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THE TWENTY-FIVE-YEAR STRUGGLE FOR MARRIAGE EQUALITY: WHAT IMPACT DOES THE SEVENTH CIRCUIT’S JURISPRUDENCE HAVE ON LGBT CIVIL LIBERTIES?

ELLY DRAKE*


INTRODUCTION

On June 28, 1969, police raided the Stonewall Inn1, a gay bar in New York’s Greenwich Village, sparking riots that are widely seen as giving birth to the modern gay rights movement.2 But the gay rights movement did not immediately take root within the law or the courts.

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1 With very few public gathering places for gays and lesbians at the time, the unwarranted police riots showcased the dislike, hate, and negative sentiments towards gays and lesbians. The riots proved the need for activism, for mutual coexistence, and for the fight to eradicate homophobia.

The 1970s were filled with unsuccessful same-sex marriage cases,\(^3\) despite the fact that in 1967 the Supreme Court, in *Loving v. Virginia*, redefined marriage as an important individual right by striking down the ban on interracial marriage.\(^4\) In *Loving*, the Court held that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”\(^5\) and described marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\(^6\) However, for more than thirty-five years after *Loving*, not a single state permitted partners of the same-sex to exercise the “vital personal right” and “basic civil right” to marry until 2003.\(^7\)

The issue of whether to allow same-sex marriage has many different facets and has created a very important cultural debate throughout the country.\(^8\) Public opinion has been shaped by two polarizing views.\(^9\) One view sees what some state courts have done in striking down same-sex marriage bans as correcting yet another vestige of entrenched discrimination against a politically unpopular and relatively powerless group in society.\(^10\) Yet, the opposing view

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\(^5\) *Id.*


\(^7\) *Id.* at 39; see Baehr v. Lewin, 74 Haw. 530 (1993). The Supreme Court of Hawaii struck down same-sex marriage bans because they discriminate against individuals on the basis of their sex. Unfortunately, through voter initiative, same-sex marriages were subsequently banned.


\(^9\) *Id.* at 783.

\(^10\) *Id.* (citing Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004)).
finds such bans necessary to defend marriage as a relationship between one man and one woman from a pernicious and immoral attack from outside the institution.\textsuperscript{11} For these individuals, marriage is a religious institution that informs their notions of family and intimacy.\textsuperscript{12} With contrasting perspectives on marriage, it has been difficult to recognize same-sex marriage.\textsuperscript{13} For years, the courts had fallen into step with the cultural and social expectations of the American public, and had upheld these normative perspectives on marriage.

Questions of the permissibility, legality, and the constitutionality of same-sex marriage is still being determined today in this country, and only recently has the jurisprudence on the topic begun taking note of its inadequacy. In the last fifteen years, courts and legislatures have responded more actively to the challenges, but the results have been inconsistent. Same-sex marriage has been permitted, overturned, and flat out banned across the country. Needless to say, the path to same-sex marriage has been long, rocky, and neither easy nor inevitable.\textsuperscript{14}

Since the United States Supreme Court, in \textit{United States v. Windsor}, struck down the core provision of the Defense of Marriage Act (DOMA) on June 26, 2013\textsuperscript{15} it has become clear that there has been a significant shift in the acceptance of same-sex marriage across the nation. To date, there have been sixty-five same-sex marriage victories across the country.\textsuperscript{16} Of the twelve federal circuits, the Tenth, Fourth, Ninth, and Seventh Circuits have affirmed district court

\textsuperscript{11} \textit{Id.} at 784.
\textsuperscript{12} \textit{Id.} (citing Michael Massing, \textit{Bishop Lee's Choice}, N.Y. TIMES, Jan. 4, 2004, § 6, at 34 ((discussing the uproar within the Episcopal Church over the decision to confirm as bishop an openly gay man, who is in a committed same-sex relationship))).
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} Gulino, \textit{supra} note 8, at 38.
\textsuperscript{15} 28 U.S.C. § 7 (1996). Section 3 of DOMA defined marriage as between one man and one woman.
decisions in favor of successful challenges against state constitutional amendments or statutes barring recognition of same-sex marriage. Winning arguments against same-sex marriage bans have successfully argued that the bans violate the federal constitutional guarantees of Equal Protection and Due Process, or both.\footnote{Richard Roane, et al., \textit{Marriage Equality Update}, 27 J. AM. ACAD. MATRIM. LAW 123, 130 (2014).} Despite these successes, the Sixth Circuit recently upheld the constitutionality of same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee, causing a circuit split.\footnote{Freedom to Marry, \textit{supra} note 19.} As of the date of publication\footnote{June 23, 2015.} there are thirteen states in the United States, including Puerto Rico, that have not recognized same-sex marriage.\footnote{Freedom to Marry, \textit{supra} note 19.}

On September 4, 2014, in the consolidated federal district cases of \textit{Wolf v. Walker} and \textit{Baskin v. Bogan}, the United States Court of Appeals for the Seventh Circuit weighed in on the constitutionality of same-sex marriage bans and the failure to recognize valid, out-of-state same-sex marriages.\footnote{Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).} In a scathing, unanimous opinion from Judge Richard Posner, the court struck down discriminatory same-sex marriage bans in Indiana and Wisconsin.\footnote{\textit{Id.} at 672.} The court found that “the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; [but] . . . totally implausible.”\footnote{\textit{Id.}}

This Comment analyzes the legal rationale for the Court’s decision. Given the Seventh Circuit’s decision, it signals that the nation is ready for marriage equality for gays and lesbians. While the Seventh Circuit’s decision achieves marriage equality, it also is the first step in shaping the arena for additional legal battles over what legal status sexual orientation should have in constitutional law and whether the fundamental right to marry should be available to all.
The deferential rational basis standard of constitutional review that the Seventh Circuit used does not explicitly set forth sexual orientation as a protected status deserving of strict or heightened scrutiny under the equal protection guarantees. This failure stunts the development of increased protections for LGBT individuals in these future challenges because rational basis review is highly deferential to the state, as long as the state has any rational reason for the discriminatory statute. On the other hand, despite the reliance on rational basis review, Judge Posner’s detailed analysis of a framework using heightened scrutiny leaves the door open for expansion in this area of law. In effect, proponents can use the decision to argue for a broader interpretation of what constitutional standard applies, just as proponents have done with the elusive Windsor case.

Further, the Seventh Circuit completely dismissed an analysis of whether the right to marry is a fundamental right protected by the due process prong of the Fourteenth Amendment. The Seventh Circuit found it irrelevant, or a conversation for another time. This is most likely due to the fact that the implications of creating fundamental rights are heavier than retroactively deciding that statutes are discriminatory or contrary to public policy, as they would be determined, using equal protection principles. As will be seen infra\(^\text{24}\), the development of whether marriage is a fundamental right has effectively been halted.

Lastly, the Seventh Circuit determined that the sex discrimination argument in the context of same-sex marriage is untenable. The legal basis and justifications for these decisions are fully analyzed infra\(^\text{25}\) along with the ramifications on the development of LGBT civil liberties.

One thing is clear, that without expanding protections to include sexual orientation as a suspect or quasi-suspect class, the right to marry as a fundamental right equally applicable to all, or even, sex discrimination to apply in cases challenging statutes against gays and lesbians, the law leaves large loopholes for discrimination in the future.

\(^{24}\) See discussion in this Comment in Section II, A.

\(^{25}\) See discussion in this Comment in Section V.C.
against the LGBT community. Take for example the most recent dispute brewing within the Seventh Circuit—in Indiana. After the Seventh Circuit struck down marriage bans, disagreements between religious advocates and LGBT civil activists have grown. The groups are fighting over questions of whether stronger protections for the free exercise of religion could have an effect on eradicating or extinguishing some of the recent gains in protections for the LGBT community. For reasons more fully explored infra, these disagreements highlight the balancing that courts will have to do when resolving conflicts between constitutionally protected religious expression deserving of strict scrutiny and the burgeoning constitutional protections for the LGBT community, primary protection under the guise of “heightened” scrutiny for sexual orientation discrimination.

In summation, the Comment explores the development of the law from the day the police officers stormed into Stonewall Inn, to the most recent implications of the Seventh Circuit’s holding in Baskin v. Bogan. The first part of the Comment gives a comprehensive analysis of the right to marry as a constitutionally protected liberty and privacy right under the Fourteenth Amendment. Then, the Comment connects these legal principles with the developed case law over the last twenty-five years. The Comment offers the same analysis considering the equal protection arguments, what they are, and how they have developed in the law. The third part will interpret the recent same-sex marriage case as it rose up from the Indiana and Wisconsin District Courts to the United States Circuit Court of Appeals for the Seventh Circuit and its legal ramifications and impact on future developments for LGBT civil rights. Lastly, the Comment concludes with an optimistic view of the future development of LGBT civil rights, but leaves the reader with a stern warning of the work that remains ahead.

\[26\] See the Conclusion in this Comment.
I. WHAT IS MARRIAGE?

A. Societal and Normative Perspectives

“[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution and the decision whether and who to marry is among life’s momentous acts of self-definition.”

Legally speaking, the justifications for marriage have always centered on the “preservation of property, rearing of children,” and “financial stability.”

Marriage affords its participants certain civil privileges and a status rich in entitlements that, generally speaking, are not afforded to individuals who remain outside the institution. Irrespective of these important civil privileges individuals tend to enter the institution of marriage as a reflection of the partners’ mutual love, in spite of the legal benefits.

Outside of its legal purpose and meaning, marriage can be conceived as a practice where the individual participants engage in an obviously complex form of socially cooperative human activities where the aim is to make possible for both spouses, opportunities to enhance each other, their mutual benefits and psychological well being.

This occurs through the joint cooperation married partners put towards achieving certain family, economic, or social goals—like

29 Id.
whether to raise children, what employment opportunities to pursue, and how to aid each other's efforts to achieve individual goals.  

Further, when partners enter into marriage, the relationship creates both intimacy and identity for the partners. Partners assume a new ontological identity. They see themselves as “us” rather than “me,” just as they see property as “ours” rather than “mine.” For partners, it creates a collective unit operating for their mutual benefit, and it binds them to the shared larger institution of marriage, where other married partners also belong.

Because of what results from this special marital relationship, “the institution of marriage has the effect of enhancing each partner’s . . . individual freedom in the ultimate pursuit of happiness and liberty.” In a sense, the “marital relationship becomes more than just . . . rights and benefits . . . for the relationship itself is . . . an end of worthy pursuit.” It creates a sense of permanency by embodying a socially recognized set of commitments and a public attestation to the significance of these commitments. The partners affirm their mutual commitment to benefit each other, and “the public, in turn, see[s] that act as a positive good . . . which was not entered into lightly.” That is the intangible social meaning of marriage generally makes the “value of a committed partner . . . incalculable.”

The marital relationship is a publicly recognized expression of mutual love and is an integral part of each individual’s dignity and

32 Id. at 353.
33 Id. at 344.
34 Id. at 344.
35 Id. at 345.
36 Samar, supra note 28, at 792.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id. (citing William Eskridge, The Case For Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 74 (1996)(discussing the value of committed partnerships when one partner has AIDS)).
self-worth.\textsuperscript{42} Marriage means providing for each other in a sense that each is not alone in confronting life’s joys and difficulties on an ongoing, semi-permanent basis.\textsuperscript{43}

Marriage, from this perspective, is a unique human right fulfilling a significant route to human self-fulfillment by allowing the parties to a marriage to achieve an identity that significantly adds to their own individual human dignity.\textsuperscript{44} Thus, to not recognize that right, even in the context of same-sex couples, is to deny an important avenue of human self-fulfillment that is a foundation of human rights in general.\textsuperscript{45}

Society tends to agree, and the law tends to support, that marriage is a positive good to the individuals who participate in it.\textsuperscript{46} “If the marital relationship bestows so many benefits not only to society, but to individuals, then the denial of the right to legally marry a same-sex partner, represents a detriment to all those who would be served by marriage but because of their sexual orientation, over which they have no choice, and law . . . cannot participate.”\textsuperscript{47}

\textbf{B. Legal Marriage—What Type of Right?}

Marriage has historically been an institution recognized and regulated at the state level.\textsuperscript{48} States have generally regulated marriage as a way to protect the public interest, protect the nuclear family and ensure that children are not wardens of the state.

For this reason, the development of same-sex marriage jurisprudence first took root at the state level, starting with the 1993

\textsuperscript{42} Samar, \textit{supra} note 29 at 353.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id. at 347.} Human rights like liberty, privacy, freedom of association, pursuit of happiness, etc.
\textsuperscript{46} \textit{Id. at 355.}
\textsuperscript{47} \textit{Id.}
case of \textit{Baehr v. Lewin} in Hawaii. There, the court held that same-sex marriage bans constituted sex discrimination under the law.\footnote{Baehr v. Lewin, 74 Haw. 530, 530 (1993). Supreme Court of Hawaii held that denying marriage licenses to same-sex couples was sex discrimination under the state constitution. Before the law could change, voters amended the constitution to permit the legislature to limit marriage to opposite-sex couples only.} But \textit{Baehr} created controversy as opposition to same-sex marriage rose, and through legislative acts and a ballot initiative, same-sex marriage was banned yet again. At the same time, Congress enacted the Defense of Marriage Act, or better known as, DOMA.\footnote{28 U.S.C. § 7 (1996).} These events lead thirty states to amend their constitutions to create “mini-Domas” in order to prohibit same-sex marriage and the recognition of such marriages.\footnote{Freedom to Marry, \textit{supra} note 19.} From this point on, the case law is replete with state courts and legislatures grappling with whether to extend marital rights to same-sex couples and under what legal theory to recognize such a right.\footnote{\textit{Id}.}

However, marriage has also been understood to implicate rights and freedoms enshrined at the federal level in the United States Constitution.\footnote{U.S. v. Windsor, 133 S. Ct. 2675, 2719 (2006).} Hence, proponents of same-sex marriage have crafted legal arguments claiming primarily that prohibitions on same-sex marriage violate protected constitutional due process, privacy, and equal protection guarantees under the Fourteenth Amendment.\footnote{Reinheimer, \textit{supra} note 45, at 216.}

The Fourteenth Amendment of the United States Constitution guarantees that no state shall “deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\footnote{U.S. CONST. amend. XIV § 1.} The concepts of “due process” and “equal protection guarantees” are two separate constitutional protections afforded by the Fourteenth Amendment.\footnote{\textit{Id}.}

These constitutional provisions are applicable at the state level through
the Fifth Amendment.\textsuperscript{57} Due process references the first clause and equal protection references the second clause of the Fourteenth Amendment. Due process is intended to safeguard certain critical or fundamental rights for everyone, while equal protection shields a particular set of social groups from discrimination.\textsuperscript{58} Put more succinctly, due process protects the “whats” and equal protection the “whos.”\textsuperscript{59}

In the context of same-sex marriage litigation, proponents of marriage equality set forth due process arguments alleging that there is a constitutionally protected, fundamental right to marry the person of one’s choosing, regardless of the sex of that person. The argument seeks to include same-sex marriage in an inviolable sphere of safety in which everyone can make choices about their lives and identities without state intrusion, punishment, or constraint.\textsuperscript{60} Equal protection challenges, on the other hand, object to the sex-based classifications employed by same-sex marriage prohibitions, i.e., men cannot marry men because they are men, and women cannot marry women because they are women.\textsuperscript{61} A second equal protection argument alleges that the same-sex marriage bans discriminate on the basis of one’s sexual orientation, specifically targeting gays and lesbians because of their sexual preferences.\textsuperscript{62}

Despite the constitutional protections afforded to fundamental rights or protected groups, these protections can be restricted or limited in scope by the state because at times an individual’s constitutionally protected rights might come in direct conflict with the state’s interest in protecting the public interest. For example, the state is tasked with ensuring safety and education, protecting offspring and

\textsuperscript{57} U.S. CONST. amend. X.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
property rights, and the enforcement of marital responsibilities.\(^{63}\) Since the state has these interests, the state is authorized to pass legislation or laws in order to regulate these and various areas, but occasionally, questions arise on whether the state has overstepped its bounds and has infringed too much upon the constitutionally protected rights of a group or individual. In those cases, the courts are called upon to determine whether a statute or law as construed and applied, constitutes proper exercise of police power or whether it has unconstitutionally violated one of the liberty rights protected by the Fourteenth Amendment.\(^{64}\) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action that is arbitrary or without reasonable relation to some purpose within competency of the state to effect.\(^{65}\)

Therefore, depending on the right at stake, or the group of individuals it affects, the judiciary will apply a corresponding level of constitutional scrutiny to determine if a statute has gone too far. The three traditional tiers of constitutional scrutiny include: strict scrutiny, intermediate or heightened scrutiny, and rational basis review.\(^{66}\) Strict scrutiny is applied to any deprivation of constitutional rights, including fundamental rights, and classifications based on race, alienage, or national origin.\(^{67}\) This requires the law in question to be “narrowly tailored to further a compelling governmental interest.”\(^{68}\) Under intermediate scrutiny, applicable to classifications based on sex or being born out-of-wedlock, the challenged law must be “substantially related to an important government purpose.”\(^{69}\) Both strict and intermediate scrutiny require the government or state to defend the law

\(^{63}\) Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923).
\(^{64}\) Id. at 626.
\(^{65}\) Id.
\(^{66}\) Bartschi, supra note 2, at 477.
\(^{67}\) Id.
\(^{68}\) Id. (citing Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013)).
\(^{69}\) Id. (citing City of Cleburne Tex. v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985)).
and forces the state to limit the law’s reach to the actual justifications for why the law was enacted.\(^\text{70}\)

With traditional rational basis review, the most deferential standard to the state, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”\(^\text{71}\) The state need not articulate its reasons or provide empirical evidence, leaving the challengers with the burden “to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.”\(^\text{72}\)

Therefore, the framing of the legal issue is integral to how much power the state has in issuing same-sex marriage bans and the probability of marriage equality proponents of achieving a favorable decision. If one is to assume that same-sex marriage bans do not infringe upon any constitutionally protected rights or discriminate against any protected group of people, then the state only has to provide a rational reason for why same-sex marriage is banned—\(i.e.,\) the preservation of traditional marriage. On the contrary, if same-sex marriage bans are believed to infringe upon constitutionally protected rights or a protected class, then the justification for the state’s same-sex marriage ban has to meet a tougher constitutional standard of review. Under heightened or strict scrutiny same-sex marriage bans must further an important state interest by means that are substantially related to that interest or that same-sex marriage bans must serve a compelling state interest and the bans are narrowly tailored in achieving that stated goal under strict scrutiny.

\(^{70}\) Id. (citing United States v. Virginia, 518 U.S. 515, 533 (1996)) (“The burden of justification is demanding and it rests entirely on the State . . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation.”)

\(^{71}\) Id. (citing City of Cleburne Tex., 473 U.S. at 440).

\(^{72}\) Id. (citing Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001)).
II. The Development of the Law Surrounding Same-Sex Marriage Litigation

A. Marriage as a Fundamental Right

To reiterate, the Due Process Clause of the Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty, or property without the due process of law.” At first glance, “life, liberty and property” seem like concrete ideas. Delving a little deeper, it becomes apparent that they are rather abstract concepts. Take for example, “liberty”. Other than its plain, literal meaning of freedom from physical restraint, the law had to develop and define “liberty”. Liberty as a definable right first began to take shape in scholarly writing and through the judicial process. As courts began defining liberty, they began to understand that liberty encompasses necessary fundamental rights that must be constitutionally protected, but with this declaration a second question arises, “what rights are fundamental?” or “what makes a right fundamental?”

Adding to the discussion, courts determined, that the purpose of the Due Process Clause is to “protect[] those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty . . . .” Because such rights are so important, “an individual's fundamental rights may not be submitted to vote.” In simpler terms, the Due Process Clause provides substantial protections to the individual from state intervention and infringement on those rights perceived to be inalienable or integral to fairness, justice, and liberty.

As abstract as the concept of liberty is, a list of enumerated fundamental rights is just as elusive from the Constitution. But how did the courts determine what rights should rise to the level of a fundamental right? In order to answer that question, the courts first sought to understand what is implicit in liberty and how do you

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73 U.S. CONST. amend. XIV, § 1.
achieve or protect it? To that end, courts have answered that in order for man to have liberty, as a necessary corollary, he also must have privacy. The conceptualization that liberty is intrinsically tied to the right of privacy is a very important realization for the development of fundamental rights, especially in the context of same-sex marriage.

Already strongly rooted in the Fourth Amendment and in tort law, privacy as a unique fundamental right was finally articulated by the Supreme Court in 1965 in the case of Griswold v. Connecticut. Thus, liberty embraces a fundamental right to privacy. This privacy right is “without government intrusion or intervention without adequate purpose,” and includes a “right to personal privacy, or a guarantee of certain areas or zones of privacy.” Courts have articulated what these zones of privacy are and has thus extended constitutional protections to the following fundamental rights: personal decisions relating to marriage, procreation, contraception, familial relationships, child rearing, and education.

In 2003, the United States Supreme Court took a large leap, in Lawrence v. Texas, in determining that private consensual sexual conduct is also a protected liberty interest of the due process clause of the Fourteenth Amendment.

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76 U.S. CONST. amend. XIV.
79 Privacy entails freedom to protect your person, information, and place from unreasonable searches and seizures by the government while also providing protection from governmental intrusion in one’s personal affairs. Taken together, a conceptualization is created that liberty is intrinsically tied to the right to privacy in that an individual is free to control his personal realm free from governmental intrusion and scrutiny.
80 Griswold, 381 U.S. at 483.
83 Id.
1) The Legal Framework of a Fundamental Right to Marry

A cursory glance at American case law will show that most lower courts can hardly dispute that the right to marry is a fundamental right—countless courts have explicitly found it. The Supreme Court has referenced such a right fourteen times in its decisions over the years, and yet the highest court of the nation has failed to explicitly articulate the right to marry as a fundamental right.

The landmark case that frames the analysis of privacy and marriage as a fundamental right is *Loving v. Virginia*. There the Supreme Court held that Virginia’s ban on interracial marriage violated Richard and Mildred’s rights under the Due Process Clause. The *Loving* Court stated that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” and further recognized that, “marriage is one of the ‘basic civil rights of man.’” Had the Supreme Court relied on the traditions of the 1960s, the Court would not have recognized that there was a fundamental right for Mildred and Richard Loving to be married because the nation’s history was replete with statutes banning interracial marriages between Caucasians and African Americans.

Using the same logic, Judge Richard Posner, in *Baskin v. Bogan*, dismissed the defendants’ arguments that the traditional conception of marriage never anticipated same-sex marriage. Judge Posner pointed out that allowing tradition to define the confines of the law would have never allowed a decision like *Loving* to be made. In effect, following tradition would have continued our history of invidious discrimination by allowing a statute to promulgate white

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86 Loving v. Virginia, 388 U.S. 1, 12 (1967).
87 Id.
supremacy. 88 In the eyes of Judge Posner, tradition cannot be a legitimate argument for why same-sex marriages should be banned. 89 Since marriage “[is] the most important relation in life,” one can infer from the Loving Court that as a corollary the right to marry necessarily entails the right to marry the person of one’s choice. 90

Unfortunately, the law did not naturally evolve in this manner, and it was years before courts would consider the Loving holding, as Judge Posner did in Baskin v. Bogan, in cases of same-sex marriage. The explanation rests in part with the reluctance of the Court in creating new fundamental rights. Once a fundamental right is created, that right cannot be denied to particular groups on grounds that those groups have been historically denied that rights. 91 Further, the Supreme Court has consistently refused to narrow the scope of fundamental rights once articulated, and in this case, the Court has never framed the right to marry as a more limited right centered on the characteristics of the couple seeking marriage. For example, the Court consistently describes a general “right to marry” rather than “‘the right to interracial marriage,’ ‘the right to inmate marriage’ or the ‘right of people owing child support to marry.’” 92 The Court has also not specified the fundamental right to same-sex marriage. Although the Court has referenced the fundamental right to marry many times, it has never explicitly qualified whom, specifically or generally, is entitled to the right; the question of whether the fundamental right to marry applies to same-sex couples is still an unanswered question.

Under the guidance of the Supreme Court, the development of fundamental rights is typically a slow progression, and the Court will attempt to frame legal issues as narrowly as possible to halt any decision-making that seems to be too much like “legislating from the

88 Id. at 11-12.
89 Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir. 2014).
90 Id.
91 In re Marriage Cases, 183 P.3d 384, 430 (2008), superseded by constitutional amendment U.S. CONST. amend.
92 Henry v. Himes, 14 F. Supp. 3d 1036, 1046 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
For example, in *Bowers v. Hardwick* in 1986, the Court framed the legal issue as “whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .” The Court, not surprisingly, found that no such fundamental right existed.

Despite all precedent that might have suggested to the contrary, the *Bowers* Court refused to find constitutional privacy protection for two consenting adults engaging in same-sex sodomy in the home. This case confronts us with the fact that the categories in which legal cases fall into are as much a product of political philosophy as they are about principles and the rules. The irony of *Bowers* lies in the fact that the 1970’s marked a significant period in the jurisprudence of the law, where the Supreme Court expanded the categories of rights that intrinsically fall under the fundamental right of privacy. Cases such as *Eisenstadt v. Baird*, *Carey v. Population Services International*, *Roe v. Wade*, as a whole, laid out the predicate for protection of non-procreative sex among unmarried persons. Following its own precedent, the Supreme Court in *Bowers* should have found that prohibitory sodomy laws violate the constitution because they infringe on the privacy of adults to make decisions about their sexual relationships in their own homes without governmental prosecution. The *Bowers* court should have framed the question as

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95 *Id.*
97 *Id.* at 89.
98 *Id.* at 94.
102 Samar, *supra* note 93, at 96.
whether consensual, sexual acts between adults, whether same-gender or opposite-gender, are protected as a fundamental right rooted in privacy—not the more narrow question of whether homosexual sodomy is a fundamental right.

Sixteen years later, in 2003, the Court finally overruled itself in Lawrence v. Texas.\textsuperscript{103} There the Court found that its narrow reading of the legal issue in Bowers “disclosed the Court from appreciating the extent of the liberty issue at stake.”\textsuperscript{104} Moreover, the Court found that the law prohibiting sodomy violated plaintiff’s due process rights to engage in consensual sexual conduct and intruded into “the personal and private life of the individual.”\textsuperscript{105} The Court interpreted the “privacy” prong of the Due Process Clause to protect individuals from government intrusion into a dwelling or private place and that sodomy statutes “touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”\textsuperscript{106}

In the majority opinion of Lawrence, Justice Anthony Kennedy took care to distinguish between the ability of the state, consistent with the Constitution, to criminalize same-gender sexual conduct and the obligation of the state to recognize same-sex relationships.\textsuperscript{107} Although Justice Sandra Day O’Connor joined in her concurring opinion that the Lawrence case does not imply the legitimacy of same-sex relationships, Justice Antonin Scalia argued the opposite.\textsuperscript{108} Justice Scalia warned that once the Court prohibited the state from criminalizing same-gender sexual conduct, the next “logical conclusion” is that the state should also be prohibited from barring same-sex marriage.\textsuperscript{109} This warning from Justice Scalia is what

\textsuperscript{103} Lawrence v. Texas, 539 U.S. 558, 567 (2003).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 578.
\textsuperscript{107} Id. at 1184.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
influenced the Court in the earlier *Bowers* decision. Fearing that the Court would tread into uncharted waters by more broadly defining the fundamental right invoked in *Bowers*, the Court narrowly defined the legal issue and avoided the discussion entirely. The Court felt that it was not its job to change the law based on societal views on same-sex relations at that time.

Regardless of what the Court said it was and was not doing in *Lawrence*, the end result was that in striking down Texas’s anti-sodomy statute, it concluded that lesbians and gay men have liberty interests rooted in privacy. This liberty interest in privacy extends from making decisions regarding one’s sexual conduct in one’s personal relationships to having the state respect their dignity and their lives in those choices.\(^{110}\) The right to liberty under the Due Process Clause gives them the full right to engage in sexual conduct without intervention from the government.\(^{111}\)

This holding leads to the conclusion that even if the *Lawrence* Court is not endorsing same-sex relationships as valid, the mere fact that the Court outright prohibits the state from criminalizing same-gender sexual relations allows for an inference that the ability to refuse to recognize same-gender relationships, that often accompany same-gender sexual relations, becomes harder to do.\(^{112}\)

Hence, the first necessary step was taken in order to firmly change the legal and political discourse across the nation. *Lawrence* was the first case to bring sexual orientation to the forefront and removed a major obstacle from the development of sexual orientation-based equal protection law. As such, many of the lower courts used this rationale to strike down sodomy laws and over time, allow for same-sex marriage in their states.

While many courts took advantage of the power within the *Lawrence* decision, many grappled with how to apply it because the Court had failed to clearly define a standard, test, or rule. Although the *Lawrence* Court explored the substantive due process prong at length,

\(^{110}\) *Id.* at 1207-08.

\(^{111}\) *Id.* at 1210-11.

\(^{112}\) *Id.* at 1185-86.
while evoking theories of liberty and privacy as fundamental rights, the Court never clearly articulated whether the liberty interest at stake was fundamental, requiring strict scrutiny, or whether sexual orientation is a protected status under equal protection grounds.

Using rational basis as the standard of review, the Court was able to justify that prohibitory sodomy laws were unconstitutional because they infringed on privacy and liberty, but they did it without carving new law or naming and identifying a new fundamental right. To further complicate matters, Justice O’Connor’s concurrence disagreed with the majority’s invocation of the due process clause of liberty. Justice O’Connor found that the sodomy statute was unconstitutional not because it violated the right to privacy, but because it violated equal protection in that it discriminated against male to male sodomy but permitted male to female sodomy. 113 The Court also did not raise the issue of whether sexual orientation is a suspect class subject to a higher standard of review than the simple, deferential rational basis standard.

Even though Lawrence is heralded as the first pro-gay civil rights case, since that time, there has been no definitive statement on whether same-sex marriage is encompassed in the meaning of a fundamental right to marry. 114 While not dispositive, advocates will have additional work to persuade the Supreme Court and the many state and federal courts to see same-sex marriage bans as violating the fundamental right to marry. 115 The Seventh Circuit, discussed infra 116, chose not even address the issue in Baskin v. Bogan.

B) Marriage and the Equal Protection Clause

In addition to the substantive due process argument—that marriage is a fundamental right—there are two more legal arguments

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114 Bartschi, supra note 2, at 447.
115 Id. (citing Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014) rev’d sub nom; DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014)).
116 Section V, Paragraph B, in this Comment.
challenging the constitutionality of same-sex marriage bans based on the equal protection prong of the Due Process Clause, namely, that excluding same-sex couples from marriage constitutes impermissible sex discrimination, and that sexual orientation is, or should be, a suspect or quasi-suspect class within the meaning of the Constitution.\textsuperscript{117}

The Equal Protection Clause requires that a law cannot “deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{118} To that effect, it was developed to avoid past practices that may turn out, in retrospect, to be unjust, and must therefore be corrected for the future. This means that courts use the equal protection guarantees “to invalidate practices that were widespread at the time but no longer applicable because they embody certain background prejudices that have a discriminating effect, even if not intentional.”\textsuperscript{119} The equal protection guarantee is more suited to protect novel rights for groups than the substantive due process doctrine because substantive due process protects values that are rooted in tradition, while equal protection law can protect against those same traditions.\textsuperscript{120}

By comparison, the Due Process Clause looks backward and considers whether an existing convention is violated by a current practice.\textsuperscript{121} However, equal protection looks forward, serving to invalidate practices that were widespread at the time of the law’s ratification but cannot justifiably be allowed to continue.\textsuperscript{122} Equal protection’s nature makes it more congenial to recognizing inequality where none was thought to exist before.\textsuperscript{123} “The two clauses there

\begin{footnotesize}
\footnotetext{117}{Id. at 478.} \footnotetext{118}{U.S. CONST. amend XIV.} \footnotetext{119}{Reinheimer, supra note 45, at 227.} \footnotetext{120}{Id. (citing Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161, 1163-74 (1988)).} \footnotetext{121}{Id. at 227-28.} \footnotetext{122}{Id. at 228.} \footnotetext{123}{Id.}
\end{footnotesize}
operate along different tracks . . . [the Equal Protection Clause] does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.”

For example, consider the bleak history of racism in the United States: the development of the equal protection guarantee played an integral role in turning around the deeply rooted practices and laws that had long served to categorize African Americans as separate from white Americans. Over time, the equal protection guarantees confronted racism and helped eradicate notions such as “separate but equal” and helped create substantial protections against race discrimination. For classifications made based on race, a protected group, strict scrutiny applies. Any classification based on sex or gender is considered quasi-suspect and subject to some form of heightened scrutiny. Further, the equal protection guarantees not only protects specific groups or individuals from laws that are plainly discriminatory on their face, but it also protects from seemingly neutral laws that have a disparate impact in the way they affect the protected group.

1. The Legal Framework of the Equal Protection Clause in Same-Sex Marriage

Despite the challenges facing arguments grounded in the substantive due process clause of the Fourteenth Amendment, state
level equal protection arguments have been a central part of every successful legal case for same-sex marriage.\textsuperscript{129} In fact, many of the district courts and the federal circuit courts have been striking down marriage bans on the basis of equal protection. For example, the Seventh Circuit in \textit{Baskin v. Bogan} relied on an equal protection argument. Further, many states have expanded constitutional protections to include not only race, sex, national origin, and religion, but have also added sexual orientation as well as gender identity as a protected class. Within the Seventh Circuit, both Illinois and Wisconsin have included sexual orientation as a protected class, while Indiana has not extended such protections.\textsuperscript{130} At the federal level, sexual orientation is not a protected class.

As mentioned above, typically two different arguments have been made against same-sex marriage bans as violating equal protection because they discriminate on the basis of sex and sexual orientation.

\textit{A. Sex-Discrimination}

The argument is that same-sex marriage bans are discriminatory because they discriminate against individuals on the basis of their sex—\textit{i.e.}, a man can only marry a woman because he is a man, and a woman can only marry a man because she is a woman. Although sex is presumed to be a protected status under the law, like race, national origin, religion, \textit{etc.}, any challenge to a statutory


provision classifying on the basis of sex does not receive strict scrutiny under the law. Supreme Court cases like *Craig v. Boren* and *United States v. Virginia* set forth the precedent that sex-based statutory classifications are deserving of only intermediate scrutiny, meaning that the challenged law must be “substantially related to an important governmental purpose.” Finding that there could be legitimate purposes for having sex-based classifications, the Court did not apply strict scrutiny. Yet the Court agreed that statutory classifications that distinguish between men and women imply that there is a discernable difference between the sexes’ capabilities, which have the effect of reinforcing sex-based stereotypes that have been used to disadvantage women over men.

Although the sex discrimination argument is so clearly right to its proponents, it turns out to be either wrong or unworthy of engagement in the view of the nearly every other judge to whom it has been presented. Sex discrimination tends to be a “risky argument” for striking marriage bans down, for both judges who reject same-sex couples’ claims as well as judges who favor marriage equality. Out of all the cases that have used a sex-discrimination argument for why same-sex marriage bans are unconstitutional, only six courts engaged in any analysis of it and only two accepted it.

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132 See *Craig*, 429 U.S. at 197. Different minimum drinking age for males and females.
133 See *United States v. Virginia*, 518 U.S. 515 (1996). The availability of a separate military academy for women was an inadequate substitute for the fact that women were barred from being admitted into an all-male military academy.
134 *Id.*
135 See *Craig*, 429 U.S. at 197.
138 *Id.*
139 *Id.* at 2111-12.
Courts have rejected the argument following two basic lines of reasoning. First, many dismiss the argument on the grounds that same-sex marriage bans apply equally to both men and women. Second, many reject the stereotyping theory on the ground that exclusion of same-sex couples from marriage was not intended to perpetuate sex stereotypes or the subordination of women to men. The courts have found that sex discrimination is distinguishable from other types of discrimination.\textsuperscript{140} For example, the “equal application”\textsuperscript{141} anti-miscegenation law in \textit{Loving} was “designed to maintain White Supremacy.”\textsuperscript{142} Courts argue, “sex discrimination is not the kind of sham equality that the Supreme Court confronted in \textit{Loving}.”\textsuperscript{143} Arguably, the \textit{Loving} Court stressed equal application of a law and not the equality of the law. In order to better understand the sex discrimination argument, consider the following example:

“Dr. A and Dr. B both want to marry Ms. C. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite-sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. That is sex discrimination.”\textsuperscript{144}

But courts argue that even if the same-sex marriage bans are discriminatory, they are not discriminatory because of sexism, but rather, because of homophobia.\textsuperscript{145} Therefore, the sex discrimination argument does not receive enough traction because the discrimination

\begin{itemize}
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} According to defendants in \textit{Loving}, whites were not allowed to marry blacks, and blacks were not allowed to marry whites, therefore, the law was equally applied against both races.
\item \textsuperscript{142} \textit{Id.} (citing \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967)).
\item \textsuperscript{143} \textit{Id.} (citing to \textit{Hernandez v. Robles}, 7 N.Y. 3d 338, 380 (2006)) (Kaye, C.J., dissenting).
\item \textsuperscript{144} \textit{Id.} at 2106 (citing \textit{Baker v. State}, 744 A.2d 864, 906 (Vt. 1999)).
\item \textsuperscript{145} \textit{Id.} at 2119.
\end{itemize}
suffered by gays and lesbians has no connection to their sex but rather their sexual orientation.

To the contrary, it seems that same-sex bans perpetuate sex-stereotyping—a very important subset of sex discrimination. In restricting marriage to opposite-sex individuals, the state is presuming or insisting that men and women perform different roles within the marital relationship and that the different roles are rooted in their maleness and femaleness. 146 This idea objects to the notion that a man and woman can both fulfill the roles traditionally applied to the opposite-sex; for example, that women can be breadwinners and that men can be nurturers and caregivers.

The difficulty of these arguments could be that the law and our societal norms are not yet adequately developed to support these claims. From a doctrinal perspective, few cases have addressed sex stereotyping, and the circuits are split on its application. 147 Sex discrimination claims have typically been made in employment litigation arising under Title VII violations, typically challenging grooming, dress codes, and military distinctions, rather than equal protection grounds. 148 Courts overwhelming find that sex-based distinctions or “sex-based distinctions” could be necessary and therefore, sparingly used as a legal justification by courts to strike down discrimination. 149 Courts fear that expanding sex discrimination to encompass arguments against same-sex marriage bans could

146 Id. at 2100.


149 Id.
muddle the typical sex discrimination arguments. \(^{150}\) Therefore, questions regarding its applicability in same-sex marriage claims remain.\(^{151}\)

There are costs associated with sex discrimination being regarded as an untenable legal argument in favor of striking down same-sex marriages. For example, a successful sex discrimination precedent would further help dismantle the usual justifications of allowing same-sex marriage bans to stand for the “interests of the child in having a father and a mother” and in the state’s interest in privileging “natural or unintended procreation.”\(^{152}\) It would also have the effect of eroding stereotypes about what the roles are played by a father and a mother in the marital and parental relationship. Lastly, a recognition of sex-discrimination as a legitimate argument—deserving of strict scrutiny like race, national origin, religion, etc.—would make it understood that statutes treating straight and gay people differently could not pass for anything but invidious discrimination.\(^{153}\)

\textit{b. Sexual Orientation Discrimination}

Notwithstanding the discussion of sex discrimination \textit{infra}\(^{154}\), courts across the country have found it easier to frame the legal question of whether same-sex marriage bans are discriminatory on the basis of an individuals’ sexual orientation. Although excluding same-sex couples from marrying does not physically prevent gays and lesbians from marriage because they are free to marry members of the opposite-sex. Yet, courts have concluded that limiting marriage to opposite-sex couples prevents gays and lesbians from marrying a

\(^{150}\) \textit{id.} at 2126-27.
\(^{151}\) \textit{See id.}
\(^{152}\) \textit{id.} at 2126-27.
\(^{153}\) \textit{id.} at 2139.
\(^{154}\) \textit{See discussion} \textit{infra} Section II.B.1.A.
person of the gender to which they are attracted to and effectively targets and excludes them from marriage as a class.\textsuperscript{155}

Even in cases where courts held in favor of same-sex marriage bans, nonetheless courts acknowledged “the legislation does confer advantages on the basis of sexual preference. Those who prefer relationships with people of the opposite-sex and those who prefer relationships with people of the same-sex are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage.”\textsuperscript{156}

In 1996, after the \textit{Bowers} decision, the Supreme Court first considered sexual orientation as a status or special class within the context of the equal protection guarantee as violating the Fourteenth Amendment, by invalidating a law that discriminated because of the sexual orientation of gays and lesbians.\textsuperscript{157} \textit{Romer v. Evans} concerned an amendment to the Colorado Constitution that prohibited state and local government entities from taking any action to shield gays, lesbians, or bisexuals from discrimination.\textsuperscript{158}

The Court held that the amendment was unconstitutional because it abrogated the government’s power to protect a particular group from discrimination\textsuperscript{159} and that the amendment was so broad that it had no rational relation to Colorado’s stated goals,\textsuperscript{160} that a moral objection to the lifestyle of gays and lesbians was an insufficient

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\begin{itemize}
\item 155 Bartschi, \textit{supra} note 2, at 479 (citing \textit{In re Marriage Cases}, 183 P.3d 384, 451 (2008)).
\item 156 Hernandez v. Robles, 7 N.Y.3d 338, 362 (2006); see also Andersen v. King County, 158 Wash. 2d 1, 19 (2006). Court upheld marriage ban but found that the law discriminated against lesbians and gay men.
\item 157 Franklin, \textit{supra} note 53, at 857.
\item 158 \textit{Id.}
\item 159 \textit{Id.} at 858.
\item 160 Romer v. Evans, 517 U.S. 620, 653 (1996). In \textit{Romer}, the state argued that this amendment was necessary to “protect the physical and psychological well-being of . . . children”, by promoting “heterosexual marriage as the foundation of a stable family unit” and “to avert unnecessary suffering of . . . [young people] who may be influenced relative to their sexual preference’ if the government failed to sufficiently convey its disapprobation of homosexuality”.
\end{itemize}
\end{small}
reason to justify the law.\textsuperscript{161} The Court added, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\textsuperscript{162} Although the Court said it was using a rational basis review standard, Romer’s legal analysis perfectly fits in the heightened scrutiny rubric. For example, the Court found animus towards a historically targeted group because the state passed an amendment that specifically discriminated against gays and lesbians. Further, the Court found that the amendment was overly broad, and had the effect of erasing the group’s political power.\textsuperscript{163} Many call the Court’s “new” constitutional standard “rational basis with a bite.”\textsuperscript{164}

There are many parallel conclusions to be drawn between the similarities of Romer, decided in 1996, and Lawrence, decided in 2006.\textsuperscript{165} In both decisions the Court was clear in using explicit language that set forth a standard that in application it failed to use.\textsuperscript{166} It appears that the Court showed restraint in not explicitly setting forth sweeping precedent, but the legal rhetoric used in its analysis shows that the Court was articulating a stricter standard than rational basis.

Legal scholars argue that the meaning of Lawrence and Romer is read between the lines, and the power of Romer is in what was left unsaid. Romer struck down an amendment that discriminated on the basis of sexual orientation, and even though the Court argued that it was using rational basis review, it did not classify sexual orientation as a protected status under the law.\textsuperscript{167} Yet, the Court’s legal reasoning squarely analyzed the Colorado amendment within the framework of

\textsuperscript{161} \textit{Id.} at 621.
\textsuperscript{162} \textit{Id.} at 635.
\textsuperscript{163} \textit{Id.} at 632.
\textsuperscript{165} Samar, \textit{supra} note 93, at 100-03.
\textsuperscript{166} Bartschi, \textit{supra} note 2, at 487.
\textsuperscript{167} \textit{Id.}
heightened scrutiny. Perhaps, one reasons for why the Romer Court may have been hesitant to carve sexual orientation as a protected status deserving of heightened scrutiny explicitly, in part, was to prevent invalidating vast amounts of legislation that was being created at the time, namely, DOMA and the “mini DOMAs” of the states.

Given the “limited” holding of Romer within the political climate at the time, Romer was one of the first cases that initiated the conversation with the public and helped frame the legal issue with respect to certain ways of regulating gays and lesbians that might violate constitutional equality norms. The decision played an integral role in developing how the courts understand the legal issues surrounding gays and lesbians, especially by addressing what egregious discrimination against gays and lesbians looks like. In hindsight, it is easier to discern that Romer created the outlines of a new constitutional principle that would later come to play a central role in cases involving sexual orientation discrimination, but for many years its precedential value lay dormant until United States v. Windsor. By the time the Court decided Windsor, the Court was able to use Romer in order to respond to, rather than dictate a view that sexual orientation discrimination violates constitutional equality principles.

As mentioned above, since the time of Romer, courts have begun seeing sexual orientation as a suspect or quasi-suspect class. “Laws signaling out [gay persons] for disparate treatment are subject to heightened judicial scrutiny to ensure those laws are not the product of such historical prejudice and stereotyping.” California’s Supreme Court held that “there is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous that applied to statutes that classify

168 Id.
169 Franklin, supra note 53, at 858.
170 Id.
171 Id. at 870.
on the basis of suspect classifications of gender, race, or religion.”\(^{173}\)
The Supreme Court of New Mexico held that “intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination.”\(^{174}\)

Yet there is no clear consensus on whether sexual orientation is a protected status under the Fourteenth Amendment. Many courts have refused to address whether sexual orientation is a suspect or quasi-suspect class. For example, the Vermont and Massachusetts judiciary avoided the question by invalidating marriage bans on rational basis review and circumvented the discussion on sexual orientation.\(^{175}\) On the other hand, the New York Court of Appeals held that sexual preference could get heightened scrutiny, but not in the cases of marriage and family relationships.\(^{176}\) The Washington Supreme Court and the high court in Maryland found that sexual orientation is not subject to heightened scrutiny because there is no conclusive evidence that sexual orientation is an immutable characteristic.\(^{177}\) Further, in *Hernandez v. Robles*, the Court of Appeals of New York found that gays and lesbians do not constitute a politically powerless group, because they have adequate representation within the legislature and therefore do not require additional protection through the judiciary.\(^{178}\)

In spite of the judiciary, through legislative action, states like Maryland and Massachusetts now classify sexual orientation as a protected class.\(^{179}\) To date, eighteen states and the District of Columbia have added sexual orientation and gender identity as a


\(^{174}\) Griego v. Oliver, 316 P.3d 865, 884 (N.M. 2013).


\(^{177}\) Goldberg, *supra* note 122, at 2116-18.

\(^{178}\) *Hernandez*, 7 N.Y. 3d at 388.

\(^{179}\) American Civil Liberties Website map, *supra* note 115.
protected class to their state constitutions. Additionally, New York, New Hampshire, and Wisconsin only classify sexual orientation as a protect class but not gender identity. Illinois amended the Human Rights Act in 2005 in order to add sexual orientation as a protected suspect class. However, Indiana has no such protections.

On June 26, 2013, in United States v. Windsor, the Supreme Court struck down Section 3 of DOMA—which had defined “marriage” and “spouse” to include only unions of persons of the opposite-sex—because it violated the equal protection and due process clauses of the Fifth Amendment. In Windsor, two women were legally married in Canada and were residing in New York where the marriage was recognized. Unfortunately, when one of the spouses died, the IRS denied a marital deduction for property the other inherited from her late wife on the grounds of DOMA—i.e., that she was not a “spouse” under Section 3 of the act. Overturning DOMA had the immediate consequences of restructuring how the federal law recognizes and treats same-sex marriage for the purposes of federal rights, including Social Security, federal tax benefits, gift giving, estate planning and inheritance, employee benefits, IRA accounts, etc. The Windsor decision heralded consistency between the federal and state government and struck down the biggest legal rationale in support for same-sex marriage bans.

However, just as in Lawrence and Romer, the Windsor Court inexplicably left out an analysis of what level of scrutiny it used to determine that DOMA is unconstitutional, leaving out any discussion

\[180 \text{ Id.} \]
\[181 \text{ Id.} \]
\[182 \text{ 755 ILCS 5/1-101.1.} \]
\[183 \text{ American Civil Liberties Website map, supra note 115.} \]
\[184 \text{ DOMA, supra note 18.} \]
\[185 \text{ See U.S. v. Windsor, 133 S. Ct. 2675, 2719 (2013).} \]
\[186 \text{ Id.} \]
of its professed justifications.\textsuperscript{187} The Windsor Court “addressed federalism, paraded liberty, hinted at equal protection, and nodded at due process, but never articulated a defined legal construct within which to proceed.”\textsuperscript{188} As a result, “litigants on both sides of the [same-sex marriage] issue [thought they could] rely on Windsor to support [their] position.”\textsuperscript{189} Even Justice Scalia in his dissenting opinion argued that Windsor’s real rationale was a “disappearing trail of . . . legalistic argle bargle.”\textsuperscript{190} But the majority comprehensively discussed almost every legal argument and topic ever discussed in the context of same-sex marriage law.\textsuperscript{191}

Although Windsor did not resolve the issue of what level of scrutiny must be afforded to challenges alleging sexual orientation discrimination, the issue was raised by an unexpected source. The Department of Justice (DOJ) issued an unprecedented 28 U.S.C. § 530D\textsuperscript{192} letter expressing both its decision not to defend DOMA’s constitutionality and the Department’s position that legislative classifications based on sexual orientation should be accorded heightened scrutiny.\textsuperscript{193} The Department of Justice cited to Lawrence, Romer, and City of Cleburne v. Cleburne Living Center\textsuperscript{194} as support for its decision. The letter stated that heightened scrutiny should apply to sexual orientation because it satisfies the four heightened scrutiny factors: (1) there is “a significant history of purposeful discrimination against gays and lesbians . . . based on prejudice and stereotypes that

\begin{thebibliography}{99}
\bibitem{188} Id.
\bibitem{189} Id.
\bibitem{190} \textit{Windsor}, 133 S. Ct. at 2696.
\bibitem{191} Id.
\bibitem{194} Id.
\end{thebibliography}
have ramifications today,” (2) sexual orientation is an immutable characteristic, (3) LGBT individuals have “limited political power,” and (4) sexual orientation has no bearing on ability to perform or contribute to society.\textsuperscript{195} The letter went on to state that “[t]he President has concluded that given [these] factors . . . sexual orientation should be subject to a heightened standard of scrutiny.”\textsuperscript{196} Effectively, the letter from the Department of Justice indicated that DOMA did not even have support from the governmental body tasked with the responsibility of defending the law. The gesture struck DOMA as void and null.

Together, the statement from the DOJ and \textit{Windsor} created a whirlwind of legislation spanning the country aimed at dismantling same-sex marriage bans. Pundits trying to analyze the consequences of \textit{Windsor} have stated that the case is a “equal liberty” case in that it has fused together the two separate tracks of same-sex marriage jurisprudence, that of due process and equal protection.\textsuperscript{197} They argue that the decision has created a bridge from the past cases that embraced equal protection and liberty principles and has laid a precedential path for future cases.\textsuperscript{198} These attestations of the meaning and effect of \textit{Windsor} have all been made without the Court expressing a clear and explicit standard of review. A debate centers on whether the Court used rational basis review, or perhaps the “more searching form of rational review,” known colloquially as “rational basis with a bite.”\textsuperscript{199} Regardless, lower courts have broadly applied \textit{Windsor} in striking same-sex marriage bans nationwide.\textsuperscript{200} A broad understanding of Windsor stands for the premise that gays and lesbians deserve the same legal rights and protections as everyone

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\textsuperscript{195} Id.


\textsuperscript{197} Marcus, \textit{supra} note 193, at 19.

\textsuperscript{198} Id. at 32-33.

\textsuperscript{199} Id. (citing SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014)).

\textsuperscript{200} Marcus, \textit{supra} note 193, at 22.
\end{flushleft}
else. At the very least, the Windsor case means that judges do not have to start from scratch in determining if a right exists, or if gays and lesbians should be constitutionally protected.

V. THE LITIGATION

A. Wolf v. Walker, U.S. District Court for the Western District of Wisconsin

On February 3, 2014, the American Civil Liberties Union (ACLU) and the law firm of Mayer Brown filed a lawsuit in the U.S. District Court for the Western District of Wisconsin on behalf of four same-sex couples, challenging Article XIII, § 12 of the Wisconsin Constitution which states, in relevant part, that: “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”201 In addition, various provisions in the Wisconsin Statutes, primarily in chapter 765, limit marriage to a “husband” and a “wife.”202

Petitioners filed a motion for summary judgment while defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted.203 Judge Barbara Crabb denied defendant’s motion and granted plaintiff’s motion, holding that: (1) there is a fundamental right to marry under Due Process Clause encompassing the right to marry someone of the same-sex, (2) Wisconsin’s marriage amendment and relevant statutes were subject to heightened scrutiny, (3) heightened scrutiny applies to equal protection claims involving sexual orientation, and (4) that Wisconsin’s marriage amendment did not further any legitimate state interest.204

202 Id.
203 Id.
204 Id.
During oral arguments, defendants argued that: (1) *Baker v. Nelson* 205 was controlling law 206; (2) that the right to marriage was a “positive right” that the state had no duty to grant the right to everyone; and (3) the state had a legitimate interest in “preserving tradition, encouraging procreation and ‘responsible’ procreation, providing an environment for ‘optimal child rearing’, protecting the institution of marriage, proceeding with caution and helping to maintain other legal restrictions on marriage.”

Judge Crabb concluded that *Baker* was not valid law given the developments in the jurisprudence of the law in same-sex marriage cases. When *Baker* was first decided in 1972, the law had just recognized a protected right in marriage under the *Loving* framework, and it had not contemplated sexual orientation as a suspect class. In fact, at the time, *Bowers* had not even been decided and sodomy laws were still widely applicable and valid across the United States. Further, Judge Crabb cited *Romer* and *Lawrence* that have since reframed the legal issues first introduced in *Baker*, Judge Crabb commented that if defendants were still not convinced that *Baker* was dead, then the most recent Supreme Court case, *Windsor* made it clear that *Baker*’s precedential value has deteriorated. 208

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205  See *Baker v. Nelson*, 291 Minn. 310 (1971). The Minnesota Supreme Court held that same-sex couples do not have a right to marry under the due process clause or the equal protection clause of the United States Constitution. When the plaintiffs appealed, the United States Supreme Court had “no discretion to refuse adjudication of the case on its merits” because the version of 28 U.S.C. § 1257 in effect at the time required the Court to accept any case from a state supreme court that raised a constitutional challenge to a state statute. The United States Supreme Court dismissed an appeal from the Supreme Court of Minnesota for want of a substantial federal question. The Supreme Court of MN has held that: (1) the absence of an express statutory prohibition against same-sex marriages did not mean same-sex marriages are authorized; and (2) state authorization of same-sex marriages is not required by the United States Constitution.


207  *Id.*

208  *Id.* at 987-88 (citing *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012)). “Even if Baker might have had resonance for Windsor’s case in 1971, it does not today.”
Then, the court turned to defendants’ second argument that marriage was a right granted by the State of Wisconsin and as a “positive right” it need not include all individuals. Judge Crabb quickly dismissed that as a tenable argument, citing that case law is replete with evidence and precedent that marriage is not a “positive right” but a fundamental right protected by the constitution.209 As such, any state action infringing upon that right must be subject to strict scrutiny.210 At debate was not the whether marriage was a positive right, but whether restricting marriage to same-sex couples was discriminatory on its face. Once the state extends that benefit to some of its citizens, it is not free to deny the benefit to other citizens for any or no reason on the ground that a “positive right” is at issue.211 Therefore, “[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”212

Next, defendants argued that they did not want to “endorse” same-sex marriage and for that reason have acted to restrict it.213 Pointing to Romer and Bowers, Judge Crabb found that the defendants’ argument had been used before, and these arguments had failed then, and would fail here, too. Allowing citizens the right to same-sex marriage is not an endorsement by the state; rather it

209 Id. at 991; E.g., Turner v. Saefley, 482 U.S. 78, 95 (1987); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–640 (1974); Loving v. Virginia, 388 U.S. 1, 12 (1967). The “liberty” protected by the due process clause in the Fourteenth Amendment includes the “fundamental right” to marry, a conclusion that the Supreme Court has reaffirmed many times. Zablocki v. Redhail, 434 U.S. 374, 384 (1977) (“[T]he right to marry is of fundamental importance for all individuals.”); Cleveland Bd. of Educ., 414 U.S. at 639-640 (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).

210 Wolf, 986 F.Supp. 2d at 991.

211 Id. at 992.

212 Id. (citing DeShaney v. Winnebago Cnty. Dep’t of Serv., 489 U.S. 109 (1989)).

213 Id.
represents “a commitment to the law’s neutrality where the rights of persons are at stake.”

Lastly, the defendants also relied on *Windsor* to set forth their argument that marriage falls exclusively under the purview of the state. The state is free to regulate marriage according to its state interests. However, Judge Crabb found defendants’ and amici’s reliance on *Windsor* misplaced for three reasons. First, although *Windsor* devoted seven pages to develop an analysis of state rights vis-à-vis constitutional rights, *Windsor* explicitly stated that “no one questions the power of the States to define marriage”216 Yet, the Court was not articulating a new, heightened level of deference to marriage regulation by the states. Second, *Windsor* strictly relied on federalism grounds for concluding that DOMA was unconstitutional. Third, and most important, the Court discussed DOMA's encroachment on state authority as evidence that the law was unconstitutional, not as a reason to preserve a law that otherwise would be invalid. In fact, the Court was careful to point out multiple times the well-established principle that an interest in federalism

214 Romer v. Evans, 517 U.S. 620, 623 (1996); see also Bowers v. Hardick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting) (“[A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.”).
216 U.S. v. Windsor, 133 S. Ct. 2675, 2705 (2006) (Scalia, J., dissenting) (“But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is?”).
217 Wolf, 986 F.Supp. 2d at 995.
218 Windsor, 133 S. Ct. at 2692 (majority opinion) (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”); see also id. at 2705 (Scalia, J., dissenting) (“[T]he opinion has formally disclaimed reliance upon principles of federalism.”); but see id. at 2697 (Roberts, C.J., dissenting) (“[I]t is undeniable that its judgment is based on federalism.”).
219 Wolf, 986 F. Supp. 2d at 997.
cannot trump constitutional rights. Windsor’s less than clear cut analysis allows for both proponents and opponents to same-sex marriage find arguments supportive of their position. But, in Judge Crabb’s opinion, she refutes any argument to the contrary about Windsor’s relevance as a case expanding protections and rights for the LGBT.

Turning to the equal protection claims, Judge Crabb immediately dismissed the sex discrimination claim, finding that it is not analogous to the reasoning in Loving, as articulated infra and that courts found this argument as “counterintuitive and legalistic, and an attempt to ‘bootstrap’ sexual orientation discrimination to sex discrimination.” Since the Seventh Circuit Court of Appeals had also failed to embrace the theory of sex discrimination, Judge Crabb sought to decide the case on other grounds and chose to overlook the entire argument.

While analyzing Romer and Windsor, Judge Crabb found that although Court in those cases was claiming to use rational basis review, she argued that they were using “something more”. Judge Crabb takes this to indicate that perhaps the Supreme Court is on the verge of finding sexual orientation as a suspect or quasi-suspect class.

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220 Windsor, 133 S. Ct. at 2691 (majority opinion) (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”); id. at 2692 (“[T]he incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”); id at 2691 (“The States' interest in defining and regulating the marital relation [is] subject to constitutional guarantees.”); id.

221 See generally, Marcus, supra note 193.

222 Wolf, 986 F. Supp. 2d at 996.

223 For a developed discussion, please see my section, located supra, entitled “The Legal Framework of the Equal Protection Clause in Same-Sex Marriage.”

224 Wolf, 986 F. Supp. 2d at 1008.

225  Id. at 1009.

226 Id. at 1010.

227 Id.
Circuit had not engaged in any analysis of whether heightened scrutiny applies to sexual orientation challenges, therefore, leaving her free to consider the factors relevant to determining if heightened scrutiny should apply. She concluded that gays and lesbians: (1) have faced a history of discrimination; (2) sexual orientation has no bearing on their ability to contribute to society; (3) sexual orientation is immutable, it is fundamental to a person’s identity; and (4) are politically powerless in the sense of an “inherent vulnerab[ility] in the context of the ordinary political process, either because of . . . size or history of disenfranchisement. Given that the District Court found that sexual orientation is subject to heightened scrutiny, Judge Crabb found that Wisconsin must show that their prohibition on same-sex marriage is substantially related to an important governmental objective to survive heightened scrutiny.

Here, Judge Crabb was not impressed with the arguments made by Wisconsin. Starting with tradition, Judge Crabb argues that not all traditions are good traditions and following them blindly can have bad results. Traditions such as coverture, the fusing of a woman’s legal identity into her husband’s after marriage, had the effect of dismissing her political being out of existence.

Women did not always have the right to vote and at a time were not considered equals to men.

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228 Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (applying rational basis review to a law banning gays in the military); but see Nabozny v. Podlesny, 92 F.3d 446, 457-58 (1996) (stating that Ben-Shalom’s holding was limited to the military context).

229 Id. at 1011.

230 Wolf, 986 F. Supp. 2d at 1011.

231 Id. at 1014.

232 Id. at 1019.

233 Id.

234 Id. at 1018. Similarly, women were deprived of many opportunities, including the right to vote, for much of this country’s history, often because of “traditional” beliefs about women’s abilities. E.g., Bradwell v. People of State of Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring in the judgment) (“[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and
Following tradition can also mean “the [r]ote reliance on [an] historical exclusion as justification . . . serv[ing] to justify slavery, anti-miscegenation laws and segregation.”

Wisconsin argued that their restriction on same-sex marriage bans are needed to channel opposite-sex couples into marriage in order to ensure that they will stay together after procreation and that same-sex couples do not need this protection because they are not at risk of accidentally procreating. As other courts have noted, an argument relying on procreation raises an obvious question: if the reason same-sex couples cannot marry is that they cannot procreate, then why are opposite-sex couples who cannot or will not procreate allowed to marry? Judge Crabb found Wisconsin’s arguments inconsistent.

On one-hand defendants argued that same-sex couples do not need marriage because they can raise children responsibly without it. On the other hand, defendants argued that same-sex couples should not be raising children at all. Defendants argued that opposite-sex marriage promotes “optimal child rearing” but provided no justification for how or why same-sex couples could not raise children well, nor did defendants show that Wisconsin asked each marriage applicant to make any showing that they are good parents or have financial means to support child rearing. In fact, felons, alcoholics, or a person with a history of child abuse may obtain a marriage license in Wisconsin. Again, the state’s argument that banning same-sex marriage is a

mother. This is the law of the Creator.”). With respect to marriage in particular, there was a time when “the very being or legal existence of [a] woman [was] suspended” when she married. William Blackstone, Commentaries, Vol. I, 442-45 (1765).


Wolf, 986 F. Supp. 2d at 1020.

E.g., Baskin v. Bogan, 12 F. Supp. 3d 1137 (S.D. Ind. 2014); Wis. Stat. § 765.03(1) (permitting first cousins to marry if “the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating either party is permanently sterile”).

Id. at 1021.

Wolf, 986 F. Supp. 2d at 1022.

Id.

Id. at 1023.
method of promoting good parenting calls into question the sincerity of this asserted state interest. Judge Crabb also found that the “optimal child rearing” argument is an insincere one considering that the state of Wisconsin has allowed same-sex couples to adopt and raise children together for many years. What the same-sex marriage ban does is foster less than optimal results of the children of same-sex couples who are stigmatized and deprived of the benefits of marriage.

Lastly, Judge Crabb pointed out that if the state will deprive an entire group of people the fundamental right to marry, then, the state needs to offer a stronger justification than “this is the way it has always been” or “we’re not ready yet.” At the very least the state had to make a showing that the restriction on same-sex marriage furthers a legitimate state interest separate from a wish to maintain the status quo.

Relying on Loving, Romer, Lawrence and Windsor, the district court held that same-sex marriage bans are unconstitutional and therefore, struck them down. Immediately, county clerks started issuing marriage licenses to same-sex couples. Wisconsin state officials attempted to thwart the issuance of licenses by asking Judge Crabb to grant an injunction, despite that the defendants had failed to include that request in their initial pleadings. Judge Crabb did not consider their plea. An appeal was subsequently filed by the Wisconsin defendants to the Seventh Circuit Court.

242 Id. (citing Romer v. Evans, 517 U.S. 620, 635 (1996)).
243 Id.
244 Id.
245 Id. at 988.
246 Id. at 987-88.

On March 12, 2014, Lambda Legal filed Baskin v. Bogan in the United States District Court for the Southern District of Indiana on behalf of five same-sex couples. The complaint charged that Section 31-11-1-1 and Section 31-11-1-1(b) of the Indiana Code, which banned same-sex marriage and the recognition of these marriages, violated their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. Plaintiffs sought declarative and injunctive relief.

First the Court addressed a number of preliminary matters, related to who had proper standing as a defendant in the case. Then, in an almost parallel fashion to the holding of Wolf v. Walker, the Court in Baskin held that the Indiana statute banning same-sex marriage violated same-sex couples’ fundamental right to marry; that

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248 Initially there were three same-sex couples to the complaint, but the complaint was later amended to add two more couples; one of which was a married couple from Massachusetts, living in Indiana. One spouse was terminally ill and the couple sought an emergency order for a preliminary injunction from the court, in order for their valid marriage to be recognized in Indiana.
249 Ind. Code § 31-11-1-1 states:
(a) Only a female may marry a male. Only a male may marry a female.
(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.
250 Baskin, 12 F. Supp. 3d. at 1150.
251 Id.
252 On April 10, 2014 the court granted a temporary restraining order prohibiting Indiana from enforcing section b of Ind. Code § 31-11-1-1. Both parties moved for summary judgment, as there were no issues of material fact. On May 2, 2014, when motions for summary judgment were being heard, the court granted a preliminary injunction extending the temporary restraining order.

A second issue the Court had to address was which defendants had proper standing. The Court found that the IN Dept. of Rev. and Attorney General Zoeller had standing because they were tasked with enforcing the law and regulating its consequences, while Governor Mike Pence was found to lack standing and was dismissed as a party.
the statute did not discriminate against same-sex couples on the basis of their sex, but it did discriminate on the basis of their sexual orientation and finally, that there was no rational basis for treating same-sex couples differently by excluding them from marriage.\textsuperscript{253}

Just like Wisconsin in \textit{Wolf}, Indiana in \textit{Baskin} argued that Indiana’s statute was constitutional and based on the legal precedent and applicability of \textit{Baker v. Nelson}\textsuperscript{254} arguing that “lower courts are bound . . . until such time as the [Supreme] Court tells them that they are not.”\textsuperscript{255} Chief Judge Robert L. Young countered by stating that “‘when doctrinal developments indicate,’ lower courts need not adhere to the summary disposition.”\textsuperscript{256} “In the forty years after \textit{Baker}, there have been manifold changes to the Supreme Court’s equal protection jurisprudence” and that “[e]ven if \textit{Baker} might have had resonance . . . in 1971, it does not today.”\textsuperscript{257}

After determining that \textit{Baker} had no precedential value, the court considered whether there was a fundamental right to marry, what level of scrutiny to apply, and whether the bans discriminate against gays and lesbians because of their sex and sexual orientation. Relying on \textit{Loving}, \textit{Romer}, \textit{Lawrence}, and \textit{Windsor}, Judge Young found ample evidence in the case law to support that there is an undisputed fundamental right to marry,\textsuperscript{258} and the Judge reiterated that once a “fundamental right [is] recognized, [it] cannot be denied to particular groups on grounds that these groups have historically been denied those rights.”\textsuperscript{259} Judge Young used \textit{Loving} to best illustrate this concept.\textsuperscript{260} Had the court considered that a fundamental right only

\begin{thebibliography}{99}
\bibitem{253} \textit{Baskin}, 12 F. Supp. 3d at 1144.
\bibitem{254} \textit{Id.} at 1153.
\bibitem{255} Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).
\bibitem{256} \textit{Id.}
\bibitem{257} \textit{Windsor}, 699 F.2d at 178.
\bibitem{258} For a detailed discussion, see supra note 177; \textit{see} Lawrence v. Texas, 539 U.S. 558, 574 (2003) (“Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).
\bibitem{259} Samar, supra note 86 at 94.
\bibitem{260} \textit{Baskin} v. \textit{Bogan}, 12 F. Supp. 3d 1137, 1158 (S.D. Ind. 2014).
\end{thebibliography}
encompasses what it had traditionally, then Mildred and Richard Loving would have never been able to get married, since bans on interracial marriage were longstanding since colonial times. Judge Young argued that the same logic applied to same-sex marriage; defendants cannot argue that because same-sex couples traditionally have not been allowed to marry and therefore, they do not have a fundamental right to do so.

Finally, the court found that Indiana’s statute significantly interferes with the fundamental right to marry because it completely banned the plaintiffs from marrying the person of their choosing. Indiana argued that the same-sex marriage bans served the legitimate state’s interest in ensuring that one man and one woman stay together for the sake of unintended children that their sexual relation may bring. But, the court failed to find how the Indiana’s proffered justification is narrowly tailored to the state’s interest, i.e., how can a concern affecting opposite-sex couples relate to whether same-sex couples should be permitted to marry? Indiana’s restriction is both under-inclusive as well as over-inclusive. It is under-inclusive because it only prevents one subset of couples, those who cannot naturally conceive children, from marrying, while post-menopausal woman, infertile couples, or couples who do not want children are not prevented from marrying. The statute is over-inclusive because the statute prohibits some opposite-sex couples who can naturally and unintentionally procreate from marrying, like close relatives or cousins from marrying. Ultimately, excluding same-sex couples from marriage has no effect on opposite-sex couples and on the choices they make relating to procreation or staying together. Given these factors, the court said that Indiana’s restriction on same-sex marriage

262 Baskin, 12 F. Supp. 3d at 1155-57.
263 Id. at 1158.
264 Id.
265 Id.
266 Id.
267 Id.
was not narrowly tailored and the defendants have failed to prove their burden. Judge Young used strict scrutiny to frame his analysis.

Then, the court addressed the equal protection arguments, asking whether Section 31-11-1-1 and 21-11-1-1(b) of the Indiana Code violate the Fourteenth Amendment because it discriminates against gays and lesbians because of their sex as well as sexual orientation. Yet again, like many other courts before it, including the Wolf Court, the Baskin court found that there is no evidence of invidious sex-based discrimination. The court argued that Loving is not an analogous metaphor and the law’s purpose is not to reinforce a sex stereotype about the abilities of men and woman or to impose traditional gender roles on individuals.

On the other hand, the court found that there is discrimination on the basis of sexual orientation even while using rational basis review. While Indiana argued that gays and lesbians are not prevented from marrying an individual of the opposite-sex, the Court found that the law was specifically created to prevent gays and lesbians from marrying the individual of their choice. Following the Seventh Circuit’s lead, the Baskin Court also chose to use rational basis review.

To Judge Young, it is clear that the issue is whether excluding same-sex couples has a rational connection to the purported interest of dealing with unintentional and natural conception by opposite-sex

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268 Id.
269 Id.
270 Id. at 1159.
271 Id.
272 Id.
273 The Wolf Court disagreed. The Wolf Court analyzed the Seventh Circuit’s Schroeder v. Hamilton differently. The Wolf Court found that the Seventh Circuit only referenced in dicta the required constitutional scrutiny that should be used for sexual orientation discrimination cases. Therefore, the Wolf Court found that since the question was not definitively answered by the Seventh Circuit, they opted to use a heightened level of scrutiny. See Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002) (Homosexuals are not entitled to any heightened protection under the Constitution).
couples in enforcing the ban. \footnote{Baskin, 12 F. Supp. 3d at 1159.} He found that the only rationale for the ban is to exclude same-sex couples on the basis of their sexual orientation. \footnote{Id.}

Therefore, the District Court of Indiana struck down the marriage bans because they are unconstitutional. Judge Young granted summary judgment for the plaintiffs and issued a preliminary injunction.

\textit{C. Baskin v. Bogan, the United States Court of Appeals for the Seventh Circuit}


On September 4, 2014, the Seventh Circuit in a unanimous opinion, authored by Judge Posner, upheld the district courts’ decisions. \footnote{Id.} Immediately, on September 15, the Seventh Circuit granted a motion for a stay of the ruling to be in effect until this case or one like it was resolved at the Supreme Court. \footnote{Id.} But, on October 6, 2014, the Supreme Court denied a \textit{writ of certiorari}, letting the Circuit court decision stand. \footnote{Id.}

\footnote{274 Baskin, 12 F. Supp. 3d at 1159.}
\footnote{275 Id.}
\footnote{277 Id.}
\footnote{278 Id.}
\footnote{279 Id.}
The Seventh Circuit was the third circuit court to issue an opinion on same-sex marriage and it was the first unanimous circuit court opinion overturning a state marriage ban. The opinion was authored by Judge Posner, who based on his questions during oral argument and his written opinion, established himself as one of the most indignant judges to approach the issue. Judge Posner’s position on same-sex marriage has shifted over the last two decades; he used to oppose increased protections and rights for the LGBT community. Since then, it is clear his opinion has greatly shifted. Judge Posner opened his opinion and announced that, “[f]ormal aly cases are about discrimination against the small homosexual minority in the United States. But at a deeper level . . . they are about the welfare of American children . . . children that would be better off both emotionally and economically if their adoptive parents were married.” He framed the legal issue as beyond an evaluation of the bans from rational basis. Instead, he immediately implicated heightened scrutiny that assesses the harm caused by the restriction as one of its four prongs.

Judge Posner reiterated that although marriage falls under the purview of state regulation and courts must be weary of legislating from the bench, same-sex marriage bans statutorily create a classification that “proceed[s] along suspect lines,” and therefore, it falls to the Seventh Circuit to assess the statutory bans legitimacy under the framework of the Fourteenth Amendment. Without any undue delay, Judge Posner then outlined that even under rational basis review, Indiana and Wisconsin, have failed to provide the requisite

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280 Id.
281 Wallace, supra note 161, at 343.
283 Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014).
284 Id.
285 Id.
286 Id.

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justifications that the ban serves “reasonably conceivable state of facts” or that a “reasonable basis’ for forbidding same-sex marriage’ exists.” 287 For the court, “the only rationale that [Indiana and Wisconsin] have put [forward] with any conviction [is] that same-sex couples and their children do [not] need marriage because same-sex couples can [not] produce children, intended or unintended.” Judge Posner finds that this legal argument “is so full of holes that it cannot be taken seriously.” 288 Because the discrimination is “irrational and because the [statutory bans] failed under an equal protection analysis, the court [does not] discuss the plaintiffs' due process claims, or determine whether the right to choose whom to marry is a fundamental right.” 289

Judge Posner added that although the case is easily won in favor of the plaintiffs using rational basis review, he nevertheless outlined in detail a heightened scrutiny analysis because sexual orientation typically falls “along suspect lines”. Judge Posner first asked whether the challenged practice involves discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them. 290 He answered that without a doubt “homosexuals are among the most stigmatized, misunderstood, and discriminated against minorities in the history of the world.” 291 Secondly, he asked if there is unequal treatment based on “some immutable . . . characteristic of the people discriminated against,” and is the characteristic irrelevant to that person's ability to participate in society? 292 Judge Posner found that “there is little doubt that sexual orientation . . . is an immutable . . . characteristic rather than a choice.” 293 The court proceeded to cite to the American Psychological Association as well as various scientific journals that set

287 Id.
288 Id. at 656.
289 Id. at 657.
290 Id. at 655.
291 Id. at 658.
292 Wallace, supra note 161, at 345.
293 Id.
forth leading scientific theories that the causes of homosexuality are genetic.\textsuperscript{294} The court then spent the rest of the forty-paged decision analyzing the following two questions: “does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole? . . . [and,] [even if the policy] confer[s] an offsetting benefit, is [i]t discriminatory . . . [because the government could achieve its goal in a less-harmful manner to the discriminated-against group]?”\textsuperscript{295}

Judge Posner, under a regime focused on rational basis, questioned whether the sum of the benefits provided by allowing only opposite-sex marriage equate to an offsetting governmental interest to justify the denial to same-sex couples.\textsuperscript{296} Before he dived into the question, he quickly dispelled the notion that \textit{Baker v. Nelson} has applicable precedential value using the same logic and arguments as District Court Judges Crabb and Young.\textsuperscript{297}

Indiana defended the same-sex marriage ban on a single ground, namely, that their sole purpose in sanctioning marriage is to enhance child welfare.\textsuperscript{298} Indiana tried to “channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility”.\textsuperscript{299} Even if gays and lesbians want to enter into the regime, Indiana argued that various individuals, like friends and siblings could want to as well, but the state still has the right to refuse sanctioning those relations.\textsuperscript{300} Indiana argued that offering state benefits to opposite-sex couples is the “carrot” to induce them to enter into the marital regime.\textsuperscript{301} Indiana further argued that gays and lesbians do not need to be induced into the marital regime because they do not naturally or unintentionally

\begin{itemize}
\item \textsuperscript{294} \textit{Baskin}, 766 F.3d at 657.
\item \textsuperscript{295} \textit{Id}. at 655.
\item \textsuperscript{296} \textit{Id}. at 659.
\item \textsuperscript{297} \textit{Id}.
\item \textsuperscript{298} \textit{Id}.
\item \textsuperscript{299} \textit{Id}. at 660.
\item \textsuperscript{300} \textit{Id}.
\item \textsuperscript{301} \textit{Id}.
\end{itemize}
procreate and therefore, do not need to be allowed to enter the institution of marriage. Judge Posner found these legal arguments untenable, and that the mechanisms used to induce unwilling fathers to own up to their parental responsibility already exists within the court system, like paternity testing, and child support. Further, Judge Posner found that since Indiana allows infertile couples to marry, their reason that the law channels procreative sex, would logically conclude that there is no reason to allow infertile couples to marry. Judge Posner found that Indiana’s justifications for the ban have resulted in an insidious form of discrimination, one that favors first cousins over homosexuals. As a matter of comity, Indiana recognizes the marriage of first cousins from other states, like Tennessee, where no restriction is enforced. Elderly first cousins are permitted to marry because they cannot produce children; homosexuals are forbidden to marry because they cannot produce children. Indiana’s argument is that the marriage of first cousins who are past child-bearing age provides a “model [of] family life for younger, potentially procreative men and women.” Judge Posner finds this argument “impossible to take seriously.”

The bottom line of Judge Posner’s argument is that the classification is over-inclusive and under-inclusive at the same time. Indiana’s law is punishing responsible same-sex couples who wish to enter into the institution of marriage, who possibly have adopted or plan to adopt children, while rewarding irresponsible opposite-sex couples who procreate without forethought by allowing them into the institution of marriage. Judge Posner is less convinced by Indiana’s arguments when he asks the defendants’ attorney, about same-sex

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302 Id.
303 Id.
304 Id. at 661.
305 Id. at 667.
306 Id. at 662.
307 See Wolf v. Walker analysis on same issue supra n. 191.
adoption, which is a legal and widely accepted practice in Indiana. Judge Posner found that adopting unwanted children is a positive societal goal that should not be qualified by whether the parents are same-sex or opposite-sex. It is undisputed that it is better for children to be raised in a stable household, where they can enjoy the recognition, stability, state and federal benefits of such a legally recognized union regardless of the sex and sexual orientation of the parents. Judge Posner illustrated a hypothetical situation where a child comes some from school and asks why his same-sex parents are not married and the answer is that the law does not allow them to do so. Judge Posner argues that this realization is unsettling to the young child, because it takes away from his security, making the child feel different than his peers. Lastly, Judge Posner argued that Indiana’s law has not been very successful at encouraging people to get married because the rate of single mothers has been increasing over the years. The state’s alleged interest has failed, proving that the ban on same-sex marriage has done very little, if anything, to channel opposite-sex couples into marriage due to their unintentional procreation.

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309 *Id.*

310 *Id.*

311 *Baskin*, 766 F.3d at 663.

312 *Id.* at 663-64.

313 *Id.*
The court's disdain for the defendants’ arguments extended to Wisconsin as the court analyzed the constitutionality of Article XIII, § 13. Wisconsin argued that: (1) same-sex marriage bans are valid because per tradition, same-sex couples have not been allowed to marry; (2) the consequences of same-sex marriage cannot be foreseen; (3) the right to same-sex marriage should be left to the democratic process; and (4) same-sex marriage makes marriage fragile and unreliable.

Judge Posner found that tradition “cannot be a lawful ground for discrimination—regardless of the age of the tradition.” Judge Posner paralleled Judge Crabb’s opinion in Wolf. Further, Judge Posner found that had the Supreme Court in Loving decided to rely on the tradition of forbidding black-white marriage, which dated back to colonial times, then the case would have never been resolved the way it was. Although some traditions are harmless, like the president pardoning a Thanksgiving turkey, or like men shaking hands, “[i]f no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them

314 Wallace, supra note 161, at 347.
315 Baskin, 766 F.3d at 666.
316 Id.
317 Id.
318 Id. at 666-67 (citing Loving v. Virginia, 388 U.S. 1, 8-12 (1967)).

Wisconsin's argument that its civil union statute remedies the problem met a similar fate, as the court analogized such a system to interracial marriage: “So look what the state has done: it has thrown a crumb to same-sex couples, denying them not only many of the rights and many of the benefits of marriage but also of course the name. Imagine if in the 1960s the states that forbade interracial marriage had said to interracial couples: ‘you can have domestic partnerships that create the identical rights and obligations of marriage, but you can call them only ‘civil unions' or ‘domestic partnerships.’ The term ‘marriage’ is reserved for same-race unions.’ This would give interracial couples much more than Wisconsin's domestic partnership statute gives same-sex couples. Yet withholding the term ‘marriage’ would be considered deeply offensive, and, having no justification other than bigotry, would be invalidated as a denial of equal protection.” Id. at 670.
harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause.”

While Wisconsin argued that the judiciary, as well as the state, should proceed with caution and “go slow” before “transforming this cornerstone of civilization and society,” Judge Posner found no reason or evidence that allowing same-sex marriage would transform marriage. Judge Posner found that states have allowed for same-sex marriage for over a decade now, and there have been no discernable consequences of “transforming” marriage. Further, no studies seem to indicate that allowing same-sex marriage has any effect on opposite-sex marriage, and although no one knows for sure how many Americans identify as LGBT, most estimates vary from one and a half to four percent of the population—hardly statistically important, enough to transform marriage. Judge Posner also reasoned that that every court decision is speculative in that no judge has the ability to determine with certainty the effect a decision will have on the future but that is what the democratic process protects against.

Judge Posner found civil unions as a “slap to the face” to gays and lesbians across Wisconsin, The “Wisconsin legislature . . . finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage.” In Judge Posner’s view, not only is same-sex marriage not allowed, but Wisconsin explicitly states that civil unions are not adequate substitutes or comparables to marriage. To Judge Posner, that is the equivalent of “separate but not equal” and finds this reasoning to be completely arbitrary considering that Wisconsin does not even permit couples in domestic partnerships to adopt as one unit.

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318 Id.
320 Id. at 668.
321 Id.
322 Id.
323 Id.
324 Id. at 670.
325 Id.
326 Id. at 671.
second-class marriage treats the citizens who participate in it as second-class citizens.\footnote{327} These differences cause substantial harm by invalidating the union of a same-sex couple while also hurting them and their children financially by refusing them the various state and federal benefits.\footnote{328}

Wisconsin argued that it is dependent upon the democratic process to determine whether same-sex marriage should be allowed—not the judiciary.\footnote{329} Judge Posner struck that argument down by stating that homosexuals make up a small percentage of the population, and thus they are unable to vote strongly enough to enact change in the issues that they care for.\footnote{330} As an important corollary to minority groups with the inability to influence the democratic process, their recourse has always been in the courts--“the recourse is called constitutional law.”\footnote{331}

Judge Posner sets forth that the legal standard is explicitly found in the Supreme Court’s decision in \textit{Windsor}; “[t]he federal statute is invalid [referring to DOMA], for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”\footnote{332} The standard of constitutional review is certainly something more than rational basis review, although Judge Posner did not feel the need to name the standard as such. Instead, Judge Posner left us with what he calls “rational basis.” He argued that although he gave us a “sneak peak” of how heightened scrutiny could be applied but this case was easier to analyze because Indiana and Wisconsin’s arguments were so tenuous and unsubstantiated, that they failed even with the more deferential standard, rational basis review.\footnote{333}
Considered as a whole, Indiana and Wisconsin’s justifications for the marriage bans have no “fit” and no resemblance to the arguments they set forth for why marriage should only be limited to opposite-sex couples. Therefore, the Seventh Circuit upheld the decisions of the district courts and allows for marriage equality in Indiana and Wisconsin.

CONCLUSION

The Seventh Circuit’s decision definitively answered that same-sex marriage bans are impermissible under the law because they discriminate on the basis of sexual orientation. Although the court addressed the case under a rubric of rational basis review, built into the decision is extensive development and discussion about heightened scrutiny as a standard of constitutional review for sexual orientation. Judge Posner called it “rational basis review” but analyzed it as if it was heightened scrutiny. His actions are akin to what the Supreme Court has done so many times before, as in the cases of Romer, Lawrence, and Windsor. It appears that by leaving the test undefined, the courts might purposefully be leaving the possibility for broad legal arguments and understandings in subsequent litigation in the future. Even when the courts have failed define the standard, lower courts have swiftly reacted by using the “spirit” of the decision, to extend more civil liberties for the LGBT community, even if the explicitly articulated legal rationale was lacking.

Arguably, the Seventh Circuit was more flagrant by explicitly stating that under a regime of rational basis the Indiana and Wisconsin claims would fail. But at the same time, the Seventh Circuit counter argued itself and struck down arguments within the context of heightened scrutiny. Judge Posner clearly laid the foundational arguments as if hypothetically addressing the problem under

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334 Id.
335 Id. at 655.
336 Id.
Looking forward, in situations where the challenged action discriminates on the basis of sexual orientation, the Seventh Circuit provided fodder that state restrictions will need more than a deferential, rational basis to overcome when called into question. In many respects, this also mirrors the fact that Illinois has sexual orientation as a suspect class, while Indiana and Wisconsin do not. The Seventh Circuit’s decision allows for Illinois to continue having a higher standard of review, while also forcing Wisconsin and Indiana to recognize that sexual orientation, although not protected by statute, is protected judicially.

Outside the context of challenges that fall within the realm of same-sex marriage, this continued weak application of sexual orientation not explicitly being a constitutionally protected class deserving of heightened scrutiny could prove problematic. Depending on where the challenges arise, Indiana, Illinois, or Wisconsin, and what the area of the law the challenge touches upon can mean that inconsistent rulings could result. For example, how will lower courts or the Seventh Circuit court decide cases involving discrimination on the basis of sexual orientation in the work place? Although Illinois protects sexual orientation, Indiana does not. A defendant-employer could argue that there was no discrimination based on his employee’s sexual orientation and use *Windsor* or *Baskin* to support that there is a limited finding that sexual orientation deserves more protection, but only in same-sex marriage cases, not employment cases. Along the same lines, employers could argue that rational basis review is the standard that the courts explicitly used, and that is the standard that should be applied in the employment situation. A plaintiff-employee would not even be able to rely on a sex discrimination argument because the courts have explicitly rejected that claim. Despite how groundbreaking and progressive the Seventh Circuit’s decision was it does not take long before loopholes can be discovered.

Consider another rising issue that can prove problematic for the continued development of LGBT civil liberties. As soon as the Seventh Circuit struck down the same-sex marriage bans in Indiana,
many within the public became outraged, feeling that their religious views have been accosted.

Backtracking a little bit, the Religious Freedom Restoration Act (RFRA) was passed by Congress and signed by President Bill Clinton in 1993. The Act was passed directly in response to the Supreme Court case of Emp’t Div., Dep’t of Human Res. of the State of Or. v. Smith. There, the Court held that the state could infringe upon religious expression without violating the First Amendment, so long as the state’s restriction or regulation was a neutral law of general applicability. Finding this an assault of the state on one of the most important constitutional right, RFRA was passed to ensure that religious exercise protections were viable and strong by requiring challenges to be analyzed using strict scrutiny. RFRA was then declared unconstitutional by City of Boerne v. Flores and inapplicable against the states. Regardless, states responded to Boerne, by passing their own state Religious Freedom Restoration Acts. Most recently, the Supreme Court in Burnwell v. Hobby Lobby, decided a few days after Baskin, held that closely held corporations can be exempted from following a challenged statute, if in doing so, would substantially infringe upon the corporation’s religious exercise.

Many believe that the effect of cases like Hobby Lobby, legislation like RFRA, the “mini-RFRA’s” and with states like Indiana passing even stronger “mini-RFRAs”, will eradicate the achievements

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340 Smith, 110 S. Ct. at 879.
343 Drinan, supra note 340, at 543.
345 Id. at 2752.
of marriage equality because it will continue discrimination against the LGBT community.

On its face, what this type of legislation does is that it provides stronger precedent for more constitutional protections for the free exercise of religion. It simply sets the standard that courts must use when analyzing whether certain statutes infringe upon religious exercise under strict scrutiny. The correlation with LGBT civil liberties is this: hypothetically speaking, in a situation where a challenged action asks the court to balance the right to the free exercise of religious against the right to be free of sexual orientation discrimination, courts would have to work harder to find for the gay individual because there is less precedent and law in protecting discrimination than there is for religious exercise. Said another way, if religious exercise must be evaluated using strict scrutiny, while on the other hand, sexual orientation must be evaluated under rational basis review, arguably heightened scrutiny, it becomes very hard to determine what the balance is between the two and who ultimately prevails.

Of course there are certainly serious concerns for what the future may hold in terms of the development of LGBT rights. But what we have seen in the last twenty-five years is a nation that has completely flipped its position from anti-gay to being an ally. What we are approaching is a definitive end to the debate of whether same-sex marriage will destroy the institution of marriage. The nation has accepted that same-sex marriage will only enrich the lives of those who enter the institution but it will also create a more stable future for their children. The stage is set for courts and the legislatures to fill in the gaps, to set and define the applicable legal standards. Courts and the legislatures need to fill in the gaps of the constitutional meaning and precedential significance of all that the last twenty-five years of jurisprudence has created. Marriage equality is a wonderful first step in achieving a more inclusive and accepting society, but there is still work that needs to be done in determining where gays and lesbians fit on the legal spectrum outside of the context of same-sex marriage.