related adults. However, the State argued that the term "persons" in the statute "merely reflects a 1970 amendment which substituted the word 'persons' for the prior references to 'males' and 'remales' [sic] to implement the legislature's elimination of differing age requirements." Singer, at 249. The Court agreed with the State's analysis that the statute did not permit same-sex marriage despite the complete absence of any requirement within the statute that couples seeking marriage be of the opposite sex.

The crux of the appellants' argument was that the language of the amendment "leaves no question of interpretation … to make sex an impermissible legal classification." Singer, at 250-51. Thus, "to construe state law to permit a man to marry a woman but at the same time to deny him the right to marry another man is an unconstitutional classification 'on account of sex'" Singer, at 251. In support of their argument, the Appellants cited Loving, Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948), and J.S.K Enterprises, Inc. v. City of Lacey, 6 Wash.App. 43, 492 P.2d 600 (1971). The Court disagreed with the appellants' analogy to interracial marriage as first set forth by the U.S. Supreme Court in Loving. The Singer Court concluded, "In *Loving* and *Perez* we do not find such analogy. The operative distinction lies in the relationship which is described by the term marriage itself, and that relationship is the legal union of one man and one women." Singer, at 253. It further stated, "There is no analogous sexual classification involved in the instant case because Appellants are not being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex." Singer, at 254-55. Similarly, in J.S.K. Enterprises, Inc., the Singer Court concluded the right recognized "on the basis of principles applicable to employment discrimination has nothing to do with the question present by appellants." Singer, at 256.

The Singer Court continued, "The purpose of the ERA makes it apparent why the amendment does not support appellants' claim of discrimination. The primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women 'on account of sex'" Singer, at 257. The Court claimed there was no right or responsibility that had been denied. With no right denied, an individual was not afforded protection under the ERA. The ERA did not prohibit all sex-based classifications. The Court stated, "A generally recognized 'corollary' or

exception to even an 'absolute' interpretation of the ERA is the proposition that laws which differentiate between the sexes are permissible so long as they are based upon unique physical characteristics, rather than upon a person's membership in a particular sex." Singer, at 259.

The Court believed this was not invidious discrimination, because same-sex couples are not able to procreate from the union they form. Thus, "the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'" Singer, at 260.

Singer Conclusion

The Court, did not delve into an equal protection analysis. It imprudently skipped any analysis of whether same-sex couples were a suspect classification and even failed to address whether marriage was a fundamental right, and whether there was a documented history of discrimination against homosexuals. The Court upheld the ban on rational basis review, ruling that the state had a rational basis for limiting marriage. Thus from this limited judicial review, it seems the court used classic federal review standards.

Andersen v. King County

It took thirty years for another same-sex marriage case to percolate up to the Washington Supreme Court. In Andersen v. King County gay and lesbian couples who sought marriage licenses sued the county seeking to invalidate Washington State's Defense of Marriage Act (DOMA) as unconstitutional insofar as it prohibited same sex marriage on the basis of the Privileges and Immunities Clause of the state constitution, the Due Process Clause of the state constitution, the Privacy Clause of the state constitution, and the state's Equal Rights

Amendment. Similar to the Vermont analysis, it will be beneficial to understand preceding cases before reviewing the Andersen Court's decision.

The Andersen Court under took a federal equal protection analysis. The Court ruled using the federal rational test. The Court found that (1) gay and lesbians had been discriminated in the past, (2) sexual orientation was not an immutable quality, (3) as a class, gays/lesbians were not politically powerless, and (4) there were no economic disadvantages to the class. These four criteria are also used in federal equal protection jurisprudence.[25] This federal analysis employed by the state supreme court can be traced back to cases such as Hanson v. Hutt and Schroeder v. Weighall. The Andersen court also used a federal substantive due process review and again ruled based on rational basis. The Court in Andersen found, there was a reasonable ground to limit same-sex marriage due to the state's interest in child-bearing and procreation. Andersen continued the precedential standard of the Young Court which also employed this federal framework. With the Andersen court following both federal equal protection and due process reviews, the Court ruled using the federal three-tiered scrutiny and ultimately came to a rational basis review.

Before reviewing the Andersen decision, we will look at these precedential cases. The cases are broken up based on the constitutional challenge. Every proceeding case uses some form of federal scrutiny. Which means when the Andersen Court ruled based off the rational basis test, the court had a long history of using the federal standards of review.

[25] It is worth noting — and somewhat illogical — that the Andersen Court found sex as a suspect classification; however, sexual orientation was not even quasi-suspect. Because sexual orientation was not suspect in the Court's paradigm, the Court reviewed the case using low level scrutiny.

Privileges and Immunities Precedents

To understand some of the intricacies of Washington's Privileges and Immunities Clause, and to explain in part the Andersen court review, it is necessary to look at Hanson v. Hutt and Schroeder v. Weighall.

In Hanson v. Hutt, 83 Wash.2d 195 (1973), a woman filed action challenging statute RCW 50.20.030 disqualifying pregnant women from unemployment insurance benefits. The Supreme Court held that the statute violated the federal Equal Protection Clause and the state's Privileges and Immunities Clause.

The Court asserted that the federal Equal Protection and the State's Privileges and Immunities clauses "are substantially identical in their impact upon state legislation." Hanson, at 200.

The Court needed to determine if the Statute was discriminatory in nature. It concluded, "it is equally clear that only women must be barren to be eligible for and to receive unemployment compensation. This requirement … also places a heavier burden upon women who seek unemployment benefits." Hanson, at 198. Sex is an immutable trait which the class members are "locked by accident of birth" Hanson, at 199. The result was that the entire class was relegated to an inferior legal status without regard to capabilities and characteristics of its individual members. The Hanson Court ruled classifications based on sex were inherently suspect and require strict scrutiny.

There was no clearly stated purpose behind the law, and with no compelling state interest to justify its discriminatory provisions, the Court ruled that RCW 50.20.030 violated Washington's Privileges and Immunities Clause.

In Schroeder v. Weighall, 179 Wash.2d 566 (2014), the Court ruled that statute RCW 4.16.190(2), which eliminated medical malpractice actions from general tolling (halting the statute of limitations or timeframe in which to commence legal action) of legal actions brought by minors until the minor reached the age of majority, violated Washington's Privileges and Immunities Clause. Past case law had demonstrated that Washington's Privileges and Immunities Clause had been equal to or affords greater protection than its federal counterpart, the Fourteenth Amendment's Equal Protection Clause. *See* Seeley v. State, 132 Wash.2d 776, 788, 940 P.2d 604, 609 (1997), and Grant County II, 150 Wn.2d at 812 (2005).

After Grant County II, the courts subjected legislation to a two-part test under the "privileges" of article I, section 12 analysis. First, it determined whether a challenged law grants a "privilege" or "immunity" for purposes of the state constitution. Grant County II, at 812. If the answer is yes, it must then determine whether there is a "reasonable ground" for granting that privilege or immunity. Grant I, at 731.

The benefit that RCW 4.16.190(2) conferred was limited liability -- or an immunity from certain suits pursued by certain plaintiffs. The Washington Supreme Court had long recognized that the privileges and immunities contemplated in article I, section 12 included the right to pursue common law causes of action in court. Thus, at least where a cause of action derives from the common law, the ability to pursue it is a privilege of state citizenship triggering article I, section 12 and reasonable-ground analysis. A law limiting the pursuit of common law claims against certain defendants therefore grants those defendants an article I, section 12 "immunity." The article I, section 12 reasonable ground test is more exacting than rational basis review. Under the reasonable-ground test a court will not hypothesize facts to justify a legislative distinction. *See*, e.g., City of Seattle v. Rogers, 6 Wn.2d 31, 37- 38, 106 P.2d 598 (1940). Rather,

the courts will scrutinize the legislative distinction to determine whether it serves the legislature's stated goal. *See*, *e.g.*, State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P .2d 1101 (1936).

The stated purpose of the law is the "goal of alleviating any medical insurance crisis" Schroeder, at 575. Because less than one percent of all insurance claims nationwide were made by adults pursuant to incidents of malpractice occurring more than eight years prior, the Schroeder Court ruled, "The statute is too attenuated to survive rational basis scrutiny." Schroeder, at 575. Thus, the statute was struck down based on the Privileges and Immunities Clause of the state constitution.

The Privileges and Immunities Clause has somewhat of a double analysis. To begin each review, the Washington courts must rule if there is a special privilege granted to a minority, such as in Schroeder. If there is a special privilege granted, there is an enhanced rational basis review, requiring the court to establish whether the stated purpose of the law is, in fact, accomplished. If there is no special privilege granted, the privileges and immunities clause then becomes analogous — and interpretable -- to that of the federal equal protection clause. The analysis becomes the same as an equal protection analysis — namely, is there a fundamental right and/or a suspect classification? If there is a suspect classification, such as in Hanson involving sex discrimination, strict scrutiny is applicable. If there is no suspect classification or fundamental right, such as in Andersen, rational basis review is then applied. These cases helpped lay groundwork for the Andersen Court – which followed federal scrutiny framework – decision plausible.

Due Process Precedent

The federal analysis is evident in the Andersen Courts due process review. When no fundamental right is at stake, rational basis review is required. This is similar to an earlier Washington State Supreme Court case, Young v. Konz, 91 Wash.2d 532 (1979).

In Young, the Court, similar to the Andersen Court, used the rigid multi-tiered analysis employed by the federal courts for a due process claim. The question the Young Court faced was, "Are the defendants denied due process under article 1, section 3, of our state constitution, and under the fourteenth amendment to the United States Constitution, when tried before a nonlawyer judge in a court of limited jurisdiction for a misdemeanor wherein a loss of liberty could result?" Young, at 533.

The Court stated it would utilize the same standards used by the federal government saying, "the sound approach to this case is to acknowledge and appreciate that Const. art. *539 1, § 3 is the same as the federal due process clause, and federal cases …." Young, at 538-39. Because there was no fundamental right involved, the Court decided this case under the rational basis standard of review. It found no judicial evolution of the concepts basic to fair trial which required adoption of a higher standard of due process than that set forth in North In Young I, 88 Wash.2d 558 (1977).

Other courts have considered the same question and found non attorney judges did not violate due process, specifically the federal protections of the Sixth Amendment and state constitutional analogues. *See* State v. Lynch, 107 Ariz. 463, 489 P.2d 697 (1971); Treiman v. State ex rel. Miner, 343 So. 2d 819 (Fla. 1977); Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969); Ditty v. Hampton, 490 S.W.2d 772 (Ky. 1972); State v. Lindgren, 235 N.W.2d 379 (Minn. 1975); In re Hewitt, 81 Misc.2d 202, 365 N.Y.S.2d 760 (1975); State v. Duncan, 269 S.C.

510, 238 S.E.2d 205 (1977); Shelmidine v. Jones, 550 P.2d 207 (Utah 1976); Thomas v. Justice Court, 538 P.2d 42(Wyo. 1975).

The Young Court explained, "Under our state constitution, the people have clearly vested the legislature with the sole authority to prescribe the jurisdiction and powers, and implicitly the qualifications, of justices of the peace and such other inferior courts as the legislature may establish." Young, at 541

The people, through the constitution, have: (1) explicitly recognized and accepted justices of the peace as well as such inferior courts as the legislature may create; (2) vested such courts with the judicial power of the state; (3) authorized only the legislature (aside from the constitutional amendment process) to prescribe the powers, duties and jurisdiction of such courts; (4) established appellate jurisdiction over cases arising from such courts in the superior courts; and (5) provided that admission to practice law shall be a qualification only for judges of the superior and supreme courts. W.A. Const. art. 4, § 10 (amendment 28), W.A. Const. art. 4, § 11, W.A. Const. art. 4, § 12, and W.A. Const. art. 4, § 17. Thus, the Court held that nonlawyer adjudication does not violate the right to due process.

This case similar to the privileges and immunities cases, help show that the Washington State courts used federal lever scrutiny guidelines.

Andersen Decision

The Court began by reviewing the Appellants' claim under the Privileges and Immunities Clause, W.A. Const. art. I. § 12. which provided: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporation." Washington's

Privileges and Immunities Clause is analogous to the United States Constitution's Equal Protection Clause. During its review, the Andersen Court would apply federal standards in determining the level of scrutiny for the case. The federal standards applied here were also applied in Kerrigan v. Commissioner of Public Health 289 Conn. 135, 957 A.2d 407, (2007) and In Re Marriage Cases 183 P.3d 384 (Cal. 2008), all of which will be discussed later in this paper. With this understanding of preceding case law, a review of Andersen is necessary to understand if the court used the federal framework.

Washington's Privileges and Immunities Clause provides no greater protection than that of the federal Equal Protection Clause. Andersen, at 18. The Andersen Court needed to address if it would use its own particularized independent analysis or the federal equal protection analysis. Grant County Fire Protection District v. City of Moses Lake, 150 Wash.2d 791, 83 P.3d 419 (2004) held that an independent analysis applied under article 1, section 12 only when the challenged law granted privilege or immunity to a minority class — that is, in the event of positive favoritism. Accordingly, because DOMA did not involve the grant of a privilege or immunity, the question was whether members of a minority class were discriminated against. The Court applied "the same constitutional analysis that applies under the Equal Protection Clause of the United States Constitution." Andersen, at 18.

In order to trigger a heightened level of scrutiny (strict scrutiny), the plaintiffs first attempted to demonstrate they were a suspect classification. To quickly summarize, to qualify as a suspect classification, the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class. Hanson v. Hutt, at 599.

The parties did not dispute that gay and lesbian persons had been historically discriminated against. However, the parties disputed whether homosexuality was immutable. Both Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) and High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) held that gay and lesbian persons did not constitute a suspect classification because homosexuality is not an immutable trait. The Andersen Court concluded the Plaintiffs did not show that homosexuality was an immutable trait. The plaintiffs cited "no authority or any secondary authority or studies in support of their conclusion." Andersen, at 20.

Lastly, there had been recent legislative amendments to the Washington State Law Against Discrimination to prohibit discrimination on the basis of sexual orientation.[26] Engrossed Substitute H.B. 2661, 59th Leg., Reg. Sess. (Wash. 2006). The Court found Washington showed that, as a class, gay and lesbian persons were not powerless but, instead, exercised increasing political power. The plaintiffs, the Court found, did not demonstrate they were members of a suspect classification. Courts around the United States had also reached similar conclusions, *see*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818, (11th Cir. 2004), Able v. United States, 155 F.3d 628, 632 (2nd Cir. 1998), Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996). Therefore, strict scrutiny was not applied based on a suspect classification

Strict scrutiny review would, of course, be required where due process analysis involved a fundamental right. The fundamental right to marry "is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause: Zablocki v Redhail, 434

[26] In addition, the Intervenors point to evidence that a number of openly gay candidates were elected to national, state, and local offices in 2004. Along with amendments to chapter RCW 49.60 to add sexual orientation to the laws against discrimination.

U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).[27] For a fundamental right to exist, it must be "objectively, 'deeply rooted in this Nation's history and tradition' … and implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, (1997).

A brief review of the history and tradition of marriage was central to the determination of whether same-sex marriage was a fundamental right. As pointed out by the Andersen Court, prior to and after statehood, "state laws reflected the common law of marriage between a man and women … Laws of 1854 there really is no serious claim that the early statutes defined anything but opposite-sex marriage." Andersen, at 29. The fundamental right to marriage had been linked to the explicit purpose of procreation, childbirth, and child-rearing. S*ee,* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), Zablocki, at 383-84, and Maynard v. Hill, 125 U.S. 190, 211 (1888).

The Andersen Court acknowledged "marriage is an evolving evolution … However, although marriage has evolved, it has not included a history and tradition of same sex marriage in this nation or in Washington State." Andersen, at 30. The Andersen Court concluded that the appropriate standard of review was rational basis review.

The stated purpose of DOMA was "to reaffirm the State's historical commitment to the institution of marriage between a man and a woman." Andersen, at 35. The State reasoned that

[27] The reader should note that although the Zablocki Court links the right of privacy to the Fourteenth Amendment's Due Process clause, it would be even more accurate to reference the Ninth Amendment's right of privacy as being under the aegis of the Fourteenth Amendment, which incorporates the U.S. Constitution's Bill of Rights and makes those protections applicable to not only federal action but any governmental action — state, municipal, county, etc. Furthermore, the reader will recall that until passage of the Fourteenth Amendment, the Bill of Rights only protected against federal governmental action.

partners in a marriage were expected to engage in exclusive sexual relations "with probable result and paternity presumed." Andersen, at 35.

The Andersen Court explained, "The fact that all opposite-sex couples do not have children and that same-sex couples raise children and have children with third party assistance or through adoption does not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis" Andersen, at 36.[28] Given the rational relationship standard, and that the legislature was provided with testimony that children thrive in opposite-sex marriage environments, the legislature acted to limit the status of marriage. The legislature was entitled to believe that limiting marriage to opposite-sex couples would promote procreation and child-rearing in a "traditional" nuclear family where children tend to thrive. The Court reiterated "the rational basis standard is a highly deferential standard." Andersen, at 39, "highly deferential" being an operative term.
The Justices found that limiting marriage to opposite-sex couples furthered the State's interests in procreation and encouraged families with a mother and father and children, all of whom were biologically related. The Plaintiffs, therefore, had not established that DOMA was unconstitutional under article I, section 12 of the Washington State Constitution.

The Plaintiffs maintained that DOMA violated their right to due process W.A. Const. art. I, § 3. which states in relevant part: "No person shall be deprived of life, liberty, or property, without due process of law." The Court relied on its previous conclusion under the federal constitutional analysis regarding the presence (or absence) of a fundamental right. It ruled "The fundamental right to marriage does not include the right to same-sex marriage. In the absence of

[28] Strict scrutiny analysis rarely, if ever, permits any statute that is over-inclusive or under-inclusive to pass constitutional muster.

a fundamental right at stake, the due process inquiry is whether the law bears a reasonable relationship to a legitimate state interest." Andersen, at 43.

As the Court previously concluded under the equal protection analysis, DOMA satisfied rational basis review and was thus not violative of article 1, section 3 based upon substantive due process.[29]

Conclusion

Under the Privileges and Immunities Clause and the Due Process Clause, the Andersen Court used an identical analysis to that used by the federal courts. The Court reviewed a history of discrimination, immutability of the class, and political powerlessness. It found that because there was no fundamental right and because same-sex persons are not a suspect classification, the matter was reviewable on a rational basis standard of review. This low threshold was upheld because the law was rationally related to the state's putative interest in procreation and child-bearing.

Three cases which reviewed the Privileges and Immunities Clause of the Washington Constitution: Andersen, Hanson, and Schroeder all used federal review standards. To begin each review, the Washington courts must rule if there was a special privilege granted to a minority, such as in Schroeder. If there is a special privilege granted, there is an enhanced rational basis review, requiring the court to establish whether the stated purpose of the law was, in fact, accomplished. If there was no special privilege granted, the privileges and immunities clause

[29] Procedural due process, something very different from substantive due process and something not relevant to same-sex jurisprudence, typically is limited to a citizen's right to be heard (a zoning hearing, for example) or certain government employees' rights to a hearing before employment termination can legally occur

then becomes analogous — and interpretable -- to that of the federal equal protection clause. The analysis becomes the same as an equal protection analysis — namely, is there a fundamental right and/or a suspect classification? If there is a suspect classification, such as in Hanson involving sex discrimination, strict scrutiny is applicable. If there is no suspect classification or fundamental right, such as in Andersen, rational basis review is then applied. The Andersen court acknowledged precedent when it stated, "As we concluded in Grant County II, the concern underlying the state privileges and immunities clause, unlike that of the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class ("a few")." As the Andersen court stated above, there was no positive grant of favoritism to a minority and neither a suspect classification nor a fundamental right was implicated. Thus, the Andersen Court reviewed the case under standard federal equal protection analysis. In this analysis, the court had to review if sexual orientation was a suspect or inherently suspect classification. To determine this, it used the federal standard of review.

In both Andersen, and Young II, the courts used the same analysis employed in federal due process claims. In both cases, there were no fundamental rights at stake, which allowed the courts to proceed under a rational basis analysis. In Young II the legislature had the power to create nonlawyer judges, which was reasonably related to filling lower level vacant judgeships responsible for adjudicating petty criminal violations. Washington followed In Young's footsteps, ruling based on the federal standard of review while reviewing state due process claims.

This Court had in the past, and in Andersen, been shaped and has adopted the federal levels of scrutiny.

Chapter 4: Connecticut

Introduction

Connecticut's courts, like the states before, has been affected by the federal scrutiny framework. In a groundbreaking case, Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2007), the Connecticut Supreme Court ruled that allowing same-sex couples to form same-sex unions, but not marriages, violated the Connecticut Constitution. In Kerrigan, the Court found that same-sex couples constituted a quasi-suspect classification, the first ruling finding a "quasi-suspect" classification involving homosexuals and same-sex couples by a state appellate or federal court, triggering intermediate scrutiny. The Connecticut court was affected by the federal court system in two ways. It used the federal scrutiny framework, and a federal analysis which employed the four qualifications of a quasi-suspect/suspect classification employed with federal equal protection claims to determine the applicable scrutiny.[30]

[30] The United States Supreme Court, however, consistently has identified two factors that must be met, for purposes of the federal constitution, if a group is to be accorded such status. The two required factors are as follows: (1) the group has suffered a history of invidious discrimination; S*ee* United States v. Virginia, 518 U.S. 515, 531–32 (1996); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976); and (2) the characteristics that distinguish the group's membership bears ''no relation to [their] ability to perform or contribute to society.'' The United States Supreme Court also has cited two additional considerations that may be relevant in determining whether statutory provisions pertaining to a particular group are subject to heightened scrutiny. These two additional considerations are as follows: (1) the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control; S*ee, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986); and (2) the group is ''a minority or politically powerless.'' At the time the United States Supreme Court had recognized two quasi-suspect classes, namely, sex (*see, e.g.*, Frontiero, at 687) and illegitimacy (*See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505–506, (1976)). It bears emphasis, however, that the United States Supreme Court had placed far greater weight—indeed, it invariably has placed dispositive weight—on the first two factors: whether the group has been the subject of long-standing and invidious discrimination and whether the group's distinguishing characteristic bears any relation to the ability of the group members to perform or function in society.

The Connecticut Supreme Court's adoption of federal intermediate scrutiny in Kerrigan followed an older body of case law in which it adopted the federal scrutiny framework in non-same-sex marriage cases. This is illustrated by, Eielson v. Park, 179 Conn. 552 (1980), and Contractor's Supply of Waterbury, LLC v. Commissioner of Environmental Protection, 283 Conn. 86, 925 A.2d 1071 (2007).

In Eielson, a class action lawsuit challenging the constitutionality of the state statute establishing a graduated salary system for superior court judges, the Court recognized that there is legislation that involves rights that may be significant -- though not fundamental-- or classifications that are sensitive -- though not suspect -- that may demand some form of intermediate review. The Court is implicitly stating it is working through federal scrutiny by using this federal equal protection language. The Court was reluctant to create intermediate scrutiny, and reviewed the case on rational basis grounds. It cited, "We perceive no basis, however, in this case, for departure from the criterion of rational basis for the appraisal of the constitutionality of this statute." Eielson, at 556. Here the court explicitly mention the federal scrutiny standard.

In Contractor's Supply of Waterbury, LLC a case involving economic regulation, the Connecticut Supreme Court, once again made reference to "important rights." The Contractor's Supply of Waterbury Court was unwilling to create the third-tier of intermediate scrutiny. The Court concluded "the plaintiff has not demonstrated, however, that it is a member of a politically unpopular group, and this court never has recognized mere property rights to be "important" rights for purposes of equal protection analysis. Instead, the plaintiff's claim fits squarely within the category of claims traditionally accorded rational basis scrutiny — a claim based on a classification created by a purely economic regulation, not involving a suspect class or a

fundamental right." Contractor's Supply of Waterbury, LLC , at 94. The Court explicitly used the federal scrutiny framework, and stated that it did not want to grant intermediate scrutiny and instead used the rational basis test.

These cases partially laid the framework for the decision in Kerrigan. They laid the groundwork because a) the courts before establish that it follows the federal scrutiny framework and b) the court before has wrestle with adopting and use of intermediate federal scrutiny.

Kerrigan v. Commissioner of Public Health Decision

The Plaintiff challenged the ban on same-sex marriage under Article one § 20, of the Connecticut constitution, which provides in relevant part that ''[n]o person shall be denied the equal protection of the law . . . .'' C.T. Const. art. 1. § 20. This provision prohibits the state from treating similarly situated persons differently without sufficient reason to do so.

Connecticut's Supreme Court had never considered whether classifications that discriminate against gay persons were subject to heightened scrutiny under the equal protection provisions of the state constitution. The lower appellate state court had recently addressed the issue in State v. John M., 94 Conn. App. 667, 894 A.2d 376 (2006) *rev'd on other grounds by* State v. John F.M., 285 Conn. 528, 940 A.2d 755 (2008), which concluded that such classifications were entitled only to rational basis review on the basis of its reading of federal and sister state precedent. John M., at 678–85. For several reasons, the Kerrigan Court was not persuaded by the lower appellate court's analysis: "in John F.M., the Appellate Court decided the issue under the federal constitution, not the state constitution. *See,* 678–79. Second, the Appellate Court did not apply the federal four-pronged test for determining whether a group is entitled to

heightened protection but, rather, relied solely on case law from other jurisdictions." Kerrigan, at 145.

The Court looked first at homosexuals' history of discrimination. For centuries, the prevailing attitude toward gay persons has been ''one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.'' R. Posner, Sex and Reason (Harvard University Press 1992) c. 11, p. 291. The Kerrigan Court stated, "Gay persons have been subjected to such severe and sustained discrimination because of our culture's long-standing intolerance of intimate homosexual conduct." Kerrigan, at 142. As the United States Supreme Court had recognized, ''[p]roscriptions against [homosexual sodomy] had ancient roots.'' Bowers, at 192.

Next, the Court discussed whether sexual orientation was related to a person's ability to participate or contribute to society. The Court explained that it was the public policy of Connecticut that sexual orientation bears no relation to an individual's ability to raise children. *See, e.g.,* Conn. Gen. Stat. § 45a-727 (permitting same sex couples to adopt children); S*ee also* Conn. Gen. Stat. § 45a-727a (3) (finding of General Assembly that best interests of child are promoted whenever child is part of ''loving, supportive and stable family'' without reference to sexual preference of parents); to an individual's capacity to enter into relationships analogous to marriage; S*ee* Conn. Gen. Stat. § 46b-38aa-46b38pp (granting same sex couples all rights and privileges afforded to opposite sex couples who enter into marriage); and to an individual's ability otherwise to participate fully in every important economic and social institution and activity that the government regulates."

The third component the Court used to determine the level of scrutiny was the immutability of the group's distinguishing characteristic. Sexual intimacy is ''a sensitive, key

relationship of human existence, central to . . . the development of human personality . . . .'' Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973). Thus, the United States Supreme Court had recognized that, because ''the protected right of homosexual adults to engage in intimate, consensual conduct . . . [represents] an integral part of human freedom.'' Lawrence, at 576–77.

The Kerrigan Court claimed, "In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution." Kerrigan, at 143.

Lastly, the Court determined if homosexuals as a group were politically powerless. The Court determined that "When this approach is applied to the present case, there is no doubt that gay persons clearly comprise a distinct minority of the population." Kerrigan, at 143. Along those lines the Court found that the relatively modest political influence that gay persons possessed was insufficient to rectify the invidious discrimination to which they had been subjected to for so long. "Like the political gains that women had made prior to their recognition as a quasi-suspect class, the political advances that gay persons have attained afford them inadequate protection, standing alone, in view of the deep-seated and pernicious nature of the prejudice and antipathy that they continue to face. Today, moreover, women have far greater political power than gay persons, yet they continue to be accorded status as a quasi-suspect class." *See* Breen v. Carlsbad Municipal Schools, 138 N.M. 331 (2005).

The Court determined, "Because of the long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same-sex couples will be viewed as reflecting an official state policy that that entity is inferior to

marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples." Consequently, ''retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise [namely] . . . that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.'' Kerrigan, at 148 *See also* In re Marriage Cases, at 784–85; Goodridge v. Dept. of Public Health, 440 Mass. 333 (2003). This reasoning echoes the famous quote from Brown v. Board of Education, 347 U.S. 481 (1954) that separate schools based on race by virtue of being separate were "inherently unequal," Brown, at 495 -- reversing the 1896 Supreme Court decision in Plessy v. Ferguson, 163 U.S. 537 (1896), wherein the Court found separate but equal passenger train cars were not violative of the U.S. Constitution. Plessy, at 547. Civil unions, the Kerrigan Court believed, were inherently unequal compared to state-sanctioned marital relationships. Thus, the Court adopted the federal intermediate scrutiny standard, which followed the the trajectory started by Eielson and Contractor's Supply of Waterbury.

The burden of proof was demanding, and it rested entirely on the state. The state had to show at a minimum that the challenged classification served important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives. The justification must be genuine -- not hypothesized or invented *post hoc* in response to the litigation -- and it must not rely on overbroad generalizations about the different talents, capacities, or preferences of [the groups being classified].'' United States v. Virginia, 518 U.S. 532–33 (1996). The defendants posited two essential reasons why the legislature had

prohibited same sex marriage: (1) to promote uniformity and consistency with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as a union between one man and one woman.

The Court found the first proffered justification -- that is, uniformity and consistency with other state and federal laws -- might be rationally related to the state's interest in limiting marriage to opposite sex couples, but it could not withstand heightened scrutiny. Although the defendants maintained this reason was sufficient to satisfy their demanding burden, they had identified no precedent in support of their claim. Indeed, beyond the mere assertion that uniformity and consistency with the laws of other jurisdictions represents a truly important governmental interest, the defendants had offered no reason why that was so.

Secondly, when tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, the court needed to determine whether the reasons underlying that tradition were sufficient to satisfy constitutional requirements.

The Kerrigan Court quoted U.S. Supreme Court Blackmun's famous dissent in Bowers (upholding the criminalization of homosexual sex) when he stated, "Tradition alone never can provide sufficient cause to discriminate against a protected class, for ''[neither] the length of time a majority [of the populace] has held its convictions [nor] the passions with which it defends them can withdraw legislation from [the] [c]ourt's scrutiny.'' Bowers, at 210.

The Court concluded "Moral disapproval alone, however, is insufficient reason to benefit one group and not another because statutory classifications cannot be drawn for the purpose of disadvantaging the group burdened by the law.'' Kerrigan, at 156.

Conclusion

The Connecticut court system adopted and used the federal court's three-tiered scrutiny system. This is evident from Kerrigan citing cases over thirty years old using the federal rational basis review. The Connecticut Court in Kerrigan used federal scrutiny, but also used federal guiding principles to determine the applicable level of scrutiny. Although the Kerrigan Court was shaped by federal standards, it still came to a novel conclusion. It was the first state or federal appellate court to use the intermediate scrutiny produced by the federal government for quasi-suspect classifications. This is also evident by the evolution presented above by the preceding cases.

Chapter 5: California

Introduction

In re Marriage Cases, 183 P.3d 384 (Cal. 2008), was a California Supreme Court case (a consolidation of six related cases)[31] where the Court held that laws treating classes of persons differently based on sexual orientation should be subject to strict scrutiny, and that an existing statute and initiative measure limiting marriage to opposite-sex couples violated the rights of same-sex couples under the California Due Process and Equal Protection clauses and may not be used to preclude same-sex marriage. California presents a clear case study of a state supreme

[31] City and County of San Francisco v. State of California (A110449 [Super. Ct. S.F. City & County, No. CGC-04-429539]); Tyler v. State of California (A110450 [Super. Ct. L.A. County, No. BS-088506]); Woo v. Lockyer (A110451 [Super. Ct. S.F. City & County, No. CPF-04-504038]); Clinton v. State of California (A110463 [Super. Ct. S.F. City & County, No. CGC-04-429548]); Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco (A110651 [Super. Ct. S.F. City & County, No. CPF-04-503943]); Campaign for California Families v. Newsom (A110652 [Super. Ct. S.F. City & County, No. CGC-04-428794]).

court adopting and employing the federal strict scrutiny standard to interpret the state constitution in its key same-sex marriage case. The California Supreme Court in In re Marriage Cases undertook a traditional federal equal protection and due process review.

In using this standard, the Court followed a series of earlier cases that had adopted and applied federal scrutiny standards to state clauses. How it did so is evident if one examines the In re Marriage Cases ruling in light of three important precedents: Blumenthal v. Board of Medical Examiners,57 Cal.2d 288 (1962), In re King, 150 Cal. App. 3d 304 (1983), and Darces v. Woods, 35 Cal. 3d 871 (1984).

Case law preceding In re Marriage Cases

Blumenthal v. Board of Medical Examiners is an early case using the federal government's scrutiny framework to decide an equal protection claim under the state constitution. The Plaintiff petitioned for a writ of mandate to compel the Board of Medical Examiners to register him as a dispensing optician. He was denied because he hadn't completed five years' experience taking facial measurements and fitting / adjusting lenses in the state. He did have five years out-of-state experience. The board found the Petitioner had not met the requirement of good moral character imposed by subdivision (b) Bus. & Prof. Code, § 2552.

The Petitioner admitted that he did not meet the experience requirement of subdivision (a) of section 2552 of the Business and Professions Code, but urged that, "this subdivision is unconstitutional on the ground that it imposes inequalities prohibited by the equal protection clause of the Fourteenth Amendment of the United States Constitution and article I, sections 11 and 21 of the Constitution of the State of California."

The Court undertook an analysis and review under the state constitution. It found, "Section 2552, subdivision (a) discriminates between persons who have served the requisite five-year apprenticeship or who have been licensed for five years in another state and other persons regardless of their qualifications." To conflict with constitutional provisions, the discrimination must be actually and palpably unreasonable and arbitrary. The Court invoked the rational basis test to invalidate Section 2552. Stating "A discrimination, however, that bears no reasonable relation to a proper legislative objective is invalid." Blumenthal, at 764.

The Court did not believe that, "the Legislature could not have reasonably concluded that training as a dispensing optician acquired in a physician's office … would lead to the elimination of abuses in the field."

By stating, "A discrimination, however, that bears no reasonable relation to a proper legislative objective is invalid" the court explicitly used the federal rational basis tests.

Eight years later in In re King, the Court used explicit federal equal protection language and federal scrutiny framework to review a challenge under its own constitution. However, rather than following Blumenthal by using the rational basis test, it shifted to adopt strict scrutiny.

On February 7, 1967, Clennon Washington King was convicted of failure to support his children in violation of Penal Code section. Section 270 of the Penal Code, in prescribed varying penalties for violation, and distinguished between two "categories" or "classifications" of non-supporting fathers. The Plaintiff contested that these classifications violated the State's Equal Protection Clause.

The Court described the protections afforded by the California Constitution, stating "It is basic that the guarantees of equal protection embodied in article I, sections 11 and 21, of the

California Constitution, prohibit the state from arbitrarily discriminating among persons' subject to its jurisdiction. This principle, of course, does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose." In re King, at 482. This language has been used in numerous federal cases before.[32]

The Court used the federal framework for scrutiny, in this case citing, "in cases involving `suspect classifications' or touching on `fundamental interests' ... the state bears the burden of establishing not only that it has a compelling interest which justifies the law, but that distinctions drawn by the law are necessary to further its purpose." The Court is blatantly mirroring the federal government's strict scrutiny instead of creating its own framework.

The Court held "insofar as the section punishes nonsupporting fathers who 'remain out of the state for 30 days' more heavily than nonsupporting fathers who are within California, this penal provision establishes a classification not sufficiently related to any legitimate governmental objective, and as such violates the equal protection clause of our Constitution." In re King, at 488.

In re King evolved from previous cases and reviewed the California Equal Protection Clause based on the strict scrutiny framework, while borrowing the exact wording from federal courts.

[32] Rinaldi v. Yaeger 384 U.S. 305, 308-09 (1966); Baxstrom v. Herold (1966) 383 U.S. 107, 111 (1966).

Fifteen years after In re King, the California Court in Darces v. Woods – rather than simply following its own precedent from In re King -- used the federal levels of scrutiny, but employed federal guidelines to determine which level of scrutiny was applicable in the case.

In Darces, the Court faced the question "May the state disadvantage citizen children eligible for governmental assistance on the basis that they live with their brothers and sisters who are undocumented aliens?" The Appellant's constitutional contention was that the challenged practice penalizes her eligible children solely on the basis of their status as siblings of undocumented aliens in violation of equal protection under the state and federal Constitutions. The Court took the claim under the state equal protection grounds. The Court stated, "The guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution "compel[ ] recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." Darces, at 327. The Court linked California's Equal Protection Clause with the federal government's Equal Protection Clause, which implies the Court views them equally. The Court described the difference between the federal scrutiny standards.[33]

Not only did the Court use the federal scrutiny framework, but also used federal standard guidelines to determine the proper level of scrutiny. The Court first looked at "the nature of the classification," and if the party is similarly situated to the unaffected class. The Court found,

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[33] The Court describing federal scrutiny stated, "This principle, of course, does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose." In re King, at 474. However, this deferential standard is inapplicable " 'in cases involving "suspect classifications" or touching on "fundamental interests" .' " (Ibid.) In such cases "the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that distinctions drawn by the law are necessary to further its purpose." (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784–785, 87 Cal.Rptr. 839, 471 P.2d 487.)

"The members of both classes are similarly situated with respect to the legitimate purpose of the AFDC program—the relief of eligible, needy children." Darces, at 334

The Court reviewed the case under strict scrutiny and stated, "The appellant has the burden to show a compelling state interest that is furthered by the classification he has drawn." Darces, at 335. Again, using federal language, the Court found "Neither of the state interests advanced by respondent amounts to a constitutionally compelling state interest that justifies his policy and practice of underfunding those families, like appellant's, comprised of citizens and undocumented members." Darces, at 341.

Instead of following earlier precedents of creating its own framework for choosing the appropriate scrutiny standard, the Darces Court used federal scrutiny review, while using federal guidelines to determine strict scrutiny was applicable, while also employing federal language along the way.

In re Marriage Cases decision

In California before the In re Marriage Case, there is a distinct evolution of the adoption and use of the federal scrutiny framework. Early on, the Court borrowed the federal framework. As time went on, the California Court interpreted its Equal Protection Clause identically to that of the federal government. Beyond simply using federal scrutiny framework, the Court used federal guidelines to determine the applicable scrutiny. The In re Marriage Cases, followed Darces and once again used of both the federal framework and federal guidelines of determining scrutiny.

Plaintiffs contended that by limiting marriage to opposite-sex couples, California's marriage statutes violated a number of provisions of the California Constitution. Plaintiffs

contended the challenged statutes violated a same-sex couples' fundamental "right to marry," as guaranteed by the Privacy, Free Speech, and Due Process Clauses of the California Constitution (Cal. Const., art. I, §§ 1, 2, 7), and additionally violated the Equal Protection Clause of the California Constitution (Cal. Const., art. I, § 7).

The Court undertook a review of the Plaintiff's claim under a fundamental right. The California Constitution does not contain any explicit reference to a "right to marry," however, past California cases established that the right to marry is a fundamental right in which protection is guaranteed to all persons by the California Constitution. *See, e.g.*, Conservatorship of Valerie N. 40 Cal.3d 143, 161 (1985): ["The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests."] Williams v. Garcetti 5 Cal.4th 561, 577 (1993): ["we have . . . recognized that '[t]he concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government."] Ortiz v. Los Angeles Police Relief Assn. 98 Cal.App.4th 1288, 1303 (2002): ["under the state Constitution, the right to marry and the right of intimate association are virtually synonymous."]; and In re Carrafa 77 Cal.App.3d 788, 791 (1978).

Most importantly in Perez, at 711 — the Court's 1948 decision holding that the California statutory provisions prohibiting interracial marriage was unconstitutional — "the court did not characterize the constitutional right that the plaintiffs in that case sought to obtain as "a right to interracial marriage" and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages had never been permitted in California. Instead, the Perez decision focused on the substance of the constitutional right at issue — that is, the importance to an individual of the freedom "to join in marriage with the person of one's choice" — in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right. Characterizing

the constitutional right at issue as the right to same-sex marriage rather than the right to marry "goes beyond mere semantics. It is important both analytically and from the standpoint of fairness to Plaintiff's argument that we recognize they are not seeking to create a new constitutional right — the right to "same-sex marriage" — or to change, modify, or (as some have suggested) "deinstitutionalize" the existing institution of marriage." In re Marriage, at 53.

Instead, Plaintiffs argued that, properly interpreted, the state constitutional right to marry had to afford same-sex couples the same rights and benefits — accompanied by the same mutual responsibilities and obligations — as the constitutional right afforded to opposite-sex couples. For this reason, when the Court evaluated the constitutional issue, it directed its focus to the meaning and substance of the constitutional right to marry, and avoided the potentially misleading implications inherent in analyzing the issue in terms of "same-sex marriage." In re Marriage, at 53.

In recent decades, there had been a fundamental and dramatic transformation in the state's thinking and legal treatment of gay individuals and gay couples. The state's policies and conduct regarding homosexuality recognized that "gay individuals were fully capable of entering into the kind of loving and enduring committed relationships that serve as the foundation of a family and of responsibly caring for and raising children." In re Marriage, at 68.

The Court found that sections 1 and 7 of article I of the California Constitution could not properly be interpreted to withhold from gay individuals the same basic civil right of personal autonomy and liberty (including the right to establish, with the person of one's choice, an officially recognized and sanctioned family) that was afforded to heterosexual couples.

"The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children, and the right to marry never has been limited to

those who plan or desire to have children. Indeed, in Griswold, at 479 — one of the seminal federal cases striking down a state law as violative of the federal constitutional right of privacy — the high court upheld a married couple's right to use contraception to prevent procreation, demonstrating quite clearly that the promotion of procreation is not the sole or defining purpose of marriage."

Accordingly, "we conclude that the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage." In re Marriage, at 78.

Next, Plaintiffs argued that by permitting only opposite-sex couples to enter into a relationship designated as a "marriage," and by designating as a "domestic partnership" the parallel relationship into which same-sex couples were allowed to enter, the statutory scheme impermissibly denied same-sex couples the equal protection of the laws, guaranteed by article I, section 7, of the California Constitution. There are two different standards traditionally applied by California courts in evaluating challenges made to legislation under the equal protection clause-- strict scrutiny and rational basis. Hernandez v. City of Hanford 41 Cal.4th 279 (2007).

In the Court's view, the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex. A statute that limited the ability of same-sex couples to be intimate in the context of marriage unquestionably imposed different and unfavorable treatment on the basis of sexual

orientation. Thus, the Court had to determine whether sexual orientation should be considered a "suspect classification" under the California equal protection clause.

Orientation is a characteristic (1) that bears no relation to a person's ability to perform or contribute to society, *see e.g.*, Gay Law Students, 24 Cal.3rd 458, 488 (1977), and (2) that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities. *See, e.g.*, People v. Garcia 77 Cal.4th 1269 (2000). The Court disagreed with the Court of Appeal's conclusion that "it is appropriate to reject sexual orientation as a suspect classification, in applying the California Constitution's equal protection clause, on the ground that there is a question as to whether this characteristic is or is not 'immutable.'"

The Supreme Court, in reversing the lower court, reasoned "Immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes." In re Marriage, at 97. California cases established that a person's religion is a suspect classification for equal protection purposes *see, e.g.*, Owens v. City of Signal Hill 154 Cal.App.3d 123, 128 (1984); Williams v. Kapilow & Son, Inc. 105 Cal.App.3d 156, 161-162 (1980), and one's religion, of course, is not immutable but is a matter over which an individual has control. *See also* Raffaelli v. Committee of Bar Examiners, 7 Cal.3d 288, 292 (1972). According to Hernandez Montiel v. I.N.S. 225 F.3d 1084, 1093 (9th Cir. 2000) "Sexual orientation and sexual identity . . . are so fundamental to one's identity that a person should not be required to abandon them" and Egan v. Canada, 2 S.C.R. 513, 528 (1995) "whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." Egan, at 528. In Tanner v. Or. Health Sci. Univ., 971 P.2d 435,

446 (Or. Ct. App. 1998) the Oregon Court of Appeals came to a similar conclusion in a domestic partner benefits case, and stated that "the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." 446. Other scholarly articles had come to this same conclusion. "On that middle ground, sexual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people." Janet Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. REV. 503 (1994)[34] "The Supreme Court's reluctance to define immutability in a satisfactory manner has mystified litigants" Marc R. Shapiro, Treading the Supreme Court's Murky Immutability Waters, 38 GONZ. L. REV. 409, 443–44 (2003)[35]

In sum, the In Re Marriage Court concluded that statutes imposing differential treatment on the basis of sexual orientation must be viewed as constitutionally suspect under the California Constitution's Equal Protection clause.

The Court determined where the law had a compelling state interest under the strict scrutiny test. California courts have routinely granted relief for discrimination based on sexual orientation under both the state's civil code and its domestic partnership laws. The courts had avoided ruling on sexual orientation's eligibility for heightened scrutiny as a suspect classification under state equal protection. The closest precedent dates back to 1979, when a

[34] Reviewed three scientific theories supporting the immutability of sexual orientation and contending that legal arguments based upon immutability may actually be divisive and harmful to gay rights equal protection claims

[35] Suggests that courts should discard the immutability concept if immutability is defined narrowly as a physical inability to change

group of plaintiffs sued the Pacific Telephone and Telegraph Company, arguing the company's employment discrimination against homosexuals constituted a violation of equal protection and thus deserved heightened scrutiny. Though the California Supreme Court agreed state equal protection laws against arbitrary discrimination were applicable to homosexuals, it stopped short of granting the suspect classification protections given to traits like race and gender. Since then, California's state courts have remained mostly silent. Harvard Law Review, 122 H.L.R. 1557 at page 1561 (2008-09).

"The state bears a heavy burden of justification. In order to satisfy that strict scrutiny standard, the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question" Darces v. Wood, 893-895. In Darces, defendants asserted that the common-law definition of marriage as the union of a man and a woman is constitutionally enshrined in the California Constitution by virtue of language in the 1849 and 1879 Constitutions that employed the terms "marriage," "wife," and "husband" and thereby precluded the Legislature or the people through the statutory initiative from modifying the current statutes to permit same-sex couples to marry. The Court replied by stating, "section 308.5 is an initiative statute, any action by the Legislature redefining marriage to include same-sex couples would require a confirming vote of approval by the electorate, but the California Constitution imposes no constitutional bar to a legislative revision of the marriage statutes consistent with the requirement of voter approval"

The attorney general and the governor maintained that, because the institution of marriage traditionally (both in California and throughout most of the world) had been limited to a union between a man and a woman, any change in that status necessarily was a matter solely

for the legislative process. Thus, they suggested that the separation-of-powers doctrine precluded a court from modifying the traditional definition of marriage.

The Court explained, "On the contrary, under "the constitutional theory of 'checks and balances' that the separation-of-powers doctrine is intended to serve." In Re marriage, at 109. "A court has an obligation to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review." In re Marriage, at 109.

The Court concluded, "After carefully evaluating the pertinent considerations in the present case, we conclude that the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes. To begin with, the limitation clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples and their children." In re Marriage, at 105.

The retention of the traditional definition of marriage did not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples. Accordingly, insofar as the provisions of sections 300 and 308.5 draw a distinction between opposite-sex couples and same-sex couples and excluded the latter from access to the designation of marriage, those statutes were ruled unconstitutional.

Conclusion

The California Supreme Court has been and was shaped by the federal government's scrutiny standards. The Court used the three-tiered analysis and reviewed the case under strict scrutiny. Using this framework was nothing new, as the past case showed. In Darces, the Court not only used federal scrutiny, but also used a federal analysis to determine the applicable scrutiny. The Court used conventional federal equal protection analysis to determine if sexual orientation was a suspect class, and focused primarily on the history of discrimination and the class's immutability — the two major components under federal analysis. The Court also used federal guidelines to determine applicable scrutiny. The Federal scrutiny framework has been intruded and stuck in the California court system.

Chapter 6: Conclusion

It seems counterintuitive that state courts ruling under their respective state constitutions would adopt federal standards. These standards, have shaped how state courts review and decide cases. I have presented four state supreme court cases, which have been shaped by the federal tiers of scrutiny in same-sex marriage jurisprudence.

However, this project and question opens more doors than it closes. Chiefly, discussing how and why the justices ruled how they did in these specific cases. Inquiries into "why" would constitute a whole new project for future research. Judicial behavior is a well-studied, yet still relatively unknown mechanism, which is why, in this paper, I have purposefully strayed from asking "why." I will briefly highlight three traditional models of judicial behavior and show that

trying to applying these models is an enormous undertaking which would be best suited for future research.

The Legal model, states the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent. The Legal Model assumes the following: judges rest their decisions "in significant part on the plain meaning of the pertinent language, judges construe the Framers' intent in constitutional cases and legislative intent in statutory cases, and finally, the asserts that precedent, or stare decisis, constraints judges and endows law with temporal stability.

If justices behaved as the legal models suggests, they would rely solely on precedent. To test the legal model theory, extensive research would have to be done to shepardize previous case law. This would mean reviewing every case cited in the same-sex marriage case, along with proceeding case law, regarding the same constitutional challenges.

A second model for judicial behavior is the Attitudinal model. The Attitudinal model assumes that decision making depends on goals, rules, and situations. Judges are outcome-oriented and have goals, but their choices and decisions depend on the rules of the game, which is the institutional environment. Lastly, the situation, most centrally the facts of the case at hand, will help guide justices' decisions. (92-96).

With the knowledge at hand, it is too difficult to try and predict the state supreme court decisions. This model requires a massive amount of insight which I am not privileged too. It is difficult to guess judges' goals, which are personalized and individualized metrics. Similarly, we can assume some of the institutional environment is behind closed doors when the justices are deliberating.; thus, this task would be one for another thesis.

Epstein and Knight incorporated rational choice institutionalism within the study of judicial behavior. They posited that justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others. Specifically, a Supreme Court justice must make interdependent choices that take account of the preferences of (1) his/her fellow justices, (2) the executive branch or the legislature, (3) the public. The law, by this account, constitutes the slow accretion of myriad bouts of "short-term strategic decision-making".

Epstein and Knight make an assumption about Supreme Court justices' preferences that underlies all of the observable implications of the strategic account: "a major goal of all justices is to see the law reflect their preferred policy positions" (11). Recognizing that their ability to do so requires they make interdependent choices in relation to their colleagues, to other branches of government, and to the broader public, we should expect justices to act strategically and to not always "choose" sincerely.

Epstein and Knight argue that the strategic account generates four observable implications that the Attitudinal model could not explain: (1) bargaining, (2) forward-thinking, (3) manipulating the agenda, and (4) engaging in sophisticated opinion writing.

Similarly, this undertaking is too difficult with the information I have collected. However, there are many articles, that do calculate judges' ideal points and preferences. With this data, and some assumptions, one could try and infer how the justices would rule based of the rational choice model.

To use these models in trying to explain the state supreme court justices' decision making would take an extreme amount of time and effort, but it could be done. Judicial behavior is ongoing and still relatively unsolved. Many political scientists have provided theories and

models to predict how judges will behave; . however, judicial behavior aside, the fact the states supreme courts adopted federal scrutiny in same-sex marriage jurisprudence is extremely interesting.

Equally interesting, which could possibly be explained by inquiries into judicial behavior, is to scrutinize the specific outcome of each same-sex marriage case. Washington, Connecticut, and California all used the same federal scrutiny standards, and the same federal equal protection analysis guidelines, to help the courts review their respective cases; yet, each court came to a different conclusion regarding the level of scrutiny. Other factors besides precedent surely played a role. This question could hopefully be answered by exploring this aspect of judicial behavior.

In light of Brett Kavanaugh's appointment to the Supreme Court, it seems fitting to briefly touch on Obergefell v. Hodges, 576 U.S. ____, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)[36]. In a case first impression, the U.S. Supreme Court held that adult same-sex couples were allowed to equally participate in the fundamental right of marriage. The net effect was that any state law prohibiting same-sex marriage would be held violative of the Fourteenth Amendment of the United States Constitution, specifically the Due Process and Equal Protection clauses of that amendment.

Obergefell confers a federal constitutional right for same-sex couples to marry, similar to how Roe v. Wade, 410 U.S. 113 (1973), created a fundamental constitutional right vís a vís the

[36] As of June 2018, final bound volumes for the U.S. Supreme Court's United States Reports have been published through volume 569. Newer cases from subsequent future volumes do not yet have official page numbers and typically use three underscores in place of the page number. If a case citation in a volume after 569 is shown with a page number, the page number is based on unofficial reporting and is subject to change when the decision is bound and printed.

Fourteenth Amendment's Due Process Clause for an adult woman to terminate her pregnancy without being "unduly burdened" by state law (or federal law). A change in the membership of the nine members of the United States Supreme Court could easily result in the Court reversing Obergefell or Roe. Fundamental rights that are here today could, via Supreme Court jurisprudence, be gone tomorrow. As a practical matter for same-sex couples wishing to marry, the ultimate fight could become a fight at the state court level if the Supreme Court were to reverse its holding in Obergefell. This could serve as another interesting area of future study, to meld state precedent and judicial behavior to model the "what if."

Overall, this project has identified a specific federal influence into the state court system. This idea of states adopting federal scrutiny is novel, with more to be discovered in the realm of same-sex marriage jurisprudence.

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

Appendix

Acknowledgements

First and foremost a massive thank you to Steven Wulf for advising me throughout this year plus long project. You provided great insight from the beginning and especially during the writing stage. Thanks for taking the time to meet weekly to discuss cases and my writing. Thank you to John Farrell for the help and support on the writing and legal aspect side. Lastly, Thank you to my committee members, Hillary Caruthers, William Hixon, and Steven Wulf, for your insights into the project.

Obergefell v. Hodges

On the back of its decisions in Bowers v. Hardwick in 1986 (allowing for the criminalization of homosexual sex among consenting adults), and more importantly the explicit reversal of Bowers by Lawrence v. Texas in 2003 (holding that homosexual sex among consenting adults is a fundamental constitutional right), the United States Supreme Court created a fundamental right to same-sex marriage in 2015. In the seminal case of Obergefell v. Hodges, the Supreme Court made two constitutional realities abundantly clear: both the Due Process and Equal Protection clauses of the Fourteenth Amendment mandated that state governments (and by way of the Fifth Amendment's Due Process Clause, the federal government) grant same-sex couples the same right to marry as afforded opposite-sex couples.

Before Obergefell, Justice Kennedy, writing for the majority in United States v. Windsor, 570 U.S. 744 (2013), held that section three of the federal Defense of Marriage Act (DOMA) contravened the Fourteenth Amendment because it harmed same-sex couples and their children, but he did not expressly address the constitutionality of state bans on same-sex marriage. Relying

on *Windsor*, nearly thirty district courts invalidated these restrictions, and four of the thirteen federal appellate courts affirmed those district-court judgments, holding that state bans violated the Due Process Clause and/or the Equal Protection Clause. The Court of Appeals for the Sixth Circuit remained an outlier, however, and reversed federal district-court decisions overturning the state bans. (The United States Court of Appeals for the Sixth Circuit has jurisdiction over federal appeals arising from the states of Kentucky, Michigan, Ohio and Tennessee). The U.S. Supreme Court hears approximately one hundred cases yearly, and high priority is given to case-scenarios where there is a split of authority between or among the thirteen federal courts of appeal. It was with this forgoing backdrop that the Supreme Court was faced when resolving Obergefell in June of 2015. Implementing Marriage Equality In America, Duke Law Journal, 65 L.R. 25 (Dec. 2015). This scholarly journal article highlights the split of authority that caused the U.S. Supreme Court to hear Obergefell and render a decision that all thirteen federal appellate courts would be required to follow, thus providing uniformity among the appellate courts with respect to same-sex marriage.

Because the Defense of Marriage Act (DOMA) is the central backdrop in the lead-up to and the impetus for Obergefell, an understanding of that federal statute and the constitutional provisions relevant thereto must be discussed. Article IV, Section 1, The Full Faith and Credit Clause of the United States Constitution, mandates that every state give full faith and credit to a sister state's law (U.S. Const. art. IV, § 1.).

Accordingly, a marriage occurring in Wyoming must be given legal recognition by Wisconsin, even if that Wyoming marriage would not otherwise be legally viable (or possible) in Wisconsin. For example, Wisconsin could have a law requiring all nuptial parties to be a certain minimum age that is higher than that required in Wyoming. Nonetheless, the marriage between

an 18-year-old groom and 17-year-old bride in Wyoming must be recognized by Wisconsin, even though Wisconsin would not permit the marriage of those same individuals in its jurisdiction. Because of the Full Faith and Credit Clause, same-sex couples could be married in a state like Vermont (allowing same-sex marriage years before Obergefell), and then relocate to another state that otherwise prohibited same-sex marriage within its own boundaries. Nonetheless, that later state would have to afford legal recognition and the legal rights associated with marriage to the same-sex couple married in Vermont. This caused an uproar among the so-called Red States, as well as the vast majority of states that did not permit same-sex couples to marry.

To address this concern, the U.S. congress passed DOMA, which provided that no state was required -- pursuant to the Full Faith and Credit Clause of the U.S. Constitution — to legally recognize marriages occurring outside its borders. The Congress was granted this authority by Article IV, Section 1 of the Constitution, which reads: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof* [Emphasis added]. With the passage of DOMA, enacted in September of 1996, the Congress "prescribe[d]" the constitutional medicine to remedy the perceived malady of requiring states to recognized same-sex marriages that transpired outside its boundaries. DOMA set the table for the Obergefell dinner party, as did the history of the institution of marriage.

Basis for the Obergefell Holding

History

The history of marriage is one of both continuity and change. The institution—even as confined to opposite-sex relations—has evolved over time. For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding, it was understood to be a voluntary contract between a man and a woman. *See* N. Cott, Public Vows: *A History of Marriage and the Nation* 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). Indeed, "changing understandings of marriage are characteristic of a nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin with pleas or protests and then are considered in the political sphere and the judicial process." Obergefell, at 7.

This dynamic was seen in the experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state in most Western nations, a belief often embodied in both civil and criminal laws. Same-sex intimacy remained a crime in many states; gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. *See* Brief of the Organization of American Historians as *Amicus Curiae* in Support of Petitioners, *Obergefell v. Hodges* 576 U.S. ___, (2015) (Nos. 14-556, 14-562, 14-571, 14-574) In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives, as well as establish families. This development was followed by an extensive discussion of the issue in both the public and private sectors, and by a shift in public attitudes toward greater tolerance.

Case law

Against this cultural and historical background, the nascent, increasingly important legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. Baehr v. Lewin 74 Haw. 645, 852 P.2d 44 (1993). The new and widespread discussion of the subject led other states to take various actions. The Supreme Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. *See* Goodridge. After that ruling, some additional states granted marriage rights to same-sex couples, either through judicial or legislative processes. By the spring of 2011, for the first time in United States history, a majority of Americans were in favor of gay marriage. *Gallop Poll*, Publication Date: May 20, 2011. For the sake of comparison, a few years later, a 2013 *Gallup Poll* found that 87% of the nation approved of interracial marriage.

In Windsor, the Court invalidated DOMA to the extent it barred the federal government from treating same-sex marriages as valid even when they were lawful in the states where they were licensed (occurred). DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." Windsor *at* 14. After years of litigation, legislation, referenda, and the discussions that attended these public acts, the fifty states now are roughly equally divided on the issue of same-sex marriage. *See* Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015). In fact, at the apotheosis of state-level pushback on same-sex marriage, thirty-one states had laws or state constitutional amendments proscribing the same.

Due Process

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g.*, Eisenstadt v. Baird, 405 U. S. 438, 453 (1972); Griswold, *at* 484–486.

The Court has long held the right to marry is protected by the Constitution. In Loving, at 12 which invalidated bans on interracial marriages, a unanimous Court held that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in Zablocki, *at* 384 , which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. *See, e.g.*, M. L. B. v. S. L. J., 519 U. S. 102, 116 (1996); Cleveland Bd. of Ed. v. LaFleur, 414 U. S. 632, 639–640 (1974); Griswold, at 486; Skinner, at 541; Meyer v. Nebraska, 262 U. S. 390, 399 (1923).

The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, 409 U. S. 810 (1972), a one-line summary decision issued in 1972 by the United States Supreme Court, holding the exclusion of same-sex couples from marriage did not present a substantial federal question — and was therefore unworthy of review. This flawed analysis compelled the Obergefell Court, forty-three years later to the conclusion that, not only was same-sex marriage a federal question screaming

for attention, but that same-sex couples had a constitutionally-given right to marry. The four principles and traditions to be discussed herein demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. Similar to choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that individuals can make.

The first principle on which marriage is predicated is that two persons walking together in life's journey can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. Obergefell, at 13.

A second principle in the Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to Griswold, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association." Obergefell, at 13-14

A third basis for protecting the right to marry is that it safeguards children and families, and thus draws meaning from related rights of childrearing, procreation, and education. *See* Pierce v. Society of Sisters, 268 U. S. 510 (1925); Meyer, at 399. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, at at 23. Marriage also affords the permanency and stability important to children's best interests. *See* Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27. Excluding same-sex couples from marriage thus conflicts with a central premise

of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. The constitutional marriage right has many aspects, of which childbearing is only one. Obergefell, at 14-15.

Fourth and finally, this Court's precedent and the nation's traditions make clear that marriage is a keystone of our social order. In Maynard, at 211, the Court, explained that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress."

Indeed, while the States are generally free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. Obergefell, at 22.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty. The Court held that same-sex couples may exercise the fundamental right to marry no differently than opposite-sex couples.

Obergefell Conclusion

The public response to the Court's decision was immediate and overwhelmingly positive. Obergefell v. Hodges and Nonmarriage Inequality, California Law Review, 104 L.R. 1207 (2015). The United States Supreme Court did not technically create a new fundamental right of

same-sex marriage. Instead, the Court concluded that because there is a fundamental right to marry, same-sex couples must be allowed to participate. This was a broad sweeping opinion by Justice Kennedy. Kennedy evoked grandiose language about fundamental rights and dignity for all, which could have implications beyond Obergefell. In A new Birth of Freedom?: Obergefell v. Hodges, Harvard Law Review, 129 L.R. 147 (2015), the author highlights this important point stating,"While Obergefell's most immediate effect was to legalize same-sex marriage across the land, its long-term impact could extend far beyond this context. To see this point, consider how much more narrowly the opinion *could* [emphasis added] have been written. It could have invoked the equal protection and due process guarantees without specifying a formal level of review, and then observed that none of the state justifications survived even a deferential form of scrutiny. The Court had adopted this strategy in prior gay rights cases." In A new Birth of Freedom?: Obergefell v. Hodges, at 159.

Obergefell similar to Andersen, Kerrigen, and In re Marriage undertook an equal protection and due process analysis in ruling on same-sex marriage. Unlike the state courts, the U.S Supreme Court, was not bogged down by the semantics of determining the level of scrutiny or if sexual orientation was a suspect classification. Instead, unlike the other courts, they immediately found a fundamental right involved. The Court concluded that marriage is so integral to our society that same-sex couples — whose love and relationships are equal to that of heterosexual couples — cannot be withheld.

History of Same-Sex Marriage Court Rulings

Thirty-seven states legalized same-sex marriage before the decision in Obergefell. Below is a brief review of each ruling.

Alaska

A federal district court in Alaska held on October 12, 2014, in the case Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska. 2014) that Alaska's statutory and constitutional bans on same-sex marriage violated the Due Process and Equal Protection clauses of the United States Constitution.

Arizona

On January 6, 2014, in Connolly v. Jeanes, 73 F. Supp. 3d 1094 (D. Ariz. 2014) four same-sex couples filed a class-action lawsuit in federal district court seeking to have Arizona's definition of marriage ruled unconstitutional. On March 13, 2014, in Majors v. Horne, 14 F. Supp. 3d 1313 (D. Ariz. 2014), a U.S. District Judge ordered that the state record a death certificate for plaintiff George Martinez as the husband of Fred McQuire. On October 17, 2014, a U.S. District judge ruling in both cases, declared Arizona's ban on same-sex marriage unconstitutional and enjoined the state from enforcing its ban, effective immediately. Arizona Attorney General Tom Horn said the state would not appeal the ruling and instructed county clerks to issue marriage licenses to same-sex couples.

Colorado

On June 25, 2014, the U.S. Court of Appeals for the Tenth Circuit in the case of Kitchen v. Herbert, 961 F. 3d 1193 (10th Cir. 2013), ruled that Utah's ban on same-sex marriage violated the U.S. Constitution. The ruling in Kitchen is binding on courts in every state within the Circuit, including Colorado. Since the Court of Appeals stayed implementation of this ruling pending review by the U.S. Supreme Court, courts in Colorado have had to follow the precedent that Kitchen sets and stay subsequent rulings pending the expiration of that stay.

Florida

Same-sex marriage has been legally recognized in the U.S. state of Florida since January 6, 2015, as a result of Brenner v. Scott, 999 F. Supp. 2d 1278 (D. Fla. 2014). In this case, a federal district court ruled the state's same-sex marriage ban unconstitutional on August 21, 2014.

Idaho

In May of 2014, the United States District Court for the District of Idaho in the case of Latta v. Otter, 771 F .3d 456 (9th Cir. 2014), found Idaho's statutory and state constitutional bans on same-sex marriage unconstitutional, but enforcement of that ruling was stayed pending appeal. The Ninth Circuit Court of Appeals affirmed that ruling on October 7, 2014, though the U.S Supreme Court issued a stay of the ruling, which was not lifted until October 15, 2014.

Indiana

Baskin v. Bogan, 766 F. 3d 648 (7th. Cir 2014), was filed in the Southern District of Indiana on March 14, 2014, by Lambda Legal on behalf of two same-sex couples, all women. A federal district court found in favor of the plaintiff-couples, granted them summary judgment and striking down Indiana's ban on same-sex marriage. On September 4, 2014, the Seventh Circuit, in a unanimous opinion, upheld the district court's decision.

Iowa

A unanimous Iowa Supreme Court affirmed a lower state court's ruling in Varnum v. Brien, 763 N.W.2d 862 (2009). Using intermediate scrutiny to evaluate Iowa's justifications for denying marriage licenses to same-sex couples, the court determined that denying a marriage licenses on the basis of sexual orientation violated the equal protection clause of the Iowa Constitution. Please note that the intermediate level of scrutiny employed was virtually identical

to the same level of scrutiny applied by the Vermont Supreme Court's 1999 hallmark decision in Baker v. Vermont.

Kansas

In Marie v. Moser, 65 F. Supp. 3d 1175 (D. Kan. 2014), a U.S. District Judge issued a preliminary injunction barring the Secretary of the Kansas Department of Health and Environment, Douglas County, and Sedwick County from enforcing Kansas's same-sex marriage ban on November 4, 2014.

Montana

In Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014) a U.S. District Court Judge ruled for the plaintiffs on November 19, 2014, and his injunction against the state's enforcement of its ban on same-sex marriage took effect immediately. Montana Attorney General Fox announced plans to appeal the decision to the Ninth Circuit Court of Appeals. At the request of all parties, the Ninth Circuit suspended proceedings involving the state's appeal on February 9, 2015, pending action by the Supreme Court in Obergefell.

Nevada

In Sevcik v. Sandoval 911 F. 2d 996 (9th Cir. 2012), the Ninth Circuit on October 7, reversed the lower federal district court's ruling in Sevcik, remanding the case back to district court with direction to enter a judgment in favor of the plaintiffs. This effectively legalized same-sex marriage in Nevada.

New Jersey

The New Jersey State Supreme Court reasoned in Garden State Equality v. Dow, 82 A. 3d 336 (2013), because same-sex couples in New Jersey were limited to civil unions, which are not recognized as marriages under federal law, the state must permit civil marriage for same-sex

couples. This ruling, in turn, relied on the 2006 decision of the New Jersey Supreme Court in Lewis v. Harris, 188 N.J. 415; 908 A.2d 196 (N.J. 2006) holding that the state was constitutionally required to afford the rights and benefits of marriage to same-sex couples under New Jersey's Equal Protection clause.

New Mexico

In Griego v. Oliver, 316 P. 3d 865 (10th Cir. 2013), a District Court Judge ruled for the plaintiffs, finding that state marriage statutes that prohibit the issuance of marriage licenses to same-sex couples "are unconstitutional and unenforceable under Article II, Section 18, New Mexico Constitution." On December 19, 2013, the Supreme Court unanimously ruled that the State Constitution required the extension of marriage rights to same-sex couples. Its decision said that the Equal Protection Clause under Article II, Section 18 of the New Mexico Constitution required that "All rights, protections, and responsibilities that result from the marital relationship shall apply equally to both same-gender and opposite-gender married couples."

North Carolina

Same sex marriage has been legally recognized in the state since October 10, 2014, when a U.S. District Court judge ruled in General Synod of the United Church of Christ v. Cooper, 317 A. 3d 415 (4th Cir. 2014), that the state's denial of marriage rights to same-sex couples was unconstitutional. The ruling in the Fourth Circuit Court of Appeals and the U.S. Supreme Court's decision not to hear an appeal in that case established the unconstitutionality of North Carolina's ban on same-sex marriage.

Oklahoma

In Bishop v. United States, 760 F. 3d 1070 (10th Cir. 2014), On January 14, 2014, a federal district court Judge ruled Part A of the Oklahoma constitutional amendment banning

same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Court applied *rational basis* review and found the state's justifications inadequate, including encouraging responsible procreation, optimal child-rearing, and the impact on the institution of marriage

Oregon

Same sex marriage has been legally recognized in Oregon since May 19, 2014, when a federal district court judge ruled in Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. OR. 2014), that Oregon's 2004 state constitutional amendment banning such marriages discriminated on the basis of sexual orientation in violation of the Equal Protection Clause of the Federal Constitution.

Pennsylvania

In Whitewood v. Wolf, 992 F. Supp. 410 (D. MD. 2014), *o*n May 20, 2014, a Federal District Court Judge ruled in that Pennsylvania's same-sex marriage ban is unconstitutional. The Governor announced afterward that he would not appeal the Court's decision, effectively making Pennsylvania the 19th state to recognize same-sex marriage.

South Carolina

Before the ruling in the 2014 of the Fourth Circuit Court of Appeals in Bostic v. Schaefer, 760 F. 3d 352 (4th Cir. 2014), which found Virginia's ban on same-sex marriage unconstitutional, Bradacs v. Haley, 58 F. Supp. 3d 514 (S.C. 2014), challenged the state statute and constitutional amendment that deny legal recognition to same-sex marriages established in other jurisdictions in the U.S District of South Carolina. Bostic was resolved quickly thereafter in favor of same-sex marriage on October 6, 2014, with the decision by the Supreme Court of the

United States not to hear an appeal, thus leaving Bostic as binding precedent in federal courts in South Carolina.

Utah

A federal district court for Utah ruled in the case of Kitchen, which found that barring same-sex couples from marriage violated the U.S Constitution. The issuance of those licenses was halted during the period of January 6, 2014 until October 6, 2014, following the resolution of a lawsuit challenging the state's ban on same-sex marriage. On that day, following the U.S Supreme Court's refusal to hear an appeal in a case that found Utah's ban on same-sex marriage unconstitutional, the Tenth Circuit Court of Appeals ordered the state to recognize same-sex marriage.

Virginia

On February 13, 2014, in Bostic, a federal district court judge ruled that Virginia's statutory and constitutional ban on same-sex marriage is unconstitutional. The Fourth Circuit Court of Appeals struck down Virginia's ban on same-sex marriage. The U.S. Supreme Court stayed of enforcement of the ruling.

West Virginia

On February 13, 2014, in Bostic, a federal district court ruled that Virginia's statutory and constitutional ban on same-sex marriage is unconstitutional. The Fourth Circuit Court of Appeals ruled in favor of striking down Virginia's ban on same-sex marriage. The U.S. Supreme Court

stayed of enforcement of the ruling. This ruling is binding on all states in the Fourth Circuit, including West Virginia.

Wisconsin

A U.S. District Court, in Wolf v. Walker, 986 F. Supp. 2d 982 (D. Wis. 2014), ruled on June 6, 2014, that the state's constitutional and legislative restrictions on same sex marriage interfere with the fundamental right to marry, violating the Due Process Clause of the U.S. Constitution and discriminate on the basis of sexual orientation, violating the Equal Protection Clause. The state appealed the decision to the Seventh Circuit Court of Appeals, which combined the case for briefing and oral argument with the similar Indiana case Baskin unanimous upheld the district court decisions.

Wyoming

On October 7, 2014, the U.S. Supreme Court declined an appeal from Guzzo v. Mead, 386 F. 3d 674 (10th Cir. 2014), from the Tenth Circuit Court of Appeals that invalidated state bans on same-sex marriage in Wyoming and states under the aegis of the Tenth Circuit.

Methodology

During my broad-sweeping examination of the caselaw history of same-sex marriage in the United States, using Westlaw (a proprietary legal database that is this nation’s most comprehensive), I found a collection of fifty cases in different jurisdictions and courts. From these fifty cases, it was critical to reconnoiter all relevant precedential cases, which invalidated bans on same-sex marriage, thus yielding thirty-seven states. Of these, the vast majority of cases involved both the federal district and federal appellate courts. These federal cases all follow a

distinct, nearly identical formula of equal protection and due process analysis yielding little variation. Thus, at the begin of this project the state level was more interesting and varied, in terms of constitutional provisions available to challenge these same-sex marriage proscriptions.

Approximately fifty same-sex marriage cases were surveyed in relation to this project, that began one year ago. Of those fifty, thirty-seven of the cases invalidated bans of same-sex marriage before Obergefell was rendered in 2015. Of those thirty-seven, only eight cases legalized same sex marriage via their state supreme courts.

Ultimately, the motivating factor in picking Vermont, California, and Connecticut and Washington was each of these states had a challenge to a state constitutional provision. With these states came an additional point A clear variation of judicial review and in-turn, different levels of scrutiny. California demonstrates a clear example of strict scrutiny, while Connecticut illustrates intermediate scrutiny. Washington used a rational basis test. While the Vermont Supreme Court holding in Baker was a novel case with similarities to the federal government and the standard of review used by the federal judiciary, implementing its own intermediate scrutiny. This provides the reader with a sensibility of how a state appellate court can reach a conclusion without employing conventional federal standards.

In total, over 120 legal decisions were critically scrutinized and ultimately included in this paper, although more than 250 appellate decisions were considered.