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From Toleration to Supremacy:
A Review of Recent Supreme Court Decisions

Mr. Mark Stern, Esq., presented the following paper on January 20, 2014, at the 2014 LCA Conference in Fort Wayne, Indiana. We are publishing Part I of the paper in this issue; Part II will be published in the May 2014 issue of the Clarion.

Introduction

The title of this paper references nineteenth century Lutheran theologian Charles Porterfield Krauth, who wrote that error progresses in three stages: first, to ask for toleration, second to assert equal rights, and lastly to assert supremacy.[1] Recent Supreme Court and lower court decisions, and legislation, show how rapidly error is advancing. I should note that this paper is intended for a lay audience, so it will not address every legal nuance that might be covered in a law review type article. Please bear with me.

As Lutherans, we understand the distinction between Law and Gospel. God's Law does not save us. It is "a curb, to contain great outbreaks of sin in the world… a mirror… by which the Holy Spirit reveals our sin to us, and … a rule, or guide, by which we know what pleases God." [2] Civil law, good or bad, does not save us either; its primary purpose is the first use, to contain man's natural wickedness. We also distinguish between God's left hand kingdom and his right.

"The quote, '*everything not forbidden is compulsory*,' aptly summarizes the mindset of many. "

Secular society, however, does not make this distinction. At a time when our society's social mores more closely tracked the Judeo-Christian tradition, civil law also served, in part, the second use of the Law – a mirror of what society viewed as acceptable and unacceptable conduct. Over the past century, however, civil society began to drift away from its religious moorings, and those with a more pluralistic view sought to liberalize the law in a variety of areas. These ranged from those with which we might sympathize, such as repeal of the great Progressive achievement of Prohibition – to repeal of pietist "blue laws" – to things such as no-fault divorce, the legalization of abortion, and the decriminalization of sodomy. That was the toleration phase.

But as Professor Krauth observed, toleration only lasts for a little while. The quote, "everything not forbidden is compulsory," aptly summarizes the mindset of many. Today, it is not enough that anyone who wants it can purchase birth control; rather, concepts of "rights" and "equality" are read to require that people must be able to force their employers to buy it for them. It is not enough that abortion is legal; the government must fund it.

Some inconsistencies of modern progressive legal thought are almost comical. We are told that an expectant mother has a right to privacy that guarantees partial birth abortion on demand for the full nine months. Yet while she drives to the abortion clinic with her bumper sticker telling the government to "keep your laws off my body," the coercive utopians want her pulled over for not wearing her seat belt, and woe to her if she exercises her "choice" to stop at the drive-through for a large sugary drink or some french fries cooked in trans fat.

I want to be very clear that I am not in any way advocating that we should, or even could, entirely conform the strictures of the civil law to what God requires in His Law. That would be contrary to our confessions about free will and good works, for example in Articles XVIII (Of Free Will) and XX (Of Good Works) of the Augsburg Confession. And of course, none of us can comply with God's Law anyway. But the problem is that the world, and in particular the modern secular left, does not and cannot understand Christian liberty.

Indeed, today's self-esteem driven society cannot accept the saying, attributed to French philosopher Voltaire, that "I disapprove of what you say, but I will defend to the death your right to say it." Silence is not construed as consent; failure to affirm is viewed as outright hostility. No less an authority than the United States Supreme Court has now held that a law, that did nothing more than define marriage consistently with what is probably still in your dictionary, had "the purpose and effect to disparage and injure" homosexuals.[3]

Even five years ago, how many of us would have believed that the Supreme Court would rule, in the view of five justices, that there is "no legitimate purpose" for the government to define marriage as the union of one man and one woman? Can there be any doubt, for those of us who sup-

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port traditional marriage, that the stage of "supremacy" of our opponents is upon us?

The Legal Background Prior to 1990

The American legal system is based upon English common law, which developed from tradition and precedent over centuries of history. Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.[4] Until 1961, all 50 states had laws prohibiting sodomy.[5] That year, Illinois became the first state to repeal its sodomy law, not specifically, but as part of a complete overhaul of its criminal code. Most existing criminal statutes were repealed *en masse* when Illinois adopted the Model Penal Code. That Code, drafted by the American Law Institute,[6] decriminalized most adult, consensual, private sexual conduct[7] (although not prostitution). Many other states also adopted it in some form.

No one believes that in colonial times, in 1961, or at any point in American history, there was a vast network of secret police somehow enforcing the sodomy laws that were on the books. Sodomy prosecutions were almost nonexistent in modern times even in states with such laws.[8] The problem here is that activists were not content with tolerance, and immediately began pushing the pendulum toward what they argued was equality.

The first significant legal precedent relating to same sex marriage, *Baker v. Nelson*,[9] arose from the State of Minnesota. In May 1970, two men applied for a marriage license in Minneapolis, which was denied because they were of the same sex.[10] They then sued, arguing that requiring the parties to a marriage to be of opposite sex violated various federal constitutional provisions. In October 1971, the Minnesota Supreme Court unanimously rejected these arguments.[11] The plaintiffs then appealed to the U.S. Supreme Court, which in a one sentence order issued in October 1972, dismissed the case for "want of a substantial federal question."[12]

Ten years later, in August 1982, Michael Hardwick was observed committing homosexual sodomy and was arrested under Georgia's sodomy law. Notably, the district attorney did not file formal criminal charges against Hardwick, and the evidence showed that there had been no sodomy prosecutions in Georgia in several decades at least.[13] Nonetheless, Hardwick sought a declaratory judgment that the law violated the U.S. Constitution. A lower federal court held that it did, but in June 1986, in a 5 to 4 decision in *Bowers v. Hardwick*, the U.S. Supreme Court held that it did not.[14]

Hawaii and the Passage of DOMA

In December 1990, three homosexual couples applied for, and were denied, marriage licenses in the State of Hawaii. They sued, claiming discrimination, but the trial court dismissed the case, *Baehr v. Lewin*. However, in May 1993, the Hawaii Supreme Court reinstated it, in a 4 to 1 decision.[15] The Hawaii Supreme Court did not expressly order that same sex marriage be permitted. However, it sent the case back for review under a standard of strict scrutiny. This meant the State of Hawaii had to meet a high burden to prove why marriage should be between a man and a woman, and upon retrial, the plaintiffs won. Ultimately, the Hawaii courts did exercise some judicial restraint, and the lower court stayed its decision to allow the legislative process to govern. In 1998, the state's voters passed, with over 69% of the vote, Amendment 2, a constitutional amendment that allowed the legislature, rather than the courts, to define marriage.[16] However, the amendment did not explicitly prohibit same sex marriage. Marriage remained the union of one man and one woman in Hawaii until late 2013, when the legislature changed the law to allow same sex marriage.

The *Baehr* case really launched national awareness of same sex marriage as a potential issue, and led directly to the passage of the Defense of Marriage Act. At that time, the concern raised was that if one rogue state court were to hold that same sex marriages must be allowed, homosexual couples from other states would seek to be married there, then return to their home states and claim to be validly married. As dissenting Justice Walter Meheula Heen warned, "This court should not manufacture a civil right which is unsupported by any precedent, and whose legal incidents—the entitlement to those statutory benefits—will reach beyond the right to enter into a legal marriage and overturn long standing public policy encompassing other areas of public concern. This decision will have far-reaching and grave repercussions on the finances and policies of the governments and industry of this state and all the other states in the country."[17]

Initially, I think most people viewed the Hawaii situation as an outlier, an activist court similar to the California Supreme Court in the 1980s, where voters eventually removed left wing judges. Even in Hawaii, nearly 70% of the electorate voted to overturn the court's action.

But to avoid a situation where one state could dictate policy for the other 49 states and the federal government, in 1996 Congress passed the Defense of Marriage Act with

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broad bipartisan support.[18] DOMA, House Resolution 3396, passed the U.S. House by a vote of 342-67. Yes votes came from 118 of the 198 Democrats, including Richard Durbin, Charles Schumer, and current Minority Whip Steny Hoyer. The Senate passed it by a vote of 85-14, with yes votes from the likes of Joe Biden, Patrick Leahy and then Minority Leader Tom Daschle. It was signed into law by President Bill Clinton on September 21, 1996, just 11 days after passage by Congress.[19]

DOMA contained only two provisions. Section 2 says that no state is required to recognize a same sex marriage from another state. Section 3, which has now been struck down by the U.S. Supreme Court, states simply, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife,[20] and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." DOMA did not ban same sex marriage, nor did it place any limits on the ability of states to define marriage in whatever way they saw fit; indeed, it expressly empowered states to follow their own definitions. What DOMA did do was establish a uniform definition of marriage for purposes of federal law. Many people may have assumed that DOMA would settle the marriage issue. They were wrong.

From DOMA to Windsor

In 2003, in *Lawrence v. Texas*, the Supreme Court struck down Texas' law banning homosexual sodomy, in the process overruling *Bowers v. Hardwick*, its 1986 decision to the contrary.[21] The Court ruled that prohibiting such private conduct "is an invitation… to discrimination" and "demeans the lives of homosexual persons." [22] In dissent, Justice Scalia warned, "This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[23]

> ***"Currently, sixteen states and the District of Columbia permit same sex marriage..."***

Justice Scalia was proved right less than five months later, when in a 4 to 3 decision the Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*,[24] found a constitutional right to same sex marriage. This launched strenuous campaigns to amend state constitutions to maintain traditional marriage, on one hand, and to expand the reach of same sex marriage, either by lawsuit or by legislation, on the other. Currently, sixteen states[25] and the District of Columbia permit same sex marriage, with the matter unresolved in New Mexico. Twenty-nine states have constitutional provisions defining marriage as the union of one man and one woman. The remaining four states – Indiana, Pennsylvania, West Virginia and Wyoming – define marriage by statute.

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Even though some progress was made at the 2013 Synodical Convention, much work remains to be done to return our Synod to the Church of our Grandfathers and Reformation fathers! The Lutheran Concerns Association is dedicated to the effort to reclaim our full Lutheran heritage for the LCMS, but we cannot achieve this long-range goal alone.

We need your continued help so that a truly Lutheran church body will be there for our grandchildren and great-grandchildren. In some small way we at the LCA desire to be helpful in preserving our faith, under the Lord's blessing, so that the treasure of pure doctrine and right practice will be known for generations to come. Would you prayerfully consider assisting us in this on-going effort with your tax deductible donations?

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The California Supreme Court was the second, after Massachusetts, to find a right to same sex marriage, which it did on May 15, 2008, by a vote of 4 to 3 (*In re Marriage Cases*).[26] Subsequently, voters passed Proposition 8 by 52.2% to 47.8%, amending the California constitution to provide that "only marriage between a man and a woman is valid or recognized in California."[27] Many pre-election polls showed Proposition 8 losing. But it passed, ironically due in large part to the election of Barack Obama. Enthusiasm for Obama, who opposed the measure, caused historically high turnout among African-American voters, who supported traditional marriage in greater numbers than other ethnic groups and carried Proposition 8 to a win even in Los Angeles County.[28] Proposition 8 was upheld by the California Supreme Court in May 2009, in *Strauss v. Horton*.[29] Following that decision, same sex marriage advocates filed suit in U.S. District Court to challenge the constitutional provision, and in August 2010, that Court struck it down (*Perry v. Schwarzenegger*), setting the stage for an appeal by Proposition 8 proponents that ended up in the U.S. Supreme Court.[30]

U.S. v Windsor

Meanwhile, the *Windsor* case began in 2009, when the survivor of two New York women who the court described as "married in a lawful ceremony in Ontario, Canada" claimed federal estate tax exemption as a "surviving spouse." [31] Federal tax law permits a complete exemption from estate tax for any bequest between spouses, and Windsor also wanted this exemption.

The IRS initially denied the exemption based on the definition of marriage contained in DOMA, but after Windsor filed her lawsuit, President Obama determined that he would no longer defend DOMA in court. Nonetheless, he continued to enforce the law, and the IRS refused to grant Windsor the tax refund she sought. As a result, the U.S.

District Court ruled in favor of Windsor, held that the definition of marriage in section 3 of DOMA was unconstitutional, and ordered the IRS to refund the tax paid. This decision was ultimately affirmed, and in the process the U.S. Supreme Court struck down Section 3 of DOMA, the provision defining marriage as the union of one man and one woman for purposes of federal law.

Windsor was a 5 to 4 decision,[32] splitting the court along liberal and conservative lines, with Justice Kennedy providing the swing vote and writing the majority opinion. Parts of the opinion are almost a parody of touchy-feely jurisprudence. Acknowledging that until recent years marriage between a man and a woman was universally recognized, Kennedy wrote, "For others, however, came the beginnings of a new perspective, a new insight … New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood." [33]

What you may not know is that Windsor and Speyer, the decedent, were not actually married. Not just because of DOMA, but because New York did not permit same sex marriage in 2009, when Speyer died. The lower court ignored this fact, and had no problem deeming the marriage valid because, it said, "we predict that New York… would nevertheless" have recognized the women as "married." [34] Justice Kennedy glossed over this issue, simply stating in conclusory fashion that the two women "were married in a lawful ceremony in Ontario, Canada." [35] This is not quite consistent with Justice Kennedy's statement later in the opinion attacking DOMA because it "departs from this history and tradition of reliance on state laws to define marriage." [36]

What you also may not know is that in some respects, the litigation was a sham, because there were not two adverse parties. Windsor won at the trial court level, and the adverse party there, the U.S. government, didn't challenge the ruling. Justice Scalia argued in dissent that the case should have stopped there – both parties got what they wanted, so why did the litigation continue? He wrote, "The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States." [37] Remember the caption of the case, listing the parties as *U.S. v. Windsor*. If neither the U.S. nor Windsor objected to the trial court's ruling, why did the case continue? [38]

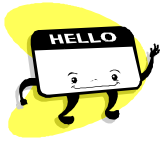
"It is the duty of the executive – the governor or the attorney general – to see that the laws are faithfully enforced. The problem is that if an executive doesn't like a law...he can refuse to defend it, and a single plaintiff and a single judge can effectively repeal a law passed...by the people."

The *Windsor* holding has been widely publicized. The Supreme Court majority first couched its decision in the language of equality, ruling that under DOMA, "same-sex married couples have their lives burdened" and can't obtain benefits they would have otherwise received.[39] It made this argument notwithstanding the fact that they didn't receive such benefits before DOMA was enacted (no states then recognized same sex marriage), and even though there are many other areas – for example, sham marriages for immigration purposes – where marriages are recognized by states but not the federal government.[40] This argument is also circular, because it first assumes that a same sex marriage is a marriage, in order to assert that those in such a relationship should be entitled to the status of marriage. There are many other situations where two people live together for many years, love one another, share financial burdens, own property together, and even have a familial relationship. For example, I knew two elderly sisters who were members of our congregation and met all these criteria. They were wonderful people, and their love and support for one another should be admired. But their relationship, though it may have shared certain outward characteristics of a marriage, was not a marriage, and the fact that they did not receive certain tax benefits does not mean they suffered unconstitutional discrimination.

Beyond the equality arguments, the *Windsor* Court also laid the groundwork for the "supremacy" stage, finding that DOMA "demeans" (that same word from *Lawrence*) same sex couples, "humiliates" their children, and was motivated by "a desire to harm a politically unpopular group." [41] Think about that for a moment – laws banning polygamy, for example, surely have the same effect on those who choose to engage in that practice. *Brown v. Buhman*,[42]

Two Conferences in Bloomington, MN

The Association of Confessional Lutherans (ACL) and the Confessional Lutherans for Christ's Commission (CLCC) will hold back-to-back conferences at the Ramada Mall of America in Bloomington, MN, on April 29—May 02, 2014.



Free Lutheran Conference on **Building Up the Body of Christ**: April 29-30, 2014, Bloomington, MN. Featuring Rev. Rob Jarvis, Rev. Jonathan Fisk and Rev. David Kind. For more information call 320-763-5897 or visit www.theclcc.org. Sponsored by the CLCC.

A Congress on the Lutheran Confessions - **Cousins in Christ: the WELS, the ELS and the LCMS**. April 30 - May 02, 2014, Bloomington, MN. Theologians, professors and pastors from each of the three synods will explore the issues that divide. Watch www.lutheracademy.com for the list of speakers. Call Rev. John Fehrmann 612-940-1927 or 763-561-6470 (Wendy). Send registrations to theacl@theacl.org. The Congress is co-sponsored by the ACL and the Luther Academy.

decided in December 2013 just one week before this article was written, struck down a portion of Utah's law banning polygamy in part in reliance upon *Windsor*. More to the point, how long will the laws of the remaining states that maintain natural marriage withstand the accusation that they "demean" same-sex couples? *Windsor* didn't address DOMA Section 2, which maintains the definition of marriage consistent with what Justice Kennedy described as "within the authority and realm of the separate states," [43] but I predict that it too will fall within five years.

Hollingsworth v. Perry

On the same day *Windsor* was decided, the second gay marriage case before the Supreme Court, *Hollingsworth v. Perry*, was also decided. This case is in some ways more interesting from a technical standpoint, and perhaps even more dangerous to the rule of law.

What you may not know about the *Hollingsworth* case is that the typical liberal-conservative split did not occur. Conservatives Roberts and Scalia joined liberals Ginsburg, Breyer and Kagan in the majority. On the other side Justice Kennedy wrote the dissent, joined by conservatives Thomas and Alito, and Obama appointee Sotomayor. Why?

The basic rationale of *Windsor* is outlined above – the Supreme Court held that the traditional definition of marriage was discriminatory. We may disagree with the outcome, but the result is at least fairly easy to understand. The *Hollingsworth* case is more complex, and requires a brief detour into the world of legal technicalities to study the concept of standing, which is fundamental to explaining what happened in *Hollingsworth*.

Not just anyone can file a lawsuit. To be a plaintiff, one must have standing, which usually means (1) an injury (economic or otherwise), (2) caused by the defendant, (3) that the court can fix. Standing can be an incredibly complicated issue, with books and Supreme Court cases devoted to the issue.

To vastly oversimplify, think of it as a "no-tattling" rule for the courts. They don't want to hear disputes brought by parties who don't have a direct interest in the case. Say on the playground, Donny punches Paul, and Tommy goes to the teacher to tattle on them. Paul has standing to sue Donny; he's been punched. Donny certainly cares what happens, because he may be punished. But Tommy has not been punched, and whatever happens to Donny won't affect Tommy. Tommy does not have standing in the dispute between Donny and Paul, and the teacher doesn't care if Tommy thinks Donny's punishment is too harsh, or too lenient. It's none of his business, at least as far as the teacher – or the court – is concerned. And, once the punishment is handed out to Donny and accepted, no one has any business continuing to argue about it.

Recall that Proposition 8 was challenged in California state court, but the California Supreme Court upheld its validity. At that point, opponents filed suit in U.S. District Court in San Francisco. The Governor of California and the California Attorney General refused to defend the statute, so the original proponents of the Proposition 8 ballot initiative sought to intervene to defend the law, and were granted leave to do so. Dennis Hollingsworth, the appealing party, was a California state senator and member of the ballot initiative committee.

The U.S. District judge ruled that Proposition 8 violated the U.S. Constitution, and the Court of Appeals affirmed it in a 2 to 1 decision. The case then was appealed to the U.S. Supreme Court.

The majority opinion in *Hollingsworth*, written by Chief Justice Roberts, found that once the State of California refused to defend its own law, the case should have been over, similar to Justice Scalia's argument in dissent in the *Windsor* case. It held that the initiative proponents lacked standing, ruling that "we have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." [44] The basis of this argument is that it is the state executive

Rev. Dr. Paul A. Zimmerman

June 25, 1918 - January 28, 2014

Resolute, Unwavering, Unimpeachable, a True Servant and a Man of God

The above words describe a modern hero of the One, True, Christian faith, Rev. Dr. Paul A. Zimmerman, at the age of 95 being called to victory in his Lord, Jesus Christ, on January 28, 2014.

Rev. Dr. Zimmerman served as president of Concordia University - Chicago, Concordia University - Ann Arbor, Concordia University - Seward and Chairman of President J.A.O. Preus' Fact Finding Committee of 1970 that investigated doctrine taught at Concordia Seminary, St. Louis. That resulted in the 1972 *REPORT OF THE SYNODICAL PRESIDENT to The Lutheran Church—Missouri Synod in Compliance with Resolution 2-28 of the 49th Regular Convention of The Synod, held at Milwaukee, Wisconsin July 9-16, 1971*, which declared certain positions to be false doctrine not to be tolerated in the Church of God.

For such a time as this God also gave our beloved Synod such giants as the likes of Rev. Dr. J. A. O. Preus, Rev. Dr. Karl Barth, Rev. Dr. Elmer Foelber, Rev. Dr. Armin Moellering, Rev. Dr. Paul Streufert, Rev. Ewald J. Otto and the "Faithful Five" professors at Concordia St. Louis: Rev. Drs. Martin Scharlemann, Robert Preus, Richard Klann, Lawrence Wunderlich and Ralph Bohlmann who held fast to the faith once delivered to the saints.

As one who served on the Concordia Seminary Board of Control 1971-83, the editor witnessed their courageous stand for the truth of God's Holy Word. It is also noted that it was January 20, 1974, that the infamous walk out of the faculty majority occurred at Concordia St. Louis. Today, there is clearly a need in our Synod again for stalwart men of God like those named.

officers who are charged with enforcing and defending state statutes, not private citizens. There is some merit to this argument; presumably the executive has both the resources and the incentive to mount a proper defense. Allowing private parties to defend constitutionality presents a risk that they will not do a good job, or even that they may collude in the outcome.

The dissent, however, pointed out that California law and the California Supreme Court both hold that initiative proponents do have standing. Justice Kennedy (who at least was consistent in finding standing in both cases) wrote that "the State Supreme Court's definition of proponent's powers is binding on this Court." [45] Further, "the very object of the initiative system is to establish a lawmaking process that does not depend upon state officials." [46] "Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure." [47] California state law gives the proponents of a ballot initiative official status and the right to defend it, so, in my view, the Court erred in denying them standing in this case. "

The end result of the *Hollingsworth* holding is in my view very dangerous for the American legal system. It is the duty of the executive – the governor or the attorney general – to see that the laws are faithfully enforced. The problem is that if an executive doesn't like a law, as in *Hollingsworth*, he can refuse to defend it, and a single plaintiff and a single judge can effectively repeal a law passed by the legislature or by the people.

Actually, the situation is even worse than that. Consider the present Obamacare situation. It is quite clear that the employer mandate/tax is effective January 1, 2014. Yet the President says he won't enforce it. Can anyone sue? The answer, probably, is no, because no one has standing. No one is specifically "injured" here by a law **not** being enforced. A party who is being taxed can challenge the validity of the tax he is required to pay, but no one has standing, generally, to contest someone else's taxes – or lack thereof – and argue that the other person should be paying more.

It is easy to see what problems could ensue. What if a future Republican president doesn't like the estate tax? Congress won't repeal it. Could he simply grant a "waiver" to all estates, and refuse to collect the tax? The answer may be yes, because no one would have standing to challenge such action. The ultimate constitutional answer for failure to perform official duties is impeachment, but that is an extreme remedy and one difficult and unlikely to be implemented. Our constitutional system cannot be maintained in the face of a public willing to tolerate widespread lawlessness by their elected officials.

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Note from Mr. Stern: Readers should be aware that this area of law continues to change with incredible rapidity. The Utah case that partially invalidated Utah's polygamy ban was decided on December 13, 2013. After this article was originally prepared for publication in mid-December 2013, several other federal judges have ruled on marriage redefinition. On December 20, 2013, a different federal judge in Utah held unconstitutional Utah's definition of marriage as between one man and one woman, in *Kitchen v. Herbert* (Case No. 2:11-cv-00217-RJS (D. Utah), available at http://www.utd.uscourts.gov/documents/213cv217_memdec.pdf). ; On December 23, 2013, a judge ordered Ohio to recognize out-of-state same sex marriage in connection with the issuance of death certificates, in *Obergefell v. Wymyslo* (Case No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio)). On January 14, 2014, a judge invalidated Oklahoma's constitutional and statutory definition of marriage as one man and one woman, in *Bishop v. U.S. ex rel. Holder* (Case No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla.)). This list is current as of January 31, 2014. All of the cases listed above are trial court decisions and are currently being appealed to higher courts by the state authorities.

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1 See, e.g., http://threehierarchies.blogspot.com/2005/08/charles-porterfield-krauth-on-progress.html.
2 Concordia, The Lutheran Confessions, McCain, Paul Timothy, Baker, Robert Cleveland, Veith, Gene Edward and Engelbrecht, Edward Andrew, eds., Concordia Publishing House, St. Louis, 2005, p. 522.
3 *U.S. v. Windsor*, 570 U.S. _____ (2013) (slip opinion at p. 25), available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.
4 *Bowers v. Hardwick*, 478 U.S. 186, 192, fn. 5 (1986), available at http://www.law.cornell.edu/supremecourt/text/478/186.
5 *Id.* at 193, fn. 7.
6 Who is the American Law Institute? It describes itself as "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education." Translated, the American Law Institute is an unelected body of lawyers and academics who seek to shape the law as they think it should be. See http://www.ali.org/index.cfm?fuseaction=about.overview.
7 *Id.*
8 Bowers v. Hardwick, *supra* at 199 (Powell, J. concurring).
9 For ease of reference, I use the term "same sex marriage" without quotation marks to describe the issue underlying these cases. This is intended as a descriptive statement of what proponents of this issue think they are creating, and is not intended as a value judgment.
10 I use the term "sex" and not "gender" to refer to male and female persons. Sex is a biological term. The term "gender" is supposedly susceptible to "multiple" genders, see, e.g., http://globalnews.ca/news/1000606/she-he-or-ze-pronouns-can-be-personal-for-students-defying-gender-norms/.
11 *Baker v. Nelson*, 191 N.W.2d 185, 185-6 (Minn. 1971), available at http://www.bc.edu/bc_org/avp/law/st_org/lambda/baker.htm.
12 *Baker v. Nelson*, 409 U.S. 810 (1972).
13 *Bowers v. Hardwick*, *supra* at 199 (Powell, J. concurring).
14 *Id.*
15 *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993), available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/baehr_hi_19930505_decision-hi-supreme-court.pdf.
16 http://en.wikipedia.org/wiki/Hawaii_Constitutional_Amendment_2_(1998).
17 *Baehr v. Lewin*, *supra*.
18 *Windsor*, *supra* (Roberts, C.J., dissenting, slip opinion pp. 1-2).
19 See http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03396:@@@X.
20 Public Law 104-199, available at http://www.gpo.gov/fdsys/pkg/PLAW-104publ199/html/PLAW-104publ199.htm.
21 *Lawrence v. Texas*, 539 U.S. 558 (2003), available at http://supreme.justia.com/cases/federal/us/539/558/case.html.
22 *Id.*, 539 U.S. at 575.
23 *Id.*, 539 U.S. at 601 (Scalia, J. dissenting).

24 *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass 2003), available at http://caselaw.findlaw.com/ma-supreme-judicial-court/1447056.html.
25 California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington.
26 *In re Marriage Cases*, 43 Cal.4th 757 (2008), available at http://www.courts.ca.gov/documents/S147999.pdf.
27 http://en.wikipedia.org/wiki/California_Proposition_8_(2008)
28 See, e.g., http://www.cbsnews.com/news/black-voters-played-role-in-proposition-8/.
29 *Strauss v. Horton*, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009), available at http://www.courts.ca.gov/documents/S168047.pdf.
30 http://en.wikipedia.org/wiki/Perry_v._Schwarzenegger.
31 570 U.S. ___ (slip opinion, p. 1).
32 570 U.S. _____ (2013); available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.
33 *Windsor*, *supra*, slip opinion at p. 14.
34 *Windsor v. U.S.*, No. 12-2335-cv, p. 9 (2nd Cir.), available at http://www.ca2.uscourts.gov/decisions/isysquery/f9399512-2d06-4431-b1c5-488cdf9fd292/6/doc/12-2335_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f9399512-2d06-4431-b1c5-488cdf9fd292/6/hilite/.
35 *Windsor*, *supra*, slip opinion at p. 1.
36 *Id.*, slip opinion at p. 29.
37 *Id.*, slip opinion at p. 5 (Scalia, J. dissenting).
38 The "Bipartisan Legislative Advisory Group," a Congressional committee, did intervene in the case to defend the constitutionality of the statute. However, the Justice Department, as the party appealing, actually filed a brief urging that the lower court decision be affirmed, which as Justice Scalia noted, is unprecedented. *Id.*, slip opinion at p. 4.
39 *Windsor*, *supra*, slip opinion at p. 23.
40 *Id.*, slip opinion at p. 15.
41 *Id.*, slip opinion at pp. 20 and 23.
42 *Brown v. Buhman*, Case No. 2:11-cv-0652-CW, District of Utah, Central Division, available at https://ecf.utd.uscourts.gov/cgi-bin/show_public_doc?211cv0652-78.
43 *Windsor*, *supra*, slip opinion at p. 14.
44 *Hollingsworth v. Perry*, 570 U.S. ____ (2013), slip opinion at p. 17.
45 *Hollingsworth*, *supra*, slip opinion pp. 1-2 (Kennedy, J. dissenting).
46 *Id.*, p. 6.
47 *Id.*, pp. 6-7.

Report from Our Missionary in Papua New Guinea: Rev. Jeffrey Horn

During the past year, *Clarion* readers generously donated $1,610.00 for the missionary work of Rev. Jeffrey Horn in Papua New Guinea. On January 20, 2014, during the Lutheran Concerns Association Conference, Rev. Michael Kumm, chairman of the LCMS Board of Directors, accepted a check on behalf of Rev. Horn. Papua New Guinea is part of an island (shared with two Indonesian provinces) in the tropical Pacific Ocean. Rev. Horn wrote the following report for the *Clarion* on January 21.

"...I am very grateful to the LCA for gathering this offering to support our mission work in Papua New Guinea.

"We have been here for five months now. I have learned Pidgin fairly well. I have begun preaching and offering Bible Studies for pastors and congregations. The new school year starts on February 10, and at that point I will begin my teaching duties here at Timothy Lutheran Seminary.

"These first months have been enlightening. The mission work done by the LCMS in PNG was extensive and it bore good fruit. Our partner church, the Good New Lutheran Church is widespread. It has many pastors and congregations. Yet many of these congregations and pastors face big challenges. Many of the pastors need further education. A pernicious Trinitarian heresy has spread to many congregations. It is much more widespread than I had expected. I will have much preaching and teaching to confront this.

"Also many congregations have no access to the Small Catechism. It is available in Pidgin, but most folks in the rural areas don't speak Pidgin, they only know Enga. While it has been translated into Enga, no copies are available. My goal is to thoroughly present the Catechism to all of the Pastors and congregations, but copies will have to be made in order to do this.

"There is a hunger for Holy Communion here, but wine is barely available."

"The liturgy is dying here in the congregations. The old hymnal produced when our missionaries were here is out of print. A new hymnal has been published by the other Lutheran denomination here, but it is expensive and it does not have good hymnody in it. Somehow good liturgical resources need to be printed in a hurry in order for pastors to be able to start leading their congregations to follow healthy liturgical practice. I don't think its too late to lead them into good worship practice, but it likely will be in ten years if we allow things to continue as they are.

"There is a hunger for Holy Communion here, but wine is barely available. Where it is available a single bottle can cost 25 dollars, which is about two weeks offering for a small congregation. A pastor often has to travel two days just to get a bottle. In the remote areas of the jungle some congregations have gone years without the Supper because wine is unavailable. The LCMS used to help with distributing wine. I hope that a partnership can be established again so that good sacramental practice will be renewed and restored. I don't know how this will work out but I will let you know more when we learn more.

"The mission work being done here is as confessional Lutheran as it can get. We are strengthening the preaching of the Word, the administration of the sacraments, as well as helping to renew good liturgical and catechetical practice.

"In order to do this we will need Bibles and Catechisms and hymnals and wine. Please keep us in your prayers. Please help us with any expertise you can access. Your encouragement and support will make a difference. By God's grace good things will happen here, to His glory.

"In Christ,

Pastor Jeffrey Horn
Missionary / Theological Educator Papua New Guinea"

Ed. Comment: We urge Clarion readers to continue to support Rev. Horn with your prayers and monetary gifts. Please send checks to: **Lutheran Concerns Association**, 1320 Hartford Avenue, Saint Paul, MN 55116-1623. *Mark the memo line: "New Guinea Mission Project." Thank you!*

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