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The Growing Acceptance and Legal Recognition of Same-Sex Marriage in America Constitutes a Victory for Reality-Based Thinking

Wilson R. Huhn*

INTRODUCTION

During the 20th century “pragmatism” emerged as the leading American philosophy and policy analysis – also called “legal realism” – became the dominant method of interpreting American law.¹ The lightning speed with which same-sex marriage is gaining acceptance in the United States is due to the fact that Americans embrace realistic rather than ideological forms of thinking, and the growing recognition of same-sex marriage in the law is due to the fact that we interpret our Constitution in accordance with realistic analysis.

Part I of this paper briefly describes the great strides that same-sex marriage has made in the United States over the past decade. Parts II, III, IV, and V summarize how realist analysis transformed American philosophy, jurisprudence, and constitutional law during the 20th century, resulting in the emergence of a reality-based “equality principle.” Part VI explains how the struggle for marriage equality for gay and lesbian couples has advanced because of these realistic methods for making choices in policy and the law.

I. THE RAPID ACCEPTANCE OF SAME-SEX MARRIAGE IN THE UNITED STATES

Over the past 16 years American attitudes towards same-sex marriage have shifted dramatically. According to Gallup, in 1996 68% of Americans were opposed to same-sex marriage; only 27% of Americans were in favor of allowing gay and lesbian couples to marry.² In contrast, in 2011 for the first time Gallup found that 53% of Americans approved of marriage equality for same-sex couples with only 45% opposed.³

Legal recognition in the states has followed in the wake of social acceptance. In 2003 not a single state permitted gays and lesbians to marry their partners.⁴ In 2012 nine states and the

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¹ See Richard A. Posner, *Jurisprudential Responses to Legal Realism*, 73 Cornell L. Rev. 326, 326 (1988) (stating, “‘Realism’ can be used simply to mean the use of policy analysis in legal reasoning.”)

² Frank Newport, Gallup Politics, *For First Time, Majority of Americans Favor Legal Gay Marriage* (May 20, 2011), at <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

³ See *id.*

⁴ See National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (identifying states recognizing same-sex marriage); Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws* at [http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf) (specifying dates when same-sex marriage was recognized).

District of Columbia recognize same-sex marriage.⁵ More than 85 million people live in these ten jurisdictions, constituting more than one-fourth of the American population.⁶

The trend towards recognition of same-sex marriage seems to be accelerating. The Gallup poll mentioned earlier showed a massive swing on the issue in one year, from 44-53 opposed in 2010 to 53-45 in favor in 2011. This rapid movement towards acceptance of marriage equality is also evident from the recent trend of decisions by state courts and legislatures extending recognition of same-sex unions. Of the four state supreme court decisions *opposing* same-sex marriage, three were handed down “long ago” in 2006 and one in 2007.⁷ Of the four state supreme court decisions *approving* same-sex marriage, one was handed down in 2003 (Massachusetts), two in 2008, and one in 2009.⁸ The six statutes recognizing same-sex marriage were all enacted since 2009.⁹ Finally, since 2010 three federal district courts and one federal appeals court have issued decisions striking down laws prohibiting same-sex marriage.¹⁰ Two other actions are pending in federal district courts.¹¹

What accounts for this rapid shift in American life and law? What made this change possible? It is in large part due to the fact that Americans embrace a realistic approach to the development of public policy and the interpretation of the law.

II. REALITY-BASED AMERICAN PHILOSOPHY

Americans have always been a practical people. Alexis de Toqueville observed of our ancestors, “I think that in no country in the civilized world is less attention paid to philosophy than in the United States.”¹² Rejecting “speculative studies” as well as “tradition” and “national prejudices,” Americans, he said:

“like to discern the object which engages their attention with extreme clearness; they therefore strip off as much as possible all that covers it, they rid themselves

⁵ *See id.*

⁶ *See* U.S. Census Bureau, *State and County Quick Facts*, at <http://quickfacts.census.gov/qfd/index.html> (containing links to the population to each of the states); *id.* at <http://quickfacts.census.gov/qfd/states/00000.html> (showing U.S. population for 2010, estimated population for 2011).

⁷ *See* *Anderson v. King County*, 158 Wash.2d 1 (2006) (upholding state DOMA); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) (refusing to recognize right to same-sex marriage under state constitution); *Conaway v. Deane*, 401 Md. 219 (2007) (same); *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006) (same).

⁸ *See* *Goodridge v. Department of Public Health*, 440 Mass. 941 (2003) (recognizing same-sex marriage under state constitution); *In re Marriage Cases*, 43 Cal.4th 757 (2008) (same); *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008) (same); *Varnum v. Brien*, 767 N.W.2d 862 (Iowa 2009) (same).

⁹ *New Hampshire* (2009); *Vermont* (2009); *Washington, D.C.* (2009); *New York* (2011); *Washington* (2012); *Maryland* (2012).

¹⁰ *See* *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010); *Golinski v. Office of Personnel Management* (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (2012).

¹¹ *See* *McLaughlin v. Panetta*, No. 11-11905 (D. Mass) (suit by Major Shannon McLaughlin, Massachusetts National Guard, challenging denial of equal benefits for her wife); *Edith Schlain Windsor v. United States*, 1:2010cv08435 (S.D. N.Y.) (challenging her liability to pay \$350,000 in federal estate tax upon the death of her wife).

¹² Alexis de Toqueville, *Democracy in America* 143 (Heffner, ed., 1956).

of whatever separates them from it, they remove whatever conceals it from sight, in order to view it more closely and in the broad light of day.”¹³

De Toqueville attributed our independent strain of thought and realistic frame of reference to the influence of democracy. “Equality begets in man the desire of judging of everything for himself: it gives him, in all things, a taste for the tangible and the real, a contempt for tradition and for forms.”¹⁴

American philosophy continued to be grounded in “realism.” In the 1870s the brilliant physical scientist Charles Sanders Peirce argued for a “pragmatic” understanding of scientific principles, an idea he eventually called “pragmatism.”¹⁵ In 1907 American philosopher William James published his landmark work *Pragmatism: A New Name for Old Ways of Thinking*, dedicated to John Stuart Mill and citing John Dewey.¹⁶ In Lecture VI, *Pragmatism’s Conception of Truth*, James distinguishes “pragmatism” from “intellectualism” on the ground that pragmatists demand proof of the truth of a concept from *experience*:

Pragmatism, on the other hand, asks its usual question. "Grant an idea or belief to be true," it says, "what concrete difference will its being true make in anyone's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms?"

The moment pragmatism asks this question, it sees the answer: TRUE IDEAS ARE THOSE THAT WE CAN ASSIMILATE, VALIDATE, CORROBORATE AND VERIFY. FALSE IDEAS ARE THOSE THAT WE CANNOT. That is the practical difference it makes to us to have true ideas; that, therefore, is the meaning of truth, for it is all that truth is known-as.¹⁷

The popular philosopher, educator, and social reformer John Dewey described how pragmatic philosophy operates in the life of the individual. Dewey explained that truth emerges from the interaction of an organism with its environment; truth is determined experientially and is proven by its usefulness to the organism.¹⁸ As one authority states: “Thus Dewey adopted the term “instrumentalism” as a descriptive appellation for his new approach.”¹⁹

¹³ *Id.* at 143, 144.

¹⁴ *Id.* at 163.

¹⁵ See Stanford Encyclopedia of Philosophy, *Charles Sanders Peirce: Pragmatism, Pragmaticism, and the Scientific Method*, at <http://plato.stanford.edu/entries/peirce/#prag>; *id.* (“In regard to physical concepts in particular, his views are quite close to those of, say, Einstein, who held that the whole meaning of a physical concept is determined by an exact method of measuring it.”).

¹⁶ See William James, *Pragmatism: A New Name for Some Old Ways of Thinking*, at [http://en.wikisource.org/wiki/Pragmatism: A New Name for Some Old Ways of Thinking](http://en.wikisource.org/wiki/Pragmatism:_A_New_Name_for_Some_Old_Ways_of_Thinking)

¹⁷ *Id.*

¹⁸ See Internet Encyclopedia of Philosophy, *John Dewey: Theory of Knowledge*, at <http://www.iep.utm.edu/dewey/#H4>.

¹⁹ *Id.*

At the same time that the theories of pragmatism and instrumentalism became ascendant in American philosophy, a similar approach took hold in jurisprudential circles. It is to that theory – “legal realism” – that I now turn.

III. REALITY-BASED AMERICAN JURISPRUDENCE

The school of “legal realism” is most often associated with American academicians, but it was brought into our law and became the central feature of American jurisprudence through the action of four great judges: Oliver Wendell Holmes, Louis Brandeis, Benjamin Nathan Cardozo, and Learned Billings Hand. Today, policy analysis lies at the heart of constitutional law. It is the defining characteristic of the fundamental constitutional standards we call “strict scrutiny” and the “rational basis test.”

The Realist Academicians

Roscoe Pound, Dean of Harvard Law School, is generally credited with founding the school of “legal realism.” In a 1912 article Pound used the term “sociological jurisprudence” to describe this new method of analysis.²⁰ Pound insisted that in interpreting the law judges should “take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.”²¹

Another legal realist, Professor John Dickinson of the University of Pennsylvania, maintained that judicial precedent should be understood principally in terms of the results that would flow from following a particular line of precedent and the values that would be served. As he explained in his 1929 article *The Law Behind Law*:

The choice which a judge makes of one analogy rather than another is an expression of ... a value-judgment; and the possibility of competing analogies therefore arises not merely or so much out of the doubtfulness of the factual resemblances among his materials, but rather out of the possibility of differences of opinion as to the comparative value of the different results which one analogy or the other would bring about.²²

Karl Llewellyn, a leading realist who became a principal drafter of the Uniform Commercial Code, described sociological jurisprudence in the following terms:

[T]he central problem of all law has to do with this still almost completely neglected descriptive science, with this “legal sociology,” this natural science of living law. What we need to study, what we must know, is not how a legal rule reads, nor how a philosophically correct rule would read, but what the legal rule

²⁰ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, Part 3*, 25 HARV. L. REV. 489 (1912).

²¹ *Id.* See Wai Chee Dimock, *Rules of Law, Laws of Science*, 13 YALE J.L. & HUMAN. 203, 213-218 (2001), for an extended discussion of Pound’s understanding of the scientific nature of law.

²² John Dickinson, *The Law Behind Law: II*, 29 Columbia Law Review 285 (1929).

means. Not in ... the heaven of legal concepts, but in human experience. What happens in life with it? What does a law mean to ordinary people?²³

Today “legal realism” so influences academic legal thought that it has spawned multiple independent schools of realistic analysis. On the right, the school of “law and economics” uses the science of economics in interpreting the law in order to foster economic efficiency and wealth maximization.²⁴ On the left, various schools of “critical” legal analysis – critical legal studies, critical race theory, critical feminist theory, and many others – insist that law must be understood in the context of its effect on oppressed populations.²⁵ All of these schools of jurisprudence share the assumption that the law should be interpreted in the light of human experience.

The Realist Judges

The names of the judges who embraced legal realism and brought it into American law are familiar every lawyer: Holmes, Brandeis, Cardozo, and Hand. Each of them emphasized that judges must take into account the consequences of their interpretations of the law – how the law would affect people in their daily lives. Their contributions to our realist understanding of the law are briefly described below.

a. Oliver Wendell Holmes – The Skeptic

Oliver Wendell Holmes is justly regarded as one of the greatest American judges. In the field of Constitutional Law we are indebted to him for writing courageous dissents laying the groundwork for two fundamentally important doctrines: the right of the individual to freedom of speech and the power of the legislature to enact economic legislation. In addition, Holmes paved the way for the adoption of realistic modes of legal analysis. All three of these accomplishments were due to the fact that Holmes was a profound skeptic.

In the area of First Amendment law, Holmes is justly celebrated for conceiving the “marketplace of ideas,” the notion that political and social truth is most likely to be discovered if there is “free trade in ideas.”²⁶ The origin of this doctrine lay in Holmes’ personal philosophy, a

²³ Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 748-749 (1992). Llewellyn’s contribution to the legal realism movement is described in WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); and William Twining, *Talk about Realism*, 60 N.Y.U. L. REV. 329, 342 (1985). Llewellyn’s influence on the Uniform Commercial Code is the subject of Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985); and Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351 (1983).

²⁴ See Brian Bix, *JURISPRUDENCE: THEORY AND CONTEXT* 204 (2009) (stating, “Part of the power of economic analysis is that it presents a largely instrumental approach”).

²⁵ See *id.* at 231 (stating, “Over the last 30 years or so, a series of loosely-related critical approaches to law have developed, which have their roots in (among other places) the Civil Rights Movement, American legal realism, and European social theory.”).

²⁶ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (stating, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

philosophy he explained to Judge Learned Hand as they debated the constitutionality of federal laws that were being used to crush dissent to the First World War. On June 24, 1918, Holmes wrote to Hand, “I don’t bother about absolute truth or even inquire whether there is such a thing”²⁷ Holmes’ skepticism eventually led him to believe that it was unconstitutional for the government to suppress the expression of unpopular opinions.²⁸

The same deep streak of skepticism led Holmes to take the position that the courts must accord a presumption of constitutionality to economic legislation. Dissenting in *Lochner v. New York*²⁹ Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.³⁰

He added:

[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.³¹

Holmes coined a number of famous aphorisms that reflect his commitment to realism in legal analysis. In *Lochner* he stated: “General propositions do not decide concrete cases.”³² In *New York Trust Co. v. Eisner*³³ he said: “a page of history is worth more than a volume of logic.”³⁴ And in *The Common Law* he wrote: “The life of the law has not been logic; it has been experience.”³⁵ The point of each of these sayings is that judges must take human experience into account in interpreting the law.

Holmes challenged traditional methods of legal analysis from the bench. Brandeis challenged the traditional paradigm from the bar.

²⁷ See THE FIRST AMENDMENT: A READER 28 (John H. Garrey & Frederick Schauer eds., 1996) (Letter from Oliver Wendell Holmes to Billings Learned Hand, June 24, 1918).

²⁸ See *Abrams*, 250 U.S., at 630 (Holmes, J., dissenting) (sarcastically stating, “Persecution for the expression of opinion seems to me to be perfectly logical.”); *Gitlow v. New York*, 268 U.S. 652, 673 (stating, “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).

²⁹ 198 U.S. 45 (1905)

³⁰ *Id.* at 75 (Holmes, J., dissenting).

³¹ *Id.* at 75-76 (Holmes, J., dissenting).

³² *Id.* at 76 (Holmes, J., dissenting).

³³ 256 U.S. 345 (1921) (striking down maximum hour legislation).

³⁴ *Id.* at 349 (Holmes, J., dissenting).

³⁵ Oliver Wendell Holmes, THE COMMON LAW 1 (1881).

Louis Brandeis – The Reformer

Before his appointment to the Supreme Court in 1916, Louis Brandeis was the “People’s Lawyer,” fighting on behalf of the average person against corrupt and abusive corporate practices. He achieved one of his greatest victories in 1908 the case of *Muller v. Oregon*,³⁶ where he persuaded the Supreme Court to uphold a state law which provided that women could work in factories no more than ten hours per day. In support of his clients he submitted a 113-page brief.³⁷ The brief contained only two pages devoted to legal analysis; the remainder summarized dozens of sociological and economic studies of the effect of long hours of work on women and their families.³⁸ Thus was born the “Brandeis brief.”

Explaining his approach to legal advocacy Brandeis said: “The method I have tried to employ in arguing cases has been inductive, reasoning from the facts.”³⁹ In *Muller* Brandeis showed the Court why human experience demanded that the law be upheld.

Benjamin Nathan Cardozo – The Policy Analyst of the Common Law

Justice Cardozo was the greatest common law judge that the United States has produced. His opinions fill American casebooks on the law of contracts and torts.⁴⁰ The method that he mastered in developing the common law was to examine a line of cases looking not for factual similarities but rather for the thread of policy that ran through the law.

One of the foundational cases in the law of tort is Cardozo’s decision in *McPherson v. Buick Motor Co.*⁴¹ in which the New York State Court of Appeals determined that an automobile driver could recover for damages suffered when a defective wheel fell apart. This case appears in nearly every casebook on torts because it illustrates how to choose between two different lines of authority, a common problem in the common law. The New York courts had on many occasions ruled that the English case of *Winterbottom v. Wright* (finding no liability for injuries cause by a defective wagon wheel) was good law,⁴² but they had also ruled that if an item was “inherently dangerous” like scaffolding then the manufacturer could be held liable if it was negligently made.⁴³ One might take the position that an automobile is more like a wagon than it is like a scaffold, but writing for the majority Cardozo found that the operative principle should

³⁶ 208 U.S. 412 (1908) (upholding maximum hour legislation for women).

³⁷ See University of Louisville Louis D. Brandeis School of Law, *The Brandeis brief – in its entirety*, at <http://www.law.louisville.edu/library/collections/brandeis/node/235>.

³⁸ *Id.*

³⁹ Louis Dembitz Brandeis, *THE WORDS OF JUSTICE BRANDEIS* 77 (Solomon Goldman ed., 1953).

⁴⁰ See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995) (discussing the number of Cardozo opinions in contracts casebooks); Lawrence A. Cunningham, *Traditional versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 FLA. L. REV. 667 (2010) (“On average, casebooks reprint more Cardozo torts opinions than any other judge’s.”)

⁴¹ 217 N.Y. 382 (1916).

⁴² See *id.* at 392 (no liability for defective wagon wheel).

⁴³ See *id.* at 393 (liability for defective scaffold).

be whether or not the product, if negligently made, would be “inherently dangerous” to the public.⁴⁴ He wrote:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁴⁵

Similarly, in *Jacob & Youngs, Inc. v. Kent*,⁴⁶ Cardozo rejected the notion of “exact performance” under the law of contract and instead adopted the rule of “substantial performance.” In the case of a minor or technical breach of contract, Cardozo ruled that the measure of damages is not the cost of rectifying the error but rather the difference in value between the promised performance and the actual performance.⁴⁷ In rejecting the clear rule requiring exact performance of a contract for the more ambiguous standard permitting substantial performance plus a measure of damages for any reduction in value, Cardozo said:

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.⁴⁸

In his masterpiece *Nature of the Judicial Process* Cardozo explained the central role that policy analysis must play in legal reasoning:

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.⁴⁹

Learned Billings Hand: The Mathematical Consequentialist:

Judge Hand – perhaps the greatest American judge never to serve on the United States Supreme Court – advanced realist analysis by demonstrating how the pertinent values served by the law might be rationally balanced. His most famous contribution to American law was in the 1947 case *United States v. Carroll Towing Co.*,⁵⁰ where he reduced the law of tort to a clear, concise, and elegant formula. The question in that case was whether the owner of a barge was

⁴⁴ See *id.* at 389 (stating, “If the nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger.”).

⁴⁵ *Id.* at 391.

⁴⁶ 230 N.Y. 239 (1921).

⁴⁷ See *id.* at 241 (stating, “an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.”).

⁴⁸ *Id.* at 242-243.

⁴⁹ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).

⁵⁰ 159 F.2d 169 (2nd Cir. 1947).

liable to others when the barge slipped her moorings and drifted downriver, damaging another vessel. Hand said:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: If the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.⁵¹

According to Hand, liability under the law of tort is not predicated upon some *a priori* concept of "duty" or "morality" but rather by reference to the likelihood and foreseeability that a person's actions will harm others.

The following portion of this article describes how the realist movement transformed American Constitutional Law during the second half of the 20th century.

IV. REALISM IN AMERICAN CONSTITUTIONAL LAW

In the second half of the 20th century the realist movement transformed both the process and the substance of American Constitutional Law. It not only led to the overruling of long-established constitutional precedent, it revolutionized how the constitutionality of laws is determined.

Brown v. Board of Education

The most important decision of the 20th century is without question *Brown v. Board of Education*.⁵² In that case the Supreme Court overruled the longstanding principle of "separate but equal" and overturned the deeply rooted social custom of racial segregation.⁵³ In writing the opinion for a unanimous Supreme Court Chief Justice Earl Warren could not rely upon the standard interpretive techniques of tradition, precedent, or the intent of the framers of the Fourteenth Amendment. Precedent and tradition both supported the separation of the races.⁵⁴ Original intent, said the Court, was both indeterminate and no longer relevant in light of how much the field of public education had changed since 1868.⁵⁵ Providing separate educational

⁵¹ *Id.* at 173

⁵² 347 U.S. 483 (1954) (striking down state-sponsored racial segregation in the public schools).

⁵³ *See id.* at 494-495 (overruling *Plessy* and stating, "Separate educational facilities are inherently unequal.").

⁵⁴ *See Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (finding that legally enforced racial segregation on trains is consistent with "the established usages, customs, and traditions of the people").

⁵⁵ *See Brown*, 347 U.S., at 489 (finding evidence as to the intent of the framers of the 14th Amendment "inconclusive" on the question of racial segregation in the public schools); *id.* at 489-490, 493 (citing the changes that had occurred since 1868 in the field of public education); *id.* at 492-493 (stating, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

facilities for the children of different races is unconstitutional, said the Court, because “it may affect their hearts and minds in ways unlikely ever to be undone.”⁵⁶ In short it was the *consequences* flowing from the practice of racial segregation that made the doctrine of “separate but equal” unconstitutional – not its pedigree in the law.

The Rational Basis and Strict Scrutiny Tests

The realist revolution utterly revised constitutional analysis. At the time of *Brown* the Supreme Court was moving towards a consequentialist form of reasoning for *all* cases involving constitutional rights. As a result of this change laws that do not infringe individual rights are evaluated under the “rational basis” test, while laws that do affect fundamental rights are subject to the “strict scrutiny” test.

In 1938 in the case of *United States v. Carolene Products*⁵⁷ the Supreme Court announced a highly deferential test for determining the constitutionality of ordinary legislative enactments.⁵⁸ This standard – the “rational basis test” – does not evaluate the constitutionality of laws by reference to tradition or original intent. Instead, under this standard the courts determine constitutionality in light of the goal that the legislation is intended to achieve. So long as the law is “rationally related to a legitimate state interest” the law must be upheld.⁵⁹ In footnote 4 of *Carolene Products*, however, the Court warned that laws infringing fundamental rights or affecting the rights of minority groups could be subjected to “more exacting judicial scrutiny.”⁶⁰

By 1965 the Supreme Court had fully developed the “more exacting judicial scrutiny” that it had referred to *Carolene Products* – a standard that it called “strict scrutiny.” In *Griswold v. Connecticut*⁶¹ the Court held that when strict scrutiny applies, the government must demonstrate not only that the law has some tendency to achieve a legitimate governmental purpose, but that the law is necessary to accomplish a compelling governmental purpose.⁶²

⁵⁶ *Id.* at 494.

⁵⁷ 304 U.S. 144 (1938) (upholding federal “filled milk” regulation under rational basis test).

⁵⁸ *See id.* at 152. The Court stated:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

⁵⁹ *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (stating, “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

⁶⁰ 304 U.S., at 152 fn. 4 (foreshadowing use of strict scrutiny in evaluating the constitutionality of legislation affecting fundamental rights or minority groups).

⁶¹ 381 U.S. 479 (1965) (striking down anti-contraception law under strict scrutiny test).

⁶² *Id.* at 497. The Court stated:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. “Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.” The law must be shown “necessary, and not merely rationally related to, the accomplishment of a permissible state policy.”

Id. (citations omitted).

Both rational basis and strict scrutiny are consequentialist forms of analysis. Under both tests the constitutionality of a law is determined not by its conformity to custom or existing doctrine, but rather by reference to the “ends” that the law seeks to achieve and the “means” used to accomplish those ends. With rational basis, the consequence that the law seeks to accomplish need only be “legitimate” and the law itself need only have “some tendency” to achieve that purpose. When strict scrutiny applies the law must serve a “compelling” governmental purpose and the law must be both “likely” to achieve that goal and be the “least restrictive means,” meaning that the government’s goal must be sufficiently important and the likelihood of achieving that goal must be sufficiently probable so as to justify both the infringement on constitutional rights and the unintended consequences flowing from the enforcement of the law. Strict scrutiny is a consequentialist form of analysis that closely resembles Hand’s formula B<PL.⁶³

The Constitution’s adherence to realist analysis is nowhere more evident than in how it has come to interpret the principle of equality that is inherent in the concept of Equal Protection. The realistic standard that the Supreme Court has developed may be referred to as the “equality principle.”

V. THE REALITY-BASED EQUALITY PRINCIPLE

In modern decisions interpreting the Equal Protection Clause the Supreme Court has adhered to a simple yet powerful idea – a basic moral concept that may be called the “equality principle.” This fundamental principle is that people who are “similarly situated” must be treated the same. As a legal standard the equality principle confers great power and grave responsibility upon the courts. It requires the courts to determine whether two groups of people are or are not similar in a particular context; if they are similar, the law must treat them the same.

The Supreme Court has consistently applied this principle only in the past half-century, but its origin may be traced to the latter part of the 19th century. In 1886 in *Yick Wo v. Hopkins*⁶⁴ the San Francisco Board of Supervisors had denied permits to all Chinese residents to operate laundries. In determining the constitutionality of the city’s action, the Court articulated the equality principle in the negative; the Court stated that a law is constitutional only if it treats in like fashion all persons who are similarly situated:

“Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.”⁶⁵

⁶³ See text accompanying note __ *supra* (Hand formula). Hand proposed just such an application of his formula to resolve First Amendment questions. See *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950), affirmed 341 U.S. 494 (1951) (stating, “In each case they must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”).

⁶⁴ 118 U.S. 356 (1886) (ruling that Board of Supervisors violated Equal Protection when they denied laundry licenses to all Chinese).

⁶⁵ *Id.* at 368, quoting *Barbier v. Connolly* 113 U.S. 27, 32 (1884).

Applying this principle in *Yick Wo* the Supreme Court reversed the discriminatory actions of the San Francisco Board of Supervisors, finding their conduct to be in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶⁶

The Supreme Court began to routinely invoke the equality principle during the latter portion of the 20th century. In 1971 in *Reed v. Reed*⁶⁷ the Court approximated the language and followed the example of *Yick Wo*. In *Reed* the Court struck down an Idaho law that preferred men over women in the administration of estates.⁶⁸ Speaking for the majority, Chief Justice Burger said:

By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.⁶⁹

In 1984 in the case of *Cleburne v. Cleburne Living Centers*⁷⁰ the Court had to decide whether persons with mental disabilities were entitled to establish a group home in a neighborhood that was zoned for group living establishments like fraternities and old-age homes.⁷¹ Despite finding that intelligence is not a suspect classification,⁷² Justice Bryon White ruled that persons with disabilities did have that right because they aren't different, in any relevant way, from those other groups, in the context of being permitted to live together in a group home.⁷³ In articulating the general principle that governed the case he said:

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.⁷⁴

In 2003, in her concurring opinion in *Lawrence v. Texas*,⁷⁵ Justice Sandra Day O'Connor echoed White's words in coming to the conclusion that gays and lesbians could not be imprisoned for engaging in homosexual sex:

The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'⁷⁶

⁶⁶ *Id.* at 373.

⁶⁷ 404 U.S. 71 (1971) (striking down state law preferring males over females in the administration of estates).

⁶⁸ *See id.* at 77.

⁶⁹ *Id.*

⁷⁰ 473 U.S. 432 (1985) (striking down city's refusal to grant permit to group home for persons with mental disabilities).

⁷¹ *See id.* at 447-448 (framing the issue as whether this group home for persons with mental disabilities could be treated differently than other facilities for group living arrangements).

⁷² *See id.* at 442-447 (holding that persons with mental disabilities do not qualify as a suspect or quasi-suspect class).

⁷³ *See id.* at 447-450 (holding that there was no rational justification for treating persons with mental disabilities differently than other groups permitted to live in group settings).

⁷⁴ *Id.* at 439.

⁷⁵ 539 U.S. 558 (2003)

⁷⁶ *Id.* at 579 (O'Connor, J., concurring).

From the foregoing cases it appears that the equality principle applies across the board not matter what distinctions the law draws among different groups of people. Race has been found to be a suspect classification,⁷⁷ gender is quasi-suspect,⁷⁸ intelligence is non-suspect,⁷⁹ and the suspectness of sexual orientation has yet to be determined by the Supreme Court.⁸⁰ But the Court applied the equality principle to *all* of these groups, and in *none* of these cases did the Court find that their characteristics warranted treating people differently. In each case the Court found that the different groups of people were “similarly situated.”

Are gay and lesbian couples similar to heterosexual couples with respect to marriage? Under the equality principle that question must be answered in order to determine whether or not the Equal Protection Clause protects their right to marry. In accordance with American philosophy and jurisprudence the answer to that question must be based upon proven facts and actual experience, not by reference to traditional moral and religious beliefs. The following portion of this article describes how advances in social science have demonstrated that gays and lesbians should be granted an equal right to marry.

VI. REALITY-BASED ANALYSIS OF MARRIAGE EQUALITY

What changed after 2007 that generated numerous victories for gay and lesbian couples in American courts and legislatures? Very simply, American judges and legislators came to believe that there are no significant differences between same-sex and different-sex couples in the context of marriage. This was also the overwhelming consensus of social science researchers.

The Prop 8 Trial

The equality of same-sex couples was unequivocally demonstrated during the “Prop 8 Trial” conducted by federal District Judge Vaughn Walker.⁸¹ The legal issue in that case was whether Proposition 8, an amendment to the California Constitution taking away the right of same-sex couples to marry, was constitutional under Equal Protection. Judge Walker invited the parties to offer evidence and expert testimony on the questions whether sexual orientation is a “suspect classification,” whether gay lesbian couples were capable of performing the responsibilities of marriage, and whether their families would benefit from marriage.

The plaintiffs in the Prop 8 Trial called nine expert witnesses, each of them possessing a prestigious degree and holding a position at a leading university.⁸² The direct and cross

⁷⁷ See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007).

⁷⁸ See *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (stating, “the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and “quasi-suspect” classes such as women or illegitimates.”).

⁷⁹ See note ___ *supra* and accompanying text.

⁸⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down law punishing same-sex intercourse on the ground that it did not serve a legitimate governmental interest, but not analyzing whether sexual orientation constitutes a suspect or quasi-suspect classification).

⁸¹ *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (striking down California Proposition 8).

⁸² See *Perry v. Schwarzenegger*, 704 F.Supp.2d, at 940-944.

examination of these witnesses extended to thousands of pages of the trial transcript.⁸³ They testified that gays and lesbians have been historically discriminated against; that compared to heterosexuals they lack effective political power; that sexual orientation is rarely chosen or subject to change; that same-sex couples love each other just as much and are as devoted to each other as different-sex couples; that gay and lesbian couples are as good at parenting as different-sex couples; that marriage will benefit the couples, their children, and their families; and that the admission of same-sex couples to the institution of marriage will not in the least harm existing marriages or marriage as an institution.⁸⁴

The defendants in the Prop 8 case called but two witnesses, David Blankenhorn and Kenneth Miller.⁸⁵ Blankenhorn earned a Masters in comparative social history from the University of Warwick, England.⁸⁶ Although he had authored several books and articles on same-sex marriage, he had conducted no peer-reviewed research.⁸⁷ Instead, he developed his expertise by “read[ing] articles and hav[ing] conversations with people, and try[ing] to be an informed person about it.”⁸⁸ The trial court ruled Mr. Blankenhorn’s testimony inadmissible because he was not qualified to testify as an expert.⁸⁹ Dr. Miller, a professor of government at Claremont McKenna College, was declared qualified as an expert in political science generally but not on the political power of gays and lesbians specifically.⁹⁰ The trial court ruled his testimony admissible but entitled to only limited weight.⁹¹ The defendants declined to call any other witnesses.⁹²

The trial court rendered a verdict in favor of the plaintiffs striking down Proposition 8. In support of its ruling the court entered dozens of findings, each supported by multiple references to the trial record. Here are a few of the court’s findings:

48. Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.⁹³

50. Same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive.⁹⁴

⁸³ See American Foundation for Equal Rights, at <http://www.afer.org/our-work/hearing-transcripts/> (containing links to the daily trial transcripts in the Prop 8 case).

⁸⁴ See text accompanying notes ___- __ *infra*.

⁸⁵ See *Perry v. Schwarzenegger*, 704 F.Supp. 2d, at 945.

⁸⁶ See *id.*

⁸⁷ See *id.* at 946

⁸⁸ *Id.*

⁸⁹ See *id.* at 950.

⁹⁰ See *id.* at 951.

⁹¹ See *id.* at 952.

⁹² See *id.* at 945.

⁹³ *Id.* at 967.

⁹⁴ *Id.* at 969.

55. Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.⁹⁵

56. The children of same-sex couples benefit when their parents can marry.⁹⁶

70. The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.⁹⁷

The foregoing findings were pertinent only because the constitutionality of Proposition 8 was dependent upon the consequences that would flow from the judge's interpretation of the Equal Protection Clause: the effects of the law on same-sex couples, their children, and all other married persons. If in fact same-sex couples are "similarly situated" to different-sex couples with respect to marriage, then Proposition 8 violates the Equal Protection Clause. It was the reality-based "equality principle" that made the expert testimony relevant and material to the constitutional question before the court.

The expert witnesses did not testify as to the ultimate legal conclusion to be derived from their testimony – that is, they did not testify that Proposition 8 is constitutional or unconstitutional. In that sense they did not testify about what the law is. Instead, they simply laid the factual predicate upon which the court based its decision finding Proposition 8 to be unconstitutional.

The Prop 8 Trial wasn't necessary. If he had chosen, Judge Walker could simply have taken judicial notice of the "legislative facts" that were at issue.⁹⁸ As one eminent authority has stated, "In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion."⁹⁹ Judge Walker could instead have simply consulted historical, sociological, and political science sources identified by the parties or of his own choosing. For example, in *Brown v. Board of Education* the Court simply cited seven authorities from the field of psychology in support of its finding that racial segregation harms children's hearts and minds.¹⁰⁰

⁹⁵ *Id.* at 972.

⁹⁶ *Id.* at 973.

⁹⁷ *Id.* at 980.

⁹⁸ See Federal Rule of Evidence 201, Advisory Committee Notes, *Subdivision (a)* at http://www.law.cornell.edu/rules/fre/rule_201.

⁹⁹ Morgan, *Judicial Notice*, 57 HARV.L.REV. 269, 270–271 (1944).

¹⁰⁰ See *Brown*, 347 U.S., at 494 n.11. Footnote 11 states:

K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological*

But Judge Walker *did* conduct the Prop 8 Trial to determine whether or not sexual orientation is a suspect classification and what the effect of marriage equality would be on same-sex couples and different-sex couples. What is remarkable about Judge Walker's decision is that these matters are pure *questions of law*. In essence Judge Walker treated the issues under consideration as if they were *questions of fact* subject to the rules of evidence and capable of being proven true or false. Experts on these questions were subject to cross-examination, "the greatest engine ever invented for the discovery of truth."¹⁰¹ The Prop 8 trial represents remarkable proof of the incorporation of pragmatism and the scientific method into American legal thought – the triumph of legal realism.

Subsequent Social Science Research

Since the Prop 8 case was decided two more comprehensive studies comparing gay and lesbian couples to different-sex couples have been published. In 2010 Michael J. Rosenfeld of Stanford University published a summary of 45 studies and found no significant difference between the children of same-sex couples and opposite-sex couples in their school progress.¹⁰² In 2011 the Williams Institute published the results of a massive study of marriage and divorce rates drawing on information from the U.S. Census Bureau and state administrative agencies.¹⁰³ The authors found substantial equality between same-sex couples and different-sex couples on marriage rates and likelihood of divorce.¹⁰⁴

The most impressive compilation of data is a Brandeis brief submitted by five national professional organizations: the American Psychological Association, American Psychiatric Association, National Association of Social Workers, American Medical Association, and

Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (MacIver, ed., (1949), 44-48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944).

See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 Yale L.J. 1535, 1553 (1998) (stating, "Brown served as a remarkable culmination of the legal realist project of taming abstract legal propositions with the whip of social science--a process that began in the modern Supreme Court with the Court's acceptance of the "Brandeis brief" in *Muller v. Oregon*.").

¹⁰¹ Irving Younger, *An Irreverent Introduction to Hearsay*, 2 (ABA Litigation Monograph No. 3, 1977).

¹⁰² Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, Demography, Volume 47 (3): 755-775 (2010), draft available at http://www.stanford.edu/dept/soc/people/mrosenfeld/documents/Rosenfeld_Nontraditional_Families_Children.pdf.

¹⁰³ See M.V. Lee Badgett, Jody L. Herman, *The Williams Institute, Patterns of Relationship Recognition by Same-Sex Couples in the United States*, at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-Dissolution-FINAL.pdf> (November, 2011).

¹⁰⁴ See *id.* at 1. The authors state:

In the states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates of different-sex couples. The percentage of those same sex couples who end their legal relationship ranges from 0% to 1.8% annually, or 1.1% on average, whereas 2% of married different-sex couples divorce annually.

...

If current trends hold, the marriage rate of same-sex couples in Massachusetts eventually will reach parity with the marriage rate of different-sex couples in Massachusetts by 2013.

American Academy of Pediatrics.¹⁰⁵ Drawing on 86 medical, psychological, and sociological studies, the brief concludes:

Homosexuality is a normal expression of human sexuality, is generally not chosen, and is highly resistant to change.

...

There is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted.¹⁰⁶

In light of these findings, courts and legislatures will find it increasingly difficult to deny the fact that same-sex and different-sex couples are equally entitled to enter into marriage.

CONCLUSION

The rapid acceptance of same-sex marriage by American courts and legislators is a testament to our society's commitment to realistic analysis and our faith in human progress.

With that in mind I close this article with quotations from two great Americans: Abraham Lincoln and William Brennan. In the first speech of his contest with Stephen Douglas for the United States Senate in 1858, Lincoln chose to make the words "all men are created equal" the centerpiece of his campaign. In defining the principle of equality Lincoln did not invoke tradition or precedent. Instead he treated equality as transcendent principle – a sacred obligation that we must constantly strive towards:

My friend [Douglas – ed.] has said to me that I am a poor hand to quote Scripture. I will try it again, however. It is said in one of the admonitions of the Lord, "As your Father in Heaven is perfect, be ye also perfect." The Savior, I suppose, did not expect that any human creature could be perfect as the Father in Heaven; but He said, "As your Father in Heaven is perfect, be ye also perfect." He set that up as a standard, and he who did most towards reaching that standard, attained the highest degree of moral perfection. So I say in relation to the principle that all men are created equal, let it be as nearly reached as we can.¹⁰⁷

Lincoln closed his speech with these words:

I leave you, hoping that the lamp of liberty will burn in your bosoms until there shall no longer be a doubt that all men are created free and equal.¹⁰⁸

¹⁰⁵ Amicus Brief filed with First Circuit Court of Appeals, November 3, 2011, at <http://www.apa.org/about/offices/ogc/amicus/gill.pdf>

¹⁰⁶ *Id.* at 6, 16.

¹⁰⁷ Abraham Lincoln, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 501 (Roy P. Basler ed. 1953), at <http://quod.lib.umich.edu/l/lincoln/>.

¹⁰⁸ *Id.* at 502.

The last word I give to William Brennan, who was the first Supreme Court justice to author an opinion expressing support for the constitutional equality of gay and lesbian persons.¹⁰⁹ In *An Affair with Freedom* Brennan describes how scientific thought is slowly replacing superstition, and realism is gradually supplanting the myths and prejudices that have blinded us to the truth of human equality:

The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formulation of new thought structures due to scientific advances and social evolution--all these phenomena hasten that day.¹¹⁰

¹⁰⁹ See *Rowland v. Mad River Local School District*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of cert.) (stating, “discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.”).

¹¹⁰ William J. Brennan, Jr., *AN AFFAIR WITH FREEDOM* 319 (Steven J. Friedman ed., 1967)