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Chatting with the Lady in the Grocery Store
About *Hernandez v. Robles*,
the New York Same-Sex Marriage Case

John B. Mitchell¹

Company was coming that evening and I'd gone to the grocery store with a list of needed ingredients in hand. After a successful shop, I was standing in line with my cart brimming over when I heard the clerk utter the most feared words known in modern society, "The computers are down." That's it. I was stuck; there was no turning back. This could take awhile. I was beginning to scan the magazines on the rack to get a quick summary of the celebrity gossip when the person ahead of me in line turned around and said, "I thought that was you, Mr. Mitchell. How funny. Here we are in another grocery line."

She was a woman whose children had graduated from the same high school as mine and with whom, in a grocery line such as this one, I'd twice before been drawn into lengthy discussions about some Supreme Court case.² Not this time, I prayed. So we chatted about family and old friends and that championship high school basketball team we all cheered for when the kids were seniors. Anything but law—no law; no law! And then it happened. She glanced at a newspaper she was holding and said, "Mr. Mitchell, you teach at a law school, so maybe you could explain something to me." Oh, no. Not again I thought, and then I heard my voice saying, "I'll try." "Well, I'm reading about this New York case where the majority of the judges said that there was no right to same-sex marriage."³ Are you familiar with that case?" I was, but considered lying, although that probably would have done me no good; she would have just supplied the facts and all, like a Socratic professor when you say you haven't read the

case. And so it began. “I’m no expert in the area, but I have read it. In fact, I have a photocopy of the main opinion here in my pack.”

Good. Now, what I don’t understand is why marriage isn’t a very important right. I know it’s not specifically mentioned in the Constitution, but don’t we have constitutional rights that aren’t explicitly listed in the Constitution, like abortion?

Yes, we do. Abortion is one,⁴ and there is also a constitutional right for both married⁵ and unmarried adults⁶ to obtain contraceptives.

Well, it would seem that the right to marry is at least as basic as the right to obtain the various means of preventing birth from sex.

It is. In fact, the Supreme Court found that marriage is a fundamental constitutional aspect of “liberty” under the Due Process Clause when it struck down laws barring interracial marriage.⁷ In other words, marriage is a fundamental constitutional right.

So then the New York court started with the notion that marriage is a fundamental constitutional right?

Not really. It defined the right in question as “same-sex marriage,” instead of just marriage.⁸ After all, that was what it was dealing with, you know, gay couples who—

Did it make any difference that the court defined the right involved as “same-sex marriage” as opposed to just plain old “marriage”?

In fact, it did. The Court has a test for determining whether a right that is not enumerated in the Constitution is, nevertheless, “fundamental.”⁹ The Court has determined that for a right to be fundamental, the right must be so “deeply-rooted in this nation’s history and traditions” and “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.”¹⁰

Like using condoms?

Well . . . oh, look at these magazines. You'd think that there were only eight people in America: Brad, Angelina, Jennifer—

But, if that's the test for finding a right to be fundamental, it was obviously all over once the court defined the right in question as "same-sex marriage," rather than "marriage."

Well, that's what the plaintiffs were asking for—not traditional marriage, but same-sex marriage.

No. I don't agree. They were asking to get married to the person they loved and with whom they wanted to share a life. That person happened to be of the same sex. The whole question was whether same-sex couples have a right to be included within the institution of marriage. To define the right the plaintiffs were seeking as some variant of the institution of marriage, sitting outside its umbrella, basically begs the question. Through the phrase "same-sex marriage," the right sought becomes related to, but separated from, "real" marriage. It becomes "gay-rrriage," the right to be "gay-rrried." It's not marriage.¹¹

Perhaps. Hey, is that Black Cherry Vanilla Diet Coke you have in your cart? How is that? I was—

Yes. It's quite tasty. But, Mr. Mitchell, I'm afraid I've lost sight of the forest for the trees in this discussion of how to define the right in question. I guess my real question should be whether it makes any difference whether a particular right is termed fundamental or not.

Actually, it makes quite a difference. In this arena, it will determine the "standard of review," which in turn will likely determine the outcome. Appellate courts, of which the United States Supreme Court is one, do not review legal decisions in a vacuum, but rather assess the cases in front of them using different standards of review. These standards of review reflect

the nature of the subject matter being reviewed. The standards of review federal courts employ when assessing the constitutionality of particular pieces of legislation are characterized in terms of levels of scrutiny.

The key to case outcomes under either fundamental rights or equal protection analysis is what level of “scrutiny” a court applies when reviewing a particular statute. This concept of scrutiny refers to how carefully the court will question the rationale underlying a piece of legislation.¹² Generally, the courts show great deference to the work of the legislature and will require only *minimal rationality* or a *rational basis*¹³ for the legislation to be held constitutional. Under this standard, if the judge can imagine any justification, even if it seems completely misguided, the law will not be found unconstitutional. There is, however, a much higher level of scrutiny known as *strict scrutiny*.¹⁴ If this level of scrutiny is applied, the judge will really dig into the statute and its purported rationale, and only find the statute constitutional if the piece of legislation is narrowly tailored¹⁵ to serve a compelling state interest.

Therefore, if a right is fundamental, the court will review any law which unduly burdens that right under a strict scrutiny analysis. If a right is not fundamental, the court will review the law through a minimum rationality lens. Simple. The only real question is whether the particular right in question is or is not a fundamental constitutional right.¹⁶ I should add that classifications based on race are also subject to strict scrutiny review.¹⁷ But, back to the main topic of fundamental rights—

Odd, this requiring a “deeply-rooted tradition” would not only seem to be lacking in the interracial marriage case, it would seem equally difficult to reconcile this requirement with the contraception cases and all of the abortion cases where you said the court found a constitutional right. Oh well, interesting, but back to my main point. I still don’t understand. I know that there were these horrible laws that prohibited interracial marriage and the Supreme Court struck them down.

That's right. The case you're thinking about involved a white man and a black woman. Note that this was a man and a woman so they fell within the traditional notion of a married couple.

Did the Supreme Court make any mention of that?

No, they had no reason to; it was not the issue in front of them—they were solely concerned with race.

But it seems that the fact that the case involved a man and a woman, as opposed to two women, played no part in the Court's thinking about their right to marry.

I'm not a psychic, so I don't know what the Justices were thinking, but again, their opinion is only about racial discrimination.

Was the alleged fundamental right in that case the "right to marry" or "the right of a white man to marry a black woman"?

The former.

It seems that, under the test for finding fundamental rights that you just told me about, that case could have come out differently if the right was defined in the latter way, as "the right to interracial marriage"?

Possibly, as to the "deeply-rooted" part. But, I'm not so sure that denying fundamental right status to the right of a white man to marry a black woman wouldn't have run afoul of the "implicit in ordered liberty" concept—you know, a right basic to being a citizen in a free democratic society. I can't imagine the Court upholding such a blatantly discriminatory law, regardless of how it defined the right in question.

So, the right in question in that case was defined as just "plain old marriage"? And if the right had been defined as just "plain old marriage" in the New York case, might that have changed the outcome?

Possibly. The rationales justifying the denial of the right would have been examined under the strict scrutiny lens of being narrowly tailored to meet a compelling need. Instead, the court only had to find a rational basis, which means that the legislature could have found, might have believed, could have intuited, further inferred, etc.”¹⁸

So, the upshot of the New York opinion was that it is not unconstitutional to restrict the availability of marriage to a man and a woman?

Basically.

So, what about a thirty-year-old man marrying a thirteen-year-old girl? That is a male and female pairing. I mean, in many countries girls are still betrothed at such ages and even younger.

I seem to recall a famous rock ‘n’ roll singer/pianist who married his thirteen-year-old cousin. It caused quite a stir, but it was legal then where he lived. Do the thirty-year-old male and the thirteen-year-old girl have a fundamental right to marry?

I would say that they could claim a fundamental right to marry. To prohibit that union, the state would have to show compelling reasons why the union should not be held constitutional and a narrowly tailored approach to achieving such ends. Here, the state can meet that high burden by setting minimum age requirements, reflecting society’s concern for the vulnerability of those of such youth and concern for the lack of capacity of most young people of that age to meaningfully consent to all that is involved in the binding contract of marriage.

So can a father marry his daughter and an uncle marry his niece?

I think you can answer that as well as I can. The multiple societal concerns motivating an incest taboo provide the state with an even more “compelling need” to bar the union than in the case of your thirteen-year-old would-be bride.

What about polygamy? Polygamy was practiced in stories in the Bible, in various societies throughout history, and presently in this country. In fact, when I see so many wonderful heterosexual women who are single, and the paucity of men who are their equal, I sometimes wonder about the wisdom of the practice.

Same as the others; there's a fundamental right, but the state has a compelling need to ban such unions. I'm certain there are serious problems with permitting polygamy, but I admit to not being versed in them. Although, I can imagine that the law would have to be pretty creative to deal with some of the custody issues—like when the husband divorces one of his six wives. Of course, a court might deal with polygamy like the New York court dealt with same-sex marriage, requiring the marriage to be between a man and a woman. And the right being sought here is “the right for one man to have more than one wife.” I don't know. When the issue of polygamy has come before the Supreme Court, it has always been about religion and arguments that polygamy was central to the Mormon belief system.¹⁹

So, like all these variants on marriage between male and female, the New York court could have defined the right in question as the right to marry, rather than same-sex marriage, and still found that that institution could be denied to same-sex couples.

I'm not quite following you.

Well, like you just said, just because a set of individuals are claiming the right to join in union under the fundamental right to marry does not mean that they will be permitted to do so. So long as the state can show narrowly tailored means to achieve the compelling needs of the state, the sought after union can be denied. Am I right?

I guess

So, if New York had “compelling” reasons to deny same-sex applicants the right to marry, it could have constitutionally done so. My guess, then, is that the state had some pretty pathetic and crummy reasons and that’s why the New York court played this shell game—sleight of hand trick—replacing the fundamental right to “marriage,” which was the appropriate starting point for its analysis and the real issue at stake, and replaced it with this phony right to “same-sex marriage.” Am I right?

Well, it did have two reasons, both involving the welfare of children,²⁰ which the court found satisfied the minimum rational basis standard.

The welfare of children, really? How touching. What were these rationales?

Well, the overall idea is that marriage and its “attendant benefits” are “inducements” to become married, and this inducement is more important to provide to different-sex than same-sex couples for the purpose of achieving two goals related to the welfare of children.²¹

Interesting. So what is the reasoning behind tying marriage and different-sex couples together in order to achieve the first goal?

Well, here’s the court’s reasoning on this one. It centers on the premise that we want children to grow up in stable home environments.²²

Of course, but I don’t see what that has to—

Now, hold on. Let me finish; this one takes a few steps.

Okay, lead on.

As a biological reality, sex between two people of the same sex cannot result in children. Both gay and lesbian couples must *choose* to have children²³—either by adoption, in vitro, insemination, or by using a surrogate. Heterosexual sex, on the other hand, leads to children. In fact,

recent scientific miracles aside, heterosexual sex is the overwhelming source of babies on this planet.²⁴ With me so far?

That's kind of hard to dispute, but how does all this lead to—

Hold on; I'm getting to that. These heterosexual relationships are, in the New York court's words, "all too often casual or temporary"²⁵—hardly the environment of stability we'd choose for children should passion overcome reason and birth control is dispensed with, or the pill or condom fails. We want to encourage heterosexual couples to enter into a more stable form of relationship, and marriage, with its attendant public commitment and the only way to end it being in a court of law, is a significant deterrent to walking away from the relationship.

Huh?

Because of the fact that only heterosexual couples can have children without consciously choosing to do so, and because most children result from heterosexual sex, it is rational—remember that we're talking about a rational basis standard²⁶—to offer marriage and its attendant benefits as an inducement exclusively to that heterosexual population. It is an inducement to marry and, thus, will increase the possibility that children, wanted or otherwise, will grow up in a far more stable environment than an ongoing series of one or the other biological parents' "casual and temporary" relationships.

You're kidding, right?

Absolutely not. That's what the New York court said. And, I must confess, it does have some common-sense appeal.

Really? First, if we're talking about couples having children out of wedlock, I realize that society has traditionally desired that the couple marry, that the mother be made an "honest woman," if only so that the child not be stigmatized as a bastard. Today, there still exists societal and

familial pressure to marry under these circumstances, even without the need of a shotgun. For many others, depending on the nature of the relationship and other circumstances, abortion may be the choice. While for others, adoption or single parenting may be the choice. It's hard for me to accept that, in the current world, society can fairly decide which among these choices should be incentivized as a matter of general policy. Also, even if having the child and marrying was the preferred societal policy to be encouraged, given the cultural story of the unwed mother, the only incentive marriage need offer is legitimacy. For a heterosexual woman, the sanctification of marriage is not a proper inducement. It is not like a car dealer throwing in a tape deck, sun roof, and air conditioning with a purchase of some vehicle. The state is giving nothing. As you said, Mr. Mitchell, the woman has an absolute constitutional right to marry the father.

Well, as a matter of a “rational basis” analysis, the court could still hold that the legislature could reasonably conclude that, while the legitimacy of marriage is a sufficient incentive for some, the “attendant benefits” will move others to choose marriage, and that marriage is the choice society wants the couple to make.

Oh, come on, Mr. Mitchell.

You can disagree, but it's not irrational. And that's the standard of review. Anyway, I don't think the New York court was focused on children already born out of wedlock. It seemed primarily concerned with the general policy of steering heterosexual relationships, with their potential for procreation, into the structure of marriage so that a stable environment will exist when the inevitability of pregnancy occurs.

All this seems far more about the issue of the availability of good sex education—whether from family and/or schools—the proper use of

contraceptives, or the availability of the morning-after pill than it does the institution of marriage.

Well, as you know, no birth control is 100 percent effective. Anyway, under rational basis review, the remedy chosen does not have to be narrowly tailored; it does not have to be the least restrictive choice to deal with the need.

Back to that standard again, please.

Of course.

So, is the idea that a man or a woman in a casual, temporary relationship should have incentive from the state to marry a person he or she has never considered as a life companion or soulmate simply because of the tax benefits? How absurd! But you're going to say that idiocy is beyond the point because we're talking rational basis here?

Correct.

Same with the fact that many heterosexual couples choose not to have children, or are biologically incapable of having children, as a result of disease or age while, at the same time, most children are born as a result of their parents' choice, and that, in fact, having children is probably the primary reason most people decide to marry rather than just live together?

Right. Those are all good points, but they can't carry the day under a rational basis analysis. The legislature may be making a bad, wrong-headed decision. Fine, vote them out of office. But as long as its decision is rational, the courts will not interfere.

Under strict scrutiny, would all my points count?

Very likely Boy, they still haven't fixed the computer. Anyway, you see how few cashiers they have? They want you to use those auto-scan machines. Have you ever used them?

A few times.

Were they difficult to use?

Not once you get the hang of it. You know, Mr. Mitchell, as you can tell, I keep coming back to that shell game that let the New York court find that same-sex marriage is not a fundamental right based on that rational basis standard.

Uh huh.

But, there's something else—this idea of incentives. I think if you separate marriage from the “attendant benefit,” it all falls apart.

What do you mean?

Well, as I said before, the right to marriage as an inducement to heterosexual couples to marry is completely illusory. They already have a fundamental constitutional right to marry, which the state can't deny for an instant. And giving that right to same-sex couples costs the state nothing. Marriage itself is not a scarce resource, like tax benefits, nor does providing it involve a choice of lesser evils, like giving immunity to a criminal in order to get his testimony against an even bigger criminal.

Go on.

In fact, allowing same-sex couples to marry is not only costless, it is positive. While the New York court is correct that gay couples can't have children by having sex, but must consciously choose to have children, that doesn't mean that we don't care if that couple does not remain together to raise the child in a loving, stable home. If that relationship falls apart, we may still have emotionally scarred children and a possible need for costly state resources for one or more of the family members. Raising children is a joy, but it also puts a great deal of strain on any relationship, gay or otherwise. The ties entailed in the commitment we call marriage, and the public and legal impediments to severing those ties, tend to hold couples

*together during those inevitable hard times. I know it, and so do you Mr. Mitchell. Gay families need those bonds in tough times as much as non-gay couples—unless we have some sound basis for saying that gay people have far greater moral fiber and commitment to duty and responsibility than do straight people.*²⁷

I grant that there's a lot of truth in what you're saying.

So, as to the pure right to marry being both costless and beneficial, it is irrational not to provide it to same-sex partners who desire it. Of course, some may argue that if we allow gay people to marry, we will devalue marriage for non-gay couples, thus, leading to fewer heterosexuals marrying, which undermines the entire social policy of encouraging heterosexuals to marry. You know, that may even happen; there are some really narrow-minded, bigoted people in this large country. But it cannot be the role of the state to determine the rights of one group because of the decisions of another, which are based on their private moral beliefs and biases.

What is your basis for that conclusion?

You're the law professor, Mr. Mitchell. Aren't there cases where one person's rights couldn't be curtailed because of the reaction of others?

Well, in the First Amendment arena, a speaker's message does not lose constitutional protection merely because his or her message makes members of the audience angry.²⁸

And what about curtailing one group's rights because of another's moral beliefs?

Well, the recent Supreme Court case striking down a Texas sodomy law, which punished gay men for engaging in such conduct in the privacy of their homes, really came down to the fact that the only reason supporting the law was a moral stance against homosexuality.²⁹

Good. Thank you.

Sure. But let's go back to the core of your idea, separating what you call "pure marriage" from the so-called "attendant benefits." You're correct, the benefits are the only "inducements" the state can offer or withhold. Marriage, however, is a legal and contractual relationship—with some lust and tender feelings thrown in—involving a bundle of rights and responsibilities. If you give someone marriage, the bundle of rights is inextricable from the union. The problem is that that bundle includes scarce state resources, which it may rationally allocate one way or another to achieve the ends of its policies. If you allow gay people to marry, they get the bundle. In fact, access to the rights and benefits in that bundle is high on the list of reasons gays and lesbians seek marriage,³⁰ and the current denial of those benefits to them and their families forms one of the most powerful, moral, and equitable arguments in favor of same-sex marriage.

Perhaps, but that is a totally separate issue. Mr. Mitchell, could you deny an attorney to an indigent criminal defendant charged with murder because of the expense, or could you deny a controversial political candidate the right to speak because security and crowd control would be too expensive?

You could control the expenses the appointed attorney incurs³¹ and reasonably regulate your political speaker as to the time, place, and manner.³² But, no, you couldn't absolutely deny the defendant an attorney or absolutely bar the candidate from public speaking because of financial costs to the state.

So, I gather that if a person has a right to marry, then the state cannot deny that right simply because of the expense the reasonable exercise of that right will cost the state.

Well, it seems—

Of course, giving most of these marriage-inducing benefits is really the choice of the state—they are not inherent in the very nature of marriage. The state is free to calculate the total costs of each benefit and then decide whether continuing to offer the particular benefit is worth the cost.

Fine. That's very thought provoking. But, you've just undercut your own argument.

How?

If gays and lesbians are allowed to marry, the state will have to give these couples benefits, which generally means allocating scarce public resources in a way that the state would otherwise not have to. So, we're really back to the New York court's rationale about targeting "inducement" to different-sex couples.

So, what is the state's rationale for not letting same-sex couples marry and essentially denying them benefits?

Wait a minute. You're becoming a regular sophist. You've just been arguing that you cannot deny a right solely based on cost, although I never got the chance to mention that your two examples, the Sixth Amendment right to counsel and the First Amendment right to free speech, are constitutional rights explicitly guaranteed in the Constitution. So *if* same-sex marriage were a constitutional right, then economic costs could not be determinative in deciding whether to recognize that right. But to assume that it's a right begs the entire question we're discussing as to whether same-sex couples have a right to marry.

No, Mr. Mitchell, the New York court is using dollar costs as the basis for determining whether the right exists in the first place.

Well—

Anyway, even if we were to assume that we are not dealing with a fundamental constitutional right, how can New York deny the status of marriage to same-sex couples, benefits aside?

But, benefits are not aside.

Why not? The New York court's rationale for letting different-sex, but not same-sex, couples marry was tied to efficient use of "inducements." Now we've agreed that marriage itself is not an inducement for heterosexual couples because it's their fundamental constitutional right.

So gay couples can get married, but are denied the benefits heterosexual couples receive as an entitlement?

Yes.

That would be blatant discrimination based solely on homosexuality. That would be naked prejudice!

I agree, but I think that the bottom line of the New York case is based on prejudice.³³ My question, however, is that using the New York court's stated rationale, why couldn't the court permit same-sex marriage, but deny benefits on exactly the same grounds the court used to deny marriage in the first place—that it is rational to provide inducements solely to different-sex couples?

While the state might be able to do that under a rational basis analysis, the court could find that the legislature could reasonably believe that to allow gay people to marry while denying them equivalent benefits, although legal, would provoke anger and social alienation in certain segments of our population.

What segments? Do you mean gay people?

Yes, and perhaps even among non-gay activists. And though this constituency may already be angered by the New York decision, it is

reasonable to believe that it will not be to the same magnitude as that which would follow your “marriage without benefits” proposal. You may not agree, but this analysis is hardly irrational. Again, all of this is very interesting. I notice you are buying veggie burgers. Have you stopped eating meat? I’ve begun to notice that many of my friends—

No, I like meat. They are for my cousin, who is visiting with her family. Anyway, you said the New York court had two goals relating to child welfare, which it sought to achieve by tying the right to marry exclusively to heterosexual couples. What is the second?

Are you sure you want to hear? Hey, your cousin, that isn’t by any chance—

Absolutely, I want to hear about the second goal.

Okay. Here goes. And remember, this is rational basis.

So, this one must be really idiotic. Go ahead.

Let me get that photocopy out of my pack. I think it would be best for me to quote the New York court. Here goes: “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. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and woman are like.”³⁴

Hmm . . . okay. I know this rational basis game by now. So, it makes no difference that a staggering percentage of these mommy-daddy families end in divorce?

No. No difference at all.

Or that living models of what both a man and a woman are like could be furnished by other relatives, friends, and co-workers, likely even better than a parent that is consistently away at work or, god forbid, abusive? Can you

imagine anything more harmful to children than growing up watching their father beat their mother, or themselves being the victims of abuse by these traditional parents?

Again, you're right; under rational basis, none of that matters. Good point, but none of it makes the legislative grounds irrational. Also, even on your own terms, exposure to relatives and friends does not model what a man and a woman are like in a day-to-day committed and sexual relationship.

I agree. But to model how to interact in a committed, sexual relationship you don't need a man and a woman; a same-sex couple will do. That's probably why, in the quote, the court did not refer to children seeing a heterosexual relationship, but rather just gave those two gender examples of man and woman, Adam and Eve. Not to mention the notion of the male-female parent preference is nonsense given the reality of marriage and divorce in our current society, but I'll accept it for the sake of argument.

Perhaps, but where's the irrationality?

You know, I think that by not taking the fundamental right to marriage as the starting point for its reasoning, what the New York court did was a total con. But even within this rational basis stuff, it's irrational.

How?

Well, let me ask you this. Do we bar gay couples from having their own children—by in-vitro, insemination, using a surrogate, or the next scientific miracle?

No, of course not.

Are gay couples forbidden to adopt?

Well, at one time there were issues; now gay couples may adopt in most states without a problem, though still not all.

Now these kids who have gay couples as parents, by definition, will not have the mother-father models the New York court believed the legislature could rationally find more desirable than same-sex parents, right?

That's correct.

So, if you're going to let gay couples be parents, how does denying marriage to these gay parents have any bearing, whatsoever, on whether or not children will have a male and female parent?

That's a fair question.

Thanks, can you give me a fair answer?

I'll try. Let me begin with the reasonable assumption that more gay couples would have children, whether through adoption or biological means, if they were formally married. I'm not guessing at how many more, but it seems that the permanence and societal recognition of that marital status naturally engenders thoughts of family. After all, from my limited experience, the adult gay couples I've known have been pretty mainstream—lawns, barbecues, soccer games, and piano lessons—when they have kids of their own. I have no reason to believe that marriage would do anything but bind most gay couples even further into the nuclear family narrative. Am I being fair?

Please, go on.

Now, the resources gay couples require to have children are quite finite: babies and children available for adoption, male and female genetic material required for procreation, and willing surrogates. The problem is that non-gay couples who, for a range of reasons, are incapable of having their own children, will vie for these same limited resources. At some point, gay married couples—who well might equal or exceed the number of heterosexual married couples who biologically cannot have their own children—will take resources away from heterosexual married couples who

need them in order to have children. As a result, children who would have been raised in the preferred male-female parenting environment will be raised by gay married couples, while some number of heterosexual married couples who cannot have their own children will be left out in the cold for lack of available adoptive and genetic resources.

You're serious? I know, I know, rational basis.

Correct, again.

What I'm gathering is that, in effect, you're asking me to accept that unless the legislation reflects the demented, incoherent ravings of a mad man, the court will find it to have a rational basis.

Well, I wouldn't put it quite that way.

Nor would I, Mr. Mitchell. You've made a clever argument, and it certainly is rational, in that it's coherent, well-articulated, one premise tied to the next, hardly the delusional babbling of the demented—

Thank you, I'm flattered.

But, what you've said is also baseless, created from thin air, without the slightest concern about any connection to reality.

Well, I don't think—

You've made up a sperm and egg shortage. Why would that be? Aren't these bits of genetic material constantly being regenerated in billions upon billions of human bodies all over the planet?

But there are transaction costs to collection, screening, and storing. Anyway, people don't want just any genetic material; the biological donor's health, intelligence, and yes, race, matter.

So you're saying that a gay couple might take the more desirable genetic material leaving the non-gay married couple with a less desirable choice?

Precisely.

But, the New York court didn't say that heterosexual married couples should be the only ones to raise the most genetically desirable children. It actually said that the male-female parenting is most desirable for raising whatever children there are. So unless the only genetic material left for non-gay couples in your fantasy is of such poor prospects that no reasonable couple would use it, the number of children raised by non-gay married couples would not be less because gay people may marry.

Still, you have to consider—

Wait a minute. Before we continue this discussion about insemination, let's get back to reality. These types of arguments are totally make-believe, and the gay couples, who love each other every bit as much as I love my husband and you love your wife, have their lives affected by this make-believe. Even in your fantasy, how many heterosexual couples who could not have their own children would be denied access to the resources for having children if same-sex partners could marry? If one non-gay couple could not obtain the resources for a child, would that justify denying gay marriage within your conjecture? How about ten? What is your criteria for even making the decision that prevents adults who love each other from formally binding their lives together? I can't begin to imagine, nor do I believe, could you.

You're right; we are getting a bit esoteric here.

Not esoteric at all, Mr. Mitchell. Underlying all of this is the message that we don't like the idea of gay couples raising kids because it's not normal. We fear that kids will "catch" gayness³⁵ from their parents and that their parents may even molest them because they are perverts, after all.

Now wait a minute. I don't read that into the court's opinion and it's not how anyone I know feels. Our society does let gay couples raise kids. The

issue is marriage and whether same-sex couples are constitutionally entitled to that status. The New York case is not some anti-gay polemic. Forgive me, but I just don't think that that kind of rhetoric helps deal with an issue admittedly so sensitive to many.

Very well. I'm sorry if I offended you.

No such thing. Well, this has been quite a discussion.

Earlier you mentioned a Supreme Court case that said that it was unconstitutional to forbid blacks and whites to marry.

Yes.

Tell me about that case.

Not much to tell really. Virginia had an anti-miscegenation law making it a felony for any white person to marry a nonwhite person. Mr. Loving was white and his wife was black, and, as a result, they were both convicted of a felony.³⁶ The Supreme Court found that the Virginia law violated the Equal Protection Clause of the Fourteenth Amendment as well as the fundamental right to marry.³⁷ The Court used a strict scrutiny analysis³⁸ and found that the state had no compelling rationale for the law.³⁹ In this regard, the Court held that the state's rationale of maintaining "racial integrity"⁴⁰ was not a compelling interest of the state to be protected.

It seems like that case is pretty much the same as the gay marriage case.

Not at all. While there may be superficial similarities, there are fundamental differences. First, the case involved a criminal statute. It was a felony for simply marrying.

That's certainly terrible, but you're not saying that if the Virginia law was a civil law, like New York's no gay marriage law, that it would be constitutional today because it was not a criminal law?

No, of course not. But the Virginia case also dealt with the core reason for the very existence of the Fourteenth Amendment—racial discrimination.⁴¹

So the Fourteenth Amendment has only been used to address racial discrimination?

No. It's been applied to unequal treatment based on gender⁴² and nationality.⁴³ But stop before you go there. We won't let legislatures arbitrarily discriminate based on sexual orientation, but sexual orientation is not a highly protected class like race and gender, and, thus, the rational basis standard is used rather than the higher level of scrutiny used for the other protected classes.⁴⁴

What makes these groups a protected class? Why do gay people belong to a class no more protected than, say, dog owners?

It's a bit complex, but basically comes down to a mix of factors including a history of discrimination, exclusion from the political process,⁴⁵ and harmful stereotypes influencing legislative decisions.⁴⁶ Of course, the plaintiffs in the New York case cited the Supreme Court opinion finding the Virginia anti-miscegenation laws unconstitutional, but the New York court rightly differentiated gays from blacks by pointing out the terrible discrimination blacks have suffered, the omnipresence of racism, and the whole civil rights movement to gain equality.⁴⁷ Blacks were entitled to be considered a protected class given that, in light of a long history of discrimination, any race-based legislation was highly suspect. Gay people simply do not present a comparable story.

Access to the political process? Until very recently in our history, the notion of gay people openly acknowledging their gayness to the point of organizing into a viable, recognizable, political constituency capable of influencing votes on issues and electing candidates is a bit far fetched, to say the least. As for "harmful stereotype," doesn't flouncing and mincing

pervert, child molester—after all, that’s what the Catholic Church said about the molestation scandal, that the problem was homosexuals in the clergy⁴⁸—and now, carrier of AIDS as a punishment from God for their immorality, constitute sufficiently “harmful stereotypes”?

Have you ever thought of entering the legal profession? You might have been able to convince the New York court.

And discrimination? I’m not saying it’s the same discrimination as blacks experienced because, after all, most blacks couldn’t hide their race, or pass as white. Gay people, on the other hand, not only could hide who they really were, society actually forced them to do so.⁴⁹ We so repressed their identity that the phenomenon is metaphorically referred to as being “in the closet,” a small, dark, cramped space totally separated from the light and life of the home. When they did “come out” into the broader community, they risked being beaten, taunted, denied, fired from their jobs, harassed, and even murdered. They were called fairies, faggots, dykes, and lesbians—the antithesis of real men and women. To tell a boy that he acted, behaved, or threw a ball “like a fag” was the ultimate degradation of his being. Not long ago, gay people were encouraged to undergo shock therapy treatment⁵⁰ to become normal, and so great was society’s intolerance that many gay people sought and embraced such frighteningly desperate means to attain that elusive “normalcy.” In fact, less than twenty-five years ago, the American Psychiatric Association classified homosexuality as a psychopathology.⁵¹ I think gay people can make their case for a history of relentless, merciless, societal discrimination which continues right up to the very present. Just ask any gay person who, while risking his or her life in the military, must still hide who he or she is.

Hey, I’m just the messenger; I’m just giving you the New York court’s reasoning. I appreciate what you’ve just—

And, I think there's even more in that Supreme Court case that bears on this. In this newspaper article it says that the New York court said the law limiting marriage to a man and woman treated all genders equally because women couldn't marry women and men couldn't marry men.⁵² But, from what you said, the fact that the Virginia law treated both whites and nonwhites the same, that both were guilty of a crime, made no difference to the Supreme Court.⁵³

That's because race, a suspect classification, was involved. In the New York case, the court was merely pointing out that the only potential protected class on the radar, gender, was not involved. Sexual orientation was, but that's not a protected class meriting heightened scrutiny.

What? This is all about gender, just like the Virginia case in which the only reason whites and nonwhites were forbidden to marry was their race. In the New York case, gender is the sole determinant. A man who loves another man is forbidden to marry that man solely because of the first man's gender. A woman who wants to marry another person she loves is forbidden to marry the object of her love solely because of that first woman's gender. This is all about gender.

Well, that's one way to look at it.

Also, at its core, this is pure, unadulterated, gender stereotyping at play; a woman dreams of her Prince Charming, a man of his fairy-tale princess. The woman should not dream of bedding the princess, and the man the prince. This law discriminates against women who will just not act like women and men who will not behave as our stereotypical man. And one more thing—

Only one?

What weight can this professed preference for male-female parenting have when the Supreme Court gave no credence to arguments that children

of interracial marriages would suffer and be harmed by their mixed heritage?

I don't recall the Court even mentioning any rationale like that for the Virginia law.

But, you're aware of that argument against interracial marriage?

Certainly, but again, it was not an idea raised by the Supreme Court. Oh, great, the computers are up! Now this line will finally move. Oh, my God, that man's grocery bag broke. What a mess. I should have brought my dinner; we're going to be in this line forever.

Poor man. I hope he knows to check those eggs now. Good, they've got two young clerks to the rescue, and the line is moving again. Almost there, Mr. Mitchell. Anyway, don't you see what this gay marriage case is ultimately all about?

No. But, I'm certain you'll tell me.

The New York court does not comprehend the harm to gay couples, and their children, from denying them the status of marriage because the court simply cannot see the relationship of two men or two women who wish to marry to be "as real" as that between a man and a woman. The court cannot find comparability between the two relationships. No doubt, some find the image of two men holding hands, kissing after reciting their vows, as disgusting and offensive, just as was (and no doubt remains) the reaction of some people to interracial couples marrying. Some will also see the marriage of two men or two women as a parody or mockery of real marriage. Heterosexual marriage is real; gay marriage is not. To face the equivalence of the two would surely be as significant a blow to "heterosexual superiority" as striking down the Virginia statute was to "white supremacy."

Hmmm

What about that recent Texas sodomy case you told me about? Did the New York plaintiffs tell the court about that case?

Of course. The New York court said that that case meant that gay people could have full, meaningful, and sexual relationships, and that the state could not impose its moral orthodoxy into the privacy of their homes.⁵⁴ But, the New York case was totally different; marriage is public and state sanctioned, and the denial of that status carried no such harm to gay people in New York, as did the criminal statute struck down by the Supreme Court in Texas.⁵⁵

Again, right below the surface of opinions, like this New York case, is the notion that gay relationships cannot be considered “real” in the same sense as heterosexual ones. In effect, the New York court was saying, “do what you do in the privacy of your home, just don’t flaunt it in public. Don’t ask, don’t tell. Follow these guidelines and we’ll have no trouble. We’ll accept your gayness as your unfortunate burden and allow you to do whatever you do with each other in the privacy of your home. Think of this as our accommodation to your psychological disability, you know, like the Americans with Disabilities Act.”

Now, that’s not fair.

I think it is. I’m not gay, nor are any of my closest friends. My children are not gay. I admit I am thankful for that because of all the pain that would await them—although, life seems to have enough pain for us all. But if one of them was, and found that special person and wanted to get married, it would be hard for me to conceive that their marriage would, in any way, differ from or be any less “real” than that of my daughter to my son-in-law, so long as it was “for better or for worse, in sickness and in health, for richer or poorer, until death do you part.” That’s marriage, not the gender of the plastic figures on the wedding cake. That’s why I would imagine that a “civil union,” replete with all the “additional benefits”

accompanying marriage, though no doubt far, far better than the existing situation for gay couples, would still not fulfill the needs of many gay couples. They want their union publicly acknowledged to be as real as that of heterosexuals, and they want it proclaimed from the top of the church, temple, mosque, or city hall that they do not live in a society of “heterosexual superiority,” which relegates them to second-class citizenship.

Yet, marriage between a man and a woman is not a radical, new idea. It’s not easy to get the image of Adam and Eve out of people’s minds, you know.

Adam and Eve? Now, Mr. Mitchell, you aren’t suggesting that an American court can base its decision upon the beliefs of a particular religion?

No, of course not. In our pluralistic society, religious beliefs are the province of each individual; they are not the proper basis for a court’s action.⁵⁶

Good, I thought so. Oh, I’m almost at the head of the line, but I’d like to say something about Adam and Eve and the Book of Genesis.

Sure, go ahead.

Now, I know that the various versions of the Bible can differ somewhat, but I’ve looked at a few and, with regard to this part, they’re pretty much the same. God looks at Adam and thinks that it’s not good for man to be alone. Adam was brought into the garden of Eden to “till and tend it” and God decided to “make a fitting helper for him.”⁵⁷ Not a lover, not a soulmate, but a “helper.” So, God then created all the wild beasts and birds—obviously, fish would be little help tilling and tending a garden—and he brought them in front of Adam to see what he would name each. Adam named each, but “for Adam no fitting helper was found.”⁵⁸ Only then does

God create woman out of Adam's rib, truly, a last resort for a helper. Adam accepts Eve as his helper⁵⁹ and the rest as they say—

Interesting, but I'm not sure I get the point.

It was not necessary that man's sole companion be a woman. If Adam had been more practical or creative, he would have chosen a horse, donkey, or elephant as a helper in tilling and tending the land. If he were ten years old, he would have chosen a puppy. Oops, I've got to put my groceries on the belt. Nice talking to you, Mr. Mitchell. Give my best to your family.

Same to you.

Then it was my turn to place my groceries on the belt, and by the time I was done, she was gone. Could she have been right? Was it possible that all of the New York court's carefully crafted legal arguments were no more than baseless pretenses masking raw, visceral prejudice? And then I heard the words heralding the end of my long journey through the grocery line—"paper or plastic?"

¹ Professor, Seattle University School of Law. The author wishes to thank Julie Shapiro for her ideas, librarian-extraordinaire Kelly Kunsch, and the co-word processing of Erin Espedal and Phyllis Brazier.

² My first two encounters with "The Lady" are documented in John B. Mitchell, *Don't Ever Discuss Rust v. Sullivan with a Lady in a Grocery Line*, 9 CONST. COMMENT. 25 (1992), and John B. Mitchell, *Another Chat with the Lady in the Grocery Line: Clinton v. Jones*, 15 CONST. COMMENT. 441 (1998).

³ *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (plurality opinion). Instead, the *Robles* court felt that this was an issue for the legislature. *Id.* at 9. Some might contend that this is the very situation for the court to step in; i.e., when majoritarian politics threaten a minority. *See, e.g., id.* at 24–25 (Kaye, C.J., dissenting).

⁴ *See Roe v. Wade*, 410 U.S. 113 (1973); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) [hereinafter *Abortion decisions*].

⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding a ban on marriage between whites and non-whites unconstitutional). *Accord Zablocki v. Redhail*, 434 U.S. 374 (1978)

(holding a law barring marriage by certain parents who have not complied with child support orders unconstitutional); *Turner v. Safley*, 482 U.S. 78 (1987) (holding that prisoners have a right to marry); *Hernandez*, 855 N.E.2d at 15.

⁸ *Hernandez*, 855 N.E.2d at 10. Note that the first step in a fundamental rights analysis is a “careful description” of the right claimed to be fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

⁹ *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

¹⁰ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

¹¹ A similar position was taken by Chief Justice Kaye, dissenting in *Hernandez*: “Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.” *Hernandez v. Robles*, 855 N.E.2d 1, 25 (N.Y. 2006) (Kaye, C.J., dissenting).

¹² See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 206 (1980) (“[T]here can be no doubt that the judicial branch, at least at the federal level, is significantly less democratic than the legislative and executive.”); cf. RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 120–21 (1993) (noting that permitting the Supreme Court to find unenumerated rights in the Constitution of course carries certain risks of justices lending constitutional mandate to their own personal political-value preferences.).

¹³ Under the rational basis test, courts may engage in the purely speculative exercise of hypothesizing a legitimate goal that the challenged law might have been designed to further. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular measure was a rational way to correct it.”).

¹⁴ The strict scrutiny standard of review is articulated as “narrowly tailored” to meet a compelling need. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

¹⁵ See *id.*; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).

¹⁶ Thus, the Abortion decisions, *supra* note 4, are all analyzed within a strict scrutiny framework.

¹⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Brown I); *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁸ The Lady and I never got to the subject of so-called “intermediate scrutiny,” developed in the area of gender discrimination. See *Michael M. v. Sonoma County*, 450 U.S. 464, 468–69 (1981) (explaining that the intermediate scrutiny standard of review requires that the law reflects no gender stereotypes, that it serves important government objectives, and that the objectives are genuine); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). Given that this heightened standard of review was founded upon the concern regarding the effect of “harmful stereotypes” upon the legislative process, one could

imagine a strong claim for a similar standard of heightened review for legislative classifications based upon sexual preference.

¹⁹ See *Reynolds v. United States*, 98 U.S. 145 (1878). For an argument on why *Reynolds* was incorrectly decided, including a discussion of the widespread acceptance of polygamy by the world's non-Christian religions, see Jeremy M. Miller, *A Critique of the Reynolds Decision*, 11 W. ST. U. L. REV. 165, 178–81 (1984).

²⁰ *Hernandez v. Robles*, 855 N.E.2d 1, 7 (2006).

²¹ *Id.* (“[The legislature] thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.”).

²² *Id.*

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.* at 6.

²⁷ The irony of this concept was perfectly expressed in a recent *New York Times* Op-Ed piece:

When an Indiana court introduced this seemingly heterophobic logic last year in upholding a state ban on same-sex marriage, I thought it was a cockeyed aberration. But after both New York City and New York State presented similar logic in oral arguments, and the court followed suit, I began to understand the argument's appeal: it sounded nicer to gays....

This is not the first time courts have restricted rights with a flourish of fond regards. In 1873, the United States Supreme Court upheld an Illinois statute prohibiting women from practicing law. Concurring in that judgment, Justice Joseph Bradley observed that the “natural and proper timidity and delicacy” of women better suited them to “the noble and benign offices of wife and mother.”

Hostile rulings delivered in friendly tones can take longer to overturn, as evidenced by the century that passed before members of the Supreme Court reversed their thinking about women, and in a 1970 opinion in a sex discrimination case recognized that confining women in the name of cherishing them put them “not on a pedestal, but in a cage.”

We should not need a century to unmask the “reckless procreation” arguments as a new guise for an old prejudice. The “reckless procreation” argument sounds nicer—and may even be nicer—than the plainly derogatory “role model” argument. But equality would be nicer still.

Kenji Yoshino, Op-Ed., *Too Good for Marriage*, N.Y. TIMES, July 14, 2006, at A19.

²⁸ See generally *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁰ *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (“It is undisputed that the benefits of marriage are many. The diligence of counsel has identified 316 such benefits in New York law.”).

³¹ See *Ake v. Oklahoma*, 470 U.S. 68 (1985) (defining parameters when indigent criminal defendant is and is not entitled to appointment of an expert at state expense).

³² Time, place, and manner regulations are constitutional so long as they (1) “are justified without reference to the content of the regulated speech,” (2) “are narrowly tailored to serve a significant governmental interest,” and (3) “leave open ample alternative channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

³³ The plurality in *Hernandez* noted, “[i]f we were convinced that the restrictions plaintiffs attack were founded on nothing but prejudice . . . we would hold it invalid, no matter how long its history.” 855 N.E.2d at 8 (plurality opinion).

³⁴ *Id.* at 7.

³⁵ See KENJI YOSHINO, *COVERING* 45 (2006) (“The metaphorical contagion model captures a fundamental fear about homosexuality—that gays will spread our condition to others.”).

³⁶ *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

³⁷ *Id.* at 2 (holding that law preventing marriage solely because of race “violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”). See also *id.* at 12.

³⁸ *Id.* at 11.

³⁹ *Id.* (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 10 (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

⁴² See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁴³ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 378 (1971) (“[A]liens lawfully within this country have a right to enter and abide in any State in the Union ‘on an equality of legal privileges with all citizens under nondiscriminatory laws.’” (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948))).

⁴⁴ *Hernandez v. Robles*, 855 N.E.2d 1, 11 (2006).

⁴⁵ For example, John Hart Ely proposed that the court should only delve deeply into legislative motives and alternatives when the legislation impacts groups that have been systematically excluded from the political process that crafted the legislation; i.e., when the excluded group constitutes a “discrete and insular minority.” ELY, *supra* note 12; see also Robert A. Burt, *Constitutionalizing Physician-Assisted Suicide: Will Lightning Strike Thrice?*, 35 DUQ. L. REV. 159, 179 (1996) (contending that the issue of assisted suicide should not be subject to heightened scrutiny because “[d]ying people are clearly not a discrete and insular minority in the same, sure way as are black people subject to race discrimination laws [or] women subject to abortion restrictions.”).

⁴⁶ See ELY, *supra* note 45.

⁴⁷ *Hernandez*, 855 N.E.2d 1 at 8. No one can deny the terrible history of discrimination against blacks and other non-whites. Thus, as Professor Allen Ides and Christopher N. May explained in *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 205 (2d. ed 2001), strict scrutiny appropriately applies to laws making classifications involving “disadvantaged racial minorities”:

All of these suggested rationales for heightened scrutiny apply with respect to laws that disadvantage racial minorities. In terms of first-degree prejudice, this nation's history of black slavery and racial discrimination leaves no doubt that racial minorities have been and are often still the objects of hatred and vilification. Second-degree prejudice is likewise present in the form of widespread and exaggerated negative stereotypes about the intelligence, morality, industry, and honesty of racial minority groups. Next, race is an immutable characteristic; and since most legislators are white, there is a danger that laws singling out racial minorities for adverse treatment may have been adopted because of the legislature's inability to empathize with those targeted by the measure. In addition, race is generally, if not always, irrelevant to a person's abilities. Finally, racial minorities have historically been excluded from the political process, initially by outright denial of the right to vote and later through such devices as literacy tests, poll taxes, and physical intimidation.

⁴⁸ See, e.g., Eileen McNamara, *What About Girl Victims?*, BOSTON GLOBE, Dec. 4, 2005, at B1 ("The Vatican directive issued last week that would ban most gay men from the priesthood has been widely interpreted as Rome's response to the worldwide clergy sex abuse scandal."); see also Michael S. Rose, *Are "Gay" Priests the Problem?*, 14 CATHOLIC INSIGHT 15 (Jan. 1, 2006) ("The Vatican realizes that an underlying problem facing the church in the United States is tied up with homosexual activism and 'gay' cronyism."); Marie Szaniszlo, *Vatican Officially Unveils Policy Banning Gays from Seminary*, BOSTON HERALD, Nov. 30, 2005, at 18 ("Foreman [of America's National Gay and Lesbian Task Force] accused the Vatican of 'a calculated campaign' to blame gay men for the church's own criminal conduct in fostering and covering up decades of sex abuse.").

⁴⁹ In his extraordinary book *Covering*, Professor Kenji Yoshino identifies three modalities gays employ in reaction to the discrimination that surrounds them: "conversion" (i.e., stop being gay; change yourself to be straight); "passing" (i.e., be gay, but keep it to yourself and a very small circle; this is the world of "don't ask, don't tell"); and "covering" (i.e., be gay and be open about it, but don't flaunt it—no holding hands and kissing in public, no sex-mixing dressing). Yoshino, *supra* note 35, at 18–19.

⁵⁰ *Id.* at 33.

⁵¹ Until its deletion in 1973, "homosexuality" was classified as a "psychopathology" by THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM). See YOSHINO, *supra* note 35, at 38, 40.

⁵² *Hernandez*, 855 N.E.2d 1 at 10–11.

⁵³ *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

⁵⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁵⁵ *Id.* at 567 (defining the right at issue as the right to engage in private sexual conduct); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

⁵⁶ See H. Tristan Englehardt, Jr., *Death by Free Choice: A Modern Variation on an Antique Theme*, in SUICIDE AND EUTHANASIA: HISTORICAL AND CONTEMPORARY THEME 260 (Baruch A. Brody, ed., 1989); ROBERT I. MISHBIN, EUTHANASIA: THE GOOD OF THE PATIENT—THE GOOD OF SOCIETY 175 (1992).

⁵⁷ Genesis 2:18.

⁵⁸ *Id.* at 2:19–20.

⁵⁹ *Id.* at 2:21–23.