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IN THIS ISSUE

Strip Search of Student Unconstitutional

SUMMARY: School officials violated the constitutional rights of a thirteen-year-old junior high student when they subjected her to a strip search after she was accused of possessing prohibited medications, which she denied, and after a search of her backpack and outer clothing yielded no evidence of drugs. The United States Supreme Court decided *Safford Unified School District v. Redding* on June 25, 2009.

BACKGROUND: Savana Redding attended Safford Middle School in Arizona. The school had a policy prohibiting the possession or sale of illegal controlled substances, alcohol and/or unauthorized prescription drugs on school property.

In October 2003, a student named Jordan appeared at school with his mother and asked to meet with the principal and vice principal, Robert Beeman and Kerry Wilson. Jordan's mother told them that Jordan had become violent with her a few nights earlier and was then sick to his stomach. Jordan blamed these events on some pills he had taken, which he stated he had gotten from a fellow student. He said there were students who were bringing drugs and weapons into school. In Addition, he told them that Redding, who was 13 years old, had served alcohol to students at her family's home prior to a dance earlier in the year.

A week later, Jordan was back in the school office. He gave Vice Principal Wilson a white pill, which he said he had gotten from a classmate named Marissa. He told Wilson that several students were planning to take pills at lunch. Wilson took the pill to the school nurse, who identified it as Ibuprofen 400, a pain-relief pill available only by prescription. Wilson then went to Marissa's classroom and told her to collect her belongings and accompany him to the front office. When Marissa got up, she left behind a "planner." Wilson asked her if it was hers and she said no. The teacher picked up the planner and discovered a knife, a cigarette, and a lighter inside. Marissa told her the planner belonged to Savana Redding.

Wilson recruited office assistant, Helen Romero, to serve as a witness when he took Marissa into his office. He told Marissa to turn out her pockets. In them Marissa was concealing a blue pill, several white pills and a razor blade. The blue pill was later identified as Naprosyn 200 mg, a prescription pain and inflammation drug. Wilson asked where the blue pill had come from and Marissa replied, "I guess it slipped in when she gave me the IBU 400s." By "she," Marissa explained that she meant Savana Redding.

Wilson collected Redding from her classroom, took her to his office and showed her some small white pills on his desk. He asked her if she had anything to do with them and she said no. He then asked if he could search her backpack. She said he could and he found nothing prohibited inside. Likewise, when she turned out her pockets, there was no incriminating evidence. Wilson then told Redding to follow him to the school nurse. There Romero and the nurse, also a woman, told Redding to strip down to her underwear. No drugs were revealed. They then commanded her to pull out her bra and then the waistband of her underwear, actions that exposed her breasts and pelvic area. She had no drugs.

Redding was embarrassed and humiliated by the strip search. After the encounter, she and her mother sued the school. School officials moved for summary judgment, which the district court granted, and Redding appealed. A three-judge panel of the Ninth Circuit affirmed and Redding asked for a rehearing "en banc" (by the full court). The full court granted the rehearing and reversed the prior decision. The en banc court ruled that Reddings constitutional rights had been violated and that she could sue the school and its principal. The school petitioned the United States Supreme Court for review, which was granted.

ANALYSIS: The Fourth Amendment prohibits unreasonable searches and seizures by government officials. Where adults are involved, the amendment requires probable cause to believe that a crime has been or is being committed and that a search as described in the warrant will yield evidence of that crime. (Certain special circumstances, such as when a police officer's life is in danger, are exceptions to the warrant requirement.)

Although public school students have less constitutional protection than adults, they are not without rights. Criminal allegations and searches can have a strong impact on a child's well- being, reputation and future. To balance a school's responsibilities with a student's rights, the Surpeme Court has established a "reasonableness" standard for determining whether a search of a student is constitutional. Under this standard, a search is constitutional when conducted in a manner that is reasonably related to the search's objectives and not excessively intrusive in light of the age and sex of the student and the nature of the alleged infraction.

The school defended its actions by reciting the various infractions involving alcohol or drugs during the preceding months. Given an allegation that Redding had been involved with alcohol prior to a school dance, and Marissa's identification of Redding as the source of prohibited pills in her possession the day they searched Redding, the school argued it had acted reasonably in pursuit of potentially dangerous drugs.

Redding parsed the facts differently. She had denied any knowledge of the drugs and had submitted to searches of her clothing and backpack. They turned up no evidence of wrongdoing (whereas a comparable search of Marissa, the one Jordan blamed, did turn up contraband). When a search of the most obvious places to hide and carry pills yielded nothing, the school had no basis for forcing Redding to expose her breasts and pelvic area. That search

was excessive and intimidating and unlikely to reveal what their reasonable searches did not.

A majority of the Supreme Court agreed with Redding. Age and context are critical components in evaluating a search's reasonableness. This was not a state of group undress, as with a sports team in the showers after practice. Instead, it was forced exposure under accusation of wrongdoing. The school was not wrong to initiate a search once Marissa, a girl in possession of forbidden drugs, identified Redding as her source for them. But once school officials conducted a reasonable investigation of Redding's clothing and belongings and found nothing, they exhausted their options for pursuing the information to an acceptable extent. No one had accused anyone of hiding pills in their undergarments, and Marissa had not even stated what day Redding allegedly gave her the pills. Expecting to find pills stashed in Redding's bra or underpants when there were none in her pockets or backpack was unjustified and the degree of embarrassment and stress a 13-year-old would feel under such a search rendered it unconstitutional.

Finding the search unlawful was a moral vindication for Redding, but to collect damages to compensate for her embarrassment and humiliation, she needed to overcome Wilson's claim of immunity. Immunity protects public officials from suit, unless clearly established law identifies their behavior as unconstitutional. Redding and her mother argued that strip-searching a 13-year-old girl without evidence was clearly unconstitutional. A majority of the Court, however, disagreed. Numerous court cases in many jurisdictions have validated searches of students to varying degrees and drug searches are an important disciplinary tool because of the danger these substances pose to students and the academic environment. The Court concluded that the school had gone too far, but it did so inadvertently under a permissible, if wrong, belief that this search was constitutionally acceptable under the circumstances.

Justices Stevens, Ginsburg and Thomas dissented in part. The first two justices agreed that the search was unconstitutional but disagreed with the majority's decision to let the school off the hook with qualified immunity. They felt the unconstitutionality of the school's behavior was clearly established and that Redding was therefore entitled to damages. Thomas, on the other hand, agreed with the majority that qualified immunity was appropriate but opined that Redding's constitutional rights were not violated by the school's search.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Souter): "Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.

"The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T. L. O.*, that the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place. The scope will be permissible, that is, when it is not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

"Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

"Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that students . . . hid[e] contraband in or under their clothing, and cite a smattering of cases of students with contraband in their underwear. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that. . . . Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

"In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable."

EXCERPTS FROM THE PARTIAL DISSENT (By Justices Stevens and Ginsburg): "This is, in essence, a case in which clearly established law meets clearly outrageous conduct. I have long believed that it does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.

"The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student's purse in (our prior case,) *T. L. O.* Therefore . . . I disagree with its decision to extend qualified immunity to the school official who authorized this unconstitutional search."

EXCERPTS FROM THE PARTIAL DISSENT (By Justice Thomas): Redding would not have been the first person to conceal pills in her undergarments. Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school.

"The majority has placed school officials in this impossible spot by questioning whether possession of Ibuprofen and Naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. In effect, then, the majority has replaced a school rule that draws no distinction among drugs with anew one that does. As a

result, a full search of a student's person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous. Such a test is unworkable and unsound. School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is not severe enough to warrant an intrusive investigation.

"By declaring the search unreasonable in this case, the majority has surrender[ed] control of the American public school system to public school students by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials. . . . [I]n the early years of public schooling, courts applied the doctrine of in *loco parentis* to transfer to teachers the authority of a parent to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.

"If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have immunity from the strictures of the Fourth Amendment when it comes to searches of a child or that child's belongings."

COMMENTS & QUESTIONS

Safford Unified School District v. Redding

1. Who are Savana, Jordan and Marissa? Are they friends?
2. Did Jordan see Savana with illegal drugs? Did anyone else?
3. Describe the "strip search" that conducted in this case.
4. How much money did Savana win in this case as damages?

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Does the United States Constitution apply to students in a public school? The Supreme Court has stated that "students do not lose their constitutional rights at the schoolhouse door." However, students do not enjoy the full extent of protections that an individual outside of school may possess. In order to maintain a safe environment and to promote an environment suitable for the educational process, school officials can limit a student's constitutional rights when appropriate. Where the potential infraction involves students on school grounds, the Supreme Court does not assign full Fourth Amendment protections. School officials are responsible for the students' welfare and safety on school premises and children are required to attend school (up to a certain age). Requiring a warrant and probable cause would unduly interfere with school officials' ability to resolve potential problems quickly and efficiently. School officials therefore operate in a sort of grey area different from the rest of society, though governed by court decisions covering the school environment.

It should be noted that the Fourth Amendment, in any case, only protects against "unreasonable" searches. Reasonable searches are OK. The question is whether or not the strip search of Savana was reasonable. The Court thought the search unreasonable. Does the strip search of Savana seem unreasonable or outrageous to you? What additional facts would have made the search more reasonable? What if Savana had been known to be involved with drugs before? What if others had implicated her? What if others had been known to hide drugs in their undergarments? What if more dangerous drugs were involved? What if the search was for a weapon? If the principal had found drugs in Savana's bra, would the search have been justified "after-the-fact"? Students undress in the locker rooms for their physical education classes all the time. Was the limited strip search in this case really a big deal?

The Court did think that the search was a big deal. The search violated Savana's constitutional rights. However, it was only a moral victory for Savana. The school and the principal were immune from suit based on the doctrine of qualified immunity. "Qualified immunity" protects public officials from being sued for damages unless they violate "clearly established" law of which a reasonable official in his position would have known. It aims to protect civil servants from the fear of litigation in performing discretionary functions entrusted to them.

In this case, the law regarding the strip search of students was not "clearly established". Courts are often reluctant to second-guess school officials when they make decisions like the one in this case. However, they did second-guess the principal in this case. In its deliberations, the court had time to sit back and analyze the facts of the situation. The principal did not have that luxury on the day in question. Do you think this case now "clearly establishes" the law with regard to strip searches of students? Or, does it make things more confusing? Is it never permissible to conduct a strip search, or in this ruling limited to this set of facts? Will this case make other principals reluctant to conduct a strip search? Could this adversely impact the safety of a school environment?

What would you have done if you were the principal?

Youth Curfew Ordinance Could Not Stand

SUMMARY: A city's curfew ordinance that had no exception for parent-authorized activities and that was not justified by sufficient evidence of nighttime crime involving minors violated both the children's and parents' constitutional rights. The New York Court of Appeals decided *Jiovon Anonymous v. City of Rochester* on June 9, 2009.

BACKGROUND: Concerned that minors were at risk of committing or being the victims of crime during the late-night hours, the City Council of Rochester, New York, passed a curfew ordinance prohibiting minors from being outdoors between 11 p.m. and 5 a.m. on weekdays and between midnight and 5 a.m. on Saturdays and Sundays.

The ordinance did not apply if . . .

"A. The minor was accompanied by his or her parent, guardian, or other responsible adult;

B. The minor was engaged in a lawful employment activity or
going to or returning home from his or her place of employment;

C. The minor was involved in an emergency situation;
D. The minor was going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization;

E. The minor was in the public place for the specific purpose of
exercising fundamental rights such as freedom of speech or
religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the
Constitution of the State of New York, as opposed to generalized social association with others; or
F. The minor was engaged in interstate travel."

The ordinance allowed police to approach individuals who appeared to be subject to the curfew law during its effective hours and request information to determine whether or not the person was a minor. When an officer determined that a person was subject to the law and no exception applied, the police could detain the violator or take him or her into custody. Minors taken into custody under the law were to be brought to a place designated by the Chief of Police. Under the law, the chief chose a children's center as the place to detain a violator. Disobeying the curfew constituted a violation of city law.

A Rochester father and minor son challenged the law as a violation of their rights under the federal and state constitutions. The trial court dismissed the suit but the appellate court (which New York calls Supreme Court) reversed. The city appealed to the New York Court of Appeals (the state's highest court).

ANALYSIS: The minor and his father argued that the curfew violated a minor's right to freedom of movement and parent's right to control the raising of their children. In evaluating challenges to legislation, courts look at the nature of the right the law intrudes upon. Some rights are so basic to our society that they are deemed fundamental. When a challenged law affects a fundamental right, courts apply "strict scrutiny," requiring that the law be "narrowly tailored to advance a compelling state interest."

The court reasoned that an adult's right to freedom of movement is a fundamental liberty interest essential in advancing other basic rights, like free speech, freedom of association, and the right to petition the government for redress of grievances. Minors, however, do not enjoy the same rights as adults. Because of their lesser education and experience, government can exert greater control over them for their own and the public's sake. In evaluating a minor's right to freedom of movement, the court concluded that intermediate scrutiny would suffice. Under this standard, a law is valid if it is substantially related to an important government interest.

Preventing crimes by and against children is an important government interest. Yet to survive intermediate scrutiny review, the city had to demonstrate that the curfew law was substantially related to this interest, or, as the court put it, that there was a "substantial nexus" between the burdens imposed on minors by the curfew and the goals of reducing crimes involving children.

The majority found the curfew law was not sufficiently linked to its purported purpose of protecting minors. The court looked at three deaths mentioned during the creation of the legislation. Supporters cited these deaths as evidence of the need to protect young people with a curfew. The majority, however, determined that two of these youths were killed outside curfew hours and the third had been adjudicated as a person in need of supervision and was therefore already subject to a court-ordered individual curfew. These deaths, while unfortunate, did not support a need for a limiting children's movement during the designated hours.

The majority also questioned the basic premise that late-night hours posed a significant threat to children's welfare. During weekday curfew hours, only 10 percent of the crimes committed involved minors. By contrast, children are much more likely to commit and be victims of crimes on weekends, yet on those days the curfew covers fewer hours. The lack of a reasonable alignment between the hours posing the greatest risk to children and the parts of the week during which the curfew was in effect failed intermediate scrutiny. The crime statistics used to support the law did not establish a substantial nexus between the hours of enforcement and the curfew's asserted purpose of reducing crimes by and against minors. Because the law failed intermediate scrutiny, the court struck down the curfew.

One judge dissented. He was of the opinion that

children have no fundamental right to freedom of movement because parents can limit their freedom in their discretion and the state can do so too, as when it requires them to attend school. Because they lack this right, children's movement as limited by a state statute should be subject only to the lowest standard of scrutiny, rational basis. Under this standard, a law is constitutional if it is rationally related to a legitimate government interest. Protecting children from criminal temptation and risk is, in the dissent's opinion, an obvious legitimate interest and a curfew is rationally related to it.

The dissent agreed that intermediate scrutiny was the correct standard for evaluating the encroachment on parental rights. Because the law made only the most minor intrusion upon those rights, given the various exceptions for activities sanctioned by parents such as work, organized activities, and any excursion for which a parent is present, the law satisfied intermediate scrutiny. It did not encroach upon parents' rights so much as pick up where parents were not exerting control over their children. Without children's own right to freedom of movement, the law was not impermissible for acting under such circumstances.

EXCERPTS FROM THE MAJORITY OPINION (By Judge Jones): "In many situations, children do not possess the same constitutional rights possessed by their adult counterparts; for example, children are afforded lesser freedom of choice than adults with respect to marriage, voting, alcohol consumption, and labor. On the other hand, a child's otherwise-criminal actions do not carry the same consequences as those of adults. The inherent differences between children and adults -- specifically their immaturity, vulnerability, and need for parental guidance -- have been recognized by the Supreme Court as the basis to justify treating children differently than adults under the Federal Constitution. So 'although children generally are protected by the same constitutional guarantees . . . as are adults, the State is entitled to adjust its legal system to account for children's vulnerability' by exercising broader authority over their activities.

"Rather than categorically applying strict scrutiny to a curfew which implicates a minor's right to free movement simply because the same right, if possessed by an adult, would be fundamental, courts have found that intermediate scrutiny is better suited to address the complexities of curfew ordinances -- it is sufficiently skeptical and probing to provide rigorous protection of constitutional rights yet flexible enough to accommodate legislation that is carefully drafted to address the vulnerabilities particular to minors.

"Quite simply, the proof offered by the City fails to support the aims of the curfew in this case. As the Appellate Division observed, a common theme of the [affidavits of political officials and affidavits and reports of police officials] is that city officials perceived a pressing need to respond to the problem of juvenile victimization and crime as a result of the . . . tragic deaths of three minors. These incidents would not have been prevented by the curfew because two of the victims were killed during hours outside the curfew and the third, as a result of being adjudicated a person in need of supervision, was already subject to an individualized curfew. Thus, these incidents do not provide the necessary nexus between the curfew and the ordinance's stated purpose.

"Further, we conclude that the crime statistics produced by defendants do not support the objectives of Rochester's nocturnal curfew. Although the statistics show that minors are suspects and victims in roughly 10% of violent crimes committed between curfew hours (11:00 p.m. to 5:00 a.m.), what they really highlight is that minors are far more likely to commit or be victims of crime outside curfew hours5 and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime (83.6% and 87.8% respectively) during curfew hours. The crime statistics are also organized by days of the week and despite that minors are 64% to 160% more likely to be a victim and up to 375% more likely to be a suspect of violent crimes on Saturdays and Sundays as compared to a given weekday, surprisingly, the curfew is less prohibitive on weekends.

EXCERPTS FROM THE DISSENT (By Judge Piggott): "The decision to enact the curfew, while based in part on objective data, was also based in substantial part on the subjective judgment of experienced civic leaders, who believed the ordinance to be the best way of dealing with a very troubling problem. Their judgment is, in my opinion, entitled to considerable deference. The majority gives it none.

"Instead, the majority focuses on the statistics, but does so in a selective manner. It does not mention the statistics which demonstrate that between 2000 and 2005 most of the 13 juvenile murder victims in Rochester would have been in violation of the ordinance at the time of the murders. Nor does it mention that 45% of homicides in Rochester occurred during the curfew hours, a surprisingly high percentage given that the curfew hours make up less than 25% of the hours in a week. The majority casts a skeptical eye on the statistics, writing that they show 'that minors are far more likely to commit or be victims of crime outside curfew hours and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime during curfew hours.'

"Here, I respectfully suggest, the majority jumbles together two platitudes. Of course minors are more likely to commit or be victims of crime outside curfew hours. For one thing, the curfew hours comprise only 40 out of the 168 hours in a week. As to the likelihood of becoming crime victims, most children are at home during the curfew hours, as the defendant Mayor noted. But it certainly does not follow that a child who goes out at night is less likely to become the victim of a crime than one who goes out during the day. Again, it is completely unsurprising that adults commit and are victims of most crimes during curfew hours. Adults commit more crimes than children at all hours. Indeed, this may simply be an

instance of the general truth that adults, who make up some three-quarters of the population, are more likely to do anything [than children].

"In essence, the majority is asserting that if adults commit and become victims of more crimes than children, then protecting children from crime cannot be an important city objective, and that if more crimes are committed during the day than at night, then preventing nighttime crime cannot be an important city objective. The problem with that reasoning is obvious.

"Putting aside the Rochester crime statistics, which suggest that a significant proportion of violent crime victims in that city are children, I do not believe that it is the judiciary's place to decide that protecting even a small number of minors from crime is an unimportant objective. I would have thought that protecting children from becoming the victims or perpetrators of violent crime is one of the most important goals a municipality could try to achieve, especially in the wake of a series of nighttime murders of minors."

COMMENTS & QUESTIONS

Jiovan Anonymous v. City of Rochester

1. Why did the City of Rochester enact its curfew ordinance?
2. How many exceptions did the ordinance have?
3. What time restrictions were placed on minors under the ordinance?
4. What were the procedures for enforcing the ordinance?

The concept of "parens patriae" describes the government's power to act in a parental capacity with respect to children. It does this because children lack experience, education and physical and mental maturity required to act and think on their own behalf, or at a level equal to adults. A government formed for the benefit of the people pays attention to child welfare and acts, when parents do not, for their protection and care. The concept of "child" or "minor" is tricky, though, because people do not develop the ability to think and act in their own behalf at the same age. Some young people are mature and levelheaded by 14 or 15, while some 17-year-olds may need supervision to avoid hurting themselves or others through poor judgment.

Curfew laws are an outgrowth of this "parens patriae" concept. Youth curfew laws limit a minor's right to be out in public at certain times. The purpose of curfews is usually to achieve social order goals such as the prevention of crime involving juveniles (either as participants or victims) and the maintenance of general peace. Curfew laws have been subject to numerous constitutional challenges. Most laws include a number of exceptions in order to attempt to comply with these constitutional restrictions.

Rochester's law provides numerous exceptions, allowing young people to move around late for various purposes. Do you think these exceptions are sensible? If a minor can be excused to be out for work, why not for any other purpose or no particular purpose? Do you believe that teenagers are more likely to break the law or confront dangerous situations late at night? If your answer is yes, is this a legitimate concern for government? Is the law the city passed a sensible way to approach the situation?

The court found Rochester's curfew law unconstitutional. Must any law serve its purpose with complete effectiveness? Can some laws be valid even if they will often fail to stop the harm for which they were created? Do you agree with the court's reasoning in this case and their application of the "strict scrutiny" and "intermediate scrutiny" method of analysis? Do you agree with the dissent?

Is there a curfew in your town? Would you abide by one if there were? Is the fact that many young people subject to the law might violate it reason to scrap the law? Do you think that curfews prevent crime? Do you think that laws enacted to preemptively prevent crime are appropriate? Should a five-year-old child be allowed to wander the streets at 3 a.m.? What about a 16-year-old? Both are minors--what are the important differences? Does this law recognize those differences? If not, should it be stricken or modified? Why doesn't equal protection require laws to treat people who are 16 the same as those who are 18?

At the beginning of the court's analysis, they seem to take for granted the fact that minors do not enjoy the same level of constitutional rights as adults. At least laws applying to them were subject to different judicial review. Is this correct? The Fourteenth Amendment to the United States Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; …" The Amendment makes not mention of age when defining "citizen". If minors are citizens, how can their constitutional rights be limited in any way? Where in the Constitution does it say that minors are different? Should they be different?

Bible Excluded From Classroom Activity

SUMMARY: An elementary school did not violate the federal or Pennsylvania constitutions when it prohibited a parent from reading from the Bible during a classroom activity devoted to her son's background and interests. The United States Court of Appeals for the Third Circuit decided *Busch v. Marple Newtown School District* on June 1, 2009.

BACKGROUND: In October 2004, Wesley Busch's kindergarten teacher, Jaime Reilly, had each student participate in a classroom activity called "All About Me." The purpose of the activity, part of the social studies program, was to teach students about individuals' different interests, sources of conflict between individuals and ways to resolve conflicts.

Each student had the opportunity to participate in three ways. Students would tell the class about themselves through a poster with pictures, drawings or magazine cut-outs of their family, hobbies or interests. They would each bring in a snack for the class, plus a special toy or stuffed animal to describe. As the final activity, Reilly invited the children's parents to come in and share a "talent, short game, small craft or story" with the class.

The Busch family were evangelical Christians whose faith was central to their lives. Wesley therefore included a picture of a church, cut from construction paper, on his poster. Below the picture, Wesley asked his mother to write "I like to go to church" or "I like to go to the House of the Lord." (The poster was not submitted as evidence and the Buschs couldn't remember the exact wording.) Reilly displayed the poster in the classroom along with the other students' posters.

Wesley informed his mother that parents were invited to come to class and read a story. When Ms. Busch asked her son what book she would like her to read to the class, he told her the Bible. Without Wesley's input, his mother chose verses 1 through 4, and 14, from Psalm 118 of the King James Bible. These passages say:

> "1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
> 2 Let Israel now say, his mercy endures forever.
> 3 Let the house of Aaron now say, that his mercy endures forever.
> 4 Let them now that fear the Lord say, that his mercy endures forever.
> * * *
> 14 The Lord is my strength and my song, and is become my salvation."

At trial, Wesley's mother said she chose these verses in part because they did not mention Jesus, whose name she thought might upset some of the children who were not Christian. She believed the children would like the verses she selected because they are similar to poetry. She also said that she and Wesley frequently read from the Book of Psalms.

On the day she was going to read to the class, Wesley's mother told Reilly what book she had in mind. Reilly was concerned over the potential constitutional issues of reading to a class from the Bible, so she informed Ms. Busch that she would have to clear it with Principal Thomas Cook. Cook told Ms. Busch that she could not read to the class from the Bible. He told her that that would amount to proselytizing and would violate the constitutional separation of church and state.

Ms. Busch responded that Wesley had just read a book from the school library called "Gershon's Monster: A Story for the Jewish New Year." Cook said that that was a book Wesley had chosen and read on his own time, which was different from an adult reading to the whole class from the Bible. Instead of the Bible, Cook and Busch settled on a book about counting, which she read to the class.

Ms. Busch believed that she and her family's beliefs were being singled out for censorship even though other religious ideas were present in and delivered to the classroom. She therefore sued the school, arguing violations of the federal and Pennsylvania constitutions.

ANALYSIS: The federal and Pennsylvania constitutions protect the people's right to practice the religion of their choice. The Federal Constitution, which renders invalid any law or state constitution in conflict with it, treats religion in the First Amendment, making two guarantees: one, that the people enjoy the free exercise of religion, and two, that the government cannot establish religion—that is, sponsor a religion as the official or required faith.

As an evangelical Christian, Wesley holds faith as a major defining characteristic of himself and his family. For the school to ask him to open up to his classmates, but then deny him the right to present a central part of his life, was, the Busch's argued, a violation of his free exercise and free speech rights. The Busch's also argued that they were being singled out for censorship as evangelical Christians who believe in the importance of spreading their faith. In support, the family noted that in addition to the school's library book on the Jewish New Year, Reilly offered religious stories in Wesley's classroom through the books, Bear Stays Up for Christmas, Froggy's Best Christmas, The Wild Christmas Reindeer, Ten Timid Ghosts on a Christmas Night, Christmas Trolls, The Best Easter Eggs Ever, Easter Bunny's On His Way, The Night Before Easter, Hooray for Hanukkah, The Magic Dreidels, and The Hanukkah Mice.

Ms. Busch told the court that one of the other parents read How the Grinch Stole Christmas to the class as part of the "All About Me" program. In addition, Reilly had allowed another parent to come into the class earlier in the year and tell them about the Jewish holidays, Hanukkah and Passover. As part of those presentations, the parent read A Blue's Clues Hanukkah Story and The Matzoh Ball Fairy to the class. Allowing this much religious content in the school, but denying Wesley the chance to share a brief verse from the Bible in a segment of the class supposedly devoted to him and his interests, was discriminatory and unconstitutional.

The school distinguished between offering materials that students could read on their own and a parent's reading to the class from a foundational religious text with the teacher's consent. The former, argued the school, was permissible and in the spirit of the Free Exercise Clause. The Supreme Court has prohibited promoting any given religion, however, and the school argued that reading from the Bible aloud did have the effect of promoting Christianity. True, it was not the teacher doing so, but when the teacher tells the class a

parent—an adult appreciated by youngsters as an authority figure—is going to read from the Bible, the effect, according to the school, was government sanctioning of the Christian faith. As to the Grinch, Hanukkah and Passover stories, the school argued that they pertained to holidays, a defined component of the social studies curriculum.

The Third Circuit Court of Appeals agreed with the school. The Bible is the basis for the Christian faith. Where a teacher approves a reading from the Bible to children so young and impressionable as kindergartners, the effect is to promote religion in their minds. It is not the school or the parent's intent that controls the analysis. Important is whether these young minds, or the community, would understand the event as promoting one faith. The school did not discriminate against Wesley or his faith. He was allowed to present a church and a statement about his devotion to religion on his poster, which was displayed to the class on terms equal to the other students' work.

One judge dissented, stating that Ms. Busch's speech on behalf of her son could not reasonably be characterized as school-sponsored speech, and that prohibiting her message, while allowing virtually any other expression of a child's interests, constituted prohibited viewpoint discrimination in violation of the First Amendment

dress code, the court upheld the grant of summary judgment and dismissed the appeal.

EXCERPTS FROM THE MAJORITY OPINION (By Chief Judge Scirica): "In the elementary school classroom, the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity. As we have explained, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise. While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergartners and first graders are different. For elementary school students, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals.

"Restrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control because they help create the structured environment in which the school imparts basic social, behavioral, and academic lessons. The curricular standards applied during these activities, especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned.

"Busch contends her speech should have been permitted because she intended to express a solicited view on the pertinent subject matter. That is, the school invited her to participate in Wesley's 'All About Me' week, where 'all about Wesley' was the subject matter, and she intended to present a viewpoint about Wesley. Accordingly, Busch contends that once she was invited to speak, any restriction on her speech was impermissible so long as her speech was about Wesley information about students as part of curricular activities and opening the classroom to any content the speaker chooses to disseminate. In crafting a curriculum, school officials face the sensitive task of exposing children to diverse traditions and cultural experiences while also remaining mindful of the expectations and rights of the children and their parents. Principal Cook disallowed a reading from holy scripture because he believed it proselytized a specific religious point of view. [T]he school's reasons — to prevent promotion of a religious message in kindergarten — were 'designed to prevent . . . speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval.'"

EXCERPTS FROM THE DISSENT (By Judge Hardiman): "[V]iewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject. Viewpoint discrimination is an egregious form of content discrimination and the violation of the First Amendment is all the more blatant. To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint. . . . Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of free speech. The Supreme Court has consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination.

"As the District Court noted, this case involves viewpoint discrimination. The teacher's description of 'All About Me' week left the subject matter of the assignment open-ended, stating: Each child will have the opportunity to share information about themselves [sic] during their 'All About Me' week. Furthermore, the description encouraged discussion of the child's family, hobbies, and interests, and invited parents to come to school to share a talent, short game, small craft, or story during their child's week.

"Accordingly, Donna Busch's attempt to read Psalm 118 to her son's class fell within the specified subject matter — i.e., somethng of interest to her son and important to his family — and the sole reason for excluding her speech was its religious character. Psalm 118 does not contain vulgar or lewd language, nor does it praise illegal activities, and there is no evidence that Busch's reading would have caused any sort of classroom disruption.

"Instead, the challenged speech was responsive to the assignment but approached it from a religious perspective because religion is most important to the Busch family. As the Supreme Court has observed, particularly in the context of religious expression, it can be difficult to discern what amounts to a subject matter unto itself, and what, by contrast, is best characterized as a standpoint from which a subject matter is approached. However, I believe the school went too far in this case in limiting participation in 'All About Me' week to nonreligious perspectives. As the District Court properly noted, Donna Busch was denied the opportunity to read the story her son chose because it expressed a religious viewpoint, rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination."

COMMENTS & QUESTIONS

Busch v. Marple Newtown School District

1. What grade was Wesley Busch in at school?
2. What was the "All About Me" classroom activity?
3. What religious faith did the Busch family practice?
4. What was Mrs. Busch prohibited from reading during "All About Me"?

The First Amendment to the United States Constitution states: "Congress shall make no laws respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, …" The Pennsylvania Constitution has similar provisions governing the freedoms of speech and religion.

The Busch's argued that both their free speech and freedom of religion rights were violated by the school's action. Most religion cases will raise both of these rights, as the expression of religious ideas requires either direct speech, like spoken or written words, or symbolic speech such as an icon or a march. The classroom poses unique and special challenges for interpreting both of these rights. Schools occupy a middle ground between the private and government spheres. A public school is run by the government, and subject to constitutional restrictions, but it takes on the parental roles of monitoring students' activities and looking after their safety and well-being. For this reason, courts must craft special rules granting schools certain leeway to look after young people without undue interference, yet not permit schools to suppress rights and ideas essential to children's development and education on their way to becoming responsible adult members of society.

In this case, the court ruled that he school officials did not violate the constitutional rights of the Busch's by precluding the reading of the Bible to the kindergarten class. Do you agree with the decision? Do you think the Busch's were denied their constitutional rights?

The school allowed Christmas books and discussion of Jewish holidays in the classroom. What's the difference between that and the reading of the Bible? Are holidays, with their easily recognized symbols and ceremonies, more or less influential on children than a religion's philosophies? Do you think the school would have allowed a reading from the Koran or another religious text?

Does this decision mean that the Bible can never be read in a public school?

What if the school had, in fact, allowed the reading of the Bible to the kindergarten class? Would this have violated the rights of non-Christian students in the class? Who would have won the lawsuit if those non-Christian students had sued the school? Do you think that the school would have been justified in making either decision? Schools have to be given wide latitude in making these pedagogical decisions. The school probably would have been justified in making either decision, as long as the reading was just a "reading" and not "preaching". There are valid arguments to be made for both sides of the argument. Of course, the age of the children is also a factor in the decision, as well.

The United States is sometimes identified by Christians as a "Christian nation." Is widespread support for one religion a good reason to pay more attention to it in schools? If 75 percent of the population identified itself as Christian, 15 percent Jewish and 10 percent Muslim, Native American, Buddhist, Hindu, or another religion, would it be fair and evenhanded to devote classroom time to general discussions of religion according to those proportions (e.g., 75% of the discussion devoted to Christianity, etc.)?

Principal Cook told Wesley's mother that reading from the Bible violated the "separation of church and state." Are these two entities, in fact, separate in our society? Can you name any words or symbols associated with religion, or a particular religion, on display in society? What message, if any, do these things convey?

A stated purpose of the "All About Me" program was to explain differences among individuals as well as sources of conflict and to help students learn to deal with conflict. Did prohibiting Ms. Busch from reading from the Book of Psalms advance or undermine those educational objectives? Throughout history, religious differences have prompted as much hostility, war, hatred and bloodshed as any other source of conflict, and continue to do so. Given the enormous power religious ideas have to motivate individuals and cultures around the world, does it make sense for schools to avoid religion, or to deal with only their most uncontroversial aspects? Should schools expose their students to a variety of religious perspectives or should they avoid religion altogether?

What effect does the age of the children have on this discussion? Is religion an appropriate topic for a kindergarten class? What about a high school social studies class? Is this just a case of "political correctness"?

Some people have expressed an opinion that it was a waste of time and money to pursue this claim in federal court. Is it that big of a deal? What difference does it really make? Shouldn't parents just let the schools do their job? If you were the Busch's, would you appeal this decision to the United States Supreme Court?

California's Amendment Banning Same-Sex Marriage

SUMMARY: The change to California's constitution limiting the definition of marriage to one between a man and a woman was a valid amendment, not a revision, and was properly incorporated into the state's highest source of law. The California Supreme Court decided *Strauss v. Horton* on May 26, 2009.

BACKGROUND: The California constitution, like all constitutions under our system, contains provisions specifying the manner for its amendment. This process may be initiated through a proposal supported by two-thirds of each house of the California legislature, or by public initiative. The latter method requires the support of only eight percent of the number of voters who participated in the prior election for governor—a figure well below eight percent of the state population. Because of the lenient process for adding to the supreme source of its state law, California's Constitution has been amended more than 500 times.

The issue of same-sex marriage has been in the California courts before. Early in the 21st century, clerks in the city and county of San Francisco with the power to issue marriage licenses began providing licenses to same-sex couples in defiance of a state "defense of marriage" statute. That activity was challenged in and appealed to the highest state court, which ruled that the officials lacked power to issue same-sex licenses. That law was then challenged directly as a violation of equal protection rights guaranteed by the state constitution. In that case, the California Supreme Court ruled the law invalid. Following that ruling, same-sex couples began marrying in the state. Opponents of the practice then launched a state initiative to amend the California constitution to define marriage as a union exclusively between a man and a woman. The initiative garnered the required eight percent support, went to public vote, and was passed by 52 percent of those who turned up at the polls.

A group of same-sex California couples that included those who had been married in the state, and others who wished to marry, challenged the initiative, known as Proposition 8, as a violation of fundamental state constitutional rights.

ANALYSIS: California's voter initiative process permits amending the state constitution, but not revising it. The challengers in this case argued that Proposition 8 was an amendment in name only and that in effect it stripped same-sex couples of their equal-protection right to the benefits of marriage, the very rights the court had recently held they were entitled to when it struck down the state's defense of marriage statute. This, they argued, constituted a revision of the constitution rather than an amendment, rendering Proposition 8 invalid. To revise the constitution, as opposed to merely amending it, the state must hold a constitutional convention. Revision cannot occur through public initiative.

Over the course of the numerous prior amendments to the state constitution, California courts have developed a test for determining whether a given change functions as a permitted amendment or a forbidden revision. To make its judgment, the court determines the meaning and scope of the constitutional change, as well as the effect that the constitutional change has on "the basic governmental plan or framework" existing under the constitution at the time of the change.

The petitioners who challenged Proposition 8 argued that by excluding same-sex couples from marriage, the amendment destroyed the rights to privacy and due process under the state constitution. The California Supreme Court had just found these rights to be protected, when it invalidated the defense of marriage statute, before the initiative was passed. The petitioners also contended that the amendment fundamentally altered the meaning and substance of state equal protection principles, suddenly rendering same-sex couples unequal with respect to the right to marry.

The state took a much narrower view of the amendment's effect. Discrimination against same-sex couples is prohibited under California law. Likewise, state statutes guarantee these couples the same rights married couples enjoy. The change brought on by the amendment was one of terminology, not substantive rights. Adding the phrase, "Only marriage between a man and a woman is valid or recognized in California," did not revise the constitution. Moreover, it did not have a meaningful quantitative or qualitative effect on the basic governmental plan or framework of the constitution at the time it was passed.

A majority of the court sided with the state, ruling that a change only in the definition of the word marriage, which did not and could not reduce the substantive rights same-sex couples enjoy to form relationships and families, was an amendment and not a revision of the constitution. Because this change was small and one of terminology, it did not alter the constitution's other protections.

One justice dissented, opining that the change effected by Proposition 8 could not be described as minor or an amendment. Limitation of the rights of disfavored minorities by a transient majority is precisely the sort of injustice for which constitutional recognition of equal protection was created. When gays and lesbians are denied a right enjoyed by others—the right to have their union officially recognized by the state as marriage—they are deprived of a fundamental right, a change to the state constitution that can only be classified as a revision of its essential underlying character. Arising, as it did, through the initiative process, rather than constitutional convention as required, Proposition 8 is, in the dissent's view, an invalid revision of the California constitution. To effect a change of this magnitude, the people of California needed far more support for this discriminatory act than a mere 8 percent of prior gubernatorial voters, followed by a simple majority of those voting on the initiative.

EXCERPTS FROM THE MAJORITY OPINION (By Chief Justice George): "[W]e confronted [in the 'Marriage Cases,' the question of] the constitutional

validity, under the then-controlling provisions of the California Constitution, of the California marriage statutes limiting marriage to a union between a man and a woman. A majority of this court concluded in the Marriage Cases that same-sex couples, as well as opposite-sex couples, enjoy the protection of the constitutional right to marry embodied in the privacy and due process provisions of the California Constitution, and that by granting access to the designation of 'marriage' to opposite-sex couples and denying such access to same-sex couples, the existing California marriage statutes impinged upon the privacy and due process rights of same-sex couples and violated those couples' right to the equal protection of the laws guaranteed by the California Constitution.

"[T]he issues facing us here do not concern a public official's authority (or lack of authority) to refuse to comply with his or her ministerial duty to enforce a statute on the basis of the official's personal view that the statute is unconstitutional, or the validity (or invalidity) of a statutory provision limiting marriage to a union between a man and a woman under state constitutional provisions that do not expressly permit or prescribe such a limitation. Instead, the principal issue before us concerns the scope of the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution.

"Contrary to petitioners' assertion, Proposition 8 does not entirely repeal or abrogate the aspect of a same-sex couple's state constitutional right of privacy and due process that was analyzed in the majority opinion in the Marriage Cases — that is, the constitutional right of same-sex couples to 'choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.' Nor does Proposition 8 fundamentally alter the meaning and substance of state constitutional equal protection principles as articulated in that opinion. Instead, the measure carves out a narrow and limited exception to these state constitutional rights, reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.

"By clarifying this essential point, we by no means diminish or minimize the significance that the official designation of 'marriage' holds for both the proponents and opponents of Proposition 8; indeed, the importance of the marriage designation was a vital factor in the majority opinion's ultimate holding in the Marriage Cases. Nonetheless, it is crucial that we accurately identify the actual effect of Proposition 8 on same-sex couples' state constitutional rights, as those rights existed prior to adoption of the proposition, in order to be able to assess properly the constitutional challenges to the proposition advanced in the present proceeding. We emphasize only that among the various constitutional protections recognized in the Marriage Cases as available to same-sex couples, it is only the designation of marriage — albeit significant — that has been removed by this initiative measure."

EXCERPTS FROM THE DISSENT (By Justice Moreno): "In [the 'Marriage Cases' from 2008], we held that denying same-sex couples the right to marry denies them equal protection of the law. Proposition 8 partially abrogated that decision by amending the California Constitution to deny same-sex couples fully equal treatment by adding the words: 'Only marriage between a man and a woman is valid or recognized in California.'

"The question before us is not whether the language inserted into the California Constitution by Proposition 8 discriminates against same-sex couples and denies them equal protection of the law; we already decided in the Marriage Cases that it does. The question before us today is whether such a change to one of the core values upon which our state Constitution is founded can be accomplished by amending the Constitution through an initiative measure placed upon the ballot by the signatures of 8 percent of the number of persons who voted in the last gubernatorial election and passed by a simple majority of the voters.

"The rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the Marriage Cases, it places at risk the state constitutional rights of all disfavored minorities. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority.

"Thus, it is not so much a discrete constitutional right as it is a basic constitutional principle that guides all legislation and compels the will of the majority to be tempered by justice. The Iowa Supreme Court, in affirming the constitutional right of gays and lesbians to marry, recently recognized the importance of this promise of equality, stating: 'If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded.'

"Of particular importance for this case is that discrimination against disfavored minorities is presumptively suspect under the equal protection clause. As we affirmed in the Marriage Cases, and as the majority reaffirms today, sexual orientation is such a suspect classification. Under our state equal protection jurisprudence, as in federal law, laws that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, meaning that 'the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.'

"The equal protection clause is therefore, by its nature, inherently countermajoritarian. As a logical matter, it cannot depend on the will of the majority for its enforcement, for it is the will of the majority against

which the equal protection clause is designed to protect. Rather, the enforcement of the equal protection clause is especially dependent on 'the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.'"

COMMENTS & QUESTIONS

Strauss v. Horton

1. How can changes be made to the California Constitution?
2. What is Proposition 8?
3. What is the difference between amending and revising the California Constitution?

In order to propose a change (amendment) to the United States Constitution a two-thirds vote of both Houses of Congress is required; or application must be made for a Convention to propose amendments by two-thirds of the Legislatures of the States. If an amendment is proposed, it must then be ratified by three-fourths of the Legislatures of the States before it becomes effective. The United States Constitution has been amended 27 times. Making changes to the California Constitution is not quite so stringent. The California Constitution has been changed more than 500 times. There are two types of changes: amendments and revisions. Amendments can be made by public initiative (requested by 8% of the voters in the prior election) and a simple majority vote of citizens taking part in the next election. Revisions, which are significant changes, must be made as a result of a Constitutional convention.

Do you think it is wise to have such a liberal method of changing a state's constitution?

The question in this case is whether Proposition 8 is an amendment or a revision to the California Constitution. This case turns on the scope of the word, and the concept, marriage. The majority stresses that denying same-sex couples the right to call their union "marriage" does not deprive them of equal protection of the laws because all the rights of marriage are available to them under the state domestic partnership act. The dissent argues that "everything but" is not enough. Do you agree? Doesn't equal protection mean "equal"?

If marriage has traditionally been understood as a bond between a man and woman, why must a longstanding legal principle, like constitutional equal protection, recognize something else as required?

At one time in U.S. history, interracial marriage between white and black individuals was illegal in some states. Could California amend its constitution to deny this union the label "marriage" today, so long as a domestic partnership or other law gave interracial couples the same rights apart from the name?

Could a portion of the public petition a state government to deprive individuals of one race or ethnicity of the right to be called "residents" as long as it had another law allowing them all of the benefits of residency except in name?

Is being told you can never earn a designation held by many other people you respect and admire demeaning? Is the right to be free from that exclusion fundamental for U.S. citizens?

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