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The Radicalism of Conservative Legal Attacks on Lesbians and Gay Men

William B. Turner, Ph.D., J.D.
Visiting Assistant Professor
Emory University School of Law
drtturner@mindspring.com
404.695.6081
1301 Clifton Road
Atlanta, GA 30322

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Is there a rational basis for distinguishing same-sex from opposite-sex couples? This is plainly a pressing legal issue, as three justices indicated with their discussions in Lawrence v. Texas.\(^1\) The most obvious way to frame this issue in terms of doctrine under the Constitution of the United States is in terms of equal protection — are same-sex couples sufficiently similarly situated to opposite sex couples that government may not distinguish between them for purposes of rights and benefits?\(^2\)

Another way of asking the equal protection question is to examine the motives of the individuals who wish to make government distinguish same-sex from opposite-sex couples. What reason can those who wish to differentiate lesbians and gay men legally from the rest of the population give in support of their goal? This is the primary mode of analysis in Romer v. Evans. Romer struck down a state constitutional amendment that named “homosexual, lesbian, or bisexual orientation” as the basis for prohibiting any unit of the state government from conferring any sort of civil rights protection on the named group, and repealed all existing lesbian/gay rights municipal ordinances in the state.\(^3\) The Court stated that it could find no motivation for the amendment except animus toward the named group.\(^4\)

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\(^1\) 539 U.S. 558 (2003), at 578: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual” (majority opinion by Justice Kennedy); at 584: “A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law” (concurring opinion by Justice O’Connor); at 599: “I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence — indeed, with the jurisprudence of any society we know — that it requires little discussion” (dissenting opinion by Justice Scalia).

\(^2\) See, e.g., Lawrence, 539 U.S. at 599-600 (Scalia dissenting): “To be sure, [Texas penal code] § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.”

\(^3\) 517 U.S. 620, 624 (1996)

\(^4\) Id. at 632: “[Amendment 2’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”
In this light, a number of cases that seem otherwise insufficiently important to consider take on new significance.\textsuperscript{5} These cases are quite boring in terms of their application of the law. Their importance lies in the fact that they reveal a pattern of attack by conservative activists on lesbians and gay men, particularly on same-sex couples. One thing these cases have in common is the specific forms of the attack, which are two: first, conservatives would deprive lesbians and gay men of the ordinary access to the legal system that non-lesbian/gay persons take for granted; second, conservatives consistently claim for themselves privileged access to the legal system because their purpose is to attack substantive rights and benefits that lesbians and gay men enjoy. The legal point of the first form of attack is essentially not different from the legal conclusion of \textit{Dred Scott v. Sandford}, that an entire class of persons should not have access to the courts.\textsuperscript{6}

Another thing several of these cases have in common is that, often, counsel for the parties who attack lesbian/gay equality are conservative law firms.\textsuperscript{7}

So far, this conservative effort to exclude lesbians and gay men from elementary legal processes and protections, and to claim privileged access for conservative attackers, has usually failed. It has failed mostly because these cases involve conservative activists presenting legal


\textsuperscript{6} Dred Scott v. Sandford, 60 U.S. 393, 403, 404 (1857): “Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in cases specified in the Constitution…. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”

\textsuperscript{7} Brinkman, Alliance Defense Fund (ADF), 2007 Ohio 4372; Rohde, Thomas More Law Center, 737 N.W.2d at 158; Miller-Jenkins, Liberty Counsel, 637 S.E. 2d at 331; Ralph v. City of New Orleans, 921 So. 2d 988, 990 (La. Ct. of Appeals, 4\textsuperscript{th} Cir., 2005), ADF; Alons, ADF, 698 N.W.2d 861.
claims that range from the merely absurd to the bizarre. Judges have not yet recognized the pattern of striving to exclude lesbians and gay men from the legal system, or claim privileged access for conservatives, since that pattern is hard to discern. These are mostly state cases emerging in a wide variety of states. Once one notices, however, the pattern is clear and the conservatives are relentless in pressing it, so it is helpful to limn the major elements of this strategy in the hope of making its instantiations more visible, and therefore easier to combat.

In that sense, this article is conceptually very simple. It consists primarily of readings of several cases in order to bring out the similarities among them – the effort by conservative activists to deprive lesbians and gay men, not only of substantive legal protections, but of access to judicial process, as well as to assert privileged access to judicial process for conservatives. Doctrinally, these cases hearken back to _Romer v. Evans_, even though none of them raises an equal protection issue on its face. As Justice Kennedy explained in his opinion, part of what made Amendment 2 suspect on equal protection grounds was that such legislation was unprecedented in the American legal tradition.8 When their goal is to impose disabilities on lesbians and gay men, conservatives are quite radical in their eagerness to jettison ancient legal principles, and/or manufacture new ones.

The majority opinion in _Romer_ eschews any explicit discussion of access to the political process in its explanation for why Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.9 Even so, the Court’s reasoning makes much more sense if one infers behind it the observation that Amendment 2 failed because it uniquely deprived a “single named group” of access to the political process.10 The cases in this article illustrate that conservative activists have not given up the goal of excluding lesbians and gay men from the political process.

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8 517 U.S. 632, 633.
9 _Id._ at 650 n. 3.
they have simply changed how they go about it. Having lost the battle over Amendment 2, they now actively seek ways of using litigation to prevent lesbians and gay men from having equal access to legal process, and to assert their own special rights to access. Presumably, were they to win any of these battles, they would return to the use of vehicles such as Amendment 2 in order to deprive lesbians and gay men of access to the political process.

These cases thus also contribute a new perspective to the perennial problem of how to explain which groups merit increased protection by the courts from the majoritarian process, and which do not.\textsuperscript{11} Why is the Court willing to strike down laws that discriminate against racial/ethnic minorities,\textsuperscript{12} women,\textsuperscript{13} and lesbians and gay men,\textsuperscript{14} but not laws that discriminate against certain classes of advertisers in New York City,\textsuperscript{15} or opticians in Oklahoma?\textsuperscript{16} In terms of existing doctrine, the obvious distinction would be a history of discrimination against the

\textsuperscript{11} Perhaps the most famous statement of this problem is United States v. Carolene Products, 304 U.S. 144 (1938) at 152 n.4. The text of the opinion uses the term “rational basis” in asserting that “regulatory legislation affecting ordinary commercial transactions” is presumptively constitutional. \textit{Id.} at 152. Footnote 4 asserts that the judiciary may typically need to look with greater care at legislation that falls “within a specific prohibition of the Constitution,” or targets “particular religious, or national, or racial minorities.” \textit{Id.} at 152 n.4. This distinction forms an undercurrent in disputes over lesbian/gay civil rights claims. In his \textit{Romer} dissent, Justice Scalia takes pains to insist that conduct defines the class, “lesbians and gay men,” such that any prohibition on legislation that discriminates against that class would seem to preclude the possibility of prohibiting conduct entirely. \textit{Romer}, 517 U.S. at 641-44 (Scalia dissenting). This is an issue that the \textit{Carolene Products} court, writing well before the emergence of a social movement on behalf of lesbian/gay civil rights, cannot have anticipated.

\textsuperscript{12} \textit{E.g.}, Loving v. Virginia 388 U.S. 1 (1967) (state prohibition on marriages between black and white persons violates Equal Protection Clause).

\textsuperscript{13} \textit{E.g.}, Reed v. Reed, 404 U.S. 71 (1971) (state statute asserting automatic preference for men as administrators of estates violates Equal Protection Clause).

\textsuperscript{14} \textit{Romer}, 517 U.S. at 635: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.....”


\textsuperscript{16} Williamson v. Lee Optical, 348 U.S. 483 (1955) (law permitting ophthalmologists to perform certain tasks that optometrists may not does not violate Equal Protection Clause).
groups whom the Court will protect, and the absence of such history against the groups whom the Court will not protect.

The cases in this article take the point one step further. They demonstrate that lesbians and gay men suffer, not merely a history of discrimination, but on-going persecution, or on-going attempts at persecution, by conservative activists. Justice Scalia defended Colorado’s Amendment 2, and the state sodomy statutes at issue in Lawrence v. Texas, by asserting that those laws only reflected the legitimate desire of reasonable majorities to perpetuate their long-standing moral principles regarding same-sex sexual conduct. Perhaps he would assert the same with respect to the conservative legal arguments in the present cases, but both the eagerness with which conservatives pursue these suits, and the peculiarity of the legal arguments they are willing to advance, strongly suggest that animus toward lesbians and gay men is a better explanation. More, even if perpetuation of “traditional” sexual mores is substantively a reasonable goal for legislation, still the enactment and enforcement of such legislation must abide by well established procedural principles, that is, it must abide by due process of law.

Allowing conservatives to exclude lesbians and gay men from the legal process would constitute gross injustice by itself, which is the first reason to oppose it. The second reason why lawyers and legal scholars generally should notice this phenomenon is that it poses a threat to the proper operation of the legal system per se. First, several of these cases involve waste of judicial

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17 E.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (requirement that female servicemembers make showing that male servicemembers need not make to receive benefits violates Equal Protection Clause) (plurality opinion) at 684: “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.”

18 E.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (legislative classification based on age does not violate Equal Protection Clause in part because age has not served as a basis for systematic discrimination in our nation’s history). But see Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (court expressly finding that mentally retarded to not qualify as a suspect or quasi-suspect class in part because many legislators, including in Congress, have acted to protect the mentally retarded, but still striking down local ordinance imposing greater licensing burden on group home for mentally retarded than for all other forms of group housing).

19 Romer, 517 U.S. at 644-51 (Scalia dissenting).

20 Lawrence, 539 U.S. at 599 (Scalia dissenting).
resources because the claims are so patently unsustainable. It is no more acceptable to deprive conservatives as a class of their access to judicial process than so to deprive lesbians and gay men, so no blanket rule will solve the problem. However, insofar as judges are aware of the pattern, they can perhaps reduce the waste of these cases when they see them.\(^{21}\)

Second, with these attacks, conservatives demonstrate that they will sacrifice even the most elementary principles of American law in their zeal to heap disabilities on lesbians and gay men. The clearest cases involve simple federalism. Conservatives have publicly taken the position that full faith and credit does not apply where the state’s goal is to deprive lesbians and gay men of ordinary legal protections that non-lesbian/gay persons take for granted.\(^{22}\) They have argued that states may disregard federal statutes, or interpret those statutes in ways that are plainly insupportable to anyone who does not begin their reasoning with the proposition that the goal of harassing lesbians and gay men takes precedence over all others.\(^{23}\) They have repeatedly asserted standing for the purpose of stopping public agencies from providing benefits to lesbians and gay men.\(^{24}\)

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\(^{21}\) One way to recognize the possible presence of legal attacks on lesbians and gay men is to note the presence as counsel of one of the conservative law firms that typically promote such litigation, including the Thomas More Law Center (*Rohde*, 737 N.W. 2d at 158), [www.thomasmore.org](http://www.thomasmore.org) (last visited Feb. 1, 2008); Liberty Counsel (*Miller-Jenkins*, 637 S.E. 2d at 331 (VA) and 912 A.2d at 954 (VT)) ([see Brief of Appellee, Miller-Jenkins, by Liberty Counsel, available at](http://www.lc.org/attachments/Miller_Brief_VACtApp.pdf) (last visited Feb. 1, 2008), and the Alliance Defense Fund (*Alons*, 698 N.W. 2d at 861; *Hetgeland*, 724 N.W. 2d at 213; *Brinkman*, 2007 Ohio 4372; Ralph v. City of New Orleans, 921 So. 2d 988, 990 (La. Ct. App. 2005)) ([www.alliancedefensefund.org](http://www.alliancedefensefund.org), last visited Feb. 1, 2008). Again, these organizations have the same right to participate in litigation as anyone else, and the lesbian/gay rights movement relies on similar organizations, such as Lambda Legal ([www.lambdalegal.org](http://www.lambdalegal.org), last visited Feb. 1, 2008) and the lesbian/gay civil rights project of the American Civil Liberties Union ([www.aclu.org](http://www.aclu.org), last visited Feb. 1, 2008), so no blanket rule about which groups may participate in lesbian/gay civil rights cases will solve the problem.


\(^{24}\) *See infra*, sec. XX.
Most of these cases have attracted relatively little attention for at least two reasons. They tend to be state cases, which tend to be less important than federal cases in our federal system.\textsuperscript{25} Also, the good news is that the conservatives have lost in all but one of these cases, usually because their efforts to exclude lesbians and gay men from the legal process entirely involve gross violations of well established procedural principles.

But the mere fact of conservative efforts to exclude lesbians and gay men from the legal process, and to claim privileged access for themselves, should itself cause judges to take notice. Apart from the obvious equal protection issue – what rational basis could exist for excluding an entire class of citizens from the legal process, or for giving privileged access to another group? – the conservative goal in these cases is also a gross violation of due process in the most literal and obvious sense. Due process of law begins with access to judicial process. This point reflects Justice Kennedy’s observation in \textit{Lawrence} that equal protection and due process are closely related.\textsuperscript{26} In the case of lesbian/gay civil rights, or \textit{Dred Scott}, one means of perpetuating the denial of equal protection of the laws is to deny due process of laws. How can citizens vindicate their substantive right to equal protection of the laws if they lack access to the courts? Why else deprive a class of citizens of access to the courts except to deprive them of equal protection of the laws?

In different ways, all of these cases involve questions of the rights and benefits available to lesbians and gay men given the existence of state statutes prohibiting recognition of same-sex marriages or otherwise restricting the rights of same-sex couples. Such cases will only become


\textsuperscript{26} 539 U.S. at 574-75.
more common as same-sex couples continue to create families in defiance of discriminatory laws. There is no more reason to expect that conservatives will halt their assault on the rights of lesbians and gay men than there is to expect that lesbians and gay men will stop demanding their rights, so these issues are bound to recur for the foreseeable future.

The seven cases that I discuss in this article fall into two larger categories according to the primary legal issue they present: 1) standing/intervention, and 2) full faith and credit. Section I of this article discusses the issue of standing/intervention and the five cases that address that issue, Alons v. Iowa District Court of Woodbury County, Rohde v. Ann Arbor, Brinkman v. Miami University, Ralph v. City of New Orleans, and Helgeland v. Wisconsin Department of Employee Trust Funds. Section II discusses the issue of full faith and credit and the two cases that address that issue, Miller-Jenkins v. Miller-Jenkins, with a final opinion from the Vermont Supreme Court and an opinion under review from the Virginia court of appeals, and Finstuen v. Crutcher, the one federal case on this list.

I. Standing/Intervention

The related issues of standing and intervention in these cases vividly illustrate the lengths conservatives are willing to go to in their attacks on lesbians and gay men. In each of these cases, conservatives pursue litigation for the express purpose of depriving lesbians and gay men of some legal right, including access to the legal process itself. But not only do they pursue litigation with that substantive goal, they do so in ways that the courts readily dismiss as impermissible. The conservatives in these cases claim the right to bring a particular suit, or intervene in a particular suit, apparently because they believe they should have an unfettered right to use the courts for the purpose of oppressing lesbians and gay men. Happily, to date they
have lost all but one of these cases because their claims to standing or intervention in fact have no basis in American law. The instance in which conservative would-be plaintiffs won, Ralph v. City of New Orleans, involves a distinction in Louisiana law that is unusual, if not unique.

A. Alons v. Iowa District Court for Woodbury County

In Alons, the plaintiffs petitioned for a writ of certiorari from the Iowa Supreme Court in order to nullify the trial court’s order adjudicating rights and responsibilities between two lesbians who had ended their relationship.\textsuperscript{27} The lesbian couple had entered into a civil union in Vermont. The trial court initially treated the case as a divorce. After the plaintiffs in Alons filed their petition, the trial court withdrew its divorce decree, substituting instead an order terminating the civil union and ratifying the parties’ stipulation regarding division of property and debts.\textsuperscript{28} The substitute order stated that the court lacked subject matter jurisdiction to adjudicate a Vermont civil union, but predicated its jurisdiction instead on its general equitable power to determine the rights and responsibilities of parties.\textsuperscript{29}

Even so, the plaintiffs insisted that the substitute order did not rectify the underlying jurisdictional defect.\textsuperscript{30} Logically, this claim entails the proposition that a lesbian couple may not avail themselves of the Iowa courts because they are lesbians. The Iowa Supreme Court did not reach the merits of this claim, holding instead that the plaintiffs lacked standing to bring the suit.\textsuperscript{31} The Court’s standing analysis was routine, resting on well established state and federal precedent. The key issue in Iowa law was the presence or absence of a “specific personal or

\textsuperscript{27} Alons v. Iowa District Court for Woodbury County, 698 N.W.2d 858, 862 (Iowa, June 17, 2005).

\textsuperscript{28} Id. at 863.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id. at 862, 863.
legal interest in the litigation’.” 32  Given such an interest, “the plaintiffs must also prove ‘that they have been injured in a special manner, different from that of the public generally.’” 33  The court also discussed relevant federal law, finding that it provided much the same standard. 34  It discussed the issue of standing under Article III of the United States Constitution, particularly as interpreted in Lujan v. Defenders of Wildlife. 35  Reviewing each of the individual claims that plaintiffs put forward, the court repeatedly found that they could demonstrate neither an interest with the requisite specificity, nor any particular injury, apart from the injury they claimed on behalf of the general public. 36

Necessarily, the Iowa Supreme Court’s discussion of standing involved some recital of the plaintiffs’ claims.  Individual married plaintiffs asserted that they would defend their interest in traditional marriage against encroachment by same-sex couples. 37  A minister claimed to fear criminal prosecution “if he solemnizes a marriage of a heterosexual couple when one of the parties has entered into a civil union that has not been terminated.” 38  The Church of Christ of Le Mars claimed standing because “[t]he decree, which is contrary to well-established law, public policy, and ecclesiastical principles of the plaintiff’s denomination, would undermine the

32 Id. at 864, citing Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004).
33 Alon, 698 N.W. 2d at 864-65, citing State v. West, 320 N.W.2d 570, 573 (Iowa 1982).
34 Alon, 698 N.W. 2d at 867-69.
36 Id. at 868-69.  “[T]hese plaintiffs have not shown that they have a legally recognized or personal stake in the underlying case.  Nor have they shown that they have been injured in fact as distinguished from having been injured in an abstract manner.”  Id. at 873-74.
37 Id. at 870.
38 Id. at 871-72.  The court patiently explained why this was an absurd claim: “Iowa Code section 595.9 provides that ‘if a marriage is solemnized without procuring a license, the parties married, and all persons aiding them, are guilty of a simple misdemeanor.’  Therefore, once a couple presents a marriage license to a minister, it seems clear to us that the minister may solemnize the marriage without fear of criminal sanctions provided in Iowa Code section 595.9.  Moreover, this plaintiff is under no duty to solemnize any marriage.  If this plaintiff is in doubt about the validity of such a proposed marital union, he can simply refuse to solemnize the marriage.”  Id. at 872.
denomination’s teachings concerning marriage.” 39 None of these claims presented either an interest or an injury of sufficient particularity to give the plaintiffs standing. 40

Several members of the Iowa Legislature and one member of its Congressional delegation asserted that the trial court had violated their rights as legislators to make public policy for the state by exercising jurisdiction in a type of case that it lacked authority to adjudicate. The court noted that

Here the district court was doing what judges do: interpreting the law concerning a case over which it had jurisdiction…. It would be strange indeed and contrary to our notions of separation of powers if we were to recognize that legislators have standing to intervene in lawsuits just because they disagree with a court’s interpretation of a statute. 41

Legislators who perceive a given judicial opinion to be erroneous have the option of enacting statutes to correct that opinion. 42 The judge’s observation here illustrates an important underlying point about standing – in several of these cases, it also implicates separation of powers between the judiciary and the legislature.

39 Id. at 872. The violation of the Establishment Clause of the First Amendment to the United States Constitution that would result from the court’s adoption of this argument seems obvious. See McReary County v. ACLU, 545 U.S. 844 (2005); Lemon v. Kurtzman, 403 U.S. 602 (1971).
40 The court summarized the point thus: “Reduced to their simplest form, the plaintiffs’ contentions and arguments do no more than to assert a right to represent the general public rather than to identify their individual interests.” Id. at 870. Nowhere does the court make the further point, but implicit in this observation is the recognition that the plaintiffs in this case effectively claim to represent many persons who do not share their position in the litigation. That is, given a statute prohibiting recognition of same-sex marriages in Iowa, still some citizens of Iowa must disagree with that policy. They may not have the capacity to change the policy, but they do have a right not to participate in litigation toward an interpretation of that policy, or any other goal, that they disagree with. This is the inverse of the more common observation that standing requirements prevent the courts from usurping legislative power by requiring them only to adjudicate cases and controversies. See Rohde v. Ann Arbor, 737 N.W.2d 158, 164 (Mich. 2007), quoting Nat’l. Wildlife Federation v. Cleveland Cliffs Iron Co., 684 N.W.2d 800 (2004): “If the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch…."
41 Id. at 873.
42 Id.
Two of the plaintiffs’ claims deserve particular mention. First, attempting to demonstrate standing as individual married persons, the plaintiffs asserted that “by recognizing a civil union, the district court has injured them because such recognition would dilute the value of traditional marriage long recognized by this state.” Conservatives also often claim that divorce undermines “the value of traditional marriage.” On this logic, any married plaintiff could file suit against any court that issues a divorce decree. Granted, Iowa statutes permit divorce while they prohibit recognition of same-sex marriages. The plaintiffs’ substantive claim is that the court lacked all statutory or other legal authority to adjudicate the lesbians’ rights and responsibilities relative to one another, which they cannot say about divorce.

The procedural claim, however, must be that any married person has standing to bring a writ of certiorari before the Iowa Supreme Court any time that person perceives a threat to her/his marriage from any suit in any Iowa trial court. One suspects that some conservatives genuinely believe this proposition should be true, but it is plainly at odds with elementary principles of American law. Specifically with respect to same-sex couples, this claim illustrates the conservative belief that lesbians and gay men should always be subject to surveillance and correction by heterosexuals, including legal action as necessary. Any heterosexual couple should be able to file suit to prevent a same-sex couple from using the courts.

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43 Id. at 871.
44 See, e.g., Institute for Marriage and Public Policy, http://www.marriagedebate.com/ (last visited, Jan. 27, 2008), containing arguments against both divorce and same-sex marriage.
46 Iowa Code, sec. 595.2.1 (2006): “Only a marriage between a male and a female is valid.” But see, Varnum v. Brien, Iowa District Court for Polk County, Case no. CV5965, Aug. 30, 2007 (holding that sec. 595.2.1 violates due process and equal protection rights under Iowa constitution of same-sex couples who wish to marry). The trial judge has suspended the order in this case pending appeal. Monica Davey, Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway, N.Y. TIMES, Sept. 1, 2007.
The second, and more important, point stems from plaintiffs’ assertion that they have standing as individual taxpayers. The court quoted the plaintiffs’ position at length:

the district court opened up the judicial system to a new class of petitioners and respondents outside those individuals provided for under state law, which will require the provision and expenditure of additional state judicial resources beyond those approved by the state legislature. Dissolution/termination of a Civil Union will likely result in additional litigation, requiring state judicial resources, concerning property distribution, child custody and support, and spousal benefits.\(^\text{47}\)

The supreme court compared this claim to directly relevant precedent, noting that taxpayers do not have standing to challenge judicial opinions that involve the ordinary and necessary expenditures of running a court system.\(^\text{48}\)

The court did not address the more sinister implications of this argument. Certainly Iowa can and should use statutes and rules of civil procedure to define legal processes, including limiting who may use the courts and how.\(^\text{49}\) \textit{Alons} itself is a manifestation of this phenomenon.\(^\text{50}\)

\(^{47}\) \textit{Alons}, 698 N.W. 2d at 871.

\(^{48}\) \textit{Id.} at 871, quoting Polk County v. District Court, 110 N.W. 1054, 1054-55 (1907). To state the obvious, if the lesbians were residents of Iowa when they filed to dissolve their union, as they must have been, then they too were taxpayers in the state of Iowa. The argument of the \textit{Alons} plaintiffs only makes sense if one assumes either that lesbians and gay men pay no taxes, or that the taxes of lesbians and gay men do not entitle them to the use of the court system on equal terms with all other citizens.

\(^{49}\) Iowa Constitution, Art. V, sec. 4: “Jurisdiction of supreme court. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.” Sec. 6: “Jurisdiction of the district court. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.” Sec. 14: “System of court practice. It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.” Iowa Code sec. 602.6101: “Unified Trial Court. A unified trial court is established. This court is the ‘Iowa District Court’. The district court has exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body. The district court has all the power usually possessed and exercised by trial courts of general jurisdiction, and is a court of record.” Sec. 602.5103: “Jurisdiction. 1. The jurisdiction of the court of appeals is coextensive with the state. The court of appeals has appellate jurisdiction only in cases in chancery, and constitutes
But to assert generally that an entire class of citizens may not avail themselves of the state’s courts for fear of increasing the cost of those courts to other citizens would plainly be a violation of the principles of due process and equal protection of the laws. Unless conservatives wish to assert that lesbians do not pay taxes, this assertion necessarily rests on the subsidiary proposition that some citizens’ tax payments are more valuable than others, allowing those who make approved payments – or who have approved identities – to use the courts while others apparently just have to fight it out among themselves.

Recall that the plaintiffs insisted that the district court’s second order, predicated on its equitable power to declare the rights and responsibilities of parties, was still unlawful.\textsuperscript{51} Plaintiffs initially seem to claim that they are simply asserting the Iowa district court’s lack of subject matter jurisdiction over civil unions, which Iowa does not recognize,\textsuperscript{52} but to proceed in the same manner against a decree in equity is to suggest that the lesbians have no relief whatsoever available to them to adjudicate their rights and responsibilities relative to each other.\textsuperscript{53} If conservatives see some difference between this argument and the holding in \textit{Dred Scott}, they should explain what it is.

\textsuperscript{50} \textit{Alons}, 698 N.W.2d at 874; “Because the plaintiffs have shown no standing to challenge the district court’s amended decree, we annul the writ.”
\textsuperscript{51} \textit{Id.} at 863.
\textsuperscript{52} \textit{Id.} at 862.
\textsuperscript{53} See, e.g., \textit{Hoeppner} v. \textit{Holladay}, 2007 Iowa App. Lexis 1064 (Ct. App. Iowa 2007) (unpublished) (upholding rescission of quit claim deed, award of common-law attorney’s fees and punitive damages against boyfriend who fraudulently induced girlfriend to sign quitclaim deed in his favor). \textit{Hoeppner} involves a claim of fraud, but one of the key issues is the same as in the district court’s order in \textit{Alons}: an equitable adjudication of property rights. \textit{See Alons}, 698 N.W.2d at 863; \textit{Hoeppner}, 2007 Iowa App. Lexis 1064 at 11: “The remedies at law are inadequate. Rescission of that deed is affirmed.” It seems clear that the logic of the plaintiffs in \textit{Alons} would preclude the court from adjudicating such a case if the parties happened to be lesbian or gay. The potential injustice involved is so obvious as not to require explanation.
The issue and the holding in Alons are in most respects very similar to that in Rohde v. Ann Arbor Public Schools. Both cases involve citizens as plaintiffs who hoped to stop actions by public officials benefiting same-sex couples that the plaintiffs consider unlawful.

B. Rohde v. Ann Arbor Public Schools

The plaintiffs in Rohde hoped to stop the Ann Arbor, Michigan public school district from providing benefits to the same-sex partners of employees. They asserted that the Michigan constitution and statutes, as interpreted, prohibited such conferral of benefits. They wrote letters to various public officials demanding that the conduct cease under a Michigan statute that allows any resident of a township or school district to demand cessation of any unlawful expenditure of public funds. Having sent the demand, the complainant under the statute may then initiate a suit in law or equity to stop the allegedly unlawful expenditure and recover any misspent funds.

The Michigan Supreme Court held that the plaintiffs lacked standing to bring the suit. It further held that the statute was unconstitutional insofar as it appeared to permit such suits by persons who otherwise lacked the constitutional requirements for standing generally. The court initially invoked its own precedent for the standing threshold in Michigan, but noted that Michigan’s analysis of standing mostly follows in lock step with the United States Supreme Court.
Court’s analysis in *Lujan v. Defenders of Wildlife*.\(^{61}\) Thus, both the Michigan and the federal courts require three elements for standing: 1) the plaintiff must show an “injury in fact” in the form of harm to “a legally protected interest” that is both “concrete and particularized,” and “actual or imminent,” rather than “‘conjectural’ or ‘hypothetical.’” 2) Some causal connection must obtain between the offending conduct and the injury. 3) Legal redress must be likely to result in relief for the plaintiff.\(^{62}\)

Plaintiffs asserted that their suit amounted to a *qui tam* action, similar to a suit under the federal False Claims Act (FCA). The court acknowledged important similarities between a suit under FCA and one under MCL 129.61, but also noted important differences. For purposes of standing, the key was that the FCA allows the relator in a successful suit to reap a “bounty” in the form of a percentage of the recovered funds. MCL 129.61 makes no such provision. The bounty serves, *inter alia*, to confer on the relator the sort of concrete and particular interest in the suit that she would otherwise lack.\(^{63}\) The court also noted that *qui tam* actions characteristically allow the government to take over the suit completely should it choose to do so. MCL 129.61 makes no such provision.\(^{64}\) Thus, plaintiffs’ claim under MCL 129.61 did not qualify as a *qui tam* action. Given these legal determinations, the facts of the case required little discussion because “[p]laintiffs admit that their injury is minute and generalized. Thus, it is not a concrete and particularized injury in fact. Indeed, any ‘remedy’ they might obtain will not confer a financial benefit on them.”\(^{65}\)

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62 *Rohde*, 737 N.W. 2d at 163.
63 *Id.* at 165, 165 n. 14.
64 *Id.* at 165-66.
65 *Id.* at 167.
Rohde grew out of a debate that will keep coming up – whether state statutes and/or constitutional amendments prohibiting recognition of same-sex marriages also prohibit public employers in those states from conferring benefits on the same-sex partners of their employees.\footnote{See supra note 57 for discussion of on-going litigation on this point in a different Michigan case.} This is a specific version of the larger issue in Alons, the proper enforcement of state anti-marriage statutes and amendments. The issue in Rohde, in turn, is very similar to the issue in Brinkman v. Miami University.

C. Brinkman v. Miami University

Brinkman\footnote{2007 Ohio 4372 (Ct. App. Ohio, 2007).} is simple enough in this context. Much as a group of taxpayers in Rohde filed suit to stop a public employer from providing benefits to the same-sex partners of employees, so Brinkman sued to stop the public Miami University of Ohio from providing such benefits. The Ohio Appeals Court upheld the trial court’s finding that Brinkman lacked standing to bring the suit.\footnote{Id. at P5.} Brinkman chose not to appeal to the Ohio Supreme Court.\footnote{See “History,” Brinkman, Lambda Legal web site, \url{http://www.lambdalegal.org/our-work/in-court/cases/brinkman-v-miami-university.html} (last visited Feb. 3, 2008).}

The biggest difference between Brinkman and Rohde is that, unlike Michigan, Ohio has no specific statute enabling suits by aggrieved taxpayers to stop illegal expenditures of public funds. However, no one disputed that a common-law right to file such suits exists in Ohio.\footnote{Brinkman, 2007 Ohio 4372 at P32, quoting State ex rel. Masterson v. Ohio State Racing Comm., 123 N.E.2d 1 (Ohio 1954). Obviously, if an expenditure is illegal, to some extent the amount becomes nearly irrelevant. However, it is worth noting in this context the court’s observation that the premium the University paid to cover same-sex domestic partners in 2004-05, $100,221, represented .0527 percent of the entire faculty and staff compensation budget that year. Id. at P7.} The question was the criteria the would-be plaintiff must meet in order to bring the suit.

Brinkman claimed standing on three distinct grounds: first, that the University uses a portion of his tax payments to the state in order to provide benefits to the same-sex partners of employees, such that “he possesses common-law taxpayer standing”; second, he predicated the same type of
standing on the fact that he pays tuition to the University for two of his children; third, he claimed “public-right” standing because of the issue’s importance to the general public.\textsuperscript{71}

A significant impediment to Brinkman’s standing claims was the fact that, although the University initially paid the premiums to provide insurance for same-sex domestic partners out of its primary operating fund, which includes tax revenue, it made a practice of reimbursing that particular cost to the operating fund out of a separate account that contained only funds from private donations.\textsuperscript{72} The court described whether a tax payer could file suit to stop a public entity from spending private funds as “an open question”\textsuperscript{73} and engaged in a lengthy discussion of conflicting precedent from Ohio, as well as a case from Alabama that it found “persuasive.” Ultimately, the Ohio court held that, “[u]nder these circumstances, Brinkman cannot demonstrate any injury-in-fact based upon his status as a taxpayer. Without an injury-in-fact, he lacks standing to maintain this action.”\textsuperscript{74}

As the Ohio court’s use of the phrase “injury-in-fact” indicates, although it here examines a suit based in Ohio common law, many of the principles are the same as in other states.\textsuperscript{75} Similarly, the Ohio court quoted the “leading case on the issue”\textsuperscript{76} as stating, “private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.”\textsuperscript{77} This is no different from the holding of the Alons court that the would-be plaintiffs there could demonstrate no harm other than what

\textsuperscript{71} Brinkman at P4.
\textsuperscript{72} Id. at P8. The court acknowledged that the University failed to make this reimbursement for the 2004-05 academic year, \textit{id.}, but it treated this as an oversight and accepted the uncontroverted testimony of the University Controller that such reimbursement would be routine in future years, \textit{id.} at P26.
\textsuperscript{73} Id. at P18.
\textsuperscript{74} Id. at P25.
\textsuperscript{75} See, \textit{e.g.}, supra note 62 and accompanying text, \textit{infra} note 155 and accompanying text for other discussions of “injury-in-fact” as a prerequisite for standing.
\textsuperscript{76} Brinkman at P31, citing Masterson.
\textsuperscript{77} Brinkman at P33, quoting Masterson at 368.
the general public would suffer. The *Brinkman* court later expressly asserted the wisdom of considering federal as well as state precedent on this point, finding that they agree.

The court dispensed quickly with Brinkman’s claim that he had standing because he paid tuition to the University for two of his children. Unlike state taxes, Brinkman has no legal obligation to pay tuition to Miami University. If he dislikes the University’s disposition of its funds, he can stop paying money to it. The court also noted that the liability for tuition did not belong to Brinkman to claim. His two children were both adults and, as such, legally liable for their own University tuition payments. That Brinkman made such payments on his children’s behalf was Brinkman’s choice, so it certainly conferred no standing on him to bring suit against the University under the circumstances of this case. Similarly, the court took little time to find that Brinkman’s claim to public-right standing failed. The primary question was the importance of the substantive issue. Public-right standing in Ohio is available only when the substantive issue is of the very highest importance to the public. Brinkman claimed that the domestic-partner benefit issue qualified. The court held that it did not.

Where *Brinkman* involved a dispute over existing benefits at a single public university, *Ralph v. City of New Orleans* involved a dispute over benefits for the same-sex partners of employees as conferred by the City of New Orleans. The legal issue is exactly the same – whether individual citizens may bring suit to stop expenditures of funds that they consider unlawful. The outcome, however, was exactly the opposite. *Ralph* is the sole one of these cases that the conservative plaintiffs won.

**D. Ralph v. City of New Orleans**

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78 Supra note 40 and accompanying text.
79 *Brinkman* at P44-P45.
80 *Id.* at P50.
81 P59-P60.
Given the discussion in the previous cases, Ralph v. City of New Orleans is a simple case. What makes it interesting is that it comes to the opposite conclusion from all the other cases. As in Alons, Rohde, and Brinkman, Ralph involves taxpayers suing both to prevent expenditure by the City of New Orleans to provide benefits to the same-sex partners of municipal employees, and to eliminate the domestic partnership registry with which the City administers these benefits.

The appeals court held that, “absent a showing by plaintiffs that they possess a real and actual interest vested in their assertions that the public fisc is affected by the actions of the City and the Council, the plaintiffs did not establish the minimal requisite interest sufficient to afford them a right of action.” This is consistent with what other courts have held in Alons, Rohde, and Brinkman – the threshold for standing in cases of citizens suing to stop specific expenditures by public officials tends to be high.

Not, however, in Louisiana. Quoting from three major precedents, the Louisiana Supreme Court held:

A citizen seeking to restrain unlawful action by a public entity is not required to demonstrate a special or particular interest distinct from the public at large.

Consequently, taxpayer plaintiffs seeking to restrain action by a public body are afforded a right of action upon a mere showing of an interest, however small and indeterminable.

Unlike Alons, Rohde, and Brinkman, then, the plaintiffs in Ralph may proceed with their suit against the rights and benefits of lesbians and gay men.

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82 928 So.2d 537 (La. 2006).
83 Id. at 537-38.
84 Id. at 538.
85 See supra note 33
86 See supra notes 61, 62.
87 See supra notes 74, 77.
88 Id.
E. Helgeland v. Department of Employee Trust Funds

This case demonstrates two related aspects of the conservative assault – procedural oddity and willful disregard for basic structural principles of American government. The underlying case is a claim by lesbian public employees in Wisconsin that the failure to provide their same-sex partners with employee benefits on the same terms as heterosexual couples violates the equal protection provision of the Wisconsin constitution.\(^89\) The issue for present purposes is that members of the legislature and several municipalities tried to intervene as defendants in the case, but the trial, appeals, and state supreme courts all rejected the attempt.\(^90\) Although the supreme court agreed to hear the appeal of the municipalities, it refused to hear the appeal of the legislature,\(^91\) leaving the appeals court decision as the final word on that topic.

The majority opinion of the Wisconsin Supreme Court on the intervention issue of Helgeland is a remarkable document in that it begins with an overtly exasperated statement of the issue in the case.\(^92\) Justice Abrahamson, long-time Chief Justice of the Court, wrote to chastise the dissenting justices, who, according to Abrahamson, “stir[] the cauldron of hot-button issues.”\(^93\) She suggests that the dissent’s identification of the American Civil Liberties Union as counsel for the plaintiffs in this case serves only to gin up political resentments, citing George H.W. Bush’s assertion in 1988 that presidential candidate Michael Dukakis was a “card-carrying member of the ACLU.”\(^94\) She finished her chastisement by asserting, “Without support in the

\(^89\) 2008 WI 9 at P22. Because of this interlocutory appeal by would-be intervening defendants, to date no court has rendered an opinion on the substantive claim. Indeed, the Wisconsin Supreme Court’s majority opinion goes to extraordinary lengths to point out that the only issue before it in this particular decision is the procedural issue of intervention, not the underlying substantive issue. \textit{Id.} at P2-P15.

\(^90\) \textit{Id.} P1, P34.

\(^91\) \textit{Id.} at P1 n.3.

\(^92\) \textit{Id.} at P2-P18.

\(^93\) \textit{Id.} at P10.

\(^94\) \textit{Id.} at P11, n. 9.
facts or law on intervention and joinder, the dissent has unfortunately turned to political
considerations and appeals to emotions."95

According to the supreme court, intervention as a matter of right depends on a four-part
test under Wisconsin law:

(A) that the movant’s motion to intervene is timely; (B) that the movant claims an interest
sufficiently related to the subject of the action; (C) that disposition of the action may as a
practical matter impair or impede the movant’s ability to protect that interest; and (D) that
the existing parties do not adequately represent the movant’s interest.96

The goal in applying this test is to balance the interest of judicial efficiency in addressing as
many legal issues as possible in a single lawsuit with the interest of the litigants to shape their
suit as they see fit.97

This is the same test that the appeals court applied in finding that the legislature did not
qualify for intervention.98 According to the appeals court, the legislature failed to meet the
second and third elements of this test.99 In addition to the procedural issue, the court’s
discussion of the claim necessarily addressed the structural principle of separation of powers.100

The petitioners from the legislature asserted that victory for the plaintiffs in Helgeland would
impair the legislature’s constitutional mandate to set public policy for the State.101 The court
responded by noting that “The Legislature's interest in this respect is limited to establishing
policy through the enactment of constitutional legislation, and it is the court's exclusive

95 Id. at P18.
96 Id. at P38.
97 Id. at P40.
98 Helgeland, 724 N.W. 2d at 216.
99 No one disputed the timeliness of the motions to intervene. Id. at 216-17.
100 at 218-20.
101 Id. at 217.
responsibility to determine whether legislation is constitutional.’’

In support of this proposition, the court cited not only *Marbury v. Madison*, but relevant Wisconsin statutes defining the responsibilities of the various branches of the state’s government. The legislature also moved the trial court for permissive intervention, which leaves the issue largely to the discretion of the judge. The trial judge refused the legislature’s request, and the appeals court affirmed.

With respect to the municipalities, the Wisconsin Supreme Court provided a long, detailed discussion of all of their claims, but ultimately concluded that they had no basis for intervening in the case. No one contested the timeliness of the municipalities’ motion to intervene. The court found, however, that the municipalities “have failed to show in the circuit court or here how their interests relate to the subject of the action in a direct and immediate fashion.” They also “make no showing that the financial interest is sufficient, direct, immediate, or special and that DETF inadequately represents their interests, much less a showing that could overcome the presumptions of adequacy applicable in this case.”

The Wisconsin Supreme Court spent relatively little time explaining why it upheld the appeals court’s conclusion that the Attorney General at the time of *Helgeland’s* initial filing, Peg Lautenschlager, would adequately represent the state in this case. The most obvious reason why the municipalities’ concerns about Lautenschlager occupied little of the Supreme Court’s time is that she was no longer Attorney General by the time the Supreme Court reviewed the case. Insofar as one complaint the would-be intervenors raised involved Lautenschlager’s

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102 *Id.* at 218, P11.
103 *Id.* at 219 P14.
104 *Id.* at 226.
105 *Id.* at 228.
106 *Helgeland*, 2008 WI 9 at P42.
107 *Id.* at P71.
108 Department of Employee Trust Funds, the named defendant in the case. See *id.* at P22.
109 at P115.
personal political opinions, that complaint became moot when she left office.\textsuperscript{110} The appeals court’s decision provides a more thorough explanation of the issue. This issue merits focus for present purposes because, although it played only a small legal role in determining the outcome of the case, it illustrates vividly the types of arguments conservatives are willing to make.

The appeals court noted at the outset that the Municipalities had aimed at the wrong target.\textsuperscript{111} The statute permitting intervention as of right specifies the possibility of inadequate representation by parties. The Attorney General is not a party to this action. Even so, the court noted the seriousness of the allegation that the Attorney General would fail to discharge her duties properly and examined the evidence that the Municipalities offered in support.\textsuperscript{112} The court noted that, although the Attorney General had publicly expressed support for the concept that lesbians and gay men do not currently enjoy equal treatment in the United States, and for creating civil unions for same-sex couples, nowhere had she mentioned the statutes or administrative regulations that were the subject of \textit{Helgeland}.\textsuperscript{113}

Controlling precedent involved a previous Attorney General who had stated in a letter that he considered a specific statute unconstitutional.\textsuperscript{114} The Wisconsin Supreme Court was unwilling to see that letter as overcoming the presumption that the Attorney General would fully discharge his responsibilities to defend the law. The Municipalities presented far less direct evidence of the Attorney General’s position regarding the statutes and regulations in \textit{Helgeland}, making that evidence insufficient to overcome the presumption.\textsuperscript{115}

\textsuperscript{110} \textit{Id.} at P97.
\textsuperscript{111} \textit{Helgeland}, 724 N.W. 2d at 222.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 223-25.
\textsuperscript{114} \textit{Id.} at 223, 224-25 citing \textit{White House Milk Co. v. Thomson}, 81 N.W.2d 725 (Wis. 1957).
\textsuperscript{115} \textit{Helgeland}, 724 N.W. 2d at 224-25.
The Municipalities also pointed to a specific instance in which the Attorney General’s spokesperson disparaged the holding in Phillips v. Wisconsin Personnel Commission, a 1992 Wisconsin appeals court decision in which the court held that the state’s statutory prohibition on sexual-orientation discrimination did not require the state as employer to provide employee benefits to the plaintiff-employee’s same-sex partner.\(^{116}\) Facially, it seems obvious that Phillips disposes of the issue in Helgeland, although Helgeland presents the claim in terms of the state constitution’s equal protection provision rather than relying on the statute that prohibits sexual-orientation discrimination. As the court pointed out, in its initial response to the Helgeland complaint, the Attorney General’s office moved for dismissal on the pleadings, citing Phillips as controlling precedent.\(^{117}\) That is, the Municipalities presented in open court the claim that the Attorney General would not properly defend a precedent after the Attorney General had cited that very precedent as the basis for moving to dismiss on the pleadings.

This claim illustrates the point that, for conservatives, any statement of support for a lesbian/gay civil rights position should subject a public official to attack. Insofar as conservatives choose to launch these attacks in a lawful manner, they have every right to do so. But judges should subject such attacks to careful scrutiny in order to discern when conservatives are twisting or disregarding long-standing principles of law, including the structure of American government at both the federal and state levels, in order to change political and policy outcomes that they disagree with.

The Wisconsin Supreme Court noted other oddities in the logic of the municipalities’ position, similar to the concern that the Attorney General would not defend controlling precedent


\(^{117}\) 724 N.W. 2d at 225.
after the Attorney General moved for dismissal on the pleadings solely on the basis of that precedent. First, the municipalities expressed concern that the Attorney General had not moved to compel discovery in the case.\textsuperscript{118} As the Supreme Court pointed out, this put them on the same side as the plaintiffs, who did move for discovery.\textsuperscript{119}

Second, the court pointed out that, even as the municipalities denounced the Attorney General’s motion for judgment on the pleadings, in their own filings with the court, they predicted success for this motion at the trial and appellate levels. As the court put it, “[t]he municipalities’ very unusual claim is thus that Lautenschlager somehow failed in her duties as attorney general by setting DETF on a course to defeat Helgeland before the circuit court and court of appeals.”\textsuperscript{120} Attorneys often offer otherwise contradictory positions to courts as alternatives. From the opinion, however, that is not what the municipalities did here. They simply presented patently contradictory positions. This point makes it hard to avoid the conclusion that conservatives are willing to abandon even the most elementary points of logic when the goal is to heap disabilities on lesbians and gay men.

\textit{Alons, Rohde, Brinkman, Ralph} and \textit{Helgeland} all involve questions of standing or intervention, which entails the structural question of separation of powers insofar as its effect, especially as applied in these cases, is to prevent plaintiffs from using the judiciary as a substitute for the legislature.\textsuperscript{121} The last two cases, \textit{Miller-Jenkins v. Miller-Jenkins} and \textit{Finstuen v. Crutcher}, involve full faith and credit, or the structural issue of how to ensure some measure of legal uniformity when numerous separate republics become one. As with the previous three

\begin{flushleft}
\textsuperscript{118} P101.  \\
\textsuperscript{119} Id.  \\
\textsuperscript{120} P104.  \\
\textsuperscript{121} See, e.g., \textit{Alons}, 698 N.W. 2d at 783; \textit{Helgeland}, 2008 WI 9 at P16: “Unfortunately, the dissent encourages the reader to confuse the legislative function, which determines public policy in a forum open to all and not governed by court rules of evidence, and the judicial function, which resolves a legal dispute between named parties according to the facts and law (including rules of evidence) in a fair, neutral, impartial, and nonpartisan way.”
\end{flushleft}
cases, *Miller-Jenkins* and *Finstuen* involve substantive issues that will only arise more frequently for the foreseeable future because they involve issues of interstate family recognition that same-sex couples increasingly create with their choices about family formation.

II. Full Faith and Credit

A. *Miller-Jenkins v. Miller-Jenkins*

This case has produced two major opinions, one from the Vermont Supreme Court, one from the Virginia Court of Appeals. Lisa and Janet Miller-Jenkins were a couple who, as residents of Virginia, traveled to Vermont to enter a civil union. Having returned to Virginia, Lisa became pregnant through alternative insemination using sperm from an anonymous donor. She and Janet were still a couple at this time. Janet attended the delivery of the child, IMJ. Lisa, Janet, and IMJ then moved to Vermont. Some time later, Lisa and Janet decided to split up.

Lisa filed a petition in family court in Rutland, Vermont to terminate the civil union. The petition listed IMJ as “the biological or adoptive child of the civil union.” The trial judge issued a temporary order giving Lisa primary legal and physical custody of IMJ, but allowing Janet regular visitation with the child.

Lisa complied with the terms of the visitation order only once. She then moved back to Virginia with IMJ and petitioned a Virginia trial court for an order determining that she was the sole parent of IMJ. The Vermont trial court found Lisa in contempt for refusing to abide by the

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124 912 A.2d at 955-57; 637 S.E.2d at 332-33. The facts as related in the two opinions are effectively identical.
125 912 A.2d at 956.
terms of the visitation order. The Virginia trial court found that it had jurisdiction to adjudicate IMJ’s parentage because, in its view, Virginia law prohibiting recognition of same-sex marriages and civil unions from other jurisdictions prevented it from abiding by any order that emanated from the dissolution of a Vermont civil union. The trial court has been persistent in its attempts to assert jurisdiction in this case. Even after the appeals court specifically instructed the trial court to grant full faith and credit to the orders of the Vermont court in this case, the trial court still refused to record the custody/visitation order from Vermont. The Virginia appeals court once again expressly ordered the trial court to do so.

The Virginia appeals court joined the Vermont Supreme Court in analyzing the case under the federal Parental Kidnapping Prevention Act (PKPA), which establishes procedures for determining what state has jurisdiction in cases of child custody and visitation. Both courts cited Thompson v. Thompson, the primary decision of the United States Supreme Court construing the PKPA. In the Vermont Supreme Court’s rendition, “[t]he purpose of the PKPA is to determine when one state must give full faith and credit to a child custody determination of another state, such that the new state cannot thereafter act inconsistently with the original custody determination.” The Virginia court offered a long quotation from Thompson beginning thus: “The Parental Kidnapping Prevention Act… imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act.” The Virginia court then quoted

126 912 A.2d at 956, 957, 973-74; 637 S.E. 2d at 333.
127 912 A.2d at 956-57; 637 S.E. 2d at 332-33.
129 Id.
130 637 S.E. 2d at 33-35; 912 A.2d at 957-59.
132 912 A.2d at 957.
133 Thompson, 484 U.S. at 175, quoted in 637 S.E. 2d 333.
its own precedent: “Congress’ chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.”\(^\text{134}\)

The quotation from *Thompson* that the Virginia appeals court offered explained that a state had jurisdiction to adjudicate custody and visitation for a child so long as its own state’s law gave it jurisdiction and any of five other conditions applied. The first of those conditions was that the forum state was then or had recently been the child’s home state. More specifically, the Virginia appeals court noted that the statute provides six months as the time period within which the child must have lived in the forum state in order for the forum state to exercise jurisdiction.\(^\text{135}\) It then noted that IMJ’s home state at the beginning of the legal proceedings was Virginia, but it had been Vermont only two months before, and it changed only because Lisa moved from Vermont to Virginia.\(^\text{136}\)

Perhaps more importantly, not only had IMJ lived in Vermont less than six months before the initiation of custody and parentage proceedings, but Lisa initiated those proceedings in Vermont.\(^\text{137}\) Neither court chose to emphasize this point, but in effect, by filing for a parentage determination in Virginia after initiating the dissolution of her civil union in Vermont, Lisa claimed the right to withdraw the issue from the jurisdiction of the Vermont court on her own authority. The Virginia trial court concurred with Lisa’s position, finding that “it had jurisdiction to determine the parentage and parental rights of IMJ and that any claims of Janet to parental status were ‘based on rights under Vermont’s civil union laws that are null and void under Va. Code § 20-45.3.’”\(^\text{138}\)


\(^{135}\) 637 S.E. 2d at 335.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) 912 A.2d at 957. Va. Code Ann. Sec. 20-45.3: “A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or
This argument illustrates the fallout that results when a majority imposes special disabilities on a minority – no matter how carefully one defines the initial disability, the fact of it will lead others to conclude that a group that suffers one legal disability should also be subject to others. If the state of Virginia enacted legislation discriminating against lesbians and gay men, then Virginia courts could disregard decisions by courts in states that chose to expand the rights of lesbians and gay men. This is not logically different from the previously common practice of depriving lesbian/gay parents of custody and/or visitation during divorce proceedings by asserting that any lesbian or gay man presumptively violated a state’s sodomy statute.139

The Virginia appeals court observed that, perhaps most extraordinarily, with her appeal to them, Lisa effectively asked a Virginia court to overrule the Vermont Supreme Court’s construction of Vermont law. She asserted that the Vermont trial court did not have jurisdiction for purposes of the PKPA in the first place, even though the Vermont Supreme Court had specifically ratified the trial court’s jurisdiction. As the Virginia appeals court explained, “Lisa cites no authority, and we know of none, that permits us to rule that the supreme court of another state incorrectly interpreted its own law. The contrary is well established….“140

The Vermont Supreme Court addressed a related but distinct point. In addition to its analysis under the PKPA, the Vermont Court considered Lisa’s claims and the order of the Virginia trial court separately in terms of Full Faith and Credit. They noted the odd posture of jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.”

139 See, e.g., Elizabeth Erin Bosquet, Contextualizing and Analyzing Alabama’s Approach to Gay and Lesbian Custody Rights, 51 ALA. L. REV. 1625 (2000); Nancy Polikoff, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS (John D’Emilio, William B. Turner, and Urvashi Vaid, eds. 2000). Obviously, insofar as this practice relied primarily on the claim that the lesbian/gay parent violated the state sodomy statute, it should have stopped after Lawrence v. Texas, 539 U.S. 558 (2003). I know of no cases involving denial of custody or visitation to a lesbian/gay parent on the claim that the individual violates the state sodomy statute since 2003, but many family law decisions go unreported, and one can envision places in the United States where the parent might not know that the state’s sodomy statute is no longer valid.

140 637 S.E. 2d at 335.
the Virginia trial court’s order relative to the Vermont trial court’s order: the Virginia trial court effectively asserted that the Vermont trial court should grant full faith and credit to the Virginia order even as the Virginia court disclaimed any responsibility on its part to grant full faith and credit to the Vermont order.\textsuperscript{141} Citing its own precedent, the Vermont Supreme Court stated that “[w]e will not give ‘greater faith and credit to the judgments of the courts of other states than we give to our own courts’ judgments.”\textsuperscript{142} For conservatives who wish to attack lesbians and gay men, even the most elementary principles of logic are no impediment.

But perhaps the most revealing of Lisa’s arguments, which the Virginia court addressed, was that “DOMA [Defense of Marriage Act], enacted in 1996, effectively trumps the PKPA, enacted in 1980, thus enabling the [Virginia] trial court to exercise jurisdiction over Lisa’s petition.”\textsuperscript{143} In other words, with the Defense of Marriage Act, Congress declared, and conservatives agreed with, open season on queers. No existing statute or other law should stand in the way of nullifying any recognition of any same-sex relationship. Not only would this reasoning result in the refusal of judges to defend the existing legal rights of lesbians and gay men, it would also invite roving attacks by conservatives on same-sex couples, or more roving attacks than they already engage in.

The Virginia court of appeals rejected the claim. “Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations.”\textsuperscript{144} It went on to note that

\begin{quote}
[t]his case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is
\end{quote}

\textsuperscript{141} 912 A.2d at 959-60.
\textsuperscript{142} Id. at 959-60, quoting Medveskas v. Karparis, 640 A.2d 543, 546 (Vt. 1994).
\textsuperscript{143} 637 S.E. 2d at 336.
\textsuperscript{144} Id. at 337.
whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ’s custody and visitation. It cannot.\textsuperscript{145}

This point implicates the difficult, ongoing question of how far prohibitions on recognition of same-sex marriages reach.

At one level, the Virginia appeals court is simply wrong when it claims that \textit{Miller-Jenkins} does not place before it the question of whether Virginia must recognize Vermont civil unions. By refusing to disregard the Vermont court’s visitation order, which occurred solely because of the creation and dissolution of a civil union, the Virginia courts necessarily confer some degree of recognition on the Vermont civil union. They give to Janet the power to enforce visitation and, potentially, contempt orders against Lisa in the Virginia courts based on orders from Vermont emanating from dissolution of a civil union.

But Virginia statute expressly prohibits recognition of civil unions for same-sex couples\textsuperscript{146} as well as prohibiting recognition of same-sex marriage.\textsuperscript{147} Therefore, the Virginia appeals court would refuse recognition to any Vermont civil union if any case presents the issue more directly.\textsuperscript{148} Even so, the Virginia statute prohibiting recognition of same-sex marriages and civil unions cannot trump all other law. The Virginia appeals court correctly rejected the conservative logic according to which all other law, substantive or procedural, must give way to the imperative of disparaging same-sex relationships. The Virginia appeals court refused to

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Supra} note 138.
\textsuperscript{147} Va. Code Ann. Sec. 20-45.2: “A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”
\textsuperscript{148} To date, no Virginia court has had occasion to apply either statute directly. In Stroud v. Stroud, 641 S.E. 2d 142, 151 (Va. App. Ct. 2007), the court expressly held that the two statutes were irrelevant to the determination of continuing contractual obligations between divorced spouses where one spouse had entered a same-sex relationship. In holding that same-sex cohabitation qualified under the contract to end spousal support by being “analogous to marriage,” the court asserted that it was describing the same-sex relationship in factual terms, not addressing any issues involved in the legal status of the relationship. \textit{Id. See} Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002) (former spouse in violation of visitation order prohibiting presence of unrelated adults while child was visiting because Georgia statute prohibited recognition of parent’s same-sex Vermont civil union).
disregard elementary principles of federalism and comity just because those principles interfered with a litigant’s desire to repudiate a former same-sex relationship. The positions Lisa took as related in both opinions indicate a willful disregard of such principles. Similarly, officials in the state of Oklahoma willfully disregarded elementary legal principles in their effort to impose a disability on same-sex couples.

V. Finstuen v. Crutcher

In Finstuen, plaintiffs challenged an Oklahoma statute prohibiting state officials from issuing supplementary birth certificates showing two parents of the same sex even when a competent court in a different state had granted an adoption to those two parents. The Tenth Circuit Court of Appeals affirmed the trial court opinion, which dismissed two of the plaintiffs for lack of standing, but also struck down the statute as violating the principle of full faith and credit. It is perhaps worth noting that the standing analysis in Finstuen is entirely consistent with the standing analyses in Alons and Rohde. The Alons and Rohde judges did not base their holdings on any adoption of “the homosexual agenda,” as conservatives are wont to assert about any decision that benefits lesbians and gay men. Rather, standing doctrine presents a coherent set of principles that produces consistent outcomes without regard for the sexual orientation or other identity characteristics of the parties – if the judges can bring themselves to disregard irrelevant identity characteristics. That is, it produces equal protection of the laws.

As in the previous cases, the Finstuen court’s analysis of the standing issue is legally quite simple and straightforward. It takes up more space than the substantive discussion in the

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149 Finstuen v. Crutcher, 496 F.3d 1139, 1141 (CA10, Aug. 3, 2007).
150 496 F.3d at 1143-45.
151 See supra notes 31-36 and accompanying text.
152 See supra notes 74 and 77 and accompanying text.
153 See, e.g., Lawrence, 539 U.S. at 602-03 (Scalia dissenting); Romer, 517 U.S. at 652-53 (Scalia dissenting).
opinion. However, because the court patiently addresses all of the appellee’s arguments, no matter how patently absurd. Quoting its own precedent, the *Finstuen* court noted that “[w]hile the rules for standing are less stringent for a facial challenge to a statute, a plaintiff must still satisfy the injury-in-fact requirement.” It summarized the requirements for Article III standing under the United States Constitution thus: “a plaintiff [must] establish injury-in-fact, causation and redressability.”

The *Finstuen* court’s analysis of standing focused on the first element, injury-in-fact. It found that the district court was correct to hold that two of the plaintiff couples had failed to demonstrate any injury-in-fact. One couple, who had entered an open adoption, had a legal obligation to visit the child’s biological mother in Oklahoma, but felt deterred from doing so out of fear that Oklahoma officials would refuse to recognize their parenting rights if any event occurred to raise the issue. But they could point to no actual incident involving official disparagement of their parenting rights.

The other couple who lacked standing lived in Oklahoma. The court noted that one member of this couple was the biological mother of the children, so the restriction on issuing supplementary birth certificates did not implicate her rights as a parent at all. This couple claimed that their children suffered anxiety, however, because of the other partner’s uncertain legal status, and that the other partner felt chilled from exercising parental rights for fear of conflict with Oklahoma authorities. This couple, however, offered no specific instances in

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154 See 496 F.3d at 1151-56 for full faith and credit discussion, at 1143-1151 for standing discussion. Note that the shift from the standing discussion to the full faith and credit discussion occurs near the bottom of 1151.
155 Id. at 1143, quoting PETA v. Rasmussen, 298 F.3d 1198, 1203 (CA10 2002).
156 496 F.3d at 1143, citing Opala v. Watt, 454 F.3d 1154, 1157 (CA10 2006), Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (CA10 2005).
157 496 F.3d at 1144-45.
158 Id. at 1144.
159 496 F.3d at 1145.
160 Id.
which Oklahoma authorities had actually challenged their parenting rights.\textsuperscript{161} Neither couple, the court concluded, had presented an injury-in-fact that would qualify for standing.\textsuperscript{162} Their claims were plainly too speculative.

But the appeals court also agreed with the district court’s finding that the third couple did state an injury-in-fact.\textsuperscript{163} Oklahoma officials had refused to revise the child’s birth certificate to list both women’s names as parents. This alone constituted an injury-in-fact. This couple also recounted an incident in which both an ambulance driver and hospital officials told them that only “the mother” could accompany their injured child while she sought medical treatment. This was also plainly an injury-in-fact according to the court.\textsuperscript{164} Having found an injury-in-fact, the court also easily found both causation and redressability: Oklahoma officials refused to provide the birth certificate in question because of the statute at issue, and the court had the authority both to strike down the statute, and order Oklahoma officials to provide the birth certificate.\textsuperscript{165}

Oklahoma officials did assert that their refusal to provide the requested birth certificate did not result from the statute in question, but the court reviewed this claim and offered a detailed explanation for why it completely failed to persuade.\textsuperscript{166} On this particular point, the court went so far as to cite precedent regarding rules for summary judgment review that permitted the court to disregard affidavits creating “sham facts”; they then expressly made the analogy to the standing analysis, concluding that they should disregard Oklahoma officials’ claim on this point as a sham.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 1144-45.
\item \textsuperscript{163} \textit{Id.} at 1145.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 1147.
\item \textsuperscript{166} \textit{Id.} at 1145-47.
\item \textsuperscript{167} \textit{Id.} at 1146 n. 5.
\end{itemize}
The *Finstuen* court did not go so far as to characterize Oklahoma officials’ argument regarding prudential standing as a “sham,” but they were equally clear in dismissing that argument. Prudential standing, as the court explained, is different from Article III standing in that it does not determine the issue of jurisdiction. The court could have simply disregarded Oklahoma officials’ assertion that it should dismiss the case on the basis of prudential standing because prudential standing does not determine jurisdiction, and because Oklahoma officials raised the issue only on appeal. However, the court noted that the officials hoped to “bootstrap” their prudential standing claim into an assertion that the case was moot, which would determine jurisdiction, so the court reviewed the claim in detail.168

The key requirement here for prudential standing is that the plaintiff’s claim must fall within the ambit of the statute in question.169 Oklahoma officials asserted that the plaintiffs’ claim failed this test because the plaintiffs had adopted their children in two steps – first one parent adopted the children, then the second parent did so. Oklahoma officials argued that the statute only applied to adoptions by same-sex couples that occurred in a single adoption proceeding, such that these plaintiffs’ adoptions did not qualify.170 In what can only have been a tactical retreat in the instant case in hopes of preserving the statute for another day, Oklahoma officials stated that they would provide a birth certificate to these particular plaintiffs based on their own interpretation of the statute.171

An obvious problem with this approach, as the court noted, was that it rested on the presumption that executive-branch officials in Oklahoma state government had the power to interpret statutes in ways that would bind other agencies and the state’s judiciary by determining

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168 *Id.* at 1147.
169 *Id.*
170 *Id.* at 1147-48.
171 *Id.* at 1149.
who would or would not qualify for the wide range of rights and duties that accompany any adoption – a clear violation of separation of powers. By its terms, the statute applied to all state agencies and judges, which a single official in the executive branch does not have the authority to bind. 172 The court also noted that, in effect, the executive branch officials in this instance proposed the adoption of an administrative rule during the course of adversarial litigation, rather than through the procedures for administrative rule making that the Oklahoma legislature had expressly adopted. 173

Equally important, the court explained in some detail why the proposed construction of the statute was completely implausible. Ample evidence existed elsewhere in the Oklahoma statutes to indicate that the legislature was entirely capable of differentiating the broad act of “adoption” from the individualized “proceedings” involved in bringing an adoption about; the statute prohibiting issuance of supplementary birth certificates to same-sex parents made no such distinction. 174 The court could find nothing in the record to indicate that the Oklahoma legislature would find adoptions by same-sex couples more acceptable if they occurred in a multi-part, as opposed to a single, proceeding. 175 Thus, both in terms of the substance of the argument, and in terms of its underlying procedural implications, they rejected the argument for dismissal based on mootness and prudential standing considerations. 176

Finally, the court provided a clear statement of its holding on the substantive issue:

We hold that final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other

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172 Id. at 1150.
173 Id. at 1150-51.
174 Id. at 1149.
175 Id.
176 Id. at 1151.
state in the nation. Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause. 177

The court provided an extended discussion of controlling doctrine regarding the principle of full faith and credit. It noted the distinction that the Supreme Court has drawn between judgments and statutes; courts have some leeway in choosing to apply the statutes of other states, but their adherence to judgments from other states must be “exacting.” 178

Rather than assert that full faith and credit did not apply here, Oklahoma officials asserted that any requirement to provide a supplemental birth certificate in response to an adoption decree from another state would infringe on the power of Oklahoma officials to decide how to enforce other states’ judgments. The Supreme Court has plainly held that, while the forum state may not disregard the substance of another state’s judgments, the forum state may still rely on its own law in deciding how to enforce such judgments. 179 Not only with respect to process, but with respect to substantive rights, according to Oklahoma officials, Oklahoma should be able to exercise the control over its own laws necessary to disregard an adoption from another state. As an example, they noted that adoption confers property rights, such that another state’s adoptions could create rights to property in Oklahoma that would not otherwise exist. 180

The court pointed out that, if Oklahoma had no statute providing for issuance of supplementary birth certificates, the plaintiffs could not sue to require Oklahoma officials to provide such. However, given the existence of such a statute, Oklahoma officials had no power to pick and choose among foreign adoption judgments in deciding how to carry out the statute. As the court put it, “[Oklahoma] already has the necessary ‘mechanism[] for enforcing

177 1141.
179 Baker, 522 U.S. at 234-35.
180 Finstuen, 469 F.3d at 1153.
[adoption] judgments.’ The Doels merely ask Oklahoma to apply its own law to ‘enforce’ their adoption order in an ‘even-handed’ manner.”  

Conclusion

The situation in Finstuen is legally analogous to that of Miller-Jenkins v. Miller Jenkins. Recall the Vermont Supreme Court’s response to the Virginia trial court. The Virginia trial court held that it had jurisdiction in the case because its state statute prohibited recognition of same-sex civil unions from other states. Therefore, it could disregard the custody determination and visitation order of the Vermont family court, which stemmed from a Vermont civil union. The Vermont Supreme Court responded that Vermont courts would not grant greater faith and credit to the orders of other states than those states’ courts granted to Vermont orders. Similarly, in effect, the Oklahoma legislature claimed the power to nullify, at least within Oklahoma, any adoption order from another state that differed from what the Oklahoma adoption statutes provided.

But this situation is also analogous to the issue in equal protection claims, even if no court may have couched it that way. Does a state’s governing majority have the right to single out a group of persons and deny rights to the members of that group that everyone else in the state takes for granted? One could define the minority in terms of geography – the state of X will deny certain rights to citizens of state Y – which is part of the problem that the Full Faith and Credit clause addresses. It precludes, inter alia, a state from giving systematic advantage to its own residents at the expense of residents of other states.

The conservative activists in each of these cases claimed some sort of systematic advantage for themselves relative to lesbian/gay activists. They repeatedly offered arguments for

181 Id. at 1154, citing Baker, 522 U.S. at 234-35.
their own standing to sue, or their alleged right to disregard the judgments of other states’ courts, that judges had no trouble dismissing as patently inconsistent with the law of the forum state – Louisiana excepted – and of the United States. Again, the point is not to suggest that one should adopt some sort of blanket rule depriving conservative activists of access to the courts. That would be as unjust as depriving lesbian/gay activists of access to the courts. The point is to offer judges an overview of the issue so that they can evaluate examples of it that come before them.

The other point is to ask the question – if this is what the legal arguments of conservative activists in opposition to lesbian/gay equality look like, what does that tell us about their political arguments? If they have to rely on patently insupportable positions when they make procedural arguments in court, one has to wonder if they do not also rely on patently insupportable arguments during legislative and other political debates regarding lesbian/gay civil rights issues.

Finally, as I have noted above, these cases indicate repeatedly that, for some conservatives anyway, no goal is higher than that of imposing disabilities on same-sex couples. Elementary principles of standing and full faith and credit should not get in the way of this highest of conservative goals. Presumably, neither should any other elementary principles of American law. But now that the pattern is clear, not only judges, but lesbian/gay litigators, can strive to uphold those elementary principles against the conservative onslaught.