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.

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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 09[(se)-5(x)-8(7.8e)-2(a),(a)4 2.98( )]TJ-0.011 Tc 0.011 T1-T1(t)-6(he)-T Tc0(a)-i8(tach004

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.*

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

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

briefs in these two cases overflow with debate over whether prohibiting same-sex marriage is "over- or underinclusive"—for example, overinclusive

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' [illegible]

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

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; exemption 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 (2w 1.16 0 /(h)30r-u3i226[(20) 0 Td[(, 133)5State

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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 stat 0 Td(s)8(u)-3(0 Tdth th)64(t)]TJ1aev]TJ-

likely is that the fertile member, though *desiring* a biological child, would have procreative sex with another person and

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 permitted 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. Suppose 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 Co

nt/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 im

the U.S.? In My State?" www.acf.hhs.gov/programs/cb/faq/foster-

versely, 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

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, rea ahply di0 Td[i816(e)-12(a)-1i81 Theeed Wosh dat.1(e-0.hi)15(10sr)-1b/868enc 0 Tw 16.8

(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

cess. 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, "Target 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 ts94 -1.j0.001 Tc 0.239 - -1.j0r w 5.93(r 0.23a( )]T504 Tc(t(n p)-123a( )(er)

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, wh-eo[(to r)-1[(,)eTc -0..83 0 auaru

ates a danger of "shifting the public understanding of ma

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

their opinion. But neither Indiana nor Wisconsin make a

uals 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 ex

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,

Though these decisions are in the spirit of Mill,

nized." 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 toNot to

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.