No. 14-___

In the

Supreme Court of the United States

SCOTT WALKER, *et al.*,

Petitioners,

v.

VIRGINIA WOLF, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourteenth Amendment prohibit a state from defining and recognizing marriage as only the legal union between one man and one woman?

LIST OF PARTIES

Petitioners are Scott Walker, in his official capacity as Governor of Wisconsin, J.B. Van Hollen, in his official capacity as Attorney General of Wisconsin, and Oskar Anderson, in his official capacity as State Registrar of Vital Statistics of Wisconsin.

Respondents are Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann, and Keith Borden.

The only parties to the proceeding not listed in the caption are defendant Jospeh Czarnezki, in his official capacity as Milwaukee County Clerk, Wendy Christensen, in her official capacity as Racine County Clerk, and Scott McDonell, in his official capacity as Dane County Clerk, all of whom did not appeal the district court ruling.

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Scott Walker, in his official capacity as Governor of Wisconsin, J.B. Van Hollen, in his official capacity as Attorney General of Wisconsin, and Oskar Anderson, in his official capacity as State Registrar of Vital Statistics of Wisconsin, respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

The petitioners waive their right to file a reply in support of this petition so that the Court can consider the petition at its September 29, 2014, conference.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at ---F.3d ----, 2014 WL 4359059, and is reprinted at Appendix A, 1a-44a.

The judgment of the United States Court of Appeals for the Seventh Circuit is reprinted at Appendix B, 45a-46a.

The opinion and order of the United States District Court for the Western District of Wisconsin granting plaintiffs' motion for summary judgment and declaring unconstitutional article XIII, § 13 of the Wisconsin Constitution is reported at 986 F. Supp. 2d 982 and is reprinted at Appendix C, 47a-143a.

The opinion and order of the United States District Court for the Western District of Wisconsin granting a permanent injunction is unreported, available at 2014 WL 2693963, and is reprinted at Appendix D, 144a-160a.

The judgment of the United States District Court for the Western District of Wisconsin is reprinted at Appendix E, 161a-164a.

JURISDICTION

The court of appeals entered its judgment on September 4, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

Wisconsin Const. art. XIII, § 13 states:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Wisconsin Stat. § 765.001(2) states, in relevant part:

> It is the intent . . . to promote the stability and best interests of marriage and the family. . . . Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal

> obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse.

Wisconsin Stat. § 765.01 states, in relevant part:

> Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.

Wisconsin Stat. § 765.16(1m) states, in relevant part:

> Marriage may be validly solemnized and contracted in this state only . . . by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband and wife[.]

STATEMENT OF THE CASE

Since statehood, Wisconsin has defined marriage in traditional terms as the union of one man and one woman. Eight years ago, when confronted with the real possibility that state court judges might find traditional marriage laws unconstitutional under the state constitution (as had occured in other states such as Hawaii, Vermont, and Massachusettes), Wisconsonites voted overwhelmingly in favor of a

referendum amending the Wisconsin Constitution to provide that only a marriage between a man and a woman shall be recognized in Wisconsin, and that a legal status identical or substantially similar to marriage for unmarried individuals shall not be recognized. The marriage amendment referendum, voted for by 1,264,310 Wisconsin residents—over 59% of voters—was an act of a functioning democracy. This reaction to the threat of judicial activism was not unique to Wisconsin: voters in 29 other states similarly amended their constitutions to remove the definitional issue of marriage from the field of judge-made law, and memorialized the traditional definition of marriage into constitutional law.

This democratically initiated strategy of protecting traditional marriage had one fatal flaw: starting in 2010, *federal* courts started to invalidate state-law definitions based on the *federal* constitution.

Just last week, the Seventh Circuit struck down Wisconsin's constitutional amendment and re-defined marriage for the State of Wisconsin. The Seventh Circuit, in finding that Wisconsin's traditional marriage laws violate the Equal Protection Clause of the Fourteenth Amendment, ignored Wisconsin voters' right to "exercise[] their privilege to enact laws as a basic exercise of their democratic power." *Schuette* v. *Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality). Like *Schuette*, "[t]his case is not about how the debate . . . should be resolved. It is about who may resolve it." *Id.* at 1638. Instead of

deferring to the wisdom of *Schuette*, the Seventh Circuit voided the policy preference of more than a million Wisconsin voters and inserted the policy preference of three judges.

The merits are not unique to this case. At least three other petitions for writs of certiorari relating to same-sex marriage are pending. *See Herbert, et al. v. Kitchen, et al.*, No. 14-124; *Smith v. Bishop, et al.*, No. 14-136; *Rainey v. Bostic, et al.*, Nos. 14-153, 14-225, 14-251. Others will soon follow.

This case, however, is the ideal vehicle to fully and finally resolve *all* issues regarding this compelling nationwide "debate between two competing views of marriage." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). This case uniquely presents:

- Both marriage licensing and recognition issues;
- Both a state constitutional amendment and a statutory scheme that recognizes only opposite sex marriage;
- The effect, if any, of domestic partnership laws on the propriety of traditional marriage laws;
- Viable defendants who are actively defending the laws; and
- No standing problems for plaintiffs.

The State of Wisconsin, along with at least 30 other states,[1] filed *amici curiae* briefs supporting Herbert's and Reyes' petition for a writ of certiorari. *See Herbert*, No. 14-124. A broad nationwide consensus agrees that the Court's review is necessary. So the question is not *whether* this Court should address the issue, but rather *what state* presents the apprporiate vehicle for the Court's resolution. The purpose of this Petition is to argue that Wisconsin uniquely presents the optimal vehicle for reviewing this compelling issue of nationwide importance.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS OF OBVIOUS EXCEPTIONAL CONSTITUTIONAL AND SOCIETAL IMPORTANCE.

The constitutionality of states' traditional marriage laws as presented in this, and other states' cases, *i.e.*, *Herbert*, No. 14-124, *Bishop*, No. 14-136, *Rainey*, Nos. 14-153, 14-225, 14-251, is of obvious exceptional constitutional and societal importance,

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[1]On September 4, 2014, Wisconsin, along with Colorado, Alabama, Alasaka, Georgia, Idaho, Louisiana, Montana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and West Virginia filed an *amici curiae* brief in support of Herbert's petition for writ of certiorari. Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Washington filed a separate *amici curiae* brief in support of Herbert and Reyes' petition for writ of certiorari.

both to the petitioners and the respondents in this case and for citizens and sovereigns nationwide. This is beyond dispute: persons on all sides of the issue have found common ground in requesting that the Court grant certiorari to determine the constitutionality of state-based traditional marriage laws.

According to Colorado and other states' *amici curae* brief supporting Petitioners Herbert's and Reyes' petition, *see Herbert*, No. 14-124, 89 same-sex marriage cases are presently pending in 31 states nationwide, including several cases before the Fifth,[2] Sixth,[3] and Ninth[4] Circuits. The

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[2]Briefing is ongoing in *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), appeal docketed, No. 14-50196.

[3]Oral argument was heard on August 6, 2014, in six cases from four States (cases within the same State were consolidated): *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), appeal docketed, No. 14-1341; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), appeal docketed, *Obergefell v. Himes*, No. 14-3057; *Henry v. Himes*, No. 14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), appeal docketed, No. 14-3464; *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), appeal docketed, No. 14-5291; *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), appeal docketed, No. 14-5818; *Tanco v. Haslam*, No. 13-CV-1159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), appeal docketed, No. 14-5297.

[4]Oral argument was heard on September 8, 2014, in three cases: *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012), appeal docketed, Nos. 12-16995, 12-16998; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), appeal docketed, No. 12-17688; *Latta v. Otter*, No. 13-CV-482, 2014 WL 1909999 (D. Idaho May 13, 2014), appeal docketed, Nos. 14-35420, 14-35421.

constitutional issues presented in this petition are of particular importance, not just to Petitioners and Respondents, but to people supporing traditional marriage laws, as well as same-sex marriage rights, across the country.

II. THIS CASE IS THE IDEAL VEHICLE FOR FULLY RESOLVING THE CONSTITUTIONAL QUESTIONS RELATING TO SAME-SEX MARRIAGE.

This case is the ideal vehicle for resolving *all* constitutional questions relating to same-sex marriage.

First, this case involves three distinct categories of claims and claimants: Wisconsin resident couples who married in Minnesota and seek recognition of their out-of-state marriages under Wisconsin law; former California residents whose marriage was recognized by California law who seek recognition of their marriage under Wisconsin law; and unmarried couples who seek Wisconsin marriage licenses. *See* App. C, 52a-53a. Unlike other states where some but not all issues are presented, *i.e.*, *Bishop*, No. 14-136, this case would allow the Court to fully address issues relating to both the issuance of marriage licenses, as well as recognition of out-of-state marriages conducted under varying circumstances.

Second, the defendants, Wisconsin Governor Scott Walker, Attorney General J.B. Van Hollen, and

State Registrar of Vital Statistics Oskar Anderson, have all consistently defended Wisconsin's traditional marriage laws. Several county clerks remain defendants, at least one of whom, *i.e.*, Racine County Clerk Wendy Christensen, has defended Wisconsin's marriage laws. Unlike other states where officials have not defended the laws, *i.e.*, *Rainey*, Nos. 14-153, 14-225, 14-251, or have limited enforcement authority, *i.e.*, *Herbert*, No. 14-124, this case presents Wisconsin's chief executive, its top law enforcement official, and its agent responsible for establishing and recording marriage licenses as defendants actively defending the laws.

Third, Wisconsin's marriage laws are codified both in a state constitutional amendment and as part of a comprehensive statutory scheme. The constitutional amendment was adopted by two successive legislatures and overwhelmingly ratified by the people in a statewide referendum, 59% to 41%. The statutory scheme, literally dating to statehood, has consistently defined marriage in traditional terms as between one man and one woman. *See* Wis. Stat. ch. 78 (1849); Wis. Stat. ch. 245 (1959); Wis. Stat. ch. 765 (1979). Unlike other states that have only state statutes and not constitutional amendments, *i.e.*, *Baskin v. Bogan*, No. 14-2386 (7th Cir.), Wisconsin presents both a constitutional amendment and a comprehensive statutory scheme.

Fourth, although Wisconsin has consistently affirmed its traditional marriage laws, it has also recognized domestic partnerships for same-sex couples, providing a package of rights and benefits

similar to those provided by civil marriage. *See* Wis. Stat. ch. 770; *see also Appling v. Walker*, 2014 WI 96, ¶ 57, 2014 WL 3744232 (affirming the constitutionality of Wisconsin's domestic partnership laws). No other petitioning state has domestic partnership or civil union laws providing legal recognition for same-sex couples. This is particularly significant here, where Wisconsin has argued before lower courts that, under the substantive due process doctrine, any fundamental right to marriage does not extend to include all tangible and intangible benefits incident to marriage. Domestic partnership laws' effects, if any, on whether a state's traditional marriage laws pass constitutional muster, or were motivated by animus, can only be presented in this case.

Fifth, unlike *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), neither standing nor jurisdictional issues will prevent the Court from from considering the question presented. Here, Wisconsin's Governor, Attorney General, and State Registrar of Vital Statistics are all appropriate parties to defend, enforce, and implement Wisconsin's laws. Respondents are appropriate parties to challenge the laws. The parties present a concrete adversarial conflict between Petitioners and Respondents.

Sixth, both Petitioners and Respondents have found common ground in recognizing the importance of the issues presented and the need for swift resolution by the Court. Following the district court's decision, *see* App. C, hundreds of same-sex

couples applied for and received marriage licenses in Wisconsin. At present, the legal status of their marriages is unknown. The parties are thus faced with a quandary: either the respondent same-sex couples' constitutional rights are being denied or Wisconsonites' voices, as reflected by their votes in a statewide referendum, will be silenced. Either way, the Court should grant Wisconsin's petition and conclusively settle this ongoing, emotionally charged debate between these two competing views of marriage.

III. WISCONSIN WOULD PRESENT A UNIQUE LEGAL PERSPECTIVE REGARDING THE POSITIVE/NEGATIVE RIGHTS DICHOTOMY UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Unlike any other state involved in a traditional marriage laws challenge, Wisconsin has presented a theory based upon the idea that the Fourteenth Amendment's Due Process Clause is not a charter of positive rights for citizens. Instead, the Fourteenth Amendment—through the Due Process Clause—prevents government intrusion into citizens' lives and confers no positive, tangible benefits on citizens or corresponding obligations upon government. Plaintiffs in all nationwide same-sex marriage cases have requested courts to require state governments to provide a marital licensing scheme that recognizes and provides certain rights and confers certain

benefits upon same-sex couples. Wisconsin's position is that the substantive due process doctrine does not affirmatively confer such rights and benefits.

The Court has emphasized the distinction between negative and positive rights under the Fourteenth Amendment's Due Process Clause. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (Due Process Clause "prevent[s] government from abusing [its] power, or employing it as an instrument of oppression," but "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual") (internal quotations omitted). The Framers were content to leave the area of affirmative governmental obligations "to the democratic political processes." *Id.*

Wisconsin's unique argument is that, particularly in the area of marriage rights, the Fourteenth Amendment's Due Process Clause is an inappropriate mechanism to foist upon the States the affirmative obligation to provide a benefit to a particular class of people. States could, if they chose, get out of the business of marriage altogether and leave it to solely secular recognition without offending the Fourteenth Amendment. *See Windsor*, 133 S. Ct. at 2691 ("regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States") (citation and internal quotation marks omitted). Accordingly,

Wisconsin would bring this unique prospective to the Court's consideration of the issue of the constitutionality of same-sex marriage.

Although the Seventh Circuit did not grant relief on Due Process Clause grounds, plaintiffs in this and nearly all other same-sex marriage cases have consistently requested such relief on that basis and are expected to do so before this Court.

IV. THE SEVENTH CIRCUIT'S INIMITABLE, BUT WRONG, EQUAL PROTECTION ANALYSIS WARRANTS THIS COURT'S DIRECT REVIEW.

The Court should also grant review because the Seventh Circuit's decision is rife with judicial policymaking and the creation of new judge-made law, instead of the even, measured, and modest applicaiton of this Court's existing precedent.

A. The Seventh Circuit's analysis eschews this Court's tiered equal protection jurisprudence in favor of an inherently subjective cost-benefits analysis.

The Seventh Circuit's analysis eschews this Court's tiered equal-protection jurisprudence in favor of an inherently subjective cost-benefit analysis. Ultimately, the Seventh Circuit's analysis

reflects a policy judgment rather than a constitutional one.

The Seventh Circuit's decision begins by paying lip service to a statement from this Court's decision in *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." App. A, 3a. Rapidly shifting gears, the Seventh Circuit then fashions a policy-based four-part test that does not harmonize with this Court's Equal Proectition jurisprudence. The Seventh Circuit's test is:

> 1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?
>
> 2. Is the unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails)? . . .
>
> 3. Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important

> offsetting benefit on society as a whole? . . .
>
> 4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's purported rationale for the policy implies that it should equally apply to other groups as well?

App. A, 5a-7a.

These four questions—although they are not accompanied by a single citation to a case—"go to the heart of equal protection doctrine." App. A, 7a. Questions 1 and 2 "are consistent with the various formulas for what entitles a discriminated-against group to heightened scrutiny of the discrimination," and questions 3 and 4 "capture the essence of the Supreme Court's approach in heightened-scrutiny cases." *Id.*

The primary problem with questions 1 and 2 is that they presume that a state is engaged in baseless discrimination when it favors traditional marriage. This is a faulty assumption that puts cart firmly before horse. Nowhere in this Court's equal-protection jurisprudence is unlawful discrimination presumed first.

The primary problem with questions 3 and 4 is that they do not fairly determine whether a state's law is sufficiently "tailored" to meet a state's proffered interests. *See* App. A, 7a. Instead, questions 3 and 4 demand that a state show that the law creates a benefit that does not outweigh the costs of a different, less strict law, which might be hypothetically less burdensome on a particular group of people. Questions 3 and 4 are merely judicial stand-ins for a state legislature's policymaking and would be wholly inappropriate in a rational-basis analysis. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (a classification "must be upheld . . . if there is any reasonably conceivable state of facts" that could justify it) (citation and internal quotatation marks omitted). In other words, if the answers to questions 1 and 2 are "no," questions 3 and 4 are utterly inconsistent with this Court's rational-basis jurisprudence.

The Seventh Circuit's decision does not state whether some or all of its four questions must be answered in the affirmative or the negative. It does not state whether an answer of "no" to the first two questions means that a court need not proceed to the last two. It does not state whether any of the four questions are dispositive of the entire constitutional issue. The questions only create *more* questions for a future district or circuit court that might be called upon to apply the new analysis. The analysis itself is policy-driven and eschews this Court's tiered Fourteenth Amendment Equal Protection case law to such an extent that it cannot stand.

B. The Seventh Circuit's analysis is an indecipherable amalgam of numerous Fourteenth Amendment theories, which will result in confusion for lower courts.

The Seventh Circuit's decision unnecessarily confuses Fourteenth Amendment Equal Protection jurisprudence. The decision is untethered to any particular constitutional test and is an indecipherable amalgam of several—at times contradictory—theories, none of which provides a satisfactory basis to strike down Wisconsin's traditional marriage laws.

A consequence of the Seventh Circuit's approach here is that it will confuse Fourteenth Amendment Equal Protection jurisprudence in the Circuit and beyond, particularly with regard to when and how the rational basis standard is to be applied. This is not the first time in recent memory that the Seventh Circuit has side-stepped this Court's precedents in favor of its own unique concept of the Fourteenth Amendment. *See, e.g.*, *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (Posner, J.), *cert. denied*, 134 S. Ct. 2841 (June 23, 2014) (affirming an injunction against Wisconsin's admitting-privileges requirement for abortion doctors while applying this Court's "undue burden" analysis as a cost-benefits anlaysis: "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate

or gratuitous."). This Court should take the instant case to prevent further unwarranted confusion in the Seventh Circuit's Fourteenth Amendment jurisprudence and to clarify the proper test.

The Seventh Circuit indicates that its decision finds guidance in a statement from *Beach Commc'ns*: "In areas of social and economic policy, a statutory classification that neither proceeds *along suspect lines* nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." App. A, 3a (quoting *Beach Commc'ns*, 508 U.S. at 313; Seventh Circuit's emphasis). The Seventh Circuit calls the "along suspect lines" language "the exception applicable to this pair of cases" and the "formula" that it is applying. App. A, 3a.

The "formula" then vanishes from sight. Throughout its decision, the Seventh Circuit shifts gratuitously between numerous Equal Protection theories, never explaining which of the several contradicting legal standards it is ultimately applying or how the Seventh Circuit's "simplified four-step analysis," App. A, 42a, is consistent with *Beach Commc'ns*' "formula." The Seventh Circuit conceives of the Fourteenth Amendment inquiry as some or all of the following, depending

upon which policy justifications it chose to emphasize at a particular juncture in its decision:

- Holding that "more than a reasonable basis is required" when the classification is "along suspect lines;" App. A, 4a;

- Determining that government discrimination "against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic," creates a "presumption" of an equal protection violation that is "rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims;" App. A, 4a-5a;

- Holding that, in a "heightened scrutiny" case, the classification must serve "'important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives;'" App. A, 7a (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996));

- Evaluating whether a law is over- or unerinclusive as a means of determining "arbitrariness;" App. A, 8a;

- Determining that the classification here is "irrational" and "therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny;" App. A, 9a;

- Finding that "*groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws;" App. A, 15a (emphasis in original);

- Holding that the law "'must bear a rational relationship to a legitimate governmental purpose;'" App. A, 28a (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)); and

- Indicating that the state must come forth with "*some* evidence," to support its rational basis argument that same-sex marriage could transform traditional marriage negatively; App. A, 34a (emphasis in orginal).

Cataloguing all of the varied and contradictory "tests" in the Seventh Circuit's decision is unnecessary. The point is that it is not possible to ascertain *any* governing standard from the Seventh Circuit's decision. At most, the Seventh Circuit applied a form of heightened scrutiny. At least, the Seventh Circuit applied rational basis scrutiny and concluded that Wisconsin's traditional marriage laws are irrational. The result is clear, but the methodology is not. That's the problem.

The lack of a clear statement of the constitutional standard illustrates the policy-driven nature of the Seventh Circuit's decision and the confusion it will create in Fourteenth Amendment Equal Protection jurisprudence in the Seventh Circuit and beyond.

This Court should take this case to clarify what standard applies, whether it is heightened scrutiny or rational basis. The Court should then apply that standard to conclude that Wisconsin's traditional marriage laws do not violate the Equal Protection Clause.

V. WISCONSIN'S AND INDIANA'S APPEAL PRESENTS THE MOST DIRECT PATH TO A SATISFACTORY RESOLUTION OF THIS IMPORTANT ISSUE.

Contemporaneous with the filing of this petition, Indiana is filing a petition for a writ of certiorari to seek review of the same Seventh Circuit decision. This Court should grant both petitions and consider the cases together because they present the most uncomplicated procedural postures. These cases also squarely present the most salient legal issue, equal protection, by advancing a positive-rights limiting principle that will restrain the lower courts' interest in granting new social rights under the due-process provision.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14-2386 to 14-2388

MARILYN RAE BASKIN, *et al.*,

Plaintiffs-Appellees,

v.

PENNY BOGAN, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB,
1:14-cv-00406-RLY-MJD — **Richard L. Young**,
Chief Judge.

No. 14-2526

VIRGINIA WOLF, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT WALKER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:14-cv-00064-bbc — **Barbara B. Crabb**, *Judge*.

ARGUED AUGUST 26, 2014 — DECIDED
SEPTEMBER 4, 2014

Before POSNER, WILLIAMS, and HAMILTON,
Circuit Judges.

POSNER, *Circuit Judge*. Indiana and Wisconsin are among the shrinking majority of states that do not recognize the validity of same-sex marriages, whether contracted in these states or in states (or foreign countries) where they are lawful. The states have appealed from district court decisions invalidating the states' laws that ordain such refusal.

Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, as we shall see, they are about the welfare of American children. The argument that the states press hardest in defense of their prohibition of same-sex marriage is that the only reason government encourages marriage is to induce heterosexuals to marry so that there will be

fewer "accidental births," which when they occur outside of marriage often lead to abandonment of the child to the mother (unaided by the father) or to foster care. Overlooked by this argument is that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married.

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

We hasten to add that even when the group discriminated against is not a "suspect class," courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–50 (1985). In *Vance v. Bradley*, 440 U.S. 93, 111 (1979), an illustrative case in which the Supreme Court accepted the government's rationale for discriminating on the

basis of age, the majority opinion de-voted 17 pages to analyzing whether Congress had had a "reasonable basis" for the challenged discrimination (requiring foreign service officers but not ordinary civil servants to retire at the age of 60), before concluding that it did.

We'll see that the governments of Indiana and Wisconsin have given us no reason to think they have a "reasonable basis" for forbidding same-sex marriage. And more than a reasonable basis is required because this is a case in which the challenged discrimination is, in the formula from the *Beach* case, "along suspect lines." Discrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *Regents of University of California v. Bakke*, 438 U.S. 265, 360–62 (1978); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007); *Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir. 2013); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1018–19 (8th Cir. 2012). These circumstances create a presumption that the discrimination is a denial of the equal protection of the laws (it may violate other provisions of the Constitution as well, but we won't have to consider that possibility). The presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly

outweigh the harms to its victims. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003); *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

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

1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?

2. Is the unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails)? The characteristic must be one that isn't relevant to a person's ability to participate in society. Intellect, for example, has a large immutable component but

also a direct and substantial bearing on qualifications for certain types of employment and for legal privileges such as entitlement to a driver's license, and there may be no reason to be particularly suspicious of a statute that classifies on that basis.

3. Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole? Age is an immutable characteristic, but a rule prohibiting persons over 70 to pilot airliners might reasonably be thought to confer an essential benefit in the form of improved airline safety.

4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's purported rationale for the policy implies that it should equally apply to other groups as well? One way to decide whether a policy is overinclusive is to ask whether unequal treatment is *essential* to attaining the desired benefit. Imagine a statute that imposes a $2 tax on women but not men. The proceeds from that tax are, let's assume, essential to the efficient operation of government. The tax is therefore socially efficient, and the benefits clearly outweigh the costs. But that's not the end of the inquiry. Still to be determined is whether the benefits from imposing the tax only on women outweigh the costs. And likewise in a same-sex marriage case the issue is not whether heterosexual marriage is a socially beneficial institution but

whether the benefits to the state from discriminating against same-sex couples clearly outweigh the harms that this discrimination imposes.

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

The difference between the approach we take in these two cases and the more conventional approach is semantic rather than substantive. The conventional approach doesn't purport to balance the costs and benefits of the challenged discriminatory law. Instead it evaluates the importance of the state's objective in enacting the law and the extent to which the law is suited ("tailored") to achieving that objective. It asks whether the statute actually furthers the interest that the state asserts and whether there might be some less burdensome alternative. The analysis thus focuses not on "costs" and "benefits" as such, but on "fit." That is why the briefs in these two cases overflow with debate over whether prohibiting same-sex marriage is "over- or

underinclusive"—for example, overinclusive in ignoring the effect of the ban on the children adopted by same-sex couples, under-inclusive in extending marriage rights to other non-procreative couples. But to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy, and to say that the policy is underinclusive is to say that its exclusion of other, very similar groups is indicative of arbitrariness.

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

Our pair of cases is rich in detail but ultimately straight-forward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes

that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents. The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases.

It is also why we can avoid engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment. The plaintiffs rely on cases such as *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990), and *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978), that hold that the right to choose whom to marry is indeed a fundamental right. The states reply that the right recognized in such cases is the right to choose from within the class of persons eligible to marry, thus excluding children, close relatives, and persons already married—and, the states contend, persons of the same sex. The plaintiffs riposte that there are good reasons for ineligibility to marry children, close relatives, and the already married, but not for ineligibility to marry persons of the same sex. In light of the compelling alternative grounds that we'll be exploring for allowing same-sex marriage, we won't have to engage with the parties' "fundamental right" debate; we can confine our attention to equal protection.

We begin our detailed analysis of whether prohibiting same-sex marriage denies equal protection of the laws by noting that Indiana and Wisconsin, in refusing to authorize such marriage or (with limited exceptions discussed later) to recognize such marriages made in other states by residents of Indiana or Wisconsin, are discriminating against homosexuals by denying them a right that these states grant to heterosexuals, namely the right to marry an unmarried adult of their choice. And there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice. Wisely, neither Indiana nor Wisconsin argues otherwise. The American Psychological Association has said that "most people experience little or no sense of choice about their sexual orientation." APA, "Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality" 2 (2008), www.apa.org/topics/lgbt/orientation.pdf (visited Sept. 2, 2014, as were the other websites cited in this opinion); see also Gregory M. Herek et al., "Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample," 7 *Sexuality Research and Social Policy* 176, 188 (2010) ("combining respondents who said they'd had a small amount of choice with those reporting no choice, 95% of gay men and 84% of lesbians could be characterized as perceiving that they had little or no choice about their sexual orientation"). That homosexual orientation is not a choice is further suggested by the absence of evidence (despite extensive efforts to find it) that psychotherapy is

effective in altering sexual orientation in general and homosexual orientation in particular. APA, "Answers to Your Questions," supra, at 3; Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation 35–41 (2009).

The leading scientific theories of the causes of homosexuality are genetic and neuroendocrine theories, the latter being theories that sexual orientation is shaped by a fetus's exposure to certain hormones. See, e.g., J. Michael Bailey, "Bio-logical Perspectives on Sexual Orientation," in Lesbian, Gay, and Bisexual Identities Over the Lifespan: Psychological Perspec-tives 102–30 (Anthony R. D'Augelli and Charlotte J. Patter-son eds. 1995); Barbara L. Frankowski, "Sexual Orientation and Adolescents," 113 Pediatrics 1827, 1828 (2004). Although it seems paradoxical to suggest that homosexuality could have a genetic origin, given that homosexual sex is non-procreative, homosexuality may, like menopause, by reducing procreation by some members of society free them to provide child-caring assistance to their procreative relatives, thus increasing the survival and hence procreative prospects of these relatives. This is called the "kin selection hypothesis" or the "helper in the nest theory." See, e.g., Association for Psychological Science,"Study Reveals Potential Evolutionary Role for Same-Sex Attraction," Feb. 4, 2010,
www.psychologicalscience.org/media/releases/2010/v
asey.cfm. There are other genetic theories of such attraction as well. See, e.g., Nathan W. Bailey and Marlene Zuk, "Same-Sex Sexual Behavior and

Evolution," forthcoming in *Trends in Ecology and Evolution*, www.faculty.ucr.edu/~mzuk/Bailey%20and%20Zuk%202009%20Same%20sex%20behaviour.pdf. For a responsible popular treatment of the subject see William Kremer, "The Evolutionary Puzzle of Homosexuality," *BBC News Magazine*, Feb. 17, 2014, www.bbc.com/news/magazine-26089486.

The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community. Not that allowing same-sex marriage will change in the short run the negative views that many Americans hold of same-sex marriage. But it will enhance the status of these marriages in the eyes of other Americans, and in the long run it may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples.

The tangible as distinct from the psychological benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children of the marriage, whether biological or

adopted, are also considerable. In Indiana they include the right to file state tax returns jointly, Ind. Code § 6-3-4-2(d); the marital testimonial privilege, § 34-46-3-1(4); spousal-support obligations, § 35-46-1-6(a); survivor benefits for the spouse of a public safety officer killed in the line of duty, § 36-8-8-13.8(c); the right to inherit when a spouse dies intestate, § 29-1-2-1(b), (c); custodial rights to and child support obligations for children of the marriage, and protections for marital property upon the death of a spouse. §§ 12-15-8.5-3(1); 12-20-27-1(a)(2)(A). Because Wisconsin allows domestic partnerships, some spousal benefits are available to same-sex couples in that state. But others are not, such as the right to adopt children jointly, Wis. Stat. § 48.82(1); spousal-support obligations, §§ 765.001(2), 766.15(1), 766.55; the presumption that all property of married couples is marital property, § 766.31(2); and state-mandated access to enrollment in a spouse's health insurance plan, § 632.746(7).

Of great importance are the extensive federal benefits to which married couples are entitled: the right to file income taxes jointly, 26 U.S.C. § 6013; social security spousal and surviving-spouse benefits, 42 U.S.C. § 402; death benefits for surviving spouse of a military veteran, 38 U.S.C. § 1311; the right to transfer assets to one's spouse during marriage or at divorce without additional tax liability, 26 U.S.C. § 1041; ex-emption from federal estate tax of property that passes to the surviving spouse, 26 U.S.C. § 2056(a); the tax exemption for employer-provided healthcare to a spouse, 26 U.S.C. § 106; Treas. Reg. § 1.106–1; and healthcare benefits for spouses of federal employees, 5 U.S.C. §§ 8901(5),

8905.

The denial of these federal benefits to same-sex couples brings to mind the Supreme Court's opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013), which held un-constitutional the denial of all federal marital benefits to same-sex marriages recognized by state law. The Court's criticisms of such denial apply with even greater force to Indiana's law. The denial "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. [No same-sex marriages are valid in Indiana.] This places same-sex couples in an unstable position of being in a second-tier marriage [in Indiana, in the lowest—the unmarried—tier]. The differentiation demeans the couple … [and] humiliates tens of thousands of children now being raised by same-sex couples. The law … makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694.

The Court went on to describe at length the federal marital benefits denied by the Defense of Marriage Act to married same-sex couples. Of particular relevance to our two cases is the Court's finding that denial of those benefits causes economic harm to children of same-sex couples. "It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family

security. [The Act also] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept." *Id.* at 2695 (citations omitted).

Of course there are costs to marriage as well as benefits, not only the trivial cost of the marriage license but also the obligations, such as alimony, that a divorcing spouse may be forced to bear. But those are among "the duties and responsibilities that are an essential part of married life and that [the spouses] in most cases would be honored to accept." That marriage continues to predominate over cohabitation as a choice of couples indicates that on average the sum of the tangible and intangible benefits of marriage outweighs the costs.

In light of the foregoing analysis it is apparent that *groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws, and there-fore that Indiana and Wisconsin must to prevail establish a clearly offsetting governmental interest in that rejection. Whether they have done so is really the only issue before us, and the balance of this opinion is devoted to it—except that before addressing it we must address the states' argument that whatever the merits of the plaintiffs' claims, we are bound by *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), to reject them. For there the Supreme Court, without issuing an opinion, dismissed "for want of a substantial federal question" an appeal from a state court that had held that prohibiting same-sex marriage did not violate the Constitution. Although even a decision without

opinion is on the merits and so binds lower courts, the Supreme Court carved an exception to this principle of judicial hierarchy in *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), for "when doctrinal developments indicate otherwise"; see also *United States v. Blaine County*, 363 F.3d 897, 904 (9th Cir. 2004); *Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d 266, 272 (2d Cir. 1985). *Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned. Subsequent decisions such as *Romer v. Evans*, 517 U.S. 620, 634–36 (1996); *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003), and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative. At least *we* think they're distinguishable. But Justice Scalia, in a dissenting opinion in *Lawrence*, 539 U.S. at 586, joined by Chief Justice Rehnquist and Justice Thomas, thought not. He wrote that "principle and logic" would *require* the Court, given its decision in *Lawrence*, to hold that there is a constitutional right to same-sex marriage. *Id.* at 605.

First up to bat is Indiana, which defends its refusal to allow same-sex marriage on a single ground, namely that government's sole purpose (or at least Indiana's sole purpose) in making marriage a legal relation (unlike cohabitation, which is purely contractual) is to enhance child welfare. Notably the state does not argue that recognizing same-sex marriage undermines conventional marriage.

When a child is conceived intentionally, the parents normally intend to raise the child together.

But pregnancy, and the resulting birth (in the absence of abortion), are some-times accidental, unintended; and often in such circumstances the mother is stuck with the baby—the father, not having wanted to become a father, refuses to take any responsibility for the child's welfare. The sole reason for Indiana's marriage law, the state's argument continues, is to try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility. The state recognizes that some or even many homosexuals want to enter into same-sex marriages, but points out that many people want to enter into relations that government refuses to enforce or protect (friendship being a no-table example). Government has no interest in recognizing and protecting same-sex marriage, Indiana argues, because homosexual sex cannot result in unintended births.

As for the considerable benefits that marriage confers on the married couple, these in the state's view are a part of the regulatory regime: the carrot supplementing the stick. Marital benefits for homosexual couples would not serve the regulatory purpose of marital benefits for heterosexual couples because homosexual couples don't produce babies.

The state's argument can be analogized to requiring drivers' licenses for drivers of motor vehicles but not for bicyclists. Motor vehicles are more dangerous to other users of the roads than bicycles are, and therefore a driver's license is required to drive the former but not to pedal the latter. Bicyclists do not and cannot complain about

not having to have a license to pedal, because obtaining, renewing, etc., the li-cense would involve a cost in time and money. The analogy is not perfect (if it were, it would be an identity not an analogy) because marriage confers benefits as well as imposing costs, as we have emphasized (indeed it confers on most couples benefits greater than the costs). But those benefits, in Indiana's view, would serve no state interest if extended to homosexual couples, who should therefore be content with the benefits they derive from being excluded from the marriage-licensing regime: the cost of the license and the burden of marital duties, such as support, and the costs associated with divorce. Moreover, even if possession of a driver's license conferred benefits not available to bicyclists (dis-counts, or tax credits, perhaps), the state could argue that it offered these benefits only to induce drivers to obtain a license (the carrot supplementing the stick), and that bicyclists don't create the same regulatory concern and so don't deserve a carrot.

Another analogy: The federal government extends a $2000 "saver's credit" to low- and middle-income workers who contribute to a retirement account. Although everyone would like a $2000 credit, only lower-income workers are entitled to it. Should higher-income workers complain about being left out of the program, the government could reply that only lower-income workers create a regulatory concern—the concern that they'd be unable to support themselves in retirement without government encouragement to save while they're young.

In short, Indiana argues that homosexual relationships are created and dissolved without legal consequences because they don't create family-related regulatory concerns. Yet encouraging marriage is less about forcing fathers to take responsibility for their unintended children—state law has mechanisms for determining paternity and requiring the father to contribute to the support of his children—than about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together. Moreover, if channeling procreative sex into marriage were the only reason that Indiana recognizes marriage, the state would not allow an infertile person to marry. Indeed it would make marriage licenses expire when one of the spouses (fertile upon marriage) became infertile because of age or disease. The state treats married homosexuals as would-be "free riders" on heterosexual marriage, un-reasonably reaping benefits intended by the state for fertile couples. But infertile couples are free riders too. Why are they allowed to reap the benefits accorded marriages of fertile couples, and homosexuals are not?

The state offers an involuted pair of answers, neither of which answers the charge that its policy toward same-sex marriage is underinclusive. It points out that in the case of most infertile heterosexual couples, only one spouse is infer-tile, and it argues that if these couples were forbidden to marry there would be a risk of the fertile spouse's seeking a fertile person of the other sex to breed with and the result would be "multiple relationships that might yield unintentional babies." True, though the

fertile member of an infertile couple might decide instead to produce a child for the couple by surrogacy or (if the fertile member is the woman) a sperm bank, or to adopt, or to divorce. But what is most unlikely is that the fertile member, though *desiring* a biological child, would have procreative sex with another person and then *abandon* the child—which is the state's professed fear.

The state tells us that "non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children." That's a strange argument; fertile couples don't learn about child-rearing from infertile couples. And why wouldn't same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?

It's true that infertile or otherwise non-procreative heterosexual couples (some fertile couples decide not to have children) differ from same-sex couples in that it is easier for the state to determine whether a couple is infertile by reason of being of the same sex. It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile (although later we'll see Wisconsin flirting with such an approach with respect to another class of infertile couples). And often the couple wouldn't know in advance of marriage whether they were fertile. But then how to explain Indiana's decision to carve an exception to its prohibition against marriage of close relatives for

first cousins 65 or older—a population guaranteed to be infertile because women can't conceive at that age? Ind. Code § 31-11-1-2. If the state's only interest in allowing marriage is to protect children, why has it gone out of its way to permit marriage of first cousins *only after* they are provably infertile? The state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage. And among non-procreative couples, those that raise children, such as same-sex couples with adopted children, gain more from marriage than those who do not raise children, such as elderly cousins; elderly persons rarely adopt.

Indiana has thus invented an insidious form of discrimination: favoring first cousins, provided they are not of the same sex, over homosexuals. Elderly first cousins are permit-ted to marry because they can't produce children; homosexuals are forbidden to marry because they can't produce children. The state's argument that a marriage of first cousins who are past child-bearing age provides a "model [of] family life for younger, potentially procreative men and women" is impossible to take seriously.

At oral argument the state's lawyer was asked whether "Indiana's law is about successfully raising children," and since "you agree same-sex couples can successfully raise children, why shouldn't the ban be lifted as to them?" The lawyer answered that "the assumption is that with opposite-sex couples there is very little thought given during the sexual act, sometimes, to whether babies may be a consequence." In other words, Indiana's government

thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Which brings us to Indiana's weakest defense of its distinction among different types of infertile couple: its assumption that same-sex marriage cannot contribute to alleviating the problem of "accidental births," which the state contends is the sole governmental interest in marriage. Sup-pose the consequences of accidental births are indeed the state's sole reason for giving marriage a legal status. In advancing this as *the* reason to forbid same-sex marriage, Indiana has ignored adoption—an extraordinary oversight. Unintentional offspring are the children most likely to be put up for adoption, and if not adopted, to end up in a foster home. Accidental pregnancies are the major source of unwanted children, and unwanted children are a major problem for society, which is doubtless the reason homosexuals are permitted to adopt in most states—including Indiana and Wisconsin.

It's been estimated that more than 200,000 American children (some 3000 in Indiana and about

the same number in Wisconsin) are being raised by homosexuals, mainly homosexual couples. Gary J. Gates, "LGBT Parenting in the United States" 3 (Williams Institute, UCLA School of Law, Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-parenting.pdf; Gates, "Same-Sex Couples in Indiana: A Demographic Summary" (Williams Institute, UCLA School of Law, 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/IN-same-sex-couples-demo-aug-2014.pdf; Gates, "Same-Sex Couples in Wisconsin: A Demo-graphic Survey" (Williams Institute, UCLA School of Law, Aug. 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/WI-same-sex-couples-demo-aug-2014.pdf. Gary Gates's demographic surveys find that among couples who have children, homosexual couples are five times as likely to be raising an adopted child as heterosexual couples in Indiana, and two and a half times as likely as heterosexual couples in Wisconsin.

If the fact that a child's parents are married enhances the child's prospects for a happy and successful life, as Indiana believes not without reason, this should be true whether the child's parents are natural or adoptive. The state's lawyers tell us that "the point of marriage's associated benefits and protections is to encourage child-rearing environments where parents care for their biological children in tandem." Why the qualifier "biological"? The state recognizes that family is about raising children and not just about producing them. It does not explain why the "point of marriage's associated benefits and protections" is inapplicable to a couple's

adopted as distinct from biological children.

Married homosexuals are more likely to want to adopt than unmarried ones if only because of the many state and federal benefits to which married people are entitled. And so same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters. Notably, same-sex couples are *more* likely to adopt foster children than opposite-sex couples are. Gates, "LGBT Parenting in the United States," *supra*, at 3. As of 2011, there were some 400,000 American children in foster care, of whom 10,800 were in Indiana and about 6500 in Wisconsin. U.S. Dept. of Health & Human Services, Children's Bureau, "How Many Children Are in Foster Care in the U.S.? In My State?" www.acf.hhs.gov/programs/cb/faq/foster-care4.

Also, the more willing adopters there are, not only the fewer children there will be in foster care or being raised by single mothers but also the fewer abortions there will be. Carrying a baby to term and putting the baby up for adoption is an alternative to abortion for a pregnant woman who thinks that as a single mother she could not cope with the baby. The pro-life community recognizes this. See, e.g., Students for Life of America, "Adoption, Another Option," http://studentsforlife.org/resources/organize-an-event/adoption: "There may be times when a mother facing an un-planned pregnancy may feel completely unequipped to parent her child. She may feel her *only option* is to kill her pre-born child. Pro-life individuals touch lives by helping women place their

baby or child for adoption. *It is important to show women on your campus that adoption can be the answer to all of her fears"* (emphasis in original).

Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples. Suppose such a child comes home from school one day and reports to his parents that all his classmates have a mom and a dad, while he has two moms (or two dads, as the case may be). Children, being natural conformists, tend to be upset upon discovering that they're not in step with their peers. If a child's same-sex parents are married, however, the parents can tell the child truthfully that an adult is per-mitted to marry a person of the opposite sex, or if the adult prefers as some do a person of his or her own sex, but that either way the parents are married and therefore the child can feel secure in being the child of a married couple. Conversely, imagine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.

Indiana permits joint adoption by homosexuals (Wisconsin does not). But an unmarried homosexual couple is less stable than a married one, or so at least the state's insistence that marriage is better for children implies. If marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents. The state should *want* homosexual couples who adopt children—as, to repeat, they are permitted to do—to be married, if it is serious in arguing that the only governmental

interest in marriage derives from the problem of accidental births. (We doubt that it is serious.)

The state's claim that conventional marriage is the solution to that problem is belied by the state's experience with births out of wedlock. Accidental pregnancies are found among married couples as well as unmarried couples, and among individuals who are not in a committed relationship and have sexual intercourse that results in an unintended pregnancy. But the state believes that married couples are less likely to abandon a child of the marriage even if the child's birth was unintended. So if the state's policy of trying to channel procreative sex into marriage were succeeding, we would expect a drop in the percentage of children born to an unmarried woman, or at least not an increase in that percentage. Yet in fact that percentage has been rising even since Indiana in 1997 reenacted its prohibition of same-sex marriage (thus underscoring its determined opposition to such marriage) and for the first time declared that it would not recognize same-sex marriages contracted in other states or abroad. The legislature was fearful that Hoosier homosexuals would flock to Hawaii to get married, for in 1996 the Hawaii courts appeared to be moving toward invalidating the state's ban on same-sex marriage, though as things turned out Hawaii did not authorize such marriage until 2013.

In 1997, the year of the enactment, 33 percent of births in Indiana were to unmarried women; in 2012 (the latest year for which we have statistics) the percentage was 43 percent. The corresponding figures for Wisconsin are 28 percent and 37 percent

and for the nation as a whole 32 percent and 41 percent. (The source of all these data is Kids Count Data Center, "Births to Unmarried Women," http://datacenter.kidscount.org/data/tables/7-births-to-unmarried-women#detailed/2/16,51/false/868,867,133,38,35/any/257,258.) There is no indication that these states' laws, ostensibly aimed at channeling procreation into marriage, have had any such effect.

A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws. One wouldn't know, reading Wisconsin's brief, that there is or ever has been discrimination against homosexuals anywhere in the United States. The state either is oblivious to, or thinks irrelevant, that until quite recently homosexuality was anathematized by the vast majority of heterosexuals (which means, the vast majority of the American people), including by most Americans who were otherwise quite liberal. Homosexuals had, as homosexuals, no rights; homosexual sex was criminal (though rarely prosecuted); homosexuals were formally banned from the armed forces and many other types of government work (though again enforcement was sporadic); and there were no laws prohibiting employment discrimination against homosexuals. Because homosexuality is more easily concealed than race, homosexuals did not experience the same economic and educational discrimination, and public humiliation, that African-Americans experienced.

But to avoid discrimination and ostracism they had to conceal their homosexuality and so were reluctant to participate openly in homosexual relationships or reveal their homosexuality to the heterosexuals with whom they associated. Most of them stayed "in the closet." Same-sex marriage was out of the question, even though interracial marriage was legal in most states. Although discrimination against homosexuals has diminished greatly, it remains widespread. It persists in statutory form in Indiana and in Wisconsin's constitution.

At the very least, "a [discriminatory] law must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans, supra*, 517 U.S. at 635. Indiana's ban flunks this undemanding test.

Wisconsin's prohibition of same-sex marriage, to which we now turn, is found in a 2006 amendment to the state's constitution. The amendment, Article XIII, § 13, provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Opponents of same-sex marriage in Indiana have tried for a number of years to insert a prohibition of such marriages into the state's constitution, as yet without success. A number of large businesses in Indiana oppose such a constitutional amendment. With 19 states having authorized same-sex marriage, the businesses may feel that it's only a matter of time before Indiana joins the bandwagon, and that a constitutional

amendment would impede the process—and also would signal to Indiana's gay and lesbian citizens, some of whom are employees of these businesses, that they are in a very unwelcoming environment, with statutory reform blocked. (On the attitude of business in Indiana and Wisconsin to same-sex marriage, see, e.g., Nick Halter, "Tar-get Files Court Papers Supporting Same-Sex Marriage in Wisconsin and Indiana," Aug. 5, 2014, www.bizjournals.com/twincities/news/2014/08/05/target-amicus-same-sex-marriage-wisconsin-indiana.html.)

Wisconsin's brief in defense of its prohibition of same-sex marriage adopts Indiana's ground ("accidental births") but does not amplify it. Its "accidental births" rationale for prohibiting same-sex marriage is, like Indiana's, undermined by a "first cousin" exemption—but, as a statutory matter at least, an even broader one: "No marriage shall be contracted … between persons who are nearer of kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile." Wis. Stat. § 65.03(1). Indiana's marriage law, as we know, authorizes first-cousin marriages if both cousins are at least 65 years old. But—and here's the kicker—Indiana apparently will as a matter of comity recognize any marriage lawful where contracted, including therefore (as an Indiana court has held) marriages of first cousins contracted in Tennessee, a state that places no restrictions on such

marriages. See Tenn. Code Ann. § 36-3-101; *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. App. 2002). Indiana has not tried to explain to us the logic of recognizing marriages of fertile first cousins (prohibited in Indiana) that happen to be contracted in states that permit such marriages, but of refusing, by virtue of the 1997 amendment, to recognize same-sex marriages (also prohibited in Indiana) contracted in states that permit them. This suggests animus against same-sex marriage, as is further suggested by the state's inability to make a plausible argument for its refusal to recognize same-sex marriage.

But back to Wisconsin, which makes four arguments of its own against such marriage: First, limiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights. Second, the consequences of allowing same-sex marriage cannot be foreseen and therefore a state should be permitted to move cautiously—that is, to do nothing, for Wisconsin does not suggest that it plans to take any steps in the direction of eventually authorizing such marriage. Third, the decision whether to permit or forbid same-sex marriage should be left to the democratic process, that is, to the legislature and the electorate. And fourth, same-sex marriage is analogous in its effects to no-fault divorce, which, the state argues, makes marriage fragile and unreliable—though of course Wisconsin has no-fault divorce, and it's surprising that the state's assistant attorney general, who argued the state's appeal, would trash his own state's law. The contention, built on the analogy to no-fault divorce and sensibly dropped in the state's briefs in this court—but the assistant attorney general could not

resist resuscitating it at the oral argument—is that, as the state had put it in submissions to the district court, allowing same-sex marriage creates a danger of "shifting the public understanding of marriage away from a largely child-centric institution to an adult-centric institution focused on emotion." No evidence is presented that same-sex marriage is on average less "child-centric" and more emotional than an infertile marriage of heterosexuals, or for that matter that no-fault divorce has rendered marriage less "child-centric."

The state's argument from tradition runs head on into *Loving v. Virginia*, 388 U.S. 1 (1967), since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009). Tradition per se has no positive or negative significance. There are good traditions, bad traditions pilloried in such famous literary stories as Franz Kafka's "In the Penal Colony" and Shirley Jackson's "The Lottery," bad traditions that are historical realities such as cannibalism, foot-binding, and suttee, and traditions that from a public-policy standpoint are neither good nor bad (such as trick-or-treating on Halloween). Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition. Holmes thought it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell

Holmes, Jr., "The Path of the Law," 10 *Harv. L. Rev.* 457, 469 (1897). Henry IV (the English Henry IV, not the French one—Holmes presumably was referring to the former) died in 1413. Criticism of homosexuality is far older. In Leviticus 18:22 we read that "thou shalt not lie with mankind, as with womankind: it is abomination."

The limitation on interracial marriage invalidated in *Loving* was in one respect less severe than Wisconsin's law. It did not forbid members of any racial group to marry, just to marry a member of a different race. Members of different races had in 1967, as before and since, abundant possibilities for finding a suitable marriage partner of the same race. In contrast, Wisconsin's law, like Indiana's, prevents a homosexual from marrying any person with the same sexual orientation, which is to say (with occasional exceptions) any person a homosexual would want or be willing to marry.

Wisconsin points out that many venerable customs appear to rest on nothing more than tradition—one might even say on mindless tradition. Why do men wear ties? Why do people shake hands (thus spreading germs) or give a peck on the cheek (ditto) when greeting a friend? Why does the President at Thanksgiving spare a brace of turkeys (two out of the more than 40 million turkeys killed for Thanksgiving dinners) from the butcher's knife? But these traditions, while to the fastidious they may seem silly, are at least harmless. If no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them harm beyond just offending

them, it is not just a harmless anachronism; it is a violation of the equal protection clause, as in *Loving*. See 388 U.S. at 8–12.

Against this the state argues in its opening brief that *Loving* "should be read as recognizing the constitutional restrictions on the government's ability to infringe the freedom of individuals to decide for themselves how to arrange their own private and domestic affairs." But that sounds just like what the government of Wisconsin has done: told homosexuals that they are forbidden to decide for themselves how to arrange their private and domestic affairs. If they want to marry, they have to marry a person of the opposite sex.

The state elaborates its argument from the wonders of tradition by asserting, again in its opening brief, that "thousands of years of collective experience has [*sic*] established traditional marriage, between one man and one woman, as optimal for the family, society, and civilization." No evidence in support of the claim of optimality is offered, and there is no acknowledgment that a number of countries permit polygamy—Syria, Yemen, Iraq, Iran, Egypt, Sudan, Morocco, and Algeria—and that it flourishes in many African countries that do not actually authorize it, as well as in parts of Utah. (Indeed it's been said that "polygyny, where-by a man can have multiple wives, is the marriage form found in more places and at more times than any other." Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* 10 (2006).) But suppose the assertion is correct. How does that bear on same-sex marriage? Does Wisconsin want to push

homosexuals to marry persons of the opposite sex because opposite-sex marriage is "optimal"? Does it think that allowing same-sex marriage will cause heterosexuals to convert to homosexuality? Efforts to convert homosexuals to heterosexuality have been a bust; is the opposite conversion more feasible?

Arguments from tradition must be distinguished from arguments based on morals. Many unquestioned laws are founded on moral principles that cannot be reduced to cost-benefit analysis. Laws forbidding gratuitous cruelty to animals, and laws providing public assistance for poor and disabled persons, are examples. There is widespread moral opposition to homosexuality. The opponents are entitled to their opinion. But neither Indiana nor Wisconsin make a moral argument against permitting same-sex marriage.

The state's second argument is: "go slow": maintaining the prohibition of same-sex marriage is the "prudent, cautious approach," and the state should therefore be allowed "to act deliberately and with prudence—or, at the very least, to gather sufficient information—before transforming this cornerstone of civilization and society." There is no suggestion that the state has any interest in gathering information, for notice the assumption in the quoted passage that the state already knows that allowing same-sex marriage would transform a "cornerstone of civilization and society," namely monogamous heterosexual marriage. One would expect the state to have provided *some* evidence, *some* reason to believe, however speculative and tenuous, that allowing same-sex marriage will or

may "transform" marriage. At the oral argument the state's lawyer conceded that he had no knowledge of any study underway to determine the possible effects on heterosexual marriage in Wisconsin of allowing same-sex marriage. He did say that same-sex marriage might somehow devalue marriage, thus making it less attractive to opposite-sex couples. But he quickly acknowledged that he hadn't studied how same-sex marriage might harm marriage for heterosexuals and wasn't prepared to argue the point. Massachusetts, the first state to legalize same-sex marriage, did so a decade ago. Has heterosexual marriage in Massachusetts been "transformed"? Wisconsin's lawyer didn't suggest it has been.

He may have been gesturing toward the concern ex-pressed by some that same-sex marriage is likely to cause the heterosexual marriage rate to decline because heterosexuals who are hostile to homosexuals, or who whether hostile to them or not think that allowing them to marry degrades the institution of marriage (as might happen if people were allowed to marry their pets or their sports cars), might decide not to marry. Yet the only study that we've discovered, a reputable statistical study, finds that allowing same-sex marriage has no effect on the heterosexual marriage rate. Marcus Dillender, "The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States," 51 *Demography* 563 (2014). No doubt there are more persons more violently opposed to same-sex marriage in states that have not yet permitted it than in states that have, yet in all states there are opponents of same-sex marriage.

But they would tend also to be the citizens of the state who were most committed to heterosexual marriage (devout Catholics, for example).

No one knows exactly how many Americans are homosexual. Estimates vary from about 1.5 percent to about 4 percent. The estimate for Wisconsin is 2.8 percent, which includes bisexual and transgendered persons. Gary J. Gates & Frank Newport, "LGBT Percentage Highest in D.C., Lowest in North Dakota," *Gallup* (Feb. 15, 2013), www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx. Given how small the percentage is, it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying its fears; it has provided none.

The state falls back on Justice Alito's statement in dissent in *United States v. Windsor*, *supra*, 133 S. Ct. at 2716, that "at present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment." What follows, if prediction is impossible? Justice Alito thought what follows is that the Supreme Court should not interfere with Congress's determination in the Defense of Marriage Act that "marriage," for purposes of entitlement to federal marital benefits, excludes same-sex marriage even if lawful under state law. But can the "long-term ramifications" of *any* constitutional decision be predicted with

certainty at the time the decision is rendered?

The state does not mention Justice Alito's invocation of a moral case against same-sex marriage, when he states in his dissent that "others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so." *Id.* at 2718. That is a moral argument for limiting marriage to heterosexuals. The state does not mention the argument because as we said it mounts no moral arguments against same-sex marriage.

We know that many people want to enter into a same-sex marriage (there are millions of homosexual Americans, though of course not all of them want to marry), and that forbidding them to do so imposes a heavy cost, financial and emotional, on them and their children. What Wisconsin has not told us is whether any heterosexuals have been harmed by same-sex marriage. Obviously many people are distressed by the idea or reality of such marriage; otherwise these two cases wouldn't be here. But there is a difference, famously emphasized by John Stuart Mill in On Liberty (1869), between the distress that is caused by an assault, or a theft of property, or an invasion of privacy, or for that matter discrimination, and the distress that is caused by behavior that disgusts some people but does no (other) harm to them. Mill argued that neither law (government regulation) nor morality (condemnation by public opinion) has any proper

concern with acts that, unlike a punch in the nose, inflict no temporal harm on another person without consent or justification. The qualification *temporal* is key. To be the basis of legal or moral concern, Mill argued, the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or spiritual. Mill illustrated nontemporal harm with revulsion against polygamy in Utah (he was writing before Utah agreed, as a condition of being admitted to the union as a state, to amend its constitution to prohibit polygamy). The English people were fiercely critical of polygamy wherever it occurred. As they were entitled to be. But there was no way polygamy in Utah could have adverse effects in England, 4000 miles away. Mill didn't think that polygamy, however offensive, was a proper political concern of England.

Similarly, while many heterosexuals (though in America a rapidly diminishing number) disapprove of same-sex marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of. Wisconsin doesn't argue otherwise. Many people strongly disapproved of interracial marriage, and, more to the point, many people strongly disapproved (and still strongly disapprove) of homosexual sex, yet *Loving v. Virginia* invalidated state laws banning interracial marriage, and *Lawrence v. Texas* invalidated state laws banning homosexual sex acts.

Though these decisions are in the spirit of Mill, Mill is not the last word on public morality. But Wisconsin like Indiana does not base its prohibition

of same-sex marriage on morality, perhaps because it believes plausibly that *Lawrence* rules out moral objections to homosexuality as legitimate grounds for discrimination.

In passing, Wisconsin in its opening brief notes that it "recogniz[es] domestic partnerships." Indeed it does: Wis. Stat. ch. 770. And the domestic partners must be of the same sex. *Id.*, § 770.05(5). But the preamble to the statute states: "The legislature … finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage," § 770.001, citing for this proposition a decision by a Wisconsin intermediate appellate court. *Appling v. Doyle*, 826 N.W.2d 666 (Wis. App. 2012), affirmed, 2014 WI 96 (Wis. July 31, 2014). Indeed that is what the court held. It pointed out that chapter 770 doesn't specify the rights and obligations of the parties to a domestic partnership. Rather you must go to provisions specifying the rights and obligations of married persons and see whether a provision that you're concerned with is made expressly applicable to domestic partnerships, as is for example the provision that gives a surviving spouse the deceased spouse's interest in their home. 826 N.W.2d at 668. But as the court further explained, the rights and obligations of domestic partners are far more limited than those of married persons. See *id.* at 682–86. (For example, only spouses may jointly adopt a child. *Id.* at 685.) They have to be far more limited, because of the state's constitutional provision quoted above that "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." Wis. Const. Art. XIII, § 13.

Domestic partnership in Wisconsin is not and cannot be marriage by another name.

It is true that because the state does not regard same-sex marriages contracted in other states as wholly void (though they are not "recognized" in Wisconsin), citizens of Wisconsin who contract same-sex marriages in states in which such marriages are legal are not debarred from receiving some of the federal benefits to which legally married persons (including parties to a same-sex marriage) are entitled. Not to all those benefits, however, because a number of them are limited by federal law to persons who reside in a state in which their marriages are recognized. These include benefits under the Family & Medical Leave Act, see 29 C.F.R. § 825.122(b), and access to a spouse's social security benefits. See 42 U.S.C. § 416(h)(1)(A)(i).

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.

The most arbitrary feature of Wisconsin's treatment of same-sex couples is its refusal to allow couples in domestic partnerships to adopt jointly, as married heterosexual couples are allowed to do (and in Indiana, even unmarried ones). The refusal harms the children, by telling them they don't have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent. The state offers no justification.

Wisconsin's remaining argument is that the ban on same-sex marriage is the outcome of a democratic process—the enactment of a constitutional ban by popular vote. But homosexuals are only a small part of the state's population—2.8 percent, we said, grouping transgendered and bisexual persons with homosexuals. Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.

In its reply brief Indiana adopts Wisconsin's democracy argument, adding that "homosexuals are politically powerful out of proportion to their numbers." No evidence is presented by the state to support this contention. It is true that an increasing number of heterosexuals support same-sex marriage; otherwise 11 states would not have changed their laws to permit such marriage (the other 8 states that allow same-sex marriage do so as a result of judicial decisions invalidating the states' bans). No inference of manipulation of the democratic process by homosexuals can be drawn, however, any more than it could be inferred from the enactment of civil rights

laws that African-Americans "are politically powerful out of proportion to their numbers." It is to the credit of American voters that they do not support only laws that are in their palpable self-interest. They support laws punishing cruelty to animals, even though not a single animal has a vote.

To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible.

For completeness we note the ultimate convergence of our simplified four-step analysis with the more familiar, but also more complex, approach found in many cases. In *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014), the Ninth Circuit concluded, based on a reading of the Supreme Court's decisions in *Lawrence* and *Windsor*, that statutes that discriminate on the basis of sexual orientation are subject to "heightened scrutiny"—and in doing so noted that *Windsor*, in invalidating the Defense of Marriage Act, had balanced the Act's harms and offsetting benefits: "Notably absent from *Windsor's* review of DOMA are the 'strong presumption' in favor of the constitutionality of laws and the 'extremely deferential' posture toward government action that are the marks of rational basis review. … In its parting sentences, *Windsor* explicitly

announces its balancing of the government's interest against the harm or injury to gays and lesbians: 'The federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.' 133 S. Ct. at 2696 (emphasis added). *Windsor's* balancing is not the work of rational basis review."

The Supreme Court also said in *Windsor* that "the Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law." 133 S. Ct. at 2693–94. A second-class marriage would be a lot better than the cohabitation to which Indiana and Wisconsin have consigned same-sex couples.

The states' concern with the problem of unwanted children is valid and important, but their solution is not "tailored" to the problem, because by denying marital rights to same-sex couples it reduces the incentive of such couples to adopt unwanted children and impairs the welfare of those children who are adopted by such couples. The states' solution is thus, in the familiar terminology of constitutional discrimination law, "overinclusive." It is also underinclusive, in allowing infertile heterosexual couples to marry, but not same-sex couples.

Before ending this long opinion we need to address, though only very briefly, Wisconsin's complaint about the wording of the injunction entered by the district judge. Its lawyers claim to fear the state's being held in contempt because it

doesn't know what measures would satisfy the injunction's command that all relevant state officials "treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." If the state's lawyers really find this command unclear, they should ask the district judge for clarification. (They should have done so already; they haven't.) Better yet, they should draw up a plan of compliance and submit it to the judge for approval.

The district court judgments invalidating and enjoining these two states' prohibitions of same-sex marriage are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

September 4, 2014

Before: RICHARD A. POSNER, Circuit Judge
ANN CLAIRE WILLIAMS, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

Nos.: 14-2386 to 14-2388

MARILYN RAE BASKIN, et al.,
Plaintiffs - Appellees
v.
PENNY BOGAN, et al.,
Defendants - Appellants

No.: 14-2526

VIRGINIA WOLF, et al.,
Plaintiffs - Appellees
v.
SCOTT WALKER, et al.,

Defendants – Appellants

Originating Case Information:

District Court Nos: 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 3:14-cv-00064-bbc
Western District of Wisconsin
District Judge Barbara B. Crabb

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VIRGINIA WOLF and CAROL SCHUMACHER,
KAMI YOUNG and KARINA WILLES,
ROY BADGER and GARTH WANGEMANN,
CHARVONNE KEMP and MARIE CARLSON,
JUDITH TRAMPF and KATHARINA HEYNING,
SALUD GARCIA and PAMELA KLEISS,
WILLIAM HURTUBISE and LESLIE PALMER,
JOHANNES WALLMANN and KEITH BORDEN,

Plaintiffs, OPINION and ORDER

v. 14-cv-64-bbc

SCOTT WALKER, in his official capacity as Governor of Wisconsin, J.B. VAN HOLLEN, in his official capacity as Attorney General of Wisconsin, OSKAR ANDERSON, in his official capacity as State Registrar of Wisconsin, JOSEPH CZARNEZKI, in his official capacity as Milwaukee County Clerk, WENDY CHRISTENSEN, in her official capacity as Racine County Clerk and SCOTT MCDONELL, in his official capacity as Dane County Clerk,

Defendants.

Plaintiffs Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubiseurbise, Leslie Palmer, Johannes Wallmann and Keith Borden are eight same-sex couples residing in the state of Wisconsin who either want to get married in this state or want the state to recognize a marriage they entered into lawfully outside Wisconsin. Standing in their way is Article XIII, § 13 of the Wisconsin Constitution, which states 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." In addition, various provisions in the Wisconsin Statutes, primarily in chapter 765, limit marriage to a "husband" and a "wife." The parties agree that both the marriage amendment and the statutory provisions prohibit plaintiffs from marrying in Wisconsin or obtaining legal recognition in Wisconsin for a marriage they entered in another state or country. The question raised by plaintiffs' complaint is whether the marriage amendment and the relevant statutes violate what plaintiffs contend is their fundamental right to marry and their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

Two motions are before the court: (1) a motion to dismiss for failure to state a claim upon which relief may be granted filed by defendants Scott Walker, J.B. Van Hollen and Oskar Anderson, dkt. #66; and

(2) a motion for summary judgment filed by plaintiffs. Dkt. #70. (Defendants Joseph Czarnezki, Scott McDonell and Wendy Christensen, the clerks for Milwaukee County, Dane County and Racine County, have not taken a position on either motion, so I will refer to defendants Walker, Van Hollen and Anderson simply as "defendants" for the remainder of the opinion.) In addition, Julaine K. Appling, Jo Egelhoff, Jaren E. Hiller, Richard Kessenich and Edmund L. Webster (all directors or officers of Wisconsin Family Action) have filed an amicus brief on behalf of defendants. Dkt. #109. Having reviewed the parties' and amici's filings, I am granting plaintiffs' motion for summary judgment and denying defendants' motion to dismiss because I conclude that the Wisconsin laws prohibiting marriage between same-sex couples interfere with plaintiffs' right to marry, in violation of the due process clause, and discriminate against plaintiffs on the basis of sexual orientation, in violation of the equal protection clause.

In reaching this decision, I do not mean to disparage the legislators and citizens who voted in good conscience for the marriage amendment. To decide this case in favor of plaintiffs, it is not necessary, as some have suggested, to "cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools," United States v. Windsor, 133 S. Ct. 2675, 2717-18 (2013) (Alito, J., dissenting), or "adjudg[e] those who oppose [same-sex marriage] . . . enemies of the human race." Id. at 2709 (Scalia, J., dissenting). Rather, it is necessary to conclude only that the state may not intrude without adequate justification on

certain fundamental decisions made by individuals and that, when the state does impose restrictions on these important matters, it must do so in an even-handed manner.

This case is not about whether marriages between same-sex couples are consistent or inconsistent with the teachings of a particular religion, whether such marriages are moral or immoral or whether they are something that should be encouraged or discouraged. It is not even about whether the plaintiffs in this case are as capable as opposite-sex couples of maintaining a committed and loving relationship or raising a family together. Quite simply, this case is about liberty and equality, the two cornerstones of the rights protected by the United States Constitution.

Although the parties in this case disagree about many issues, they do agree about at least one thing, which is the central role that marriage plays in American society. It is a defining rite of passage and one of the most important events in the lives of millions of people, if not *the* most important for some. Of course, countless government benefits are tied to marriage, as are many responsibilities, but these practical concerns are only one part of the reason that marriage is exalted as a privileged civic status. Marriage is tied to our sense of self, personal autonomy and public dignity. And perhaps more than any other endeavor, we view marriage as essential to the pursuit of happiness, one of the inalienable rights in our Declaration of Independence. Linda Waite and Maggie Gallagher, Case for Marriage 2 (Broadway Books 2000) (stating

that 93% of Americans rate "having a happy marriage" as one of their most important goals, an ever higher percentage than "being in good health"). For these reasons and many others, "marriage is not merely an accumulation of benefits. It is a fundamental mark of citizenship." Andrew Sullivan, "State of the Union," New Republic (May 8, 2000). Thus, by refusing to extend marriage to the plaintiffs in this case, defendants are not only withholding benefits such as tax credits and marital property rights, but also denying equal citizenship to plaintiffs.

It is in part because of this strong connection between marriage and equal citizenship that the marriage amendment must be scrutinized carefully to determine whether it is consistent with guarantees of the Constitution. Defendants and amici defend the marriage ban on various grounds, such as preserving tradition and wanting to proceed with caution, but if the state is going to deprive an entire class of citizens of a right as fundamental as marriage, then it must do more than say "this is the way it has always been" or "we're not ready yet." At the very least it must make a showing that the deprivation furthers a legitimate interest separate from a wish to maintain the status quo. Defendants attempt to do this by arguing that allowing same-sex couples to marry may harm children or the institution of marriage itself. Those concerns may be genuine, but they are not substantiated by defendants or by amici.

Under these circumstances, personal beliefs, anxiety about change and discomfort about an

unfamiliar way of life must give way to a respect for the constitutional rights of individuals, just as those concerns had to give way for the right of Amish people to educate their children according to their own values, Wisconsin v. Yoder, 406 U.S. 205 (1972), for Jehovah's Witnesses to exercise their religion freely, West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), and for interracial couples to marry the person they believed was irreplaceable. Loving v. Virginia, 388 U.S. 1 (1967). In doing this, courts do not "endorse" marriage between same-sex couples, but merely affirm that those couples have rights to liberty and equality under the Constitution, just as heterosexual couples do.

BACKGROUND

All plaintiffs in this case are same-sex couples. Virginia Wolf and Carol Schumacher reside in Eau Claire, Wisconsin; Kami Young and Karina Willes reside in Milwaukee, Wisconsin. Both couples left Wisconsin to enter into a legal marriage in Minnesota and they wish to have their marriages recognized in Wisconsin. At the time that plaintiffs filed their summary judgment motion, plaintiffs Young and Willes were expecting a baby imminently.

Johannes Wallmann and Keith Borden reside in Madison, Wisconsin. They were married in Canada in 2007 and wish to have their marriage recognized in Wisconsin.

Roy Badger and Garth Wangemann reside in Milwaukee, Wisconsin, as do Charvonne Kemp and Marie Carlson. Judi Trampf and Katy Heyning

reside in Madison, Wisconsin, as do plaintiffs Salud Garcia and Pam Kleiss. William Hurtubise and Leslie "Dean" Palmer reside in Racine, Wisconsin. Each of these five couples wishes to marry in Wisconsin. Hurtubise and Palmer want to adopt a child jointly, which they cannot do in Wisconsin while they are unmarried.

All plaintiffs meet the requirements for getting married in Wisconsin, with the exception that each wishes to marry someone of the same sex.

OPINION

I. PRELIMINARY ISSUES

Defendants raise three preliminary arguments supporting their belief that Wisconsin's marriage ban on same-sex couples is immune from constitutional review, at least in this court: (1) Baker v. Nelson, 409 U.S. 810 (1972), is controlling precedent that precludes lower courts from considering challenges to bans on same-sex marriage under the due process clause or the equal protection clause; (2) marriage between same-sex couples is a "positive right," so the state has no duty to grant it; (3) under principles of federalism, states are entitled to choose whether to extend marriage rights to same-sex couples. None of these arguments is persuasive.

A. Baker v. Nelson

In Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 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. Hicks v. Miranda, 422 U.S. 332, 344 (1975). (In 1988, Congress amended § 1257 to eliminate mandatory jurisdiction in this context). However, the Court "was not obligated to grant the case plenary consideration," id., and it chose not to do so, instead issuing a one sentence order stating that "[t]he appeal is dismissed for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810 (1972). At the time, this type of summary dismissal was a common way for the Court to manage the relatively large number of cases that fell within its mandatory jurisdiction. Randy Beck, Transtemporal Separation of Powers in the Law of Precedent, 87 Notre Dame L. Rev. 1405, 1439-40 (2012) ("Because the volume of . . . mandatory appeals did not permit full briefing and argument in every case, the Court adopted the practice of summarily affirming many lower court decisions and summarily dismissing others for want of a substantial federal question. These summary affirmances and dismissals were routinely issued without any opinion from the Court explaining its disposition."). In fact, a few years later, the Court similarly handled another case involving gay persons when it summarily affirmed a decision upholding the constitutionality of a statute criminalizing sodomy. Doe v. Commonwealth's Attorney for City of

Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976).

Despite the absence of an opinion, full briefing or oral argument, a summary dismissal such as Baker is binding precedent "on the precise issues presented and necessarily decided by" the lower court. Mandel v. Bradley, 432 U.S. 173, 176 (1977). See also Chicago Sheraton Corp. v. Zaban, 593 F.2d 808, 809 (7th Cir. 1979) ("[A] summary disposition for want of a substantial federal question is controlling precedent."). As a result, defendants argue that this court has no authority to consider the question whether a ban on marriage between same-sex couples violates the Constitution. They cite Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989), in which the Court stated that lower courts should adhere to the holdings of the Supreme Court, even if they "appea[r] to rest on reasons rejected in some other line of decisions, . . . leaving to this Court the prerogative of overruling its own decisions."

The rule for summary affirmances and dismissals is not so clear cut. Those orders "are not of the same precedential value as would be an opinion of [the Supreme] Court treating the question on the merits." Edelman v. Jordan, 415 U.S. 651, 671 (1974). For example, a summary dismissal is no longer controlling "when doctrinal developments indicate" that the Court would take a different view now. Hicks, 422 U.S. at 344 (internal quotations omitted). See also C. Steven Bradford, Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling, 59 Fordham L.

Rev. 39, 51 (1990) (citing Hicks for the proposition that "a precedent that has not been overruled may be disregarded when later doctrinal developments render it suspect.").

It would be an understatement to say that the Supreme Court's jurisprudence on issues similar to those raised in Baker has developed substantially since 1972. At the time, few courts had addressed any issues relating to the constitutional rights of gay persons; favorable decisions were even less frequent. E.g., Boutilier v. Immigration & Naturalization Service, 387 U.S. 118 (1967) (homosexual individual could be denied admission to United States on ground that homosexuality is a "psychopathic personality"). Perhaps because there were so few people who identified publicly as gay, it was difficult for courts to empathize with their plight.

In more recent years, the Supreme Court has issued a series of cases in which it has denounced the view implicit in cases such as Baker that gay persons are "strangers to the law." Romer v. Evans, 517 U.S. 620, 635-36 (1996). In Romer, the Court invalidated under the equal protection clause a state constitutional amendment that discriminated on the basis of sexual orientation. In Lawrence v. Texas, 539 U.S. 558 (2003), the Court concluded that a Texas law criminalizing homosexual sodomy violated the due process clause, overruling Bowers v. Hardwick, 478 U.S 186 (1986), and implicitly the summary affirmance in Doe, 425 U.S. 901 (which the Court did not even mention).

To the extent Romer and Lawrence left any room for doubt whether the claims in this case raise a substantial federal question, that doubt was resolved in United States v. Windsor, 133 S. Ct. 2675 (2013), in which the Court invalidated the Defense of Marriage Act, a law prohibiting federal recognition of same-sex marriages authorized under state law. Before the case reached the Supreme Court, the Court of Appeals for the Second Circuit had discussed at length the continuing vitality of Baker and the majority had concluded over a vigorous dissent that Baker was no longer controlling. Compare 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."), with id. at 210 (Straub, J., dissenting) ("Subjecting the federal definition of marriage to heightened scrutiny would defy or, at least, call into question the continued validity of Baker, which we are not empowered to do."). On appeal before the Supreme Court, those defending the law continued to press the issue, arguing that the lower court's rejection of Baker as precedent made "the case for this Court's review . . . overwhelming." Windsor v. United States of America, Nos. 12-63 and 12-307, Supplemental Brief for Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives, available at 2012 WL 5388782, at *5-6.

Despite the lower court's and the parties' debate over Baker, the Supreme Court ignored the case in both its decision and during the oral argument for Windsor. (In a companion case regarding same-sex marriage that was dismissed on prudential grounds,

counsel for petitioners began discussing Baker during oral argument, but Justice Ginsburg cut him off, stating, "Mr. Cooper, Baker v. Nelson was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny." Oral argument in Hollingsworth v. Perry, No. 12-144, available at 2013 WL 1212745, at *12.) The Court's silence is telling. Although the Court did not overrule Baker, the Court's failure to even acknowledge Baker as relevant in a case involving a restriction on marriage between same-sex persons supports a view that the Court sees Baker as a dead letter. Cf. Romer, 517 U.S. at 642 (Scalia, J, dissenting) (noting Court's failure to discuss Bowers in case decided before Court overruled Bowers in Lawrence). Not even the dissenters in Windsor suggested that Baker was an obstacle to lower court consideration challenges to bans on same-sex marriage.

Before Windsor, the courts were split on the question whether Baker was still controlling. Compare Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294, 307 (D. Conn. 2012) (Baker not controlling); Smelt v. County of Orange, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) (same); In re Kandu, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (same), with Massachusetts v. United States Dept. of Health and Human Services, 682 F.3d 1, 8 (1st Cir. 2012) (Baker controlling); Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012) (same); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1086 (D. Haw. 2012) (same); Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005) (same). (Oddly, the first federal court to rule in favor

of the right of same-sex couples to marry did not discuss Baker. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).) Since Windsor, nearly every court to consider the question has concluded that Baker does not preclude review of challenges to bans on same-sex marriage. E.g., Latta v. Otter, 1:13-CV-00482-CWD, — F. Supp. 2d. — , 2014 WL 1909999, *9 (D. Idaho May 13, 2014); Bostic v. Rainey, 970 F. Supp. 2d. 456, 470 (E.D. Va. 2014); Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013). The only outlier seems to be Merritt v. Attorney General, CIV.A. 13-00215-BAJ, 2013 WL 6044329 (M.D. La. Nov. 14, 2013), in which the court cited Baker for the proposition that "the Constitution does not require States to permit same-sex marriages." However, Merritt is not persuasive because the court did not discuss Romer, Lawrence or Windsor in its decision.

Even defendants seem to acknowledge that the writing is on the wall. Although this is a threshold issue, they bury their short discussion of it at the end of their summary judgment brief. Accordingly, I conclude that, despite Baker, I may consider the merits of plaintiffs' claim.

B. Positive Rights vs. Negative Rights

What is perhaps defendants' oddest argument relies on a distinction between what defendants call "positive rights" and "negative rights." In other words, the Constitution protects the rights of individuals to be free from government interference ("negative rights"), but it does not give them a right

to receive government benefits ("positive rights"). Defendants cite cases such as DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989), for the proposition that the Constitution "confer[s] no affirmative right to governmental aid." Thus, defendants say, although the due process clause may protect the right of individuals to engage in certain intimate conduct (a "negative right"), it "does not preclude a state from choosing not to give same-sex couples the positive right to enter the legal status of civil marriage under state law." Dfts.' Br., dkt. #102, at 8.

Defendants' argument has two problems. First, the Supreme Court has held on numerous occasions that marriage is a fundamental right protected by the Constitution. E.g., Turner v. Safley, 482 U.S. 78, 95 (1987); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974); Loving v. Virginia, 388 U.S. 1, 12 (1967). Thus, even if marriage is a "positive right" as defendants understand that term, marriage stands as an exception to the general rule.

Second, even if I assume that the state would be free to abolish the institution of marriage if it wished, the fact is that Wisconsin obviously has *not* abolished marriage; rather, it has limited the class of people who are entitled to marry. The question in this case is not whether the state is required to issue marriage licences as a general matter, but whether it may discriminate against same-sex couples in doing so. Even in cases in which an individual does not have a substantive right to a particular benefit or privilege, 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. In fact, under the equal protection clause, "the right to equal treatment . . . is not co-extensive with any substantive rights to the benefits denied the party discriminated against." Heckler v. Mathews, 465 U.S. 13 728, 739, 646 (1984). Therefore, "[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." DeShaney, 489 U.S. at 197 n.3.

Defendants fail to distinguish this case from the others in which the Supreme Court considered the constitutionality of laws that denied the right to marry to some class of citizens. Loving, 388 U.S. 1 (interracial marriage); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage of parents who fail to make child support payments); Turner v. Safley, 482 U.S. 78 (1987) (marriage of prisoners). Although defendants say that their argument is "consistent" with Loving, Zablocki and Turner because those cases did nothing more than "recognize a negative right," Dfts.' Br., dkt. #102, at 10, defendants do not explain why marriage is a "positive right" when the state discriminates on the basis of sexual orientation, but a "negative right" when it discriminates on the basis of race, custody or financial status.

Defendants make a related argument that the government should not be required to "officially endorse the intimate and domestic relationships that gay and lesbian persons may choose to enter." Dfts.' Br., dkt. #102, at 9. They cite cases in which the Court held that there is no constitutional right to

subsidies for having an abortion and that the government is entitled to have a preference for childbirth. Rust v. Sullivan, 500 U.S. 173, 201 (1991); Webster v. Reproductive Health Services, 492 U.S. 490, 509 (1989). Along the same lines, defendants argue that they are entitled to have a preference for marriage between opposite sex couples.

Even setting aside the many obvious factual differences between marriage and abortion, the analogy defendants attempt to draw is inapt for three reasons. First, as noted above, the state is already issuing marriage licenses to some citizens. The comparison to abortion would be on point only if, in the cases cited, the state had decided to fund abortions for heterosexual women but not for lesbians.

Second, abortion cannot be compared to marriage because the government does not have a monopoly on providing abortions. In other words, if the government refuses to use its resources to provide or fund abortions, a woman may seek an abortion somewhere else. In contrast, it is the state and only the state that can issue a marriage license. Thus, defendants' "preference" for marriage between opposite-sex couples is not simply a denial of a subsidy, it is a denial of the right itself.

Defendants' concern about "endorsing" marriage between same-sex couples seems to be one that has been shared by both judges and legislators in the past. E.g., Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 986-87 (Mass. 2003) (Cordy, J.,

dissenting) ("The plaintiffs' right to privacy . . . does not require that the State officially endorse their choices in order for the right to be constitutionally vindicated."); Dean v. District of Columbia CIV.A. 90-13892, 1992 WL 685364, *4 (D.C. Super. June 2, 1992) ("[L]egislative authorization of homosexual, same-sex marriages would constitute tacit state approval or endorsement of the sexual conduct, to wit, sodomy, commonly associated with homosexual status."); Transcript of the Mark-Up Record of the Defense of Marriage Act, House Judiciary Committee, June 12, 1996 (statement of Rep. Sonny Bono that he is voting for DOMA because "I can't tell my son [same-sex marriage is] ok, or I don't think I can yet."). These concerns may be common, but they rest on a false assumption about constitutional rights. Providing marriage licenses to same-sex couples on an equal basis with opposite-sex couples is not "endorsing" same-sex marriage; rather, it simply represents "a commitment to the law's neutrality where the rights of persons are at stake." Romer, 517 U.S. at 623. See also Bowers, 478 U.S. at 205-06 (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.").

There are many situations in which the Constitution requires the government to provide benefits using neutral criteria, even with respect to groups that are unpopular or that the government finds abhorrent, without any connotation that the government is endorsing the group. E.g., Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) (public university could

not rely on concerns of improper endorsement to justify refusal to fund student newspaper when funds were available to similarly situated groups); Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995) (state could not rely on concerns about endorsement to deny request of Ku Klux Klan to erect monument on public land when other similarly situated groups were allowed to do so). Thus, extending marriage to same-sex couples does not require "approval" of homosexuality any more than the Supreme Court "approved" of convicted criminals or deadbeat dads when it held in Turner, 482 U.S. 78, and Zablocki, 434 U.S. 374, that the right to marry extends to prisoners and fathers who have failed to make child support payments. In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) ("This is not a matter of social policy but of constitutional interpretation."); Baker v. State, 744 A.2d 864, 867 (Vt. 1999) ("The issue before the Court . . . does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.").

C. Judicial Restraint, Federalism and Respect for the Democratic Process

Defendants and amici argue that federal courts should not question a state's democratic determination regarding whether and when to extend marriage to same-sex couples. Rather, courts should allow states to serve as "laboratories of democracy" so that each state can learn from the

experience of others and decide what works best for its own citizens. Oregon v. Ice, 555 U.S. 160, 171 (2009); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Defendants rely generally on principles of federalism and more specifically on the fact that regulation of marriage is a matter traditionally left to the states. A number of courts and dissenting judges in other cases have asserted a similar argument. Windsor, 133 S. Ct. at 2718-19 (Alito, J., dissenting) ("Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence."); In re Marriage Cases, 183 P.3d 384, 463-64 (Cal. 2008) (Baxter, J., dissenting) ("By . . . moving the policy debate from the legislative process to the court, the majority engages in faulty constitutional analysis and violates the separation of powers."); Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) ("[W]e believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made."); Goodridge, 798 N.E.2d at 974 (Spina, J., dissenting) ("What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from

the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights.").

Although I take no issue with defendants' observations about the important role that federalism plays in this country, that does not mean that a general interest in federalism trumps the due process and equal protection clauses. States may not "experiment" with different social policies by violating constitutional rights.

The fundamental problem with defendants' argument is that it cannot be reconciled with the well-established authority of federal courts to determine the constitutionality of state statutes or with the Fourteenth Amendment, the very purpose of which was to protect individuals from overreaching by the states. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("The Fourteenth Amendment . . . sought to protect Americans from oppression by state government."); De Leon v. Perry, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014) ("One of the court's main responsibilities is to ensure that individuals are treated equally under the law."). To further that purpose, federal courts have invalidated state laws that violate constitutional rights, even when the law enjoys popular support and even when the subject matter is controversial. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause."); West Virginia Board of Education v. Barnette, 319 U.S.

624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); Chambers v. State of Florida, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."); Laurence Tribe, American Constitutional Law § 15–10, at 1351 (2d ed. 1988) ("As in the case of racial segregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role in expounding and protecting constitutional rights.").

Federalism was a common defense to the segregationist laws of the Jim Crow era. E.g., Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (in case upholding anti-miscegenation law, stating that "[r]egulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights"). See also Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 397 (1969) (Douglas, J., dissenting) ("States' rights are often used as a cloak to cover unconstitutional encroachments such as the maintenance of second-

class citizenship for Negroes or Americans of Mexican ancestry."). However, that defense has long since been discredited. Defendants' federalism argument arises in a different context, but they identify no way to distinguish their argument from those the Supreme Court rejected long ago. Andersen v. King County, 138 P.3d 963, 1028-29 (Wash. 2006) (Bridges, J., dissenting) (in case involving claim for same-sex marriage, stating that, "had the United States Supreme Court adopted the plurality's [view of federalism], there would have been no Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).").

Although Wisconsin's same-sex marriage ban was approved by a majority of voters, is part of the state constitution and deals with a matter that is a traditional concern of the states, none of these factors can immunize a law from scrutiny under the United States Constitution. The Supreme Court has not hesitated to invalidate any of those types of laws if it concludes that the law is unconstitutional. Romer, 517 U.S. 620 (invalidating state constitutional amendment); Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 736-37 (1964) ("[T]hat [a law] is adopted in a popular referendum is insufficient to sustain its constitutionality. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."); Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954) (striking down school segregation while noting that "education is perhaps the most important function of state and local governments"). See also Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) ("The result we

reach today is in complete harmony with the Loving Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws."). Even in Baker, 191 N.W.2d at 187, in which the Minnesota Supreme Court brushed off a marriage claim brought by a same-sex couple, the court acknowledged that "Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment."

To the extent that defendants mean to argue that a special rule should apply to the issue of same-sex marriage, they cite no authority for that view. There is no asterisk next to the Fourteen Amendment that excludes gay persons from its protections. Romer, 517 U.S. at 635.

In a footnote, amici argue that cases such as Loving, Turner and Zablocki are distinguishable because they "all involved laws that prevented individuals otherwise qualified for marriage from marrying, and have not gone to the essentials of what marriage means as the claim in this case does." Amici Br., dkt. #109, at 17 n.3. However, this argument has nothing to do with federalism or the democratic process; rather, it goes to the scope of the right to marry, which is discussed below. Even if I assume for the purpose of this discussion that amici are correct about the distinction between this and previous cases about marriage, it would not mean that a general interest in what amici call "state sovereignty" would preclude review of Wisconsin laws banning same-sex marriage.

Defendants and amici cite Windsor, 133 S. Ct. 2675, and Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), to support their argument, but neither case is on point. First, defendants quote the statement in Schuette that there is "a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." Schuette, 134 S. Ct. at 1637. However, the holding in Schuette was that Michigan did not violate the equal protection clause by enacting a state constitutional amendment that *prohibits* discrimination in various contexts. The Court said nothing about state laws such as Wisconsin's marriage amendment that *require* discrimination and the Court did not suggest that such laws are immune from constitutional review.

Windsor is closer to the mark, but not by much. It is true that the Supreme Court noted multiple times in its decision that the regulation of marriage is a traditional concern of the states. Windsor, 133 S. Ct. at 2689-90 ("By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."); id. at 2691 ("[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.") (internal quotations omitted). In addition, the Court noted that the Defense of Marriage Act departed from that tradition by refusing to defer to the states'

determination of what qualified as a valid marriage. Id. at 2692 ("DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.").

However, defendants' and amici's reliance on Windsor is misplaced for three reasons. First, the Supreme Court's observations were not new; the Court has recognized for many years that the regulation of marriage is primarily a concern for the states. In his dissent, Justice Scalia noted this point and questioned the purpose of the Court's federalism discussion. Id. at 2705 (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?"). Thus, it would be inappropriate to infer that the Court was articulating a new, heightened level of deference to marriage regulation by the states.

Second, the Court declined expressly to rely on federalism as a basis for its conclusion that DOMA is unconstitutional. Windsor, 133 S. Ct. at 2692 ("[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.").

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 cannot trump constitutional rights. Id. at 2691 ("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. ("The States' interest in defining and regulating the marital relation [is] subject to constitutional guarantees.").

All this is not to say that concerns about federalism and the democratic process should be ignored when considering constitutional challenges to state laws. It is obvious that courts must be sensitive to judgments made by the legislature and the voters on issues of social policy and should exercise the power of judicial review in rare instances. However, these concerns are addressed primarily in the context of determining the appropriate standard of review. We are long past the days when an invocation of "states' rights" is enough to insulate a law from a constitutional challenge.

II. STANDARD OF REVIEW

Plaintiffs' claim arises under two provisions in the Fourteenth Amendment to the United States Constitution. First, plaintiffs contend that Wisconsin's ban on same-sex marriage violates their

fundamental right to marry under the due process clause. Second, they contend that the ban discriminates against them on the basis of sex and sexual orientation, in violation of the equal protection clause. As other courts have noted, the rights guaranteed by these constitutional provisions "frequently overlap." Goodridge, 798 N.E.2d at 953. See also Lawrence, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of libertyare linked in important respects."). In this case, the ultimate question under both provisions is whether the state may discriminate against same-sex couples in the context of issuing marriage licenses and recognizing marriages performed in other states. However, each clause presents its own questions about the appropriate standard of review. I will address the standard first under the due process clause and then under the equal protection clause.

A. Fundamental Right to Marry

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. Turner, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right."); Zablocki, 434 U.S. at 384 ("[The] right to marry is of fundamental importance for all individuals."); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974) ("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."); Loving, 388 U.S. at 12 (referring to marriage as "fundamental freedom"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to marry is "central part of the liberty protected by the Due Process Clause"). In Loving, 388 U.S. at 12, the Court went so far as to say that marriage is "one of the basic civil rights of man."

The Supreme Court has articulated a standard of review "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right" such as the right to marry, which is that the law "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 388. See also Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980) (Kennedy, J.) ("[S]ubstantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.").

1. Scope of the right to marry

The threshold question under the Zablocki standard is whether the right to marry encompasses a right to marry someone of the same sex. Defendants say that it does not, noting that "[t]he United States Supreme Court has never recognized" a "right to marry a person of the same sex" and that

same-sex marriage is not "deeply rooted in this Nation's history and tradition," which defendants say is a requirement to qualify as a fundamental right under the Constitution, citing Washington v. Glucksberg, 521 U.S. 702 (1997). Dfts.' Br., dkt. #102, at 26. Amici add that "our Nation's law, along with the law of our antecedents from ancient to modern times, has consistently recognized the biological and social realities of marriage, including its nature as a male-female unit advancing purposes related to procreation and childrearing." Amici Br., dkt. #109, at 6. They cite cases in which they say the Supreme Court has "explicitly linked marriage and procreation." Id. (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."), and Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage is "the foundation of the family.")). For many years, arguments similar to these were accepted consistently by the courts. E.g., Sevcik, 911 F. Supp. 2d at 26 1013-14; Jackson, 884 F. Supp. 2d at 1071; Hernandez, 855 N.E. 2d at 10; Andersen, 138 P.3d at 979; Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006); Dean, 1992 WL 685364.

Defendants' observation that the Supreme Court has not yet recognized a "right to same-sex marriage" is both obvious and unhelpful. When the Court struck down Virginia's anti-miscegenation law in Loving, it had never before discussed a "right to interracial marriage." If the Court had decided previously that the Constitution protected marriage between same-sex couples, this case would not be here. The question is not whether plaintiffs' claim is on all fours with a previous case, but whether

plaintiffs' wish to marry someone of the same sex falls within the right to marry already firmly established in Supreme Court precedent. For several reasons, I conclude that it does.

a. Purposes of marriage

I am not persuaded by amici's argument that marriage's link to procreation is the sole reason that the Supreme Court has concluded that marriage is protected by the Constitution. Although several courts have adopted that view, e.g., Dean v. District of Columbia, 653 A.2d 307, 332 (D.C. 1995); Baehr, 852 P.2d at 56, I believe tat it is misguided. First, gay persons have the same ability to procreate as anyone else and same-sex couples often raise children together, so there is no reason why a link between marriage and procreation should disqualify same-sex couples.

Second, although the Supreme Court has identified procreation as *a* reason formarriage, it has never described procreation as a requirement. This point has been clear at least since Griswold v. Connecticut, 381 U.S. 479 (1965). If it were true that the Court viewed procreation as a necessary component of marriage, it could not have found that married couples have a constitutional right *not* to procreate by using contraception. Instead, the Court described marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association

for as noble a purpose as any involved in our prior decisions." Id. at 486.

To the extent that Griswold leaves any ambiguity, it is resolved by Turner, 482 U.S. 78, which raised the question whether prisoners retain the right to marry while incarcerated. The Supreme Court concluded that they did, despite the fact that the vast majority of prisoners cannot procreate with their spouses. The Court stated:

> Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious

> and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Id. at 95-96. Turner makes it clear that the Court views marriage as serving a variety of important purposes for the couple involved, which may or may not include procreation, and that it is ultimately for the couple to decide what marriage means to them. (Although the Court stated that most inmate marriages "will be fully consummated" when the prisoner is released, there is obviously a difference between consummating a marriage and procreation. In any event, the Court did not suggest that an intent to consummate is a prerequisite to marriage.) Because defendants identify no reason why same-sex couples cannot fulfill the Court's articulated purposes of marriage just as well as opposite-sex couples, this counsels in favor of interpreting the right to marry as encompassing the choice of a same-sex partner.

b. Nature of the decision

In describing the type of conduct protected by the due process clause, including marriage, family relationships, contraception, education and procreation, the Supreme Court has stated that the common thread is that they all relate to decisions that are central to the individual's sense of identity and ability to control his or her own destiny. This point may have been made most clearly in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992):

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

See also Lawrence, 539 U.S. at 578 (state may not "control th[e] destiny" of its citizens by criminalizing certain intimate conduct); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Constitution protects right "to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person.").

In addition, the Supreme Court has stated that the liberty protected in the due process clause includes the right to choose your own family. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499, 506 (1977) ("A host of cases . . . have consistently acknowledged a private realm of family life which the state cannot enter. . . . [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). With respect to marriage in particular, the Supreme Court has stated repeatedly that it is a matter of individual choice. Hodgson v. Minnesota, 497 U.S. 417, 435

(1990) ("[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."); Loving, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State. . . The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness."). See also Zablocki, 434 U.S. at 403-04 (Stevens, J., concurring in the judgment) ("The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection.").

In Bowers, when the Supreme Court refused to acknowledge that homosexual relationships are entitled to constitutional protection, Justice Blackmun noted in his dissent that the Court was being inconsistent with previous cases in which it had protected decisions that "form so central a part of an individual's life." Bowers, 478 U.S. at 204-05 (Blackmun, J., dissenting). See also id. at 218-19 (Stevens, J., dissenting) ("[E]very free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life."). In Lawrence, 539 U.S. at 567, the

Court acknowledged that, in Bowers, it had "fail[ed] to appreciate the extent of the liberty at stake," when it framed the question as whether there is a "right to homosexual sodomy." Instead, the Court should have recognized that "our laws and tradition afford constitutional protection" to certain "personal decisions" and that "[p]ersons in a homosexual relationship may seek autonomy" to make those decisions "just as heterosexual persons do." Id. at 574.

Of course, Lawrence is not directly on point because that case was about sexual conduct rather than marriage, but even in Lawrence, the Supreme Court acknowledged that sexual conduct is but "one element in a personal bond that is more enduring." Lawrence, 539 U.S. at 567. The Court went on to state that its holding "should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries* absent injury to a person or abuse of an institution the law protects." Id. (emphasis added). More generally, the Court reaffirmed the principle that, in determining the scope of a right under the due process clause, the focus should be on the nature of the decision at issue and not on who is making that decision. Turner, 478 U.S. 82 (right to marry extends to prisoners); Zablocki, 434 U.S. 374 (right to marry extends to father who failed to make court-ordered child support payments); Eisenstadt, 405 U.S. at 453 (right of married couples to use contraception recognized in Griswold must be extended to single persons as well). See also Latta, 2014 WL 1909999, at *12 ("[The argument that the right to same-sex marriage is a] 'new right' . . . attempts to narrowly

parse a right that the Supreme Court has framed in remarkably broad terms. Loving was no more about the 'right to interracial marriage' than Turner was about the 'prisoner's right to marry' or Zablocki was about the 'dead-beat dad's right to marry.'").

If the scope of the right to marry is broad enough to include even those whose past conduct suggests an inclination toward violating the law and abdicating responsibility, then it is difficult to see why it should not be broad enough to encompass same-sex couples as well. Defendants do not suggest that the decision about whom to marry is any less important or personal for gay persons than it is for heterosexuals. Accordingly, I conclude defendants are making the same mistake as the Court in Bowers when they frame the question in this case as whether there is a "right to same-sex marriage" instead of whether there is a right to marriage from which same-sex couples can be excluded. Latta, 2014 WL 1909999, at *13; Kitchen, 961 F. Supp. 2d at 1199-1200; Andersen, 138 P.3d at 1022 (Fairhurst, J., dissenting).

c. History of exclusion

Defendants argue that including the choice of a same-sex partner within the right to marry would contradict Washington v. Glucksberg, 521 U.S. 702, 722 (1997), in which the Supreme Court stated that its "substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment . . . have . . . been carefully refined by concrete examples involving fundamental rights found to be

deeply rooted in our legal tradition." Although the Court previously had recognized "the right of a competent individual to refuse medical treatment," it declined to expand the scope of that right to include a more general "right to commit suicide," in part because of "a consistent and almost universal tradition that has long rejected the asserted right" to suicide. Id. at 723-24. Defendants say that a similar conclusion is required with respect to the right of same-sex couples to marry because that right had not been recognized in any state until recently.

As an initial matter, it is hard to square aspects of Glucksberg with the holdings in Griswold and Roe v. Wade, 410 U.S. 113 (1973), in which the Court recognized the rights to contraception and abortion, neither of which were "deeply rooted" in the country's legal tradition at the time. Lawrence, 539 U.S. at 588 (Scalia, J., dissenting) ("Roe [has] been . . . eroded by [Glucksberg] . .. [because] . . .Roe . . . subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation's tradition."). Despite the tension between these cases, the Court has reaffirmed the rights recognized in both Roe and Griswold since Glucksberg. Lawrence, 539 U.S. at 564 (citing holding of Griswold and Roe with approval); Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (reaffirming Roe).

In any event, I conclude that Glucksberg is not instructive because that case involved the question whether a right to engage in certain conduct (refuse medical treatment) should be expanded to include a right to engage in different conduct (commit suicide),

"two acts [that] are widely and reasonably regarded as quite distinct." Id. at 725. In this case, the conduct at issue is exactly the same as that already protected: getting married. The question is whether the scope of that right may be restricted depending on *who* is exercising the right.

Both Lawrence and Loving support a view that the state cannot rely on a history of exclusion to narrow the scope of the right. When the Supreme Court decided those cases, there had been a long history of states denying the rights being asserted. Although the trend was moving in the other direction, many states still prohibited miscegenation in 1967 and many still prohibited homosexual sexual conduct in 2003. Lawrence, 539 U.S. at 573 (noting that 13 states retained sodomy laws); Loving, 388 U.S. at 7 (noting that 16 states had anti-miscegenation laws). See also Andrew Sullivan, Same-Sex Marriage: Pro and Con Introduction xxv (Vintage 2004) (in 1968, one year *after* Loving, 72 percent of Americans disapproved of interracial marriages); Michael Klarman, Courts, Backlash and the Struggle for Same-Sex Marriage Introduction i (Oxford University Press 2012) (when Court decided Brown v. Board of Education, 21 states required or permitted racial segregation in public schools).

In both Loving and Lawrence, proponents of the laws being challenged relied on this history of exclusion as evidence that the scope of the right should not include the conduct at issue. Bowers, 478 U.S. at 211 (Blackmun, J., dissenting) (In Loving, "defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was

ratified, most of the States had similar prohibitions."); Lawrence, 539 U.S. at 594-95 (Scalia, J., dissenting) ("[T]he only relevant point is that [sodomy] was criminalized—which suffices to establish that homosexual sodomy is not a right deeply rooted in our Nation's history and tradition.") (internal quotations omitted). In fact, in Bowers, 478 U.S. at 192, the Court itself relied on the fact that laws against sodomy had "ancient roots." However, in both Lawrence and Loving, the Supreme Court held that history was not dispositive, particularly in light of more recent changes in law and society. Lawrence, 539 U.S. at 571-72 ("[There is] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (internal quotations and alterations omitted); Casey, 505 U.S. at 847–48 ("Interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia.").

Past practices cannot control the scope of a constitutional right. If the scope of the right is so narrow that it extends only to what is so well-established that it has never been challenged, then the right serves to protect only conduct that needs no protection. Casey, 505 U.S. at 847 (It is "tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific

level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law."). Thus, the scope of the right must be framed in neutral terms to prevent arbitrary exclusions of entire classes of people. In this way, courts remain true to their "obligation . . . to define the liberty of all [rather than] mandate [their] own moral code." Id. at 850.

d. "Definition" of marriage

Finally, amici attempt to distinguish Loving on the ground that sex, unlike race, "go[es] to the essentials of what marriage means." Amici Br., dkt. #109, at 17 n.3. See also id. at 11 (opposite-sex requirement "has always been the universal essential element of the marriage definition"). This sort of "definitional" argument against marriage between same sex couples was prominent in many of the early cases, in which courts said that the right to marry was not implicated because it simply was "impossible" for two people of the same sex to marry. Baker, 191 N.W.2d at 187 ("But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) ("In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) ("The operative distinction [between interracial marriage and same-sex marriage] lies in the relationship

which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."); Adams v. Howerton, 486 F. Supp. 1119, 1122 (C.D. Cal. 1980) ("The term 'marriage' . . . necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes."); Dean, 653 A.2d at 361 (Terry, J., concurring)("same-sex 'marriages' are legally and factually—i.e., definitionally—impossible").

Although amici try to rely on the inherent "nature" of marriage as a way to distinguish anti-miscegenation laws from Wisconsin's marriage amendment, the argument simply reveals another similarity between the objections to interracial marriage and amici's objections to same-sex marriage. In the past, many believed that racial mixing was just as unnatural and antithetical to marriage as amici believe homosexuality is today. Wolfe v. Georgia Railway & Electric Co., 58 S.E. 899, 902-03 (Ga. 1907) (stating that "there is a universally recognized distinction between the races" and that miscegenation is "unnatural" and "productive of evil, and evil only"); Kinney v. Commonwealth, 71 Va. 858, 869 (1878) (interracial marriage "should be prohibited by positive law" because it is "so unnatural that God and nature seem to forbid" it); Lonas v. State, 50 Tenn. (3 Heisk) 287, 310 (1871) ("The laws of civilization demand that the races be kept apart."). This view about interracial marriage was repeated by the trial court in Loving, 388 U.S. at 3 ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no

cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.").

Mildred Loving herself, one of the plaintiffs in Loving, saw the parallel between her situation and that of same-sex couples. Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and the Constitution 140 (Oxford University Press 2010) (quoting Mildred Loving as stating that "[t]he majority believed . . . that it was God's plan to keep people apart and that the government should discriminate against people in love" but that she believes that "all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry"). Although amici may believe that a particular sex is more "essential" to marriage than a particular race, this may reveal nothing more than amici's own views about what seems familiar and natural. Cf. John Stuart Mill and Harriet Taylor Mill, "The Subjection of Women," included in John Stuart Mill, On Liberty and Other Writings 129 (Stefan Collini ed., Cambridge University Press 1989) ("Was there ever any domination which did not appear natural to those who possessed it?").

Even if I assume that amici are correct that the condemnation against miscegenation was not as "universal" as it has been against same-sex marriage, the logical conclusion of amici's argument suggests that the Supreme Court would have been compelled to uphold bans on interracial marriage if the opposition to them had been even stronger or more consistent. Of course, the Court's holding in

Loving did not rest on a "loophole" that interracial marriage had been legal in some places during some times. A second flaw in defendants' argument is that it is circular and would allow a state to exclude a group from exercising a right simply by manipulating a definition. Civil marriage is a *legal* construct, not a biological rule of nature, so it can be and has been changed over the years; there is nothing "impossible" about defining marriage to include same-sex couples, as has been demonstrated by the decisions of a number countries and states to do just that.

Amici say that opposite-sex marriage reflects "biological and social realities," Amici's Br., dkt. #109, at 3, but they do not explain what that means. To the extent amici are referring again to procreation, I have discussed that issue above and need not address it again. To the extent they are referring to stereotypically masculine and feminine roles that men and women traditionally have held in marriage, that is not a legitimate basis for limiting the scope of the right. United States v. Virginia, 518 U.S. 515, 541-42 (1996) ("State actors may not rely on overbroad generalizations [about the sexes] to make judgments about people that are likely to perpetuate historical patterns of discrimination."); Goodridge, 798 N.E.2d at 965 n.28 (rejecting argument "that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated"). Although the Supreme Court has acknowledged that there are "[i]nherent differences between men and women," the state may not rely on those differences to impose "artificial constraints on an individual's

opportunity." Virginia, 518 U.S. at 533-34. I see no reason why that principle should apply any differently in the context of marriage. Accordingly, I conclude that the right to marry protected by the Constitution includes same sex couples.

2. Significant interference

The next question under Zablocki is whether Wisconsin "significantly interferes" with plaintiffs' right to marry. It seems obvious that it does because Wisconsin law prohibits plaintiffs from entering a marriage relationship that will be meaningful for them. Id. at 403-04 (Stevens, J., concurring) ("A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship."). Cf. Perez v. Lippold, 198 P.2d 17, 25 (Cal. 1948) (under anti-miscegenation law, "[a] member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable"). Even defendants do not suggest that marrying someone of the opposite sex is a viable option for plaintiffs. Thus, the practical effect of the law is to impose an absolute ban on marriage for plaintiffs. Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009) ("[T]he right of a gay or lesbian person underthe marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all" because it would require that person to "negat[e] the very trait that defines gay and lesbian people as a class."); Andrew Sullivan, Virtually Normal 44 (Vintage Books 1995)(ban on same-sex

relationships bars gay persons "from the act of the union with another" that many believe "to be intrinsic to the notion of human flourishing in the vast majority of human lives").

Neither defendants nor amici argue that domestic partnerships, which are available to both same-sex and opposite-sex couples under Wis. Stat. chapter 770, are an adequate substitute for marriage, such that the marriage ban does not "significantly interfere" with plaintiffs' rights, so I need not consider that question. However, most courts considering the issue have found that domestic partnerships and civil unions do not cure the constitutional injury because, even if the tangible benefits of a domestic partnership are similar to marriage, creating a "separate but equal" institution still connotes a second-class status. E.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010); Varnum, 763 N.W.2d at 906-07; Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 412 (Conn. 2008); Marriage Cases, 183 P.3d at 445 (Cal. 2008); Opinions of the Justices, 802 N.E.2d at 571. But see Sevcik, 911 F. Supp. 2d at 1015 ("The State has not crossed the constitutional line by maintaining minor differences in civil rights and responsibilities that are not themselves fundamental rights comprising the constitutional component of the right to marriage, or by reserving the label of 'marriage' for one-man-one-woman couples in a culturally and historically accurate way.").

The only issue raised by defendants about the significance of the state's interference relates to the plaintiffs who were married legally in other states.

Defendants say that Wisconsin law does not interfere with those plaintiffs' marriage rights because Wisconsin has done nothing to invalidate their marriages or to deprive them of benefits that they could receive from the state where they were married.

This argument is bewildering. Defendants acknowledge that Wisconsin "refuses to recognize same-sex marriages lawfully contracted in other jurisdictions," Dfts.' Br., dkt. #102, at 29, which means that the plaintiffs married in other states are deprived of any state rights, protections or benefits related to marriage so long as they reside in Wisconsin. I have no difficulty concluding that such a deprivation qualifies as "significant interference" under Zablocki. De Leon, 975 F. Supp. 2d 632 (holding that state's refusal to recognize out-ofstate marriage interferes with plaintiffs' right to marry); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (same). See also Baskin v. Bogan, 1:14-CV-00355-RLY, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (granting preliminary injunction on claim that state's refusal to recognize out-of-state marriage interferes with plaintiffs' right to marry).

In sum, I conclude that Wisconsin's marriage amendment and the Wisconsin statutes defining marriage as requiring a "husband" and a "wife" significantly interfere with plaintiffs' right to marry, so the laws must be supported by "sufficiently important state interests" that are "closely tailored to effectuate only those interests," Zablocki, 434 U.S. at 388, in order to survive constitutional scrutiny. However, because this case is likely to be appealed,

before I consider the state's asserted interests for these laws, I will consider plaintiffs' alternative argument that they are entitled to heightened protection under the equal protection clause, in the event the Court of Appeals for the Seventh Circuit disagrees with my conclusion regarding the scope of plaintiffs' rights under the due process clause.

B. Equal Protection

In addition to placing limits on state deprivations of individual liberty, the Fourteenth Amendment says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause "require[s] the state to treat each person with equal regard, as having equal worth, regardless of his or her status." Nabozny v. Podlesny, 92 F.3d 446, 456 (7th Cir. 1996). Stated another way, it "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 300 (1990) (Scalia, J. concurring). "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." Railway Express Agency v. People of State of New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Although the text of the equal protection clause does not distinguish among different groups or classes, the Supreme Court has applied different standards of review under the clause, depending on the type of classification at issue. Most classifications "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a

rational basis for the classification." FCC v. Beach Commcations, Inc., 508 U.S. 307, 313 (1993). Generally, under a rational basis review, the state has "no obligation to produce evidence" and "courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Heller v. Doe by Doe, 509 U.S. 312, 320-21 (1993).

However, under some circumstances, the Supreme Court has applied a heightened standard of review. For "suspect" classifications, such as race, alienage and national origin, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 & n.4 (1976), the court applies "strict scrutiny," under which the government must show that the classification is "narrowly tailored" to achieve a "compelling" interest. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 720 (2007). With respect to a small number of other classifications, such as sex and legitimacy (often referred to as "quasisuspect" classifications), the Court has applied what it calls intermediate scrutiny, under which the classifications must be "substantially related" to the achievement of an "important governmental objective." Virginia, 518 U.S. at 524.

In this case, plaintiffs contend that some form of heightened scrutiny should apply because the marriage amendment discriminates on the basis of

sex and sexual orientation. I will address both of these contentions in turn.

1. Sex discrimination

Plaintiffs identify two theories of sex discrimination. The first is straightforward: if each plaintiff was to choose a marriage partner of the opposite-sex, he or she would be permitted to marry in Wisconsin. Therefore, plaintiffs say, it is because of their sex that they cannot marry. Plaintiffs' second theory is more nuanced and relies on the concept of sex stereotyping. In particular, plaintiffs say that Wisconsin's ban on marriage between same-sex couples "perpetuates and enforces stereotypes regarding the expected and traditional roles of men and women, namely that men marry and create families with women, and women marry and create families with men." Plts.' Br., dkt. #71, at 18.

With respect to the first theory of sex discrimination, plaintiffs analogize their situation to the plaintiffs in Loving, who were prohibited from marrying because of the race of their partner. The state argued in Loving that the anti-miscegenation law was not discriminatory because it applied to both whites and blacks, but the Supreme Court rejected that argument, stating that "we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." Loving, 388 U.S. at 7-8. See also McLaughlin v. State of Florida, 379 U.S. 184, 191 (1964) (statute

prohibiting interracial cohabitation is unconstitutional, even though it penalized both whites and blacks; "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation"). Plaintiffs argue that the same reasoning should apply in this case. In other words, plaintiffs believe that the same-sex marriage ban discriminates on the basis of sex, even though it applies equally to both men and women, because it draws a line according to sex.

In the first case resolved in favor of same-sex couples seeking to marry, the court adopted this theory, even though the plaintiffs had not argued it initially. Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993). Since then, however, the sex discrimination theory has been rejected by most courts to consider it, even those ruling in favor of the plaintiffs on other grounds. E.g., Geiger v. Kitzhaber, 6:13-CV-01834-MC, 2014 WL 2054264, at *7 (D. Or. May 19, 2014); Latta, 2014 WL 1909999, at *15; Bishop, 962 F. Supp. 2d at 1286-87; Sevcik, 911 F. Supp. 2d at 1005; Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1098-99 (D. Haw. 2012); Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865, 880; Kerrigan, 957 A.2d at 509; Marriage Cases, 183 P.3d at 438; Conaway v. Deane, 4932 A.2d 571, 601-02 (Md. 2007); Hernandez, 855 N.E.2d at 10-11. But see Kitchen, 961 F. Supp. at 1206 ("[T]he court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."); Perry v. Schwarzenegger, 704 F. Supp. 2d

at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); Brause v. Bureau of Vital Statistics, 3AN-95-6562 CI, 1998 WL 88743, *6 (Alaska Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.").

Although the reasoning of the courts rejecting the theory has varied, the general view seems to be that a sex discrimination theory is not viable, even if the government is making a sex-based classification with respect to an individual, because the intent of the laws banning same-sex marriage is not to suppress females or males as a class. E.g., Sevcik, 911 F. Supp. 2d at 1005 ("[B]ecause it is homosexuals who are the target of the distinction here, the level of scrutiny applicable to sexual-orientation-based distinctions applies."). In other words, courts view this theory as counterintuitive and legalistic, an attempt to "bootstrap" sexual orientation discrimination into a claim for sex discrimination.

With respect to plaintiffs' second theory, there is support in the law for the view that sex stereotyping is a form of sex discrimination. Virginia, 518 U.S. at 541-42 ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.") (internal quotations omitted); Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51

(1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matc[h] the stereotypes associated with their group."). See also Doe by Doe v. City of Belleville, Illinois, 119 F.3d 563, 581 (7th Cir. 1997)("A woman who is harassed . . . because [she] is perceived as unacceptably 'masculine' is harassed 'because of' her sex. . . . In the same way, a man who is harassed because . . . he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.") (citations omitted). But see Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring) ("'Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes . . . be evidence of sex discrimination."). Some commentators have argued that sexual orientation discrimination should be seen as the ultimate form of sex stereotyping because it is grounded in beliefs about appropriate gender roles, e.g., Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187 (1988), but plaintiffs have not cited any courts that have adopted that theory and I am not aware of any.

Plaintiffs' arguments about sex discrimination are thought-provoking enough to have caught the interest of at least one Supreme Court justice. Oral argument, Hollingsworth v. Perry, No. 12-144, 2013 WL 1212745, at *13 (statement of Kennedy, J.) ("Do you believe [that a ban on same-sex marriage] can be treated as a gender-based classification? It's a difficult question that I've been trying to wrestle with it."). However, neither the Supreme Court nor

the Court of Appeals for the Seventh Circuit has embraced either theory asserted by plaintiffs. With respect to the first theory, the court of appeals assumed in a recent case that a sex-based classification may be permissible if it imposes comparable burdens on both sexes. Hayden ex rel. A.H. v. Greensburg Community School Corp., 743 F.3d 569, 581 (7th Cir. 2014) ("Sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike."). With respect to the second theory, the court has stated that there is "a considerable overlap in the origins of sex discrimination and homophobia," but the court declined to "go so far" as "to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination." Doe, 119 F.3d at 593 n.27. The Supreme Court has not discussed either theory as it relates to sexual orientation.

Because of the uncertainty in the law and because I am deciding the case in plaintiffs' favor on other grounds, I decline to wade into this jurisprudential thicket at this time. However, the court of appeals' statement that sex and sexual orientation are related provides some support for a view that, like sex discrimination, sexual orientation discrimination should be subjected to heightened scrutiny.

2. Sexual orientation discrimination

a. Supreme Court guidance

The Supreme Court has never decided explicitly whether heightened scrutiny should apply to sexual orientation discrimination. Lee v. Orr, 13-CV-8719, 2013 WL 6490577 n.1 (N.D. Ill. Dec. 10, 2013) ("[T]he Supreme Court has yet to expressly state the level of scrutiny that courts are to apply to claims based on sexual orientation."). In Romer, 517 U.S. at 632, in which the Court invalidated a state constitutional amendment because it discriminated on the basis of sexual orientation, the Court ignored the question whether heightened scrutiny should apply, perhaps because it was unnecessary in light of the Court's conclusion that the law in dispute "lack[ed] a rational relationship to legitimate state interests." The Court did not discuss the standard of review in Windsor either.

Despite the lack of an express statement from the Supreme Court, some courts and commentators have argued that the Court's analyses in Romer and especially Windsor require a conclusion that the Court, in practice, is applying a higher standard than rational basis. For example, in SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 480-81 (9th Cir. 2014), the court considered the standard of review to apply to sexual orientation discrimination in the context of jury selection. The court stated that "Windsor review is not rational basis review. In its words and its deed, Windsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, Windsor requires that heightened scrutiny be applied to equal protection claims involving sexual

orientation." Id. See also Evan Gerstmann, Same-Sex Marriage and the Constitution, 19 (2d ed. Cambridge University Press 2008) ("Some scholars, including this author, have argued that the Romer Court actually applied a level of scrutiny somewhat greater than rational basis review" because "[t]he Court seemed unusually skeptical of [the state's] professed reasons" for [the law]."). This conclusion is consistent with Justice Scalia's dissenting opinion in Windsor, 133 S.Ct. at 2706, in which he stated that "the Court certainly does not apply anything that resembles [the rational-basis] framework."

In SmithKline, 740 F.3d at 981-83, the court of appeals relied on four factors to conclude that Windsor applied heightened scrutiny: (1) the Supreme Court did not consider "conceivable" justifications for the law not asserted by the defenders of the law; (2) the Court required the government to "justify" the discrimination; (3) the Court considered the harm that the law caused the disadvantaged group; and (4) the Court did not afford the law a presumption of validity. Finding all of these things inconsistent with rational basis review, the court of appeals concluded that the Supreme Court must have been applying some form of heightened scrutiny.

I agree with the court in SmithKline that the Supreme Court's analysis in Windsor (as well as in Romer) had more "bite" than a rational basis review would suggest. In fact, in Justice O'Connor's concurrence in Lawrence, 539 U.S. at 580, she acknowledged that the Court conducted "a more

searching inquiry" in Romer than it had in the ordinary case applying rational basis review.

It may be that Windsor's silence is an indication that the Court is on the verge of making sexual orientation a suspect or quasi-suspect classification. Cf. Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (plurality opinion) (stating for first time that sex discrimination should receive heightened scrutiny and relying on previous case in which Court had "depart[ed] from a 'traditional' rational-basis analysis with respect to [a] sex-based classificatio[n]" but Court did not say expressly in previous case that it was applying heightened standard of review). Alternatively, it may be that Romer and Windsor suggest that "[t]he hard edges of the tripartite division have . . . softened," and that the Court has moved "toward general balancing of relevant interests." Cass Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 77 (1996). However, in the absence of a clear statement from the Court regarding the standard of review it was applying, it is difficult to rely on those cases as authority for applying heightened scrutiny to sexual orientation discrimination. Accordingly, I will consider next whether the Court of Appeals for the Seventh Circuit has provided definitive guidance.

b. Guidance from the Court of Appeals for the Seventh Circuit

Defendants argue that circuit precedent prohibits this court from applying heightened scrutiny, but I disagree. In Ben–Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir.1989), the court of appeals applied

rational basis review to a law banning gays in the military, but in Nabozny, 92 F.3d at 457-58, the court stated that Ben-Shalom's holding was limited to the military context. This makes sense in light of the general rule that courts must be more deferential to the government in matters of national security. E.g., Rostker v. Goldberg, 453 U.S. 57, 68 (1981) (upholding sex-based classification in military context). In Nabozny, a case involving allegations that school officials failed to protect a student from harassment because of a perception that he was gay, the court stated that it "need not consider whether homosexuals are a suspect or quasi-suspect class" because, viewing the facts in the light most favorable to the plaintiff as required on a motion for summary judgment, the defendants' actions lacked any rational basis. Id. at 458.

Since Nabozny, the court of appeals has not engaged in any further analysis of the question whether sexual orientation discrimination should be subjected to heightened scrutiny. In Schroeder v. Hamilton School District, 282 F.3d 946, 950-51 (7th Cir. 2002), the court stated that "homosexuals do not enjoy any heightened protection under the Constitution," but that statement was dicta because the court did not rely on the standard of review to decide the case. Instead, the court held that the plaintiff had failed to prove that the defendants treated him less favorably because of his sexual orientation. Schroeder, 282 F.3d at 956 ("Schroeder failed to demonstrate that the defendants treated his complaints of harassment differently from those lodged by non-homosexual teachers, that they intentionally discriminated against him, or acted

with deliberate indifference to his complaints because of his homosexuality.").

"[D]ictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject." United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988). As a general rule, district courts should be guided by the views of the court of appeals or the Supreme Court, even when those views are expressed in dicta, Reich v. Continental Casualty Co., 33 F.3d 754, 757 (7th Cir.1994), but, when dicta is not supported by reasoning, its persuasive force is greatly diminished. Sutton v. A.O. Smith Co., 165 F.3d 561, 564 (7th Cir.1999); Wilder v. Apfel, 153 F.3d 799, 803 (7th Cir. 1998); Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 916 F.2d 1174, 1176 (7th Cir. 1990). In Schroeder, the court did not provide any reasoning for its conclusion that sexual orientation discrimination is not entitled to heightened scrutiny; instead the court simply cited Romer, 517 U.S. at 634-35, which did not address the issue, and Bowers, 478 U.S. at 196, which was overruled a year after Schroeder in Lawrence. Cf. Kerrigan, 957 A.2d at 468 (2008) (concluding that sexual orientation discrimination is subject to heightened scrutiny, despite case law to contrary, because those cases "rely so heavily on Bowers"). Accordingly, I conclude that Schroeder does not resolve the question of the appropriate standard of review to apply to discrimination against gay persons.

c. Factors relevant to determining status as suspect or quasi-suspect class

Because neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has provided definitive guidance on whether sexual orientation discrimination requires heightened scrutiny, I must make that determination on my own. Other courts making the same determination have identified four factors that the Supreme Court has discussed, often in dicta, as relevant to the analysis: (1) whether the class has been subjected to a history of discrimination, Murgia, 427 U.S. at 313; (2) whether individuals in the class are able to contribute to society to the same extent as others, Cleburne, 473 U.S. at 440–41; (3) whether the characteristic defining the class is "immutable," Lyng v. Castillo, 477 U.S. 635, 638 (1986); and (4) whether the class is "politically powerless." Bowen v. Gilliard, 483 U.S. 587, 602 (1987). But see Virginia, 518 U.S. at 568 (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."). Since Windsor, all the courts to consider the issue have concluded that each of the factors applies to sexual orientation discrimination. E.g., Whitewood v. Wolf, 1:13-CV-1861, — F. Supp. 2d — , 2014 WL 2058105, at *14 (M.D. Pa. May 20, 2014); De Leon, 975 F. Supp. 2d at 650-51; Bassett v. Snyder, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013).

Defendants do not challenge plaintiffs' contentions that gay persons have been subjected to a history of discrimination and that sexual orientation does not impair an individual's ability to contribute to society, so I see no reason to repeat the

analyses of the many courts that have reached the same conclusion. E.g., Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012); De Leon, 975 F. Supp. 2d at 650-51; Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294, 316 (D. Conn. 2012); Golinski v. U.S. Office of Personnel Management, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012); Perry, 704 F.Supp.2d at 1002; Varnum, 763 N.W.2d at 889; Kerrigan, 957 A.2d at 435 (2008). In fact, I am not aware of *any* cases in which a court concluded that being gay hinders an individual's ability to contribute to society.

With respect to immutability, defendants do not directly challenge the view that it applies to sexual orientation, but instead argue in a footnote that the authorities plaintiffs cite do not support their position. Dfts.' Br., dkt. #102, at 40 n.10. With respect to political powerlessness, defendants deny that it applies to gay persons, pointing to various statutes in Wisconsin and around the country that prohibit sexual orientation discrimination in contexts other than marriage, such as employment. Dfts.' Br., dkt. #102, at 40-41. In addition, they cite public opinion polls suggesting that attitudes about homosexuality have become more positive in recent years. Most courts concluding that sexual orientation discrimination is not subject to heightened scrutiny have relied on a similar argument about political power. E.g., Sevcik, 911 F. Supp. 2d at 1008 ("[The political success] the homosexual-rights lobby has achieved . . . indicates that the group has great political power. . . . In 2012 America, anti-homosexual viewpoints are widely regarded as uncouth.").

I disagree with defendants that heightened scrutiny is inappropriate, either because of any doubts regarding whether sexual orientation is "immutable" or because of any political successes gay persons have had. In applying the four factors to a new class, it is important to consider the underlying reasons for applying heightened scrutiny and to look at the classes that already receive heightened scrutiny to see how the factors apply to them.

With respect to immutability, the Supreme Court has applied heightened scrutiny to discrimination on the basis of alienage, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971), even though aliens can become citizens. Sugarman, 413 U.S. at 657 (Rehnquist, J., dissenting) ("[T]here is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the 'status' [that can be] changed by . . . affirmative acts."). The Court also applies heightened scrutiny to discrimination on the basis of religion, e.g., Larson v. Valente, 456 U.S. 228 (1982), even though religion is something that a person chooses. (Although most religious discrimination claims arise under the First Amendment, it is likely that the same standard would apply under the equal protection clause. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all

speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").) Even a person's gender is not written in stone. E.g., Glenn v. Brumby, 724 F. Supp. 2d 1284, 1289 (N.D. Ga. 2010) (discussing process leading up to sex reassignment surgery).

Rather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should be required* to change because it is central to a person's identity. Of course, even if one could change his or her race or sex with ease, it is unlikely that courts (or virtually anyone else) would find that race or sex discrimination is any more acceptable than it is now.

In Lawrence, 539 U.S. at 577, the Supreme Court found that sexual expression is "an integral part of human freedom" and is entitled to constitutional protection, which supports a conclusion that the law may not require someone to change his or her sexual orientation. Further, sexual orientation has been compared to religion on the ground that both "often simultaneously constitut[e] or infor[m] a status, an identity, a set of beliefs and practices, and much else besides." Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 2995 n.1 (2010) (Stevens, J., concurring). See also Martha Nussbaum, From Disgust to Humanity: Sexual Orientation & Constitutional Law 39 (Oxford University Press 2010) (like religion, sexual orientation "goes to the heart of people's self-

definition, their search for identity and self expression"). For this reason, I agree with those courts that have concluded that, regardless whether sexual orientation is "immutable," it is "fundamental to a person's identity," De Leon, 975 F. Supp. 2d at 651, which is sufficient to meet this factor. Bassett, 951 F. Supp. 2d at 960; Griego, 316 P.3d at 884.

With respect to political powerlessness, it seems questionable whether it is really a relevant factor. When the Supreme Court has mentioned political power, it has been only to include it in a list of other reasons for denying a request for heightened scrutiny. E.g., Bowen, 483 U.S. at 603; Cleburne, 473 U.S. at 445; Murgia, 427 U.S. 307 at 313–14. Defendants cite no case in which the Supreme Court has determined that it is a dispositive factor. On a practical level, it would be challenging to apply because it would suggest that classes could fall in and out of protected status depending on some undetermined level of political success, an idea for which the Court has never even hinted support. Regents of University of California v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.) (rejecting view that equal protection clause should be "hitch[ed] . . . to . . . transitory considerations [that] vary with the ebb and flow of political forces").

Perhaps most telling is that almost none of the classifications that receive heightened scrutiny, including race or sex, could satisfy this factor if the test were whether the group has had any political success. Marriage Cases, 183 P.3d at 443. Particularly because discrimination against white citizens is subjected to strict scrutiny, e.g., City of

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), it is difficult to understand why a group's political power should be determinative.

To the extent that "political powerlessness" is an appropriate factor, I conclude that the question is best framed as whether the class is inherently vulnerable in the context of the ordinary political process, either because of its size or history of disenfranchisement. In light of the fact that gay persons make up only a small percentage of the population and that there is no dispute that they have been subjected to a history of discrimination, I have no difficulty in concluding that sexual orientation meets this factor as well. Windsor, 699 F.3d at 184; Pedersen, 881 F. Supp. 2d at 332.

In any event, a review of the various classifications that receive heightened scrutiny (race, sex, alienage, legitimacy) reveals a common factor among them, which is that the classification is seldom "relevant to the achievement of any legitimate state interest." Cleburne, 473 U.S. at 440. Under these circumstances, the classification is more likely "to reflect prejudice and antipathy," so courts should be more suspicious of the discrimination. Id. See also Pedersen, 881 F. Supp. 2d at 319 ("The ability to contribute to society has played a critical and decisive role in Supreme Court precedent both denying and extending recognition of suspect class to other groups."). Neither defendants nor amici offer an argument that sexual orientation would not meet that standard.

Accordingly, I conclude that sexual orientation discrimination is subject to heightened scrutiny. The Supreme Court has not explained how to distinguish a "suspect" classification from a "quasi-suspect" classification, but sexual orientation is most similar to sex among the different classifications that receive heightened protection, Doe, 119 F.3d at 593 n. 27. Because sex discrimination receives intermediate scrutiny and the difference between intermediate scrutiny and strict scrutiny is not dispositive in this case, I will assume that intermediate scrutiny applies, which means that defendants must show that Wisconsin's laws banning marriage between same-sex couples must be "substantially related" to the achievement of an "important governmental objective," Virginia, 518 U.S. at 524, to survive scrutiny under the equal protection clause.

3. Other considerations relevant to the standard of review

In cases involving both suspect classes as well as other groups of people, the Supreme Court has taken into account the nature and severity of the deprivation at issue, particularly when it seems to threaten principles of equal citizenship or imposes a stigma on a particular class. Cleburne, 473 U.S. at 448 (striking down law that restricted where mentally disabled, a nonsuspect class, could live); Plyler v. Doe, 457 U.S. 202, 223-24, (1982) (in equal protection case involving nonsuspect class's access to public education, noting that "[p]ublic education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other

forms of social welfare legislation" and that, as a result of a denial of education, the"[t]he stigma of illiteracy will mark [the uneducated children] for the rest of their lives"); Brown, 347 U.S. at 494 (segregation "generates a feeling of inferiority as to [black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). See also Cleburne, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."). This focus on stigma and equal citizenship makes sense because one purpose of the equal protection clause is to prohibit "stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." Heckler v. Mathews, 465 U.S. 728, 739 (1984).

The Supreme Court's focus on the nature and severity of the deprivation is particularly apparent in its more recent cases touching on sexual orientation. In Romer, 517 U.S. at 627, 629, 631, 635, the Court noted that the state constitutional amendment at issue (which prohibited municipalities from enacting ordinances that banned sexual orientation discrimination) imposed "severe consequence[s]," "special disabilit[ies]" and "immediate, continuing, and real injuries" on gay persons and no one else and that the amendment "put [them] in a solitary class with respect to transactions and relations in both the private and

governmental spheres." The Court contrasted the challenged law with differential treatment the Court had upheld in the past regarding economic activities such as advertising and operating a pushcart. Id. at 632. In part because of the nature of the harm, the Court concluded that the state law amounted to "class legislation" and "a classification of persons undertaken for its own sake." Id. at 635. The Court quoted the famous dissenting opinion by Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, 559 (1896), for the proposition that the Constitution "neither knows nor tolerates classes among citizens." Id. at 623.

Although the Supreme Court did not decide Lawrence under the equal protection clause, it continued to use similar language. For example, the Court noted that the sodomy law at issue "demeans the lives of homosexual persons," "invit[es] . . . discrimination [against gay persons] both in the public and in the private spheres" and "imposes" a "stigma" on them. Lawrence, 539 U.S. at 575.

Finally, in Windsor, 133 S. Ct. at 2693, the Supreme Court concluded that, by denying federal benefits to same-sex couples married under the laws of a particular state, the "practical effect [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." The Court repeated the theme of stigma and second-class status multiple times. Id. at 2694 (DOMA "tells [same-sex] couples [married under state law], and all the world, that their otherwise valid marriages are unworthy of federal recognition.

This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects."); id. at 2696 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."); id. (effect of DOMA is to treat some persons as "living in marriages less respected than others."). Throughout the decision, the Court emphasized that DOMA imposes a disability on same-sex couples, demeans them, violates their dignity and lowers their status. Id. at 2692, 2695.

Although the Court did not explain in Romer, Lawrence or Windsor how these considerations affected the standard of review, it seems clear that they were important to the decisions. Thus, even if one assumes that same-sex marriage does not fall within the right recognized in Loving and other cases, this does not mean that courts may ignore the nature and severity of the deprivation that a ban imposes on those couples.

Of course, the tangible benefits that marriage provides a couple are numerous. However, many would argue that the intangible benefits of marriage are equally important, if not more so. Recognizing this, some courts have found that the denial of marriage rights to same-sex couples necessarily is a denial of equal citizenship. E.g., Goodridge, 798 N.E.2d at 948. Others have concluded that the significance of the deprivation must be incorporated

into the standard of review. Baker, 744 A.2d at 884 ("The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."). I agree with both conclusions.

In sum, I conclude that Wisconsin's marriage amendment and the other laws at issue are subject to heightened scrutiny under both the due process clause and the equal protection clause. First, because I have concluded that the marriage ban significantly interferes with plaintiffs' right to marry under the due process clause, defendants must show that the ban furthers "sufficiently important state interests" that are "closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 388. With respect to the equal protection clause, the marriage ban is subject to intermediate scrutiny because the ban discriminates on the basis of sexual orientation. In addition, the nature and severity of the deprivation is a relevant factor that must be considered. However, regardless whether I apply strict scrutiny, intermediate scrutiny or some "more searching" form of rational basis review under the equal protection clause, I conclude that the marriage amendment and related statutes cannot survive constitutional review.

III. EVALUATING THE ASSERTED STATE INTERESTS

The final question is whether defendants have made an adequate showing that the Wisconsin laws prohibiting same-sex marriage further a legitimate interest. Defendants and amici rely on several interests in their briefs: (1) preserving tradition; (2) encouraging procreation generally and "responsible" procreation in particular; (3) providing an environment for "optimal child rearing"; (4) protecting the institution of marriage; (5) proceeding with caution; and (6) helping to maintain other legal restrictions on marriage. These interests are essentially the same as those asserted by other states in other cases around the country involving similar laws.

Defendants' asserted interests also overlap substantially with the interests asserted in Windsor by the proponents of the Defense of Marriage Act. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, United States of America v. Windsor, No. 12-307, 2013 WL 267026 (citing interests in "providing a stable structure to raise unintended and unplanned offspring," "encouraging the rearing of children by their biological parents" and "promoting childrearing by both a mother and a father"). However, the Supreme Court did not consider these interests individually, even though the dissenting justices relied on them. Id. at 2718 (Alito, J., dissenting). Instead, the Court stated that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Id. at 2696. This is similar to the approach the Court took in Loving, 388 U.S. at

11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

The Court's silence raises the question whether its refusal to credit the interests asserted by the defenders of DOMA requires the same approach in this case. On its face, Windsor does not apply to state law bans on marriage between same-sex couples. Windsor, 133 S. Ct. at 2696 (limiting its holding to denial of federal benefits of same-sex couples married under state law); Kitchen, 961 F. Supp. 2d at 1194 ("The Windsor court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage."). However, as noted by Justice Scalia in his dissent, it is difficult to cabin the Court's reasoning to DOMA only. Windsor, 133 S. Ct. at 2709-10. If anything, the Court's concerns about the "second-class status" imposed by DOMA on same-sex couples would be *more* pronounced by a total denial of the right to marry than by the "second-tier" marriages at issue in Windsor that provided state but not federal benefits. Further, although Windsor involved a federal law rather than a state law, I am not aware of any other case in which the Court applied equal protection principles differently to state and federal government. Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis [with respect to the federal government] in the Fifth Amendment area is the same as that under the Fourteenth Amendment [with respect to the states.]"). This may be the reason why all federal courts reviewing a ban on same-sex marriage since Windsor have concluded that the ban is unconstitutional.

Defendants say that Windsor is distinguishable, arguing that the Supreme Court relied on the "unusual character" of the discrimination at issue in that case, just as the Court did in Romer. In Windsor, 133 S. Ct. at 2693, the Court stated that DOMA was unusual because it departed from the federal government's ordinary practice of deferring to the states on marriage issues. In Romer, 517 U.S. at 632 the Court relied on the "sheer breadth" of the discriminatory law.

Although defendants are correct that the facts in this case are not the same as Windsor or Romer, there is a colorable argument that Wisconsin's marriage amendment is "unusual" in other ways. First, the amendment represents a rare, if not unprecedented, act of using the Wisconsin Constitution to *restrict* constitutional rights rather than expand them and to require discrimination against a particular class. Cf. Akhil Amar, America's Unwritten Constitution 451, 453 (Basic Books 2012) ("[An amendment] to restrict the equality rights of same-sex couples should be viewed with special skepticism because the amendmen[t] would do violence to the trajectory of the American constitutional project over the past two hundred years. . . . [Such an] illiberal amendment would be [a] radical departur[e] from our national narrative thus far."). Particularly because Wisconsin statutory law already limited marriage to opposite-sex couples, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121, 129 (Ct. App.1992), enshrining the ban in the state constitution seems to

suggest that the amendment had a moral rather than practical purpose.

Second, like the constitutional amendment at issue in Romer, Wisconsin's ban on same-sex marriage (a) implicates a right "taken for granted by most people"; and (b) is sweeping in scope, denying same-sex couples hundreds of derivative rights that married couples have and excluding same-sex couples "from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." Id. at 631.

Although there is support for a view that Windsor is controlling in this case, I need not resolve that question. Even if I assume that Wisconsin's ban on same-sex marriage is not "unusual" in the same sense as the laws at issue in Romer and Windsor, I conclude that defendants have failed to show that the ban furthers a legitimate state interest.

A. Tradition

Both defendants and amici defend Wisconsin's same-sex marriage ban on the ground of tradition. Defendants say that "[t]he traditional view of marriage—between a man and woman . . . —has been recognized for millennia." Dfts.' Br., dkt. #102, at 45. Amici go even further to state that "virtually all cultures through time" have recognized marriage "as the union of an opposite-sex couple." Amici's Br., dkt. #109, at 3-4.

As an initial matter, defendants and amici have overstated their argument. Throughout history, the

most "traditional" form of marriage has not been between one man and one woman, but between one man and *multiple* women, which presumably is not a tradition that defendants and amici would like to continue. Stephanie Coontz, Marriage, a History 10 (2005) ("Polygyny, whereby a man can have multiple wives, is the marriage form found in more places and at more times than any other.").

Nevertheless, I agree with amici's more general view that tradition can be important because it often "reflects lessons of experience." Amici's Br., dkt. #109, at 7. For this reason, courts should take great care when reviewing long-standing laws to consider what those lessons of experience show. However, it is the reasons for the tradition and not the tradition itself that may provide justification for a law. Griego, 316 P.3d at 871-72 ("[L]egislation must advance a state interest that is separate and apart from the classification itself."); Kerrigan, 957 A.2d at 478-79 ("[W]hen tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, we must determine whether the reasons underlying that tradition are sufficient to satisfy constitutional requirements."). Otherwise, the state could justify a law simply by pointing to it. Varnum, 763 N.W.2d at 898 ("When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification."); Hernandez v. Robles, 805 N.Y.S.2d 354, 382 (2005) (Saxe, J., dissenting) ("Employing the reasoning that

marriage must be limited to heterosexuals because that is what the institution has historically been, merely justifies discrimination with the bare explanation that it has always been this way."). Like moral disapproval, tradition alone proves nothing more than a state's desire to prohibit particular conduct. Lawrence, 539 U.S. at 583 (O'Connor, J., concurring in the judgment); id. at 601-02 (Scalia, J., dissenting) ("'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples.").

Although many venerable practices are part of American history, there are darker traditions as well, which later generations have rejected as denials of equality. For example, "[r]ote reliance on historical exclusion as a justification . . . would have served to justify slavery, anti-miscegenation laws and segregation." Hernandez v. Robles, 794 N.Y.S.2d 579, 609 (Sup. Ct. 2005). 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 fulfil the noble and benign offices of wife and 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). In

the 1870's, Elizabeth Cady Stanton went so far as to argue that marriage at that time was "slavery" for women because they were required to forfeit so many rights. Jason Pierceson, Same-Sex Marriage in the United States 41 (Rowman & Littlefield 2013).

The rejection of these inequalities by later generations shows that sometimes a tradition may endure because of unexamined assumptions about a particular class of people rather than because the laws serve the community as a whole. Compare Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) ("[C]ommon sense and common experience demonstrate" that gay officers in military "are almost certain to be harmful to morale and discipline."), with Jim Garamone, "Don't Ask, Don't Tell' Repeal Certified by President Obama," American Forces Press Service (July 22, 2011), available at http://www.defense.gov/news/newsarticle.aspx?id=64780 (visited June 6, 2014) ("The President, the chairman of the Joint Chiefs of Staff, and [the Secretary of Defense] have certified that the implementation of repeal of [restrictions on gay persons in the military] is consistent with the standards of military readiness, military effectiveness, unit cohesion and recruiting and retention of the armed forces."). For this reason, the Supreme Court has stated that the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis," Heller v. Doe, 509 U.S. 312, 326 (1993), and it has "not hesitated to strike down an invidious classification even though it had history and tradition on its side." Levy v. Louisiana, 391 U.S. 68, 71 (1968). Thus, if blind

adherence to the past is the only justification for the law, it must fail. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

B. Procreation

Perhaps the most common defense for restricting marriage to opposite-sex couples is that procreation is the primary purpose of marriage and that same-sex couples cannot procreate with each other. E.g., Dean, 1992 WL 685364 (ban on same-sex marriage justified by state's interest in "fostering, at a socially-approved point in time (i.e. during marriage), that which is essential to the very survival of the human race, namely, procreation"). See also Kandu, 315 B.R. at 147; Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451, 462 (Ariz. Ct. App. 2003); Adams, 486 F. Supp. at 1124-25; Singer, 522 P.2d at 1195; Baker, 191 N.W.2d at 187. A more recent twist on this argument is that marriage is needed to help opposite-sex couples procreate "responsibly," but same-sex couples do not have the same need. Morrison v. Sadler, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005). Defendants and amici repeat these arguments.

One problem with the procreation rationale is that defendants do not identify any reason why denying marriage to same-sex couples will encourage

opposite-sex couples to have children, either "responsibly" or "irresponsibly." Geiger, 2014 WL 2054264, at *13; Bishop, 962 F. Supp. 2d. at 1291. Defendants say that this argument "misses the point" because "[t]he focus under rational-basis review is whether the challenged statute rationally supports a State interest, not whether expanding the class of beneficiaries to marriage would harm the State's interest." Dfts.' Br., dkt. #102, at 65-66 (citing Johnson v. Robison, 415 U.S. 361, 383 (1974) (classification will be upheld under rational basis review if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not")). In other words, defendants seem to concede that they have no reason to believe that marriage between same-sex couples will have an adverse effect on procreation between opposite-sex couples; however, preferential treatment for opposite-sex couples is permissible because they "need" marriage to better insure that they will stay together after procreation and same-sex couples do not need such assistance because they do not procreate "accidentally."

As defendants acknowledge implicitly by citing Johnson, 415 U.S. 361, this argument is contingent on applying the most deferential standard of review. Because I have concluded that Wisconsin's laws banning same-sex marriage are subject to heightened scrutiny under both the due process clause and the equal protection clause, this argument is a nonstarter. Defendants identify no other situation in which a right could be denied to a class of citizens simply because of a perception by the state that the class "doesn't need" the right as

much as another class. Treating such a fundamental right as just another government benefit that can be offered or withheld at the whim of the state is an indicator either that defendants fail to appreciate the implications for equal citizenship that the right to marry has or that they do not see same-sex couples as equal citizens. Cf. John Stuart Mill, "The Subjection of Women," included in Classics of Moral and Political Theory 1145 (Michael Morgan ed., 5th ed. 2011) ("[T]here are many persons for whom it is not enough that the inequality has no just or legitimate defence; they require to be told what express advantage would be obtained by abolishing it. To which let me first answer, the advantage of having the most universal and pervading of all human relations regulated by justice instead of injustice.").

Further, despite the popularity of this argument in courts in other states, it is difficult to believe that Wisconsin voters and legislators were willing to go to the great effort of adopting a constitutional amendment that excluded a class of citizens from marriage simply because the voters and legislators believed that same-sex couples were so stable and responsible that marriage was unnecessary for them. Even setting aside the standard of review, "the breadth of the amendment is so far removed from th[is] particular justificatio[n] that [I] find it impossible to credit." Romer, 517 U.S. at 635 (interest in "conserving resources to fight discrimination against other groups" did not justify amendment permitting sexual orientation discrimination).

There is a second problem with the procreation rationale. 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? E.g., Baskin, 2014 WL 1568884, at *3; De Leon, 975 F. Supp. 2d at 655. Wisconsin law does not restrict the marriages of opposite-sex couples who are sterile or beyond the age of procreation and it does not require marriage applicants to make a "procreation promise" in exchange for a license.

Defendants do not address this problem, but amici offer two responses. First, amici say that "it would be difficult (if not impossible), and certainly inappropriately intrusive, to determine ahead of time which couples are fertile." Amici Br., dkt. #109, at 12. Second, they quote Morrison, 821 N.E.2d at 27, for the proposition that a "reasonable legislative classification is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others." Id. at 13. See also Baker, 191 N.W.2d at 187 (making same arguments); Adams, 486 F. Supp. at 1124-25 (same).

Neither argument is persuasive. First, amici's argument that it would be "difficult (if not impossible)" to attempt to determine a couple's ability or willingness to procreate is simply inaccurate. Amici identify no reason that the state could not require applicants for a marriage license to certify that they have the intent to procreate and are not aware of any impediments to their doing so. In

fact, Wisconsin already *does* inquire into the fertility of some marriage applicants, though in that case it requires the couple to certify that they are *not* able to procreate, which itself is proof that Wisconsin sees value in marriages that do not produce children and is applying a double standard to same-sex couples. 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"). To the extent amici mean to argue that an inquiry into fertility would be inappropriately intrusive because opposite-sex married couples have a constitutional right *not* to procreate under Griswold, that argument supports a view that the same right must be extended to same-sex couples as well. Cf. Eisenstadt, 405 U.S. at 453 (denying access to contraception on basis of marital status violates equal protection clause).

Like defendants' argument regarding "responsible procreation," amici's alternative argument that "mathematical certainty is not required" is contingent on a rational basis review, which I have rejected. Further, this rationale is suspicious not just because Wisconsin has failed to ban infertile couples from marrying or to require intrusive tests to get a marriage license. Rather, it is suspicious because neither defendants nor amici cite any instances in which Wisconsin has ever taken *any* legal action to discourage infertile couples from marrying. There is also little to no stigma attached to childless married couples. Neither defendants nor amici point to any social opprobrium directed at the

many millions of such couples throughout this country's history, beginning with America's first family, George and Martha Washington, who had no biological children of their own. http://en.wikipedia.org/wiki/George_Washington (visited June 6, 2014). The lack of any attempts by the state to dissuade infertile persons from marriage is proof that marriage is about *many* things, including love, companionship, sexual intimacy, commitment, responsibility, stability *and* procreation and that Wisconsin respects the decisions of its heterosexual citizens to determine for themselves how to define their marriage. If Wisconsin gives opposite-sex couples that autonomy, it must do the same for same-sex couples.

C. Optimal Child Rearing

Defendants argue that "[s]ocial science data suggests that traditional marriage is optimal for families." Dfts.' Br., dkt. #102, at 52 (citing articles). Amici make a similar argument that the state has a valid interest in encouraging "the rearing of children by a mother and father in a family unit once they are born." Amici Br., dkt. #109, at 13. See also Kandu, 315 B.R. at 146 ("[T]he promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern.").

This argument harkens back to objections to interracial marriage made by the state in Loving. Brief for Respondents at 47–52, Loving v. Virginia, 388 U.S. 1 (1967), 1967 WL 113931 ("Inasmuch as

we have already noted the higher rate of divorce among the intermarried, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?'"). Further, it seems to be inconsistent with defendants' previous argument. On one hand, defendants argue that same-sex couples do not need marriage because they can raise children responsibly without it. On the other hand, defendants argue that same-sex couples should not be raising children at all.

The substance of defendants' and amici's argument has been seriously questioned by both experts and courts. E.g., Golinski., 824 F. Supp. 2d at 991 (citing evidence that "it is 'beyond scientific dispute' that same-sex parents are equally capable at parenting as opposite-sex parents"); Perry, 704 F. Supp. 2d at 1000 ("The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes."); Charlotte Patterson, Children of Lesbian and Gay Parents: Summary of Research Findings, cited in Same-Sex Marriage: Pro and Co 240 (Andrew Sullivan ed., Vintage Book 2004) (finding no adverse effects on children of same sex parents). However, I need not resolve this sociological debate because, even if I assume that children fare better with two biological parents, this argument cannot carry the day for defendants for four reasons.

First, this is another incredibly underinclusive rationale. Defendants point to *no* other restrictions

that the state places on marriage in an attempt to optimize outcomes for children. Marriage applicants in Wisconsin do not have to make any showing that they will make good parents or that they have the financial means to raise a child. A felon, an alcoholic or even a person with a history of child abuse may obtain a marriage license. Again, the state's singular focus on banning same-sex marriage as a method of promoting good parenting calls into question the sincerity of this asserted interest. Romer, 517 U.S. at 635.

Second, even if being raised by two biological parents provides the "optimal" environment on average, this would not necessarily justify a discriminatory law. Under heightened scrutiny, the government may "not rely on overbroad generalizations about the different talents, capacities, or preferences of" different groups. Virginia, 518 U.S. at 533 (state violated equal protection clause by denying women admission to military college, despite evidence that college's "adversative method" was less suitable for women on average).

Third, with or without marriage rights, some same-sex couples will raise children together, as they have been doing for many years. Thus, the most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide. Goodridge, 798 N.E.2d at 963-64 ("Excluding same-sex couples from civil marriage . . . prevent[s] children of same-sex couples

from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.") (internal quotations omitted). Cf. Windsor, 133 S. Ct. at, 2694 (DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). The state's failure to consider the interests of part of the very group it says it means to protect is further evidence of the law's invalidity. Plyler, 457 U.S. at 223-24 ("In determining the rationality of [law restricting some children's access to public schools], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.").

Finally, and perhaps most important, defendants do not explain how banning same sex marriage helps to insure that more children are raised by an opposite-sex couple. I agree with the courts that see no way that it could. DeBoer, 973 F. Supp. 2d at 770-71; De Leon, 975 F. Supp. 2d at 653; Bourke, 2014 WL 556729, at *8. Defendants do not suggest that it would be rational to believe that the same-sex marriage ban causes any gay person to abandon his or her sexual orientation and enter an opposite-sex marriage for the purpose of procreating or that, even if the ban had such an effect, the situation would be beneficial for the child in the long run. Although it might be rational to believe that some same-sex couples would forgo raising children without the

benefits and protections afforded by marriage, that result would not lead to more children being raised by opposite-sex couples; rather, it simply would mean that fewer children would be born or more would be left unadopted. Not surprisingly, neither defendants nor amici argue that not being born at all or being a ward of the state is preferable to being raised by a same-sex couple. Accordingly, Wisconsin's ban on marriage between same-sex couples cannot be justified on the ground that it furthers optimal results for children.

D. Protecting the Institution of Marriage

Both defendants and amici express concerns about the effect that allowing same-sex couples to marry could have on the institution of marriage as a whole. Defendants say that "[r]eshaping social norms about marriage could have harmful effects," such as "shifting the public understanding of marriage away from a largely child-centric institution to an adultcentric institution focused on emotion." Dfts.' Br., dkt. #102 at 57. They analogize samesex marriage to no-fault divorce laws, which defendants say led to an increase in divorce rates and generally made marriages "fragile and often unreliable." Id. (quoting Sandra Blakeslee, Unexpected Legacy of Divorce 297 (New York: Hyperion, 2000)). In addition, defendants quote an article in which the author argues that, if marriage between same-sex couples is legalized, "[t]he confusion of social roles linked with marriage and parenting would be tremendous." Id. at 58 (quoting Lynn Wardle, "Multiply and Replenish": Considering

Same–Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 799 (2001)). Amici make a similar argument, stating that allowing same-sex marriage risks "psycho-social inversion of the purpose of marriage from promoting children's interests to promoting adult arrangements in which children are secondary." Amici Br., dkt. #109, at 8.

As an initial matter, it is not clear whether the Supreme Court would view this interest as even legitimate. In Windsor, 133 S. Ct. at 2693, the Court concluded that Congress' stated purpose to "defend" marriage from same-sex couples was evidence that the purpose of DOMA was to "interfer[e] with the equal dignity of same-sex marriages" and therefore improper. Similarly, in Loving, 388 U.S. at 8, 11, the Court stated that there was "patently no legitimate overriding purpose" for a ban on interracial marriage despite an argument that "the scientific evidence is substantially in doubt" about the effect that interracial marriage would have on society. Certainly, to the extent that defendants or amici are concerned about the erosion of strict gender roles in marriage, that is a sexist belief that the state has no legitimate interest in furthering. Virginia, 518 U.S. at 541.

In addition, this interest suffers from the same problem of underinclusiveness as the other asserted interests. Two strangers of the opposite sex can marry regardless of their intentions, without any demonstration or affirmation of the example they will set, even if they have been previously divorced or have a history of abusing the institution.

Similarly, the no-fault divorce rules that defendants cite actually undermine their argument by showing that Wisconsin *already* supports an "adult-centric" notion of marriage to some extent by allowing easy divorce even when the couple has children. Coontz, supra, at 274 (excluding same-sex couples from marriage after liberalizing heterosexual marriages and relationships in other ways is "a case of trying to lock the barn door after the horses have already gone").

In any event, neither defendants nor amici cite any evidence or even develop a cogent argument to support their belief that allowing same-sex couples to marry somehow will lead to the de-valuing of children in marriage or have some other adverse effect on the marriages of heterosexual couples. Thus, it is doubtful whether defendants' belief even has a rational basis. Cf. Doe, 403 F. Supp. at 1205 (Merhige, J., dissenting) ("To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges— it is difficult to envision any substantial number of heterosexual marriages being in danger of dissolution because of the private sexual activities of homosexuals.").

Under any amount of heightened scrutiny, this interest undoubtedly fails. The available evidence from other countries and states does not support defendants' and amici's argument. Nussbaum, supra, at 145 (states that allow marriage between

same-sex couples have lower divorce rates than other states); Gerstmann, supra, at 22 (citing findings of economics professor M.V. Lee Badgett that same-sex partnerships in Europe have not led to lower rates of marriage, higher rates of divorce or higher rates of nonmarital births as compared to countries that do not offer legal recognition); William N. Eskridge, Jr. and Darren Spedale, Gay Marriage: For Better or Worse? 205 (Oxford University Press 2006) (discussing study finding that percentage of children being raised by two parents in Scandinavia increased after registered partnership laws took effect).

E. Proceeding with Caution

Defendants say that the "Wisconsin people and their political representatives could rationally choose to wait and analyze the impact that changing marriage laws have had in other states before deviating from the status quo." Dfts.' Br., dkt. #102, at 46. However, that argument is simply a restatement of defendants' argument that they are concerned about potential adverse effects that marriage between same-sex couples might have, so I need not consider it again. In itself, a desire to make a class of people wait to exercise constitutional rights is not a legitimate interest. Watson v. Memphis, 373 U.S. 526, 532–533 (1963) ("The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."). See also Martin Luther King, Jr., Letter from Birmingham Jail ("For years now I have heard the word 'Wait!' It rings in the ear of

every Negro with piercing familiarity. This 'Wait' has almost always meant 'Never.'"); Evan Wolfson, Why Marriage Matters 121 (Simon & Schuster 2004) (quoting state senator's statement after Goodridge, 798 N.E.2d 941) ("Goodridge is ahead of our mainstream culture and our own sensibilities [but] my level of comfort is not the appropriate monitor of the Constitutional rights of our citizens. . . . [The Constitution] has always required us to reach beyond our moral and emotional grasp.").

F. Slippery Slope

Finally, defendants express concern about the legal precedent that allowing same-sex marriage will set. Dfts.' Br., dkt. #102, at 55 ("Extending the fundamental right to marriage to include same-sex couples could affec[t] other legal restrictions and limitations on marriage."). In other words, if same-sex couples are allowed to marry, then how can prohibitions on polygamy and incest be maintained?

I make three observations in response to defendants' concern about the slippery slope. First, and most important, the task of this court is to address the claim presented and not to engage in speculation about issues not raised that may or may not arise at some later time in another case. Socha v. Pollard, 621 F.3d 667, 670 (7th Cir. 2010) ("If [an] order represents a mere advisory opinion not addressed to resolving a 'case or controversy,' then it marks an attempted exercise of judicial authority beyond constitutional bounds."). Thus, the important question for this case is not whether another individual's marriage claim may be analogous to

plaintiffs' claim, but whether *plaintiffs'* claim is like the claims raised in cases such as Loving, Zablocki, Turner and Windsor. I have concluded that it is. When the Supreme Court struck down the marriage restrictions in those other cases, it did not engage in hypothetical discussions about what might come next. See also Lewis v. Harris, 875 A.2d 259, 287-88 (N.J. Super. A.D. 2005) (Collester, J., dissenting) ("It is . . . unnecessary for us to consider here the question of the constitutional rights of polygamists to marry persons of their choosing. . . . One issue of fundamental constitutional rights is enough for now.").

Second, there are obvious differences between the justifications for the ban on same sex marriage and other types of marriage restrictions. For example, polygamy and incest raise concerns about abuse, exploitation and threats to the social safety net. A more fundamental point is that Wisconsin's ban on same-sex marriage is different from other marriage restrictions because it completely excludes gay persons from participating in the institution of marriage in any meaningful sense. In other words, gay persons simply are asking for the right to marry *someone*. With the obvious exception of minors, no other class is being denied this right. As in Romer, plaintiffs are not asking for "special rights"; they are asking only for the rights that every adult already has.

Third, opponents of marriage between same-sex couples have been raising concerns about the slippery slope for many years, but these concerns have not proved well-founded. Again, there is no

evidence from Europe that lifting the restriction on same-sex marriage has had an effect on other marriage restrictions related to age, consanguinity or number of partners. Eskridge and Spedale, supra, at 40. Similarly, in Vermont and Massachusetts, the first states to give legal recognition to same-sex couples, there has been no movement toward polygamy or incest. Further, I am aware of no court that even has questioned the validity of those restrictions. Marriage Cases, 183 P.3d at 434 n.52 (rejecting comparison to polygamy and incest); Goodridge, 798 N.E.2d at 969 n.34 (2003) (same). Accordingly, this interest, like all the others asserted by defendants and amici, does not provide a legitimate basis for discriminating against same-sex couples.

CONCLUSION

In 1954, in what likely was one of the first cases explicitly addressing issues involving gay persons, a federal district court denied a claim involving censorship of a gay news magazine, stating that the court "rejected" the "suggestion that homosexuals should be recognized as a segment of our people." Joyce Murdoch and Deb Price, Courting Justice 33 (Basic Books 2002) (quoting unpublished decision in ONE, Inc. v. Oleson). In the decades that followed, both courts and the public began to better appreciate that the guarantees of liberty and equality in the Constitution should not be denied because of an individual's sexual orientation. Despite these advances, marriage equality for same-sex couples remained elusive. Court rulings in favor of same-sex couples were rare and, even when achieved, they

tended to generate strong backlash. Klarman, supra, at 58, 113 (noting that, after decision favorable to same-sex marriage in Baehr, 852 P.2d 44, Congress enacted Defense of Marriage Act and many states passed similar laws; in 2004, after Goodridge, 798 N.E.2d 941, eleven states passed constitutional amendments banning marriage between same-sex couples).

In my view, that initial resistance is not proof of the lack of merit of those couples' claims. Rather, it is evidence of Justice Cardozo's statement (quoted by Justice Ginsburg during her confirmation hearing) that "[j]ustice is not to be taken by storm. She is to be wooed by slow advances." Editorial, "Ginsburg's Thoughtful Caution," Chicago Tribune (July 22, 1993), available at 1993 WLNR 4096678. It took the Supreme Court nearly a century after the Fourteenth Amendment was enacted to hold that racial segregation violates the Constitution, a view that seems obvious today. It took another 12 years for the Court to strike down anti-miscegenation laws. (Although the Court had the opportunity to review Virginia's anti-miscegenation law shortly after Brown, the Court declined to do so at the time, Naim v. Naim, 350 U.S. 985 (1956) (dismissing appeal), leading some to speculate that the Court believed that the issue was still too controversial. Eskridge and Spedale, supra, at 235.) It took longer still for courts to begin to remedy the country's "long and unfortunate history of sex discrimination." Frontiero, 411 U.S. at 684.

In light of Windsor and the many decisions that have invalidated restrictions on same-sex marriage

since Windsor, it appears that courts are moving toward a consensus that it is time to embrace full legal equality for gay and lesbian citizens. Perhaps it is no coincidence that these decisions are coming at a time when public opinion is moving quickly in the direction of support for same-sex marriage. Compare Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide? 95 Mich. L. Rev. 1578, 1585 (1997) ("Public opinion may change . . . but at present it is too firmly against same-sex marriage for the courts to act."), with Richard A. Posner, "Homosexual Marriage—Posner," The Becker-Posner Blog (May 13, 2012) ("[T]he only remaining basis for opposition to homosexual marriage . . . is religious. . . . But whatever the [religious objections are], the United States is not a theocracy and should hesitate to enact laws that serve religious rather than pragmatic secular aims.").

Citing these changing public attitudes, defendants seem to suggest that this case is not necessary because a majority of Wisconsin citizens will soon favor same-sex marriage, if they do not already. Dfts.' Br., dkt. #102, at 40 (citing article by Nate Silver predicting that 64% of Wisconsinites will favor same-sex marriage by 2020). Perhaps it is true that the Wisconsin legislature and voters would choose to repeal the marriage amendment and amend the statutory marriage laws to be inclusive of same-sex couples at some point in the future. Perhaps it is also true that, if the courts had refused to act in the 1950s and 1960s, eventually all states would have voted to end segregation and repeal anti-miscegenation laws. Regardless, a district court may

not abstain from deciding a case because of a possibility that the issues raised in the case could be resolved in some other way at some other time. Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) (federal courts have "virtually unflagging obligation" to exercise jurisdiction in cases properly before them).

It is well-established that "the Constitution protects persons, not groups," Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), so regardless of possible future events affecting the larger community, my task under federal law is to decide the claims presented by the plaintiffs in this case *now*, applying the provisions in the Fourteenth Amendment as interpreted by the Supreme Court in cases such as Loving, Romer, Lawrence and Windsor. Because my review of that law convinces me that plaintiffs are entitled to the same treatment as any heterosexual couple, I conclude that the Wisconsin laws banning marriage between same-sex couples are unconstitutional.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants Scott Walker, J.B. Van Hollen and Oskar Anderson, dkt. #66, is DENIED.

2. The motion for summary judgment filed by plaintiffs Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson,

Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann and Keith Borden, dkt. #70 is GRANTED.

3. It is DECLARED that art. XIII, § 13 of the Wisconsin Constitution violates plaintiffs' fundamental right to marry and their right to equal protection of laws under the Fourteenth Amendment to the United States Constitution. Any Wisconsin statutory provisions, including those in Wisconsin Statutes chapter 765, that limit marriages to a "husband" and a "wife," are unconstitutional as applied to same-sex couples.

4. Plaintiffs may have until June 16, 2014, to submit a proposed injunction that complies with the requirement in Fed. R. Civ. P. 65(d)(1)(C) to "describe in reasonable detail . . . the act or acts restrained or required." In particular, plaintiffs should identify what they want *each* named defendant to do or be enjoined from doing. Defendants may have one week from the date plaintiffs file their proposed injunction to file an opposition. If defendants file an opposition, plaintiffs may have one week from that date to file a reply in support of their proposed injunction.

5. I will address defendants' pending motion to stay the injunction after the parties have had an opportunity to file materials related to the proposed injunction. If the parties wish, they may have until June 16, 2014, to supplement their materials related to that motion in light of the Supreme Court's

decision in Geiger v. Kitzhaber not to grant a stay in that case.

Entered this 6th day of June, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VIRGINIA WOLF and CAROL SCHUMACHER,
KAMI YOUNG and KARINA WILLES,
ROY BADGER and GARTH WANGEMANN,
CHARVONNE KEMP and MARIE CARLSON,
JUDITH TRAMPF and KATHARINA HEYNING,
SALUD GARCIA and PAMELA KLEISS,
WILLIAM HURTUBISE and LESLIE PALMER,
JOHANNES WALLMANN and KEITH BORDEN,

Plaintiffs, OPINION and ORDER

v. 14-cv-64-bbc

SCOTT WALKER, in his official capacity as Governor of Wisconsin, J.B. VAN HOLLEN, in his official capacity as Attorney General of Wisconsin, OSKAR ANDERSON, in his official capacity as State Registrar of Wisconsin, JOSEPH CZARNEZKI, in his official capacity as Milwaukee County Clerk, WENDY CHRISTENSEN, in her official capacity as Racine County Clerk and SCOTT MCDONELL, in his official capacity as Dane County Clerk,

Defendants.

In an order dated June 6, 2014, dkt. #118, I denied defendants' motion to dismiss and granted plaintiffs' motion for summary judgment on plaintiffs' claim that Wisconsin laws banning same-sex couples from marrying violated the Fourteenth Amendment to the United States Constitution. However, I did not resolve plaintiffs' request for injunctive relief or defendants' request to stay the injunction because plaintiffs had not proposed an injunction that complied with the specificity requirement in Fed. R. Civ. P. 65(d). Accordingly, I gave both sides an opportunity to file supplemental materials regarding the content of the injunction.

In response to the court's request, plaintiffs submitted a seven-paragraph proposed injunction:

> 1. Defendants Wendy Christensen, Joseph Czarnezki and Scott McDonell, in their official capacities, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined from enforcing art. XIII, § 13 of the Wisconsin Constitution and any Wisconsin statutory provisions limiting marriage to different-sex couples, including those in Wis. Stat. ch. 765, so as to deny same-sex couples the same rights to marry that are provided to different-sex couples.
>
> 2. Defendants Wendy Christensen, Joseph Czarnezki and Scott McDonell, in their official capacities, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them are permanently enjoined

to issue marriage licenses to couples who, but for their sex, satisfy all the requirements to marry under Wisconsin law.

3. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined from enforcing art. XIII, § 13 of the Wisconsin Constitution and any Wisconsin statutory provisions limiting marriage to different-sex couples, including those in Wis. Stat. ch. 765, so as to deny same-sex couples the same rights to marry that are provided to different-sex couples.

4. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to accept for registration, assign a date of acceptance, and index and preserve original marriage documents and original divorce reports for couples of the same sex on the same terms as for couples of different sexes under Wis. Stat. § 69.03(5).

5. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to prescribe, furnish and distribute, under Wis. Stat. § 69.03(8), forms required for marriages under Wis. Stat. ch. 69 and Wis. Stat. § 765.20 that permit couples of the same

sex to marry on the same terms as couples of different sexes.

6. Defendants Scott Walker and J.B. Van Hollen, in their official capacities, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined from enforcing art. XIII, § 13 of the Wisconsin Constitution and any Wisconsin statutory provisions limiting marriage to different-sex couples, including those in Wis. Stat. ch. 765, so as to deny same-sex couples the same rights to marry that are provided to different-sex couples or to deny same-sex couples lawfully married in Wisconsin or in other jurisdictions the same rights, protections, obligations and benefits of marriage under Wisconsin law that are provided to different-sex couples.

7. Defendant Scott Walker, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to use the full extent of their authority under art. V, § 4 of the Wisconsin Constitution to ensure that same-sex couples may marry and that same-sex couples lawfully married in Wisconsin or other jurisdictions are provided the same state law rights, protections, obligations and benefits of marriage that are provided to different sex couples; and to direct all department heads, independent agency heads, or other executive officers appointed by the Governor under Wis.

> Stat. ch. 15 and their officers, agents, servants, employees and attorneys, and all those acting in concert with them to ensure that same-sex couples may marry in Wisconsin and to provide to same-sex couples lawfully married in Wisconsin or other jurisdictions all the state law rights, protections, obligations and benefits of marriage that are provided to different-sex couples.

Dkt. #126-1.

After defendants objected to the proposed injunction on various grounds, dkt. #128, plaintiffs submitted an amended proposed injunction, dkt. #132-1, in which they added a new paragraph related to defendant Van Hollen:

> Defendant J.B. Van Hollen, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined from initiating any prosecution of a county clerk under Wis. Stat. § 765.30(2)(b) for issuing a marriage license to a same-sex couple, or any prosecution of an officiant under § 765.30(3)(a) for solemnizing a marriage by a same-sex couple.

In addition, plaintiffs have proposed new language with respect to defendant Anderson that relates to birth certificates. In paragraph four, plaintiffs ask that Anderson be required to:

> accept for registration, assign a date of acceptance, and index and preserve original birth certificates, under Wis. Stat. § 69.03(5), for children born to same-sex couples who were married at the time of the child's birth so that both spouses are listed on the birth certificate as parents; and to accept for registration, assign a date of acceptance, and index and preserve any other vital records, under Wis. Stat. § 69.03(5), in which a spouse's name is recorded so that same-sex spouses are treated the same as different-sex spouses.

In paragraph five, plaintiffs ask that Anderson be required to:

> prescribe, furnish and distribute, under Wis. Stat. § 69.03(8), forms required for birth certificates that permit married same-sex couples to designate both spouses as parents; and to prescribe, furnish and distribute, under Wis. Stat. § 69.03(8), forms required for any other vital records in which a spouse's name is recorded so that same-sex spouses are treated the same as different-sex spouses.

On June 13, 2014, a hearing was held to resolve disputes about the content of the injunction and to decide whether to stay the injunction when it issued. Plaintiffs appeared by John Knight, Gretchen Helfrich, Frank Dickerson and Jim Esseks. Defendants Walker, Van Hollen and Anderson appeared by Timothy Samuelson, Clayton Kawski

and Daniel Lennington. Defendant McDonell appeared personally and by David Gault. Defendant Czarnezki appeared by Paul Bargren. Defendant Christensen appeared by Michael Langsdorf.

After considering the written materials submitted by the parties and their arguments at the hearing, I am adopting some of the language in plaintiffs' proposed injunction, modifying some of the language and eliminating some, for the reasons discussed below. In addition, I conclude that Herbert v. Kitchen, 134 S. Ct. 893 (2014), compels me to stay the injunction.

A. Content of the Injunction

Rule 65(d) of the Federal Rules of Civil Procedure requires that an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts sought to be restrained or required." Paragraphs (1), (3) and (6) of plaintiffs' proposed injunction do not meet that standard. In each of these paragraphs, plaintiffs ask that defendants be enjoined from "enforcing" the unconstitutional laws without identifying any particular acts of possible enforcement. Vague injunctions that do no more than require parties to "follow the law" are disfavored. EEOC v. AutoZone, Inc., 707 F.3d 824, 841 (7th Cir. 2013) ("An injunction that does no more than order a defeated litigant to obey the law raises several concerns."). Two related problems with this type of injunction are that it fails to give the defendants adequate notice of conduct that is required or prohibited and it makes disputes about potential violations of the injunction that much more

difficult to resolve. Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002).

At the hearing, counsel for plaintiffs said that it simply was too difficult to be more specific in these provisions, but if plaintiffs are unable to articulate what they want defendants to do, then it would be equally problematic for defendants to determine for themselves what is required and prohibited. Thus, it is in the interest of all parties to make the requirements in the injunction as clear and precise as possible. As defendants point out, the Court of Appeals for Seventh Circuit has not hesitated to reject injunctions that do not comply with the content requirements of Fed. R. Civ. P. 65. Wisconsin Right To Life, Inc. v. Barland, No. 12-2915, — F.3d — , 2014 WL 1929619, *23 (7th Cir. May 14, 2014) (ordering district court to amend injunction to comply with specificity requirement in Rule 65 even though none of the parties raised that issue on appeal); Patriot Homes, Inc. v. Forest River Housing, Inc., 512 F.3d 412, 415 (7th Cir. 2008) (vacating injunction that "require[d] a lot of guesswork on [defendant's] part in order to determine if it is engaging in activities that violate the injunction, since the order itself is a little more than a recitation of the law"); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998) (vacating injunction that "fail[ed] to comply with the requirements of Fed. R. Civ. P. 65 that an injunction be precise and self-contained, so that a person subject to it who reads it and nothing else has a sufficiently clear and exact knowledge of the duties

it imposes on him that if he violates it he can be adjudged guilty of criminal contempt").

I see no problem with the specificity of plaintiffs' proposed paragraph (2), in which plaintiffs ask that the county clerks be enjoined from discriminating against same-sex couples in the context of issuing marriage licenses. However, I have reworded the paragraph slightly in an attempt to make it clearer. In particular, I have changed plaintiffs' proposed language that the clerks are "enjoined to issue marriage licenses to couples who, but for their sex, satisfy all the requirements to marry under Wisconsin law" to say that the clerks are "enjoined from denying a marriage license to a couple because both applicants for the license are the same sex."

In the original versions of paragraphs (4) and (5) of the proposed injunction, plaintiffs asked for an order requiring the registrar to accept marriage and divorce documents from same-sex couples and to modify the existing forms to be inclusive of those couples. Because defendants have raised no specific, substantive objections to these paragraphs and I see no problems with them, I will include these paragraphs in the injunction.

However, I am not including the additions to these paragraphs related to birth certificates that plaintiffs included with their reply brief. The new language is not responsive to any objections that defendants raised and plaintiffs do not explain why they did not include the language in any of their previous proposals. Even if I overlooked the untimeliness of the request, an injunction related to

birth certificates seems to go beyond the scope of the issues in this case. Plaintiffs have not developed an argument that an amendment to procedures related to obtaining a birth certificate is implicit in the conclusion that a ban of same-sex marriage is unconstitutional. Any disputes that arise about birth certificates will have to be resolved in another forum.

Defendants objected to including any injunction related to defendants Walker and Van Hollen on the ground that "[n]either [Walker nor Van Hollen] is a public official with statutory authority to either validate or invalidate a marriage. Furthermore, neither is vested with statutory authority to take any action in regard to a marriage license under Chapter 765." Dfts.' Br., dkt. #128, at 5. In response to this argument, plaintiffs proposed the additional paragraph related to Van Hollen in which they seek to enjoin him from prosecuting county clerks for issuing marriage licenses to same-sex couples. They cite media reports in which Van Hollen is quoted as stating that county clerks who have issued such licenses may be violating state law. Patrick Marley and Dana Ferguson, "Van Hollen: Clerks issuing licenses to gay couples could be charged," Milwaukee Journal Sentinel (June 12, 2014). Although the reports quote Van Hollen as stating that it would be "up to district attorneys" to decide whether to prosecute the clerks, plaintiffs cite Wis. Stat. § 165.25(1m) for the proposition that Van Hollen has the authority to prosecute the clerks as well.

Regardless whether the attorney general has authority to initiate prosecutions, this seems to be

another issue that goes beyond the scope of the June 6 order. In particular, that order does not address the question whether county clerks were entitled under state law to issue marriage licenses to same-sex couples in the absence of an injunction. Accordingly, I decline to issue an injunction against defendant Van Hollen because plaintiffs have not identified any specific actions that he may be required to take to enforce the June 6 order.

In what was originally paragraph (7) in the proposed injunction, plaintiffs ask for an order requiring defendant Walker and his agents "to use the full extent of their authority under art. V, § 4 of the Wisconsin Constitution" to enforce the court's ruling. Again, plaintiffs do not identify in their proposed injunction any specific actions they want Walker or any of his agents to take. In their brief, plaintiffs say that they want Walker to give "direction to officers in the executive branch to provide recognition (and its attendant state law benefits, obligation, protections, and rights) to married same-sex couples." Plts' Reply Br., dkt. #132, at 8. This is a little closer to mark, but it is still unclear what plaintiffs mean by the phrase "provide recognition." Because the key issue in this case is that plaintiffs are entitled to be treated the same as any opposite-sex couple, I will issue the following injunction with respect to defendant Walker:

> Defendant Scott Walker, in his official capacity, is permanently enjoined to direct all department heads, independent agency heads, or other executive officers appointed

> by the Governor under Wis. Stat. ch. 15 and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage.

Defendants also raise two, more general objections to plaintiffs' proposed injunction. First, defendants object to plaintiffs' request to enjoin not only defendants themselves, but also defendants' "officers, agents, servants, employees and attorneys, and all those acting in concert with them." I am overruling this objection because Rule 65 itself says that "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with" the parties' are bound by the injunction. Fed. R. Civ. P. 65(d)(2). "The purpose of the rule is to ensure that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." Blockowicz v. Williams, 630 F.3d 563, 566-70 (7th Cir. 2010) (internal quotations omitted).

Although I am sympathetic to defendants' concern about the lack of specificity, I also understand that it would be impossible to list every individual who might act as an agent for one or more of the defendants. In lieu of limiting an injunction to just the defendants, the court of appeals has stated that this type of concern about scope can be addressed after the fact if a dispute arises. H-D

Michigan, LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 842 (7th Cir. 2012) ("Should any non-party believe that it has been enjoined improperly, it is free to seek a modification or clarification from the district court.").

Finally, defendants say that plaintiffs' proposed injunction "effectively requires a rewrite of Wisconsin Statutes." Dfts.' Br., dkt. #128, at 11. I am overruling this objection as well. The proposed injunction does not require the "re-writing" of any statutes. Rather, it requires only equal treatment of same-sex couples and opposite-sex couples. If I accepted defendants' argument, it would be impossible for individuals subjected to constitutional violations to obtain relief when the violation was caused by multiple laws.

B. Motion to Stay

This leaves the question whether the injunction should be stayed pending appeal under Fed. R. Civ. P. 62(c). Generally, the answer to that question is determined by weighing four factors: (1) whether the defendant has made a strong showing that it is likely to succeed on appeal; (2) whether the defendant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

If I were considering these factors as a matter of a first impression, I would be inclined to agree with plaintiffs that defendants have not shown that they

are entitled to a stay. However, I cannot ignore the Supreme Court's order in Herbert v. Kitchen, 134 S. Ct. 893 (2014), in which the Court stayed a district court's order enjoining state officials in Utah from enforcing its ban on same-sex marriage. It is impossible to know the Court's reasoning for issuing the stay because the Court did not accompany the order with an opinion, but, since Herbert, every statewide order enjoining the enforcement of a ban on same-sex marriage has been stayed, either by the district court or the court of appeals, at least when the state requested a stay. In following Herbert, other courts have stated that, despite the lack of any reasoning in Herbert, they did not see any grounds for distinguishing the Supreme Court's order. E.g., DeBoer v. Snyder, No. 14-1341 (6th Cir. Mar. 25, 2014).

Plaintiffs offer two grounds for distinguishing Herbert: (1) since Herbert, each of the more than a dozen district courts considering bans on same-sex marriage has concluded that the ban is unconstitutional; and (2) same-sex marriages recognized under state law in other states since Herbert have not caused any harm to the state. However, even if I accept both of these arguments, it does not change the fact that the Supreme Court's order in Herbert is still in place. Until the Supreme Court provides additional guidance on this issue, the unanimity of federal districts is not a dispositive factor.

It is true that the Supreme Court declined to issue a stay in a more recent case in which a district court in Oregon enjoined enforcement of that state's

ban on same-sex marriage. National Organization for Marriage v. Geiger, 13A1173, 2014 WL 2514491 (U.S. June 4, 2014). However, that order is not instructive because the district court's injunction was not opposed by the state; rather, a nonparty had requested the stay. Thus, I do not interpret Geiger as undermining the Court's order in Herbert.

After seeing the expressions of joy on the faces of so many newly wedded couples featured in media reports, I find it difficult to impose a stay on the event that is responsible for eliciting that emotion, even if the stay is only temporary. Same-sex couples have waited many years to receive equal treatment under the law, so it is understandable that they do not want to wait any longer. However, a federal district court is required to follow the guidance provided by the Supreme Court. Because I see no way to distinguish this case from Herbert, I conclude that I must stay any injunctive relief pending appeal.

The remaining question is whether the stay should include all relief, including the declaration, rather than just the injunction. Although I remain dubious that it is necessary to "stay" declaratory relief, I understand that there has been much confusion among county clerks regarding the legal effect of the declaration. To avoid further confusion among the clerks, I will issue a stay of all relief.

ORDER

Pursuant to Fed. R. Civ. P. 65(d), and for the reasons set forth in this court's June 6, 2014 Opinion and Order, dkt. #118, IT IS ORDERED that

1. Defendants Wendy Christensen, Joseph Czarnezki and Scott McDonell, in their official capacities, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them are permanently enjoined from denying a marriage license to a couple because both applicants for the license are the same sex.

2. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to accept for registration, assign a date of acceptance and index and preserve original marriage documents and original divorce reports for couples of the same sex on the same terms as for couples of different sexes under Wis. Stat. § 69.03(5).

3. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to prescribe, furnish and distribute, under Wis. Stat. § 69.03(8), forms required for marriages under Wis. Stat. ch. 69 and Wis. Stat. § 765.20 that permit couples of the same sex to marry on the same terms as couples of different sexes.

4. Defendant Scott Walker, in his official capacity, is permanently enjoined to direct all department heads, independent agency heads, or

other executive officers appointed by the Governor under Wis. Stat. ch. 15 and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage.

FURTHER IT IS ORDERED that defendants' motion to stay all relief in this case, dkt. #114, is GRANTED. The injunction and the declaration shall take effect after the conclusion of any appeals or after the expiration of the deadline for filing an appeal, whichever is later.

The clerk of court is directed to enter judgment in favor of plaintiffs and close this case.

Entered this 13th day of June, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VIRGINIA WOLF and CAROL SCHUMACHER,
KAMI YOUNG and KARINA WILLES,
ROY BADGER and GARTH WANGEMANN,
CHARVONNE KEMP and MARIE CARLSON,
JUDITH TRAMPF and KATHARINA HEYNING,
SALUD GARCIA and PAMELA KLEISS,
WILLIAM HURTUBISE and LESLIE PALMER,
JOHANNES WALLMANN and KEITH BORDEN,

Plaintiffs, JUDGMENT IN A CIVIL CASE

v. Case No. 14-cv-64-bbc

SCOTT WALKER, in his official capacity as Governor of Wisconsin, J.B. VAN HOLLEN, in his official capacity as Attorney General of Wisconsin, OSKAR ANDERSON, in his official capacity as State Registrar of Wisconsin, JOSEPH CZARNEZKI, in his official capacity as Milwaukee County Clerk, WENDY CHRISTENSEN, in her official capacity as Racine County Clerk and SCOTT MCDONELL, in his official capacity as Dane County Clerk,

Defendants.

This action came for consideration before the court with District Judge Barbara B. Crabb

presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the motion to dismiss filed by defendants Scott Walker, J.B. Van Hollen, Richard G. Chandler, Oskar Anderson, Gary King and John Chisholm is GRANTED with respect to defendants Gary King, John Chisholm and Richard G. Chandler. The complaint is DISMISSED as to defendants Kind, Chisholm and Chandler.

IT IS FURTHER ORDERED AND ADJUDGED that the motion for summary judgment filed by plaintiffs Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann and Keith Borden is GRANTED. It is DECLARED that art. XIII, § 13 of the Wisconsin Constitution violates plaintiffs' fundamental right to marry and their right to equal protection of laws under the Fourteenth Amendment to the United States Constitution. Any Wisconsin statutory provisions, including those in the Wisconsin Statutes chapter 765, that limit marriages to a "husband" and a "wife," are unconstitutional as applied to same-sex couples.

IT IS FURTHER ORDERED AND ADJUDGED that:

1. Defendants Wendy Christensen, Joseph Czarnezki and Scott McDonell, in their official capacities, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them are permanently enjoined from denying a marriage license to a couple because both applicants for the license are the same sex;

2. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to accept for registration, assign a date of acceptance and index and preserve original marriage documents and original divorce reports for couples of the same sex on the same terms as for couples of different sexes under Wis. Stat. § 69.03(5);

3. Defendant Oskar Anderson, in his official capacity, and his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are permanently enjoined to prescribe, furnish and distribute, under Wis. Stat. § 69.03(8), forms required for marriages under Wis. Stat. ch. 69 and Wis. Stat. § 765.20 that permit couples of the same sex to marry on the same terms as couples of different sexes; and

4. Defendant Scott Walker, in his official capacity, is permanently enjoined to direct all department heads, independent agency heads, or other executive officers appointed by the Governor under Wis. Stat. ch. 15 and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, to treat same-sex

couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motion to stay all relief in this case is GRANTED. The injunction and the declaration shall take effect after the conclusion of any appeals or after the expiration of the deadline for filing an appeal, whichever is later.

Approved as to form this 18th day of June, 2014.

/s/ Barbara B. Crabb
Barbara B. Crabb, District Judge

/s/ Peter Oppeneer 6/19/14
Peter Oppeneer, Clerk of Court Date