THE GAY RIGHTS STATE: WISCONSIN'S PIONEERING LEGISLATION TO PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION

William B. Turner[*]

INTRODUCTION

In late 1982, the *Capital Times* of Madison, Wisconsin noted an interesting contradiction in the Wisconsin statutes: "A law adopted in 1981 [sic] prohibits discrimination against homosexuals. Another, on the books for many years, prohibits homosexual practices."[1] The article quoted state legislator David Clarenbach who led the battle over several years both to enact the prohibition on discrimination based on sexual orientation, and to repeal prohibitions on various forms of consensual, adult sexual activity, including oral and anal intercourse.[2] "'I think inconsistencies in the law will be one of the motivations for backers to seek passage of the bill' [repealing prohibitions on consensual adult sexual activity]."[3] The Wisconsin statute prohibiting sexual orientation discrimination was the nation's first. This Article describes the history of that statute's enactment and early implementation.

The story of the Wisconsin statute prohibiting sexual-orientation discrimination is inherently interesting and important. But it also helps illustrate the ongoing paradox of lesbian and gay civil rights in the United States. Wisconsin law in this area only grew more perplexing on November 7, 2006, when 59% of the state's voters approved a state constitutional amendment prohibiting recognition of same-sex marriages.[4] That the first state

---

[*] Ph.D., Vanderbilt, 1996; J.D., Wisconsin, 2006. Thanks to Elizabeth Mertz, who helped with this article in numerous ways, to all who agreed to interviews, and to the editors of the Wisconsin Women's Law Journal for their patience and help.

1. Arthur L. Srb, *Gay Rights Law Contradicts State Statutes*, CAPITAL TIMES (Madison, Wis.) n.d. (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 1, "Articles (Information)" Folder, Consenting Adults Bill Tab). Note that Srb was mistaken about the year in which the Act passed—although its official designation is Ch. 112, 1981 Wis. Sess. Laws, it passed the Wisconsin Senate on Feb. 18, 1982 and Governor Lee Dreyfus (R) signed it on Feb. 25, 1982. In order to minimize this date confusion, I will refer to Ch. 112, 1981 Wis. Sess. Laws either as "the Act" or as "Chapter 112" throughout this article; although in some places I necessarily use the bill designation, AB 70.

2. *Id.*

3. *Id.* (quoting former state legislator David Clarenbach).

4. WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."), *available at* http://www.legis.state.wi.us/statutes/wisconst.pdf.

to prohibit sexual-orientation discrimination by statute has now joined twenty-five other states in amending its constitution to prohibit recognition of same-sex marriages[5] seems strange indeed. Nevertheless, it is quite consistent with a long history of profound ambivalence about lesbian and gay civil rights claims in the American public.[6] Historically, support for equal employment rights for lesbians and gay men—one of the key provisions of Chapter 112, 1981 Wisconsin Laws—has been high, while support for recognition of lesbians' and gay men's families, including marriage and adoption, has been much lower.[7]

The people of Wisconsin are not alone in taking contradictory positions regarding lesbian and gay civil rights issues.[8] It is worth noting that, in

---

5. HUMAN RIGHTS CAMPAIGN FOUNDATION, EQUALITY FROM STATE TO STATE 2006: GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LEGISLATION 5 (2006), *available at* http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=35078.

6. Stephen C. Craig, et al., *Core Values, Value Conflict, and Citizens' Ambivalence about Gay Rights*, 58 POL. RES. Q. 5, 5-6 (2005).

7. Gregory B. Lewis & Marc A. Rogers, *Does the Public Support Equal Employment Rights for Gays and Lesbians?*, *in* GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION 118, 118-45 (Ellen D.B. Riggle & Barry Tadlock, eds. 1999); ALAN YANG, POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE, FROM WRONGS TO RIGHTS 1973 TO 1999: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 6, 14-15 (1999), *available at* http://thetaskforce.org/reports_and_research/wrongs_rights; Jeni Loftus, *America's Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762, 767-68 (2001); Public Agenda, Gay Rights: Red Flags, http://www.publicagenda.org/issues/red_flags.cfm?issue_type=gay_rights (last visited June 6, 2007). This web site provides recent polling data from a wide range of sources. Their "red flag" section provides cautions for interpreting data. *Id. But see Adoption by Gay Couples Wanes as Issue in U.S.*, Advocate.com, Jan. 27, 2007, http://www.advocate.com/news_detail_ektid41464.asp (stating that public opposition to adoption by lesbians and gay men is rapidly declining in the U.S., unlike the United Kingdom where it has become a major issue).

8. A Minnesota court only struck down its prohibition on consensual, adult sodomy in 2001, *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (D. Ct. Minn. May 15, 2001), eight years after the state prohibited sexual-orientation discrimination by statute, MINN. STAT. ANN. § 363A.02, 08 (West 2004). (My thanks to Phil Duran of OutFront Minnesota for help with this chain of events). Also, in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), the wording of *Gay Rights Law Contradicts State Statute*, *supra* note 1, invites the inference that the Wisconsin law, like the Texas statute at issue in *Lawrence*, prohibited conduct only when the participants were the same sex. This is not the case.

> **Sexual perversion**. Whoever does either of the following is guilty of a Class A misdemeanor:
>
> > (1) Commits an abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another; or
> >
> > (2) Commits an act of sexual gratification involving his sex organ and the sex organ, mouth, or anus of an animal.

WIS. STAT. § 944.17 (1981). Note that the penalty for "sexual perversion" under this statute was lower than the penalty for adultery, which was a Class E felony. *See* WIS. STAT. §

November 2003, the Wisconsin Legislature failed by one vote to override a veto of legislation prohibiting recognition of same-sex marriages.[9] At the time, that made it one of only thirteen states with no prohibition, statutory or constitutional, of same-sex marriages.[10] The evidence suggests that the people of Wisconsin have much the same ambivalence about lesbian and gay civil rights claims as most other Americans; they just have it more acutely.

But the constitutional amendment cannot negate the fact that Wisconsin was the first state legislature in the nation to prohibit discrimination on the basis of sexual orientation.[11] For many years after passage of Chapter 112, 1981 Wisconsin Laws, Wisconsinites would appear at national LGBT[12] civil rights events with signs declaring Wisconsin to be "The Gay Rights State."[13] In some respects, Chapter 112, 1981 Wisconsin Laws may seem so anomalous as to offer little didactic value. But, for all the ways in which it is unique, the Wisconsin law is still part of a larger history of LGBT civil rights politics, policy, and law, which is in turn part of a larger history of civil rights politics, policy, and law in the United States.

The Wisconsin Act is anomalous because it was the first state statute to prohibit discrimination on the basis of sexual orientation.[14] It is also unusually comprehensive, and nine years elapsed before any other state enacted such a statute.[15] Moreover, it was noteworthy in the extent to which a single

---

944.16 (1981); § 939.50(3) (1981) (classification of felonies including penalties); § 939.51(3) (1981) (classification of misdemeanors including penalties).

9. *Wisconsin Veto of Gay Marriage Ban Stands*, Advocate News & Politics, PlanetOut.com, Nov. 13, 2003, http://www.planetout.com/pno/news/article.html?2003/11/13/4.

10. *Id.*; Nat'l Gay & Lesbian Task Force, Anti-Gay Marriage Measures in the U.S. as of November 2006 (2006), http://thetaskforce.org/reports_and_research/marriage_map.

11. *See, e.g.*, *Wisconsin First State to Pass Gay Rights Law*, THE ADVOCATE, Apr. 1, 1982, at 9, 9.

12. "LGBT" stands for "lesbian, gay, bisexual, and transgender." This is the current acronym of choice for referring to the social movement by and for persons who suffer discrimination based on their sexual orientation and/or gender identity, i.e., persons whose sense of their gender or their presentation of gender in public conflicts with the expectations of others based on their observable secondary sex characteristics (facial hair, body size, voice, carriage, etc.). This term is anachronistic in reference to the period that I describe in this article. I use it at the outset solely to indicate my belief that the social movement must include the claims and energies of bisexual and transgender persons. In the interest of historical consistency, however, I will refer hereafter to the "lesbian and gay civil rights movement."

13. E-mail from Kathleen Nichols, Madison Lesbian and Gay Rights Activist, to author (July 5, 2006) (on file with author).

14. *Wisconsin First State to Pass Gay Rights Law*, *supra* note 11.

15. *See, e.g.*, Act 2, sec. 1, 1991 Haw. Sess. Laws 3, 3 (codified as amended at HAW. REV. STAT. ANN. § 368-1 (Lexis Nexis 2004)); Act 2, sec. 3, 1991 Haw. Sess. Laws 4-5 (codifed as amended at HAW. REV. STAT. ANN. § 378-2 (Lexis Nexis 2004)). For a map showing all states with statutes, judicial decisions, or executive orders prohibiting discrimination based on sexual orientation in at least some areas, see

legislator, Clarenbach, almost single-handedly got the bill passed. Clarenbach accomplished a feat that many observers at the time doubted he, or anyone else in Wisconsin, could accomplish.[16] Wisconsin's statute prohibiting sexual-orientation discrimination in this respect resembles the remarkable access to White House staff that lesbian and gay civil rights activists enjoyed during the early months of Jimmy Carter's presidential administration five years before.[17] Both were impressive achievements in their own right, but they also illustrate the ambiguity of the historical moment with respect to civil rights generally. The civil rights movements of the 1950s and 1960s created both opportunities and constraints for lesbian and gay activists in the 1970s and 1980s.

As historians such as Pippa Holloway have shown, state regulation of sexuality was intimately intertwined with regulation of race, gender, and class during the early twentieth century.[18] The African American and women's movements of the 1950s and 1960s significantly reduced, and in some cases completely eliminated,[19] race-[20] and gender-[21]specific regulations, with ambiguous results for lesbian and gay civil rights. The African American and women's movements created a political and policy framework that lesbian and gay activists strove to use for themselves.[22] But the inability to regulate in race- and gender-specific ways also increased the anxiety about social control among many citizens while narrowing the range of potential targets.[23] Further, the impact of lobbying in the Carter White House, and of Wisconsin's pioneering statute on specific legal and policy changes were blunted for lesbians and gay men by the increasingly conservative political climate.[24]

---

http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821.

16. *See infra* Part III for further discussion.

17. William B. Turner, *Mirror Images: Lesbian/Gay Civil Rights in the Carter and Reagan Administrations*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 4, 12-14 (John D'Emilio, William B. Turner, & Urvashi Vaid, eds. 2000).

18. PIPPA HOLLOWAY, SEXUALITY, POLITICS, AND SOCIAL CONTROL IN VIRGINIA, 1920-1945 (2006). Although Holloway focuses on Virginia, and studies of other states would produce importantly different results, her conclusions reflect a general trend in the United States at the time. *See also* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940 (1994) (describing, *inter alia*, intersecting regulations of sexuality, race, and class).

19. HOLLOWAY, *supra* note 18, at 195.

20. *E.g.*, Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (striking down Virginia's anti-miscegenation statute as violating the Equal Protection Clause of the Fourteenth Amendment).

21. *E.g.*, Reed v. Reed, 404 U.S. 71, 77 (1971) (striking down state preference for male executors over female executors where candidates are otherwise equally qualified).

22. *See infra* Part II.

23. HOLLOWAY, *supra* note 18, at 195.

24. *See generally* MARTIN ANDERSON, REVOLUTION (1988); WILLIAM C. BERMAN, AMERICA'S RIGHT TURN: FROM NIXON TO BUSH (1994); LEE EDWARDS, THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA (1999); ROWLAND EVANS JR. & ROBERT D. NOVAK, THE REAGAN REVOLUTION (1981); GODFREY HODGSON, THE WORLD

Consequently, subsequent opportunities for lesbian and gay rights activists at both the state and federal level would only occur several years later.[25]

Even as it was anomalous in some respects, the Wisconsin Act fits neatly into the larger debates over lesbian and gay civil rights as they have played out nationally in the years following its passage. Its passage falls into a middle ground of liberal tolerance and nondiscrimination. Chapter 112 exists between the extremes of claiming that "gay is good," on one hand, and that "lesbian and gay civil rights" is a contradiction in terms, because the real issue is a legitimate moral condemnation of deviant sexual conduct on the other.[26] Indeed, the terms of the debate— the middle ground of nondiscrimination versus the conservative extreme of condemning supposedly immoral sexual activity, in 1981, as the legislature considered the bill, and in subsequent years as opponents challenged it—were those that proponents and opponents continue to use in the present.[27]

The enactment of Chapter 112 also illustrates how existing legal categories shape the options of those who come after. Even some policy makers who supported the idea of prohibiting discrimination on the basis of sexual orientation saw such discrimination as importantly different from more established categories such as race and sex.[28] However, as a strategic matter, lesbian and gay activists would have been fools to eschew the existing categories and procedures of American civil rights law in the hope of producing

---

TURNED RIGHT SIDE UP: A HISTORY OF THE CONSERVATIVE ASCENDANCY IN AMERICA (1996); J. DAVID HOEVELER, JR., WATCH ON THE RIGHT: CONSERVATIVE INTELLECTUALS IN THE REAGAN ERA (1991); REBECCA E. KLATCH, WOMEN OF THE NEW RIGHT (1987); PEGGY NOONAN, WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA (1990); WILLIAM A. RUSHER, THE RISE OF THE RIGHT (1984); F. CLIFTON WHITE & WILLIAM J. GILL, WHY REAGAN WON: A NARRATIVE HISTORY OF THE CONSERVATIVE MOVEMENT, 1964-1981 (1981); JOHN KENNETH WHITE, THE NEW POLITICS OF OLD VALUES (2d ed. 1990).

25. *See* Joe Rollins, *Beating around Bush: Gay Rights and America's 41st President*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS at 29, 29-42 (John D'Emilio, William B. Turner, & Urvashi Vaid, eds. 2000).

26. *See, e.g,* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting)

> [The decision to strike down Colorado's Amendment 2] places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed).

Id.

27. *See generally* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005). These articles address directly the limitations on the version of lesbian and gay civil rights advocacy according to which advocates avoid the debate about whether "gay is good" or not by insisting that government should remain neutral among competing conceptions of moral goods. This approach worked to eliminate sodomy statutes, but it will not work to win same-sex marriage rights.

28. *See infra* Part II.B.

something entirely new for lesbians and gay men. Conceptually, it is difficult even to imagine what an entirely new legislative regime designed to do for lesbians and gay men what anti-discrimination legislation does for racial and ethnic minorities and women would look like.[29] This is the chronic problem for lesbian and gay civil rights activists in the wake of the 1964 Civil Rights Act; how does one persuade legislators and the general public that discrimination on the basis of sexual orientation is sufficiently like discrimination on the basis of race and sex to justify the same or similar legislative remedies? Chapter 112 was a great success in simply adding sexual orientation as a protected category to the existing lists in the Wisconsin statutes, but the prohibition on affirmative action based on sexual orientation within the same act indicates the extent to which the categorical fit is imprecise.[30]

One of the key reasons to write down the history of Wisconsin's legislation prohibiting sexual-orientation discrimination is that it provides a unique opportunity to examine some of the paradoxes, not only of lesbian and gay civil rights advocacy, but of civil rights law and policy in the United States generally. Affirmative action became a flash point for AB 70, as the bill was known in the legislature before becoming Chapter 112, in part because Wisconsin had at the time a robust set of affirmative action requirements in its statutes.[31] Wisconsin first prohibited racial discrimination in employment in 1945, well before the rest of the nation.[32] On one hand, Wisconsin was very progressive in this regard. On the other hand, for anyone who either doubted the wisdom of affirmative action per se, or who doubted the analogy between discrimination based on race and on sexual orientation, the possibility of adding sexual orientation to the categories for affirmative action in Wisconsin statutes was a red flag.

Perhaps the biggest paradox, which is still playing itself out at the time of this writing, is the fact that the "Gay Rights State" amended its constitution in November 2006 to prohibit recognition of same-sex marriages.[33] Political and policy success by minorities tends to produce backlash in general, and by most accounts the nation was well into a wholesale shift toward conservatism even as the Wisconsin Legislature enacted Chapter 112 of its 1981 Laws.[34] But the combination of a statutory prohibition on sexual-orientation discrimination with a constitutional prohibition on recognizing same-sex marriages reflects, more than anything, the deep ambivalence of the American public regarding lesbian

29. *But see* Nan D. Hunter, *Sexuality & Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 573-79 (2000) (engaging in "thought experiment" of considering what civil rights protections would look like if sexual orientation were the first category, rather than an addition to an existing model and emphasizing protection for communication about one's sexual orientation).

30. *See infra* Part III.A-B.

31. *See infra* Part III.A-B.

32. *See infra* Part III.A-B.

33. *See* WIS. CONST. art. XIII, § 13.

34. *See* sources cited *supra* note 24.

and gay civil rights claims. Most Americans see no contradiction at all in believing that lesbians and gay men should have equal job opportunities, but should not be able to marry one another.[35]

Justice Scalia defended this perspective.[36] Dissenting in *Lawrence v. Texas*, the decision striking down the statute prohibiting same-sex sodomy in Texas, he wrote:

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.[37]

Or not legislate, as the case may be. At least some evidence indicates that, although most Americans oppose employment discrimination based on sexual orientation, many still do not support legislation prohibiting such discrimination.[38] The story of Wisconsin's legislation prohibiting sexual-orientation discrimination illustrates how both sides in the political and policy debates appeal to their fellow citizens' ambivalence. Is prohibiting sexual-orientation discrimination a matter of equality, or of granting "special rights" to an undeserving minority?[39]

This Article cannot resolve the paradoxes of public opinion. It can help us understand those paradoxes, and their outcomes in law and policy. Part I of this Article describes the Act itself in some detail. Part II describes its relationship to the larger framework of civil rights law in the United States, focusing particularly on the issue of affirmative action. Part III describes Clarenbach's strategy for passing the law in terms of issue framing—the practice of associating one specific issue with a larger set of values in order to influence how others think about it. He assiduously focused on anti-discrimination, avoiding the issue of whether laws prohibiting discrimination based on sexual orientation put the state's imprimatur on lesbian and gay sexuality, the "Is gay good?" question. Finally, Section IV describes some of the major enforcement issues that Chapter 112 created.

I. CHAPTER 112, 1981 WISCONSIN SESSION LAWS

Chapter 112's coverage is surprisingly broad in some respects, but it fails to cover certain areas that would later become important elements of most anti-discrimination legislation. For example, Chapter 112 prohibits sexual

35. *See supra* notes 5-7 and accompanying text.
36. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).
37. *Id.*
38. Lewis & Rogers, *supra* note 7, at 118.
39. *See infra* Parts I and II.A. for further discussion of these issues.

orientation discrimination in the Wisconsin National Guard[40], but it does not address discrimination in education.[41] Acts in the 1985 and 1989 sessions prohibiting discrimination against students included sexual orientation among the protected categories.[42] An order of the Wisconsin Supreme Court in 1997 included sexual orientation among the bases on which discrimination against jurors is illegal.[43] Chapter 112 mostly added "sexual orientation" as a protected category to lists of nondiscrimination categories in existing statutes.[44] Such lists previously consisted of sex, race, color, creed, or national origin in most cases,[45] but variously included physical condition, developmental disability, handicap, religion, ancestry, arrest or conviction record, political affiliation, and marital status in others.[46]

The bulk of the Act addresses discrimination in housing and employment in various forms.[47] It also adds sexual orientation to the list of protected categories prohibiting discrimination in public accommodations.[48] The Act covers housing comprehensively just by adding "sexual orientation" as a protected category to the existing statutes.[49] In addition to amending the statute

40. Act of Mar. 2, 1982, ch. 112, sec. 3, § 21.35, 1981 Wis. Sess. Laws 901, 902 (codified as amended at WIS. STAT. § 21.35).

41. *See* ch. 112, 1981 Wis. Sess. Laws 901.

42. 1985 Wis. Act, ch. 29, sec. 1711, § 118.13(1)-(2), 1985 Wis. Sess. Laws 382 (repealed and recreated as WIS. STAT. § 118.13) (prohibiting discrimination against pupils in elementary and secondary schools); Act of Apr. 10, 1990, ch. 186, 1989 Wis. Sess. Laws 1113 (codified at WIS. STAT. §§ 36.12, 32.23) (prohibiting discrimination against students in the University of Wisconsin System and Wisconsin Technical College System). Wisconsin is thus famous for another paradox of lesbian and gay civil rights. School administrators in Ashland, WI bear responsibility for the facts that produced a landmark opinion, *Nabozny v. Podlesny*, which held that they violated a general responsibility under the equal protection clause of the Fourteenth Amendment when they repeatedly, over the course of many years, failed to stop other students from harassing Nabozny—to the point of physical injury—because he was openly gay. 92 F.3d 446,457 (7th Cir. 1996). *See also* DAVID BUCKEL, STOPPING ANTI-GAY ABUSE OF STUDENTS IN PUBLIC SCHOOLS: A LEGAL PERSPECTIVE 12 (Peg Byron & Deirdre M. Reznik eds., 2d ed. 1998) (summarizing the holding of *Nobozny*), *available at* http://www.lambda.org/stopping.abuse.youth.legal.pdf; Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 135 (2000) (describing the facts that gave rise to *Nabozny*).

43. WIS. SUP. CT. R. 756.001(3) (effective July 7, 1997).

44. *See* ch. 112, 1981 Wis. Sess. Laws 901.

45. *Id.* sec. 1 § 15.04(1)(g).

46. *Id.* at sec. 1, § 15.04(1)(g); sec. 12, §§ 101.22(1), (1m)(b), (2m), (4n); sec. 14, §§ 111.31(1)-(3); sec. 16, § 111.32(5)(a); sec. 22, § 230.01(2); sec. 23, § 230.18; sec. 25, §§ 924.04(1)(a)-(c), (3), 1981 Wis. Sess. Laws at 902-08.

47. *See* ch. 112, 1981 Wis. Sess. Laws 901.

48. *Id.* at sec. 25, §§ 942.04 (1)(a)-(c), (3), 1981 Wis. Sess. Laws at 907-08 (repealed and recreated at WIS. STAT. § 101.22 (9)(a)(1)-(3) by 1989 Wis. Act 47, available at http://www.legis.state.wi.us/acts89-93/89Act47.pdf.

49. *See id.* at sec. 4, § 66.39(13); sec. 10, §§ 66.432(1), (2); sec. 12, §§ 101.22 (1), (1m), (b), (2m), (4n), 1981 Wis. Sess. Laws at 902-904.

prohibiting housing discrimination generally,[50] it amends the statutes prohibiting discrimination in veteran selection for housing projects where veterans receive preference,[51] and in the selection of residents and contractors for public housing generally.[52] Chapter 112 also adds "sexual orientation" to the statute providing that the state's prohibition on housing discrimination does not preempt municipal ordinances containing similar prohibitions.[53]

Similarly, the Act comprehensively prohibits employment discrimination by adding "sexual orientation" as a protected category to existing statutes. Sections 14 through 20 of Chapter 112 amend various sections of the Wisconsin Fair Employment Act (WFEA), Subchapter II of Chapter 111, Employment Relations.[54] Section 14 adds "sexual orientation" to the list of categories in the sections that articulate the state's policy decision to prohibit employment discrimination and reasons therefore.[55] Section 15 places the definition of "sexual orientation" into the statutes,[56] Section 16 adds it to the definition of "discrimination,"[57] and Section 17 specifies which acts constitute discrimination because of sexual orientation in employment.[58] Section 2 of Chapter 112 adds "sexual orientation" to the list of characteristics on the basis of which state contractors may not discriminate.[59] Section 21 includes "sexual orientation" among the nondiscrimination categories for rulemaking by state agencies,[60] while Sections 22 and 23 add it to the nondiscrimination categories for employment by the state.[61]

Many of the provisions of Chapter 112, 1981 Wisconsin Laws that amended the WFEA actually appear in the statutes in slightly different form. As it happened, during the same session, the Wisconsin Legislature enacted a comprehensive revision of Chapter 111 of the statutes in order to repair problems with the original, frequently amended, act.[62] Legislators saw the need

50. *Id.* at sec. 12, §§ 101.22 (1)-(4n), 1981 Wis. Sess. Laws at 904.

51. *Id.* at sec. 4, § 66.39 (13), 1981 Wis. Sess. Laws at 902. *Compare* Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill*, 90 J. AM. HIST. 935 (2003) (describing Veterans' Administration choice of to deny benefits under the G.I. Bill to soldiers discharged for homosexual conduct).

52. Act of Mar. 2, 1982, sec. 24, § 234.29, 1981 Wis. Sess. Laws at 907 (codified as amended at WIS. STAT. § 234.29.

53. *Id.* at sec. 10, § 66.432 (1)-(2), 1981 Wis. Sess. Laws at 903.

54. §§ 111.31-111.32, 1981 Wis. Sess. Laws at 905-06.

55. § 111.31(1)-(3), 1981 Wis. Sess. Laws at 905.

56. § 111.32 (4s), 1981 Wis. Sess. Laws at 905.

57. § 111.32(5)(a), 1981 Wis. Sess. Laws at 905.

58. § 111.32(5)(i), 1981 Wis. Sess. Laws at 905-06.

59. § 16.765(1), (2)(a), 1981 Wis. Sess Laws at 902.

60. § 227.033(1), 1981 Wis. Sess. Laws at 906-07.

61. §§ 230.01(2), 230.18, 1981 Wis. Sess. Laws at 907.

62. Wisconsin Fair Employment Act, ch. 334, 1981 Wis. Sess. Laws 1378-79 (repealing, renumbering and amending numerous sections). *See* Information Memorandum on Revision of the Wisconsin Fair Employment Act by Ch. 334, Jim Schneider, Staff

to state that the comprehensive reform act did not repeal Chapter 112 of the 1981 Acts as part of their annual omnibus act for making corrections and clarifications.[63] This is an important point to note, if only because of the peculiar fact that the statutory section entitled "Prohibited Bases of Discrimination" in the current statute does not include sexual orientation in the otherwise comprehensive list of categories.[64] That section is expressly subject to the provisions of several subsequent sections,[65] one of which bears the title "Sex, sexual orientation; exceptions and special cases."[66]

This is only one of several oddities in the Act, and the only one that is explicable solely by reference to other actions by the same session of the legislature. Explanations for other oddities in the Act lie with the surrounding history of American civil rights law and policy, which is the subject of the next section.

II. THE CIVIL RIGHTS FRAMEWORK

Even after twenty-five years, a compilation by Lambda Legal Defense and Education Fund, a national public interest lesbian and gay civil rights law firm, shows that only three other states and the District of Columbia prohibit sexual-orientation discrimination as comprehensively as Wisconsin does.[67] Kathleen Nichols, the first openly lesbian or gay elected official in Wisconsin and a Co-Chair of the Governor's Council on Gay and Lesbian Issues during Tony Earl's term as Governor (1982-86), recalls that, at the time, national lesbian and gay activists insisted that passage of anti-discrimination legislation in Wisconsin was impossible.[68] Taking the Wisconsin Progressive tradition as a necessary background condition,[69] the next two sections place Chapter 112 into historical context in order to help explain why Wisconsin became known as "The Gay Rights State" for its pioneering legislation to prohibit discrimination based on sexual orientation.

Attorney, Wisc. Legislative Council, (May 7, 1982) [hereinafter Schneider, Wisconsin Fair Employment Act].

63. Act of May 6, 1992, ch. 391, sec. 105, § 111.31(1), 1981 Wis. Sess. Laws 1660, 1660 (stating that the amendment of § 111.31 by chapter 112 was not repealed by ch. 334).

64. WIS. STAT. § 111.321 (2005-06).

65. *Id.*

66. WIS. STAT. § 111.36 (2005-06).

67. *See generally* Lambda Legal, http://www.lambdalegal.org/news/. The other three states are Connecticut, Massachusetts, and Vermont. *Id.* *See also* DAYNAH SHAH, ASSOCIATE GENERAL COUNSEL, U.S. GEN. ACCOUNTING OFFICE, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES EXPERIENCE WITH STATUTORY PROHIBITIONS 4 (2002) (comparing provisions in state statutes and the federal Employment Nondiscrimination Act).

68. Interview with Kathleen Nichols, in Madison, Wis. (June 11, 2006).

69. *See* 4 JOHN D. BUENKER, THE HISTORY OF WISCONSIN: THE PROGRESSIVE ERA, 1893-1914 (William Fletcher Thompson, ed., 1998); ROBERT C. NESBIT, WISCONSIN: A HISTORY 399-456 (William F. Thompson ed., 2d ed. rev. 1989).

Chapter 112 necessarily reflected the larger context of civil rights law and policy in many respects. In American law generally in 1982, "civil rights" applied first to race, second to gender.[70] This fact influenced the strategies of lesbian and gay civil rights activists in various ways, providing both opportunities and impediments. The biggest opportunity was the precedent that state and federal governments could and should prohibit discrimination.[71] The biggest impediment was the argument that statutes prohibiting sexual-orientation discrimination would require affirmative action for lesbians and gay men.[72]

Attorney Chai Feldblum has described how the first attempts to prohibit sexual-orientation discrimination at the federal level took the form of bills amending the 1964 Civil Rights Act.[73] This approach reflected the belief that discrimination based on sexual orientation was, in principle, no different from discrimination based on race, gender, religious belief, or any of the other categories that existing civil rights legislation protected. Representative Bella Abzug introduced a sweeping bill to prohibit discrimination on the basis of sexual orientation, marital status, or sex on May 14, 1974.[74] Proponents of amending the 1964 Act met with little success at the federal level, however.[75] Even David Clarenbach could not persuade his member of the House of Representatives, Robert Kastenmeier (D-WI), to sponsor a 1979 bill to add sexual orientation to the 1964 Civil Rights Act, although Kastenmeier did express his support for the concept of prohibiting sexual-orientation discrimination.[76]

---

70. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532 (1995) ("Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)" (citation omitted)); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) ("[C]lassifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect . . .") (citations omitted). *See also* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY (1990); CYNTHIA ELLEN HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988).

71. GRAHAM, *supra* note 70, *passim*.

72. *See infra* Part II.A.

73. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149, 149-87 (John D'Emilio, William B. Turner, & Urvashi Vaid, eds. 2000).

74. *Id.* at 149; DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 239-41 (1999).

75. Feldblum, *supra* note 73 at 152-68; CLENDINEN & NAGOURNEY, *supra* note 74 at 241-44.

76. Letter from David Clarenbach, Wisconsin State Representative, to Robert Kastenmeier, House Representative (D-WI) (Feb. 9, 1979) (informing Kastenmeier of Clarenbach's support for federal bill to prohibit sexual-orientation discrimination and Clarenbach's own introduction of similar bill in the Wisconsin Assembly) (on file with the Wisconsin State Historical Society Archives, *in* Clarenbach Files, Box 3, "Gay Rights Correspondence"); Letter from Steve Endean, Executive Director, Gay Rights Nat'l Lobby,

The Wisconsin State Legislature, by contrast, proved willing to prohibit sexual-orientation discrimination by comprehensively amending existing anti-discrimination laws only three years later.[77] This was the same body that first enacted prohibitions on racial discrimination in employment in 1945, nearly twenty years before Congress would do so.[78] The eighteen years that elapsed between the passage of the 1964 Civil Rights Act in Congress and Chapter 112, 1981 Wisconsin Laws, saw the emergence of a controversy that would cause a last-minute problem for Clarenbach's pioneering bill, however. Even as Wisconsin legislators were willing to add "sexual orientation" as a protected category to laws that prohibited discrimination based on race, sex, religion, and other categories, the bill nearly fell victim to the objection that it would require affirmative action for lesbians and gay men.[79] The resolution of the controversy demonstrated that many state legislators understood the prohibition on sexual-orientation discrimination in very different terms than they did the prohibition on race or sex discrimination. The next section explains the dispute over affirmative action as a useful vehicle for relating Wisconsin's prohibition on sexual-orientation discrimination to civil rights law more generally.

A. *The Affirmative Action Imbroglio*

Among the most striking features of Chapter 112 is the length it goes to in order to abjure affirmative action as a remedy for discrimination based on sexual orientation. In perhaps no other respect does the Wisconsin law better illustrate how sexual orientation does and does not fit within the historical logic of civil rights law and policy in the United States. If prohibiting sexual-orientation discrimination is analogous to prohibiting race discrimination, then affirmative action for lesbians and gay men is just as appropriate as affirmative action for African Americans.[80] Historian Hugh Davis Graham has traced the

---

to David Clarenbach, Wisconsin State Representative (Mar. 15, 1979) (thanking Clarenbach for his letter to Kastenmeier, and stating that Kastenmeier had decided not to co-sponsor the bill even though he supported it) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Gay Rights Correspondence" Folder). On the other hand, Wisconsin Senator William Proxmire did support the Senate version of the 1979 bill. Clarenbach wrote to a staffer in Proxmire's office who was apparently unaware of the Senator's position, encouraging her to ask Proxmire to co-sponsor the bill with Senator Paul Tsongas (D-MA). Letter from David Clarenbach, Wisconsin State Representative, to Shirley Nyder, Office of Senator Proxmire (Dec. 17, 1979) (enclosing a copy of Stephen M. Johnson, *Prox Supports Gay Job-Rights Proposal*, CAPITAL TIMES (Madison, Wis.), Dec. 7, 1979, at 28) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Mailings Sent" Folder).

77. Act of Mar. 2, 1982, ch. 112, 1981 Wis. Sess. Laws. 901.

78. *See* Schneider, Wisconsin Fair Employment Act, *supra* note 62, at 2.

79. *See infra* Part II.A-B.

80. *See, e.g.*, Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47 (1993) (proposing affirmative action for lesbians and gay men by analogy to programs based on race and gender).

peculiar trajectory of affirmative action in federal civil rights policy, beginning with the Philadelphia Plan for integrating the skilled-building trades during the Nixon administration.[81] Affirmative action programs have been a fruitful source of litigation ever since.[82] But apart from the controversy surrounding race-based affirmative action, the analogy between race and sexual orientation is simply not that exact.

Affirmative action for lesbians and gay men has not produced the same controversy as affirmative action for African Americans largely because lesbian and gay civil rights activists have so willingly accepted explicit prohibitions of it as a necessary, if not sufficient, condition for passage of anti-discrimination legislation.[83] According to Feldblum, the decision to include language prohibiting either "quotas" or "preferential treatment" was only one of many that strategists made about scope and content in writing the Employment Nondiscrimination Act (ENDA).[84] ENDA was the new, more modest bill that lesbian and gay rights activists proffered in 1993 after the adoption of the "Don't Ask, Don't Tell" policy for lesbian and gay members of the armed services.[85] "Don't Ask, Don't Tell" seemed to demonstrate that the lesbian and gay civil rights movement lacked the political clout necessary to pass a more comprehensive bill.[86] ENDA even eschews disparate impact claims, as well as any effect either on employee benefits for same-sex partners or service in the military.[87] Rather than amend the 1964 Civil Rights Act,

---

81. GRAHAM, *supra* note 70, at 28, 33, 287-97.

82. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down university's use of race as one of several factors in its undergraduate admissions process to achieve the goal of having a diverse undergraduate student body); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding law school's use of race as one of several factors in the goal of achieving a diverse student body); Adarand v. Pena, 515 U.S. 200 (1995) (holding that all race-based classifications in federal law must undergo strict scrutiny); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (striking down municipal set-aside program because it lacked a compelling state interest and was not narrowly tailored); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (striking down medical school policy of reserving a specific number of spaces in incoming class for racial and ethnic minorities).

83. *See, e.g.*, Feldblum, *supra* note 73, at 178-79. *But see* Byrne, *supra* note 80. *See also* Jeffrey S. Byrne & Bruce R. Deming, *On the Prudence of Discussing Affirmative Action for Lesbians and Gay Men: Community, Strategy and Equality*, 5 STAN. L. & POL'Y REV. 177 (1993) (considering possible political impact of Byrne's law review article, *supra* note 81, advocating affirmative action for lesbians and gay men).

84. Feldblum, *supra* note 73, at 178-79.

85. National Defense Authorization Act, Pub. L. No. 103-160, § 571(a)(1), 1993 107 Stat. 1670 (codified as amended at 10 U.S.C. § 654 (2000)). *See, e.g.*, Able v. United States, 155 F.3d 628 (2d Cir. 1998) (holding that the part of the National Defense Authorization Act mandating the termination of military service members for engaging in homosexual conduct violates Equal Protection). *See also* Tim McFeeley, *Getting it Straight: A Review of the "Gays in the Military" Debate*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 236, 236-50 (John D'Emilio, William B. Turner, & Urvashi Vaid, eds. 2000).

86. Feldblum, *supra* note 73, at 179.

87. *Id.*

ENDA would create a free-standing statute applying only to sexual-orientation discrimination.[88]

Felblum's account of ENDA is consistent with political scientist Evan Gerstmann's work on Colorado's anti-gay Amendment 2,[89] which passed in 1992 but which the United States Supreme Court struck down in 1996.[90] The debate over Chapter 112 in the Wisconsin Legislature anticipated the Colorado debate in important respects. Amendment 2 not only repealed all existing lesbian and gay civil rights ordinances and executive orders, but it forbade all future laws and policies that would grant civil rights protections on the basis of "'homosexual, lesbian, or bisexual orientation . . .'"[91] Gerstmann thus demonstrates another paradox about lesbian and gay civil rights,[92] since the people of Colorado strongly opposed discrimination based on sexual orientation.[93]

But Colorado voters also strongly opposed affirmative action based on sexual orientation, which is why proponents of Amendment 2 seized on the claim that anti-discrimination legislation conferred "special rights" on lesbians and gay men. This phrase effectively evoked concerns about affirmative action, leading a majority of Colorado voters to endorse the Amendment even though it contradicted their stated opposition to discrimination based on sexual orientation.[94] Given Gerstmann's data on existing support among Colorado voters for nondiscrimination on the basis of sexual orientation at the time of Amendment 2,[95] it is not surprising for Wisconsin to be the first state to prohibit sexual-orientation discrimination, and among the most recent to prohibit recognition of same-sex marriages by constitutional amendment.

B. *Affirmative Action in Wisconsin*

Ten years before Amendment 2, *The Advocate* reported that Wisconsin's Republican Governor Lee Sherman Dreyfus refused to sign Chapter 112 unless it contained language explicitly prohibiting affirmative action on the basis of sexual orientation.[96] Opponents of the bill raised the issue just after the Assembly had passed it on a vote of 49 to 46; the possibility of affirmative action for lesbians and gay men was sufficient to secure for opponents a delay

88. *Id.* For systematic comparisons between ENDA and state laws prohibiting sexual-orientation discrimination, see SHAH, *supra* note 67 and similar reports by the General Accounting Office.

89. EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 100-02 (1999).

90. COLO. CONST. art. II, § 30b; Romer v. Evans, 517 U.S. 620 (1996).

91. 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30b).

92. *See supra* note 8 and accompanying text.

93. GERSTMANN, *supra* note 89, at 100-01.

94. *Id.* at 102-03.

95. *Id.* at 99-101.

96. *Wisconsin First State to Pass Gay Rights Law*, *supra* note 11.

in sending the bill to the Senate for consideration.[97] Once Clarenbach amended the bill to add language prohibiting affirmative action, Dreyfus was willing to sign it.[98] Indeed, Dreyfus' public statement explaining his decision to sign the bill specifically pointed to the prohibition on affirmative action as part of the reason for his support.[99]

Moreover, Clarenbach was quite willing to accept language expressly forbidding affirmative action on the basis of sexual orientation once it became obvious that such language was the price for passing the bill.[100] He would later insist that the prohibition on affirmative action was "neither a compromise nor a concession" because he was giving up something he never wanted in the first place.[101] He had received a letter from the Director of the State Affirmative Action Office stating flatly that the relevant sections of the bill as the Assembly had passed it "do not authorize the State to take affirmative action on the basis of sexual orientation."[102] On the other hand, an attorney for the Department of Administration, which produced affirmative action regulations, considered the bill ambiguous; he asked Clarenbach to have the legislature state clearly in Chapter 112 whether sexual orientation should be an affirmative action category.[103] The political traction of the affirmative action claim gave Clarenbach no choice but to acquiesce to the express prohibition.[104] He coordinated the drafting of the amendment and sent a letter to his Assembly

97. Matt Pommer, *Affirmative Action Issue Debated: State's Gay Rights Bill Threatened*, CAPITAL TIMES (Madison, Wis.), Oct. 23, 1981 (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112: Copies and Info Packets to Mail" Folder).

98. Statement on AB 70, Lee Sherman Dreyfus, Former Wis. Governor, (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Originals to Copy" Folder).

99. *Id.*

100. *See* Letter from David Clarenbach, Former Wis. State Representative, to Marlene A. Cummings, Governor's Advisor for Women and Family Initiatives (Jan. 25, 1982) (referring to and enclosing letter from Roehmann, *infra* note 102, and referring to affirmative action issue as "smoke screen") (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Mailings Sent" Folder).

101. Interview with David Clarenbach, Former Wis. State Representative, in Madison, Wis. (Aug. 29, 2005).

102. Letter from Claudean Roehmann, Dir., Wis. State Affirmative Action Office, Wis. Dep't of Employee Relations, to David Clarenbach, Former Wis. State Representative (Oct. 26, 1981) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Senate Hearing" Folder).

103. Memorandum from Ed Main, Attorney, Dep't of Admin. (Wis.), to David Clarenbach, Former Wis. State Representative (Oct. 26, 1981) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Affirmative Action" Folder).

104. *See* Letter from David Clarenbach to Marlene A. Cummings, *supra* note 100 (referring to letter from Roehmann, *supra* note 102, and referring to affirmative action issue as "smoke screen").

colleagues expressing his support for it after the state Senate sent it back so amended.[105]

It seems unlikely that Dreyfus' insistence on prohibiting affirmative action based on sexual orientation in Chapter 112 could have stemmed from the same sort of opposition to quotas and preferential treatment that had driven the controversy over race-based affirmative action at the federal level.[106] If Dreyfus objected to affirmative action per se, or particularly to quotas and preferential treatment, he would have found the existing Wisconsin statutes governing state contractors[107] and the state as employer[108] maddening. Those provisions expressly required affirmative action to correct disparities between the percentage of minorities among employees and their percentage in the general population.[109] As Graham notes, before the early 1970s policy makers all seemed to agree that the phrase "affirmative action" meant only that employers should work actively toward the goal of eliminating discrimination.[110] No one interpreted it to require the establishment of quotas or other specific goals for hiring a predetermined number or percentage of minority or women applicants, nor explicit preferences for such applicants.[111]

The Wisconsin statute governing contractors uses the phrase "affirmative action" without defining it, beyond stating that the goal is "to ensure equal employment opportunities."[112] So it fell to the Wisconsin Department of Administration (DOA) to decide in its administrative regulations what "affirmative action" meant for contractors.[113] Those regulations required contractors to submit a plan indicating how they would achieve a "balanced work force within a reasonable period of time."[114] A "reasonable period of

105. Memorandum from Richard Sweet, Senior Staff Attorney, Wisconsin Legislative Council Staff (Feb. 4, 1982) (explaining the effects of the amendment to AB 70, as the bill was known) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Affirmative Action" Folder); Lettter from David Clarenbach, Former Wis. State Representative, to Colleagues (Feb. 17, 1982) (stating Clarenbach's support for the amended version of AB 70 that the Assembly needed to concur in for passage after the Senate added the amendment prohibiting affirmative action) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Affirmative Action" Folder).

106. *See* GRAHAM, *supra* note 70 *passim*.

107. WIS. STAT. § 16.765 (1981).

108. WIS. STAT. § 230.01 (2) (1981).

109. §§ 16.765, 230.01 (2).

110. *See* GRAHAM, *supra* note 70, at 33-34.

111. *See id.*

112. § 16.765.

113. Memorandum from Richard Sweet, Wisconsin Legislative Council Staff, to David Clarenbach, Former Wis. State Representative (Oct. 26, 1981) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Affirmative Action" Folder).

114. WIS. ADMIN. CODE [Adm] § 50.05 (4) (1981).

time" was usually between six months and two years.[115] The administrative code defined a "balanced work force" as "an equitable representation of qualified *handicapped persons, minorities and women* in each level of a work force which approximates the percentage of handicapped persons, minorities and women available for jobs at any particular level from the relevant labor market."[116]

The Legislative Council staff lawyer who explained all of this in a memo to Clarenbach emphasized the words "handicapped persons, minorities, and women" in order to demonstrate the point that the correlation between the nondiscrimination categories in the statute and the affirmative action categories in the administrative regulation was not exact.[117] The disparity indicated that the DOA possessed leeway to determine which groups merited affirmative action. In other words, given the language of Chapter 112 as originally drafted, there was no guarantee that "sexual orientation" would get onto the affirmative action list.[118] However, the ambiguity potentially invited lobbying of the DOA by anyone who thought that "sexual orientation" should get onto that list.

Governor Dreyfus indicated with his signing statement for Chapter 112 that he put race and sexual orientation in different categories, such that affirmative action would be inappropriate for lesbians and gay men even though the same statutes could prohibit discrimination based on both categories.[119] His position indicates the peculiar status of sexual orientation as a category within the logic of civil rights policy in the United States. Dreyfus stated in his signing message that he saw the Act as protecting individual privacy.[120] In order to discriminate on the basis of sexual orientation, employers, landlords, and others would first have to determine what an individual's sexual orientation was, which constituted an unjustified invasion of privacy in Dreyfus' mind.[121] This understanding of the problem carried the implicit corollary that most lesbians and gay men would be just fine so long as they kept their sexual orientation to themselves. Even so, the right to privacy was a major rallying cry for the lesbian and gay civil rights movement.[122] But

115. Memorandum from Richard Sweet to David Clarenbach, *supra* note 113.

116. *Id.* (quoting § 50.03 (1)).

117. *Id.*

118. *Id.*

119. Statement by Lee Sherman Dreyfus, *supra* note 98.

120. *Id.*

121. *Id.*

122. Privacy as indicating either connection or distinction between the African-American and lesbian and gay civil rights movements becomes more obvious, if not any clearer, from the claim by leading constitutional law scholar, Lawrence Tribe, that *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down that state's sodomy law as a violation of the right to privacy, is to the lesbian and gay civil rights movement what *Brown v. Board of Education*, 347 U.S. 483 (1954), is to the African-American civil rights movement. Lawrence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1895 (2004). This claim strikes me as significantly overblown. Regardless, the contrast is instructive: a key demand of the

this is a key point at which the lesbian and gay civil rights movement differed from the African-American civil rights movement, and even from the women's movement.[123] The claim to privacy rights offers no legal or policy basis for affirmative action.[124]

Within the Wisconsin Statutes, the results of the difference between race and gender, and sexual orientation could look a bit strained. Section 14 of Chapter 112, amending the policy statement in the statute governing employment relations, simply states: "Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force."[125] As the author of a summary of the 1982 changes to WFEA noted in the *Wisconsin Bar Bulletin*, this language appeared in Chapter 112, the act that added sexual orientation as a protected category to numerous statutes, not Chapter 334, the comprehensive overhaul of the entire WFEA.[126] This fact would appear to make the provision simply part of the larger purpose of prohibiting affirmative action based on sexual orientation.[127] The language is so broad, however, that it seems to apply to all employers who are neither the state itself nor in contracts with the state.[128] This issue has apparently not produced any litigation.[129]

In contrast, the statutes that apply to the state as employer and to contractors with the state are very clear about imposing affirmative action

---

African-American civil rights movement was for access to the public schools on the same terms as whites—access to a public resource—while a key demand of the lesbian and gay civil rights movement was for freedom from police interference in choice of sexual activity—a necessarily private choice, as virtually no one ever suggested that they should have the right to engage in such sexual activity in public places.

123. It may seem peculiar to assert that privacy was not a rallying cry for the women's rights movement, given the prominence of privacy as the justification for women's right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). However, as Ruth Bader Ginsburg argued before ascending to the United States Supreme Court, the right to abortion would stand on firmer ground if the Court had articulated it in terms of the importance of fertility control for women's equality, which the public widely and strongly supports. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382-83 (1985). Further, long before abortion rights became a major issue for women's rights activists, they addressed issues such as suffrage, married women's property laws, and overt employment discrimination. *See, e.g.*, NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 3, 22 (1987); ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869, at 40 (1987); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP xxi, 193 (1998).

124. *See* Byrne, *supra* note 80, at 107 (advocating for private employers to voluntarily expand affirmative action programs to include self-identified lesbians and gay men).

125. Act of Mar. 2, 1982, ch. 12, sec. 14, § 111.31, 1981 Wis. Sess. Laws 901, 905.

126. David C. Rice, *The Wisconsin Fair Employment Act and the 1982 Amendments*, 55 WIS. BAR BULL. Aug. 1982, at 17, 17.

127. *Id.*

128. *Id.*

129. The annotations to WIS. STAT. § 111.31 (2005-06) that the Wisconsin Revisor of Statutes Bureau provides, list no cases addressing affirmative action.

requirements. Section 2 of Chapter 112 amended the statute governing state contractors to read:

> Contracting agencies of the state shall include in all contracts executed by them a provision obligating the contractor not to discriminate against any employe or applicant for employment because of age, race, religion, color, handicap, sex, physical condition, developmental disability . . . sexual orientation as defined in s. 111.32(4s), or national origin, and, except with respect to sexual orientation, obligating the contractor to take affirmative action to ensure equal employment opportunities.[130]

Chapter 112 thus had the odd effect of giving with one hand and taking away with the other. It added "sexual orientation" as a protected category, but expressly defined that category as distinct from other protected categories, at least for purposes of affirmative action.

The General Assembly had also imposed the affirmative action requirement on the state itself as an employer. Section 22 of Chapter 112 modified the statute governing state hiring practices.[131] Unlike the statute governing contractors, the law requiring state personnel managers to use affirmative action defined the problem for eradication within the statute itself: affirmative action should eliminate "substantial disparities between the proportions" of the general population and the proportions of state employees who were "members of racial, ethnic, gender, or handicap groups."[132] Chapter 112 added "sexual orientation" to the sentence announcing the state's policy to base personnel actions on ability, rather than prohibited categories.[133] However, immediately after the sentence requiring affirmative action to remedy disparities, it added this sentence: "Gender group does not include any group discriminated against because of sexual orientation."[134] In other words, the requirement for affirmative action to remedy any disparities between the gender make-up of the general population and the gender make-up of the state employee population should not be construed to encompass sexual orientation.[135]

---

130. Act of Mar. 2, 1982, ch. 112, sec. 2, § 16.765(1), 1981 Wis. Sess. Laws 901, 902. Underlining in original indicates language amending existing legislation.

131. *Id.* at sec. 22, § 230.01(2), 1981 Wis. Sess. Laws at 907.

132. *Id.*

133. *Id.*

134. *Id.*

135. The U.S. Supreme Court has held that discrimination based on gender stereotypes is discrimination "because of sex" for purposes of Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989). Some courts have been willing to recognize impermissible gender stereotypes in claims of discrimination on the basis of sexual orientation. *See, e.g.*, Nichols v. Azteca Rest. Enters, Inc., 256 F.3d 864, 869-70 (9th Cir. 2001) (holding that harassment by a fellow employee for failure to meet male stereotypes was "because of sex") *and* Heller

C. *Impact of Prohibiting Affirmative Action*

It is virtually impossible to demonstrate any concrete impact from the prohibition on affirmative action in Chapter 112. However, one striking piece of evidence does exist to demonstrate that such prohibition influenced citizens' perception of the law. Faculty at the University of Wisconsin-Madison created an Ad Hoc Study Committee on Adherence to University Policies on Placement and Non-Discrimination after the enactment of Chapter 112 created problems with allowing employers who expressly discriminated on the basis of sexual orientation—especially federal agencies—to use University facilities for recruiting students as employees.[136] The members of the Ad Hoc Study Committee stated their understanding of "faculty rules and state law" thus: "The policy against discrimination based on sexual orientation is not as firm, however, as the policies against discrimination on the basis of sex and race, because affirmative action obligations attach to the latter, but not to sexual orientation discrimination."[137] This is a difficult statement to parse from a legal perspective.

The purpose of affirmative action in the modern sense has always been to compensate for past discrimination against a group in ways that antidiscrimination laws simpliciter cannot do.[138] From that perspective, not only the absence, but the express prohibition of affirmative action with regard to sexual orientation in the statute, affords less protection to anyone who suffers sexual orientation discrimination than to persons who suffer discrimination based on a category that does qualify for affirmative action. How such lesser protection renders less "firm" the other protections that it does offer is not clear, however. But the legal incomprehensibility of the claim is what makes it important. A group of educated non-lawyers—mostly university professors— perceived that the state's commitment to prohibiting discrimination on the basis of sexual orientation was less than its commitment to prohibiting other forms of discrimination because the prohibition on sexual-orientation discrimination carried its own prohibition on affirmative action as a remedy for such discrimination.[139]

---

v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Ore. 2002) (holding that claims by lesbian employee of sex or gender discrimination were actionable under Title VII), *but see* Spearman v. Ford Motor Co., 231 F.3d 1080, 1085-86 (7th Cir. 2000) (rejecting claim of discrimination based on gender stereotypes despite evidence that harassers had called plaintiff a "bitch" and compared him to a drag queen).

136. Report to the University Committee of the Ad Hoc Study Committee on Adherence to University Policies on Placement and Non-Discrimination 1 (1983) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112—Enforcement" Folder) [hereinafter Report of the Ad Hoc Study Committee].

137. *Id.* at 2.

138. *See* GRAHAM, *supra* note 70 at 6, 188, 197-201. *But see* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (asserting that Court has never held past discrimination to be the only valid basis for affirmative action).

139. Report of the Ad Hoc Study Committee, *supra* note 136, at 2.

Thus, in an ironic sense, the very law that prohibited discrimination based on sexual orientation itself performed such discrimination. The law explicitly excluded persons who suffered sexual-orientation discrimination from a type of remedy that all other victims of prohibited discrimination might claim. Such ambivalence was not a new experience for lesbian and gay civil rights activists. As I have argued elsewhere, the Carter administration's treatment of lesbian and gay civil rights issues—the President himself repeatedly refusing to speak publicly on those issues even as his White House staff devoted substantial energy to them—reflects the fact that by 1977, lesbian and gay activists had persuaded many Democratic Party activists that the logic of American civil rights policy should extend to encompass lesbians and gay men.[140] Nonetheless, President Carter was not persuaded himself while he was President, despite his substantial commitment to civil rights generally.[141]

To some extent, this disparity between the status of race and sex, and the status of sexual orientation, in civil rights law is a function of the historical circumstance that a coherent lesbian and gay civil rights movement appeared only after African Americans and women had been organizing for decades.[142] As John D'Emilio, the leading historian of the lesbian and gay civil rights movement, has demonstrated, the creation of a social movement by and for lesbians and gay men required concerted effort on the part of activists to persuade potential constituents that they did constitute an identifiable minority with a legitimate set of grievances.[143] Beyond the historical difference, however, Governor Dreyfus' position on affirmative action for lesbians and gay men indicates that he saw a conceptual difference as well. Dreyfus, like President Carter, saw a legitimate grievance, but was not prepared to put the grievants in the same category as heterosexual African Americans or women.[144] The next section explores these distinctions within the debate as they played out between the movement's activists and the movement's opponents.

III. ISSUE FRAMING

As this section demonstrates, the enactment of Chapter 112, 1981 Wisconsin Laws, as a major event in the movement for lesbian and gay civil rights, was not unique at all in terms of the language and key concepts that both proponents and opponents used to frame the issue. Proponents described the

140. *See* Turner, *supra* note 17.

141. *Id.* at 15-17. Carter later became a more vocal supporter of lesbian and gay civil rights claims. *See* Jimmy Carter, Op-Ed., *It's Fundamentally Christian to Reject Politics of Hate: No One Should Condone, Even by Silence, the Persecution of Homosexuals*, L.A. TIMES, Feb. 23, 1996, at B9, *available at* http://www.mindspring.net/~wtk3/carter.html.

142. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, at 4-5 (1983).

143. *Id. See also* NAN ALAMILLA BOYD, WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965, at 58-61 (2003).

144. *See supra* notes 99-102 and accompanying text.

issue in terms of opposition to discrimination, while opponents described it in terms of sexual morality.[145] What is striking about Chapter 112 is how successful proponents were in controlling the scope and the terms of the debate.

Political scientist Paul Brewer provides a brief, useful overview of the idea of "issue framing" in his article on the framing of lesbian and gay civil rights issues.[146] "Framing" refers to the practice of connecting a specific political or policy issue to a more general value or set of values in the hope of influencing the public's support for or opposition to the issue.[147] Brewer relies on the familiar frames of equality and morality in using lesbian and gay civil rights to explore how individuals adopt or resist the frames they see in news sources.[148] People who use an equality frame to think about lesbian and gay civil rights are very likely to support them, while people who use a morality frame are very likely to oppose them.[149]

Issue framing plays an important role in the nuts and bolts of policy change, as political scientists Donald Haider-Markel and Kenneth Meier have shown. They describe two models of issue framing: interest group politics and morality politics.[150] Interest group politics involves containing the scope of the conflict, lobbying sympathetic public officials, presenting policy preferences as incremental changes, and striving to maintain a relatively low profile with the general public.[151] Morality politics tends to involve putting government's stamp of approval on one set of values rather than another.[152] It can be very difficult to confine debate on moral issues to political elites, if only because every citizen is expert in her/his own value system and therefore is more likely to have strong opinions.[153] Consequently, political actors frame issues in terms

145. Paul R. Brewer, *Framing, Value Words, and Citizens' Explanations of Their Issue Opinions*, 19 POL. COMM. 303 (2002).

146. *Id.*

147. *Id.* at 303-16.

148. *Id.*

149. *Id.* at 303. Brewer does demonstrate that individuals can adopt the language of one frame while continuing to think in terms of the other frame. He cites survey responses such as "Life is not easy and it is not up to the government to ensure that we have equality of outcome," using the term "equality" to explain opposition to nondiscrimination laws, and "Discrimination of any kind is morally repugnant," using the term "morally" to support such laws. *Id.* at 311. These uses are exceptions, however. For the most part, the terms individuals use to describe their responses are consistent with the prevailing frames they choose. *Id.*

150. Donald P. Haider-Markel & Kenneth Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POL. 332 (1996). Haider-Markel and Meier's two part scheme, morality politics and interest-group politics, does not map precisely onto Brewer's equality versus morality frame. Rather, as subsequent text explains, Clarenbach successfully avoided the equality versus morality frame by using his status as a political insider to pursue passage of Chapter 112 primarily in terms of interest-group politics.

151. *Id.* at 334.

152. *Id.*

153. *Id.* at 333-34.

of religious beliefs, and partisan competition among elected officials rises, given the presence of sharply delineated options.[154]

Lesbian and gay civil rights issues have often become classic examples of morality politics in action. Such framing started in 1977, with Anita Bryant's very public campaign to repeal a lesbian and gay civil rights ordinance that officials in Dade County, Florida passed.[155] Even the major Supreme Court decisions on lesbian and gay civil rights reflect this framing of the issue.[156] What is most remarkable about Clarenbach's effort in the Wisconsin General Assembly during the early 1980s is that he largely succeeded in avoiding the morality frame. Instead, he used the methods of interest group politics to pass legislation prohibiting sexual-orientation discrimination.[157]

A. *Clarenbach as a Political Elite*

Kathleen Nichols believes that Clarenbach's stature in the Wisconsin General Assembly and his decision to focus on prohibiting sexual-orientation discrimination were the most important factors in the passage of Chapter 112.[158] Scrupulous framing of the issue in terms of equality, rather than morality, also played an important role. An interesting contrast is available from Steve Endean, who mounted an unsuccessful campaign to make neighboring Minnesota the first state to prohibit sexual-orientation discrimination.[159] Endean later founded the Human Rights Campaign Fund,[160] now the nation's largest lesbian and gay civil rights organization.[161] He noted the opposition of conservative state legislators to proposed lesbian and gay civil rights legislation in the state legislature.[162] However, he also described difficulties he had with other lesbian and gay civil rights activists, whose scorched-earth tactics included holding a press conference about the issue in a men's room that state legislators used.[163] Endean claimed that two possible

154. *See id.* at 334.

155. *See* CLENDINEN & NAGOURNEY, *supra* note 75, at 291-311.

156. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (striking down anti-gay state constitutional amendment as violating equal protection clause; dissent argued that amendment was legitimate effort by citizens to preserve their "traditional sexual mores"); Lawrence v. Texas, 539 U.S. 528 (2003) (holding that moral disapproval simpliciter is insufficient to justify prohibiting consensual, adult sodomy; dissent held the opposite).

157. *See* Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights*, 20 REV. POL'Y RES. 671, 676 (2003).

158. Interview with Kathleen Nichols, *supra* note 68.

159. STEVE ENDEAN, BRINGING LESBIAN AND GAY RIGHTS INTO THE MAINSTREAM: TWENTY YEARS OF PROGRESS 15 (Vicki L. Eaklor ed., 2006).

160. *Id.* at 5.

161. Human Rights Campaign, http://www.hrc.org/Template.cfm?Section=About_HRC (formerly Human Rights Campaign Fund).

162. ENDEAN, *supra* note 159, at 16-18.

163. *Id.* at 121.

swing votes were using the restroom at the same time as the press conference and subsequently proved unwilling to support the bill.[164] Endean believed that such tactics by militant activists helped defeat, rather than pass, the bill.[165]

Perhaps because of his centrality to the legislative process as a long-time legislator and future Speaker Pro Tem,[166] Clarenbach managed to avoid such conflicts with more militant activists in Madison.[167] He entered the Wisconsin Assembly as a Democrat representing the near-east side of Madison in 1974.[168] His district was perhaps the most liberal part of a famously liberal city.[169] He was twenty-one-years-old at the time of his initial election, and the son of Kathryn Clarenbach, who taught at the University of Wisconsin–Madison and had served as the first Chairperson of the National Organization for Women.[170] In 1980, he chaired the Brown for President Steering Committee in Wisconsin,[171] and he was an outspoken advocate of abortion rights.[172]

Although Clarenbach would ultimately see the prohibition on sexual-orientation discrimination passed first, he started his legislative career in 1975 with a comprehensive bill to reform the state's laws governing sexual activity.[173] He proposed this bill in the same session during which he proposed amendments prohibiting sexual-orientation discrimination to existing bills on housing[174] and public accommodations.[175] *The Advocate*, the national lesbian and gay newsweekly, described the comprehensive sex-law reform bill as too radical to have a chance of passage.[176] It read like a veritable wish list of the sexual revolution, not only repealing all prohibitions on consensual sex among adults, but legalizing prostitution, lowering the age of consent from eighteen to fourteen, repealing all obscenity and abortion statutes, removing penalties for incest except with a child, and lowering the penalty for incest with a child to a

164. *Id.*

165. *Id.*

166. Betty Brickson, *Profile: David Clarenbach, The Power of Principle*, ISTHMUS (Madison, Wis.), Feb. 19-25, 1988, at 7.

167. Interview with David Clarenbach, *supra* note 101; Interview with Kathleen Nichols, *supra* note 68.

168. Brickson, *supra* note 166.

169. *Id.*

170. *Id.* at 7.

171. Press Release, Brown for President Headquarters (Jan. 18, 1980) (announcing Clarenbach's appointment as Chair of the Wisconsin Brown for President Steering Committee) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 1, "Correspondence from Brown" Folder).

172. *See* various documents on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 1, "Abortion" Tab.

173. H.R. 269, 1975 Assemb. (Wis. 1975).

174. H.R. 209, 1975 Assemb. (Wis. 1975).

175. H.R. 358, 1975 Assemb. (Wis. 1975).

176. Ron McRea, *Dairy State Looks at Sex Laws*, THE ADVOCATE, May 21, 1975 at 8, 8.

misdemeanor.[177] Anticipating a major political debate that would erupt some twenty years later, Clarenbach's bill also legalized same-sex marriages.[178] Not surprisingly, thirteen years after the initial bill, many of Clarenbach's colleagues in the Wisconsin Legislature would remember him as an ineffective radical during his early days.[179] The year after Chapter 112 passed, however, colleagues elected Clarenbach as Speaker Pro Tem of the Assembly, a position he continued to occupy until he left the legislature in January 1993, ten years later.[180]

Clarenbach insists that the introduction of a radical bill in 1975 was part of a larger legislative strategy to make subsequent bills look much more palatable.[181] Compared to legalizing same-sex marriage, prohibiting employment discrimination on the basis of sexual orientation looks quite tame to most Americans.[182] But he recognized the perils involved if legislators came to frame the prohibition on sexual-orientation discrimination in terms of morality politics.[183] From the beginning, AB 70, as the bill that would become Chapter 112 was known in the legislature, was not a typical political issue involving horse-trading among competing interest groups.[184] Clarenbach strove to control the terms of the debate primarily in two ways: he sought support from Republicans to make the bill bipartisan, and he sought support from religious leaders.[185] Above all, he strove to avoid making AB 70 a debate about approval or disapproval of lesbians and gay men per se.[186]

B. *Is Gay Good?*

Clarenbach's use of the equality frame to condemn discrimination, rather than to approve of lesbians and gay men, was a major accomplishment. A particular distillation of the equality frame was the claim by pioneering gay activist Franklin Kameny—radical at the time—that "gay is good."[187] Kameny and other activists intended this proposition to benefit the lesbian and gay civil

177. *Id.*

178. *Id.*

179. Brickson, *supra* note 166, at 1, 7.

180. Interview with David Clarenbach, *supra* note 101.

181. *Id.*

182. *See* Loftus, *supra* note 7, at 765; Robin Toner, *Opposition to Gay Marriage is Declining, Study Finds*, N.Y. TIMES, July 25, 2003, at A16; *see also supra* note 7 and accompanying text.

183. Interview with David Clarenbach, *supra* note 101. Clarenbach did not use the term, "morality politics," himself, but he clearly understood the concept, and it informed his strategies as a legislator.

184. *Id.*

185. *Id.*

186. *Id.*

187. Franklin E. Kameny, *Gay is Good*, *in* THE SAME SEX: AN APPRAISAL OF HOMOSEXUALITY 129, 129-45 (Ralph W. Weltge ed., 1969). *See also* Feldblum, *supra* note 27.

rights movement by disputing the central contention of those who would discriminate—that the discrimination was necessary to maintain control over a minority that was, at best, unfortunate and, at worst, dangerous.[188] The assertion that "gay is good" could also have the effect of increasing lesbians' and gay men's sense of their own political efficacy and the legitimacy of their objections to discrimination.[189] In the long run, it seems, Kameny's strategy has proven effective.

Nondiscrimination legislation, however, poses the problem: does prohibiting discrimination based on sexual orientation entail the adoption by government of the proposition that "gay is good"? This is the morality politics model. Or is the liberal ideal of government as neutral arbiter among competing perspectives truly possible, such that all that the prohibition of sexual-orientation discrimination achieves is to level the playing field? This approach lends itself to interest group politics. Chai Feldblum presents the debate over whether "gay is good" is a leitmotiv of the battle to enact legislation prohibiting sexual-orientation discrimination at the federal level.[190] She notes repeatedly that various activists who have promoted antidiscrimination legislation, including herself, have carefully avoided answering the question, "is gay good," in favor of insisting that proposed anti-discrimination legislation is neutral on the point.[191]

Neutrality was the approach Clarenbach took in explaining AB 70 during the debates on its passage. He managed to persuade Governor Dreyfus, whose signing statement for the Act asserted: "Let me firmly state that this restriction on discriminatory actions or decisions does not imply approval or encouragement any more than the restriction on discrimination because of a religion or creed implies approval or encouragement of certain religions or creeds."[192] Clarenbach himself made a similar argument in support of his bill:

> The right of private sexual preference among adults should be considered inherent. And as long as someone does not impose this sexual preference on others, he or she should be guaranteed the basic human right to live without harassment or discrimination. The point is not whether homosexuality is admirable, but whether discrimination is tolerable.[193]

188. *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 25, 60 (1997).

189. *See* BOYD, *supra* note 143 at 58-61; D'EMILIO, *supra* note 142, at 152-54, 162.

190. Feldblum, *supra* note 27, *passim*.

191. *See id.* at 181-82.

192. Statement, Lee Sherman Dreyfus, *supra* note 99.

193. Representative Clarenbach, Statement on AB 70, n.d. (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Originals to Copy" Folder).

At every turn during the debate over AB 70, Clarenbach strove to deflect whether gay is good in favor of the question, is discrimination tolerable?

Perhaps the single most important effect of this approach was to allow a wide range of mainstream religious leaders to support AB 70. In packets Clarenbach distributed to provide information about and to gain political support for the bill, the first letter of endorsement came from Rembert G. Weakland, O.S.B., Roman Catholic Archbishop of Milwaukee.[194] Weakland's letter reworks the terms of the morality frame to echo Clarenbach's position:

> There has been no change in the Catholic position concerning homosexual activity, which has always been considered as morally wrong; on the other hand, it has also been consistent with Catholic teaching that homosexuals should not be deprived of their basic human rights.[195]

Other letters came from the President of the American Lutheran Church's Southern Wisconsin District, the Bishop of the United Methodist Church for the Wisconsin District, and the Episcopal Bishop of Milwaukee.[196]

Such widespread support from mainstream religious leaders helped to deflect criticism from Christian conservatives, who were becoming increasingly vocal in state and national politics during this period.[197] Among the most vocal opponents was Rev. Richard Pritchard, a Madison minister known for his social activism.[198] Another opponent, Wayne Wood, the state

---

194. Information Packet, n.d. & n.p. (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112: Copies and Info Packets to Mail" Folder). Letter from Reverend Rembert G. Weakland, Archbishop of Milwaukee (Wis.), to Reverend John Murtaugh, Office for Human Concerns, (Mar. 2, 1981) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112: Copies and Info Packets to Mail" Folder).

195. Letter from Reverend Rembert G. Weakland, to Reverend John Murtaugh, *supra* note 194.

196. Letter from Charles T. Gaskell, Bishop, The Episcopal Diocese of Milwaukee (Wis.), to Members of the Wisconsin State Legislature (Feb. 12, 1981); Letter from Majorie S. Matthews, Bishop, The United Methodist Church Wisconsin District, to Members of the Wisconsin State Legislature (Apr. 3, 1981); Letter from A.C. Schumacher, President, The American Lutheran Church, Southern Wisconsin District, to Leon Rouse (Apr. 13, 1981) (All on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112: Copies and Info Packets to Mail" Folder).

197. *See, e.g.*, HERMAN, *supra* note 188.

198. *See* Letter from Reverend Richard E. Pritchard, Pastor, Heritage Church (Madison, Wis.), to Members of the Wisconsin Assembly (Oct. 26, 1981) (explaining reasons to oppose AB 70) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Opponents" Folder); Memorandum from Richard E. Pritchard, Reverend, to Members of the Wisconsin Senate (Feb. 16, 1982) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Opponents" Folder). For background on Pritchard, see Bill Graham, *Richard Pritchard's Lonely Fight Against the Devil*, MADISON MAG., Apr. 1981, at 9 (on file with the Wisconsin

representative who first raised the affirmative action issue, reportedly held regular Bible study sessions in his legislative office.[199] Wood expressed concern about state contractors who dealt with children and prisoners having to hire homosexuals because of affirmative action requirements.[200] He stated that the question "borders on a moral issue."[201]

Christian conservatives, clearly not believing that gay is good, launched two efforts against Chapter 112 after it became law. In 1983, Representative Lary [sic] Swoboda introduced a bill to repeal Chapter 112 outright.[202] A flyer suggesting reasons for supporting the repeal stated, *inter alia*:

> 2. Law is unnecessary. Freedom for all is guaranteed by the Constitution of the U.S. This law gives homosexuals special minority status and special privileges. Homosexuals should not be guaranteed a job or apartment simply because they are homosexuals. They should have to compete in the job and housing markets like anyone else.
> 3. This is a MORAL issue, not a civil rights issue! There is NO scientific evidence to support the "constitutionally gay" theory; homosexuals are NOT BORN THAT WAY! Homosexuality is a behavior and should not be classified with legitimate minorities such as race, sex.[203]

This flyer illustrates the argument that anti-discrimination legislation confers special privileges on lesbians and gay men, thus invoking the equality frame against the legislation. It also illustrates the morality frame argument that homosexuality is a behavior and therefore does not merit civil rights protections in the same sense as race and gender. The dispute over whether lesbian and gay identity is in-born or otherwise immutable, and whether immutability is a necessary condition for civil rights protections, continues to the present day.[204] The repeal effort failed.

State Historical Society Archives, *in* David Clarenbach Files, Box 1, "Articles (Information)").

199. Pommer, *supra* note 97.

200. *Id.*

201. *Id.* (quoting Wood).

202. Flyer instructing opponents of the bill to contact the Governor and their legislators, n.d. & n.p. (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70: Repeal Effort" Folder).

203. *Id.*

204. *See, e.g.*, virtually every amicus curiae brief in support of respondents in *Lawrence v. Texas*, 539 U.S. 517 (2003). Supporters of the Texas sodomy statute consistently asserted that lesbian and gay identity is mutable as part of their argument that the U.S. Supreme Court had no legitimate basis for striking the statute down. *See also* Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CLEV. ST. L. REV. 545 (2005-06). *But see* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from*

In 1985 and 1986, Clarenbach would have to fight off an effort to carve an exemption for religious groups out of the prohibition on sexual-orientation discrimination. Rawhide Ranch, a facility for delinquent boys, refused to comply when the county governments it contracted with began to enforce Chapter 112.[205] Representative Wood introduced a bill to create the exception.[206] Clarenbach issued a press release to announce its failure in the Assembly by a vote of 55 to 44.[207] This effort came during the same year in which Democratic Governor Tony Earl, an outspoken supporter of lesbian and gay civil rights, lost his re-election bid to Republican Tommy Thompson, who had voted against AB 70 as a state legislator.[208]

Despite these efforts to repeal or restrict Chapter 112, implementation of the new law proceeded apace. For the most part, enforcement presented few problems. At the points where Chapter 112 itself pushed the envelope, or where a citizen tried to use the new law to push the envelope, however, it largely failed. The next section explains these enforcement issues in more detail.

IV. ENFORCEMENT

As in its enactment, enforcement of Chapter 112 presented an array of issues most of which anticipated on-going controversies over lesbian and gay civil rights. This section describes the major enforcement issues that arose under Chapter 112 during the first decade after its enactment. As Hugh Graham demonstrated in his pioneering study of civil rights law and policy,

---

Immutability, 46 STAN. L. REV. 503 (1994) (arguing that a pro-gay legal argument should not focus on immutability, which is at risk of misinterpreting and dividing the gay community, but on common ground that adequately represents the self-conceptions of both pro-gay essentialists and pro-gay constructivists).

205. Letter from Rawhide Boys' Ranch to Wisconsin Churches (Apr. 11, 1985) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Past Correspondence" Folder). Press Release, David Clarenbach, Speaker Pro Tem of the Wisconsin Assembly (Feb. 20, 1986) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Gay Rights–Press Release 1986").

206. *Id.*

207. *Id.*

208. Earl convened the first Governor's Council on Lesbian and Gay Issues and appointed an openly gay man as his press secretary. *See* David Clarenbach, *A Decade of Gay and Lesbian Rights* (Dec.) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, "Decade of G/L Right" [sic]). Clarenbach offered his assessment of the 1982 election, in which Earl won by a large margin over industrialist Terry Kohler, who castigated Earl for his support for lesbian and gay civil rights. Letter from David Clarenbach, Former Wis. State Representative, to Jim Dressel, Mich. Legislator (Sept. 30, 1983) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box "Gay Rights—1982 Election" Folder). *See also* Kenneth R. Lamke, *Kohler Rips Earl on Tax, Homosexual Appointees* (n.d.) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 Follow-up mailing"). For Thompson's vote, see list in Letter from Clarenbach to Dressel, *supra*.

implementation is crucial.[209] Antidiscrimination legislation is pointless if no one uses it. Further, as Graham discovered at the Equal Employment Opportunity Commission, the implementation decisions of administrators can contravene enabling statutes.[210] Nothing so dramatic occurred with Chapter 112, but various issues inevitably arose.

A. *Administrative Procedure*

In keeping with its tradition of prohibiting employment discrimination from an early date, Wisconsin makes filing discrimination complaints relatively cheap and easy. Although it is a unit of the Department of Workforce Development—Department of Industry, Labor, and Human Relations (DILHR) at the time of Chapter 112's enactment—the Equal Rights Division (ERD) takes complaints of discrimination in housing and public accommodations as well as employment.[211] Judicial review of administrative decisions in discrimination cases is possible.[212] However, no private right of action exists under Wisconsin's nondiscrimination statutes,[213] so the only way to initiate a complaint is to file it with the ERD. Additionally, the first level of review is administrative, through an entity known as the Labor and Industry Review Commission (LIRC).[214]

Although this procedure makes it possible for individuals to file complaints without hiring a lawyer, not all potential complainants know that. Reviewing Chapter 112 three years after its enactment, a reporter for *The Advocate* found a twenty-year-old in Superior, a town in northwestern Wisconsin, who chose not to file a complaint because he assumed he would need a lawyer.[215] He expected that a lawyer would cost more than any relief he might receive under the statute, so he chose not to file.[216] Merry Fran Tryon, administrator of the ERD at the time, expressed concern that information about

209. *See* GRAHAM, *supra* note 70, at 287-97. *See also* HOLLOWAY, *supra* note 18 at 52, 111 (demonstrating at various points how enforcement can differ from the apparent intent of legislators in passing legislation).

210. GRAHAM, *supra* note 70, at 287-97.

211. *See* Equal Rights Divison, http://www.dwd.state.wi.us/er (last visited, June 8, 2007).

212. WIS. STAT. § 111.39(5)(a) (2005-06); WIS. ADMIN. CODE [LIRC] § 4.04(1) (2006). *See, e.g.*, Klatt v. Labor and Indus. Review Comm'n, 2003 WI App 197, 669 N.W.2d 752 (appealing decision of a circuit court affirming the decision of the Labor and Industry Review Commission (LIRC) that the employee had terminated her employment without good cause).

213. *See, e.g.*, Busse v. Gelco Express Corp., 678 F. Supp. 1398, 1402 (E.D. Wis. 1988) (stating that no private right of action exists under the Wisconsin Fair Employment Act).

214. WIS. STAT. § 111.39(5)(a); WIS. ADMIN. CODE [DWD] § 218.21(1) (2006).

215. Peter Freiberg, *Wisconsin: Gay Rights*, THE ADVOCATE, Sept. 3, 1985, at 12, 12 (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112–Enforcement" Folder).

216. *Id.*

not only the complaint process, but the categories the law protected, had not reached all parts of the state.[217]

The total number of complaints claiming sexual-orientation discrimination has apparently always been small in Wisconsin.[218] Opponents of lesbian and gay civil rights laws have long asserted that such laws are unnecessary because little or no discrimination occurs.[219] A number of responses to this argument is possible. If, as Clarenbach asserted, discrimination per se is wrong,[220] then the small number of violations is no reason not to prohibit the conduct. Tryon offered another reason to disregard a small number of complaints in evaluating the need for anti-discrimination legislation: enforcement of the statute can occur without filing formal complaints. For example, in Tryon's case, the dean of a state university asked a newly hired professor to resign after the professor's real estate agent told the dean that he was gay.[221] The professor was unwilling to file a formal complaint for fear of its impact on future job prospects, but after Tryon informed the dean that his request for the professor's resignation violated state law, the dean withdrew the request.[222] In this instance, enforcement of the statute occurred without a formal complaint.

Most importantly, as law professor William Rubenstein has argued, the significant number in evaluating the need for statutes prohibiting sexual-orientation discrimination is not the number of claims simpliciter, but the frequency of claims—the total number of claims by members of any given group expressed as a percentage of that group's total population.[223] Rubenstein

---

217. *Id.*

218. Data on the number of complaints under the provisions of Ch. 112, 1981 Wis. Sess. Laws is surprisingly difficult to find. The Wis. Equal Rights Division (ERD) does not have data on the number of complaints for the period from 1982 to 2006. E-mail from LeAnna Ware, Equal Rights Division (Wis.), to author (July 18, 2006) (on file with author). An ERD representative does assert, however, that complaints of sexual-orientation discrimination in employment have consistently numbered between 50 and 85 throughout the period. E-mail from LeAnna Ware, Equal Rights Division (Wis.), to author (July 18, 2006) (on file with author). Complaints of sexual-orientation discrimination in housing or public accommodations have numbered fewer than five in each of those years. *Id.* These numbers are very small compared to the total number of complaints filed for the period from 2000 to 2006, when the smallest number of total complaints was 4,282 (2000) and the highest was 5,175 (2002). Trends in Complaints with the Civil Rights Bureau Since CY 2000, July 18, 2006 (provided by LeAnna Ware via e-mail) (on file with author). *See also* SHAH, *supra* note 67, at 10, for data from 1996 through 2001, with notation that data for years before 1996 were "not readily available;" Gary Radloff, *Few Gays in State Filing Bias Complaints*, MILW. J., June 20, 1983 (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112 – Enforcement" Folder).

219. ENDEAN, *supra* note 159, at 194; William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 65-66 (2001).

220. *See supra* note 193 and accompanying text.

221. Freiburg, *supra* note 215, at 13.

222. *Id.*

223. Rubenstein, *supra* note 219, at 67. Clearly the biggest hurdle of method for this study was determining the number of lesbians and gay men in the workforce. Rubenstein

demonstrated that, although the raw number of sexual-orientation complaints is small, calculating it as a rate and comparing that rate to the rate of complaints on the basis of race and sex shows that lesbians and gay men are as likely to file complaints as racial minorities and women.[224] Because Rubenstein surveyed all states that prohibited sexual-orientation discrimination at the time, his results included Wisconsin.[225] Wisconsin is one of eight states where he found that complaints of sexual-orientation discrimination occurred at a higher rate than complaints of discrimination because of sex.[226] However, the number of complaints based on sexual orientation was consistently lower than the number of complaints based on race in most of the states Rubenstein examined, including Wisconsin.[227]

The complaint process is perhaps the single most important aspect of Wisconsin's general anti-discrimination scheme insofar as it allows ordinary persons who have suffered discrimination to seek redress. However, in the few years immediately after Chapter 112's enactment, other implementation issues arose that anticipated ongoing issues for lesbian and gay civil rights activists.

B. *ROTC, FBI*

Two enforcement issues arose primarily involving the University of Wisconsin–Madison, one relatively minor and the other fairly major. The minor issue involved updating the myriad forms and brochures that the University produced to reflect the addition of "sexual orientation" as a protected category under state law.[228] The issue produced significant correspondence, particularly between Robert M. O'Neil, President of the University of Wisconsin System, and various legislators, including Clarenbach.[229] Members of The Ten Percent Society, a lesbian and gay student group, also wrote to the Dean of Students noting the absence of sexual orientation from the list of nondiscrimination categories in the 1984 Undergraduate Bulletin.[230] On May 31, 1984, System Vice President Ronald C. Bornstein resolved the issue by sending a memo to the chancellors of all individual campuses recommending the following language for any document that contained a nondiscrimination statement: "The University of Wisconsin

chose to run his calculations using three different estimates. For his explanation, see *id.* at 83-86.

224. *Id.* at 87-88.

225. *Id.* at 67 n.10, 88.

226. *Id.* at 88.

227. *Id.* at 91.

228. *See* Letters in Folders "Chapter 112–Enforcement," and "UW Bulletins & Pamphlets–Ch. 112 Enforcement" (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3).

229. *See id.*

230. Letter from The Ten Percent Society to Mary Rouse, Dean of Students, Univ. of Wis.-Madison, (Dec. 2, 1983) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "Chapter 112–Enforcement" Folder).

does not discriminate on the basis of age, race, creed, color, handicap, sex, sexual orientation, developmental disability, national origin, ancestry, marital status, arrest record, or conviction record."[231]

The much larger issue in enforcing Chapter 112 was the use of University of Wisconsin facilities for job recruitment by employers, especially federal agencies, which discriminate based on sexual orientation. This issue would result in a United States Supreme Court decision in 2006, *Rumsfeld v. Forum for Academic Institutional Rights*, upholding a federal statute that withdraws all federal research funding from any university if any campus unit restricts access to military recruiters because of the military's official policy of discriminating against lesbians and gay men.[232] The FBI resolved the issue very easily in 1982. Edward J. Reiser, Assistant Dean of the University of Wisconsin Law School, wrote to Special Agent James A. Swanda on September 3, 1982, to inform him of the change in Wisconsin law and of an interviewing complaint that the Student Bar Association had filed against the FBI for discriminating on the basis of sexual orientation.[233] H. Ernest Woodby, Special Agent in Charge in the Milwaukee office, wrote back to state that he had forbidden all FBI personnel from appearing on the Madison campus for recruitment.[234] Interested applicants would have to contact the FBI office in Milwaukee or in Madison.[235]

The issue of the University's Reserve Officer Training Corps (ROTC) program proved much more complicated, eventually producing an opinion from the Attorney General, a statement to the faculty by the Chancellor of the UW–Madison campus, and a report by an ad hoc faculty committee. The clear problem was that, as Attorney General Bronson LaFollette put it, while lesbian and gay students were free to take military science courses, the United States Armed Forces would not accept them as officers if it knew they were lesbian

231. Memorandum from Ronald C. Bornstein, Vice President of the Univ. of Wis. System, to Chancellors (May 31, 1984) (attached to Letter from Robert M. O'Neil, President of the Univ. of Wis. System to David Clarenbach, Former Wis. State Representative (June 4, 1984) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "UW Bulletins & Pamphlets–Ch. 112 Enforcement" Folder).

232. 547 U.S. 47 (2006) (holding statute prohibiting access to several categories of federal funds for any university whose law school restricts job recruiting by U.S. military does not violate universities' rights to free expression and assembly under First Amendment because it regulates conduct, not speech).

233. Letter from Edward J. Reisner, Assistant Dean, Univ. of Wis.-Madison, to James A. Swanda, Special Agent, FBI (Sept. 3, 1982) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder).

234. Letter from H. Ernest Woodby, Special Agent in Charge, FBI, Milwaukee Office, to Edward J. Reisner, Assistant Dean, Univ. of Wis.-Madison (Sept. 8, 1982) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder).

235. *Id.*

and gay.[236] These events preceded enactment of the "Don't Ask, Don't Tell" policy, according to which lesbians and gay men may serve in the military so long as they conceal their identities.[237] The policy at the time prohibited lesbians and gay men from serving at all.[238]

The *Milwaukee Journal* ran a story at the time with the headline, *New Gay-rights Law Could Force ROTC Off Campuses*.[239] When the issue resurfaced five years later, however, the *Wisconsin State Journal* noted that denying access to ROTC could jeopardize all of the grants that the University of Wisconsin received from the Department of Defense and the National Aeronautics and Space Administration, totaling $16.3 million for 1985-86.[240] In 1982, just as the issue arose for the first time, the Department of Defense promulgated a new rule implementing legislation prohibiting the use of Department of Defense funds at any college or university that prohibited military recruiting personnel from their campus.[241]

Although it might seem obvious that federal regulations regarding military service would trump state law, the *Milwaukee Journal* reported that an aide to Governor Dreyfus saw ROTC units as "a gray area—not absolutely under state or federal jurisdiction."[242] However, Attorney General La Follette avoided this problem by noting in good lawyerly fashion that, according to the Wisconsin Supreme Court, statutes of general application do not include the sovereign unless they do so expressly.[243] Thus, even assuming that the federal government stands simply as an employer relative to military officers, and as a

236. Letter from Bronson C. La Follette, Attorney General (Wis.), to Barbara Ulichny, State Representative (Wis.) (Apr. 5, 1983) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC").

237. *See* 10 U.S.C. § 654 (2000) (policy concerning homosexuality in the armed forces).

238. *See generally* RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF (1993).

239. David I. Bednarek, *New Gay-Rights Law Could Force ROTC Off Campuses*, MILW. J., Aug. 19, 1982 (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder).

240. David Stoeffler, *UW Sticking to Guns over ROTC, Gays*, WIS. STATE J., March 8, 1987 (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder).

241. 47 Fed. Reg. 42,757 (Sept. 29, 1982) (codified at 32 C.F.R. pt. 216) (copy on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder). Although the Solomon Amendment, 10 U.S.C. § 983 (2000), has become the primary focus of this debate because of *Rumsfeld v. Forum for Academic and Institutional Rights*, the Department of Defense itself opposed enactment of the Solomon Amendment in 1994 as "unnecessary and duplicative." 390 F.3d 219, 226 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006). *See also* Anita J. Fitch, *The Solomon Amendment: A War on Campus*, ARMY LAW. 12, 12-14 (2006). As the 1982 revised regulation indicates, the Department of Defense already had the power to effect the policy goal of the Solomon Amendment.

242. Bednarek, *supra* note 239.

243. Letter from Bronson C. LaFollette to Barbara Ulichny, *supra* note 236.

contractor relative to the University of Wisconsin, Chapter 112 only added to the categories on the basis of which employers and contractors may not discriminate.[244] It did not change the definitions of "employer" or "contractor" to include the federal government.[245]

Irving Shain, Chancellor of the UW–Madison campus, noted that any Wisconsin employer who discriminated on the basis of sexual orientation necessarily violated the law, and that the University would cooperate with any investigations of such employers.[246] However, he went on to state that "because the law seems to treat Federal agencies differently, I think we are also going to be obliged to do so."[247] This statement is not terribly clear on its face, but it seems to mean that the Chancellor saw no choice but to continue permitting ROTC units on campus. The University would also have to permit the military to recruit in other ways, despite the conflict between its discriminatory employment policy and the state statute prohibiting such discrimination.

Similarly, the Ad Hoc Study Committee on Adherence to University Policies on Placement and Non-Discrimination stated that it "supports in principle" the Chancellor's proposal as articulated in his speech to the Faculty Senate.[248] The Ad Hoc Committee did present five specific recommendations, which amounted mostly to ensuring that anyone using campus placement facilities knew about the full list of nondiscrimination categories under Wisconsin law, and to providing students with information, if possible, about employers who discriminated.[249]

Perhaps the most interesting aspect of the FBI/ROTC imbroglio was Representative Clarenbach's response. He wrote that he would prefer the issue to go away because he believed that most lesbians and gay men did not really care about it.[250] He thought the issue arose more from the activities of persons who wanted to eliminate the FBI and ROTC from all UW campuses, not lesbian and gay civil rights activists.[251] More importantly, he worried that such

244. *Id.* at 1-2.

245. *Id.* at 2.

246. Irving Shain, Chancellor, Univ. of Wis.-Madison, Speech to Faculty Senate at 5 (Oct. 4, 1982) (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder).

247. *Id.* at 6.

248. Report of the Ad Hoc Study Committee, *supra* note 136, at 4.

249. *Id.* at 5.

250. Untitled Document, n.d. (on file with the Wisconsin State Historical Society Archives, *in* David Clarenbach Files, Box 3, "AB 70 FBI–ROTC" Folder). It is true that this document bears little on its face to justify attributing authorship of it to Clarenbach. However, it is much less plausible to posit that someone else's unidentified notes would appear in Clarenbach's files than to posit that Clarenbach's own such notes would appear there. Further, Clarenbach confirms that he and his legislative assistant, Dan Curd, would communicate at times by leaving notes for one another. Interview with David Clarenbach, *supra* note 101.

251. Untitled Document, *supra* note 250.

agitation would only encourage legislators who wanted to repeal the statute entirely.[252]

C. *National Guard*

Precisely because the issue of openly lesbian and gay members of the Armed Forces later became a major political issue with the Solomon Amendment, and because of *Rumsfeld v. Forum for Academic Institutional Rights*, which specifically involved the issue of military recruitment at law schools,[253] it seems inevitable that the ROTC issue would arise. The major puzzlement of Chapter 112 is that its prohibition on discrimination by the Wisconsin National Guard[254] never invited a direct challenge. In 1993, addressing the same legal issue with respect to application of the Wisconsin Fair Employment Act to the National Guard, the Wisconsin Court of Appeals held in *Hazelton v. State Personnel Commission* that federal law governing personnel requirements for the National Guard preempted state law.[255]

Although Hazelton complained of discrimination both on the basis of sexual orientation and on the basis of handicap[256]—he tested positive for HIV after 27 years of service[257]—the facts as related in the opinion suggest that the National Guard discharged him solely because of his HIV status.[258] The Personnel Commission concluded that federal law preempted state law on the issue, but the trial court reversed.[259] It held that Congress had not fully occupied the field of regulating state national guard units because no "'federal statute expressly or implicitly informs the state that once it opts into inclusion into the federal national guard it loses its option to decline to adopt regulations contrary to its own policies.'"[260] The Court of Appeals reversed the trial court.[261] It noted that, in considering the issue of field preemption—whether congressional regulation was pervasive and occurred in an area where national interest predominates—the trial court had failed to consider the various relevant clauses in the Constitution.[262] Article I, Section 8 expressly grants to Congress

252. *Id.*

253. 547 U.S. 47 (2006); *see* Untitled Document, *supra* note 250.

254. Act of Mar. 2, 1982, ch. 112, sec. 3, § 21.35, 1981 Wis. Sess. Laws 902. (codifed as amended at Wis. Stat. § 21.35).

255. 505 N.W.2d 793 (Wis. Ct. App. 1993).

256. *Id.* at 795.

257. *Id.* at 794. The Wisconsin Court of Appeals had already concluded that "persons with AIDS," presumably including persons who have tested positive for HIV but do not yet have symptoms of AIDS, have a handicap for purposes of the WFEA under Section 111.32 (8) of the Wisconsin Statutes. *Id.* at 795 n.4 (citing Racine Unified Sch. Dist. v. Labor and Indus. Review Comm'n, 476 N.W.2d 707, 719 (Wis. Ct. App. 1991)).

258. *See id.* at 795.

259. *Id.* at 796.

260. *Id.* (quoting the trial court).

261. *Id.* at 794.

262. *Id.* at 796.

the power to regulate the various branches of the military, including control and discipline of the Militia.[263] After analyzing these clauses and the history of Congressional regulation of Militias under them,[264] the circuit court concluded that federal regulations governing the National Guard clearly preempt WFEA.[265] It reached the same conclusion as a result of its review of the Wisconsin Constitution and relevant statutes.[266]

The legal issue is moot insofar as federal preemption settles it, but the *Hazelton* decision remains puzzling in that it makes no reference to the fact that sexual orientation is a protected category, not only in the WFEA, but in the statute creating the state Department of Military Affairs, Chapter 21.[267] Perhaps no one considers the point worth making. Even during a comprehensive update of Chapter 21 in 2003, the legislature chose not to remove sexual orientation as a protected category from the nondiscrimination provision.[268] If the *Hazelton* decision seems fairly obvious, however, another Wisconsin Court of Appeals opinion involving Chapter 112 from the same period has invited renewed challenge.

D. *Phillips v. Wisconsin Personnel Commission*

On its face, the plaintiff's claim in *Phillips v. Wisconsin Personnel Commission*[269] seems quite logical: Chapter 112 added "sexual orientation" to the list of categories on the basis of which the state may not discriminate in employment.[270] The WFEA includes "to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership" in its definition of "discriminatory actions prohibited."[271] Therefore, the Department of Employee Trust Funds (DETF), which administers benefits for Wisconsin state employees, violated state law when it refused to add Phillips' same-sex partner to her employee health insurance coverage.[272] The Wisconsin Court of Appeals upheld the administrative agencies and the trial court in holding that no discrimination had occurred.[273] The case was not appealed to the Wisconsin Supreme Court.

---

263. *Id.* at 798-99 (citing U.S. CONST., art I, § 8).

264. *Id.* at 798-800 (citations omitted).

265. *Id.* at 800.

266. *Id.*

267. WIS. STAT. § 21.35 (2005-06).

268. *See* 2003 Wis. Act 69, sec. 14 § 21.35, 2003 Wis. Sess. Laws 533.

269. 482 N.W.2d 121 (Wis. Ct. App. 1992).

270. Act of Mar. 2, 1982, ch. 112, sec. 22, § 230.01(2), 1981 Wis. Sess. Laws 907.

271. WIS. STAT. § 111.322.

272. 482 N.W.2d at 123. Phillips also claimed discrimination on the basis of marital status and gender, and a violation of equal protection of the laws under the Wisconsin state constitution. *Id.*

273. *Id.*

The Court of Appeals articulated its analysis in the first footnote of the opinion. There it stated:

> Phillips's inability to marry Tommerup is thus the key to her argument. But whether to allow or disallow same-sex marriages—or even whether to allow extension of state employee health insurance benefits to companions of unmarried state employees of whatever gender or sexual orientation—is a legislative decision, not one for the courts.[274]

The opinion recurs repeatedly to the claim that the real issue is marriage, even asserting that the rule defining "dependents" for purposes of state employee benefits did not classify by sexual orientation at all.[275]

This assertion is particularly illogical given that the court also deduced the absence of gender discrimination in the policy from the fact that it treated equally the only males to whom Phillips was similarly situated: "those with male 'spousal equivalents.'"[276] Thus, when the imperative was to avoid the claim of gender discrimination, the court made Phillips' sexual orientation the operative factor. She suffered no discrimination because, as a lesbian, she received equal treatment to gay men.[277] But this was an ad hoc exception to the larger imperative of denying Phillips' other claims in part by asserting that the policy in question did not classify by sexual orientation.

The court relied on equally twisted logic at other points in the opinion. Distinguishing between permissible disparate treatment and discriminatory disparate treatment, the court again resorted to the question of what it means to be "similarly situated."

> For good or ill, the fact is that under current Wisconsin law Phillips, unlike a spouse, has no legal relationship to Tommerup. The law imposes no mutual duty of general support, and no responsibility for provision of medical care, on unmarried couples of any gender, as it does on married persons.[278]

In other words, Phillips was not "similarly situated" for purposes of equal protection analysis to persons who enjoyed the rights and responsibilities of marriage because the law forbade her to undertake those rights and responsibilities with the person of her choice. Apparently, the court felt no responsibility to ascertain why the State would not allow Phillips to impose on herself a mutual duty of general support with her partner. Having asserted that

274. *Id.* at 124 n.1.
275. *Id.* at 126-27.
276. *Id.* at 128.
277. *Id.*
278. *Id.* at 126.

the real issue was the State's failure to recognize same-sex marriages, the court declared itself powerless to grant Phillips the relief she sought because the definition of marriage was solely a matter for the legislature, "as the policymaking branch of government."[279]

With *Helgeland v. Department of Employee Trust Funds*,[280] the Wisconsin affiliate of the American Civil Liberties Union (ACLU-WI), which helped Phillips with her suit,[281] decided to try again. This time the plaintiffs argued that same-sex couples voluntarily take on the obligation of mutual responsibility without appropriate benefits.[282] The issue in *Helgeland* is the same as in *Phillips*—the inability of lesbian and gay public employees in Wisconsin to include their spouses in their employee benefits.[283] The *Helgeland* complaint addresses the assertion in *Phillips*, that same-sex couples are not similarly situated to married couples because the law imposes no obligation of mutual responsibility on the partners.[284] It argues that same-sex couples have voluntarily undertaken such responsibilities without the benefit of corresponding legal rights.[285]

Legally, *Helgeland* differs from *Phillips* in asserting only a violation of the state constitution's equal protection clause, with no reference to state statutes prohibiting sexual orientation discrimination.[286] *Phillips*, by contrast, grew primarily out of a statutory claim, adding constitutional arguments only at the level of judicial review, after two administrative steps.[287] *Phillips* is central to the debate in *Helgeland*, however. The State of Wisconsin argued in *Helgeland* that the court should grant judgment on the pleadings to the defendant because no material facts were at issue and the plaintiffs' complaint failed to state a valid legal claim. Therefore, *Phillips* controlled, completely settling the matter.[288] Oddly, then, the *Helgeland* complaint constitutes the effort to rely on the state constitutional guarantee of equal protection of the laws to avoid the inability of Chapter 112 to secure benefits for the same-sex partners of state employees.

---

279. *Id.* at 124 n.1.

280. Helgeland v. Dep't of Employee Trust Funds, No. 05-CV-1265 (Dane County Cir., 2005).

281. *Phillips*, 482 N.W.2d at 124 n.1.

282. Amended Complaint at 29-30, *Helgeland*, No. 05-CV-1265, *available at* http://etf.wi.gov/news/helgeland_amended_complaint.pdf.

283. *Id.* at 30.

284. Amended Summons at 29, *Helgeland*, No. 05-CV-1265.

285. Amended Complaint, *supra* note 291, at 29.

286. *Id. See also* Helgeland v. Wisconsin Municipalities, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208 (interlocutory appeal by would-be intervenor-defendants but for trial court's decision holding they lack standing to serve as defendants).

287. Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 128 n.10 (Wis. Ct. App. 1992).

288. Defendants' Memorandum in Support of Motion for Judgment on the Pleadings at 3-4, *Helgeland*, No. 05-CV-1265.

CONCLUSION

As *Helgeland* demonstrates, the legal implications of Chapter 112 remain in dispute, nearly twenty-five years after its enactment. One cannot envy the judges who must now decide which controls, the equal protection clause of the Wisconsin Constitution,[289] or the prohibition on recognition of same-sex marriages.[290] The constitutional amendment banning same-sex marriage might seem irrelevant to *Helgeland's* issue of benefits for the same-sex partners of public employees in the state. However, a very similar issue has arisen already in Michigan, which added an anti-marriage amendment to its state constitution in 2004.[291]

In the Michigan case, municipalities had already agreed to provide benefits to the same-sex partners of their employees, but feared that the anti-marriage amendment prohibited such action.[292] The trial court held that the provision of benefits is a function of the employment contract, but not part of the statutory rights of marriage, making the anti-marriage amendment irrelevant.[293] The appeals court reversed, holding that the eligibility determination for employee benefits necessarily depended on the claim to a quasi-marital relationship, thus violating the amendment.[294]

The Michigan court explained that it faced an issue of first impression, noting the similarities and differences between the amendment in its state and comparable amendments in other states, including Wisconsin.[295] But it concluded that comparable amendments from other states provided no help, since judges in those other states had not had occasion to apply them.[296] Thus,

289. WIS. CONST. art. I, § 1 ("All people are born equally free and independent, and have certain inherent rights: among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.").

290. WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."), *available at* http://www.legis.state.wi.us/statutes/wisconst.pdf.

291. Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139 (Mich. Ct. App. 2007).

292. *See id.* at 152.

293. *Id.* at 154-55. *See also* Nat'l Pride at Work, Inc. v. Granholm (*Granholm*), No. 05-368-CZ, 2005 WL 3048040, at *4 (Mich. Cir. Ct. Sept. 27, 2005), *rev'd sub nom.* Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139 (Mich. Ct. App. 2007).

294. *Nat'l Pride at Work, Inc.*, 732 N.W.2d at 159 ("The operative language of the amendment plainly precludes the extension of benefits related to an employment contract if the benefits are conditioned on or provided because of an *agreement recognized as a marriage or similar union*").

295. *Id.* at 151 n.3.

296. *Id.* at 151 ("[G]uidance from the decisions of other jurisdictions is unavailing.").

the Michigan appeals court relied on that state's own longstanding principles of constitutional interpretation.[297]

Perhaps the greatest irony in this situation is that conservatives who complain when "activist judges" defend the legal equality of lesbians and gay men[298] have now written their paradoxical beliefs[299] about lesbian and gay civil rights into law. The result is that they have handed the issue to judges for resolution. So far, the decisions of the trial and appeals courts in Michigan suggest that, when majorities enact contradictory legislation, they also get contradictory judicial decisions.[300] On the other hand, the former Wisconsin Attorney General, Democrat Peg Lautenschlager, has issued an admirably lawyerly opinion explaining why she believes that the new anti-marriage amendment in Wisconsin does not prohibit the domestic partnership registry that has existed for many years in Madison, Wisconsin.[301] Her Republican replacement, J.B. Van Hollen, agrees.[302]

Yet, the legal issues in the Michigan case and the Lautenschlager opinion are different. General Lautenschlager's opinion addresses whether the anti-marriage amendment precludes municipal domestic partnership registries,[303] while *Helgeland* claims that the failure to provide benefits to public employees' same-sex partners violates the equal protection of the laws.[304] Lautenschlager was careful at the end of her letter to note this difference.[305] The point remains that insistence on discriminating among citizens based on their sexual orientation continues to create litigation. How much simpler it would be to apply the rule of equality across the board, instead of creating and trying to justify ad hoc exceptions.

---

297. *Id.* at 156 ("Michigan law recognizes three rules for construing constitutional provisions.").

298. *See, e.g*, Holtzman v. Knott (*In re H.S.H-K.*), 533 N.W.2d 419, 442 (Wis. 1995) (Steinmetz, J., concurring in part, dissenting in part); JAMES DOBSON, MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS WAR 80 (2004) (quoting Gerard V. Bradley, law professor at Notre Dame, criticizing "willful judges"); Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006, at A1 ("[A]nother activist court issue[d] a ruling that raises doubt about the institution of marriage. . . . [We believe that marriage is] 'a union between a man and a woman . . . and it must be defended.'") (quoting remarks made by George Bush while campaigning in Iowa).

299. *See supra* note 7 and accompanying text.

300. *See supra* notes 293-94.

301. Advisory Letter from Peggy A. Lautenschlager, Attorney General, State of Wisconsin, to Michael P. May, City Attorney, City of Madison (Dec. 27, 2006) (on file with the Wisconsin Department of Justice), *available at* http://www.doj.state.wi.us/ag/opinions/2006_12_27%20may.pdf.

302. Mark Pitsch, *Attorney General's Role in Ethics Cases*, WIS. STATE J., Jan. 13, 2007, at A1.

303. Advisory Letter from Peggy A. Lautenschlager to Michael P. May, *supra* note 301, at 6.

304. *See supra* notes 280-88 and accompanying text.

305. Advisory Letter from Peggy A. Lautenschlager to Michael P. May, *supra* note 301, at 6.

Politically, having the nation's first legislation prohibiting sexual-orientation discrimination did not prevent the Wisconsin legislature from proposing an amendment to the state constitution to prohibit same-sex marriages.[306] The struggle over the meaning of lesbian and gay civil rights that the legislature began with the prohibition on affirmative action in Chapter 112 continues. The nation's first legislation prohibiting discrimination on the basis of sexual orientation was just another chapter in the Wisconsin Progressive tradition, but it was a major milestone in the history of lesbian and gay civil rights and deserves to be remembered as such.

306. *See* YANG, *supra* note 7, at 14; Stacy Forster, *Same-Sex Marriage Goes to Voters: Measure to Define Marriage as Being Between Man, Woman will be on Nov. 7 Ballot*, MILW. JOURNAL-SENTINEL, Mar. 1, 2006, at A1.