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## An Analysis in Empathy: Why Compassion Need Not Be Exiled from the Province of Judging Same-Gender Marriage Cases

Kacie Gray

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**AN ANALYSIS IN EMPATHY: WHY COMPASSION NEED  
NOT BE EXILED FROM THE PROVINCE OF JUDGING  
SAME-GENDER MARRIAGE CASES**

Kacie F. Gray\*

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I. INTRODUCTION

When the methods of decision-making point in different directions, Justice Benjamin Nathan Cardozo tells us that no one decision-making “formula” should be followed. “If you ask how [the judge] is to know when one interest outweighs the other, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.”<sup>1</sup> What Justice Cardozo did not explicitly say, however, is

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\* J.D., Paul M. Hébert Law Center, Louisiana State University (2015). This note was written prior to the judgment delivered on June 26, 2015, by the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruling that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1. Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 112-113 (1921).

that beyond experience, study, and reflection reside empathy and compassion. In formulating judgments, the court's angle of vision makes all the difference.

The law is rooted in the ethical treatment of persons, and the underlying basis of ethics is empathy.<sup>2</sup> In the absence of empathy the law is merely a tool for rationalization, and fails to act as an instrument for social justice. There is, however, a widely held—but fallacious—belief in the “purely objective ruling.” Incontrovertibly, each decision implicitly reflects the bias that each judge carries. Such bias expresses itself as the inclination to give the “benefit of the doubt” to those with whom they identify and to be skeptical of those with whom they share little mutuality. Nevertheless, while judges' decisions must be in accord with the Constitution, it is essential that they have a sense of empathy such that the law may accomplish its ultimate purpose—to preserve human dignity.

Justice Harry A. Blackmun's jurisprudence has been marked by a similar insight. Judging is much more than a process of pristine deductive analysis. Compassion, wisdom, and common sense are as essential to the judicial role as scholarship and technical mastery of the law.<sup>3</sup> Expressing this notion in his opinions, Justice Blackmun acknowledges the inevitable limitations of judges while also exposing the cruel reality of the law as a mathematical application of legal “axioms and corollaries” that “ignores the consideration of its impact on the lives of real people.”<sup>4</sup> In his separate dissent in *DeShaney v.*

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2. Arthur Dorbin, *Why the Law Can't Do Without Compassion* (Aug. 23, 2011), <http://www.psychologytoday.com/blog/am-i-right/201108/why-the-law-cant-do-without-compassion> (last visited Apr. 10, 2015).

3. William H. Rehnquist, Ruth Bader Ginsburg, William J. Brennan, Jr., Byron R. White, Richard Arnold, A.M. Keith, Paul R. Baier, Allan Gates, Erwin N. Griswold, Edward Lazarus, Norval Morris, Gregg Orwoll, Estelle H. Rogers, Herman Schwartz, Nina Totenberg, & Sarah Weddington, *A Tribute to Justice Harry A. Blackmun: "The Kind Voice of Friends."*, 43:3 AM. U.L. REV. 687-753 (Spring 1994).

4. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

*Winnebago County Department of Social Services*,<sup>5</sup> Justice Blackmun scolds the majority for purporting to be the dispassionate oracle of the law, unmoved by “natural sympathy.”<sup>6</sup> Justice Blackmun observes that the Court's precedents left questions unanswered and, in response, suggests a “sympathetic” reading of the Due Process Clause: “One which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”<sup>7</sup>

Same-gender marriage is a socially diversory topic, and the controversy surrounding it finds prominent expression in law, politics, and personal beliefs.<sup>8</sup> The inextricable nature of same-gender marriage encompasses matters of family structure, gender roles, justice, and equality. The Due Process Clause of the Fourteenth Amendment, which resides at the forefront of the proponents' arguments, guarantees that no person shall be deprived of life, liberty, or property without due process of law. The Supreme Court of the United States dedicates a considerable amount of time to itemizing specific liberties protected by this guarantee, including those related to marriage. Crucially, in *Loving v. Virginia*<sup>9</sup> the Supreme Court held that states could not ban interracial marriage since “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>10</sup> To “deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes,” Chief Justice Earl Warren writes, is “directly subversive of the principle of equality

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5. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 212 (1989). (Blackmun, J., dissenting).

6. *Id.* at 212.

7. *Id.* at 213.

8. Justin Reinheimer, *Same Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 BERKELEY J. GENDER L. & JUST. 213 (2006).

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

10. *Id.* at 13.

at the heart of the Fourteenth Amendment.”<sup>11</sup> Thus, “under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.”<sup>12</sup>

Where political discourse surrounding same-gender marriage has become convoluted by religion and arguments of morality, the legal treatment of same-gender marriage under a sympathetic reading of the Due Process Clause holds the potential to provide a more direct path to the legalization of same-gender marriage.

## II. *UNITED STATES V. WINDSOR*: A LOVE STORY

The Supreme Court’s 2013 decision in *United States v. Windsor*<sup>13</sup> significantly altered the legal landscape for same-gender marriage in the United States.<sup>14</sup> The Supreme Court held Section 3 of the Defense of Marriage Act (DOMA) unconstitutional as a violation of equal protection pursuant to the Due Process Clause of the Fifth Amendment. As a result of this landmark decision, marriages performed in those states recognizing same-gender marriages were to be treated equally for purposes of federal law.

*Windsor* involves the individual, the institution, and competing points of view. From one point of view there is the individual plaintiff, Edith Windsor, and the love story of her same-gender marriage. From the other point of view, the case is about institutional power and the conflict between federal and state definitions of marriage. In a broader sense, the case is a reflection of the constant tension between the rights of the individual versus the “best interests” of the government, and the perpetual conflict regarding the division of political power between the state and the federal government.

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11. *Id.* at 12.

12. *Id.*

13. *United States v. Windsor*, 133 S.Ct. 2675 (2013).

14. DOMA (Pub.L. 104–199, enacted Sep. 21, 1996) defines “marriage” as union between a man and a woman, and “spouse” to refer to a person of the opposite sex.

Thea Spyer and her surviving spouse, Edith Windsor, were married under Canadian law, a marriage recognized by the state of New York. After the death of Thea Spyer, Edith Windsor was denied the benefit of a spousal estate tax exemption under the DOMA. In bringing suit against the federal government for a refund of federal estate taxes paid, Edith Windsor challenged the constitutionality of DOMA. Although the Department of Justice refused to defend the statute, the Bipartisan Legal Advisory Group (BLAG) intervened in the litigation to defend DOMA's constitutionality.

The complaint filed by Edith Windsor in the Southern District of New York focused on "Edie and Thea."<sup>15</sup> Edie and Thea's love story spans four pages of the complaint, while a description of DOMA required only one page of the response. The story begins with the following excerpt:

Edie and Thea's life stories are in one sense remarkable for the extraordinary times through which they lived, and at the same time quite typical of the lives of gay men and lesbians of their generations given the pervasive discrimination and homophobia that Edie and Thea encountered on a routine basis. Yet despite obstacles nearly unimaginable today to the generations of gay men and lesbians who followed in their wake, Edie and Thea went on to live lives of great joy, full of dancing, love, and celebration.<sup>16</sup>

When a protagonist like Edith Windsor drives the story of the opinion, the emotion invoked by her character becomes the impetus that energizes and commands the reader. Scholarship indicates that narratives "influence beliefs and attitudes by encouraging empathetic and emotional connections with story characters."<sup>17</sup> Having a character in the opinion allows the reader to distance himself from any existing preconceptions and to

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15. Complaint at 2, *Windsor v. U.S.*, 833 F.Supp.2d 394 (S.D.N.Y. 2010) (No. 1:10CV08435).

16. Complaint at 5, *Windsor v. U.S.*, *id.*

17. Phillip J. Mazzocco & Melanie C. Green, *Narrative Persuasion in Legal Settings: What's the Story?*, 23:1 THE JURY EXPERT (May 2011).

empathize with the narrative of the story. Identifiable characters facilitate the “receiver’s identification with and potential empathy for the characters” because the readers “vicariously experience characters’ beliefs and emotions, empathize with them, and become engrossed in the story.”<sup>18</sup>

In discussing the Defense of Marriage Act, the *Windsor* Court continuously links the impact of the Federal statute to all persons, including Edie Windsor. In examining the relationship between the federal and state powers to define marriage, the Court explains that DOMA’s impact on the individual: “Diminishes the stability and predictability of the basic personal relations the State has found it proper to acknowledge and protect.”<sup>19</sup>

Justice Kennedy writes, “The federal statute is invalid, for no legitimate purpose overcomes the effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>20</sup> Writing for the majority, Justice Kennedy reasons:

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. . . Responsibilities, as well as rights, enhance the dignity and integrity of the person.... By this dynamic, DOMA undermines both the public and private significance of state-sanctioned same-gender marriages: for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition . . . .<sup>21</sup>

When the federal government treats heterosexual marriages differently than those state-sanctioned same-gender marriages, the court holds that the Constitution prevents the distinction. “Such a

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18. Min Kyung Lee, *Story of Birth and Funeral: Rhetorical Analysis of Windsor and Shelby County*, Columbia Public Law Research Paper No. 14-372 (February 2014), available at SSRN: <http://ssrn.com/abstract=2393634>.

19. *United States v. Windsor*, 133 S.Ct. 2675, 2720 (2013).

20. *Id.* at 2696.

21. *Id.* at 2681.

differentiation,” Justice Kennedy exclaims, “demean[s] the couple, whose moral and sexual choices the Constitution protects.”<sup>22</sup>

Though the word “dignity” cannot be found in the language of the Constitution, Justice Kennedy uses it no fewer than ten times in his majority opinion. Justice Kennedy emphasizes human dignity as a constitutional value; one that stands at the heart of the Court’s longstanding commitment to equal protection. In refusing to engage in a solely methodical and dispassionate analysis, the Court situates itself to deliver an opinion that contemplates human dignity, compassion, and the impact on the lives of very real people, including those children affected by the decision.

“DOMA,” Justice Kennedy writes, “humiliates tens of thousands of children now being raised by same-gender couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and the concords of daily life.”<sup>23</sup> Justice Kennedy describes the anticipated harms of DOMA, beyond those financial consequences, and contemplates a clear identification of the victims of the Defense of Marriage Act and their suffering. In rendering an opinion that takes cognizance of these consequences, arguably, Justice Kennedy recognizes that the right to same-gender marriage is implicit in the Constitution. Nevertheless, underlying tones of federalism in the opinion have caused some confusion in lower courts.

### III. MUDDLING IN LOUISIANA

#### *A. Robicheaux v. Caldwell: Abandoning the “Pageant of Empathy”*

The same-gender marriage situation in Louisiana has now become somewhat muddled, among recent conflicting rulings by different courts—one federal, one state. Judge Martin Leach-Cross Feldman of the Eastern District of Louisiana was the first federal

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22. *Id.* at 2675.

23. *Id.* at 2694.



judge to uphold a state prohibition against same-gender marriage since the landmark decision striking down the Defense of Marriage Act in *Windsor*.<sup>24</sup>

The petitioners in *Robicheaux v. Caldwell*<sup>25</sup> include seven Louisiana same-gender couples, several of whom are raising children, and the Forum For Equality, a statewide organization whose members include Louisiana same-gender couples and their families. The petitioners allege that Louisiana's constitutional ban on same-gender marriage forbids them access to the status, rights, and protections of marriage; disparages their families; and inflicts harms on their children. Such a ban, they argue, denies petitioners who are unmarried the right to marry within the state and denies petitioners who have legally married outside of the state all legal recognition of their marriages. The descriptions of each petitioner are limited to, at most, four to five lines of the complaint. In brief, they argue that Louisiana's marriage ban infringes upon their constitutional right to due process and equal protection and, accordingly, that the ban should be struck down.

While most federal judges responsible for striking down same-gender marriage prohibitions incorporate arguments of love, equality, empathy, and compassion into their opinions, Judge Feldman's opinion provides an unadulterated contrast. In upholding Louisiana's prohibition on same-gender marriage, Judge Feldman concludes that same-gender couples have no "fundamental right to marry" and that Louisiana's Constitutional amendment<sup>26</sup> should be judged by the lowest standard of judicial scrutiny, rational basis.<sup>27</sup>

In his nearly thirty-two page opinion, Judge Feldman exiles compassion from his judgment and fails to employ a sympathetic reading of the Due Process Clause, as advocated by Justice Harry

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

25. *Id.*

26. La. Const. Art. XII, § 15.

27. *Robicheaux v. Caldwell*, *supra* note 24.

A. Blackmun. Judge Feldman dispassionately argues that being homosexual is a choice, compares same-gender marriage to incest and polygamy, and, most offensively, labels same-gender marriage as “inconceivable.”<sup>28</sup> “No authority dictates,” Feldman writes, “that same-gender marriage is anchored to history or tradition. The concept of same-gender marriage is ‘a new perspective, a new insight,’ nonexistent and even *inconceivable* until very recently ....”<sup>29</sup> Despite the fact that the majority of federal courts are currently striking down same-gender marriage bans, Judge Feldman explicitly disagrees. “The federal court decisions,” Feldman wrote “thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos . . . . It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing issue, if this court were confident in the belief that those cases provide a correct guide.”<sup>30</sup>

Judge Feldman’s opinion goes beyond that of legal analysis and delivers a demoralizing and personal insult to marriage equality proponents. In invoking his “moral slippery slope” argument, Judge Feldman implies that expanding the definition of marriage to include same-gender couples might “open the door” to the legalization of incest and polygamy—two behaviors explicitly prohibited by existing law. In proffering the following questions, Judge Feldman grossly mischaracterizes same-gender marriage and implies that such a right is distinct and inferior to the fundamental right of marriage enjoyed by heterosexual couples:

Must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? . . . Such unions would undeniably be equally committed to love and caring for one another, just

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28. *Id.* at 926.

29. *Id.* at 923 (citing *Windsor*, 133 S. Ct. 2689) (emphasis added).

30. *Id.* at 925.

like the plaintiffs.<sup>31</sup>

At no point in *Loving v. Virginia*,<sup>32</sup> however, did the Supreme Court engage in such an attenuated, impertinent analysis of whether allowing interracial couples the right to marry would lead to such obscure consequences, notwithstanding the illegality of interracial sexual relations at that time in history. In *Lawrence v. Texas*, Justice Kennedy indicated that private, consensual sexual intimacy between two adult persons of the same gender may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.”<sup>33</sup>

Misapplying the language of the majority in *Windsor*, Judge Feldman relies upon the first portion of Justice Kennedy’s opinion that speaks to the states’ power to define marriage.<sup>34</sup> The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, proceeds from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Relying on *Windsor* as a shield, Judge Feldman writes:

This court finds it difficult to minimize, indeed, ignore, the high court’s powerful reminder in *Windsor*: ‘The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities . . . . The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’<sup>35</sup>

Judge Feldman blatantly takes portions of the *Windsor* decision out of context and errs in disregarding the second portion of Justice Kennedy’s opinion, which reiterates that state laws must respect

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31. *Id.* at 926.

32. 388 U.S. 1 (1967).

33. *Lawrence v. Texas*, 539 U. S. 558, 567 (2003).

34. *United States v. Windsor*, 133 S.Ct. 2675, 2692 (2013).

35. *Robicheaux v. Caldwell*, *supra* note 24, at 918 (citing *In re Burrus*, 136 U.S. 586, 593).

the constitutional rights of persons, and that same-gender marriage bans offend the basic principles of equality.

Greatly persuaded by the argument that same-gender marriage should be a product of the democratic process, Judge Feldman lends legitimacy to the disposition of social issues by prevailing popular opinion and agrees that, “fundamental social change . . . is better cultivated through democratic consensus.”<sup>36</sup>

Relying upon a dissenting opinion from the Tenth Circuit Court of Appeals, Judge Feldman invokes the words of Judge Paul J. Kelley which, he claims, “ought not be slighted”:

[W]here, as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great . . . . But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court’s giving effect to its own notions of what is wise or politic.<sup>37</sup>

Classical legal scholar John Chipman Gray would argue, instead, that the limits of jurisprudence include not only subject matter, but also a consideration what the law *should be*. “The opinions of judges on matters of ethics and policy,” Gray argues, “are the ‘chief engines’ of legal development.”<sup>38</sup> Thus, emotion *is* and *ought to be* understood as part of the legal process, and not as merely a “personal preference.” In accepting a judge’s use of discretion we must understand who the judge is. This understanding includes his sociological, political, ideological, and psychological aspects; none of which can be thought of independently of emotion.<sup>39</sup> In the case of same-gender marriage,

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36. *Id.* at 918.

37. *Id.* at 926 (citing *Kitchen v. Herbert*, 755 F.3d 1193 (2014)).

38. Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 88:5 IOWA L. REV. (August 2001).

39. RENATA GROSSI, *LOOKING FOR LOVE IN THE LEGAL DISCOURSE OF MARRIAGE* 4-5 (ANU Press 2014).

however, love is a human experience, not a political statement for which Judge Feldman's own notion is required.

Beyond Judge Martin Feldman's exile of empathy from judgment lies another aspect of the case that, arguably, contributes to its adverse outcome. Like the same-gender cases that preceded it, the plaintiffs in *Robicheaux* are several. While it is true that the consolidation of cases may act as a mechanism for legal expediency, it does so to the detriment of the parties. The result is a dilution of the personal narrative. The personal stories of the plaintiffs, which are critical in invoking empathy and compassion, become lost amongst the legal argument. As a result, the narrative is uneven and judges like Martin Feldman, then, are less likely to empathize with a seemingly unidentifiable main character. Because the interests at stake are so closely tied to the personal lives of each character affected, it is imperative that marriage equality proponents place the story of the individual at the forefront of their arguments.

*B. Costanza v. Caldwell: The Intact, Same-Gender Family*

In a Louisiana state court action, *Costanza v. Caldwell* (2014),<sup>40</sup> Judge Edward Rubin of the Fifteenth Judicial District Court overturned Louisiana's ban on same-gender marriage in declaring the law unconstitutional as a violation of the Due Process and Equal Protection Clauses of Fourteenth Amendment, as well as the Full Faith and Credit Clause. Judge Rubin ordered state officials to recognize the marriage of a lesbian couple, Angela Costanza and Chastity Brewer; to officially approve their adoption of a boy, N.B., born in 2004; and to allow the couple to file a joint state income tax return.

The case involves a same-gender couple (Costanza and Brewer) married in California in 2008, who petitioned the state of

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40. *Costanza v. Caldwell*, No. 2013-0052 D2. (LA 15th JDC, Sept. 22, 2014).

Louisiana to have their marriage recognized and to allow Mrs. Costanza to adopt the biological child of Mrs. Brewer through an intra-family adoption. In denying their request, the State notes that same-gender marriage is expressly prohibited under Louisiana law.<sup>41</sup> In their petition, Costanza and Brewer argue that by forbidding same-gender couples to marry and adopt, the state of Louisiana violates the Equal Protection Clause of the Fourteenth Amendment because such a prohibition denies same-gender couples those rights afforded to similarly-situated heterosexual couples. The petitioners also argue that Louisiana's failure to recognize their marriage and its refusal to grant the intra-family adoption of their ten-year old son, N.B., deprives them of their fundamental right to marry and raise their child in violation of the Due Process Clause of the Fourteenth Amendment.

Judge Rubin in *Costanza*, like Justice Kennedy in *Windsor*, utilizes the symbolic meaning of children in creating the personal narrative and crafting a persuasive argument. The three means of effecting persuasion, according to Aristotle, are to understand emotions, to name them and describe them, and to know their causes and the way in which they are excited.<sup>42</sup> If the reader is sympathetic to those negatively affected by Louisiana's ban on same-gender marriage, such as young N.B., they are generally more agreeable to the court's determination of the ban as unconstitutional. Moral emotions, including sympathy, are highly correlated and related to vulnerability. In the case of same-gender marriage, the most readily identifiable and vulnerable victims are the children.

Contradicting Judge Feldman, Judge Rubin dismisses the state's proposition that the ban on same-gender marriage has a rational relationship to its goals of linking children with their biological parents. In evidencing that Louisiana allows adoptions by foster parents, Judge Rubin reasons that it would be "illogical"

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41. LA. CONST. art. XII, § 15.

42. ARISTOTLE, ON RHETORIC, BOOK 1, at 8.

to say that intact families are only those formed by a child's biological parents. "There can be no distinction between linking children to 'intact families,' formed by their biological parents and linking children to already intact families<sup>43</sup> involving same-gender marriages, such as the Costanza-Brewer family."<sup>44</sup> Finding that the petitioners are best positioned to make familial decisions regarding the custody and care of their young child, N.B., Judge Rubin declares that the result of holding otherwise would constitute an infringement upon Chastity and Angela's liberty interest in raising their child, as guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>45</sup> In his last remarks relating to the adoption of young N.B., Judge Rubin explains that while the children of same-gender couples may only have biological ties to one parent, "Biological relationships are not the exclusive determinant of the existence of a family."<sup>46</sup>

In addition to possessing the requisite legal expertise, Judge Rubin displays a compassionate recognition of how legal decisions impact the lives of ordinary people, particularly those involved in same-gender marriages. While the last eight pages of the opinion contain a mechanical recitation of the relied upon jurisprudence, Judge Rubin devotes a considerable portion of the opinion to affirming that the right sought by same-gender couples is not a new right, but merely the fundamental right to marry that is similarly enjoyed by heterosexual couples. In contrast, by denying the applicability of *Loving v. Virginia*<sup>47</sup> to *Robicheaux*, Judge Feldman scornfully treats the notion of same-gender marriage as

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43. In his reasons for opinion, Judge Edward Rubin chooses to include parentheticals around "intact family" when it precedes a description of a heteronormative family. When describing a family structure, whose composure is that of a same-gender couple, the words "intact family" are not surrounded by parentheticals. It would appear, here, that Judge Rubin's grammar choice is purposeful; highlighting that the scope of intact families includes both hetero and homosexual couples.

44. *Costanza v. Caldwell*, *supra* note 40, at 18.

45. *Id.* at 19.

46. *Id.*

47. *Id.*

“inconceivable,” non-traditional, and secondary to the fundamental right of marriage afforded to heterosexual couples—depriving those same-gender couples of their dignity. By comparison, relying upon the majority opinion in *Kitchen*,<sup>48</sup> Judge Rubin explains that the relevant question presented in *Loving*<sup>49</sup> is not whether interracial marriage is deeply rooted in tradition, or whether interracial marriage is implicit in the concept of ordered liberty. Rather, he submits that the relevant right at issue in *Loving* is “the freedom to marry.”<sup>50</sup>

Judge Rubin’s empathetic opinion recognizes that although the *right* to same-gender marriage is not deeply rooted in tradition, a history of discrimination against homosexuals is ever present:

Lest we forget, there was a time in America’s history when gays and lesbians were not permitted to even associate in public....We are past that now, but when it comes to marriage between persons of the same sex, this nation is moving towards acceptance that years ago would have never been contemplated.<sup>51</sup>

Compassion in the province of judging becomes increasingly important to address the issues of stigma and discriminatory attitudes:

There are those that might argue that gays and lesbians can be treated differently, and yet be considered to be equal among the rest of Americans. [B]ut . . . fortunately for this country, the U.S. Supreme Court was presented with the case of *Brown v. Board of Education*,<sup>52</sup> which overruled

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48. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. June 25, 2014). In 2013, three same-gender couples (Derek Kitchen and Moudi Sbeity, Karen Archer and Kate Call, and Laurie Wood and Kody Partridge) filed suit challenging Utah’s ban on same-gender marriage. The U.S. District court held that the ban was unconstitutional. The state appealed to the Tenth Circuit Court of Appeals, who ruled in June, 2014, that the ban violates the U.S. Constitution’s guarantees on equal protection and due process. In October, 2014, the U.S. Supreme Court declined to hear a review of the Appeals Court decision.

49. *Id.*

50. *Costanza v. Caldwell*, *supra* note 40, at 21.

51. *Id.* at 20.

52. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).



any doctrine of ‘separate but equal.’<sup>53</sup>

In comparing *Brown v. Board of Education* to *Costanza v. Caldwell*, Judge Rubin brilliantly links the deprivation of equal protection experienced by homosexual couples to the same deprivations of dignity experienced by racial minorities during the civil rights era; a moral evil deeply rooted in our nation’s history.

Judge Rubin likewise dismisses the notion, relied upon by Judge Feldman, that widespread democratic consensus is required before adopting such social change. Notwithstanding the approval of Louisiana voters to ban same-gender marriages and civil unions in 2004,<sup>54</sup> “It is the opinion of this court that widespread social consensus leading to *acceptance* of same-gender marriage is already in progress. The moral disapproval of same-gender marriage is *not* the same as it was when Louisiana first defined marriage as a union between one man and a woman.”<sup>55</sup> Further, and more importantly, public consensus does not guarantee that public policy comports with the rights guaranteed by the United States Constitution.

#### IV. *BASKIN V. BOGAN*: SARDONICISM IN THE SEVENTH CIRCUIT

Writing for a unanimous three-judge panel, in *Baskin v. Bogan* (2014),<sup>56</sup> Judge Richard Posner of the Seventh Circuit rendered an opinion providing that Wisconsin and Indiana have “no reasonable basis” for forbidding same-gender marriage.<sup>57</sup> In Judge Posner’s opinion, there is no question that homosexuals constitute a suspect class of persons. Tantamount to the line of reasoning employed by Judge Rubin, same-gender couples constitute a group of persons with an immutable characteristic who have historically faced discrimination. “It was tradition to not allow blacks and whites to

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53. *Costanza v. Caldwell*, *supra* note 40, at 19.

54. La. Const. Art. XII, § 15.

55. *Costanza v. Caldwell*, *supra* note 40, at 19.

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

57. *Id.*

marry—a tradition that got swept away,” Posner says. “Prohibition of same-gender marriage is [rooted in] a tradition of hate ... and savage discrimination.”<sup>58</sup>

To achieve a ruling that firmly provides for marriage equality, Judge Posner recognizes that federal judges in other circuits may have revised the constitutional framework for marriage by either requiring heightened judicial scrutiny or declaring same-gender marriage a fundamental right. Posner, however, is not interested in reformulating the constitutional framework. Rather, he seeks to emphasize the constitutionally offensive nature of the state statutes. In doing so, he underscores that such statutes offend the Constitution under *any* interpretation of the equal protection clause, regardless of the level of judicial scrutiny.

Although unnecessary, Judge Posner performs a review of “the leading scientific theories” about homosexuality to illustrate that being homosexual is not a choice, an opinion held by notable jurists, including Justice Antonin Scalia and Judge Martin Feldman.<sup>59</sup> The review, however, reinforces Posner’s analytical framework that a suspect class may not be constitutionally disadvantaged without a rational basis. Even at such a low threshold, he condemns the viability of prohibitions against same-gender marriage.

During oral arguments in *Baskin v. Bogan*,<sup>60</sup> the recurring theme of the state’s arguments included “responsible procreation.” In summarizing and dismissing the states’ arguments, Judge Posner exclaims:

[The] government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of government encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or

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58. Oral Argument, Judge Posner, *Baskin v. Bogan*, *id.*

59. *Baskin v. Bogan*, *supra* note 56, at 657.

60. *Id.* at 648.

unwanted, are model parents—model citizens really—so have no need for marriage.<sup>61</sup>

“Heterosexuals,” Judge Posner responds, “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.”<sup>62</sup>

Despite the entertaining and amusing juxtaposition of Judge Posner’s opinion, in more serious terms, Posner describes the case as being one “at a deeper level,” about “the welfare of American children.” The mere fact that gay couples in America are raising more than hundred thousand children suggests a compelling interest in support of gay marriage, since actively banning it, demonstrably harms children. During oral arguments, Judge Posner frequently interrupts Indiana Solicitor General Thomas Fischer, just moments into his presentation to outline a number of psychological strains endured by the children of unmarried couples, including the struggle to understand “[W]hy their schoolmates’ parents are married, yet theirs are [not].”<sup>63</sup> “What horrible stuff,” Posner says.<sup>64</sup> In describing the harmful effects on children, Posner comprehensively contributes to the vivid imagery of their victimization.

Assuming that same-gender couples constitute a suspect class, Judge Posner recognizes that a law that harms such a class may be constitutional if it has offsetting benefits. Judge Posner, recognizing this possibility, then asks what group of persons could possibly benefit from a ban on same-gender marriage. Quoting John Stuart Mill, Posner writes,

To be the basis of legal or moral concern . . . the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or

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61. *Id.* at 662.

62. *Id.*

63. Oral Argument at 4:25, Judge Posner, *Baskin v. Bogan*, *supra* note 56.

64. Oral Argument at 42:17, Judge Posner, *id.*

spiritual. . . . [W]hile many heterosexuals (though in America a rapidly diminishing number) disapprove of same-gender marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of. Wisconsin doesn't argue otherwise. Many people strongly disapproved of interracial marriage, and, more to the point, many people strongly disapproved (and still strongly disapprove) of homosexual sex, yet *Loving v. Virginia*<sup>65</sup> invalidated state laws banning interracial marriage, and *Lawrence v. Texas*<sup>66</sup> invalidated state laws banning homosexual sex acts.<sup>67</sup>

“There is simply no harm,” Posner writes, “tangible, secular, material—physical or financial, or . . . focused and direct done to *anybody* by permitting gay marriage. Conservative Christians may be offended, but there is no way they are going to be hurt by it in a way that the law would take cognizance of.” A lot of people, after all, objected to interracial marriage in 1967—but that didn't stop the court from invalidating anti-miscegenation laws in *Loving v. Virginia*.<sup>68</sup>

In his opinion, Judge Posner makes his points with sardonic humor, but he emphasizes the profound harm that marriage bans inflict on same-gender couples and their families. In humanizing the parties central to his opinion, Judge Posner “restores the equal protection clause to its rightful place as the safeguard for all whom the state seeks to harm unjustly.”<sup>69</sup> In the words of Mark Joseph Stern, a constitutional law blogger for Slate Magazine:

Posner does not sound like a man aiming to have his words etched in the history books or praised by future generations. Rather, he sounds like a man who has listened to all the arguments against gay marriage, analyzed them cautiously and thoroughly, and found himself absolutely disgusted by

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

66. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

67. *Baskin v. Bogan*, *supra* note 56, at 670.

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

69. Mark Joseph Stern, *Judge Posner's Gay Marriage Opinion Is a Witty, Deeply Moral Masterpiece* (Sept. 5, 2014), [http://www.slate.com/blogs/outward/2014/09/05/judge\\_richard\\_posner\\_s\\_gay\\_marriage\\_opinion\\_is\\_witty\\_moral\\_and\\_brilliant.html](http://www.slate.com/blogs/outward/2014/09/05/judge_richard_posner_s_gay_marriage_opinion_is_witty_moral_and_brilliant.html).

their sophistry and rank bigotry. The opinion is a masterpiece of wit and logic that doesn't call attention to—indeed, doesn't seem to care about—its own brilliance. Posner is not writing for Justice Anthony Kennedy, or for judges of the future, or even for gay people of the present. He is writing, very clearly, for himself.<sup>70</sup>

#### V. CONCLUSION

Human sympathy and compassion are vital in the work of the Court. Justice Harry A. Blackmun's vision focuses upon human details and on the problems, worries, and predicaments of individuals. This has been the hallmark of his vision of constitutional law and his interaction with the world around him.<sup>71</sup> This practical yet compassionate view adds to the scope of the Court's work and its angle of vision. Where political discourse surrounding same-gender marriage has become muddled by religion, morality, public policy, and personal prejudice, the legal treatment of same-gender marriage under a sympathetic reading of the Due Process Clause holds the potential to provide a more direct path to the legalization of same-gender marriage. We must never forget, "Compassion need not be exiled from the province of judging."<sup>72</sup>

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70. *Id.*

71. Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Courts Mirabeau*, 59 LA. L. REV. (1999).

72. *Deshaney v. Winnebago Cnty. Dep't of Soc. Services*, *supra* note 5, at 213.