Georgia State University Law Review

Volume 27
Issue 4 *Summer 2011*

Article 2

3-13-2012

Henry J. Miller Lecture Series: Old Reasons, New Reasons, No Reasons

Pamela Karlan

Follow this and additional works at: http://scholarworks.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Karlan, Pamela (2010) "Henry J. Miller Lecture Series: Old Reasons, New Reasons, No Reasons," *Georgia State University Law Review*: Vol. 27: Iss. 4, Article 2.
Available at: http://scholarworks.gsu.edu/gsulr/vol27/iss4/2

This Article is brought to you for free and open access by the College of Law Publications at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia State University Law Review by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

OLD REASONS, NEW REASONS, NO REASONS

Pamela S. Karlan*

It has long been the law in cases where rationality review applies that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[1] Nowhere have the courts been more imaginative than in conceiving justifications for laws that deal with the family, gender roles, and sexuality. What was true for Shakespeare's weaver Nick Bottom in the woods outside Athens remains true: "[R]eason and love keep little company together nowadays."[2]

In this essay, I explore two aspects of judicial review as it relates to the family, gender roles, and sexuality. The first is descriptive, albeit implicitly critical. In a number of areas, describing what happens as "rationality review"—let alone as "heightened scrutiny"—is a bit of a misnomer: courts seem to be driven as much by unexamined intuitions and deeply felt sentiment as by anything rational. The second is speculative. I ask whether the general principle that it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"[3] should still hold when the government affirmatively *disclaims* a particular reason. I suggest that the general principle underlying rationality review—deference to the policy choices of the political process—cuts against courts upholding a practice on the basis of a justification the government forswears.

---

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. I delivered an earlier version of this essay as the 2011 Miller Lecture at Georgia State University, as the 2010 Hon. Betty Roberts Talk at Lewis and Clark Law School, and at a lunchtime workshop at the University of Denver Sturm College of Law. In thinking about the issues I discuss here, I also benefitted greatly from discussions with Viola Canales, Jane Schacter, and my Constitutional Law class.

1. McGowan v. Maryland, 366 U.S. 420, 426 (1961).
2. WILLIAM SHAKESPEARE, A MIDSUMMER'S NIGHT DREAM, Act III, sc. i.
3. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

I. THE CONSTITUTION OF PARENTHOOD

Family arrangements are fundamental to people's lives. So it is no surprise that the legal rules that affect them prompt a range of litigation. As a matter of formal doctrine, courts adjudicate these claims under a wide variety of legal standards. Some claims receive heightened scrutiny, either because a fundamental right is at issue[4] or because a disfavored classification is used.[5] But even when doctrine calls for heightened scrutiny, the analysis judges offer often rests on the kind of hypothetical reasoning that rationality review expressly contemplates.

To get a sense of just how forgiving rationality review can be, it is hard to imagine a better example than *Kotch v. Board of River Port Pilot Commissioners*.[6] For many years, Louisiana had a system for licensing river pilots for the port of New Orleans that required applicants first to serve a six-month apprenticeship under one of the incumbent pilots. The pilots generally chose only their "kinsmen" for these career-enabling apprenticeships.[7] The plaintiffs in *Kotch* brought suit, alleging that the result of Louisiana's law was to deny them an opportunity to become pilots, in violation of the equal protection clause.

By a 5–4 vote, the Supreme Court upheld the Louisiana system. Justice Hugo Black's opinion for the Court offered a romanticized account of life on the Mississippi. Pilotage, he explained, was "a

---

4. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (applying heightened scrutiny to a Washington state law that gave visitation rights over a parent's objection); Zablocki v. Redhail, 434 U.S. 374, 383–88 (1978) (using heightened scrutiny to strike down a Wisconsin provision denying persons who were not meeting their child support obligations the right to marry); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (using heightened scrutiny to strike down a zoning law as applied to the ability of relatives to live together).

5. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (overturning a child custody decision that denied the mother custody because she was involved in an interracial relationship as impermissible racial discrimination); Califano v. Goldfarb, 430 U.S. 199 (1977) (striking down a federal survivors' benefits rule that treated widows and widowers differently as impermissible sex discrimination).

6. 330 U.S. 552 (1947). Interestingly, the last time the Supreme Court cited the decision was in *Romer v. Evans*, 517 U.S. 620 (1995), where the Court recognized that the law "seem[ed] unwise or work[ed] to the disadvantage of a particular group" and "the rationale for it seem[ed] tenuous." *Id.* at 632 (citing *Kotch*). Notably, in *Kotch* itself, the Court took a far rosier view of the challenged law, expressing no reservation about the wisdom of the state's choice.

7. *See* Kotch v. Board of River Port Pilot Comm'rs, 209 La. 737, 746 (1946).

highly personalized calling," requiring "a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and conformation of the harbor or river."[8] Growing up in the distinctive "pilot towns" on the river, young men, he declared, "have an opportunity to acquire special knowledge of the weather and water hazards of the locality and seem to grow up with ambitions to become pilots in the traditions of their fathers, relatives, and neighbors."[9]

The Court recognized that it was faced with straightforward nepotism, but it upheld the law on the hypothesis that Louisiana might have concluded that nepotism served the public interest:

> We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.[10]

Well, maybe. But this sort of nepotism was hardly restricted to exceptional vocations like river pilot. In fact, labor unions often adopted similar policies in fields that involved no specialized lore or public purpose.[11] And they did so for the obvious restraint-of-trade

8. *Kotch*, 330 U.S. at 558.
9. *Id.* at 559.
10. *Id.* at 563.
11. For example, *Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047, 1050 (5th Cir. 1969), involved a Title VII lawsuit against a Louisiana-based union local that restricted membership to applicants who had "four years of experience as an 'improver' or 'helper' member of the union, but improver membership in the union is restricted to sons or close relatives living in the households of members."

advantage exclusion confers. Indeed, even the Supreme Court ultimately came to describe Louisiana's river pilot policy as "unwise," and its "rationale" as "tenuous."[12]

If *Kotch* represents a romanticization of fathers and sons, then a later case, *Nguyen v. INS*[13] represents a staggering blindness. Tuan Nguyen was born in 1969 in Vietnam. His mother was a Vietnamese national, Hung Thi Nguyen, and his father was an American citizen, Joseph Boulais. Tuan's parents were not married. Shortly after Tuan was born, the couple split up and while Tuan was still an infant, he went to live with Boulais. After the fall of Saigon to North Vietnamese troops, the child came to the United States where he lived with his father; he never again had any contact with his mother.[14]

When Tuan Nguyen was 22 years old, he pleaded guilty to two serious felonies in state court. As a result, the INS moved to deport him. Nguyen sought to claim U.S. citizenship—which would have forestalled the deportation—but the Board of Immigration Appeals denied his claim because Boulais had failed to comply with one of the requirements for conferring citizenship on a child born abroad to a U.S. citizen when the citizen parent is the father, rather than the mother, and the parents are not married.[15] U.S. law requires unmarried fathers to acknowledge a child's paternity before he turns eighteen.[16] It imposes no equivalent requirement on U.S. citizen mothers.

And in the context of public employment, Congress recognized that nepotism was both discriminatory and unrelated to job performance. *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) (noting that when Congress extended federal antidiscrimination laws to public employers, it relied on a U.S. Commission on Civil Rights report that had found "discrimination in municipal employment even more pervasive than in the private sector . . . because public employers often rel[ied] on criteria unrelated to job performance including nepotism or political patronage") (internal quotation marks omitted).

12. Romer v. Evans, 517 U.S. 620, 632 (1995) (citing *Kotch*).

13. 533 U.S. 53 (2001).

14. *See id.* at 57; Brief of Petitioners at 5, Nguyen v. INS, 533 U.S. 53 (2001).

15. *Nguyen*, 533 U.S. at 57–58.

16. *See* 8 U.S.C. § 1409(a)(4) (providing that a person born outside the United States "out of wedlock" to a father with United States citizenship can becomes a United States citizen if "while the person is under the age of 18 years . . . the person is legitimated under the law of the person's residence or domicile, . . . the father acknowledges paternity of the person in writing under oath, or . . . the paternity of the person is established by adjudication of a competent court").

Again by a 5–4 vote, the Supreme Court upheld the statute against an equal protection challenge. Justice Kennedy's opinion for the Court offered two rationales for treating unmarried fathers and unmarried mothers differently. The first is that the government has an important interest in "assuring that a biological parent-child relationship exists"[17]—an interest that the Court saw as automatically "verifiable from the birth itself"[18] in the case of mothers, but requiring proof in the cases of fathers, who "need not be present at the birth" and whose presence is not "incontrovertible proof of fatherhood" in any case.[19] The more interesting and revealing rationale was the second: the government's interest in "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[20]

Mothers, the Court declared, always have such an opportunity, merely from their physical presence at a child's birth. The Court offered no comment on the sexual behavior of American women who find themselves unmarried, pregnant, and overseas. By contrast, the Court's portrait of American men was hardly flattering. It suggested they would often be unaware that they had impregnated foreign women, singling out "young men . . . who are on duty with the Armed Forces in foreign countries."[21] It pointed to the "realistic possibility" that the father, having enjoyed only a "short sojour[n] abroad,"[22] would never meet his child. The Court upheld Congress's

---

By contrast a child born abroad to unmarried parents whose mother is a citizen of the United States "shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *Id.* § 1409(c).

17. *Nguyen*, 533 U.S. at 62.
18. *Id.*
19. *Id.*
20. *Id.* at 64–65.
21. *Id.* at 65.
22. *Id.* at 66.

prerogative to ensure that citizenship is not conferred by "unwitting means."[23]

For present purposes, there are two particularly striking aspects of the Court's opinion. The first is the staggering disconnect between the Court's theoretical account of mothers and fathers and the facts in the case before it. The only parent who had real everyday ties with Nguyen was his father. Whatever the relative magnitude of his parents' ex ante opportunities to develop a relationship with him, only his father had realized them. In light of these facts, the Court's insistence that its analysis involved no "stereotype, defined as a frame of mind resulting from irrational or uncritical analysis,"[24] rings hollow at best.

The second point is the way in which the Court ignored doctrinal constraints on the sorts of reasons that can justify discrimination. As Justice O'Connor's impassioned dissent points out, the normal rule in cases involving explicit gender classifications is that the justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[25] Here, however, while the Court set aside the Government's arguments in its brief as "not conclusive as to the objects of the statute,"[26] instead of inquiring into the actual reasons for the differential treatment the Court declared that it would "ascertain the purpose of [the] statute by drawing *logical conclusions* from its text, structure, and operation."[27] Notably, the Court nowhere in its opinion pointed to any evidence in the legislative record that the Congress that enacted the citizenship provisions was concerned with ensuring a meaningful day-to-day *Kramer v. Kramer* style relationship between children and their dads. To the contrary, the dissent quite persuasively showed that the sex-based distinction was enshrined in American law as part of "a historic regime that left

23. *Nguyen*, 533 U.S. at 67.
24. *Id.* at 68.
25. *Id.* at 76 (O'Connor, J., dissenting) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
26. *Id.* at 67 (opinion of the Court).
27. *Id.* at 68.

women with responsibility, and freed men from responsibility, for nonmarital children."[28]

Even in situations where doctrine clearly calls for heightened scrutiny, it is striking how often what the Court elsewhere dismissed as "gauzy sociological considerations"[29] inflect judicial decisions in cases involving gender roles and sexuality. The courts seem endlessly inventive in devising new rationales for traditional laws. Recent cases involving abortion and marriage equality each reflect a jurisprudential jujitsu, in which critiques of traditionalism are turned on their head in order to justify existing restrictions.

For many years, restrictions on abortion were understood as limitations on pregnant women's autonomy, justifiable only if the state had some sufficient countervailing interest—for example, protection of the fetus. Recently, however, rhetorical focus has shifted to what Professor Reva Siegel has called "woman-protective" rationales for upholding restrictions on abortion.[30] These justifications claim to be vindicating, rather than overriding, women's interests. According to their proponents, the government enjoys authority to restrict women's access to abortion because such restrictions promote women's welfare, in the same way that minimum wage and maximum hour laws, though they restrict workers' freedom of contract, might be properly understood to protect employees' welfare.

The locus classicus of women-protective rationalization is the Supreme Court's 2007 opinion in *Gonzales v. Carhart*,[31] the case upholding the federal Partial Birth Abortion Ban Act.[32] A pivotal passage in Justice Kennedy's opinion for the Court declares the "reality" that "[r]espect for human life finds an ultimate expression in

28. *Id.* at 92 (O'Connor, J., dissenting).

29. City of Mobile v. Bolden, 446 U.S. 55, 75 (1980) (opinion of Stewart, J.).

30. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991.

31. 550 U.S. 124 (2007).

32. The following discussion of *Carhart* is based in large part on my earlier article, *The Law of Small Numbers:* Gonzales v. Carhart, Parents Involved in Community Schools, *and Some Themes From the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369 (2008).

the bond of love the mother has for her child."[33] Although he conceded that there were "no reliable data to measure the phenomenon," Justice Kennedy found it "unexceptionable" and "self-evident" that women would regret having abortions using the proscribed procedure.[34]

To be sure, at one level, Justice Kennedy is correct. *Some* women surely do regret having abortions. But how many? The sole source Justice Kennedy cited for the idea that the government has a rational basis for forbidding women to obtain the proscribed procedure was an amicus brief filed on behalf of 180 women who regretted having had abortions during the period following *Roe v. Wade*.[35] But there have been close to fifty million legal abortions in the United States during that time;[36] the likelihood that this self-selected sample is representative of the population seems infinitesimal. Moreover, that some women regret having had abortions tells us very little about how to compare that group to two other salient groups: women who do not regret having had abortions or women who regret not having had them.[37] And more fundamentally, the fact that individuals regret a choice they have made hardly says that they wish the government had forbidden them from having had a choice in the first place. To put this in perspective, consider the fact that roughly forty percent of marriages entered into in the past half century seem likely to end in divorce.[38] Some substantial number of those who get divorced

33. *Carhart*, 550 U.S. at 159.

34. *Id.*

35. *Id.* at 159 (citing Brief for Sandra Cano et al. at 22–24, Gonzales v. Carhart, 550 U.S. 124 (2007)).

36. Guttmacher Inst., Facts on Induced Abortion in the United States (May 2010) (reporting that "From 1973 through 2005, more than 45 million legal abortions occurred" and noting that in recent years, there were more than one million abortions annually), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited July 15, 2010).

37. To my knowledge, the "turnaway study" being done by scholars at the University of California San Francisco, see http://www.ansirh.org/research/turnaway.php (last visited July 15, 2010), is the first rigorous study to compare women who had abortions to women who sought abortions but could not obtain them, rather than to women who voluntarily carried their pregnancies to term.

38. According to the Census Bureau "[a]bout 38 percent of men born from 1945 to 1954 and 41 percent of women in the same age group had been divorced by 2004." Most People Make Only One Trip Down the Aisle, But First Marriages Shorter, Census Bureau Reports (Sept. 19, 2007), *available at* http://www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb07-131.html (last visited July 15, 2010).

presumably regret ever having married their spouse in the first place. And yet we see no serious argument that the government should bar people from entering into marriages because some proportion of them will later feel that they have ruined their lives. In a variety of constitutional contexts, the Court has "recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices,"[39] and that some of those choices will turn out to be regrettable after the fact.[40]

Far from being "self-evident," the Court's analysis is of course profoundly dependent on a particular, and hotly contested, worldview. As with the moment of birth in *Nguyen*, and life on the river in *Kotch*, the moment of abortion in *Carhart* takes on a mystical significance. But ironically, in *Carhart*, the Court credits an illusory, and in fact unwanted parental relationship, while in *Nguyen* it ignored an undeniable parental bond in favor of theory.

The inventive rationalization that characterized *Carhart* is also evident in the New York Court of Appeals' decision in *Hernandez v. Robles*[41] to uphold the state's restriction of marriage to opposite-sex couples. I think it is safe to say that the conventional rationale for restricting marriage to heterosexual couples rested, in significant part, on a disapproval of homosexual relationships.[42] But that rationale is no longer acceptable, at least not in blue states. So the New York

---

39. Bowers v. Hardwick, 478 U.S. 186, 205-05 (1986) (Blackmun, J., dissenting).

40. Vera Pavlova's poem, *If There Is Something To Desire*, captures this point exactly:

If there is something to desire,
there will be something to regret.
If there is something to regret,
there will be something to recall.

If there is something to recall,
there was nothing to regret.
If there was nothing to regret,
there was nothing to desire.

Vera Pavlova, *Four Poems*, THE NEW YORKER, July 30, 2007, *available at* http://verapavlova.us/New_Yorker.html (last visited July 15, 2010).

41. 855 N.E.2d 1 (N.Y. 2006).

42. In enacting a federal definition of "marriage" that restricts the institution to opposite-sex couples, 1 U.S.C. § 7, for example, Congress invoked "defending traditional notions of morality" as one of the four "governmental interests" supporting its action. H.R. Rep. No. 104-664, at 12, *reprinted in* 1996 U.S.C.C.A.N. at 2916–17.

court devised a new rationale that comes quite close to turning the conventional justification on its head. One of the two grounds it identified that "rationally support[ed] the limitation on marriage"[43] to opposite-sex couples stemmed from the importance of avoiding "instability" in heterosexual relationships. The legislature, it declared, could find that sexual relationships between men and women "are all too often casual or temporary."[44] Marriage, "and its attendant benefits," might provide an "inducement" to opposite-sex couples to stay together for the benefit of the children that were the unintended consequence of their sexual relationships.[45]

By contrast, same-sex couples would not create children carelessly:

> These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.[46]

Notice how the New York court in its haste to restrict marriage has unwittingly denigrated heterosexuals as irresponsible and impulsive and suggested that straight men often avoid attachment to their children absent external compulsion. This is *Nguyen* with a vengeance. And the New York court apparently thought that men unwittingly impregnate women in casual encounters at home as well as abroad. Moreover, by contrasting the feckless, reckless, accident-prone straight fornicator with the gay or lesbian couple that

43. *Hernandez*, 855 N.E.2d at 7.
44. *Id.*
45. *Id.*
46. *Id.*

painstakingly achieves parenthood through deliberative means, the New York court assured that its justification involves judicial invention rather than discernment of actual purpose: It defies belief to assume that New York's longstanding marriage restriction in fact excluded gay people because they could be trusted to take care of their children. There is an oft-quoted assertion by Justice Oliver Wendell Holmes that "[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[47] But the four parenthood-related cases I have discussed—*Kotch*, *Nguyen*, *Carhart*, and *Hernandez*—suggest that there may be an equivalent problem when courts offer newfangled justifications for old rules that have outworn their original purposes.

II. THE PROBLEM OF REPUDIATED REASONS

> That is not what I meant at all.
> That is not it, at all.
> T.S. Eliot, *The Love Song of J. Alfred Prufrock*

The hypothetical reasons advanced in favor of upholding a challenged statute might often be viewed as a sort of best-lights reading of the statute: what rationales might justify the legislative choice?[48] But saying that rationality review authorizes a court to imagine additional justifications for a law does not answer a question that is arising with special urgency in the context of marriage equality litigation: can a court rely on reasons that the government affirmatively *repudiates*? To my mind, even if courts can fill a justificatory vacuum by hypothesizing a permissible reason for a challenged statute, they should not uphold laws on the basis of reasons that the democratic process has already rejected.

47. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
48. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 128 (1986).

In *Gill v. Office of Personnel Management*[49]—which challenges the constitutionality of the federal Defense of Marriage Act insofar as it results in a denial of federal benefits to same-sex couples who are validly married under state law (there, the law of Massachusetts)—the court noted that Congress had expressly identified "four interests" which Congress had "sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources."[50] In the course of the litigation, however, the federal government's attorneys "disavowed Congress's stated justifications for the statute,"[51] defending it instead on the basis of a quite different rationale: namely, "preserv[ation of] the 'status quo,' pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage."[52] As it turned out, the district court found neither set of justifications persuasive, and therefore concluded that the restriction of marriage lacked any "rational relationship" to "a legitimate governmental objective."[53] But suppose a court were to conclude that one of the congressional rationales *would* justify DOMA's restriction of marriage to opposite-sex couples. Should it consider itself estopped from relying on that justification because of the government's explicit disclaimer?

An even more complicated version of the issue arises in the context of *Perry v. Schwarzenegger*, the federal constitutional challenge to a California constitutional provision restricting marriage to opposite-sex couples. In that case, the state attorney general—the government official normally charged with representing the state's interests[54]—essentially disclaimed any state interest in restricting

49. 2010 U.S. Dist. LEXIS 67874 (D. Mass. 2010).
50. *See id.* at *34 (citing H.R. Rep. No. 104-664, at 12–18 (1996)).
51. *Id.*
52. *Id.* at *42.
53. *Id.*
54. *See* CAL. GOV'T CODE §§ 12511, 12512 (West) (providing that "[t]he Attorney General has charge, as attorney, of all legal matters in which the State is interested" and shall "defend all causes to which the State, or any State officer is a party in his or her official capacity").

marriage to opposite-sex couples.[55] His disclaimer came on the heels of a California Supreme Court decision that, while it upheld California's marriage restriction, declined to find any affirmative rationale for the restriction.[56] Indeed, the California Supreme Court went out of its way to adopt the narrowest possible reading of Proposition 8, a restriction that left intact the same-sex marriages that had occurred,[57] as well as the court's prior holdings that gay couples are entitled to state recognition of, and protection for, their relationships[58] and that all other discrimination on the basis of sexual orientation required strict scrutiny as a matter of state constitutional law.[59]

Suppose, for a moment, that California's restriction of marriage had been the product of ordinary legislation. If the state's legal representatives were to disclaim reliance on a particular rationale—say, for example, the welfare-of-the-child justification—would a court nonetheless be free to uphold the law on that basis? Does the United States Supreme Court's insistence that courts need not find that a legislature *actually* relied on a particular reason mean that even if a court were to conclude that a legislature rejected a reason that reason would still justify the law? Or is upholding a law on a basis a state expressly disclaims disrespectful of state autonomy?

In *Diamond v. Charles*,[60] in the course of explaining why a private citizen lacked standing to defend a law's constitutionality once the state had conceded its invalidity, the Court explained that "concerns for state autonomy" apply with particular force "to an attempt by a private individual to compel a State to create and retain [a] legal framework."[61] Because only the state "is entitled to create a legal code," the Court concluded that "only the State has the kind of 'direct stake" identified in [the Court's earlier standing cases] in defending

55. *See* Perry v. Schwarzenegger, 2010 U.S. Dist. LEXIS 78817 at *14.
56. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).
57. *See id.* at 122.
58. *Id.* at 76.
59. *Id.* at 78.
60. 476 U.S. 54 (1986).
61. *Id.* at 65.

the standards embodied in that code."[62] State constitutional and statutory provisions that vest power in the state attorney general to direct the course of the state's litigation would seem to empower the attorney general to disclaim reliance on a particular argument, and it would thus undermine, rather than respect, a state for a federal court to foist a rationale on a resisting state. It would resemble a kind of *Faretta* violation.[63] As Justice Scalia recently observed in *Citizens United v. Federal Election Commission*,[64] the First Amendment's protection of freedom of speech "is written in terms of 'speech,' not speakers."[65] It would resemble a form of compelled speech to associate a government with a justification that its representatives deem repugnant.[66]

CONCLUSION

In Shakespeare's aptly titled *Twelfth Night, or What You Will*, Sir Toby Belch demands of the foppish Sir Andrew Aguecheek, "thy exquisite reason, dear knight?," to which Sir Andrew replied, "I have no exquisite reason for't, but I have reason good enough."[67] The question in rationality review cases of when the reason is good enough for government work is a fascinating one, particularly when the reasons a court provides tell us as much about the court as they do about the law at issue. When that issue is combined with the question of who can invoke potential reasons for upholding a law, it reveals important features of the democratic process as well as the judicial one.

---

62. *Id.*

63. *See* Faretta v. California, 422 U.S. 806, 821 (1975) (explaining that a criminal defendant's Sixth Amendment rights are violated when he is denied the right to represent himself because "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction").

64. 130 S. Ct. 876 (2010).

65. *Id.* at 919 (Scalia, J., concurring).

66. *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that New Hampshire could not force motorists to display license plates with the phrase "Live Free or Die" on them).

67. WILLIAM SHAKESPEARE, TWELFTH NIGHT, Act II, sc. 3 (1601–02).