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An Incurable Malaise: *Commonwealth v. Australian Capital Territory* and *Baskin v. Bogan* as Symptoms of Early-Onset Dystopia

*Neville Rochow SC**

I. INTRODUCTION

Dystopia holds sway in all of our imaginations. That concept of control by others and loss of individual freedom is the stuff of our collective nightmare. The very idea that the only freedom is one of conforming to an order that is dictated sends chills down the spine.

One thing that is noticeably absent in the books and films of the popular dystopia is any mention of deity or religion. The implied premise seems to be that all such questions were disposed of long before the events of the current story. But nowhere do we get the backstory as to how such questions disappeared.

We are left to guess how, in this or that particular dystopia, consideration of the divine disappeared. Recognizing, as one must, that correlation is not causation, we are left to speculate whether the loss of religious inclination was merely coincidental or whether that loss may have had some contributing effect to the sorry state of affairs in which the story places us.

We may not be in need of speculation much longer. It has long been a part of the arsenal of arguments used against proposed changes to marriage laws that these laws would be used as a weapon—in combination with anti-discrimination laws—to drive more conservative, predominantly religious views of marriage from

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the public square. With the changes that are occurring, those arguments—placed as logical extrapolations—now have evidence that the laws promoting tolerance of deviations from a previously accepted norm seem only to promote tolerance of the deviation in substitution of the norm. This limits the freedom of those who hold conservative views from promoting or even preferring the norm.

In the case of marriage reform, which is so closely connected to moral and religious beliefs, our only freedom left might be conformity. If so, could we perhaps be witnessing symptoms of early-onset dystopia?

This Article looks at how various courts have recently dealt with questions of proposed marriage reform and finds that they have limited the ability of gay marriage opponents to disagree. This limitation puts freedom of conscience and religious liberty at serious risk.¹ The approach of these courts also suggests that societies can introduce a new right without carefully considering the cost that it may have for time-honored liberties that have served society well in the past. This Article argues that instead of requiring an urgent rewriting of all that is now held dear to many individuals, societies should take a gradualist approach, weighing each matter carefully before jettisoning the old mores.²

To accomplish all of this, this Article analyzes two cases, one from Australia and one from the United States: *Australian Capital Territory* and *Baskin*. Part II introduces these two cases and some of the problems with their reasoning. Parts III and IV then delve into each of the cases individually, pointing out—particularly in *Baskin*—the arguments and factual matters that appear to be the subjects of confusion, elision, conflation, and oversight. Part V then addresses evidence of the negative impact same-sex marriage would have on

1. One scholar has argued that the protections for religious freedom in Australia were already relatively weak. See generally, Denise Meyerson, *The Protection of Religious Rights under Australian Law*, 2009 BYU L. REV. 529. As to the potential for greater protection, see Paul Babie & Neville Rochow, *Feels Like Déjà vu: An Australian Bill of Rights*, 2010 BYU L. REV. 821, 836–42; *Protecting Religious Freedom under Bills of Rights: Australia as Microcosm*, in FREEDOM OF RELIGION UNDER BILL OF RIGHTS 1 (Paul Babie & Neville Rochow eds., 2012).

2. Other issues, beyond the scope of this inquiry, include whether our anti-discrimination laws require recalibration. See Neil J. Foster & Katherine Towers, *New Anti-discrimination Laws “Erode Religious Freedom”*, THE AUSTRALIAN, May 9, 2014, at 35–6, available at http://works.bepress.com/neil_foster/81.

society generally and children especially. Part VI shows the history and tactics of the LGBT community in achieving its goal of same-sex marriage, including the negative impact it is having on the freedoms of speech, association, religion, and conscience. Part VII concludes questioning whether the law is developing in a way that benefits society as a whole.

II. AUSTRALIAN CAPITAL TERRITORY & BASKIN: INTRODUCTION AND PROBLEMS

A. Australian Capital Territory Introduction

In a previous article, I explained how, under Australian constitutional arrangements, it was arguable whether the federal or the state legislatures are competent to pass laws permitting so-called “same-sex” marriage.³ The suggested limitation on the federal legislature depends on an originalist interpretation of the federal marriage power.⁴ While there was no certainty at the time of writing that article that such an argument would be accepted by the High Court of Australia, it was defensible based on *dicta* from earlier decisions of that Court.⁵ It was also sustainable by analogizing to cases where a similar argument had been accepted by the Court in respect of other institutions and legal constructs existing when the Constitution came into force in 1901.⁶ As to limits on the State’s legislative powers to make laws permitting same-sex marriage, the arguments rested upon a more certain foundation. Under section 109 of the Constitution, federal legislation on a matter within federal power has “paramountcy”⁷ over any concurrent state legislation on the same matter.⁸ Regarding territory legislation, acts establishing

3. See generally Neville Rochow, “*Speak Now or Forever Hold Your Peace*”—*The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia*, 2013 BYU L. REV. 521.

4. See *id.*

5. See *id.*

6. See *id.* at 540.

7. This term is used in Australian constitutional literature to denote the supremacy of federal legislation over state legislation when the criteria of section 109 of the Constitution are satisfied.

8. AUSTRALIAN CONSTITUTION s 109 (“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”).

federal territory legislatures provide for federal paramountcy similar to section 109.⁹

In 2004, federal Parliament passed an amendment to the *Marriage Act 1961* (Cth) that, for current purposes, had two significant effects. First, it introduced what had been assumed since Federation but not expressly provided: a traditional definition of marriage—namely, that “marriage” in Australia was between a man and a woman, entered voluntarily, to the exclusion of all others, for life.¹⁰ Secondly, it introduced section 88AE, which prohibited the recognition of so-called “same-sex” marriages solemnized overseas as marriages in Australia.¹¹ The changes were remarkable in two respects: first, because they went contrary to trends in some jurisdictions towards the legal recognition of marriages without regard to the gender of the contracting parties; second, because their passage into law came about through bi-partisan support.¹² Ten years later and with the benefit of hindsight, supporters of these changes regard them as revolutionary in the Orwellian sense: despite trends in other jurisdictions, Australia has held true to the correct principles that inform what describes a marriage. For opponents of same-sex marriage, the amendment gave them cause to celebrate: the 2004 amendment had proven prescient as a barrier to trends that they would not want to see emulated in Australia. But the celebration of the “revolutionary” marriage amendment serves as a prelude to the subject matter of the present article in another way.

By the time of the 2014 celebration, the posturing as to either of the constitutional arguments referred to above had been brought to an end by the High Court in *Commonwealth v Australian Capital Territory*, in which case the Court declared territory same-sex marriage legislation invalid.¹³ In this widely anticipated result, the Court unanimously held that territory legislation permitting and

9. See, e.g., *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. See also Anne Twomey, *Same-sex marriage – Inconsistency between Commonwealth and Territory Laws*, UNIVERSITY OF SYDNEY (Nov. 28, 2013), available at http://sydney.edu.au/law/cru/documents/2013/same_sex_marriage.pdf.

10. *Marriage Act 1961* (Cth) s 5 (Austl.).

11. *Id.* at s 88EA.

12. See *Marriage Amendment Bill 2004* (Austl.), available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd005.

13. See generally *Commonwealth v. Australian Capital Territory* (2013) 250 CLR 441 (Austl.).

recognizing marriages without regard to gender was invalid because of its inconsistency with the federal *Marriage Act 1961* (Cth). The celebration of the federal amendment and the striking down of the territory law was, however, tinged. In fact, the decision had a distinct sting in the tail for both sides of the marriage debate. Despite the opponents of the same-sex marriage law not intervening, the Court considered the originalist argument in their absence and rejected it. The Court also said that the way was indeed open for potential federal laws permitting same-sex marriage.¹⁴ Not only did the Court pronounce via *dicta* that the federal government could pass marriage laws without regard to gender, but also it saw no barrier to federal laws permitting polygamy.¹⁵

This last pronouncement was neither anticipated nor welcomed by either side of the debate. Proponents of same-sex marriage have generally been at pains to promote their proposed reforms as but a very small step that should not concern anyone with regard to its implications. In order to win support, they generally have been careful to distance themselves from any suggestion of polygamy.¹⁶ And opponents of same-sex marriage are generally opposed to any concept of plurality of spouses. Indeed, anything outside of what is regarded as traditional marriage is anathema to them. Needless to say, same-sex marriage opponents in Australia have looked upon other jurisdictions with a combination of bemusement and horror as they see one after the other falling prey to arguments presented in either courts or legislatures to re-define marriage so as to permit so-called “marriage equality.” Not only do they deprecate what they see as the deception in that label, but they now fear that, over time, a majority of federal legislators may be persuaded to support a change in the federal marriage law under what they regard as its deceptive and beguiling influence.

14. *Id.* at ¶¶ 1–2.

15. *Id.* at ¶¶ 33–7.

16. See, as an example, the opinion piece by same-sex marriage supporter and campaign director for Australian Marriage Equality, Rodney Croome, *Marriage Equality and the Christian Persecution Narrative*, AUSTRALIAN BROADCASTING CORPORATION (Aug. 15, 2011), <http://www.abc.net.au/religion/articles/2011/08/15/3293123.htm>. See also the reaction to the suggestion of a link between arguments supporting same-sex marriage and polygamy in the following op-ed article: Staff Writers, *Bisexual Advocate Dismisses ACL Link*, STAROBSERVER.COM (June 14, 2012), <http://www.starobserver.com.au/news/bisexual-advocate-dismisses-acl-link/79068>.

Perhaps what was not fully appreciated at the tenth anniversary of Australia's quiet revolution on marriage law was that there was a further reason for them to celebrate; as in all things, the decision in *Australian Capital Territory* could have been much worse. A decision of the United States Court of Appeals for the Seventh Circuit, *Baskin v. Bogan*, demonstrates how things might have turned out in Australia.¹⁷ *Baskin* is one of the most recent of a number of the United States decisions that have overturned state constitutional provisions, to the same effect as the 2004 amendment to the Australian *Marriage Act 1961* (Cth). Just how badly the topic of genderless marriage could be handled by an unsympathetic court cannot be appreciated without reading *Baskin*. Its hectoring tone shows the deep-seated deprecation that its members held for any argument in opposition to same-sex marriage. And it is that very tone that deprives it of any persuasive value to the objective reader. Both the *Australian Capital Territory* and *Baskin* decisions were handed down within a short time after argument,¹⁸ and both cases decided a similar issue but under different constitutional regimes.

B. Confusion at Home and Bewilderment From Afar

Both cases also contain elements that are surprising to the Anglo-Australian lawyer trained in the traditions of common law and the doctrine of *stare decisis*. In *Australian Capital Territory*, the surprising element is the use of *dicta* effectively to decide anticipated cases regarding issues when all proper contradictors on those issues were not before the Court. This has led to some startling new ways of viewing both *stare decisis* and constitutional interpretation in Australia. Nevertheless, the High Court ultimately left the question to be decided by democratic processes and through the legislative arm of government. In *Baskin*, what is surprising is not only the intemperate use of language in its reasons,¹⁹ but also the vaults in logic and fact-finding in the reasoning which are breathtaking for an

17. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014).

18. *Commonwealth v. Australian Capital Territory* (2013) 250 CLR 441, ¶ 44 (Austl.) (nine days after argument); *Baskin*, 766 F.3d (also nine days after argument).

19. *Baskin*, 766 F.3d at 662 (“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.”).

intermediate appellate court. To compound this, it appears to the observer from afar that members of the court have vaulted the separation of legislative power from judicial power and to have circumvented democratic processes by striking down the results of the referendum on grounds that appear quite tenuous.

While the Australian Constitution also has a “full faith and credit” provision,²⁰ the recent U.S. jurisprudence developments on same-sex marriage do not provide a coherent approach as to how the federal constitutional principles invoked in support can operate in the way these courts have said they do.

First, there seems to be inconsistency among the respective courts as to how the Fourteenth Amendment applies in such cases. For example, a decision of another court is decided with the opposite outcome of *Baskin* despite being handed down within a day of *Baskin* and dealing with similar constitutional and legislative provisions.²¹ Furthermore, it is not at all clear to the outsider why the “full faith and credit” is not accorded to those state constitutional provisions that provide for monogamous, heterosexual marriage. It is not clear why the right of those who vote *not* to have same-sex marriage in the state boundaries find those rights treated as being automatically subservient to the rights of those who come from states where the vote has been cast the other way. And why must the according of full faith and credit extend beyond the individuals involved to overturn the democratic processes of the entire state?

Second, when the same question in the United States is framed under different constitutional and rights structures, such as in Europe and Australia, the highest courts of these areas come to the opposite conclusion. How does the Fourteenth Amendment operate differently in the United States so that the U.S. courts come to such different conclusions from the European Court of Human Rights on the issue of the State’s right to re-define marriage when both jurisdictions are purporting to correctly interpret bills of rights? Can this merely be a question of different words in the rights-conferring

20. AUSTRALIAN CONSTITUTION s 118 (“Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceeding of every State.”).

21. *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 913 (E.D. La. 2014).

instruments giving rise to different rights or could it be that there is some political agenda being played out in the courts?²²

III. VINDICATION OF THE AMENDMENT IN 2004:
COMMONWEALTH V. AUSTRALIAN CAPITAL TERRITORY

The *Australian Capital Territory* case resolved the debate on who could change marriage laws in Australia. As with probably every revolution, the amendment to the *Marriage Act 1961* (Cth) was not universally popular. There persisted, until recently, an argument that the federal Act still permitted entry by states and territories into the legislative field of marriage so that each local legislature could, if it so chose, pass an Act permitting gender-neutral marriage in its own state or territory and recognize such marriages if contracted elsewhere.²³ Though apparently difficult for some gender-neutral proponents to accept,²⁴ the position taken in the Parliament in 2004 was vindicated by the High Court in *Australian Capital Territory*. The amendment had the desired effect. There would be no same-sex marriage in Australia while its provisions remain in force.

A. *Background to Commonwealth v. Australian Capital Territory*

A previous article describes the polemics and history of same-sex marriage in Australia.²⁵ In short, each of the Australian States that proposed legislation permitting so-called same-sex marriage in their jurisdiction were persuaded not to pass such a law.²⁶

One policy reason for Australia not to follow other jurisdictions in permitting same-sex marriage may be that since the 1970s and progressively up to 2008, there has been a process of removal of distinctions in laws regulating unmarried domestic partnerships that

22. See generally *Hämäläinen v. Finland*, App. No. 37359/09 (Eur. Ct. H.R. 2014).

23. Rochow, *supra* note 1.

24. At the time of writing there have been reports of another bill being prepared for presentation in the Norfolk Island legislature. *Norfolk Island Gay Marriage Bid 'Safe'*, NEWS.COM.AU (Sept. 17, 2014, 7:06 AM), <http://www.news.com.au/national/breaking-news/norfolk-island-considers-gay-marriage/story-e6firku9-1227061263356>. Indications are that this bill would be defeated through the political process.

25. Rochow, *supra* note 1.

26. *Id.* at 529.

are heterosexual or homosexual.²⁷ In fact, state laws even accord rights in property in financial awards to multiple party relationships.²⁸ Where there were remaining areas of discrimination, they were dealt with in 2008 by a suite of federal legislation to remove all differences other than the case of marriage and, in most states, adoption.²⁹

As mentioned, foremost among the legal arguments that were accepted by those States was that any such legislation would be invalid pursuant to section 109 of the Australian Constitution.³⁰ That section operates to invalidate any state legislation that is inconsistent with federal legislation on the same subject matter.³¹ It was accepted by the state legislatures that sought submissions that any venture into the legislative field of “marriage” would be inconsistent with the *Marriage Act 1961* (Cth) because that Act had shown an intention to operate as a complete code on the subject. That included, as a

27. There has been a long succession of legislation at both state and federal level over some decades seeking to equate, as far as possible, both married and unmarried relationships, without regard to their heterosexual or homosexual nature. They have had the cumulative effect of providing the same economic and proprietary outcomes, irrespective of the status of the relationship, in areas of taxation, superannuation and property settlements. See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008* (Austl.); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008* (Austl.); *Property Law (Amendment) Act 1998* (Vic) (Austl.); *De Facto Relationships Act 1996* (SA) (Austl.); *Local Government Act 1995* (WA) (Austl.); *De Facto Relationships Act 1991* (NT) (Austl.); *Social Security Act 1991* (Cth) (Austl.); *Property (Relationships) Act 1984* (NSW) (Austl.); *Succession Act 1981* (Qld) (Austl.); *Maintenance Act 1967* (Tas) (Austl.); *Wills, Probate and Administration Act 1898* (NSW) (Austl.).

28. See *supra* note 27; *Family Law Act 1975* (Cth) s 90SM (Austl.). As an example, the definition of “de facto relationship” in section 3 of the *De Facto Relationships Act 1996* (SA) (Austl.) contemplates more than one person satisfying the criteria with any particular partner. There is thus no restriction to monogamous relationships in the Act. *Id.*

29. See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008* (Austl.); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008* (Austl.); *Property Law (Amendment) Act 1998* (Vic.) (Austl.); *De Facto Relationships Act 1996* (S. Austl.); *Local Government Act 1995* (W. Austl.); *De Facto Relationships Act 1991* (N. Terr.) (Austl.); *Social Security Act 1991* (Cth) (Austl.); *Property (Relationships) Act 1984* (N.S.W.) (Austl.); *Succession Act 1981* (Queensl.) (Austl.); *Maintenance Act 1967* (Tas.) (Austl.); *Wills, Probate and Administration Act 1898* (N.S.W.) (Austl.).

30. See Twomey, *supra* note 9; AUSTRALIAN CONSTITUTION s 109.

31. *Id.* (“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶¶ 48–61 (Austl.).

consequence of the 2004 amendment, the definition of marriage.³² Any entry into that legislative field by a state would be invalid. All of the states showed a reluctance to run the risk of their laws being challenged and invalidated by the High Court.

The only exception to this reluctance was the Australian Capital Territory (ACT). That territory has a seventeen-member unicameral Legislative Assembly and enjoys self-government subject to certain constraints imposed legislatively and constitutionally. Among the constraints is section 28 of the *Australian Capital Territory (Self-Government) Act 1988*.³³ For all practical purposes, section 28 has a similar effect for territory legislation as section 109 has for state legislation.

Prior to the 2012 territory election, the Labor Government of the Australian Capital Territory had governed as a minority party with support of the Greens.³⁴ The Greens have long had a policy of so-called “marriage equality.” Apparently as part of the price for continued support from the Greens, the ACT Labor government went to the polls in 2012 with a policy that it would legislate for same-sex marriage in the territory if re-elected. It was returned by the narrowest of margins,³⁵ needing support from the Greens in order to govern. On September 19, 2013, the ACT Attorney-General introduced the *Marriage Equality (Same-Sex) Act Bill 2013* into the chamber.³⁶ With support of the Greens, the legislation was

32. See Olivia Rundle, *An examination of relationship registration schemes in Australia*, 25 AUSTL. J. FAM. L. 121, 126–7 (2011). *Marriage Amendment Act 2004* ch 1 s 5(1) (Austl.) (“Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”).

33. *Australian Capital Territory (Self-Government) Act 1988* (Cth).

34. The Greens are an Australian Political Party, ostensibly formed to protect the environment from legislation and governmental policies that would otherwise be to what the party’s members consider its detriment. The policies of the party range much more widely and generally take the extreme liberal position on moral and social issues such as abortion, euthanasia and same-sex marriage. See *generally* THE GREENS, <http://greens.org.au/> (last visited Sept. 21, 2015).

35. That is with only 41 more votes on the popular vote and with an equal number of seats to the Liberal opposition under the Hare-Clarke electoral system which operates in the Australian Capital Territory. See ELECTIONS ACT, 2012 RESULTS BY ELECTORATE AND BY PARTY (2012), http://www.elections.act.gov.au/elections_and_voting/past_act_legislative_assembly_elections/2012_act_legislative_assembly_election/2012_election_results2/2012_results_by_electorate_and_by_party.

36. Santilla Chingaipe, *ACT to Push Ahead with Gay Marriage Laws*, SBS WORLD NEWS (Oct. 22, 2013), <http://www.sbs.com.au/news/article/2013/10/22/act-push-ahead->

passed into law on October 22, 2013.³⁷ It was to come into operation on November 7, 2013 and the first marriages would be permitted on December 7, 2013.³⁸

There was strong opposition to the bill not only from the Liberal Party opposition, but also within the community.³⁹ One of the reasons for opposition among sections of the community included the social policy arguments mounted and championed by religious groups. Religious leaders from several different faith traditions signed a joint letter sent by the Australian Christian Lobby to Attorney General Corbell protesting the bill and its anticipated social and legal consequences.⁴⁰

The managing director of the Australian Christian Lobby, Lyle Shelton, raised a specific concern with the Attorney General regarding people of faith not being able, in conscience, to support same-sex marriages in the supply of goods or services.⁴¹ The response

gay-marriage-laws; Cec Busby, *Same-Sex Marriage Bill Passes in ACT*, GAY NEWS NETWORK (Oct. 22 2013), <http://gaynewsnetwork.com.au/news/national/same-sex-marriage-bill-passes-in-act-12193.html>; *Marriage Equality (Same-Sex) Act Bill 2013* (Cth) (Austl.).

37. See *supra* note 36.

38. See *supra* note 36; Katherine Murphy, *High court to hear challenge to ACT same sex marriage laws in December*, THE GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/society/2013/nov/04/high-court-to-hear-challenge-to-act-same-sex-marriage-laws-in-december>.

39. Lisa Cox & Peter Jean, *Rush to Save Gay Marriage Bill*, CANNERRATIMES.COM.AU (Oct. 22, 2013), <http://www.canberratimes.com.au/act-news/rush-to-save-gay-marriage-bill-20131021-2vxek.html>; Elizabeth Byrne, *High Court throws out ACT's same-sex marriage laws*, ABC NEWS, (Dec. 12, 2013), <http://www.abc.net.au/news/2013-12-12/high-court-decision-on-act-same-sex-marriage-laws/5152168>.

40. See Cox & Jean, *supra* note 39. The following leaders specifically spoke out against the Bill: Rabbi Shimon Cowen; Bishop Trevor Edwards, vicar general of the Anglican Diocese of Canberra and Goulburn; Monsignor John Woods, administrator of the Catholic Archdiocese of Canberra and Goulburn; Pastor Sean Stanton, of Australian Christian Churches; Rabbi Shmuel Feldman; Pastor B.J. Hayes, of the Canberra National Adventist Church; Imam Adama Konda, of the Canberra Islamic Centre; and Arnold Cummins, stake president in the Church of Jesus Christ of Latter-day Saints. They were joined by Lyle Shelton, managing director of the Australian Christian Lobby. *Id.*

41. For a case note by the author about a recent example of this, see *Same-sex Marriage and Property Rights Compete in New York State*, UNIVERSITY OF NOTRE DAME AUSTRALIA, available at <http://www.nd.edu.au/sydney/schools/law/on-the-case/on-the-case-issue-7>. Otherwise, see the excellent commentary on this type of issue in my colleague Associate Professor Foster's paper. Neil J. Foster, *Discrimination, Language and Freedom of Religion: Two Important Law and Religion decisions in Australia*, INTERNATIONAL CENTER FOR LAW AND RELIGION STUDIES, BRIGHAM YOUNG UNIVERSITY "VARIETIES OF SECULARISM, RELIGION AND LAW" OCT. 5-7, 2014. Neil J. Foster, *Sesame Street and the Gay Cake*, LAW

from the Attorney-General confirmed the worst fears of Mr. Shelton and the religious leaders:

[A]ny right to express contrary opinions is balanced under sections 7 and 20 of the *Discrimination Act 1991* (ACT). It would be unlawful for those who provide goods, services and facilities in the wedding industry to discriminate against another person on the basis of their sexuality or their relationship status. This includes discrimination by refusing to provide or make available those goods, services or facilities. Australians are free to express contrary views as the church leaders and the Australian Christian Lobby has [sic] done, provided they do so within the law.⁴²

Given the resolution of the ACT government to proceed with the bill, members of the Australian community, both within and outside of the ACT, asked for the recently elected federal Liberal government to challenge the Act, in the High Court, once it became law.⁴³ A case was reserved under section 18 of the *Judiciary Act 1903* (Cth). Argument was heard on December 3, 2013. The Full Bench⁴⁴ heard the case and delivered their reasons on December 12, 2013.⁴⁵ Prior to the hearing, religious leaders and faith-based groups, including the Australian Christian Lobby and the Australian Family Association, gave consideration to seeking leave to intervene.⁴⁶

AND RELIGION AUSTRALIA (May 23, 2015), <https://lawandreligionaustralia.wordpress.com/category/sexual-orientation-discrimination/>; See also Jordan Pendergrass, *Symposium 2014: Australia*, BYU LAW INTERNATIONAL CENTER FOR LAW AND RELIGIOUS STUDIES, <http://www.iclrs.org/index.php?pageId=2&linkId=246&contentId=2126&blurbId=35404>.

42. Letter from Simon Corbell, Attorney-General, Australian Capital Territory, to Lyle Shelton, Managing Director, Australian Christian Lobby (Nov. 21, 2013) (on file with author).

43. Interview by the author with Ms. Giulia Jones, MLC Australian Capital Territory Legislative Assembly (Nov. 2015); Interview by the author with Mr. Lyle Shelton, Australian Christian Lobby (Nov. 2015); Interview by the author with Elder Jeffrey Cummings, The Church of Jesus Christ of Latter-day Saints (Nov. 2015).

44. Generally a full bench consists of seven justices, but because newly appointed Justice Gageler had, prior to appointment, recently advised the ACT government that it could not validly pass legislation of the kind, his Honor recused himself, leaving a bench of six. See Transcript of Hearing, *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (Austl.), available at <http://www5.austlii.edu.au/au/other/HCATrans/2013/299.html> [hereinafter *Commonwealth v ACT Hearing Transcript*]; see also Twomey, *supra* note 9, at 13; *Infra* note 56.

45. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (Austl.).

46. Interview by the author with Lyle Shelton of the Australian Christian Lobby and Terri Kelleher of the Australian Family Association (Nov. 2015).

However, they were dissuaded from doing so by the federal government on the basis that doing so may work as a distraction from the central arguments the government wished to present.⁴⁷ In the case, the only intervention sought and granted was by Marriage Equality Australia, a homosexual rights activist group, which presented arguments in support of the ACT legislation.

B. The Decision in Commonwealth v. ACT

A unanimous Court handed down its judgment and reasoning, holding that the Act was invalid.⁴⁸ The Court held that the whole of the Act had to be struck down because it was inconsistent with the Marriage Act within the meaning of section 28 of the *Australian Capital Territory (Self-Government) Act 1988* and, as a consequence, had no effect.⁴⁹ The Court held that the *Marriage Act*, as amended in 2004, provided a comprehensive and exhaustive statement of the law in respect of marriage in Australia.⁵⁰ No territorial legislation could accord any relationship the status of marriage inconsistent with the Act.⁵¹ If this were to be considered a victory by those who

47. *Id.*

48. *Commonwealth*, 88 HCA at 21.

49. *Id.* at 19–20.

50. *Id.*; see also Twomey, *supra* note 9.

51. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶¶ 57–9 (Austl.) (“The *Marriage Act* regulates the creation and recognition of the legal status of marriage throughout Australia. The Act’s definition of marriage sets the bounds of that legal status within the topic of juristic classification with which the Act deals. Read as a whole, the *Marriage Act*, at least in the form in which it now stands, makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage. Why otherwise was the *Marriage Act* amended, as it was in 2004, by introducing a definition of marriage in the form which now appears, except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive? The 2004 amendments to the *Marriage Act* made plain (if it was not already plain) that the federal marriage law is a comprehensive and exhaustive statement of the law of marriage (emphasis added). Those amendments applied the newly introduced definition of marriage to the provisions governing solemnisation of marriage and gave effect to that definition in the provisions governing the recognition of marriages solemnised outside Australia. Section 88EA of the *Marriage Act* (inserted by the 2004 amendments) provides expressly that a union solemnised in a foreign country between persons of the same sex must not be recognised as a marriage in Australia. These particular provisions of the *Marriage Act*, read in the context of the whole Act, necessarily contain the implicit negative proposition that the kind of marriage provided for by the Act is the only kind of marriage that may be formed or recognised in Australia.”); See also Olivia Rundle, *An Examination of Relationship Registration Schemes in Australia*, 25 AUSTL. J. FAM. L. 126 (2011) (quoting Garfield

opposed the concept of genderless marriage, there was, as mentioned, troubling discourse in the reasoning.

During argument, the solicitor-general for the Commonwealth was asked whether, on his argument, it was necessary to decide the extent of the federal marriage power.⁵² Mr. Gleeson SC submitted that it was not necessary.⁵³ However, when pressed, he reluctantly made the concession that the power, as a plenary power, was likely not confined by an originalist interpretation to marriage as it was understood in 1900, just prior to the Constitution coming into operation. The ACT argued that the originalist interpretation was the correct construction of the head of power and thus that it left legislative space for the ACT legislation because same-sex marriage was not contemplated in 1900.⁵⁴ The Court justified its interest in this issue in observing that if the boundaries of the power were not known, it may be possible for the ACT law to operate concurrently and not offend section 28.⁵⁵

The curiosity of the Court and the submissions of the ACT, supported as they were by Marriage Equality Australia and not challenged by any contradictor, resulted in the Court proceeding

Barwick, *The Commonwealth Marriage Act 1961*, 3 MELBOURNE U. L. REV. 277 (1961)) (stating the purpose of the legislation was to “produce a marriage code suitable to present day Australian needs”).

52. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶ 50 (Austl.).

53. *Id.*; Commonwealth v ACT Hearing Transcript, *supra* note 44 includes the following exchange between Mr. J.T. Gleason and Justice Hayne:

HAYNE J: Questions of constitutional power cannot go by concession, can they, Mr Solicitor?

MR GLEESON: Your Honour, we accept entirely the thrust of these matters. First of all, we have put something as the better view. The ACT commends that view. The intervener enthusiastically commends that view. The Court does not have a contradictor on that question. The Court would not decide any matter merely on agreement. That is just not on, absolutely not on. If the matter needs to be decided, the Court will decide it and what I had proposed to do, given there was not a contradictor, was to identify what I will call the narrow argument and then deal with what I will call the broader argument.

So I will seek to identify both those arguments, there being no contradictor. But I do not retreat from the proposition that because our law on any view has stayed on the right side of the relevant part of the circumference of the circle, it is either at the circumference or it is inside it. In that sense, it is not necessary to decide the constitutional question.

54. *Id.* at ¶¶ 19–21, 29–38.

55. *Id.* at ¶¶ 3, 9.

into an area that the Commonwealth and those who oppose genderless marriage would have preferred left untouched. Contrary to what it had previously observed in relation to institutional concepts such as trademarks, juries, and marriage, it now found *obiter* that any originalist argument would have to be rejected.⁵⁶ The Commonwealth head of power extended the legalization of same-sex marriage. It observed that the marriage head of power in the Constitution gave the federal Parliament power not only to provide for same-sex marriage but for the recognition of any form of marriage between natural persons.⁵⁷

In its exploration of the issue, it made the logical connection that the supporters of genderless marriage have long been seeking to avoid; namely, that there is no distinction between same-sex marriage and polygamous marriage:

The formal requirements to establish the union, and thus the legally recognised status of marriage, may be very simple (for example, no more than the exchange of certain promises before witnesses). The rights and obligations which stem from that status will commonly include rights and obligations about maintenance and support, succession to and ownership of property (both as between the parties to the marriage and between the parties and others) and, if there are children of the union, rights and obligations in relation to them.

The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions between a man and a woman to the exclusion of all others, voluntarily entered into for life. Marriage law is and must be recognised now to be more complex. Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same sex couples.⁵⁸

56. *See supra* note 1.

57. AUSTRALIAN CONSTITUTION s 51(xxi).

58. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶¶ 34–5 (Austl.).

C. Criticisms of the Court's Approach in Commonwealth v. ACT

This decision created multiple problems. First, it opened up a political debate about what other forms of marriage the state should recognize. Second, it created uncertainty on when groups should intervene in cases. Third, it will lead to difficult challenges between same-sex marriage and religious business individuals. Fourth, it dealt with issues unnecessary to its final decision. Finally, it created a new method of constitutional interpretation that brings with it inherent uncertainty.

First, the decision effectively turned the issue of defining marriage into a political matter for the federal Parliament to resolve. It may have also fueled the debate as to just how “equal” the law could purport to be that singled out same-gender marriage as what is permitted by the law—more than the polygamous genie that has been let out of the marriage-power bottle. The debate is now genuinely raised as to why there should be criminal sanctions against incestuous relationships and why there should be any lower limit on the age for consenting to marriage.⁵⁹

Second, the decision not only created political and sociological dilemmas for legislators, it also necessarily creates new uncertainties for constitutional lawyers and for those considering intervention in any existing High Court action.⁶⁰ The intervention of Marriage Equality Australia in the proceedings and the quandary created by the *dicta* has left religious groups wondering whether the outcome might not have been different had they intervened after all.⁶¹ Since the Australian High Court's decision, it seems that many religious groups are now of the view that they can no longer afford *not* to

59. See Louise Hall, *Judge Compares Incest and Paedophilia to Past Attitudes Towards Homosexuality, Claiming They Might Not Be Taboo Anymore*, THE SYDNEY MORNING HERALD (July 10, 2014), <http://www.smh.com.au/nsw/judge-compares-incest-and-paedophilia-to-past-attitudes-towards-homosexuality-claiming-they-might-not-be-taboo-anymore-20140709-zt0v2.html>; Justin Huggler, *Incest a 'Fundamental Right,' German Committee Says*, THE TELEGRAPH (Sept. 24, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/germany/11119062/Incest-a-fundamental-right-German-committee-says.html>; Bridget Brennan, *Teen Prevented From Flying Overseas "For Arranged Marriage"*, AUSTRALIAN BROADCASTING CORPORATION (Sept. 27, 2014), http://www.abc.net.au/news/2014-09-28/teen-prevented-from-flying-overseas-for-arranged-marriage/5774364?WT.ac=localnews_sydney.

60. AUSTRALIAN CONSTITUTION s 51(xxi).

61. *Supra* note 46.

apply for leave to intervene when cases that may have implications for religious freedom will be heard.⁶²

Third, as would be apparent from the letter from the Attorney General⁶³ and from the following analysis,⁶⁴ the questions surrounding same-sex marriage and discrimination against those in homosexual relationships have become inextricably linked with questions of freedom of conscience and religious freedom.⁶⁵ For example, a forced “tolerance” for same-sex marriages has risen to a new level in what has come to be referred to as the “butcher, baker and candlestick maker” cases.⁶⁶ Despite assurances that clergy will not be compelled to render their services or make available their facilities to solemnize marriages of homosexual couples contrary to their conscience, the laity of their congregations—equally people of conscience—find themselves required to trade contrary to their conscience. They cannot withhold support for homosexual wedding ceremonies by declining to supply goods or services even though their religious leaders are not required to do so. As I have noted elsewhere, same-sex marriage rights have recently been held in New York State to trump property rights.⁶⁷ Professor Anne Twomey recently noted that *Commonwealth v ACT* has not been critically analyzed for its implications in “butcher, baker and candlestick

62. *Id.*

63. *Supra* note 41; *Commonwealth*, 88 HCA at 21; Twomey, *supra* note 9.

64. *See supra* text accompanying note 57.

65. *Id.*

66. *See* LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE REPORT INTO THE RECOGNITION OF FOREIGN MARRIAGES BILL 2014 (Cth) §§ 2.28–29 (Austl.) [hereinafter FOREIGN MARRIAGES BILL 2014 COMMITTEE REPORT], *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Recognition_of_Foreign_Marriages_Bill_2014/~/_media/Committees/legcon_cte/Recognition_of_Foreign_Marriages_Bill_2014/report/report.pdf; *See, e.g., Christian Youth Camps Ltd. v Cobaw & Ors* (2014) 308 ALR 615 (Austl.).

67. *See* Neville Rochow, *Same-Sex Marriage and Property Rights Compete in New York State*, in ON THE CASE ISSUE 7, *available at* <http://www.nd.edu.au/sydney/schools/law/on-the-case/on-the-case-issue-7>. In this case, the right to grant entry onto land owned and operated by the corporate respondent and its directors was held not to extend to the telephone call in which the complainants were informed that because of devout Catholic beliefs of the directors they would be unable to hire out their facility. Their right to refuse entry was abrogated by the relevant discriminatory laws protecting the sensibilities of the complainants. *Id.*

maker” cases or its relation to the interpretation of the Constitution.⁶⁸

Fourth, the High Court decided matters beyond those necessary to decide the case.⁶⁹ In addition to the *dicta* contained in ACT’s reasoning,⁷⁰ Professor Twomey is critical of the High Court unnecessarily going beyond the immediate decision for the case. None of the parties before the Court placed the validity of the *Marriage Act* at issue.⁷¹ Since that was not at issue, the only question legitimately before the Court was that of the inconsistency of the *Territory Act* with the federal Act, not a hypothetical question as to how far the legislature might be permitted to go in regulations regarding marriage.⁷²

Professor Twomey observed:

Their Honours contended that it was necessary to decide whether s 51(xxi) permits the Commonwealth Parliament to enact “a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the *Marriage Act* if the federal Parliament had no power to make a national law providing for same sex marriage.” It is hard to see how this could be the case, given that court had earlier stated that the object of the ACT Act was to “provide for marriage *equality* for same sex couples, not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognize.” If this is so, then how could an ACT law establishing the status of “marriage” for same sex couples, operate concurrently with the *Marriage Act 1961* (Cth), if both the *Constitution* and the *Marriage Act* defined marriage exclusively as unions between people of the opposite sex and the Commonwealth law covered the field of “marriage”?⁷³

Her point is a telling one. A law that defines, for example, particular types of intellectual property as the only species of

68. Anne Twomey, *Same-Sex Marriage and Constitutional Interpretation*, 88 AUSTL. L. J. 613, 613–16 (2014).

69. *Id.* at 613.

70. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶¶ 48–61 (Austl.); *See supra* text accompanying note 57.

71. Twomey, *supra* note 68, at 613–14.

72. *Id.* at 613.

73. *Id.* at 613–14 (citations omitted).

property that can be so defined, if valid, would leave no legislative space for a state or territory to supplement the list of species of property that may be described as “intellectual property.” There would be no need, in such a case, for a court to conjecture as to whether the Commonwealth could have added a specific supplement to the list or even to conjecture more broadly at all. That legislative route would be foreclosed to all other legislatures by virtue of the Commonwealth having pronounced exclusivity. The provisions of section 88AE of the *Marriage Act* could have been widened to add states and territories same-sex marriages to those foreign marriages that are forbidden recognition in Australia. But given that in 2004 there was no announced prospect of state- or territory-based marriages, the intention of exclusivity of heterosexual marriage under the *Marriage Act* amendments was clear enough.⁷⁴ It is understandable that the Court should wish to deal with the obviously related question of the extent of the legislative power in respect to marriage so that it could return the question back to the Parliament. But to do so without appropriate contradictors on each of the aspects of this question was unusual and not helpful in the long run to the conduct of the common law adversarial system.

Fifth, the High Court introduced a new method of constitutional interpretation, “topics of juristic classification,” which brings inherent uncertainty.⁷⁵ Professor Twomey criticized the dismissal of originalist arguments, not joined properly in the arguments heard by the Court.⁷⁶ The contention that “marriage” should mean the same thing as it had meant in 1900 was dismissed peremptorily:

The utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied. This case does not require examination of those theories or the resolution of any conflict, real or supposed, between them. The determinative question in this case is whether s 51(xxi) is to be construed as referring only to the particular legal status of “marriage” which could be formed at the time of federation (having the legal content which it had according to English law at that time) or as using the

74. See *supra* text accompanying note 57.

75. Twomey, *supra* note 68, at 613.

76. Twomey, *supra* note 68, at 614–15.

word “marriage” in the sense of a “topic of juristic classification”. For the reasons that follow, the latter construction should be adopted. Debates cast in terms like “originalism” or “original intent” (evidently intended to stand in opposition to “contemporary meaning”) with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.⁷⁷

As Professor Twomey noted, “[i]n doing so, [the court] seemed to regard such interpretative approaches as mysterious foreign distractions that were irrelevant to its own past reasoning.”⁷⁸

Instead, it developed a new method of interpretation, not previously used or heard of: it decided that marriage was a “topic of juristic classification” that included “laws of a kind ‘generally considered for comparative law and private international law, as being the subjects of a country’s marriage laws.’”⁷⁹ By this pronouncement, the High Court held that “the meaning of marriage for constitutional purposes is to be interpreted by reference to the scope of marriage laws in other countries”⁸⁰ rather than by what was understood by the concept of marriage in 1900.⁸¹ By this new method of constitutional interpretation, the High Court introduced a new set of imponderables to be explored the next time that it examines the extent of the marriage power. It changed the power from one that is a juristic concept accepted in Christian nations to one that embraces marriage as it is understood, in all of its dimensions, in any number of nations.

This new concept of “juristic classification” as a method of constitutional interpretation brings inherent uncertainty, whereas previously it was used only pejoratively.⁸² Professor Twomey noted that the only instance of using “a ‘topic of juristic classification’” as a means of interpreting a constitutional term appears to be the dissenting judgment of Windeyer J, in *Attorney-General (Vic) v*

77. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, para 14 (Austl.) (citations omitted).

78. Twomey, *supra* note 68, at 614.

79. *Id.* (citing *ACT* 250 CLR, para 22).

80. *Id.*

81. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, ¶ 23 (Austl.); *see also* Twomey, *supra* note 68, at 614.

82. Twomey, *supra* note 68, at 615.

*Commonwealth*⁸³ (the “*Marriage Act Case*”). In this case, his Honour referred to the “concept of marriage that is universal in all systems of law that participate in” a shared “inheritance of European Christian civilisation.”⁸⁴ In this reference, his Honour appeared to be adopting what would be termed an “originalist” approach to interpretation.⁸⁵

Professor Twomey was, with respect, quite correct when she said that the High Court could have used more orthodox methods of constitutional interpretation to achieve the same outcome. And most importantly, she observed that adopting the novel concept of “juristic classification,” has left unexplained why “marriage” has been separated out from other institutional concepts that had previously received an originalist interpretation such as “court” and “jury.”⁸⁶

She observed in conclusion:

As same-sex marriage has not been recognised yet in a majority of countries, it would appear that this topic of juristic classification can be affected by the laws of a minority of countries and as the High Court understandably is no longer prepared to draw distinctions between countries, such as “Christian countries” and others, then the potential is opened for laws of even the most oppressive countries to affect a topic of juristic classification in Australia. Moreover, as noted above, it seems that some aspects of the constitutional meaning of marriage can be changed by reference to laws adopted in other countries (such as polygamy and same-sex marriage) but that other aspects, such as the consensual nature of marriage and the intention that it endure, remain immutable and unaffected by foreign law. No explanation was given as to why this was so, leaving this new method of constitutional interpretation shrouded in uncertainty.

... The risk of establishing new methods of constitutional interpretation is that one can never be sure where they might lead. While the most likely outcome is that the pool of topics of juristic classification will remain stagnant with no new entries, this

83. *Id.*

84. *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 578 (Austl.) (Windeyer, J., dissenting).

85. Twomey, *supra* note 68, at 615.

86. *Id.* at 615–16.

judgment might yet give birth to more surprising developments in the future.⁸⁷

Whatever other consequences of the decision in *Commonwealth v. ACT*, two are certain: first, that the matter of same-sex marriage has now been returned to the federal Parliament as a political issue; second, that future cases involving homosexual rights will attract applications for intervention from both sides of the debate. But the consequences in *ACT* did not extend as far as those in *Baskin*.

IV. *BASKIN V. BOGAN*; *WOLF V. WALKER*⁸⁸

While the courts in *ACT* and *Baskin* were both deciding similar issues and coming to opposite conclusions, the approaches could not be more different. Despite the criticisms made by both Professor Twomey and me, the High Court adopted and maintained the legalistic approach that it is known for. In contrast, in *Baskin*, the circuit court embarked upon inquiries into factual matters the relevance of which is not altogether obvious to the issue decided. It does so reaching conclusions that would seem to be either contrary to known evidence or that would, despite the reasoning available on the record, remain contestable. Also, if the reasons for the decision are a true guide to the arguments put to the court by the states, they seem to have omitted a number of quite obvious arguments. This section will begin by addressing some general, broad criticisms of the *Baskin* decision before moving on to specific arguments that the court relied on to justify same-sex marriage without regard to evidence that ran contrary to the court's conclusions.

A. *General Criticism of Baskin*

Baskin had several major flaws. First, it made unsupported predictions about the trend of same-sex marriage. Second, it assumed that it was in the best position to know a state's purpose in supporting heterosexual marriages.

87. *Id.*

88. *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) *cert. denied sub nom.* *Walker v. Wolf*, 135 S. Ct. 316 (2014).

That the decision was going to be controversial is evident from the first line when Judge Posner, delivering the opinion on behalf of the court, makes a prediction as to the trend of same-sex marriage in the United States. “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.”⁸⁹ The prediction implicit in the adjective “shrinking” predicts not only political outcomes, but also judicial outcomes at first instance on appeal to intermediate courts⁹⁰ and, of course, the now well-publicized case of *Kitchen v. Herbert* regarding the validity of Utah’s heterosexual marriage laws, enshrined in its constitution.⁹¹

In the next paragraph of the decision, the controversial nature of the reasoning and decision is confirmed:

Formally, these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, as we shall see, they are about the welfare of American children. The argument that the states press hardest in defense of their prohibition of same-sex marriage is that the only reason the government encourages marriage is to induce heterosexuals to marry so that there will be fewer “accidental births,” which when they occur outside of marriage often lead to the abandonment of the child to the mother (unaided by the father) or to foster care. Overlooked by this argument is that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married.⁹²

For a lawyer not as well acquainted with Fourteenth Amendment issues central to this case as American lawyers would be, the first surprise of this case is why the court is permitting parties to embark on this kind of factual defense of the legislature’s will. In Australia, this type of question would be the subject of a parliamentary inquiry through an appropriate committee. This was the case in the recently

89. Baskin, 766 F.3d at 653.

90. Such as the decision that went contrary to the prediction in *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

91. 961 F. Supp. 2d 1181 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014); *stay granted*, 134 S. Ct. 893 (2014).

92. Baskin, 766 F.3d at 654.

released Senate inquiry into whether a bill for the recognition in Australia of foreign same-sex marriages should be passed, upon inquiry and consideration of the evidence. On the evidence, the Senate did not recommend that the bill be passed.⁹³ Unless a legislature has acted beyond its constitutional power, the reasons for the law would seem to be a matter for the legislature.⁹⁴

Second, if such an inquiry is relevant under the American constitutional Fourteenth Amendment principle of “reasonable basis,” then surely the argument above, as explained by Judge Posner, could not possibly have been the best argument that could have been put forward by the states. Evaluative evidence as to what is in the best interests of the community, particularly children, is available now in a number of well-documented longitudinal studies. And the argument would not just be one of encouraging marriage, surely, but of the welfare of children in marriages where there are parents of both genders, ideally their biological parents. Allied to this, at the community level, is the impact that same-sex marriage has had on existing freedoms, among which the rights to freedom of conscience and freedom of religious practice are foremost. It is now well established in American jurisprudence, to which I will return,⁹⁵ that in this contest of rights, both freedoms suffer.

Third, the judicial assertion begs yet a further question; whether all types of marriages are in the best interests of the child. But even assuming such a question were to be the subject of the court’s inquiry, how does an intermediate court of appeal ascertain those facts on what are clearly contentious and complex questions of sociological fact and data collection? This judicial assertion is as astounding for its peremptory dismissal of the argument that provoked it as it is for the forensic leaps that inhere in it.

93. FOREIGN MARRIAGES BILL 2014 COMMITTEE REPORT, *supra* note 66, at ss 2.55–2.56, at 17. Details of the Bill are available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s963.

94. FOREIGN MARRIAGES BILL 2014 COMMITTEE REPORT, *supra* note 66, at s 2.55, at 17.

95. *See infra* text accompanying notes 277 *et seq.*

B. Baskin's Faulty Reasoning

In the criticism made here of *Baskin*, first is a consolidation of general criticisms made of the decision by the conservative Internet commentators together with my own observations.⁹⁶ I then turn to some specific criticisms that could be leveled at the case from an Australian perspective, including evidence that does not appear to have been considered by the Court.⁹⁷

The reasoning of Judge Posner seems to rest on four critical points. First, infertility does not prevent other couples from marrying. Second, homosexuality is an inherited orientation. Third, same-sex marriage does no harm to the existing institution of marriage. Fourth, same-sex marriages will benefit children. On each of these points, the reasoning is superficial.

1. Infertile couples

First, the court dismissed the State's arguments in favor of heterosexual marriage in part because of the issue of the infertility of homosexual marriages.⁹⁸ If the reasons fairly represent the argument as made, it seems the argument was rather poorly framed. But the

96. Unlike the *ACT* case, the decision in *Baskin* has received criticism from a number of conservative Internet commentators who have criticized it as being amoral pro-homosexual marriage polemic. See *Baskin* 766 F.3d; Michael Cook, *A Deeply Amoral Deference of Same-Sex Marriage*, CONJUGALITY (Sept. 10, 2014), <http://www.mercatornet.com/conjugality/view/14767>; *State is "Fake Church" Imposing its Own Form of Morality on All*, THE CHRISTIAN INST., (Sept. 22 1014), http://www.christian.org.uk/news/state-is-fake-church-imposing-its-own-form-of-morality-on-all/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+christianinstitute+religiousliberty+%28The+Christian+Institute+%C2%BB+Religious+liberty%29&utm_content=FeedBurner. In fairness, it should be noted that pro-gay websites have praised the decision as an unanswerable disposal of all of the arguments against same-sex marriage. See, e.g., Michelle Dean, *Hero Federal Appeals Judge Burns Down the Case Against Gay Marriage*, GAWKER (Sept. 5, 2014, 9:49 AM), <http://gawker.com/hero-federal-appeals-judge-burns-down-the-case-against-1630697112>.

97. It should be noted that much of the alleged financial and proprietary discrimination that is considered in the reasons would not be relevant in Australia because of the state and federal legislation to which I have already referred. See *supra* note 27. Those are matters on which I cannot be critical of the Court. It seems rather an omission of the respective legislatures to have made any allowance in the law for the manner in which people in relationships outside marriage may want to arrange their affairs. It may be this oversight on the part of lawmakers that explains the haste with which same-sex marriage was adopted in the United States.

98. *Baskin v. Bogan*, 766 F.3d 648, 661 (7th Cir. 2014) *cert. denied sub nom.* *Walker v. Wolf*, 135 S. Ct. 316 (2014).

judicial riposte is equally jejune. Judge Posner points out that Indiana bans marriages of first cousins until they are well past the age of procreation at age sixty-five. “Elderly first cousins are permitted to marry because they can’t produce children; homosexuals are forbidden to marry because they can’t produce children.”⁹⁹ But surely, the focus in the case of homosexual couples is whether they are appropriate candidates for adoption in the first place. Would the state laws permit these sexagenarians to be adoptive parents? If not, it is not their reproductive status that is at issue but their inappropriateness as adoptive parents. That is the question that must be asked of the homosexual couple, which would require detailed sociological analysis. While single-sex upbringing is a fact of life in, say, the case of aunts or uncles or other relatives that may be charged with the upbringing of a child, they are exceptional and should not be legislated as the default position.

In fairness to Judge Posner, the question put by the court to Indiana’s counsel “you agree same-sex couples can successfully raise children, why shouldn’t the ban be lifted as to them?” did not receive the most persuasive of responses.¹⁰⁰ It gave rise to derision in the reasons.¹⁰¹ This derision could have been avoided if the response had been that the State’s policy was based upon the most credible evidence available as to the durability of homosexual relationships and the outcomes for children that have reached adulthood in relationships other than with their biological parents. If Indiana had taken this approach, the court would have had much less capacity to deride, particularly if that evidence were, as it should have been, the subject of submissions. That would surely have gone some distance to satisfying the test laid down in *United States v. Virginia* and *Mississippi University for Women v. Hogan* that there was an important governmental objective substantially related to the discriminatory means used to achieve it.¹⁰²

99. *Id.*

100. Baskin, 766 F.3d at 662. The lawyer responded by saying, “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.” *Id.*

101. *Id.*

102. See *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

2. *The genetic argument*

Second, Judge Posner concludes that homosexual orientation is genetic, an immutable and innate characteristic. To support this, his Honor cites a 2008 brochure from the American Psychological Association and scholarly articles in much the way that a court might refer to academic opinion on a point of economic theory.¹⁰³ But the outcome here is not a question of whether corporate behavior contravenes a statute but rather whether a constitutional principle should be invoked to invalidate state legislation with the effect of changing the long established social and legal institution of marriage—a matter, it might be suggested, that requires somewhat more certainty than contestable academic opinion. No other evidence seems to have been made available to the court on this point. And on this basis, his Honor concludes *as a fact* the genetic origins of the proclivity. However, it seems well-known that contrary opinions hold that no genetic cause has yet been identified; homosexuality's origin is still an open question.

There is, for instance, also the contrary argument that if homosexuality was genetic, it should have disappeared according to evolutionary theory: homosexuals do not produce offspring.¹⁰⁴ Judge Posner acknowledges that this is a problem, but says that the “kin selection hypothesis,” also known as “inclusive fitness theory,”¹⁰⁵ shows that homosexuality is compatible with evolutionary theory.¹⁰⁶ What Judge Posner fails to refer to is that the kin selection hypothesis or inclusive fitness theory is controversial and has been severely criticized by scientists, including the Harvard evolutionary biologist who first popularized the theory, Edward Wilson:

Inclusive fitness theory is not a simplification over the standard approach. It is an alternative accounting method, but one that works only in a very limited domain. Whenever inclusive fitness does work, the results are identical to those of the standard

103. See *Baskin v. Bogan*, 766 F.3d 648, 657–58, 666–68 (7th Cir. 2014) *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014).

104. See *id.*

105. See *id.*; William D. Hamilton, *The Evolution of altruistic behavior*, 1963 AM. NAT. 97, 354–56.

106. See *id.* at 657–58.

approach. Inclusive fitness theory is an unnecessary detour, which does not provide additional insight or information.¹⁰⁷

The genetic origin of homosexuality is unsettled and contestable. This presents what appears to be a fundamental flaw in this part of the opinion. The case illustrates that the Court was hardly the right venue for the resolution of issues of strongly contested evolutionary theory in order to effect constitutional and social change.

3. *No harm to society or the institution of marriage*

Third, comes the reasoning that same-sex marriage does no harm to the institution of marriage or to society at large. This is an assertion that may be impossible to prove in less than two generations. Judge Posner seems quite impressed by a recent study which analyzed whether marriage rates fell after Massachusetts permitted same-sex marriage. “[A]llowing same-sex marriage has no effect on the heterosexual marriage rate,”¹⁰⁸ he concludes. But this is not to the point. How could a snapshot of Massachusetts marriages from 2004 to 2010 be expected to say anything worthwhile about the effect upon an international and centuries-old institution? And, as has already been mentioned, his Honor’s treatment of the implications for children seems superficial and poorly reasoned in the extreme.¹⁰⁹

4. *Benefits to children*

Fourth, Judge Posner confirms that the welfare of children should be at the front and center of arguments about marriage.¹¹⁰ Since marriage is the best place to raise children, he argues, it is discriminatory to deny homosexual couples the right to raise their children within the framework of marriage.¹¹¹

But he only considers the material benefits of a hefty household income and the psychological comforts of having one’s parents be

107. Martin A. Nowak, Corina E. Tarnita, & Edward O. Wilson, *The Evolution of Eusociality*, 466 NATURE 1057, 1059 (2010).

108. *Baskin v. Bogan*, 766 F.3d 648, 668 (7th Cir. 2014) *cert. denied sub nom.* *Walker v. Wolf*, 135 S. Ct. 316 (2014).

109. *See supra* text accompanying notes 95–96.

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

111. *See id.*

married.¹¹² The real question that should have been addressed is whether a marriage with a mother and a father is the best place to raise children. Judge Posner ignores almost completely the psychological effects on children of growing up in a homosexual marriage, focused as he is on the rights of adults. It is these effects, as well as others, that this paper will now address.

V. TYPES OF EVIDENTIARY AND POLICY CONSIDERATIONS OVERLOOKED IN *BASKIN*

It is not just the way in which the court in *Baskin* dealt with the evidence and arguments that were before it or that it assimilated into its reasons that is troubling. Rather, it is what was not considered in the reasons that is particularly alarming. It is a demonstration that the curial process is not well suited to the type of policy considerations and judicial activism on which the court embarked.

In the case of *Baskin*, the burden on the State should have been relatively light given the conjectural nature of the support for the same-sex side of the argument. And so, at some stage in the process, it must fall to the complainant to show that there is not only a deficiency in the evidence adduced by the State in showing its reasonableness in so discriminating, but also that there is good reason why the court should not discriminate. Just how strong is the justification for same-sex marriage? A logical answer to that question seems to be missing from *Baskin*. Yet, it is not at all self-evident.

There were many stronger arguments that needed consideration other than this strawman. What follows are examples of the types of arguments and evidence that a thoroughgoing consideration would be likely to take into account. It starts with the statistical advantages of marriage. It then moves to the benefits to children of a stable marriage between their biological parents. It finishes with the statistical disadvantages of parenting outside of traditional marriage.

A. *Statistical Advantages of Heterosexual Marriage*

There is one matter on which Judge Posner is correct, despite his failure to cite supporting evidence: marriage *is* a “socially beneficial

112. *Baskin*, 766 F.3d at 664.

institution.”¹¹³ However, his Honor overlooked the fact that the vast bulk of the statistical evidence gathered has been about heterosexual marriage and the evidence regarding the comparability of homosexual marriage is either too new or longitudinally insufficient to compare the outcomes for both types of relationship. Some of the evident benefits of heterosexual marriage are outlined below:¹¹⁴

- Married people are more productive, have higher incomes, and enjoy more family time than the unmarried due to the division of specialization of labor.¹¹⁵
- Married men earn between 10% and 40% more than similarly situated unmarried men.¹¹⁶
- Married mothers are less likely to live in poverty.¹¹⁷
- Children are less likely, statistically, to live in poverty if they are raised by biological parents whose marriage endures.¹¹⁸
- Married men and women lead healthier lives than the unmarried.¹¹⁹
- Married women more often have access to health insurance.¹²⁰
- Divorced and widowed men and women are more likely to get into arguments and fights and to do dangerous things.¹²¹
- Married couples lead more ordered lives, with healthier eating and sleeping habits and take fewer chances that could cause accidents.¹²²

113. *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014) *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *see also* William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 991 n.185. *See also* the contrasting evidence arising from other studies discussed below at the text accompanying notes 153 and following.

114. For a general bibliography, see *Why Marriage Matters: Economic Impact*, FOR YOUR MARRIAGE, <http://www.foryourmarriage.org/economic-impact/> (last visited March 13, 2015), at which each of the works cited are referenced.

115. *Id.*

116. DAVID POPENOE & BARBARA WHITEHEAD, *THE STATE OF OUR UNIONS* 16 (2005).

117. WITHERSPOON INSTITUTE, *MARRIAGE AND THE PUBLIC GOOD: 10 PRINCIPLES* 20 (2006).

118. INSTITUTE FOR AMERICAN VALUES, *WHY MARRIAGE MATTERS: 26 CONCLUSIONS FROM THE SOCIAL SCIENCES* 19 (2005).

119. KEVIN ANDREWS, “MAYBE I DO” 30 (2012) (discussing drinking, substance abuse, drinking and driving and generally living dangerously among single men).

120. *Id.*

121. *Id.*

- Marriage improves both men's and women's psychological well-being.¹²³
- Married men and women have statistically longer lives than the unmarried.¹²⁴
- Married men and women statistically have lower rates of contracting cancer and it seems that marriage offers a better chance of survival in the event of diagnosis.¹²⁵
- Those who are married have statistically lower incidents of premature deaths from cardiovascular disease, hypertension, pneumonia, and stroke.¹²⁶
- The married have statistically fewer mental problems and tend to smoke and drink much less than separated or divorced men and women.¹²⁷
- Marital status has a stronger correlation with age at death than socioeconomic status for most major causes.¹²⁸

The research does seem unanimous to the effect that marrying and remaining married bring better health outcomes than any other form of lifestyle. The research also seems to be unanimous across jurisdictional boundaries, whether in the United States, Britain, Canada, or Australia.¹²⁹

In relation to a survey of almost 40,000 Australians to which Kevin Andrews refers,¹³⁰ researcher Jonathan Kelley observes, "It isn't just that happier people marry but when we follow single people over time, we find their happiness is actually boosted by marriage."¹³¹ Of course, Andrews and Kelley are both referring to longitudinal studies of heterosexual marriage. The evidence so far available on homosexual relationships is discussed in the section "How same-sex relationships compare" below.¹³²

122. *Id.*

123. *Id.*

124. KEVIN ANDREWS, "MAYBE I DO" 30 (2012).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. KEVIN ANDREWS, "MAYBE I DO" 31-32 (2012).

130. *Id.*

131. *Id.*

132. *See infra Part V.C.2.*

*B. The Benefits of Stable Marriage between Biological
Parents for Children*

The evidence not only indicates that marriage favors the wellbeing of adults, but, even more importantly, enhances in marked ways the happiness, health, and adjustment of children. Children who are raised by their two *biological* parents within a stable marriage enjoy significant advantages. Whether it be in terms of better health,¹³³ enjoyment of subsequent adult relationships,¹³⁴ or educational outcomes,¹³⁵ children from stable marriages are significantly better off. With respect to the research on educational outcomes, Andrews observes:

Families are one of the strongest influences on the growth of human confidence, mental and emotional wellbeing and physical health. Four decades ago, the Coleman report identified the family rather than the school as the major determinant of learning outcomes for children. The results have been replicated many times. Children of Indochinese refugees, who had missed months, even years of schooling, and had lived in relocation camps, with scant exposure to western culture and little knowledge of the English language, were found to achieve remarkable success. The stunning success was not found in the schools that they had originally come from or to which they subsequently attended, but attributable to their family environment. This is just one illustration of the powerful impact of stable marriage and family life on educational outcomes for children.

Children who grow up in an intact family achieve higher school scores, report significantly less school-related behavioural problems and higher aspirations for tertiary studies. They also receive greater parental nurturance, mentoring and advising.¹³⁶

*C. Statistical Disadvantages of Parenting Outside of
Traditional Marriage*

What is also absent from the reasoning in *Baskin* is whether relationships other than traditional marriage can be beneficial to

133. *Id.* beginning at 55.

134. *Id.* at 66–67.

135. *Id.* at 67–68.

136. KEVIN ANDREWS, “MAYBE I DO” 67 (2012).

children. This is again a serious oversight in the reasoning of the case. It is clear, from the above examples, which reflect only a small fraction of the research that has been done, that stable marriage between biological parents is the best predictor of good outcomes for adults and children and a net contributor to social stability.

This section shows this through a few different sets of statistics. First, it will address the social and economic costs of divorce and family breakdown. Second, it will move to a comparison of heterosexual and homosexual parenting by looking at two things: 1) the uncertain or inconclusive findings on the potentially negative impact on children of same-sex parents and 2) the difference in divorce rates between heterosexual and homosexual parents.

1. *The social and economic costs of divorce and family breakdown*

In a recent article, social commentator Bettina Arndt cited a British High Court Judge, Sir Paul Coleridge, who observed that “couples” shouldn’t have children if their relationship is not stable enough to merit getting married.¹³⁷ Speaking shortly before his retirement after a distinguished career in family law, the Judge challenged the common notion that it makes no difference whether parents cohabit or marry. “One [arrangement] tends to last and the other doesn’t. . . . [C]hildren with unmarried parents were twice as likely to suffer a family break-up as those with married parents. The proportion of children born to unmarried parents in Britain reached a record 47.5 per cent [in 2012].”¹³⁸

Referring to a Brookings Institution report, Arndt goes on to make the following observations:

The result, according to the report, is a growing social divide, with well-educated people still tending to marry and then have children, while lower socio-economic groups are more likely to have children in de facto relationships. These children often end up in single-parent families. This emerging difference in marriage patterns is

137. Bettina Arndt, *The Unspoken Truth About Marriage and Kids*, THE AGE (Dec., 16, 2013), available at <http://www.theage.com.au/comment/the-unspoken-truth-about-marriage-and-kids-20131215-2zf3f.html>.

138. *Id.* (quoting Sir Paul Coleridge, British High Court Judge who was citing Marriage Foundation research).

adding to the gap between the haves and the have-nots, increasing social disadvantage.

Of course there are de facto couples with lasting relationships and thriving children, but the broader patterns tell a different story – just as the 90-year-old who smokes has no bearing on the link between cigarettes and health risks. . .

The media is part of the problem, given in their number are more than a fair share of cohabiting couples. . . .

Public discussion of this important social trend is discouraged by media players who won't acknowledge that their preferred lifestyle choices have very different consequences on the other side of the social divide – yet the impact on kids of the casualisation of family relations is no laughing matter.¹³⁹

Millions of children are victims of adult selfishness. These phenomena are also indelibly etched into our national psyche and form part of our history that brings us shame. And it is as if the national disgrace of children being the victims of divorce were not enough. We have also in our recent history an acknowledgement of the “Stolen Generation” of Aboriginal children taken from their biological mothers in the 1940s and 1950s to be raised in Caucasian families.¹⁴⁰ There have also been Royal Commissions into this and other abuses of children in both publicly funded¹⁴¹ and religiously organized institutions.¹⁴² As a nation, Australia should certainly pause before racing headlong into any other change in social policy that would impact upon children, as marriage necessarily does. And a court such as that presided over by Judge Posner ought to have done the same.

139. *Id.* (citing Brookings Institution, *Knot Yet: The Future of Marriage in the U.S.*, available at http://www.brookings.edu/~media/events/2013/3/20-knot-yet-marriage/20130320_knot_yet_marriage_transcript.pdf).

140. See Australian Human Rights Commission, *Bringing them home: The 'Stolen Children' Report* (1997), available at <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>.

141. *Mullighan Inquiry*, GOVERNMENT OF SOUTH AUSTRALIA (Feb. 12, 2015), <https://www.sa.gov.au/topics/crime-justice-and-the-law/mullighan-inquiry> (concerning public institutional abuse).

142. ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEX ABUSE, 142, available at <http://www.childabuseroyalcommission.gov.au/> (last visited March 14, 2015).

Despite these glaring warnings of how society can systemically fail innocent children with alarming indifference, one is compelled to ask whether the lesson has yet been properly learned. Some social trends still move alarmingly towards the denial of the child's ability to identify with and live with their biological parents. Two of the foremost scholars on family, Wilcox and Marquardt, have recently expressed the social trend in these terms:

Throughout history, marriage has first and foremost been an institution for procreation and raising children. It has provided the cultural tie that seeks to connect the father to his children by binding him to the mother of his children. Yet in recent times, children have been increasingly pushed from center stage.¹⁴³

One of America's most prominent legal scholars and social commentators, Professor Mary Ann Glendon, described the current law and attitude towards marriage and divorce in these terms:

The [current] American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfilment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will. . . . Children hardly appear in the story; at most they are rather shadowy characters in the background.¹⁴⁴

And former University of Chicago Law School professor, Brigham Young University president, Utah State Supreme Court Justice, and current international religious leader, Dallin Oaks, observed as follows:¹⁴⁵

There are surely cases when a divorce is necessary for the good of the children but those circumstances are exceptional. In most marital contests the contending parents should give much greater weight to the interests of the children. . . . Children need the emotional and personal strength that come from being raised by

143. THE NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA* 82 (2011).

144. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 108 (1987).

145. Dallin H. Oaks, *Protect the Children*, *ENSIGN*, Nov. 2012, *audio and visual recordings available at* <https://www.lds.org/general-conference/2012/10/protect-the-children?lang=eng>.

two parents who are united in their marriage and their goals. As one who was raised by a widowed mother, I know first hand that this cannot always be achieved, but it is the ideal to be sought whenever possible.

Children are the first victims of the current laws permitting so-called “no-fault divorce.” From the standpoint of children, divorce is too easy. Summarizing decades of social science research, a careful scholar concluded that “the family structure that produces the best outcomes for children, on average, are two biological parents who remain married.”¹⁴⁶ A *New York Times* writer noted, “the striking fact that even as traditional marriage has declined in the United States . . . the evidence has mounted for the institution’s importance to the wellbeing of children.”¹⁴⁷ That reality should give important guidance to parents and parents-to-be in their decisions involving marriage and divorce. We also need politicians, policymakers, and officials to increase their attention to what is best for children in contrast to the selfish interests of voters and vocal advocates of adult interests. . . . We should assume the same disadvantages for children raised by couples of the same gender. The social science literature is controversial and politically charged on the long-term effect of this on children, principally because, as the *New York Times* writer observed, “same-sex marriage is a social experiment, and like most social experiments it will take time to understand its consequences.”¹⁴⁸

The reasoning of Judge Posner on behalf of the court falters not only by the logical omission of the above considerations, but if all of the available evidence were carefully considered, the result should have been the other way. That evidence shows that children whose biological parents have always been married enjoy higher grades at school, greater educational achievements, and live longer and happier lives with a better chance for success in their own marriages when they reach adulthood.¹⁴⁹ The opposite occurs when they are

146. *Id.* (quoting CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA*, 1960-2010, at 158 (2012)).

147. *Id.* (quoting Ross Douthat, *Gay Parents and the Marriage Debate*, N.Y. TIMES, June 11, 2012, <http://douthat.blogs.nytimes.com/2012/06/11/gay-parents-and-the-marriage-debate>).

148. *Id.*

149. *See supra* text accompanying note 144.

subjected to the turmoil of divorce and relationship breakdown.¹⁵⁰ It is the children who are clearly the major casualties of the poor personal and social choices made by those who care for them. Marriage is, on the evidence, the optimal circumstance in which they should be raised. Heterosexual nuclear family marriage is capable of being put up successfully against any other form of social experiment on how the family should be arranged.

The other side of the marriage equation that has to be evaluated is the cost of divorce. Whereas a stable marriage is a net contributor to society as well as the wellbeing of all of the members of the family that is based upon that marriage,¹⁵¹ divorce is a net cost to the community. A recent Newscorp analysis of information from the Australian Attorney-General's Department and the Department of Human Services has shown that the financial cost of divorce annually is a huge one.¹⁵² Each Australian taxpayer now pays about \$1,100.00 per year to support families in crisis. The figures that were analyzed in respect of the current financial year show that "the government will spend \$12.5 billion on support payments to single parents, including tax benefits and rent assistance. Another \$1.5 billion will be spent on the administration of the child support system, while the cost to taxpayers from family disputes in Australian courts is \$202 million [each year]."¹⁵³

The results of one of those studies conducted by Judith Wallerstein, who started interviewing a group of 131 children in 1975 are compelling.¹⁵⁴ These were children whose parents were all going through a divorce.¹⁵⁵ Wallerstein asked the children to tell her about the intimate details of their lives, which they did with remarkable candor. What was unique about the published study was that the researcher, Wallerstein, stayed in contact with the group of 131 children, along with a control group of children who were in

150. *Id.*

151. *Id.*

152. Lauren Wilson & Lisa Cornish, *Divorce Is Costing The Australian Economy \$14 Billion A Year*, NEWS.COM.AU (July 5, 2014, 10:52 PM), <http://www.news.com.au/lifestyle/relationships/divorce-is-costing-the-australian-economy-14-billion-a-year/story-fnet09y4-1226979027353>.

153. *Id.*

154. JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xix (2001).

155. *Id.*

stable families, for a quarter of a century. One social commentator cited the following passage from the authors in a review:

From the viewpoint of children, and counter to what happens to their parents, divorce is a cumulative experience. Its impact increases over time and rises to a crescendo in adulthood. At each developmental stage divorce is experienced anew in different ways. In adulthood it affects personality, the ability to trust, expectations about relationships, and ability to cope with change. . . . But it's in adulthood that children of divorce suffer the most. The impact of divorce hits them most cruelly as they go in search of love, sexual intimacy, and commitment. Their lack of inner images of a man and woman in a stable relationship and their memories of their parents' failure to sustain the marriage badly hobbles their search, leading them to heartbreak and even despair. . . . [C]hildren of divorce and those in happy intact families live in separate albeit parallel universes. . . . What about the children? In our rush to improve the lives of adults, we assumed that their lives would improve as well. We made radical changes in the family without realizing how it would change the experience of growing up. We embarked on a gigantic social experiment without any idea about how the next generation would be affected.¹⁵⁶

Social science is teaching us that marriage alone cannot be the best of outcomes. It must be a stable marriage of a couple of opposite sex. Furthermore, policy needs to encourage that outcome. This is precisely what history and common sense should have told us already. Social and economic costs and loss of social capital are bound up with failure to encourage stable marriage. The evidence behooves all legislators and policymakers to do all they can to preserve the institution of stable marriage between biological parents. Recognizing that departures from this ideal will, from time to time, arise or become necessary, legislators should not, on the evidence, lightly depart from marriage.

A court charged with a decision as important as that in *Baskin* needs to look to what will produce the best outcomes for the next generation. This raises a couple of questions. Is experimentation with

156. Bill Muehlenberg, *A Review of The Unexpected Legacy of Divorce by Judith Wallerstein*, CULTURE WATCH, <http://billmuehlenberg.com/2000/09/15/a-review-of-the-unexpected-legacy-of-divorce-by-judith-wallerstein/> (last visited March 10, 2015) (quoting WALLERSTEIN, *supra* note 154, at 298–99, 22, xxviii).

other forms of parenting justified and can society afford the potential costs?

2. *How same-sex relationships compare*

No comparison was undertaken by the Court in *Baskin* between the relative social benefits of heterosexual marriage and homosexual marriage, possibly because the evidence is scant. But such evidence as there is places a heavy persuasive burden upon the supporters of same-sex marriage that has not been discharged.¹⁵⁷

In fact, one of the constant refrains used by same-sex marriage supporters is that there is nothing to fear because nothing will really change if same-sex marriage becomes legal in Australia.¹⁵⁸ This seems counterintuitive and is contrary to the evidence available from overseas in critical areas of social concern. Specifically, same-sex parents have potentially negative effects upon their children a) in general and b) through a higher rate of divorce than for heterosexual marriages.¹⁵⁹ In short, the claims of no change or even of only minimal change are untrue.

a. Same-sex parenting. Studies looking at the effects of same-sex parents on their children have not conclusively shown that this form of parenting is the same as or better than heterosexual parenting. While there are studies suggesting findings in favor of same-sex parents, those studies have many weaknesses that make it nearly impossible to safely rely on their findings. There is at least enough uncertainty as to the benefits to the child for one to take care and time in promoting same-sex parenting as an acceptable social institution. This section will focus on an Australian study and detail its problems with methodology, contradictions, and ethics.

There is an overall problem with any sociological evidence that is examined in relation to same-sex parenting. Neither side of the debate can claim to have had sufficient time for the experiment of

157. See *supra* text accompanying notes 124–43.

158. David Penberthy, *Nothing to Fear About Gay Marriage*, THE ADVERTISER (Adelaide, Austl.) (Apr. 20, 2013, 11:30 PM), <http://www.adelaidenow.com.au/news/opinion/david-penberthy-nothing-to-fear-about-gay-marriage/story-e6freabc-1226625060309>.

159. This section does not discuss other harms to the society from losses of freedoms of speech, conscience, and religion.

same-sex parenting to be rigorously tested with sufficient data over time and large sample sizes. However, those studies that have been undertaken cannot be interpreted as auguring well. In fact, one of the latest and most thorough studies finds significant disadvantages reported by young adults with a parent who had same-sex relationships prior to the child's turning eighteen.¹⁶⁰ With stains on our nation's history pages in actions taken at the expense of children (such as the Stolen Generation and other instances of institutional child abuse as referred to above) these findings should not be ignored or rejected out of hand. Yet, that seems to be precisely what is being advocated by a number of lesbian, gay, bi-sexual and transgender (LGBT) activists and their sympathizers.¹⁶¹

Studies in this area produce a great deal of controversy.¹⁶² There is an obvious temptation to exaggerate the benefits. It is also tempting, possibly, to jump the gun on proper research methodology. One of the current controversies relates to the most recent Australian study done on child health in same-sex families, most of which coverage has been positive: *The Australian Study of Child Health in Same-Sex Families* or ACHES. ¹⁶³ ACHES had "a convenience sample of 390 parents from Australia who self-identified as same-sex attracted and had children aged 0-17 years. Parent-reported, multidimensional measures of child health and wellbeing and the relationship to perceived stigma were measured."¹⁶⁴ The self-identified volunteers for the study—some 315 parents—represented 500 children, eighty percent of them with female index parent and eighteen percent with a male index parent.¹⁶⁵

160. See Mark Regnerus, *How Different Are Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures*, 41 SOC. SCI. RESEARCH 752 (2012).

161. See *supra* notes 136–37. See also Ilana Yurkiewicz, *Why Mark Regnerus Study Shouldn't Matter, Even if it Were the Most Scientifically Robust Study in the World*, SCIENTIFIC AM. BLOG (Jun. 16, 2012), <http://blogs.scientificamerican.com/unofficial-prognosis/why-mark-regnerus-study-shouldnt-matter-even-if-it-were-the-most-scientifically-robust-study-in-the-world/>.

162. See *supra* text accompanying notes 174–75.

163. Simon R. Crouch et al., *Parent-Reported Measures of Child Health and Wellbeing in Same-Sex Parent Families: A Cross-Sectional Survey*, BMC PUB. HEALTH 14:635 (June 21, 2014), available at <http://www.biomedcentral.com/1471-2458/14/635/abstract>.

164. *Id.* at 1.

165. *Id.* at 6.

One critic observed the reaction to the study's findings:

The latest "research" about same-sex parenting was published in Australia to considerable fanfare because it "found" that children's well-being with homosexual parents was as good or better than with heterosexual parents. Any problems faced by the children were attributed to the "stigma" associated with homosexual parenting. The lead author, Simon Crouch, claimed in the Conversation, "It is liberating for parents to take on roles that suit their skills rather than defaulting to gender stereotypes, where mum is the primary caregiver and dad the primary breadwinner. Our research suggests that abandoning such gender stereotypes might be beneficial to child health."¹⁶⁶

But ACHES is the subject of serious criticism on a number of methodological bases.¹⁶⁷ The popular press coverage has not disclosed serious methodological weaknesses in ACHES, as pointed out by Mark Regnerus¹⁶⁸ and by Janice Crouse (author of *Children at Risk*¹⁶⁹ and executive director and senior fellow at Concerned Women for America's Beverly La Haye Institute).¹⁷⁰

The first weakness is that the study uses self-registration rather than random sampling. Regnerus cites the following in the methodology section: "The convenience sample was recruited using online and traditional recruitment techniques, accessing same-sex attracted parents through news media, community events and community groups. Three hundred and ninety eligible parents contacted the researchers . . ."¹⁷¹ Regnerus then points to the sampling distortion and bias inherent in the methodology leading to the conclusion by referring to the sampling approach announced two years before the study was completed:

166. Janice Shaw Crouse, *What About That Australian Study About Same-Sex Parenting?*, THE AM. SPECTATOR (July 18, 2014), <http://spectator.org/articles/60001/what-about-australian-study-about-same-sex-parenting>.

167. See *infra* text accompanying notes 183–85.

168. Mark Regnerus, *Is Same-Sex Parenting Better for Kids? The New Australian Study Can't Tell Us*, THE WITHERSPOON INST. (July 9, 2014), <http://www.thepublicdiscourse.com/2014/07/13451/>.

169. JANICE SHAW CROUSE, CHILDREN AT RISK: THE PRECARIOUS STATE OF CHILDREN'S WELL-BEING IN AMERICA (2010).

170. Crouse, *supra* note 166.

171. Regnerus, *supra* note 168.

“Initial recruitment will . . . include advertisements and media releases in the gay and lesbian press, flyers at gay and lesbian social and support groups, and investigator attendance at gay and lesbian community events Primarily recruitment will be through emails posted on gay and lesbian community email lists aimed at same-sex parenting. This will include but not be limited to, Gay Dads Australia and the Rainbow Families Council of Victoria.”¹⁷²

There are two major problems with this approach for sampling. First, the criticism that Regnerus levels at this methodology is that it does not produce a study of *average* same-sex households with children.¹⁷³ He says that to compare the results of this study with that of any “population-based sample of everyone else is . . . suspect science.”¹⁷⁴ As a further explanation, Crouse notes that

[Crouch] admits that convenience samples “are fraught with problems” . . . and notes that the parents’ level of education is skewed to higher education—73 percent have at least an undergraduate degree, with nearly half (46 percent) holding graduate degrees. Income level, too, is skewed, with 81 percent earning at least \$60,000 and more than a quarter earning more than \$100,000, nearly 20 percent earning \$150,000 to \$249,999, and 14 percent earning \$250,000 plus.¹⁷⁵

On this point, Crouse observes that Crouch “notes the significance of the differences in education and income; both he and others note that having more lesbian index parents and a shortage of male ones also significantly skews the data.”¹⁷⁶

Second, all of the participants in the study were well aware of the political import of the study topic and an unknown number of the participants signed up for that very reason.¹⁷⁷ In Crouse’s special report, she comments that its credibility is impaired by the fact that it is the gay parents who are giving themselves good ratings.¹⁷⁸ As she points out:

172. *Id.*

173. *Id.*

174. *Id.*

175. Crouse, *supra* note 166 (quoting Crouch, *supra* note 163).

176. *Id.*

177. *Id.*

178. *Id.*

Homosexual activists have been jubilant and have engaged in a public relations campaign, conveniently blurring the lines between fact and fiction. For instance, the activists imply that children actually participated when, in fact, the parents answered for the children and the children had no involvement in the responses. Further, any stigma reported was perceived by the parents as well. Is anyone surprised that the homosexual parents reported that their children are happier and healthier than children in heterosexual families?¹⁷⁹

She goes on to note that:

The authors advertised in homosexual publications and on websites to get participants; it was not a random sample. The study participants knew before going into the study that its purpose was to make homosexual parenting look successful. All of these factors made it difficult, if not impossible, to accurately assess the study's findings.¹⁸⁰

Regnerus similarly argues that it would be unwise to trust such self-reports.¹⁸¹ This is particularly true “given the high risk of ‘social desirability bias,’ or the tendency to portray oneself (or here, one’s children) as better than they actually are.”¹⁸² The temptation to report positive assessments is just unavoidable in this self-selected sample on a sensitive and politically charged topic.

Crouse concludes on self-selection by making points that discredit ACHES for use in the purposes to which proponents of same-sex marriage would wish to put it.

It is significant to note that the author admits (even though his fans angrily attack critics who make similar observations), “The self-selection of our convenience sample has the potential to introduce bias that could distort results.” Amazingly, Crouch also caveats his final conclusion; he summarized, “It is clear that there are aspects at play in our sample of same-sex families that allow improved outcomes in general behavior, general health, and in particular family cohesion.” Crouch admits that while “there is no evidence to suggest that any group of parents would systematically respond

179. *Id.*

180. *Id.*

181. Regnerus, *supra* note 168.

182. *Id.*

in a particular way on any given scale,” such a conclusion “cannot be discounted entirely.” He recommends that further research be based on reports from the children, “as well as contextual analysis of qualitative data drawn from family interviews” with a goal of eliminating “any bias that parental reporting might have.” Crouch concludes his study by expressing appreciation for a father in Gay Dads of Australia for his “guidance on community engagement” during the study.¹⁸³

The criticisms that Regnerus does make in relation to ACHESSE’s sampling methods are similar to those that he makes of the United States National Longitudinal Lesbian Family Study (NLLFS).¹⁸⁴ In the case of the NLLFS, Regnerus says that, again, the participants were well aware of the political import of the study topic and that the bias within sample is therefore impossible to discern, creating an impossible flaw in the research.¹⁸⁵

Because of these major flaws, Regnerus did his own research that avoided this major sampling problem:

Skepticism about the . . . sample is all the more reason to do a random study that doesn’t advertise its intentions beforehand. That’s exactly why the survey I oversaw, the New Family Structures Study (NFSS), elected to talk to the children *after* they had grown up, to skip the parents entirely to ensure a more independent assessment, not to broadcast our key research questions in the title or initial screener questionnaire, and to locate participants randomly in a large population-based sample. If you’ve been paying attention, however, you’ll know that my NFSS studies—which mapped 248 respondents who told us their mother or father had been in a same-sex relationship—came to rather different conclusions than the . . . study has.¹⁸⁶

In turn, and in fairness, it should be noted that the LGBT movement has produced its critics of Regnerus.¹⁸⁷ And, indeed, if the ACHESSE study’s conclusions are seriously to be relied upon it must be observed that same-sex partners produce outcomes for children

183. Crouse, *supra* note 166.

184. Regnerus, *supra* note 168.

185. *Id.*

186. *Id.*

187. *See infra* text accompanying note 191.

that are equal to or better than those for heterosexual couples.¹⁸⁸ This should not be heralded as a triumph for proponents of same-sex marriage. Rather, if its validity is not to be doubted, the claim as a justification for same-sex marriage would be far too modest. Instead, it would surely mark the more desirable way to rear children.¹⁸⁹ But it is not. While this is not a criticism that Regnerus makes, it follows from the LGBT claims.¹⁹⁰

Among the critics of Regnerus and his methodology is Nathaniel Frank, author of *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America*.¹⁹¹ Frank is a leading advocate for gay parenting who came into prominence for his advocacy in favor of including openly gay recruits in the military.¹⁹² Frank, though a historian rather than a sociologist, has criticized Regnerus for what he asserts is Regnerus' flawed sociological methodology.¹⁹³ It may be that Frank is somewhat sensitive about the methodology that he is employing in his own research project *What We Know*, because the website that displays the research simultaneously announces its bias:

The first phase focuses on research on LGBT equality, specifically gay parenting and marriage, youth challenges, and physical and mental health issues. Future phases may include additional policy issues such as economic growth, gun safety, education reform and possibly climate change, among others. The goal is to shape public policy in a "long game" that uses research-based messages to

188. Univ. of Melbourne, AUSTL. STUDY OF CHILD HEALTH IN SAME-SEX FAMILIES, <http://www.achess.org.au/> (last visited March 10, 2015).

189. The conclusion asserts: "Australian children with same-sex attracted parents score higher than population samples on a number of parent-reported measures of child health. Perceived stigma is negatively associated with mental health. Through improved awareness of stigma these findings play an important role in health policy, improving child health outcomes." Crouch, *supra* note 163.

190. Univ. of Melbourne, *supra* note 188.

191. NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* (2009).

192. *Id.*

193. Nathaniel Frank, *The Shamelessness of Professor Mark Regnerus*, SLATE BLOG: OUTWARD (Mar. 4, 2014, 5:30 PM), http://www.slate.com/blogs/outward/2014/03/04/mark_regnerus_testifies_in_michigan_same_sex_marriage_case_his_study_is.html.

influence public opinion, law, and quality of life, particularly for vulnerable populations.¹⁹⁴

It could hardly be suggested either that Frank is dispassionate or that his research is undertaken without foreordained conclusions and policy objectives in mind. And while some of Crouse's trenchant criticisms of the ACHESSE flaws are similar to those made by Regnerus, they are not as readily dismissed by Frank's tit-for-tat style response to Regnerus by pointing to his methodology rather than answering the questions raised about ACHESSE.

The second major problem with the ACHESSE study is contradictions made by its author about whether children of same-sex parents encounter and are harmed by stigmas. Crouse poses questions regarding the study's methodology including contradictions that are not explained in the Crouse's work:

Ironically and in contradiction of his own research, in 2012 Crouse was *promoting* same-sex parenting by quoting "longitudinal research from the United Kingdom" that supposedly shows that children with lesbian mothers have "social acceptance, close friendships and peer relationships" that are "no different" from other families; he also suggested that studies from the United States showed that children with lesbian mothers "were more connected at school." The contradictions continued in his 2014 study when Crouse emphasized concerns "about the impact that stigma and discrimination could potentially have . . . in countries where there's a lot of perceived stigma—most notably, the United States." He went on to assert, "Children face definite challenges coping with homophobic attitudes." (Yet, he claims, they suffer no ill effects!)¹⁹⁵

Crouse goes on to note that:

Boston University Professor of Pediatrics Benjamin Siegel also *claims* that the gender and "sexual orientation" of parents is irrelevant to children's well-being, saying that "many studies have demonstrated" that children are much more affected by the "relationships with their parents, their parents' sense of

194. Cindy Gao, Call for Interns for LGBT Research Project, COLUM. L. SCH.: GENDER & SEXUALITY BLOG (Jan. 2, 2014), <http://blogs.law.columbia.edu/genderandsexualitylawblog/2014/01/02/call-for-interns-for-lgbt-research-project/>.

195. Crouse, *supra* note 166 (quoting Crouse, *supra* note 163)

competence and security, and the presence of social and economic support for the family than by the gender or the sexual orientation of their parents.”¹⁹⁶

But, as Crouse observes:

Such statements raise the question: If homosexual parents in the Crouch study perceive a lot of stigma, how can their children have higher outcomes in some categories than children from heterosexual families? If the parents feel an overwhelming sense of stigma, and if they believe other people and the culture are stigmatizing their children, how can they report such a strong sense of security in their children?¹⁹⁷

Crouse then turns her attention to one of Crouch’s claims that “[c]hildren in same-sex parent families had higher scores on measures of general behaviour, general health and family cohesion compared to population normative data.”¹⁹⁸ Further, Crouch found

no significant differences between the two groups for all other scale scores. Physical activity, mental health, and family cohesion were all negatively associated with increased stigma and the presence of emotional symptoms was positively associated with increased stigma. . . . [Same-sex couples] construct their parenting roles more equitably than heterosexual parents.¹⁹⁹

Crouse notes both the contradiction for the first part of the cited finding and the lack of evidence from Crouch or the ACHES for the last assertion.²⁰⁰

The third and final problem with the ACHES study is an ethical issue. Crouse points to significant ethical concerns regarding the manner in which ACHES was conducted.²⁰¹ The children who are the subject of ACHES may have been bought. The male index parents almost certainly engage in buying children. “In Australia, commercial surrogacy is illegal and altruistic surrogacy is not common; therefore, the children of male index parents (born

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (quoting Crouch, *supra* note 163).

200. *Id.*

201. *Id.*

primarily in the United States and India) likely were purchased.”²⁰² While Crouse does not make the reference herself, this observation will raise the hackles of some opponents of same-sex marriage recalling the terrible Mark Newton international adoption pedophile case in which the victim, an adopted Asian child, had been purchased by the gay couple.²⁰³

In short, those who favor same-sex marriage and same-sex parenting have yet to discharge the very heavy burden to demonstrate that there is no risk of harm to the children that will be raised in any such relationship if it were to become law in Australia. And certainly, it cannot be said, that they have discharged the burden to say that same-sex relationships would be an improvement on the current status quo. These are matters that are surely worthy of consideration by a court such as that in *Baskin*. Their absence from consideration is telling.

b. Divorce in gay longitudinal studies. One matter that seems beyond controversy is that divorce has adverse effects upon the former couple’s children in areas such as health, education, and emotional wellbeing. For example, in Norway, Lyngstad and Engelhardt conducted a study which examined the influence of marital and divorce conduct of parents on subsequent generations, in relation to Norwegian first marriages between 1980 and 2003.²⁰⁴ The study concluded that whether a couple remained married or divorced was repeatedly shown to be the importance to the marital stability of their children.²⁰⁵ In a yet further study, Dronkers and Harkonen studied the intergenerational transmission of divorce across eighteen countries and sought explanations in macro-level characteristics for the cross-national variation.²⁰⁶ They determined

202. *Id.*

203. Nick Ralston, *Named: The Australian Paedophile Jailed for 40 Years*, SYDNEY MORNING HERALD: NAT’L, June 30, 2013, <http://m.smh.com.au/national/named-the-australian-paedophile-jailed-for-40-years-20130630-2p5da.html>.

204. Torkild Hovde Lyngstad & Henriette Engelhardt, *The Influence of Offspring’s Sex and Age at Parents’ Divorce on the Intergenerational Transmission of Divorce, Norwegian First Marriages 1980–2003*, 63 POPUL. STUD. 173, 173 (2009).

205. *Id.* at 179.

206. Jaap Dronkers & Juho Härkönen, *The Intergenerational Transmission of Divorce in Cross-National Perspective: Results from the Fertility and Family Surveys*, 62 POPUL. STUD. 273, 273 (2008).

that women whose parents divorced had a significantly higher risk of divorce in seventeen countries.²⁰⁷

Recently, the first lesbian couple to marry in New Zealand under its new same-sex marriage laws are now divorcing. This example raises the question of the statistical longevity of same-sex marriages.²⁰⁸ On this question, one would not expect that same-sex marriage would impact significantly upon the divorce rate of 50,000 people per annum in Australia. The numbers of same-sex marriages are most likely to be low. As will be shown in this section, the evidence gathered from other jurisdictions is that the rate of divorce among homosexual couples is higher than among heterosexual couples. This has significance for children of homosexual unions.

In neither Norway nor Sweden was there any legal recognition of same-sex “marriage” until 2009. Instead, in both countries, there was the ability for homosexual couples to register their relationships as civil unions. For the purposes of a recent demographical study, however, the registered partnerships in Norway and Sweden were treated as “same-sex marriages” to determine the rate of divorce. Andersson, Noack, Seierstad and Weedon-Fekjaer of the Max Planck Institute for Demographic Research conducted the study into divorce risks when compared with the heterosexual population.²⁰⁹

The study was based upon longitudinal information taken from population registers and looked at same-sex couples in a registered partnership.²¹⁰ The data included a wide range of demographic integers: “age, sex, geographical background, experience of previous opposite-sex marriage, parenthood, and educational attainment of the parents involved.”²¹¹ Patterns emerged in the study showing that divorce risks are considerably higher in same-sex marriages. In the case of female same-sex partnerships, the divorce risk was found to be double that for male same-sex partnerships.²¹²

207. *Id.* at 285–86.

208. Simon Collins, *Same-Sex Marriage Pioneers Split*, N.Z. HERALD (July 17, 2014), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11294678.

209. Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006).

210. *Id.* at 83–86.

211. *Id.* at 79.

212. *Id.*

The studies above (and the statistics that they disclose) do not provide any comfort that same-sex marriages statistically provide the most stable of environments into which to raise children. They show, at the very least, that on an objectively conducted longitudinal study with reliable publicly available data, that there is, statistically, at least a genuine risk to be addressed in the interests of children.²¹³

Viewed another way, the evidence reinforces the case that heterosexual marriage should be strengthened and its stability encouraged.²¹⁴ Long pause and deep reflection are in order before legislators and policymakers move to import what appears to be, based on all of the international evidence, a defective product when it comes to same-sex marriage as either an alternative or an addition to the existing form of marriage as it is known in Australia.

VI. LGBT ACTIVISM FOR AND AGAINST MARRIAGE

Despite evidence against it, LGBT proponents have continued to fight for same-sex marriage. They have used various tactics and targeted specific groups on its way towards and following same-sex marriage. First, their history shows a conflict between joining and destroying the institution of marriage. Second, they have appropriated words to bolster support for their cause or to label opponents as bigots. Third, they have argued that same-sex marriage will not change the marriage institution, but examples show otherwise. Fourth, they have tried to force their will upon religious and conscientious individuals. Finally, they have made it appear as if same-sex marriage is inevitable.

A. A Brief History of the Same-Sex Marriage Movement and its Internal Tensions

When traced back through to its sources and as will be shown below, the pressure for legal recognition of relationships through same-sex marriage commenced in the 1970s in the United States. In the United States, equalities in treatment came very slowly. And so LGBT activists' initial strategy in America was to seek legal

213. *See infra* text accompanying notes 277 *et seq.*

214. *Id.*

recognition or to destroy marriage. Klarman describes it in these terms:

[M]ost gay activists in the early 1970s were not interested in marriage. In 1971, one activist wrote a detailed position paper for the ACLU in Washington State calling for the abolition of marriage “to protect individual freedom and the happiness which depends on it.” Lesbian feminists tended to want no part of marriage, which they regarded as an oppressive institution, given the traditional rules that defined it, such as coverture and immunity from rape. An early gay manifesto denounced traditional marriage as a “rotten, oppressive institution” that is “fraught with role playing.”

Sex radicals tended to object to traditional marriage’s insistence on monogamy. To them, gay liberation meant sexual liberation. Much of the early gay press urged men to overcome their sexual shame and experiment with multiple partners. The queer politics of the 1970s embraced slogans such as “Smash the Nuclear Family” and “Smash Monogamy.” Marriage did not comfortably fit into that picture.

Yet some gays and lesbians plainly preferred committed, monogamous relationships and, if obtainable, marriage. . . .

Other gay couples, seeking legal benefits of state-recognized relationships such as inheritance rights and medical decision-making authority, turned to the practice of adult adoptions.²¹⁵

This pressure felt in the United States derived from legal imperatives that did not exist at the time in Australia. Their vestiges have long since been eroded. Now, the law in Australia places all homosexual and heterosexual relationships on the same financial footing both federally and in the states.²¹⁶

215. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 22 (2013).

216. For examples of the rights that have accrued to married persons that are also available to persons in a *de facto* relationship see: *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008*; *De Facto Relationships Act 1991* (NT); *De Facto Relationships Act 1996* (SA); *Social Security Act 1991* (Cth); *Property (Relationships) Act 1984* (NSW); *Wills, Probate and Administration Act 1898* (NSW); *Property Law (Amendment) Act 1998* (Vic); *Succession Act 1981* (Qld); *Local Government Act 1995* (WA); and *Maintenance Act 1967* (Tas).

From this brief history of the 1970s LGBT movement, it can be seen that Australia has never had much in common with the United States when it comes to the equal treatment of homosexual relationships for financial purposes before the law. Many of the most recent moves at the federal level in Australia have been in apparent recognition that although there was no need to re-define marriage, there was a need to provide equal certainty in all other areas.²¹⁷

The following are some of the common arguments against same-sex marriage that have been advanced by opponents and rejected by supporters:

- 1) It will weaken the institution of traditional marriage as a whole.²¹⁸
- 2) It will lead to demands for yet further reforms such as marriage for multi-party relationships or acceptance of underage marriage.²¹⁹
- 3) It will make gender roles and the position of mother and father superfluous.²²⁰
- 4) It will threaten moral and religious freedom.²²¹

One of the difficulties over the years of campaigning for and against same-sex marriage has been that the arguments on both sides have been dismissed as just speculation.²²² This is complicated by the fact that no one seems capable of announcing any unified LGBT goal on the subject of same-sex marriage.²²³ There has been a series of overlapping movements and those supporting same-sex marriage

217. See *infra* text accompanying note 238.

218. SHERIF GIRGIS, ET. AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 54–56 (2012).

219. *Id.* at 56–58.

220. *Id.* at 58–62.

221. *Id.* at 62–66.

222. Dana Milbank, *Speculation's All That's Left for Same-Sex Marriage Foes*, HERALDNET (Apr. 22, 2015), <http://www.heraldnet.com/article/20150422/OPINION04/150429760>; Joshua Bowman, *Five Arguments For Gay Marriage*, CATHOLICVOTE, <http://www.catholicvote.org/five-arguments-for-gay-marriage> (last visited Nov. 2, 2015).

223. Evan Lenow, *The Not-So-Unified Narrative of the LGBT Movement*, COUNCIL ON BIBLICAL MANHOOD AND WOMANHOOD (June 4, 2015), <http://cbmw.org/public-square/essays-perspectives-the-not-so-unified-narrative-of-the-lgbt-movement/>.

neither speak for all LGBT supporters, nor speak with any united voice on the motives of the respective movements.²²⁴ This has been so since the 70s; nothing has changed. Not all homosexuals seek same-sex marriage. Even among those that do wish to have same-sex marriage, there is a division in their motives.²²⁵

At a panel discussion at the Sydney Writer's Festival in 2013, Masha Gessen, a prominent Russian-American lesbian activist and author, conflates inevitability with gay nihilism:

It's a no-brainer that [homosexuals] should have the right to marry, but I also think equally that it's a no-brainer that the institution of marriage should not exist. . . . Fighting for gay marriage generally involves lying about what we are going to do with marriage when we get there—because we lie that the institution of marriage is not going to change, and that is a lie.

The institution of marriage is going to change, and it should change. And again, I don't think it should exist. And I don't like taking part in creating fictions about my life. That's sort of not what I had in mind when I came out thirty years ago.

I have three kids who have five parents, more or less, and I don't see why they shouldn't have five parents legally . . . I met my new partner, and she had just had a baby, and that baby's biological father is my brother, and my daughter's biological father is a man who lives in Russia, and my adopted son also considers him his father. So the five parents break down into two groups of three . . . and really, I would like to live in a legal system that is capable of reflecting that reality, and I don't think that's compatible with the institution of marriage.²²⁶

The division exists among lesbian feminists as to whether marriage is indeed a proper goal as opposed to the destruction of marriage itself. Some of the second-wave feminist writers such as

224. Natalie Neusch, *Gays Who Don't Want Gay Marriage*, THE DAILY BEAST (Feb. 26, 2011, 3:51 PM), <http://www.thedailybeast.com/articles/2011/02/26/gays-who-dont-want-gay-marriage.html>.

225. Lenow, *supra* note 223.

226. *Life Matters, Why Get Married When You Could be Happy?*, RN (June 11, 2012), <http://www.abc.net.au/radionational/programs/lifematters/why-get-married/4058506>. As to current moves to have polyamory recognized as a legal basis for marriage in New Zealand, see *Auckland Ratepayers Paying to Push Polyamory*, FAMILY FIRST NEW ZEALAND (June 5, 2014), www.familyfirst.org.nz/2014/06/auckland-ratepayers-paying-to-push-polyamory.

Betty Friedan, author of the *Feminine Mystique* in 1963, supported a nihilist view: marriage should be destroyed as an institution.²²⁷ Feminists like de Beauvoir and Friedan regarded marriage as an oppressive regime.²²⁸ In Friedan's view marriage was "a male (patriarchal) artifice designed by men to force women to serve them and to have sex with them."²²⁹

Feminist opposition to the institution of marriage *per se* has been adopted as part of the argument against same-sex marriage. As an example, Polikoff has attacked lesbian promotion of same-sex marriage because, according to her, feminists "believed [marriage] to be an oppressive, patriarchal institution."²³⁰

According to three United States scholars, who have researched and written extensively on legal and policy questions relating to marriage generally and same-sex marriage specifically, there are two views of marriage:

The *conjugal* view of marriage has long informed the law—along with the literature, art, philosophy, religion and social practice—of our civilization. . . . It is a vision of marriage as a bodily as well as an emotional and spiritual bond, distinguished thus by its comprehensiveness, which is, like all love, *effusive*: flowing out into the wide sharing of family life and ahead to lifelong fidelity. In marriage, so understood, the world rests its hope and finds ultimate renewal.

A second, *revisionist* view has informed the marriage policy reforms of the last several decades. It is a vision of marriage as, in essence, a loving emotional bond, one distinguished by its intensity—a bond that needn't point beyond the partners, in which fidelity is ultimately subject to one's own desires. In marriage, so understood, partners seek emotional fulfillment, and remain as long as they find it.²³¹

227. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

228. *Id.*

229. AUGUSTO ZIMMERMAN, *WESTERN LEGAL THEORY: HISTORY, CONCEPTS AND PERSPECTIVES* 235 (2012).

230. *Id.* at 239 (quoting Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 72 VA. L. REV. 1535, 1536 (1993)).

231. GIRGIS ET AL., *supra* note 218, at 1–2.

As already shown, the evidence gathered from other jurisdictions shows that there is no longer a need to speculate in respect to the effect upon children, the divorce rate, and the impact upon existing marriages.²³² On the question of the impact upon children, there is enough evidence in the studies referred to above to demonstrate that conjugal marriage is to be preferred, indeed, even privileged as a policy option.²³³ A stable marriage between biological parents is, on the preponderance of the evidence, the best environment in which to raise children. Any new institution of marriage should, for these purposes, be considered experimental at best and, in reality, second-rate and potentially disastrous. This desire to change or destroy marriage has led the LGBT community to various tactics including appropriation of certain words.

*B. Appropriation of Language, Ad Hominem Attacks,
and Malapropisms*

What has also been evident for some time is that the LGBT movement has a tendency to appropriate ordinary words to its cause and to create new terms of opprobrium for those who oppose its objectives. In the early days of the movement, the noun and verb “camp” was appropriated by the movement as a self-reference and an acronym of the description of the movement as the “Campaign against Moral Persecution.”²³⁴ In more recent times the word “gay” has been rendered so that it can no longer sensibly be used in any other context than to describe a male homosexual.

And as for the insults invented by the movement, which seem to have passed unchecked by linguists into common usage, it is hard to imagine a more ill-suited set of words than “homophobia,” “homophobe,” and “homophobic.” These malapropisms are either ridiculous or are dishonestly devised to divert the argument from logic and evidence to personal attack. Instead of describing a fear or its sufferer, these concocted words can only refer, legitimately, to the fact of disagreement. They are weasel words calculated to demean

232. *See supra* Part IV.

233. *See supra* Part IV.

234. *Campaign against Moral Persecution: 30th Anniversary of Decriminalization of Homosexuality in NSW*, ALASTAIRLAWRIE BLOG (June 7, 2014), <http://alastairlawrie.net/tag/campaign-against-moral-persecution/>.

rather than address the argument and the evidence. They are used as insulting epithets for all those who oppose, reasonably or otherwise, the objectives of the movement. Disagreement with any of the LGBT causes célèbres will evoke their use.

C. Changes to the Current Institution of Marriage in the Event of Same-Sex Marriage Becoming Legal

Next, the proponents of same-sex marriage claim that its introduction will have no impact upon the institution of marriage. The Court in *Baskin* accepted this claim, but experience appears to put it to the lie in regards to the core definitions and terms of marriage. At the very least, there is need to re-define and re-word terms that have commonly been associated with heterosexual marriage: mother; father; parent; husband; wife; spouse.

The court must have been aware that as of January 1, 2015 the law in California was to change pursuant to the provisions of Senate Bill 1306, which redefines marriage in that state as a “personal relation arising out of a civil contract between 2 persons”²³⁵ In that state, as of January 2015 there is no longer a “husband” or a “wife” but only “spouses.”²³⁶ This initiative of the current Governor of California is a far cry from the initiative in 2008, when fifty-two percent of California’s citizens voted to protect marriage and its definition as being between one man and one woman.²³⁷

This reform has been hailed by gay rights activists. For example, the National Center for Lesbian Rights Executive Director Kate Kendell says of the reform:

Although there is no question that same-sex couples can marry in California, the discriminatory language that remains on the statutory books creates confusion about the rights of same-sex couples. This law makes it clear to everyone that same-sex couples can marry and that all spouses have the exact same rights and responsibilities under the law, regardless of gender.²³⁸

235. S.B. 1306, 2013–14 Leg. Sess. (Cal. 2014).

236. *Id.*

237. See Dennis Romero, *You May Now Kiss the “Spouse” Under a New Californian Law*, LA WEEKLY (July 8, 2014), <http://www.laweekly.com/informer/2014/07/08/you-may-now-kiss-the-spouse-under-a-new-california-law>.

238. *See Id.*

The pro-traditional marriage group National Organization for Marriage has had a different response. It says that the new law was “further proof that redefining marriage is not simply about ‘equality’. . . it is about fundamentally altering the meaning of the institution itself.”²³⁹

In the United Kingdom a similar move was implemented by the Marriage (Same-Sex Couples) Act 2013 where Parliament approved proposals to remove the terms “husband,” “wife,” and “widow” from legislation dating back hundreds of years.²⁴⁰ Parliament voted in favor of proposals to prevent a man who marries a King of Britain from being referred to as a “Queen” and to stop the same-sex partner of a future Prince of Wales from being referred to as the “Princess of Wales.”²⁴¹ Among the amendments that were passed was one to the Metropolitan Public Carriage Act 1869, which allowed cab licenses of deceased “husbands” to be transferred to their “widows” by way of a London Cab Order. The statutory language in the Act was changed to ensure no vestigial offence might be caused to LGBT cab owners.²⁴² Somehow, though, its wording had survived the feminist movement and the offence that the gender specific terms might cause to female cabbies. Christian Concern, an organization with similar objectives in marriage preservation to those of the United States National Organization for Marriage, reacted through its spokeswoman, Andrea Williams, predictably as follows:

This is the land of make-believe and we are operating in the realms of the absurd.

Proposed amendments in areas ranging from cab licences [sic] to royal titles show what a mess the Government has created. We are twisting language to fit a collective deception that undermines the truth about what marriage is.²⁴³

239. *Terms “Husband” and “Wife” Removed from California’s Marriage Law*, CHRISTIAN CONCERN (July 15, 2014), <http://www.christianconcern.com/our-concerns/same-sex-marriage/terms-husband-and-wife-removed-from-californias-marriage-law>.

240. The Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland), c. 30 (Eng. & Wales) [hereinafter *The Marriage Act of 2013*].

241. *Id.* art. 3, sch. 2, pt. 1, para 1.

242. *Id.* art. 2, sch. 1 para. 1(a)(i).

243. CHRISTIAN CONCERN, *supra* note 239.

*D. Of “Butchers, Bakers and Candlestick Makers”: Loss of
Freedoms of Conscience, Political Expression and Religion*

Another more insidious effect is that there are, consequent upon legalization of same-sex marriage and the promotion of LGBT social claims, negative impacts upon freedoms of speech, association, conscience and religion. The freedom to express views and to act upon them is being curtailed in jurisdictions where same-sex marriage has either become part of the law or where there are strong movements for it to become such.²⁴⁴ It now seems that strongly held views in favor of conjugal marriage are not only being discouraged by law and policy but, in a number of cases, “offenders” are being prosecuted for their positions at the public expense.²⁴⁵

The resignation of Mozilla Firefox co-founder, Brendan Eich, as the CEO of that company drew attention to how much scrutiny society gives to people’s political activities in the never-ending search for political correctness.²⁴⁶ It has now become offensive in many western cultures for a person to hold a different point of view than that agitated by the LGBT lobby.²⁴⁷ A specter of political correctness was evident recently when Chase Bank administered a questionnaire to their employees in which they were asked to disclose whether they had disabilities, had a child with disabilities, had a spouse or domestic partner with disabilities, were lesbian, gay, bisexual or transgender in their self-description, or were allies of the LGBT movement.²⁴⁸ The agenda was less than subtle.²⁴⁹

244. Kevin Jones, *LGBT Grant-Maker Wants to Win Religious Liberty Fight Within Three Years*, CATHOLIC NEWS AGENCY (July 29, 2015, 12:31 AM), www.catholicnewsagency.com/news/lgbt-grant-maker-wants-to-win-religious-liberty-fight-within-three-years-96064/.

245. Vincent Funaro, *Christian Court Clerk Fired for Refusing to Process Paperwork for Gay Marriages Sues Indiana County for Religious Discrimination*, THE CHRISTIAN POST (July 27, 2015), www.christianpost.com/news/christian-court-clerk-fired-for-refusing-to-process-paper-work-for-gay-marriages-sues-indiana-county-for-religious-discrimination-141860/; see also Matthew Chandler, *Moral Mandate or Personal Preference? Possible Avenues for Accommodation of Civil Servants Morally Opposed to Facilitating Same-Sex Marriage*, 2011 BYU L. REV. 1625.

246. David Crary, Rachel Zoll & Michael Liedtke, *Mozilla CEO Resignation Raises Free-Speech Issues*, USA TODAY (Apr. 4, 2014), www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/.

247. *Id.*

248. Brian S. Brown, *Boycott Chase Bank*, NAT’L ORG. FOR MARRIAGE BLOG (July 16, 2014), <http://www.nomblog.com/39511/>.

249. *Id.*

Despite the fact that in the LGBT and feminist literature there are differing reasons as to why one might oppose same-sex marriage, it appears that it is those who oppose it upon conscientious or religious reasons who have been particularly targeted. The following cases are some examples.

In *Craig and Mullins v. Masterpiece Cake Shop Inc. & Anor*,²⁵⁰ the State of Colorado Administrative Court found that a cake-maker, who, on grounds of a religious conscientious objection to same-sex marriage, declined to bake a cake celebrating such a wedding, was held to have acted unlawfully.

On May 30, 2014, on appeal, the Colorado Civil Rights Commission upheld the decision of the Administrative Court and ordered, among other things, that the cake-maker cease discriminating, cause staff to have comprehensive training in anti-discrimination legislation and report to the commission quarterly for two years as to compliance, which reports were to document the number of patrons refused service and the reasons for such refusal.²⁵¹ What is of interest in this case is that at the time of refusal same-sex marriage was not legal in Colorado. The marriage to be celebrated had been contracted in another state where same-sex marriage was legal.²⁵² It is not clear what the result might have been had the cake-maker been a strident feminist who objected to any form of marriage but particularly was interested in making political statements against same-sex marriage and refused on those grounds. That case is now under further appeal.

In Washington State, a florist who felt unable to supply flowers for a same-sex couple's wedding because of her strongly held religious convictions, is currently the subject of a lawsuit.²⁵³

In the State of New Mexico, wedding photographers, whose religious beliefs prevented them from photographing a same-sex

250. *Mullins v. Masterpiece Cake Shop*, CR2013-008 (Colo. Admin. Ct. Dec. 6, 2013).

251. *Mullins v. Masterpiece Cake Shop*, CR2013-008 (Colo. Civ. Rights Comm. May 30, 2014).

252. *Id.*

253. Elaine Porterfield, *Washington State Florist Sued Again for Refusal to Service Gay Wedding*, REUTERS (Apr. 19, 2013), <http://www.reuters.com/article/2013/04/19/us-usa-gaymarriage-washington-id USBRE93108820130419>.

wedding, have been found by the New Mexico Supreme Court to be in breach of the New Mexico Human Rights Act.²⁵⁴

A case that has not yet resulted in a prosecution, but has gained notoriety, concerns the demands of a gay rights activist who ordered a cake from a Christian-run bakery in Northern Ireland that carried a picture of the Sesame Street characters Bert and Ernie with the slogan “support gay marriage.”²⁵⁵ The proprietors “insisted that producing the cake with the slogan and a picture of the puppets arm in arm printed onto the icing would amount to endorsing the campaign for the introduction of gay marriage in the province,” where it is currently illegal, “and go against their religious convictions.”²⁵⁶ The Equality Commission for Northern Ireland has now written to the bakers, insisting that they are in breach of the law. It claims that refusing to decorate the cake amounted to discrimination on grounds of sexual orientation against the man who placed the order.²⁵⁷

The last-mentioned case underlines the absurdity that has arisen from these restrictions upon what can be said or done about marriage. Apart from the fact that same-sex marriage is currently illegal in Northern Ireland, the order for the cake carried a requirement for the bakers to assist in making a political statement with which they, as a matter of conscience, fundamentally disagreed.²⁵⁸

Further, there seems no basis for appropriating Bert and Ernie as symbols of same-sex marriage. Bert and Ernie are puppets. They have no sexual feelings, inclinations to marriage, or desire to make political statements on the subject. This was made clear by Sesame Street *Muppets*TM on its Facebook page in 2011, but seems to have gone unnoticed in the pursuit of the bakery:

254. *Elaine Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

255. *Bert and Ernie ‘Gay Wedding Cake’: Christian-Run Bakery Faces Legal Action over Refusal to Supply Cake*, INDEPENDENT (U.K.) (July 9, 2014), <http://www.independent.co.uk/news/uk/home-news/northern-ireland-bakery-refuses-to-make-gay-bert-and-ernie-wedding-cake-9590745.html>.

256. *Id.*

257. *Id.* The above are merely some examples of many. For discussion of recent events in Canada, see Lain T. Benson, *Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada*, 71 ADVOCATE 671 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328945.

258. INDEPENDENT, *supra* note 255.

Bert and Ernie are best friends. They were created to teach preschoolers that people can be good friends with those who are very different from themselves.

Even though they are identified as male characters and possess many human traits and characteristics (as most *Sesame Street* Muppets™ do), they remain puppets, and do not have a sexual orientation.²⁵⁹

Finally, there is nothing in the news to date that indicates that the person who ordered the cake had any license from Sesame Street to reproduce Bert and Ernie's images on a cake to make a political statement. Without such a license, the cake makers would infringe upon those rights and render themselves amenable to action for such infringement. And, with such a weak case, the bakery is being pursued at the State's expense.

In making these observations regarding the United States and other jurisdictions, certainly Australia is not immune from this form of state-sponsored persecution of those who are not politically correct about LGBTs. Just what the position would be if same-sex marriage were to become legal, one can only speculate. But how it might be for ordinary business operators was clearly illustrated in the recent Supreme Court of Victoria Court of Appeal decision in *Christian Youth Camps Limited & Rowe v. Cobaw Community Health Services Limited & Victorian Equal Opportunity and Human Rights Commission & The Attorney-General for the State of Victoria*, discussed by Associate Professor Foster in his case note concerning the decision.²⁶⁰

In *Christian Youth Camps*, the majority decided the camp was liable for discriminatory conduct because it did not allow a gay youth group to book one of the camps.²⁶¹ This result has been criticized in the press²⁶² as well as by my colleague, Associate Professor Foster.²⁶³

259. *Sesame Workshop Statement on Bert and Ernie Petitions*, SESAME WORKSHOP (Aug. 11, 2011 10:00 AM), available at https://www.facebook.com/note.php?created&¬e_id=10150290119497855&cid=1375_9741267.

260. See Neil Foster, *Christian Youth Camp Liable for Declining Booking From Homosexual Support Group*, FREEDOM 4 FAITH, http://www.freedom4faith.org.au/resources/Reading/Christian%20Youth%20Camp_Neil%20Foster%20Summary.pdf (last visited Feb. 27, 2015).

261. *Christian Youth Camps Limited & Rowe v. Cobaw Community Health Services Ltd.*, [2014] VSCA 75 (Austl.).

262. Foster & Towers, *supra* note 2.

The misreading of authority and international law that is the subject of criticism will soon be the subject of argument in the High Court, as an application for special leave is pending. The majority based its reasons upon a number of platforms.

Among them is one that is captured in the following dictum:

The appeal submission for Cobaw was that the purported distinction—between sexual orientation of those attending the camp and what would be said to them about their sexual orientation—was misconceived. Reliance was placed on the following statement in her Honour’s reasons:

“Sexual orientation, like gender, race and ethnicity, [is] part of a person’s being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who and what they are. . . . To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.”

As the amicus submission of the ICJ pointed out, the proposition that sexual orientation is an important aspect of a person’s identity has been affirmed in other jurisdictions.²⁶⁴

The *dictum* cited from the Court of first instance was accepted as being open on the evidence by the majority.

In contrast, Redlich JA, in the minority, adopted an approach that seems more acceptable, in terms of logic and a reality that tolerates a diversity of opinions to be expressed in the public square. It is one that I respectfully suggest would have commended itself to the Court in *Baskin*.

His Honour observed as follows:

263. Neil Foster, *Christian Youth Camp Liable for Declining Booking from Homosexual Youth Group*, available at http://works.bepress.com/neil_foster/78 (last visited Nov. 4, 2015); *ACL Team, Associate Professor Neil Foster Talks About the Christian Youth Camps Case*, AUSTL. CHRISTIAN LOBBY (May 27, 2014, 4:14 AM), <http://www.acl.org.au/2014/05/associate-professor-neil-foster-talks-about-the-christian-youth-camps-case/>.

264. *Christian Youth Camps v. Cobaw* (2014) VSCA 75, ¶ 57 (citations omitted).

The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much part of their religion as the belief itself. The obligation of a person to give effect to religious principles in everyday life is derived from the overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles. Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.²⁶⁵

Having described a person's religious belief to be a central part of their identity, it follows that all persons of any persuasion, be it moral, political or religious, must be free to express those views within the marketplace within certain reasonable but not stifling limits. Certainly, no person should be required to act contrary to their conscience. Redlich JA provides an illustration:

For example, assume that the applicants had been informed that the purpose of the proposed forum was to gather together for the purpose of discussing the contentions that the Divine does not exist and that Christ does not say, and of how the community might be made aware of those views. Once the applicants became apprised of that purpose, I do not doubt that it would have been necessary for them to refuse the use of their facility for such purposes. That their beliefs necessitated such a course flows from the findings made by the Tribunal under [section] 75(2) as to the content of the Christian Brethren's beliefs and principles. The same must hold true for other religious beliefs or principles which the adherence of their faith genuinely believe reflected the wills of the Divine and commanded obedience.²⁶⁶

The above illustrations demonstrate what would be lost, based on experiences in other jurisdictions as well as in Australia, if such a reform were to become law. The cost is, on the face of it, just too great to existing liberties of conscience and religion. Yet, again, these considerations were absent in *Baskin*.

265. *Id.* ¶ 560.

266. *Id.* ¶ 571.

E. Inevitability?

Finally, the opening paragraph of *Baskin* accepts without question the argument that same-sex marriage is inevitable.²⁶⁷ This is the argument that seems to have currency as a sort of defeatist justification when no other logical or evidence-based argument will suffice.

Certainly, any sense of inevitability does not hold true in Australia. Only one jurisdiction, the ACT, has ever passed same-sex marriage legislation into law, despite numerous attempts in the federal Parliament and various states, and that case, as we have seen, was struck down by the High Court.²⁶⁸

Recently, the European Court of Human Rights handed down its decision in *Hämäläinen v. Finland*, in which petitioners sought a declaration that the *European Convention on Human Rights* (ECHR) Articles 8 and 12 gave a right for citizens to require of members states legislation that permitted same-sex marriage.²⁶⁹ The court made it clear that there was no right to same-sex marriage under either Article 8 or 12 of the ECHR:

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage.

. . . .

96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman. While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be

267. *Baskin v. Bogan*, 766 F.3d 648, 653 (7th Cir. 2014).

268. *See supra* text accompanying notes 22–56.

269. *Hämäläinen v. Finland*, App. No. 37359/09, 2014 Eur. Ct. H.R. 259, available at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%22fulltext%22:%2237359/09%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-145768%22>].

construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.²⁷⁰

The Court also dismissed an alleged “European standards and consensus” that would prevent states from defining marriage as the union between one man and one woman:

73. From the information available to the Court . . . it appears that currently ten member States allow same-sex marriage [: Belgium, Denmark, France, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (England and Wales only)]. . . .

74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages.²⁷¹

It seems far better to judge matters as they actually are. In Europe, there is a diversity of positions in relation to same-sex marriage.²⁷² Some permit same-sex partnership registration.²⁷³ Among the most recent to introduce same-sex marriage are England and Wales.²⁷⁴ Of all European nations, including the twenty-eight EU countries, only eleven permit same-sex marriages,²⁷⁵ while others permit some form of union with limited legal recognition.²⁷⁶ Ten of the thirteen most recent member states to join the EU have rejected the proposal for same-sex marriage.²⁷⁷ Australia may be considered the last redoubt among Anglophone nations, but it is by no means alone in the West or indeed in the world.²⁷⁸

270. *Id.* §§ 71, 96 (citing *Schalk and Kopf v. Austria*, App. No. 30141/04, 2010 Eur. Ct. H.R. § 101; *Rees v. The United Kingdom*, Ser. A no. 106, Oct. 171986, §§ 43-44).

271. *Id.* §§ 73-74.

272. Michael Lipka, *Eastern and Western Europe Divided Over Gay Marriage, Homosexuality*, PEW RESEARCH CTR. (December 12, 2013), <http://www.pewresearch.org/fact-tank/2013/12/12/eastern-and-western-europe-divided-over-gay-marriage-homosexuality/>.

273. *Gay Marriage Around the World*, BBC NEWS WORLD (April 23, 2013), <http://www.bbc.com/news/world-21321731>.

274. The Marriage Act of 2013, c. 30 (Eng. & Wales).

275. Netherlands, Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, Luxembourg, and the United Kingdom (England and Wales).

276. BBC NEWS WORLD, *supra* note 273.

277. Michael W. Chapman, *10 of 13 Newest EU States Reject ‘Gay Marriage’*, CNSNEWS.COM (Dec. 9, 2013, 4:38 PM), <http://www.cnsnews.com/news/article/michael-w-chapman/10-13-newest-eu-states-reject-gay-marriage>.

278. BBC News World, *supra* note 273. See postscript regarding Ireland.

VII. CONCLUSION

In July of 2014, a Sydney judge compared society's opprobrium for pedophilia and incest to the position it took on homosexual relations only a few decades ago.²⁷⁹ He advocated that incest should no longer be a criminal offence given that the progeny of consanguineous sexual relations can be prevented either through contraception or abortion.²⁸⁰ More recently, a German government ethics committee came to the conclusion that not only is there nothing morally wrong with sexual relations between siblings; those relations are a right.²⁸¹ While these liberal agitations were taking place, immigration officers in Sydney detained a fourteen-year-old girl because they suspected that she was travelling to Lebanon for an arranged marriage with a much older man.²⁸² And Elton John recently assured us that Jesus would have approved of same-sex marriage.²⁸³ Added to these, we have the two cases that are the subject of this paper.

Critic Rosemary Neill commented recently that the fascination with dystopias found in the baby-boomer generation is continuing into the next generation of book and film consumers.²⁸⁴ None of the incidents referred to in the preceding paragraph would seem out of place in any novel or film in the genre. Yet, just a generation ago, none of these headline incidents would have been thought possible; they would only have appeared in fiction.

Whether it be in *1984*,²⁸⁵ *Animal Farm*,²⁸⁶ *Brave New World*,²⁸⁷ *The Handmaid's Tale*,²⁸⁸ *Never Let Me Go*,²⁸⁹ or *Fahrenheit 451*,²⁹⁰ the

279. Hall, *supra* note 59.

280. Hall, *supra* note 59.

281. Huggler, *supra* note 59.

282. Brennan, *supra* note 59.

283. Dermot Murnaghan, *Sir Elton Says Jesus Would Back Gay Marriage*, SKY NEWS (June 29, 2014), <http://news.sky.com/story/1291479/sir-elton-says-jesus-would-back-gay-marriage>.

284. Rosemary Neill, *Teen Dystopias Like the Hunger Games and the Giver Take Over Hollywood*, THE AUSTRALIAN (Sep. 13, 2014), available at <http://www.theaustralian.com.au/arts/review/teen-dystopias-like-the-hunger-games-and-the-giver-take-over-hollywood/story-fn9n8gph-1227055348774>.

285. GEORGE ORWELL, *1984* (1950).

286. GEORGE ORWELL, *ANIMAL FARM* (1945).

287. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

288. MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986).

themes seem recurrent: an enslaving, all-pervading, totalitarian regime having sprung from some unidentified historical source of dissatisfaction, some distant past apocalypse, technology having gone mad, or from inaction in enforcing moral codes; loss of the value of the individual; re-definition or abolition of the family; ruthless suppression of any opposition. There are many variations of these themes and they seem to hold our fascination and that of the rising generation with young adult novels and films churning out similar subliminal warnings. But there is, with only a few exceptions, one yawning gap in all of the dystopias depicted: there is complete silence about God, conscience, and religion.

We live in a world where there are two currents pulling in different directions. There are the fundamentalist extremists who see the ideal society as theocratic: one in which everyone is subservient to God as they imagine Him.²⁹¹ Then there is the other direction, in which we are pulled by the West, by secular extremists, in the name of “equality,” where there is freedom from religion rather than freedom of religion, where God is completely banished from the public square, and where freedom of religion and conscience end at the temple door.²⁹² These two directions are antithetical. One compels absorption in a conception of God to the exclusion of all care for our fellow humans; the other is absorbed with the rights of humans to the exclusion of God.

As critical as I am of both of the reasoning of the High Court in *ACT* and the Seventh Circuit Court of Appeals in *Baskin*, the question must be asked at a metaphysical level whether they are merely social barometers: symptomatic of a deeper malaise in public intellectual activity in the academy, the press, the legislature, executive arms of government, and, now, in the courts. There is a consciousness of this malaise in the writing of Habermas, in which he proposes some adaptation of Judeo-Christian ethics re-written in

289. KAZUO ISHIGURO, *NEVER LET ME GO* (2006).

290. RAY BRADBURY, *FAHRENHEIT 451* (1953).

291. Kevin Craig, *Theocracy!*, CRAIG FOR CONG., <http://kevincraig.us/theocracy.htm> (last visited Nov. 4, 2015).

292. *About FFRF*, FREEDOM FROM RELIGION FOUND., <http://ffrf.org/about> (last visited Nov. 4, 2015).

secular code.²⁹³ But the cure for this malaise has been the subject of vain searches by post-modern ethicists and philosophers. Western public thought seems set upon a path of banishing, in so far as it is possible, all religion and mention of God from the public square. If Nietzsche was premature in declaring God dead,²⁹⁴ there are now many who seem intent upon burying Him—dead or alive.

It seems that all public institutions are intent, to one degree or another, upon testing the Dostoyeskiian notion that if God does not exist, then everything is permissible. As secularism takes firmer hold of the public psyche, we are confronted with a public Nietzschean amorality, evident in the reasons of Judge Posner in *Baskin*.²⁹⁵ Some alternative form of theocratic fundamentalist dictatorship needs only to be mentioned to be rejected. If we are to have a dystopian reality in the West, it seems it will be one of our own making.

But, the Nietzschean outcome seems most likely unless the West was to embrace afresh the Lockean model of a conscience and equality before the law, informed by Christian belief, as advocated by Jeremy Waldron.²⁹⁶ While the return to Lockean ideals remains an unlikely possibility, the most likely result will be more of the fudging on legal principles evident in *ACT*. And as poor as the unrestrained rant passing as judicial reasoning from Judge Posner in *Baskin* may be, one can expect more of this form of economic rationalism rather than a serious and even-handed grappling with these issues.

If there is no balance possible between the divine and the profane, is the West so committed to secularism that it can see no other way? It would seem from the incidents referred to, the legalism of the High Court and the economic rationalism of the Seventh Circuit, that there may be more than coincidence. We may, in fact, as

293. Jürgen Habermas, *Modernity: An Unfinished Project*, in HABERMAS AND THE UNFINISHED PROJECT OF MODERNITY: CRITICAL ESSAYS ON THE PHILOSOPHICAL DISCOURSE OF MODERNITY 38, 38–55 (Maurizio Passerin d'Entrèves & Seyla Benhabib eds., 1997); JÜRGEN HABERMAS THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 3–49 (Ciaran Cronin & Pablo De Greiff eds., 1998).

294. FRIEDRICH NIETZSCHE, THE GAY SCIENCE (THE JOYFUL WISDOM) 120 (Bernard Williams ed., Josefine Nauckoff trans., Cambridge Univ. Press 2001) (1882).

295. KENAN MALIK, THE QUEST FOR A MORAL COMPASS: A GLOBAL HISTORY OF ETHICS, at v–vi (2014).

296. JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 82 (2002).

Western society, be suffering symptoms of an incurable dystopian malaise.

POSTSCRIPT

Since the writing of this article, the Supreme Court of United States has handed down its decision in *Obergefell v. Hodges*.²⁹⁷ There were many surprising elements to be found in the reasoning of the majority, not the least that two judges who had previously shown a disposition to favor same-sex marriage before hearing the case chose not to recuse themselves.²⁹⁸ Had they done so, it seems the result would have been entirely the opposite.

While these are matters for the comment of others, there is one other surprising element that contrasts with the Australian experience. The decision of the Supreme Court seems to display a relaxed, if not cavalier, attitude to vaulting the divide between the legislative arm of government and the judicial arm under the separation of powers doctrine.

Unlike the Australian High Court, which handed the question of same-sex marriage back to the federal Parliament, the majority in the Supreme Court refused, by process of a number of constitutional interpretations, to acknowledge the democratic decisions reached by electors in a number of states and arrogated the decision to themselves as a majority of five to four, with two of the Justices having refused, as noted before in this postscript, to recuse themselves.²⁹⁹

But, the decision of the Supreme Court could be interpreted as one more fall of the dominoes in the direction of same sex-marriage

297. 135 S. Ct. 2071 (2015).

298. Justices Ginsburg and Kagan had shown what would seem to have been partiality prior to the hearing. Both Justices had reportedly performed same-sex marriages. Michael Gryboski, *Should Two Supreme Court Justices Who Officiated Gay Weddings Recuse Themselves from Same-Sex Marriage Case?*, CP POL. (Mar. 3, 2015), <http://www.christianpost.com/news/should-two-supreme-court-justices-who-officiated-gay-weddings-recuse-themselves-from-same-sex-marriage-case-135049/>; Liz Goodwin, *As Arguments Near, Justice Ginsburg Has Already Made Up Her Mind on Gay Marriage*, YAHOO! POL. (Apr. 27, 2015), <https://www.yahoo.com/politics/as-arguments-near-justice-ginsburg-has-already117280631046.html>. It therefore would seem that position of both Justices arguably fell under the mandatory recusal provision in title 28, part I, chapter 21, section 455 of the U.S. Code: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

299. See 135 S. Ct. 2071 (2015) (Roberts, C.J., dissenting).

in Australia. In fact, there have been three other events that have occurred since this article was first written that may be regarded as watershed moments for those that support the introduction of same-sex marriage. First came the Irish referendum where the result was in favor of same-sex marriage.³⁰⁰ Next came the change of Australian Prime Minister from one who was firmly opposed to same-sex marriage to one who strongly supports it.³⁰¹ And then, finally, a Senate select committee report was handed down recommending that there be a parliamentary vote rather than a popular vote on the question.³⁰²

And yet while the same-sex marriage debate has, of course, continued to rage in Australia, the position does not seem to have changed. And it now seems that the contrast could not be starker between the American and the Australian experiences. What is still proposed by the current federal government is that there be either a constitutional referendum or a national plebiscite on the issue of same-sex marriage.³⁰³ By this mechanism, the government seeks, it says, to hand the question of a radical change to the age old social institution of marriage back to the people.

So, by a democratic political process rather than a legal one, Australia seems destined, under the current government, to test whether there is any cure for what seems in some Western nations to be as one of its symptoms of the malaise: the dictation by a small elite as to what is acceptable for the majority.

300. *Results Received at the Central Count Centre for the Referendum on the Thirty-Fourth Amendment of the Constitution (Marriage Equality) Bill 2015*, REFERENDUM IR., <http://referendum.ie/results.php?ref=10> (last visited Nov. 4, 2015).

301. George Williams, *Under PM Turnbull, Where to Now for Same-Sex Marriage?*, THE AGE (Sept. 20, 2015), <http://www.theage.com.au/comment/under-pm-turnbull-where-to-now-for-samesex-marriage-20150919-gjqmiu.html>.

302. *Matter of a Popular Vote, in the Form of a Plebiscite or Referendum, on the Matter of Marriage in Australia*, PARLIAMENT OF AUSTL. (Sept. 15, 2015), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Marriage_Plebiscite/Report.

303. *Coalition Nails Colours to Traditional Marriage*, THE AUSTL. (August 12, 2015), <http://www.theaustralian.com.au/national-affairs/coalition-nails-colours-to-traditional-marriage/story-fn59niix-1227479570397>.