

Marriage Law Digest

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HAYS V. HAYS

2040482

Alabama Court of Civil Appeals

June 23, 2006

After a father's death, a child's stepmother petitioned to adopt her stepdaughter who subsequently attained the age of majority. The probate court granted the adoption and the adoptee's mother challenged the grant. The court noted that Alabama law allows adoption of a "stepchild by marriage." Thus, on the death of a natural parent, a stepparent's relationship with the stepchild is at an end.

A concurring opinion argued that adoption of a child without the mother's consent violates the due process right to a parent child relationship.

IN THE INTEREST OF M.J.S.

2006 PA Super 154

Superior Court of Pennsylvania

June 26, 2006

The parental rights of a mother and the presumed father of her child were terminated followed by adoption of the child by the maternal grandparents. After three years, the child's biological father petitioned to vacate the TPR and adoption decree. The orphan's court held that the child welfare agency should have made a greater effort to identify the father before seeking a TPR. The superior court reversed, holding that the burden of proof to establish invalidity of adoption was on the father. By not acting to establish paternity of the child, the father was equitably estopped from challenging the adoption.

WISCONSIN V. HEATH

Appeal No. 2005AP2639-CR

Wisconsin Court of Appeals, District II

July 5, 2006

In sentencing hearing, the judge questioned defendant's commitment to his family based on his failure to marry a girlfriend with whom he had a six-year old child. The judge noted a Wisconsin statute that lauds marriage as the foundation of society. Defendant "asserted that the court had violated multiple constitutional provisions by taking into account his status as an unwed father when imposing sentence."

On appeal, the court held that the judge was mistaken to believe that the legislature's "intent was to recognize marriage of the parents as a necessary ingredient of healthy family life, an ingredient missing from [defendant's] family relationship." The court said, "we do not read the legislature's recognition that marriage is an important and vital societal institution worthy of preservation and protection as a policy judgement that other intimate relationships are of lesser value or legitimacy." This did not, however, invalidate the sentence which was justified by other factors.

HERNANDEZ V. ROBLES

No. 86

New York Court of Appeals

July 6, 2006

Four cases challenging the state's definition of marriage were consolidated on appeal before the New York Court of Appeals. The court first briefly addressed an argument, proposed by amici, that the current marriage

statute could be construed to allow same-sex couples to secure marriage licenses. The court rejected this argument noting that various laws referencing marriage use gender specific terms.

The court then assessed whether the law could be “defended as a rational legislative decision.” The court framed the question as “whether a rational legislature could decide” that the benefits of marriage should be given to opposite-sex couples but not same-sex couples; not “whether the Legislature must or should continue to limit marriage in this way.” The court concluded that there are “at least two grounds that rationally support the limitation on marriage that the legislature has enacted;” both premised on “the undisputed assumption that marriage is important to the welfare of children.”

First, since “[h]eterosexual intercourse has a natural tendency to lead to the birth of children” and “homosexual intercourse does not,” the legislature “could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born” by offering an inducement to opposite-sex couples to marry. The court noted that the same considerations do not apply to same-sex couples who do not have children without intending to do so.

The court’s second ground for believing the marriage law rational is that the legislature “could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father” since “[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.” Despite exceptions to this pattern, the court held, the legislature could find that “the

general rule will usually hold.”

The court noted that social science studies “on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households,” but rather show “that rather limited observation has detected no marked difference.”

The court said that plaintiffs “seem to assume that they have demonstrated the irrationality” of the idea that marriage benefits children “by showing there is no scientific evidence to support it” but the court noted that “[i]n the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home.”

After concluding that there are sufficient reasons for the legislature to choose to define marriage as the union of a man and a woman, the court addressed plaintiffs’ proffered analogy to *Loving v. Virginia*. The court noted that the history of racism is much different than the context of this case. The majority opinion points out that “[u]ntil a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.” Thus, “[a] court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.”

In regards to plaintiffs due process argument, the court held that the right to marry a person of the same-sex is not deeply rooted in the history and tradition of the nation so the relevant question is whether the right to marry includes “a right to same-sex marriage.” The court concluded that this case was like *Washington v. Glucksberg* in that “the relatively narrow definition of the right

at issue was based on rational line-drawing” as opposed to the “essentially arbitrary” classification struck down in *Lawrence v. Texas*. Thus, New York’s marriage law did not restrict “the exercise of a fundamental right.” Having earlier concluded that the law protected the welfare of children, the court found that it advanced a rational state interest and thus, did not deprive plaintiffs of due process.

In regards to equal protection, the court first held that the statute did not create sex discrimination because it did not “put men and women in different classes, and give one class a benefit not given to the other” thus subordinating either men or women as a class. The court did find, however, that the law “does confer advantages on the basis of sexual preference” since those who prefer relationships with persons of the same-sex are treated differently than those whose preference is for opposite-sex relationships. The court applied rational basis scrutiny to this classification because “[a] person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best.”

The classification was not invalid as underinclusive because it relied on the real differences between same and opposite-sex couples. It was not invalid as overinclusive because “[a] legislature that regarded marriage primarily or solely as an institution for the benefit of children could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea.”

The court concluded its opinion by urging participants in the marriage controversy to “address their arguments to the Legislature.”

A concurring opinion largely tracked the reasoning of the majority opinion. The concurrence noted that “[t]he binary nature of marriage—its inclusion of one man and one woman—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a man and a woman.” The concurrence also noted that the U.S. Supreme Court has treated marriage as fundamental “precisely because of its relationship to human procreation.” The concurrence distinguished *Lawrence v. Texas* since it involved a penal statute and “attempted to regulate [] private sexual conduct or disturb the sanctity of their homes.” The concurrence argued that the law was “facially neutral” as to sexual orientation. The opinion also argued that “[a]lthough many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children.”

The dissent argued that plaintiffs were being denied “the rights and responsibilities of civil marriage” “solely because of their sexual orientation” or “because of who they love.” The dissent argued that fundamental rights should be afforded to those denied them even if previously excluded. The

dissent accepted the *Loving* analogy, arguing that this earlier decision had rejected laws that were longstanding just as the male-female marriage laws are longstanding. The dissent also argued that marriage has changed over time and that historical practice cannot justify a “constitutional wrong.” The dissent believed sexual orientation should be subject to strict scrutiny and that the marriage law denied equal protection on the basis of this classification. The dissent also argued that the law constituted sex discrimination because “a woman who seeks to marry another woman is prevented from doing so on account of her sex.” The dissent posited the main issue as “whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.” The dissent said: “There are enough marriage licenses to go around for everyone.” It believed encouraging couples to marry before having children is legitimate but this law does not further that end because people who cannot have children can marry and same-sex couples do have children. The dissent rejected the idea that procreation was central to marriage since prisoners can marry. The dissenting opinion said that the benefits of marriage that are not related to children are also kept from same-sex couples even though this did not protect procreation. To the dissent, current marriage laws undermine state interests by keeping children of same-sex couples from enjoying the benefits of marriage: “The State’s interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.” The statute, says the dissent, cannot have a legitimate interest in providing heterosexual parents over homosexual parents. The dissent also said

that moral disapproval is not a valid state interest. The dissent finally argued that the state had no interest in uniformity of its laws with other state’s, since New York law is already different from those of other states. The dissent concluded: “I am confident that future generations will look back on today’s decision as an unfortunate misstep.”

PERDUE V. O’KELLEY
S06A1574
Supreme Court of Georgia
July 6, 2006

The trial court ruled that Georgia’s marriage amendment was invalid because it addressed more than one issue.

The supreme court reversed, holding that the amendment’s purpose was “reserving marriage and its attendant benefits to unions of man and woman.” Given this purpose, the court ruled that the portion of the amendment addressed to quasi-marital relationships was germane to the amendment’s purpose because “it is apparent that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage is not ‘dissimilar and discordant’ to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman.”

SHONDEL J. V. MARK D.
No. 46
New York Court of Appeals
July 6, 2006

A man listed on a child’s birth certificate signed a registry as the father, named the child as the beneficiary of his life insurance and sent money for support. The child’s mother sought a support order from this man who, in turn, sought visitation until he

learned through DNA testing that he was not the child's father. The trial court applied equitable estoppel to prevent the man from denying paternity.

This decision found that the mother had relied on the man's representation of paternity to her detriment. The court concluded that it was in the best interests of the child that the man be estopped from denying paternity.

The dissent noted that the man had not committed any fraud or take advantage of the mother, rather he relied on the mother's misrepresentation (she had lied about not having sexual relations with any other person) to his detriment. Here, the dissent believed the best interest of the child would not be advanced by the fiction of paternity because the man has not and will not play any role in the child's life other than to provide money.

**CLEAN FLICKS OF COLORADO, LLC V.
SODERBERGH**
Civil Action No. 02-cv-01662-RPM
U.S. District Court, District of Colorado
July 6, 2006

Businesses that sell and rent edited movies defended themselves against copyright infringement claims by movie producers, claiming they were making a "fair use" of copyrighted materials. The court held that the businesses do not add anything to the movies that would transform them into a new product. The court also held that the use of copyrighted material is substantive. The businesses had argued that there was no harm because without editing, customers would not have bought these movies. The court, however, found that the value of allowing the public to see edited videos does not justify copyright infringement.

SCHULMAN V. ATTORNEY GENERAL
SJC-09684
Supreme Judicial Court of Massachusetts
July 10, 2006

Plaintiffs challenged the attorney general's certification of a proposed amendment to the Massachusetts Constitution defining marriage, arguing that the amendment violates the state constitution because it is a "reversal of a judicial decision."

The court held that "reversal of a judicial decision" is a decision that "would permit the citizens to review a decision of the court, and reverse its determination of the rights of the parties. This contrasts with overruling a decision of the court, which would have prospective affect and be valid under state law. Thus, the Massachusetts Constitution does not prevent people from changing the substantive law.

A concurring opinion of two justices agreed with the result but raised the possibility that the proposed amendment would be invalid on other grounds. The concurrence notes that no Massachusetts precedent has ever prevented an initiative amendment "that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of" the Massachusetts Constitution. The concurrence then says: "Put more directly, the *Goodridge* decision may be irreversible because of its holding that no rational basis exists, of can be advanced, to support the definition of marriage proposed by the initiative and the fact that the *Goodridge* holding has become part of the fabric of the equality and liberty guarantees of our Constitution." Since this issue was not raised in this case, the concurrence suggested that, at a later time, the court could decide "whether our Constitution can be home to provisions that

are apparently mutually inconsistent and irreconcilable.”

**CHRISTIAN LEGAL SOCIETY V.
WALKER
No. 05-3239
U.S. Court of Appeals for the Seventh
Circuit
July 10, 2006**

Southern Illinois University revoked student organization status of CLS because CLS’s membership policy precludes individuals who engage in homosexual conduct. SIU alleged this conflicted with non-discrimination policy. CLS alleged deprivation of First (free speech, free exercise and expressive association) and Fourteenth (equal protection and due process) Amendment rights. The district court denied a preliminary injunction.

The panel held that the CLS is reasonably likely to succeed on the merits. First, the court noted that it is not clear that CLS violated any policy. The court held that SIU could not identify any law that CLS had violated and CLS did not likely violate the University’s equal opportunity policy because the CLS membership requirement is neutral as to orientation (it only affects conduct). Further, the court held that CLS does not employ anyone or provide an “educational opportunity,” it is engaged in private speech and is not a mouthpiece for the university. Second, the court held CLS had demonstrated that SIU probably infringed its right of expressive association. The court noted that CLS is an expressive association and that the application of SIU’s policy here could only be understood as an attempt to get CLS to change its message. Further, the court held that the lack of recognition is an injury. Finally, CLS, held the court, had demonstrated that SIU probably violated its free speech right by

ejecting it from a speech forum. The court believed that SIU’s policy has not been applied in a viewpoint neutral way since only CLS has been affected. The court felt more evidence would be needed for SIU to show that its purposes were served by this singled-out application. Since First Amendment violates are presumed to be irreparable harms, the court remanded for preliminary injunction to be issued.

The dissent believed CLS’s policy statement “reveals that CLS *would* prevent a person who openly affirmed his or her right to engage in homosexual conduct, as part of an intimate relationship with another person, from serving as an officer or member of the organization.” The dissent believed it was still a question how CLS applies its policy. Further, the dissent, believed that the U.S. Supreme Court decision in *Lawrence v. Texas* means it is permissible for government to ban discrimination on the basis of sexual orientation and sexual conduct. For the dissent, there was no expressive association violation because CLS had not been forced to admit members. Here, the dissent said CLS is trying to get SIU to admit it as a member while promoting a policy with which SIU disagrees.

**FUNDERBURKE V. NEW YORK STATE
DEPARTMENT OF CIVIL SERVICE
2006 WL 1931812
New York Supreme Court, Nassau County
July 11, 2006**

A retired public school employee married his same-sex partner in Canada and sought spousal insurance coverage from the school district. When this was denied, he filed suit.

The court identified the relevant issue as “whether a same-sex marriage performed in Canada triggers entitlement to spousal health insurance coverage in New York.”

The court noted that the *Hernandez v. Robles* decision controls this case. Thus, “plaintiff’s union is not a ‘marriage’ as same has now been defined by the Court of Appeals. Under current New York law, plaintiff and his partner are not considered spouses and therefore spousal insurance benefits are unavailable to them.”

**KERRIGAN V. CONNECTICUT
NNH CV 04 4001813**

**Connecticut New Haven Superior Court
July 12, 2006**

Eight same-sex couples sued challenging the state’s marriage law. While the suit was pending, the Connecticut legislature “took the courageous and historic step” of creating a civil union status whereby same-sex couples can have the same benefits afforded by marriage. Plaintiffs, however, complained that the civil union status was inferior to marriage and thus unconstitutional.

The court noted that the civil union law create “an identical set of legal rights in Connecticut for same-sex couples and opposite-sex couples.” (In a note, the court pointed out that the marriage and civil union laws do not create a sexual orientation classification because homosexuals and heterosexuals can contract either.) Under the new law, there are no benefits available to married couples that are not also available to same-sex couples in civil unions.

Responding to plaintiffs’ arguments about the problems with civil unions, the court held that the constitution is concerned with the “underlying rights, benefits and responsibilities” or marriage not “the nomenclature that is used to define those rights.” The court also held that with the civil union status, Connecticut law “cannot any longer be reasonably read to prefer one status over the other” so civil unions don’t

create a second-class status. The court did not believe the use of marriage as a reference point for defining civil unions had any legal significance and that the offensiveness of the term to same-sex couples is too subjective to justify a finding of unconstitutionality. Similarly, a mere difference in nomenclature does not create a constitutional problem unless it has a tangible effect and here there is none. The court said that the fact that plaintiffs may have to explain their new status to others is also not a constitutional harm. The court did hold that the fact that plaintiffs’ cannot gain recognition of their status in other states is a concrete harm but not one cause by Connecticut law.

In concluding the court said that the judiciary “ought not to be dissuaded from its duty by deferring to the legislature’s use of unprovable stereotypes in the guise of a ‘rational basis’ for the legislation” but here “it would be the elevation of form over substance to hold unconstitutional Connecticut’s current statutory scheme based on the challenge of these plaintiffs, who are entitled to the identical rights and identical treatment as opposite sex married persons in Connecticut.”

**WEEMS V. LITTLE ROCK POLICE
DEPARTMENT**

No. 05-1152

**U.S. Court of Appeals for the Eighth
Circuit**

July 13, 2006

Sex offenders challenged law requiring them to reside more that 2000 feet of school or day care. The court believed the U.S Supreme Court in *Doe v. Mller* controlled. In that case, the court had held a residency restriction valid because it did not “operate directly on the family relationship” and that it did not “infringe upon a constitutional

liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny." Following this rationale, the court held that the residency restriction did not violate plaintiffs' right to substantive due process because "a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens."

The court agreed with the district court that a rational basis standard was the appropriate level of scrutiny for plaintiffs' equal protection claim against the residency statute because the distinctions between the highest and lowest levels of risk were not based on a suspect classification and the statute did not implicate a "fundamental right." The court similarly dismissed plaintiffs' claim that the residency restriction violated a constitutional right to intrastate travel.

**CITIZENS FOR EQUAL PROTECTION V.
BRUNING
No. 05-2604
U.S. Court of Appeals for the Eighth
Circuit
July 14, 2006**

Public interest groups challenged the Nebraska marriage amendment and the district court held that the amendment was unconstitutional as (1) a violation of equal protection, (2) a bill of attainder, and (3) for infringing the First Amendment rights of plaintiffs.

The panel reversed. The court held that plaintiffs had standing because the amendment made more difficult their efforts to achieve certain legislative results.

In regards to the equal protection claim, plaintiffs and the district court argued that *Romer v. Evans* controlled. The court, disagreed. It first held that the amendment should be assessed using rational basis scrutiny since the U.S. Supreme Court has never held that "sexual orientation" merits heightened scrutiny. The court held that the law advanced a rational interest in the government's interest in "steering procreation into marriage.'" The court distinguished *Romer* because the amendment here was narrow enough to demonstrate that it could be motivated by something other than animus against a group. Thus, "[i]f the many state laws limiting the persons who may marry are rationally related to a legitimate government interest, so is the reinforcing effect of §29."

The court held that the amendment was not a bill of attainder because the "political disadvantage" it creates "is certainly not a punishment in the historical bill of attainder sense" and it serves a nonpunitive purpose. The court similarly rejected the First Amendment right of association argument because (1) the amendment doesn't "directly and substantially" interfere with the right to associate and (2) it is very unlikely to prevent people from association.

In conclusion, the court noted: "In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution." The court summarized its holding: "We hold that §29 and other laws limiting the state recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do

not violate the Constitution of the United States.”

**WHITE COUNTY HIGH SCHOOL PEERS
RISING IN DIVERSE EDUCATION V.
WHITE COUNTY SCHOOL DISTRICT
Civil Action No. 2:06-CV-29-WCO
U.S. District Court, Northern District of
Georgia
July 14, 2006**

A “gay-straight alliance” student group challenged a high schools decision not to allow them to meet on campus, alleging violations of the Equal Access Act (EAA) as well as their right to expressive association under the federal and state constitutions. The court noted that the EAA has been interpreted by the Supreme Court as requiring a public secondary school to allow noncurriculum clubs access to school facilities after instructional hours to meet once one such group has been allowed such access. Once a student group is accepted, a limited open forum exists, requiring the school to accommodate other non-curriculum groups. The court found that six noncurriculum groups were allowed by the school, thus creating a limited open forum. The court held that plaintiffs sufficiently demonstrated that they “have been denied equal access to meet based on the content of their speech at such meetings.” As such, the court found it unnecessary to address the constitutional claims. The court further found that the injury to PRIDE would be irreparable, because it “cannot be undone through monetary remedies.” In addition, the balance of harm tips in favor of the plaintiffs as the injunction “will not cause great harm to the defendants” but will be a “significant injury to the plaintiffs.” Finally, granting the injunction will not be contrary to public interest, as it furthers First Amendment rights. Therefore, the court granted plaintiffs’ injunction and held that it

also applied to other student groups denied equal access.

**ACLU V. DARNELL
No. M2006-00460-SC-RDM-CV
Supreme Court of Tennessee
July 14, 2006**

Plaintiffs (citizens, legislators and advocacy groups) sued to prevent inclusion on ballot of proposed marriage amendment, alleging the initiative was not timely published in accordance with constitutional procedure. The trial court held that they lacked standing. The supreme court affirmed. In regards to each set of plaintiffs, the court asked whether two requirements for standing had been met: (1) injury in fact and (2) a connection between the alleged injury and the challenged conduct. Regarding the individual plaintiffs, the court noted inconsistency in their testimony as to whether they were really affected by late publication and concluded they were not. In addition, the court noted that late publication affected all citizens equally, so the harm was not particularized. The court held that plaintiffs “failed to establish that their right to vote in the June 2004 election was compromised” by late publication. As to the legislators, the court noted that they have no special standing. The legislators, the court reasoned, knew about the amendment before it was published so they were not harmed by late publication. The court noted that since members of the organizations had no standing, neither did the organizations themselves. Since none of the plaintiffs was harmed, they all lacked standing.

**DUBAY V. WELLS
Case No. 06-11016-BC
U.S. District Court, Eastern District of
Michigan
July 17, 2006**

A biological father sought to invalidate a

state paternity law and enjoin enforcement that would require him to pay child support for a child he had fathered despite his not wanting the child to be born. Plaintiff argued that the right to privacy includes a right to make decisions regarding child bearing. Since *Roe v. Wade* prevents state interference with this choice for females, enforcement of paternity statute violates equal protection. "He insists that applying the Michigan Paternity Act to him and other males somehow trenches upon his right to choose to become a father, and that the Constitution protects his right to decide when he is ready to accept such responsibilities."

The court noted that "the State played no role in the conception or birth of the child in this case." The court also noted that the paternity law only applies after the child is born. The court characterized the right to privacy as preventing the state from being involved in "the process of decision-making by sexual partners concerning the matters of conception and birth." These decisions are private, but "[t]he Fourteenth Amendment gives no succor to a disgruntled sexual partner who fails to reach accord over these important matters, nor even to one who is misled by the actions of a private party." The state has no duty "to correct underlying inequality in society." "Since the State does not 'enforce' the right to privacy, it cannot do so unequally. The court found that the state "has a compelling interest in ensuring the support of children." In addition, the court noted that plaintiff still had a choice of whether to accept "the mantle of parenthood in the fullest sense of the term."

Finally, the court ruled that "plaintiff's claim is frivolous, unreasonable, and without foundation, and therefore the intervening defendant is entitled to attorney fees."

J.R. V. L.R.
Docket No. A-4471-04T2
New Jersey Appellate Division
July 17, 2006

A biological father with no other relationship with his child and te mother's ex-husband who had established a relationship with the child lasting ten years were both ordered to pay child support. The father appealed, arguing that he should have been excluded by the paternity presumption (that the husband of a child's mother is the father).

The court held that the genetic testing used to determine father's paternity did not harm the child since she already knew the mother's husband was not her father and her "desire to ascertain the identity of her biological father was in accord with her best interests." He was not, therefore, excluded by the paternity presumption and liable for her support despite the lack of any other than a biological relationship between them.

181 SOUTH INC. V. FISCHER
No. 05-1882
U.S. Court of Appeals for the Third Circuit
July 18, 2006

Topless car challenged a rule requiring liquor licensees not to engage in lewd behavior. The court held that the regulation doesn't violate the First Amendment because (1) regulation of alcohol sales is within the police power of local governments, (2) the state has an interest in "curtailing the 'unacceptable social behavior' that can arise in conjunction with adult entertainment is important and substantial," (3) the regulation is unrelated to suppression of speech, and (4) the regulation is tailored to suit the purpose of reducing problems with compiling alcohol and adult entertainment.

**VICKERS V. FAIRFIELD MEDICAL
CENTER
No. 04-3776
U.S. Court of Appeals for the Sixth Circuit
July 19, 2006**

Employee sued under Title VII alleging same-sex sexual harassment from fellow employees. Plaintiff said that the harassment was based on non-conformity to traditionally masculine roles, but “the harassment of which Vickers complains is more properly viewed as harassment based on Vickers’ perceived homosexuality, rather than based on gender non-conformity.” The court held that plaintiff’s claim of sexual orientation discrimination is not the same as sex discrimination because he had not alleged that he had been involved in non-conformity to gender stereotypes at work. The court said that recognizing plaintiff’s claim “would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.” The court distinguished *Oncale* because the actions alleged here were not based on sexual desire or hostility to men or alleged favoritism toward one sex.

The dissent said that the plaintiff alleged that treatment was based on a perception that he was not “manly” enough and this should suffice even though there was no evidence fo gender non-conforming workplace conduct.

**BISHOP V. OKLAHOMA
No. 04-CV-848-TCK-SAJ
U.S. District Court, Northern District of
Oklahoma
July 20, 2006**

Two same-sex couples (the partner in one of which had contracted a civil union in Vermont and married in Canada) challenged Oklahoma’s marriage

amendment and the federal Defense of Marriage Act alleging violations of (1) the Full Faith and Credit Clause, (2) the Due Process Clause, (3) the Equal Protection Clause, and (4) the Privileges and Immunities Clause. The defendants (the United States and Oklahoma) motioned to dismiss.

The court noted that only one of the couples asserted standing to challenge the interjurisdictional recognition requirement of DOMA based on their having contracted a Vermont civil union and Canadian marriage. Based on the distinction in Vermont law between marriage and civil unions and the recent *Smelt v. Orange County* decision, the court held that a civil union is not a marriage affected by DOMA so it does not confer standing to challenge DOMA. The court also held that DOMA does not apply to marriages contracted in foreign countries. Following *Smelt*, the court said that since one couple did not contract any legal status, they had no standing to challenge the definitional portion of DOMA. Since a civil union and Canadian marriage are so similar to a marriage, though, the court did not dismiss the other couple’s challenge and ordered further briefing.

The court then held that the definitional portion of DOMA did not violate the Full Faith and Credit or Privileges and Immunities Clauses since those clauses do not apply to the federal government.

The court held that plaintiffs had no standing to challenge the recognition portion of the Oklahoma amendment for the same reasons it rejected standing as to the similar portion of DOMA. The court did, however, grant standing to challenge to definitional challenge of the Oklahoma amendment.

The court dismissed the Privileges and Immunities claim against the state amendment since U.S. Supreme Court precedent treats the clause as largely dormant.

The court allowed for more briefing on the Equal Protection and Due Process challenges to DOMA and the amendment.

Finally, the court did not allow a state legislator and amendment advocacy group to intervene in the case because their position was adequately represented by the Oklahoma attorney general's office.

**WITT V. UNITED STATES
DEPARTMENT OF THE AIR FORCE
Case No. C06-5195 RBL
U.S. District Court, Western District of
Washington
July 26, 2006**

A lesbian challenge the military's don't ask, don't tell policy, arguing *Lawrence v. Texas* required heightened scrutiny.

The court held that *Lawrence* does not apply in this manner because it applied rational basis review. The court further held that the government had a legitimate concern with unit cohesion as evidenced by a voluminous legislative record. The court said that sexual orientation is not a suspect or quasi-suspect class so rational basis applied.

There was no First Amendment violation, according to the court, because it was directed at conduct and does not interfere with intimate association. The court finally concluded that plaintiff had no liberty or property interest in continuing military service so due process was not affected.

**ANDERSEN V. KING COUNTY
No. 75934-1
Washington Supreme Court
July 26, 2006**

In two consolidated cases, separate groups of same-sex couples challenged the marriage laws of the state. Two trial courts had ruled that the state marriage laws were unconstitutional. On appeal, the supreme court ruled 5-4 in favor of the constitutionality of the marriage law in a decision resulting in six written opinions.

The plurality opened its opinion noting that the cases "require us to decide whether the legislature has the power to limit marriage in Washington State to same-sex couples. The state constitution and controlling case law compel us to answer 'yes.'" Since this case does not involve a "grant of positive favoritism to a minority class," the court applied traditional federal equal protection analysis to plaintiffs "privileges and immunities" claims under the state constitution. The plurality held that sexual orientation is not a suspect class because, although homosexuals have been discriminated against, they have not shown immutability and recent legislation shows that they "exercise increasing political power." The plurality noted that *Romer v. Evans* and *Lawrence v. Texas* don't change this result. The plurality then held that there is no fundamental right to same-sex marriage because that status is not premised on history or tradition and U.S. Supreme Court precedent on fundamental rights has usually linked marriage to procreation. Even though the Court's decision in *Turner v. Safley* "did not expressly link marriage to procreation" it did not signal a change in the definition of marriage as a fundamental right. Here *Lawrence* doesn't apply because it involved private sexual conduct and the Court said that case did not involve formal

relationship recognition. “[A]lthough marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation or in Washington State.” The plurality further held that there is no federal constitutional authority for finding a fundamental right to marry a person of the same-sex. The plurality said the appropriate analysis in this case was rational basis review. Plaintiffs had claimed that the marriage law was motivated by animus, but the plurality rejected this argument, noting for instance, that many who voted for the marriage law also voted in favor of creating protected class status for sexual orientation in the state discrimination law. “In assuming that everyone who voted for DOMA is a bigot, Justice Fairhurst’s dissent is not only wrong, it sadly oversteps the bounds of judicial review.” The plurality held that the subjective motivation of some legislators was not relevant when the statute advanced rational bases. The plurality noted that “[h]eterosexual couples are the only couples who can produce biological offspring of the couple.” The fact that the classification is over- or under-inclusive does not mean that marriage lacks a rational basis. The plurality found that “encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.” Also, “the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.” The plurality said that the legislature, rather than the court, held “the power to make public policy determinations” and that where these determinations did not affect a fundamental right or suspect class “that power is nearly limitless.” In regards to plaintiffs’ privacy claim, the plurality held that absent a history of same-sex marriage “the citizens of

Washington have not held a privacy interest in marriage that includes a right to marry a person of the same-sex.” In regards to the sex discrimination claim, the plurality noted that men and women are treated identically by the marriage law and thus, the law does not constitute sex discrimination. The court supported its conclusion by referencing legislative history and ballot information for the state Equal Rights Amendment. The plurality distinguished *Loving v. Virginia* because it involved purposeful “racial discrimination” while the marriage law does not involve sex discrimination at all. The plurality also held that there was no evidence that the marriage law was related to sex stereotyping. The plurality said its opinion did not address any constitutional issues related to marriage benefits but noted that same-sex couples are disadvantaged by a lack of benefits and suggested that the legislature consider the impact of the marriage law on these couples.

A concurring opinion said that plaintiffs had not met their burden of proving the statute unconstitutional. To this justice, if the court were to decide otherwise, “we would be usurping the function of the legislature or the people.”

The more substantive concurrence was remarkably strong. It began by arguing that “[o]ur oath requires us to uphold the constitution and laws, not rewrite them.” The concurrence noted that “[t]rial courts may reflect the dominant political ideas of their local community. We have two such decisions before us.” The concurrence said the “opinions below were transparently result-oriented.” “At its core, the claims involve not only the purported right to a ‘marriage’ with a person of the same sex but also a claim of raw judicial power to redefine public institutions such as marriage. . . . Though advanced with fervor

and supported by special interests loudly advocating the latest political correctness, the arguments (and the dissenters) cannot overcome the plain legal and constitutional principles supporting Washington's definition of marriage." The concurrence believed same-sex marriage is not a "privilege" under state constitutional analysis because it is not a fundamental right. The concurrence argued that there is no history to support the contrary proposition. The concurrence further said that the marriage law does not create a sexual orientation classification and even if it had, sexual orientation is not a suspect classification. "Conversely, where courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance, which expressly includes the will of the people who must ratify constitutional amendments." To the concurrence, the historical right to marry is opposite-sex and is linked to procreation. The concurrence noted that the U.S. Supreme Court has rejected the idea that same-sex marriage is a fundamental right in their summary dismissal of *Baker v. Nelson*. The concurrence said that *Loving* was not applicable because antimiscegenation laws "infringed upon the union of one man and one woman by injecting racial status as a classification." The concurrence believed the "complementary nature of the sexes and the unique procreative capacity of one man and one woman as a reproductive unit provide one obvious and nonarbitrary basis for recognizing such marriage. The binary character of marriage exists first because there are two sexes." Since only opposite-sex couples can experience unintended pregnancy, marriage "encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the

raising of children, planned or otherwise." The marriage law also advanced a rational basis of ensuring that the ability to define marriage "remain with the people of Washington" rather than with the courts of Washington or another state. The marriage law is also supported by a consideration of the ramifications flowing from the impact of various family formations on children: "female couple households are necessarily fatherless and male couple households are necessarily motherless. Each of these differences from the optimum mother/father setting for stable family life may offer distinctive disadvantages." Thus, the legislature could "rationally reject outright or conclude that further study is required before engaging in a dramatic alteration of our society's social fabric with profound negative or unforeseeable consequences." The charge that Washington's marriage law is motivated by animus would also apply to all legislators and executives who have approved similar law and "[t]o state this paranoid proposition is to rebut it." The concurrence went further than the plurality in arguing that the state has a "compelling interest in marriage as the union of one man and one woman, particularly in light of its exclusive link to procreation and child rearing." In relation to the privacy claim, the concurrence noted that same-sex couples "are not prevented from having any sort of private relationship that they choose" and the right to privacy "is not a device for creating such rights of public recognition." As the concurrence closes, it suggests "[o]nly a judicial rewriting of 'fundamental principles' would result in marriage finding definition in the shifting sands of political correctness."

The main dissent garnered four votes. The dissent believed the marriage laws "do not rationally relate to or further any legitimate governmental interest" and create "a class-

based distinction which grants opposite-sex couples certain and substantial 'privileges' while explicitly denying those same privileges to same-sex couples." To the dissent, even if the interests proffered by the state are legitimate these interests are not furthered by the definition of marriage. The question for the dissent is "would giving same-sex couples the same right that opposite-sex couples enjoy injure the State's interest in procreation and healthy child rearing?" The dissent believes marriage laws do not encourage married couples to procreate, to stay married for the sake of children, or to rear children. Plus, the dissent thinks the exclusion of same-sex couples from marriage will hurt children raised by these couples. The dissent argues that the marriage law "was motivated solely by animus toward homosexuals." The dissent believed the plurality defined the fundamental right at issue too narrowly. The dissent also believed that the *Loving* decision recognized the right to marry a person of one's choice. For the dissent, the marriage law also infringed the "liberty to construct and define one's own family." So, this case "falls at the intersection between the fundamental right to marry and the fundamental liberty interest in making one's own personal decisions relating to intimate partners." The dissent argued that history and tradition should not be binding when they discriminate. The dissent thinks changing the definition of marriage would only affect same-sex couples.

Another dissent said the court should not rely on religious teachings regarding marriage and that the courts must protect those historically discriminated against. This judge said that homosexuals have been historically disadvantaged and continue to experience disadvantages. This opinion argues that the legislative history and language of the marriage law "reveals that it

stems, in substantial part, from thinly-veiled animosity against a minority group, animosity that is rooted in moral and religious objections to same-sex relationships" and "reflects the legislature's intent to *exclude* an entire class of people from the institution of civil marriage." She also argued that "[m]oral judgment of a minority class of citizens is inherent in the DOMA." This dissent believed the marriage law constituted sex discrimination because it takes the sex of the parties into account. The opinion concludes: "Future generations of justices on this court and future generations of Washingtonians will undoubtedly look back on our holding today with regret and even shame."

The final dissent argued that the Washington "privileges and immunities" clause should "protect[] us against all governmental actions that create unmerited favoritism in granting fundamental personal rights" and should not be read as equivalent to federal equal protection analysis.

BARNES V. JEDEVINE
No. 129606
Michigan Supreme Court
July 26, 2006

While her divorce was pending, the mother became pregnant through adulterous relationship. This man was listed as the father on the birth certificate, signed an affidavit of paternity and lived with the mother and child for four years. When the divorce court issued a default judgement of divorce (the mother did not put in an appearance) which said that there were no children of the marriage. At the breakup of the mother's relationship with the biological father, this man sought paternity in a new court action (the present one). The trial court held that the father lacked standing since the mother's ex-husband was presumed the

father (since the child was conceived during the marriage). The appeals court reversed, holding that since the divorce order said there was no children of the marriage, this could be taken as a court determination of paternity that rebutted the parental presumption in favor of the ex-husband.

The supreme court noted that in order to rebut the paternity presumption, the plaintiff must show (1) that the child was not born or conceived during the mother's marriage or (2) that there is a court determination that the child was not the issue of the marriage. Here, the mother was married to another man when the child was conceived. The court also said that the statement in the default judgement of divorce that there were no children of the marriage was inapposite because the question of whether a child was born or conceived during the marriage was not the subject of the divorce litigation. Similarly, the birth certificate and acknowledgment of paternity are similarly not court determinations. Thus, to the court, the paternity presumption still applies.

One dissent argued that the default judgement of divorce was adequate to rebut the presumption of paternity here. The dissent said the former husband was not likely to act as a father and the biological father was being blocked from his "legal right to father and support the child."

Another dissent said that even though inaccurate, the default judgement's statement as to when the child was conceived should control. This opinion charged that the majority was rewarding the mother for her failure to appear in the divorce proceedings. The dissent also argued that the majority opinion leaves the child without support.

IN RE G
[2006] UKHL 43
United Kingdom House of Lords
July 26, 2006

This case involved a dispute between same-sex partners over custody of a child who was conceived by one of the partners as a result of assisted reproduction. The court removed the children from the mother and gave them to the former partner.

On appeal, the court found that the "children were happy and doing very well in their mother's home. That should not have been changed without a very good reason." The court said that the fact that the mother is the mother "while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future." Since the lower court had not taken this into consideration, its opinion was reversed.

Lord Nicholls of Birkenhead concurred and said: "A child should not be removed from the primary care of his or her biological parents without compelling reason."

AMERICAN BUSH V. CITY OF SOUTH
SALT LAKE
No. 20020117
Supreme Court of Utah
July 28, 2006

Adult businesses challenged a city ordinance prohibiting nude dancing under the state constitution. The court examined historical evidence of the meaning of Utah's speech guarantee and concluded "that those who framed and ratified Utah's constitution did not intend to extend its protections to nude dancing."

One dissenter argued that because "the

message of the nude dancing at issue is distorted or diminished by banning nudity," the city's ordinance conflicts with the speech clause. To this justice the only exemptions from constitutional speech protection are defamation and criminal libel. She believed reliance on history is too restrictive as a measure of constitutional meaning. She argued that the city had showed no evidence of secondary effects of the restricted activity.

**WILKINSON V. ATTORNEY GENERAL
[2006] EWHC 2022 (Fam)
England & Wales High Court of Justice,
Family Division
July 31, 2006**

An English same-sex couple contracted a marriage in Canada, returned to England and sought legal recognition of the marriage as a marriage rather than as a "Civil Partnership" as English law provides.

The court noted that English law defines marriage as the union of a man and a woman. Further, the question of the parties' capacity to marry is controlled by English law since they are domiciled there. The court held that Parliament did not intend to create a second-class institution for same-sex couples when it enacted the Civil Partnership Act (CPA). Rather, a civil partnership is "a parallel and equalising institution." The Act also, however, demonstrates "support for the long established institution of marriage."

The court held that the guarantee of the right to marry in the European Convention on Human Rights refers to opposite-sex marriage. Additionally, the Convention right of family life "does not in the present state of Strasbourg law extend to childless same-sex couples." Here, the marriage law does not "intrude on or interfere with the

private life" of a same-sex couple. For the court, the necessity to protect family and private life does not mean a requirement that they be recognized as married. The court noted that withholding marriage recognition "does not criminalise, threaten, or prevent the observance" of the Convention rights of same-sex couples. In fact, the CPA "accords [same-sex couples] also the benefits of marriage in all but name."

The court noted that the majority of European nations, as well as England, "regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or 'nuclear family') in which both maternal and paternal influences are available in respect of their nurture and upbringing." The belief that marriage is the relationship that "best encourages stability in a well regulated society is not a disreputable or outmoded notion based on ideas of exclusivity, marginalisation, disapproval or discrimination" against homosexuals. "Parliament has not called partnerships between persons of the same-sex marriage, not because they are considered inferior to the institution of marriage but because, as a matter of objective fact and common understanding, as well as under the present definition of marriage in English law, and by recognition in European jurisprudence, they are indeed different." Given these realities, the distinction between civil partnerships and marriages are legitimate.

The court distinguished same-sex marriage cases in Canada and South Africa because the same-sex couples involved in those cases did not have access to all of the benefits of marriage provided by the CPA. The court

further held that even if the rule of recognition (that the law of the domicile applies) was inapplicable, English public policy would prevent recognition.

**HARPER V. POWAY UNIFIED SCHOOL
DISTRICT
No. 04-57037
U.S. Court of Appeals for the Ninth Circuit
July 31, 2006**

A petition for rehearing of a case in which a challenge to a school decision to disallow a student from wearing a T-shirt with a message critical of homosexuality was denied.

One concurring opinion argued that saying homosexuals “are shameful and that God disapproves” of them “strikes at the very core of the young student’s dignity and self-worth.” This judge believed schools have authority “to attempt to protect young minority students against verbal persecution.”

Another concurring opinion said that “hate speech” (including “a tee shirt misusing biblical text to hold gay students to scorn”) need not be given First Amendment protection in the school environment “where administrators have a duty to protect students from physical or psychological harms.”

A group of dissenters argued that unpleasantness of the shirt to some students doesn’t justify a ban on particular speech and that “if displaying a distasteful opinion on a T-shirt qualifies as psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant.” The panel majority opinion, they charge, endorses viewpoint discrimination.

**ENTERTAINMENT SOFTWARE
ASSOCIATION V. HATCH
06-CV-2268 (JMR/FLN)
U.S. District Court, District of Minnesota
July 31, 2006**

Minnesota law prevents minors from renting video games rated “mature” or “adults only.” The video game industry challenged the law, asking for a permanent injunction. The court said that video games are protected speech, so content regulations (like this statute) are subject to strict scrutiny. The government asserted two interests: (1) “protecting the psychological well-being of minors” and (2) fostering “children’s moral and ethical development.” The court held that the available empirical evidence does not establish a causal link between violent video games and negative effects on children. Even if it did, the court believed, there’s been no showing that this statute would help. The court also held that the statutory reference to a private rating system is an unconstitutional delegation of authority.