"The Gay Rights State": Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation

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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 had 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, according to Clarenbach.[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 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 to

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[1] Arthur L. Srb, *Gay Rights Law Contradicts State Statutes*, THE CAPITAL TIMES undated, clipping in folder, "Articles (Information)," Consenting Adults Bill Tab, box 1, David Clarenbach files, Wisconsin State Historical Society archives (hereinafter, "Clarenbach files"). Note that Srb was mistaken about the year in which the Act passed – although its official designation is Chapter 112, 1981 Wis. 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 Chapter 112, 1981 Wis. Laws either as "the Act" or as "Chapter 112" throughout this article, although some places I necessarily use the bill designation, AB 70.

[2] *Id.*

[3] *Id.*

[4] Wis. Const. Art. XIII, sec. 13. Available at http://www.legis.state.wi.us/statutes/wisconst.pdf. "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."

prohibit sexual-orientation discrimination by statute has now joined 25 other states in amending its constitution to prohibit recognition of same-sex marriages[5] seems very strange indeed except that it is quite consistent with a long history of profound ambivalence about lesbian/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[7] – has been high, while support for recognition of lesbians' and gay men's families, including marriage and adoption, has been much lower.[8]

Thus, the people of Wisconsin are not alone in taking contradictory positions regarding lesbian and gay civil rights issues.[9] It is worth noting in this context that, in November 2003, the Wisconsin legislature failed by one vote to override a veto of legislation prohibiting recognition

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[5] *See Equality from State to State 2006: Gay, Lesbian, Bisexual and Transgender Americans and State Legislation, A Report by the Human Rights Campaign Foundation* 5 (Dec. 2006).

[6] Stephen C. Craig, et al., *Core Values, Value Conflict, and Citizens' Ambivalence about Gay Rights*, 58 POLITICAL RESEARCH QUARTERLY 5 (2005).

[7] *See infra*, notes 49-60 and accompanying text.

[8] Alan Yang, *From Wrongs to Rights, 1973 to 1999:Public Opinion on Gay and Lesbian Americans Moves toward Equality* (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 (2001); Gregory B. Lewis and Marc A. Rogers, *Does the Public Support Equal Employment Rights for Gays and Lesbians?*, GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION (Ellen D.B. Riggle and Barry Tadlock, eds. 1999). *See also*, Public Agenda, *Gay Rights: Red Flags*, http://www.publicagenda.org/issues/red_flags.cfm?issue_type=gay_rights (last visited Jan. 18, 2007). This web site provides recent polling data from a wide range of sources. Their "red flag" section provides cautions for interpreting data. *But see Adoption by Gay Couples Wanes as Issue in U.S.*, THE ADVOCATE, Jan. 27, 2007, http://www.advocate.com/news_detail_ektid41464.asp (last visited Feb. 6, 2007) (opposition to adoption by lesbians and gay men rapidly declining, unlike United Kingdom, where it has become a major issue).

[9] A Minnesota court only struck down its prohibition on consensual, adult sodomy in 2001, *Doe, et al. v. Ventura*, 2001 WL 543734, No. 01-000489 (Dist. Ct. Hennepin County May 15, 2001), 8 years after the state prohibited sexual-orientation discrimination by statute, Minn. Stat. sec. 363A, 1993 Minn. Laws c. 22 s. 19. (My thanks to Phil Duran of OutFront Minnesota for help with this chain of events.) Also, in the wake of the Lawrence v. Texas decision, 539 U.S. 558 (2003), the wording of the CAPITAL TIMES article 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. Wis. Stat. § 944.17 (1981) provided: "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." Note that the penalty for "sexual perversion" under this statute was lower than the penalty for adultery, which was a Class E felony. Wis. Stat. 944.16 (1981).

of same-sex marriages.[10] At the time, that made it one of only thirteen states with no prohibition, statutory or constitutional, of same-sex marriages.[11] 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 anti-marriage amendment cannot negate the fact that Wisconsin's was the first state legislature in the nation to prohibit discrimination on the basis of sexual orientation.[12] For many years after passage of Chapter 112, 1981 Wisconsin Laws, Wisconsinites would appear at national LGBT[13] civil rights events with signs declaring Wisconsin to be "The Gay Rights State."[14] As lesbian and gay civil rights issues have become increasingly prominent at both the state and federal level, it is important to look back on the history of lesbian and gay rights laws to see what has changed, and what has not. 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.

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[10] *Wisconsin Veto of Gay Marriage Ban Stands*, Nov. 13, 2003, http://www.planetout.com/news/article.html?2003/11/13/4 (last visited Feb. 9, 2007).

[11] *Id. See also, Marriage Map, http://thetaskforce.org/reports_and_research/marriage_map* (last visited Feb. 9, 2007).

[12] *See, e.g., Wisconsin First State to Pass Gay Rights Law*, THE ADVOCATE April 1, 1982.

[13] "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."

[14] Author correspondence with Kathleen Nichols, long-time Madison lesbian and gay rights activist, July 5, 2006.

The Wisconsin Act is anomalous because it was the first, because it is unusually comprehensive, and because nine years elapsed before any other state enacted such a statute.[15] It was also unusual in the extent to which a single legislator, Clarenbach, almost single-handedly got the bill passed. These are all related points insofar as 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 the 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.

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,

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[15] HAW. REV. STAT. § 368-1 & 378-2, 1991 Haw. Sess. Law c. 2, sec. 1 & 3. For a table showing all states with statutes or executive orders prohibiting discrimination based on sexual orientation in at least some areas, *see* http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=185.

[16] *See infra*, sec. 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, et al., 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, still 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 MAKINGS 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 (1967) (striking down Va's antimiscegenation statute as violating the Equal Protection Clause of the Fourteenth Amendment).

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 for lesbians and gay men that came afterward were blunted by the increasingly conservative political climate,[24] which meant that subsequent opportunities for lesbian and gay rights activists at both the state and federal level would only occur several years later.

Even as it was anomalous in some respects, however, 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 deviate sexual conduct on the other.[25] Indeed, the terms of

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

[22] *See infra*, sec. II.

[23] Holloway, *supra* note 18 at 195.

[24] *See, e.g,* ROWLAND EVANS AND ROBERT NOVAK, THE REAGAN REVOLUTION (1981); MARTIN ANDERSON, REVOLUTION (1988); PEGGY NOONAN, WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA (1990); LEE EDWARDS, THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA (1999); WILLIAM J. GILL AND CLIFTON WHITE, WHY REAGAN WON: A NARRATIVE HISTORY OF THE CONSERVATIVE MOVEMENT, 1964-1981 (1981); WILLIAM A. RUSHER, THE RISE OF THE RIGHT (1984); JOHN KENNETH WHITE THE NEW POLITICS OF OLD VALUES, 2nd ed. (1990); GODFREY HODGSON, THE WORLD 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); WILLIAM C. BERMAN, AMERICA'S RIGHT TURN: FROM NIXON TO BUSH (1994); and REBECCA E. KLATCH, WOMEN OF THE NEW RIGHT (1987).

[25] *See, e.g,* Romer v. Evans, 517 U.S. 620, 636 (Scalia 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

the debate 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.[26]

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.[27] 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 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.[28] This is the chronic problem for lesbian and gay civil rights activists in the wake of the 1964 Civil Rights Act: how to 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

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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)."

[26] *See, e.g.*, Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking beyond Political Liberalism*, 85 GEO. L.J. 1871 (1996-1997). 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.

[27] *Infra* sec. II.B.

[28] *But see* Nan D. Hunter, *Sexuality and 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 addition to an existing model, and emphasizing protection for communication about one's sexual orientation).

prohibition on affirmative action based on sexual orientation within the same act indicates the extent to which the categorical fit is not precise.[29]

Indeed, 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 of civil rights law and policy in the United States. Affirmative action became a flash point for AB 70, as the bill was known in the legislature, in part because Wisconsin had at the time a robust set of affirmative action requirements in its statutes.[30] Wisconsin first prohibited racial discrimination in employment in 1945, well before the rest of the nation.[31] 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 discrimination based on sexual orientation, the possibility of adding sexual orientation to the categories for affirmative action remedies 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.[32] 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.[33] But the combination of a statutory prohibition on sexual-orientation discrimination with a constitutional

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[29] *Infra* sec. III.A. & B.

[30] *Id.*

[31] *Id.*

[32] Wis. Const. Art. XIII, sec. 13.

[33] *See supra* note 24.

prohibition on recognizing same-sex marriages reflects, more than anything, the deep ambivalence of the American public regarding lesbian 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.[34]

Justice Scalia defended this perspective.[35] 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.[36]

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.[37] 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?[38]

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[34] *See supra* notes 6 & 8.

[35] Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia dissenting).

[36] *Id.*

[37] Gregory B. Lewis and 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 118-45 (Ellen D.B. Riggle and Barry Tadlock, eds. 1999).

[38] *See infra*, sec. III.B. for further discussion of these issues.

This article cannot resolve the paradoxes of public opinion. It can help us understand those paradoxes, and their outcomes in law and policy. Section I of this article describes the Act itself in some detail. Section II describes its relationship to the larger framework of civil rights law in the United States, focusing particularly on the issue of affirmative action. Section 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 brought up.

I. Chapter 112, 1981 Wis. Laws

Chapter 112's coverage is surprisingly broad in some respects, but it also fails to cover certain areas that would later become important elements of most anti-discrimination legislation. For example, Chapter 112 prohibits sexual orientation discrimination in the Wisconsin National Guard[39], but it does not address discrimination in education. Acts in the 1985 and 1989 sessions that prohibited discrimination against students included sexual orientation among the protected categories.[40] An order of the Wisconsin Supreme Court in 1996 included sexual orientation

[39] Chapter 112, 1981 Wis. Laws sec. 3, amending Wis. Stat. 21.35 (1981). See *infra* XX for more discussion of this provision.

[40] 1985 Wis. Act 29, sec. 1711, creating Wis. Stat. sec. 118.13 (prohibiting discrimination against pupils in elementary and secondary schools), 1989 Wisc. Act 186, creating Wis. Stat. 36.12 (prohibiting discrimination against students in the University of Wisconsin System) and Wis. Stat. 38.23 (prohibiting discrimination in the 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, 92 F.3d 466 (CA 7 1996), holding 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. *See also*, David

among the bases on which discrimination against jurors is illegal.[41] Chapter 112 mostly added "sexual orientation" as a protected category to lists of non-discrimination categories in existing statutes. Such lists previously consisted of sex, race, color, creed, or national origin in most cases,[42] but variously included physical condition, developmental disability, handicap, religion, ancestry, arrest or conviction record, political affiliation, and marital status in others.[43]

The bulk of the Act addresses discrimination in housing and in employment in various forms. It also adds sexual orientation to the list of protected categories in the statutes prohibiting discrimination in public accommodations.[44] The Act covers housing comprehensively just by adding "sexual orientation" as a protected category to the existing statutes. In addition to amending the statute prohibiting housing discrimination generally,[45] it amends the statutes prohibiting discrimination in the selection of veterans for housing projects where they receive preference,[46] and in the selection of residents and contractors for public housing generally.[47]

Buckel, *Stopping Anti-Gay Abuse of Students in Public Schools: A Legal Perspective* 12 (1998), available at http://www.lambdalegal.org/sections/library/stopping.pdf; Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERK. WOMEN'S L.J. 125 (2000).

[41] 207 Wis. 2d xx (1996-1997).

[42] Chapter 112, 1981 Wis. Laws sec. 2-9, 13, 18-21, 24.

[43] *Id.*, sec. 1, 12, 14, 16, 22, 23, 25.

[44] *Id.*, sec. 25, amending Wis. Stat. 942.09 (1981).

[45] *Id.*, sec. 12, amending Wis. Stat. 101.22 (1), (1m) (b), (2m) and (4n) (1981).

[46] Chapter 112, 1981 Wis. Laws sec. 4, amending Wis. Stat. 66.39 (13) (1981). *Compare* Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship under the 1944 G.I. Bill*, 90 J. OF AM. HIST. 935 (2003) (describing choice of Veterans' Administration to deny benefits under the G.I. Bill to soldiers discharged for homosexual conduct).

[47] Chapter 112, 1981 Wis. Laws sec. 24, amending Wis. Stat. 234.29.

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.[48]

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." Section fourteen adds "sexual orientation" to the list of categories in the sections that articulate the state's policy decision to prohibit employment discrimination and reasons therefor.[49] Section fifteen places the definition of "sexual orientation" into the Statutes,[50] section sixteen adds it to the definition of "discrimination,"[51] and section seventeen specifies which acts constitute discrimination because of sexual orientation in employment.[52] Section two of Chapter 112 adds "sexual orientation" to the list of characteristics on the basis of which state contractors may not discriminate.[53] Section twenty-one includes "sexual orientation" among the nondiscrimination categories for rulemaking by state agencies,[54] while sections twenty-two and twenty-three add it to the nondiscrimination categories for employment by the state.[55]

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[48] Chapter 112, 1981 Wis. Laws sec. 10, amending Wis. Stat. 66.432 (1) and (2).

[49] Wis. Stats. § 111.31 (1) through (3) (1981).

[50] Wis. Stats. § 111.32 (4s) (1981).

[51] Wis. Stats. sec. 111.32 (5) (1981).

[52] Wis. Stats. sec. 111.32 (5) (a) (1981).

[53] Wis. Stats. sec. 16.765 (1) and (2) (a) (1981).

[54] Wis. Stats. sec. 227.033 (1) (1981).

[55] Wis. Stats. sec. 230.01 (2), sec. 230.18 (1981).

Many of the provisions of Chapter 112, 1981 Wisconsin Laws that amended the Wisconsin Fair Employment Act actually appear in the statutes in slightly different form. As it happened, the same session of the Wisconsin legislature enacted a comprehensive revision of Chapter 111 in order to repair problems with the original, frequently amended, act.[56] Legislators saw the need to state that the comprehensive reform act did not repeal Chapter 112 as part of their annual omnibus act for making corrections and clarifications.[57] 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.[58] That section is expressly subject to the provisions of several subsequent sections,[59] one of which bears the title "Sex, sexual orientation; exceptions and special cases."[60]

This is only one of several oddities in the Act, and the only one that is explicable only 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.

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[56] Chapter 334, 1981 Wis. Laws. *See* Jim Schneider, *Revision of the Wisconsin Fair Employment Act by Ch. 334, Laws of 1981*, WISC. LEG. COUNCIL STAFF INFO. MEMO. 82-17, May 7, 1982.

[57] Chapter 391, 1981 Wis. Laws, sec. 105.

[58] Wis. Stat. § 111.321 (2005).

[59] *Id.*

[60] Wis. Stat. § 111.36 (2005).

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.[61] 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.[62] Taking the Wisconsin Progressive tradition as a necessary background condition,[63] 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.

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.[64] This fact influenced the strategies of lesbian and gay civil rights activists in various

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[61] http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=185. The other three states are CT, MA, and VT. *See also*, Daynah Shah, *Sexual-Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions*, Gov't. Accounting Office Report GAO-02-878R, July 9, 2002, at 4 for comparison of provisions in state statutes and federal Employment Nondiscrimination Act.

[62] Author interview with Kathleen Nichols, June 11, 2006.

[63] *See* ROBERT C. NESBIT, WISCONSIN: A HISTORY 399-456 (1973; 2d ed. rev. & updated by William F. Thompson, 1989); JOHN D. BUENKER, THE PROGRESSIVE ERA, 1893-1914, vol. IV of THE HISTORY OF WISCONSIN (1998).

[64] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (classifications based on sex are as inherently suspect as classifications based on race, alienage, and national origin); U.S. v. Virginia, 518 U.S. 515, 532 ("[w]ithout 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). *See also* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPOMENT OF NATIONAL POLICY (1990).

ways, providing both opportunities and impediments. The biggest opportunity was the precedent that state and federal governments in the United States could and should prohibit discrimination. The biggest impediment was the argument that statutes prohibiting sexual-orientation discrimination would require affirmative action for lesbians and gay men.

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.[65] 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.[66] Proponents of amending the 1964 Act met with little success at the federal level, however.[67] 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.[68]

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[65] Chai Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS, *supra* note 17 at 149-87, 150.

[66] *Id.* at 150. *See also,* DUDLEY CLENDINEN AND ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 239-41 (1999).

[67] Feldblum, *supra* note 65. Clendinen and Nagourney, *supra* note 66.

[68] Letter, David Clarenbach to Robert Kastenmeier, Feb. 9, 1979, informing Kastenmeier of Clarenbach's support for federal bill to prohibit sexual-orientation discrimination, Clarenbach's own introduction of similar bill in the Wisconsin Assembly; and letter, Steve Endean, Executive Director, Gay Rights National Lobby, to Clarenbach, March 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. Both in folder, "Gay Rights (Fed. Law)," box 3, Clarenbach files. 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, Clarenbach to Shirley Nyder, Office of Senator Proxmire, Dec. 17, 1979, enclosing a copy of Stephen M. Johnson, *Prox Supports Gay job-rights proposal*, THE CAPITAL TIMES, Dec. 7, 1979, at 28, in folder, "AB 70 Mailings Sent," box 3, Clarenbach files.

The Wisconsin state legislature, by contrast, proved willing to prohibit sexual-orientation discrimination by comprehensively amending existing anti-discrimination laws only three years later. But this was the same body that first enacted prohibitions on racial discrimination in employment in 1945, nearly twenty years before Congress would do so.[69] 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. 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

[69] *See* Schneider, *supra* note 56 at 3.

African Americans.[70] Historian Hugh Davis Graham has traced the 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.[71] Affirmative action programs have been a fruitful source of litigation ever since.[72] 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.[73] According to Feldblum, the decision to include language prohibiting either "quotas" or "preferential treatment" was only one of many strategists made about scope and content in writing the Employment Nondiscrimination Act (ENDA).[74] ENDA was the new, much more modest bill that lesbian and gay rights activists proffered in

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[70] *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).

[71] HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 28, 33, 287-97 (1990).

[72] Gratz v. Bollinger, 539 U.S. 224 (2003) (striking down university's use of race as one of several factors in the goal of achieving 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), Richmond v. Croson, 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 the University of Calif. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (striking down medical school policy of reserving specific number of spaces in incoming class for racial and ethnic minorities).

[73] *But see* Byrne, *supra* note 70. *See also*, Jeffrey S. Byrne and 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 (1993-1994) (considering possible political impact of Byrne's law review article, *supra* note 64, advocating affirmative action for lesbians and gay men).

[74] Feldblum, *supra* note 65 at 178-79.

1993 after the adoption of the "Don't Ask, Don't Tell" policy for lesbian and gay members of the armed services.[75] It seemed to demonstrate that the lesbian and gay civil rights movement lacked the political clout necessary to pass a more comprehensive bill.[76] ENDA even eschews disparate impact claims, as well as any effect either on employee benefits for same-sex partners or service in the military.[77] Rather than amend the 1964 Civil Rights Act, ENDA would create a free-standing statute applying only to sexual-orientation discrimination.[78]

Felblum's account of ENDA is consistent with political scientist Evan Gerstmann's work on Colorado's anti-gay Amendment 2,[79] which passed in 1992 and which the United States Supreme Court struck down in 1996.[80] The debate over Chaper 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."[81] Gerstmann demonstrates that the people of Colorado strongly opposed discrimination based on sexual orientation.[82]

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[75] 10 U.S.C. § 654, Pub. L. 10397160, div. A, title V, Sec. 571(a) (1), Nov. 30, 1993. *See, e.g.,* Able v. United States, 155 F.3d 628 (CA 2 1998). *See also,* Tim McFeeley, *Getting it Straight: A Review of the "Gays in the Military" Debate*, in CREATING CHANGE, *supra* note 17 at 236-50.

[76] Feldblum, *supra* note 65 at 178.

[77] *Id.*

[78] *Id.* For systematic comparisons between ENDA and state laws prohibiting sexual-orientation discrimination, *see* General Accounting Office Report, *Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions,* July 9, 2002, and previous reports by the GAO on the same topic as listed in this report at n. 3.

[79] EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION (1999).

[80] Romer v. Evans, 517 U.S. 620 (1996).

[81] *Id.* at 624.

[82] Gerstmann, *supra* note 79 at 100-01.

They 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 – the 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.[83] Given Gerstmann's data on existing support among Colorado voters for nondiscrimination on the basis of sexual orientation at the time of Amendment 2, for Wisconsin to be both the first state to prohibit sexual-orientation discrimination, and among the most recent to prohibit recognition of same-sex marriages by constitutional amendment, is less surprising.

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.[84] Opponents of the bill raised the issue 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 in sending the bill to the Senate for consideration.[85] Once Clarenbach amended the bill to add language prohibiting affirmative action, Dreyfus was willing to sign it.[86] Indeed, Dreyfus' public

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[83] Gerstmann, *supra* note 79 at 102-03.

[84] *Wisconsin First State*, *supra* note 12.

[85] Matt Pommer, *State's Gay Rights Bill Threatened: Affirmative Action Issue Debated*, CAPITAL TIMES (Madison, WI), Oct. 23, 1981. Photocopy in "Chapter 112: Copies and Info Packets to Mail," box 3, Clarenbach files.

[86] *Id.*

statement explaining his decision to sign the bill specifically pointed to the prohibition on affirmative action as part of the reason for his support.[87]

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. 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.[88] 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."[89] 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 or not.[90] Such was the political traction of the affirmative action claim that Clarenbach saw no choice but to acquiesce to the express prohibition.[91] He coordinated the drafting of the amendment and sent a letter to his Assembly colleagues expressing his support for it when the state Senate sent it back so amended.[92]

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[87] Undated copy of Dreyfus' statement, folder, "AB 70 Originals to Copy," box 3, Clarenbach files.

[88] Author interview with Clarenbach, Aug. 29, 2005.

[89] Letter, Claudean Roehmann, Director, Wisconsin State Affirmative Action Office, Dept. of Employment Relations, to Clarenbach, Oct. 26, 1981, in folder, "AB 70 Senate Hearing," box 3, Clarenbach files.

[90] Memo, Atty. Ed Main, Dept. of Admin. to David Clarenbach, Oct. 26, 1981, in folder, "AB 70 Affirmative Action," box 3, Clarenbach files.

[91] *See* letter, Clarenbach to Marlene A. Cummings, Governor's Advisor for Women and Family Initiatives, Jan. 25, 1982, referring to letter from Roehmann, *supra* note 33, and referring to affirmative action issue as "smoke screen." Folder, "AB 70 Mailings Sent," box 3, Clarenbach files.

[92] Wisconsin Legislative Council Staff Memorandum from Richard Sweet to David Clarenbach, Feb. 4, 1982, explaining the effects of the amendment to AB 70, as the bill was known; memo from Clarenbach to colleagues,

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.[93] 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[94] and the state as employer[95] maddening. Those provisions expressly required affirmative action to correct disparities between the percentage of minorities among employees and their percentage in the general population.[96] 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.[97] No one interpreted it to mean the establishment of quotas or other specific goals for hiring a predetermined number or percentage of minority or women applicants, including explicit preferences for such applicants.[98]

The Wisconsin statute governing contractors used the phrase "affirmative action" without defining it, beyond stating that the goal was "to ensure equal employment opportunities."[99] So it fell to the Wisconsin Department of Administration (DOA) to decide in its administrative

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February 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. Both in folder, "AB 70 Affirmative Action," box 3, Clarenbach files.

[93] *See* Graham, *supra* note 71, *passim*.

[94] Wis. Stat. 16.765 (1981).

[95] Wis. Stat. 230.01 (2) (1981).

[96] Wis. Stat. 16.765 (1981), Wis. Stat. 230.01 (2) (1981).

[97] Graham, *supra* note 71 at 33-34.

[98] *Id.*

[99] Wis. Stat. 16.765 (1981).

regulations what "affirmative action" meant for contractors.[100] Those regulations required contractors to submit a plan indicating how they would achieve a "balanced work force" within a "reasonable period of time."[101] A "reasonable period of time" was usually between six months and two years.[102] 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."[103]

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.[104] 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.[105] However, the ambiguity potentially invited lobbying of the DOA by anyone who thought that "sexual orientation" should get onto that list.

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[100] Memo, Richard Sweet to David Clarenbach, October 26, 1981, in folder, "AB 70 Affirmative Action," box 3, Clarenbach files.

[101] Wis. Adm. Code § Adm. 50.05 (4) (1981).

[102] Memo, Sweet to Clarenbach, October 26, 1981.

[103] Wis. Adm. Code § Adm. 50.03 (1) (1981) as quoted in memo, Sweet to Clarenbach, *supra* note 33. Underlining is Sweet's.

[104] Memo, Sweet to Clarenbach, October 26, 1981.

[105] *Id.*

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. 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 – 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.[106] 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.[107] Even so, the right to privacy was a major rallying cry for the lesbian and gay civil rights movement.[108] But 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.[109] The claim to privacy rights offers no legal or policy basis for affirmative action.[110]

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[106] Dreyfus statement, *supra* note 87.

[107] *See* Hunter, *supra* note 28 on the point that revealing one's sexual orientation is often the event that triggers employment discrimination. *See also*, Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WISC. L. REV. 75 (noting that the failure of minorities to identify themselves is necessarily a bar to full political participation).

[108] 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, 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 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.

[109] 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).

Within the Wisconsin statutes, the results of the difference between race and gender, on one hand, and sexual orientation on the other could look a bit strained. Section 14 of Chapter 112, amending the statement of policy 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."[111] 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.[112] That fact would appear to make the provision simply part of the larger purpose of prohibiting affirmative action based on sexual orientation.[113] 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.[114] This issue has apparently not produced any litigation.[115]

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, 378 (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.*, ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869 (1980), NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1987), LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1999).

[110] *See* Byrne, *supra* note 73.

[111] Wis. Stat. 111.31(3) (1983).

[112] David C. Rice, *The Wisconsin Fair Employment Act and the 1982 Amendments*, WIS. BAR BUL. Aug., 1982 at 17.

[113] *Id.*

[114] *Id.*

[115] The annotations to Wis. Stat. 111.31 (2005) that the Wisconsin Revisor of Statutes Bureau provides list no cases addressing affirmative action.

In contrast, the statutes that apply to the State as employer and to contractors with the state are very clear about imposing affirmative action requirements. Section 2 of Chapter 112 amended the statute governing state contractors[116] 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 [sic] 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.[117]

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 twenty-two of Chapter 112 modified the statute governing state hiring practices.[118] Unlike the statute governing contractors, the law requiring state personnel managers to use affirmative action bore the definition of 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."[119] Chapter 112 added "sexual orientation" to the sentence announcing the state's policy to base personnel actions on ability,

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[116] Wis. Stat. § 16.765 (1) (1981).

[117] 1981 Wisconsin Laws Chapter 112 § 2. Underlining in original indicates language amending existing legislation.

[118] 1981 Wisconsin Laws Chapter 112 § 22, amending Wis. Stat. 230.01 (2) (1981).

[119] Wis. Stat. 230.01 (2) (1981).

rather than prohibited categories.[120] 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."[121] 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.[122]

C. Impact of Prohibiting Affirmative Action

It is virtually impossible to demonstrate any concrete impact from the prohibition on affirmative action in Chapter 112. One striking piece of evidence does exist to demonstrate that such prohibition influenced citizens' perception of the law, however. 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.[123] The members of the Ad Hoc Study Committee stated their understanding of "faculty rules and state

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[120] *Id.*

[121] *Id.*

[122] In case this possibility seems far-fetched, note that some courts have used U.S. Supreme Court precedent holding that discrimination based on gender stereotypes is discrimination "because of sex" for purposes of Title VII (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)) in finding that discrimination against lesbians and gay men involves impermissible gender stereotypes. *See, e.g.*, Nichols v. Azteca, 256 F.3d 864 (9th Cir 2001), Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Ore. 2002). The circuits vary significantly in their responses to such claims. *See, e.g.*, Spearman v. Ford Motor Co., 231 F. 3d 1080, 1085-86 (7th cir. 2000), *cert. denied*, 2001 U.S. LEXIS 3253 (rejecting claim of discrimination based on gender stereotypes despite evidence that harassers had called plaintiff a "bitch" and compared him to a drag queen).

[123] *Report to the University Committee of the Ad Hoc Study Committee on Adherence to University Policies on Placement and Non-Discrimination*, Faculty Document 542, Dec. 5, 1983, in folder, "Chapter 112 – Enforcement," box 3, Clarenbach files (hereinafter, *Report of the Ad Hoc Study Committee)*. *See infra*, sec. XX, for more discussion of this topic.

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."[124] This is a difficult statement to parse from a legal perpsective.

The purpose of affirmative action in the modern sense has always been to compensate for past discrimination against a group in ways that anti-discrimination laws simpliciter cannot do.[125] 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.[126]

Thus, in an ironic sense, the very law that prohibited discrimination based on sexual orientation itself performed such discrimination, explicitly excluding 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

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[124] *Report of the Ad Hoc Study Committee* at 2.

[125] *See* Graham, *supra* note 71. *But see Grutter*, 539 U.S. at 328 (asserting that Court has never held this to be the only valid basis for affirmative action).

[126] *Report of the Ad Hoc Study Committee*.

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 who would work in the Carter White House that the logic of American civil rights policy should extend to encompass lesbians and gay men.[127] President Carter himself, however, despite his substantial commitment to civil rights generally, was not persuaded, at least not while he was President.[128]

To some extent, this disparity between the status of race and sex in civil rights law, 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.[129] 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 in fact constitute an identifiable minority with a legitimate set of grievances.[130] Beyond the historical difference, however, Governor Dreyfuss' 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

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[127] Turner, *supra* note 17.

[128] *Id.* Carter later became a more vocal supporter of lesbian and gay civil rights claims. *See* Jimmy Carter, *It's Fundamentally Christian to Reject Politics of Hate: No one Should Condone, even by Silence, The Persecution of Homosexuals*, op-ed column distributed during 1996 presidential campaign, available at http://www.mindspring.com/~wtk3/carter.html (last visited Feb. 3, 2007).

[129] *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1945 TO 1970 (1983).

[130] *Id.* at 4-5. *See also* NAN ALAMILLA BOYD, WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965 at 58-61 (2003).

grievants in the same category as heterosexual African-Americans or women.[131] The next section explores these shades of distinction 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 issue in terms of opposition to discrimination, while opponents described it in terms of sexual morality. 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. "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.[132] 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.[133] Persons who use an equality frame to think about lesbian and gay civil rights are very likely to support them, while persons who use a morality frame are very likely to oppose them.[134]

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[131] *Supra* notes 106 and accompanying text.

[132] Paul Brewer, *Framing, Value Words, and Citizens' Explanations of Their Issue Opinions*, 19 POLITICAL COMMUNICATION 303-16, 303 (2002).

[133] *Id.*

[134] *Id.* 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.

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, morality politics and interest group politics.[135] 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.[136] Morality politics tends to involve putting government's stamp of approval on one set of values rather than another.[137] 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.[138] Consequently, political actors frame issues in terms of religious beliefs, and partisan competition among elected officials rises, given the presence of sharply delineated options.[139]

Lesbian and gay civil rights issues have often become classic examples of morality politics in action, starting in 1977, with Anita Bryant's very public campaign to repeal a lesbian and gay civil rights ordinance that officials in Dade County, FL, passed.[140] Even the major

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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.*

[135] Donald P. Haider-Markel and Kenneth Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POLITICS 332-49, 333-34 (1996). Haider-Markel and Meier's two part scheme, morality politics and interest-group politics, does not map precisely onto Brewer's equality vesus 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.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See* CLENDINEN AND NAGOURNEY, *supra* note 66 at 291-311 (1999).

Supreme Court decisions on lesbian and gay civil rights reflect this framing of the issue.[141] 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, using instead the methods of interest group politics to pass legislation prohibiting sexual-orientation discrimination.[142]

A. Clarenbach as 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.[143] 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.[144] Endean later became the founding Executive Director of the Human Rights Campaign Fund,[145] now the nation's largest lesbian and gay civil rights organization.[146] He describes the opposition of conservative state legislators to proposed lesbian and gay civil rights legislation in the state legislature.[147] However, he also

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

[142] *See* Donald P. Haider-Markel and Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights* 20 REV. OF POLICY RES. 671-690, 676 (2003).

[143] Author interview with Kathleen Nichols, June 11, 2006.

[144] STEVE ENDEAN WITH VICKI EAKLOR, BRINGING LESBIAN AND GAY RIGHTS INTO THE MAINSTREAM: TWENTY YEARS OF PROGRESS 15 (2006).

[145] *Id.* at 55.

[146] www.hrc.org (the organization has since changed its name to the Human Rights Campaign).

[147] Endean, *supra* note 144 at 15-20.

describes 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.[148] Endean claims that two possible swing votes were using the restroom at the same time as the press conference and subseqently proved unwilling to support the bill.[149] Endean believed that such tactics by militant activists helped defeat, rather than pass, the bill.[150]

Perhaps because of his centrality to the legislative process as a long-time legislator and future Speaker Pro Tem,[151] Clarenbach managed to avoid such conflicts with more militant activists in Madison.[152] He entered the Wisconsin Assembly as a Democrat representing the near east side of Madison in 1974.[153] His district was perhaps the most liberal part of a famously liberal city.[154] He was 21 years old at the time of his initial election, the son of Kathryn Clarenbach, who taught at the University of Wisconsin at Madison and had served as the first Chairperson of the National Organization for Women.[155] In 1980, he chaired the Brown for President Steering Committee in Wisconsin,[156] and he was an outspoken advocate of abortion rights.[157]

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[148] *Id.* at 121.

[149] *Id.*

[150] *Id.*

[151] Betty Brickson, *Profile: David Clarenbach. The Power of Principle*, THE ISTHMUS (Madison, WI), Feb. 19-25, 1988.

[152] Author interview with Clarenbach, Aug. 29, 2005, author interview with Kathleen Nichols, June 11, 2006.

[153] Brickson, *supra* note 151.

[154] *Id.*

[155] *Id.*

[156] Press release, Jan. 18, 1980, announcing Clarenbach's appointment as Chair of the Wisconsin Brown for President Steering Committee, in folder, "Correspondence from Brown," box 1, Clarenbach files.

[157] *See* various documents at "Abortion" tab, box 1, Clarenbach files.

Although, as the *Capital Times* described in 1982, Clarenbach would ultimately see the prohibition on sexual-orientation discrimination passed first,[158] he started his legislative career in 1975 with a comprehensive bill to reform the state's laws governing sexual activity[159] in the same session during which he proposed amendments prohibiting sexual-orientation discrimination to existing bills on housing[160] and public accommodations.[161] *The Advocate*, the national lesbian and gay newsweekly, described the comprehensive sex-law reform bill as too radical to have a chance of passage.[162] 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 18 to 14, 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 misdemeanor.[163] Anticipating a major political debate that would erupt some twenty years later, Clarenbach's bill also legalized same-sex marriages.[164] 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.[165] The year after Chapter 112

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[158] *Infra*, p. 1.

[159] 1975 Assembly Bill 269.

[160] 1975 Assembly Bill 209.

[161] 1975 Assembly Bill 358.

[162] Ron McRea, *Dairy State Looks at Sex Laws*, THE ADVOCATE, May 21, 1975.

[163] *Id.*

[164] *Id.*

[165] Brickson, *supra* note 151.

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.[166]

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.[167] Compared to legalizing same-sex marriage, prohibiting employment discrimination on the basis of sexual orientation looks quite tame to most Americans.[168] But he recognized the perils involved if legislators came to frame the prohibition on sexual-orientation discrimination in terms of morality politics.[169] 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.[170] 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.[171] Above all, he strove to avoid making AB 70 a debate about approval or disapproval of lesbians and gay men per se.[172]

B. Is Gay Good?

[166] Author interview with David Clarenbach, August 29, 2005.

[167] *Id.*

[168] *See* Jeni Loftus, *America's Liberalization in Attitudes toward Homosexuality, 1973 to 1998*, 66 AMERICAN SOCIOLOGICAL REV. 762-82 (2001), Robin Toner, *Opposition to Gay Marriage is Declining, Study Finds*, N. Y. TIMES, July 25, 2003. *See also, supra* note 8.

[169] Author interivew with Clarenbach, Aug. 29, 2005. Clarenbach did not use the term, "morality politics," himself, but he clearly understood the concept, and it informed his strategies as a legislator.

[170] *Id.*

[171] *Id.*

[172] *Id.*

Clarenbach's use of equality framing in terms of condemning discrimination, rather than approving 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."[173] Kameny and other activists intended this proposition to benefit the lesbian and gay civil 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.[174] 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.[175] 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 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 or not "gay is good" as a leit motif of the battle to enact legislation prohibiting sexual-orientation discrimination at the federal level.[176] She notes repeatedly that various activists who have promoted anti-discrimination legislation, including herself, have carefully avoided answering the

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[173] Franklin Kameny, "Gay is Good," in THE SAME SEX: AN APPRAISAL OF HOMOSEXUALITY (1969).

[174] *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997).

[175] D'Emilio, *supra* note 129 at 152-54, 162. *See also*, Boyd, *supra* note 130 at 23, 58-61.

[176] Feldblum, *supra* note 65, *passim*.

question, "is gay good," in favor of insisting that proposed anti-discrimination legislation is neutral on the point.[177]

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 restriction on discrimination because of religion or creed implies approval or encouragement of certain religions or creeds."[178] 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 that 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.[179]

At every turn during the debate over AB 70, Clarenbach strove to deflect the question of 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 political support for the bill, the first letter of endorsement came from Rembert G. Weakland, O.S.B., Roman Catholic Archbishop of Milwaukee.[180] Weakland's letter reworks the terms of the morality frame to echo Clarenbach's position:

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[177] *Id.*, esp. 181-82.

[178] Dreyfus statement, *supra* note 87.

[179] Statement on AB 70, undated, in folder, "AB 70 Originals to Copy," box 3, Clarenbach files.

[180] Information packet, no date or pagination, in folder, "Chapter 112: Copies and Info Packets to Mail," box 3, Clarenbach files.

> 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.[181]

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.[182]

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.[183] Among the most vocal opponents was Rev. Richard Pritchard, a Madison minister known for his social activism.[184] Another opponent, Wayne Wood, the state representative who first raised the affirmative action issue, reportedly held regular Bible study sessions in his legislative office.[185] Wood expressed concern about state contractors who dealt with children and prisoners having to hire homosexuals because of affirmative action requirements.[186] He stated that the question "borders on a moral issue."[187]

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[181] Letter, Rembert G. Weakland, O.S.B., to Rev. John Murtaugh, March 2, 1981, in folder, "Chapter 112: Copies and Info Packets to Mail," box 3, Clarenbach files.

[182] *Id.*

[183] *See, e.g.,* Herman, *supra* note 174.

[184] *See* letters from Pritchard to all members of the Wisconsin Assembly, and the Wisconsin Senate, explaining reasons to oppose AB 70, both in folder, "Opponents," box 3, Clarenbach files. For background on Pritchard, *see* Bill Graham, *Richard Pritchard's Lonely Fight against the Devil*, MADISON MAGAZINE April 1981, pp. 9-16. Copy in folder, "Articles (information)," box 1, Clarenbach files.

[185] Pommer, *supra* note 85.

[186] *Id.*

[187] *Id.*

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.[188] A flyer suggesting reasons for supporting 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 everyone 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.[189]

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.[190] The repeal effort failed.

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[188] Flyer instructing opponents of the bill to contact the Governor and their legislators, no date or author listed, in folder, "AB 70: Repeal Effort," box 3, Clarenbach files.

[189] *Id.*

[190] *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 Neceesary and How It Is Met*,

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.[191] Representative Wood introduced a bill to create the exception.[192] Clarenbach issued a press release to announce its failure in the Assembly by a vote of 55 to 44.[193] 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.[194]

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.

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53 CLEV. ST. L. REV. 545 (2005/2006). *But see,* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

[191] Letter, Rawhide Boys' Ranch to "Wisconsin Churches," April 11, 1985, in folder, "Past Correspondence," box 3, Clarenbach files.

[192] Press release, Feb. 20, 1986, in folder, "Gay Rights – Press Release 1986," box 3, Clarenbach files.

[193] *Id.*

[194] 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*, in folder, "Decade of G/L Right [sic] (Dec Article)." 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, Clarenbach to Michigan legislator Jim Dressel, Sept. 30, 1983, in folder, "Gay Rights – 1982 Election." *See also*, Kenneth R. Lamke, *Kohler Rips Earl on Taxes, Homosexual Appointees*. Article appears, no date or source listed, in folder, "AB 70 Follow-up mailing." For Thompson's vote, see list in letter, Clarenbach to Rep. Jim Dressel, Grand Haven, MI, Sept. 30, 1983, in folder, "Gay Rights – 1982 Election." All box 3, Clarenbach files.

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, implementation is crucial.[195] 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.[196] 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.[197] Judicial review of administrative decisions in discrimination cases is possible.[198] However, no private right of action exists under Wisconsin's nondiscrimination statutes,[199] so the

[195] Graham, *supra* note 71 at 287-97. *See also*, Holloway, *supra* note 18 at 52, 111. Holloway devotes the second and fourth chapters of her book to describing the enforcement of legislation that she covers in the first and third chapters, demonstrating at various points how enforcement can differ from the apparent intent of legislators in passing legislation.

[196] *Id*.

[197] *See* http://www.dwd.state.wi.us/er/

[198] Wis. Stat. § 111.395 (2005), Wis. Admin. Code LIRC § 4.04(1). *See also*, Klatt v. LIRC, 2003 WI App. 197, *rev. denied*, 2003 WI 140.

[199] Busse v. Gelco Exp. Corp., 678 F. Supp. 1398, 1402 (E.D. Wis. 1988).

only way to initiate a complaint is to file it with the ERD, and the first level of review is also administrative, through an entity known as the Labor and Industry Review Commission (LIRC).[200]

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 20 year old in Superior, a town in far northwest Wisconsin, who chose not to file a complaint because he assumed he would need a lawyer, who would charge more than any compensation he might receive.[201] Merry Fran Tryon, administrator of the ERD at the time, expressed concern that information about not only the complaint process, but the categories the law protected, had not reached all parts of the state.[202]

The total number of complaints claiming sexual-orientation discrimination has apparently always been small in Wisconsin.[203] Opponents of lesbian and gay civil rights laws have long asserted that such laws are unnecessary because little or no discrimination occurs.[204] A number

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[200] Wis. Stat. § 111.39(5)(a), Wis. Admin. Code DWD § 281.21(1).

[201] Peter Freiburg, *Wisconsin: Gay Rights, Evaulating the First State Law Three Years Later*, THE ADVOCATE Sept. 3, 1985, pp. 12-13. Copy in folder, "Chapter 112 – Enforcement," box 3, Clarenbach files.

[202] *Id.*

[203] Data on the number of complaints under the provisions of Chapter 112, 1981 Wis. 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 message I, LeAnna Ware, ERD, to author, July 18, 2006. 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 message II, LeAnna Ware, ERD, to author, July 18, 2006. Complaints of sexual-orientation discrimination in housing or public accommodations have numbered fewer than five in each of those years. E-mail message II, *supra.* 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*, document provided by LeAnna Ware via e-mail, July 18, 2006. *See also*, Gary Radloff, *Few Gays in State Filing Bias Complaints*, MILW. JOURNAL June 20, 1983, copy in folder, "Chapter 112 – Enforcement," box 3, Clarenbach files. *See also*, Shah, *supra* note 63 at 10, for data from 1996 through 2001, with notation that data for years before 1996 were "not readily available."

[204] Endean, *supra* note 144 at 194, William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. Cal. L. Rev. 65, 66 (2001-2002)

of responses to this argument is possible. If, as Clarenbach asserted, discrimination per se is wrong,[205] 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. 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.[206] The professor was unwilling to file a formal complaint for fear of its impact on his 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.[207] 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.[208] 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.[209] Because Rubenstein surveyed all states that prohibited sexual-orientation

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[205] *Supra* note 179 and accompanying text.

[206] Freiburg, *supra* note 201 at 13.

[207] *Id.*

[208] Rubenstein, *supra* note 204 at 67.

[209] *Id.* at 87-88.

discrimination at the time, his results included Wisconsin.[210] 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.[211] However, the number of complaints based on sexual orientation was consistently lower than the number of race complaints in most of the states Rubenstien examined, including Wisconsin.[212]

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 at 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. The issue produced significant correspondence, particularly between Robert M. O'Neil, President of the University of Wisconsin System, and various legislators, including Clarenbach.[213] 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

[210] *Id.* at 67 n. 10, 88.

[211] *Id.* at 88.

[212] *Id.* at 91.

[213] *See* letters in folders "Chapter 112 – Enforcement," and "UW Bulletins & Pamphlets – Chapt. 112 Enforcement," both in box 3, Clarenbach files.

Undergraduate Bulletin.[214] 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 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."[215]

The much larger issue in enforcing Chapter 112 was the use of University of Wisconsin facilities for job recruitment by employers, especially federal agencies, that discriminate based on sexual orientation. This issue would result in a United States Supreme Court decision in 2006, *Rumsfeld v. FAIR*, upholding a federal statute that withdraws all federal funding from any university if any unit of the campus restricts access to military recruiters because of the military's official policy of discriminating against lesbians and gay men.[216] 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.[217] H. Ernest Woodby, Special Agent in Charge in the Milwaukee office, wrote back to state that he had

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[214] Letter, The Ten Percent Society to Dean of Students Mary Rouse, Dec. 2, 1983, in folder, "Chapter 112 – Enforcement," box 3, Clarenbach files.

[215] Memo, Ronald C. Bornstein to Chancellors, May 31, 1984, attached to letter, Robert M. O'Neil to Clarenbach, June 4, 1984, in folder, "UW Bulletins & Pamphlets – Chapt. 112 Enforcement," box 3, Clarenbach files.

[216] 126 S. Ct. 1297 (2006) (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).

[217] Letter, Edward J. Reisner to James A. Swanda, Sept. 3, 1982, in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files.

forbade all FBI personnel from appearing on the Madison campus for recruitment.[218] Interested applicants would have to contact the FBI office in Milwaukee or in Madison.[219]

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 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 and gay.[220] 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.[221] The policy at the time prohibited lesbians and gay men from serving at all.[222]

The Milwaukee *Journal* ran a story at the time with the headline, "New gay-rights law could force ROTC off campuses."[223] When the issue resurfaced five years later, however, the *Wisconsin State Journal* noted that denying access to ROTC could jeopardize all of the grants the University of Wisconsin received from the Department of Defense and the National

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[218] Letter, H. Ernest Woodby to Edward J. Reisner, Sept. 8, 1982, in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files.

[219] *Id.*

[220] Letter, Attorney General Bronson C. La Follette, to State Representative Barbara Ulichny, April 5, 1983 at 1, in folder, "AB 70 FBI-ROTC," box 3, Clarenbach files.

[221] *See* 10 U.S.C. sec. 654, Pub. L. 10397160, div. A, title V, Sec. 571(a) (1), Nov. 30, 1993.

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

[223] David I. Bednarek, *New Gay-Rights Law Could Force ROTC Off Campuses*, MILWAUKEE JOURNAL Aug. 19, 1982, photocopy in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files.

Aeronautics and Space Administration, totaling $16.3 million for 1985-86.[224] 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.[225]

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."[226] 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.[227] Thus, even assuming that the federal government stands simply as an employer relative to military officers, and as a contractor relative to the University of Wisconsin, still Chapter 112 only added to the categories on the basis of which employers and contractors may not discriminate.[228] It did not change the definitions of "employer" or "contractor" to include the federal government.[229]

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[224] David Stoeffler, *UW Sticking to Guns over ROTC, Gays,* WISCONSIN STATE JOURNAL March 8, 1987, copy in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files.

[225] 47 Fed. Reg. 42,757 (Sept. 29, 1982) (to be codified at 32 C.F.R. pt. 216), copy in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files. Although the Solomon Amendment, 10 U.S.C. § 983, has become the primary focus of this debate because of Rumsfeld v. FAIR, 126 S. Ct. 1297 (2006), the Department of Defense itself opposed enactment of the Solomon Amendment in 1994 as "unnecessary and duplicative," Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219, 226 (CA3 2004), *rev. & remanded by* Rumsfeld v. Fair, 126 S. Ct. 1297 (2006). *See also*, Maj. Anita J. Fitch, *The Solomon Amendment: A War on Campus*, 2006 ARMY LAW. 12, 12-14. As the 1982 revised regulation indicates, the DOD already had the power to effect the policy goal of the Solomon Amendment.

[226] David I. Bednarek, *New Gay-Rights Law Could Force ROTC Off Campuses,* MILWAUKEE JOURNAL Aug. 19, 1982, photocopy in folder, "AB 70 FBI – ROTC," box 3, Clarenbach files.

[227] Letter, Attorney General Bronson C. La Follette, to State Representative Barbara Ulichny, April 5, 1983 at 2, in folder, "AB 70 FBI-ROTC," box 3, Clarenbach files.

[228] *Id.* at 1-2.

[229] *Id.* at 2.

Irving Shain, Chancellor of the 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.[230] However, he went on to state "because the law seems to treat Federal agencies differently, I think we are also going to be obliged to do so."[231] This conclusory 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, and to permit the military to recruit in other ways, despite the conflict between its discriminatory employment policy and the state statute prohibiting such discrimination. At least one reporter so interpreted Shain's statement.[232]

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.[233] 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 non-discrimination categories under Wisconsin law, and to providing students with information, if possible, about employers who discriminated.[234]

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

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[230] Irving Shain speech to Faculty Senate at 5, Oct. 4, 1982, copy in folder, "AB 70 FBI-ROTC," box 3, Clarenbach files.

[231] *Id.* at 6.

[232] Rob Fixmer, *UW Can't Block Gay Bias In Federal Recruiting*, CAPITAL TIMES, undated photocopy in folder, "AB 70 FBI-ROTC," box 3, Clarenbach files.

[233] *Report of the Ad Hoc Study Committee* at 4.

[234] *Id.* at 5.

that most lesbians and gay men did not really care about it.[235] He thought the issue arose more from the activities of persons who wanted to eliminate the FBI and ROTC from UW campuses.[236] More importantly, he worried that such agitation would only encourage legislators who wanted to repeal the statute entirely.[237]

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. FAIR*, which specifically involved the issue of military recruitment at law schools,[238] it seems inevitable in retrospect that the ROTC issue would have come up sooner or later. The major puzzlement of Chapter 112 is that its prohibition on discrimination by the Wisconsin National Guard[239] never invited a direct challenge. In 1993, addressing legally the same issue with respect to application of the WFEA 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.[240]

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[235] Note, no author, recipient, or date, in folder, "AB 70 FBI-ROTC," box 3, Clarenbach files. 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. Author interview with David Clarenbach, Aug. 29, 2005.

[236] *Id.*

[237] *Id.*

[238] 126 S. Ct. 1297 (2006). *See supra*, note 225.

[239] Sec. 3, Chapter 112, 1981 Wis. Laws.

[240] Hazelton v. State Personnel Commission, 178 Wis. 2d 776 (Wis. Ct. App. 1993).

Although Hazelton complained of discrimination both on the basis of sexual orientation and on the basis of handicap[241] – he tested positive for HIV after 27 years of service[242] -- the facts as related in the opinion suggest that the National Guard discharged him solely because of his HIV status.[243] The Personnel Commission concluded that federal law preempted state law on the issue, but the trial court reversed.[244] 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."[245] The circuit court reversed the trial court.[246] It noted that, in considering the issue of field preemption – whether congressional regulation was pervasive and occurred in an area where national interest predominates[247] -- the district court had failed to consider the various clauses in the Constitution, Article I, section 8 that expressly grant to Congress the power to regulate the various branches of the military, including control and discipline of the Militia.[248] After analyzing these clauses and the history of Congressional regulation of Militias under them,[249] the circuit court concluded that federal

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[241] *Id.* at 782.

[242] *Id.* at 780. The Wisconsin court of appeals had already concluded that "persons with AIDS," *id.* at 782 n. 4, 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, Wis. Stats. § 111.32 (8). *See* Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567 (Wis. Ct. App. 1991), cited in *Hazelton*, 178 Wis. 2d at 782 n. 4.

[243] *Hazelton*, 178 Wis. 2d at 780-81.

[244] *Id.* at 783.

[245] *Id.* at 784.

[246] *Id.*

[247] *Id.* at 787.

[248] *Id.* at 790.

[249] *Id.* at 789-92.

regulations governing the National Guard clearly preempt WFEA.[250] It reached the same conclusion as a result of its review of the Wisconsin Constitution and relevant statutes.[251]

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.[252] 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.[253] 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*[254] 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.[255] 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."[256] Therefore, the Department of Employee Trust Funds (DETF), which administers

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[250] *Id.* at 794.

[251] *Id.*

[252] Wis. Stat. § 21.35 (2005).

[253] 03 Wis. Act 69 § 14.

[254] 167 Wis. 2d 205, 482 N.W. 2d 121 (Wis. Ct. App. 1992).

[255] Chap. 112, 1981 Wis. Laws, sec. 22, amending Wis. Stats. sec. 230.01 (2).

[256] Wis. Stats. 111.322 (2005).

benefits for Wisconsin state employees, violated state law when it refused to add Phillips' same-sex partner to her employee health insurance coverage.[257] The Wisconsin Court of Appeals upheld the administrative agencies and the trial court in holding that no discrimination had occurred.[258] The case was not appealed to the Wisconsin Supreme Court.

The Court of Appeals largely determined its entire 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.[259]

The opinion recurs repeatedly to the claim that the real issue is marriage,[260] even asserting that the rule defining "dependents" for purposes of state employee benefits did not classify by sexual orientation at all.[261]

This is a particularly illogical assertion 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.'"[262] 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

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[257] 167 Wis. 2d at 212. 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.*

[258] *Id.* at 212-14.

[259] *Id.* at 213 n. 1.

[260] *Id.* at 217, 219, 221-22.

[261] *Id.* at 227.

[262] *Id.* at 223.

received equal treatment to gay men[263] – 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."[264]

> 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.[265]

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 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."[266]

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[263] *Id.*

[264] *Id.* at 219.

[265] *Id.* at 220.

[266] *Id.* at 213 n. 1.

With *Helgeland v. Department of Employee Trust Funds*, the Wisconsin affiliate of the American Civil Liberties Union (ACLU-WI), which helped Phillips with her suit,[267] decided in 2005 to try again. This time the plaintiffs argued that same-sex couples voluntarily take on the obligation of mutual responsibility without appropriate benefits.[268] 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.[269] 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.[270] It argues that same-sex couples have voluntarily undertaken such responsibilities without the benefit of corresponding legal rights.[271]

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.[272] *Phillips*, by contrast, grew primarily out of a statutory claim, adding constitutional arguments only at the level of judicial review, after two administrative steps.[273] *Phillips* is central to the debate in *Helgeland*, however. Responding in *Helgeland*, the State of Wisconsin argued that the court should grant judgment on the pleadings to the defendant

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[267] *Id.* at 211.

[268] Amended Complaint, Helgeland v. Dept. of Employee Trust Funds, Dane County Circuit Court, June 8, 2005 (No. 05-CV-1265).

[269] *Id.* at 30.

[270] *Phillips*, 167 Wis. 2d at 220, Amended Complaint at 29.

[271] Amended Complaint at 29.

[272] *Id. See also*, Helgeland v. Wisconsin Municipalities, 2006 WI App 216 P3, 724 N.W.2d 208, 215 (Wis. Ct. App. 2006) (interlocutory appeal by would-be intervenor-defendants of trial court's decision that they lack standing to serve as defendants).

[273] *Phillips*, 167 Wis. 2d at 212, 223 n. 10, 224.

because no material facts were at issue and the plaintiffs' complaint failed to state a valid legal claim – *Phillips* controlled, completely settling the matter.[274] Oddly, then, the complaint in *Helgeland* constitutes the effort to rely on the state constitutional guarantee of equal protection of the laws to get around the inability of Chapter 112 to secure benefits for the same-sex partners of state employees.[275]

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,[276] or the prohibition on recognition of same-sex marriages.[277] The anti-marriage amendment might seem irrelevant to the issue in *Helgeland*, employee benefits for the same-sex partners of public employees in the state.[278] However, a very similar issue has arisen already in Michigan, which added an anti-marriage amendment to its state constitution in 2004.[279]

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.[280] The trial court held that the provision of benefits is a function of the employment

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[274] Defendants' Memorandum in Support of Motion for Judgment on the Pleadings, *Helgeland*.

[276] 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."

[277] 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."

[278] *See supra* notes 269 and accompanying text.

[279] Nat'l Pride at Work v. Gov., 2007 Mich. App. Lexis 240, *4 (Feb. 1, 2007).

[280] *Id.*

contract, but not part of the statutory rights of marriage, making the anti-marriage amendment irrelevant.[281] The appeals court reversed, holding that the determination of who was eligible for employee benefits necessarily depended on the claim to a quasi-marital relationship, thus violating the amendment.[282]

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.[283] But it concluded with regard to comparable amendments from other states that they provided no help, since judges in those other states had not had occasion to apply them.[284] Thus, the Michigan appeals court relied on that state's own longstanding principles of constitutional interpretation.[285]

Perhaps the greatest irony in this situation is that conservatives who complain when "activist judges" defend the legal equality of lesbians and gay men[286] have now written their paradoxical beliefs[287] about lesbian and gay civil rights into law, with the result that they have

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[281] *Id.* at *8. *See also,* Opinion and Order, Cir. Court for the County of Ingham, Case No. 05-368-CZ, Sept. 27, 2005, at 7, available at http://www.aclumich.org/pdf/briefs/dplawsuitdecision.pdf (last visited Feb. 15, 2007).

[282] *Nat'l Pride at Work* at *15-*16: "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*" (emphasis in original).

[283] *Id.* at *3, *3 n. 3.

[284] *Id.* at *3: "guidance from the decisions of other jurisdictions is unavailing."

[285] *Id.* at *11ff: "Michigan law recognizes three rules for construing constitutional provisions."

[286] *See, e.g,* In re H.S.H-K.: Holtzman v. Knott, 533 N.W. 2d 419, 442 (Wis. 1995), *cert. denied,* Knott v. Holtzman, 516 U.S. 975 (1995) (Steinmetz, Day dissenting); transcript of speech by President George Bush, Oct. 31, 2006: "Another activist court issued a ruling that raises doubt about the institution of marriage. We believe that marriage is the union between a man and a woman and should be defended"*;* Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage,* N.Y. TIMES, Oct. 27, 2006; JAMES DOBSON, MARRIAGE UNDER FIRE 80 (2003) (quoting Gerard V. Bradley, law professor at Notre Dame, criticizing "willful judges.".

[287] *See supra* note 8 and accompanying text.

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.[288] Judges, after all, are humans too. On the other hand, the outgoing Attorney General of Wisconsin, 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.[289] Her Republican replacement, J.B. Van Hollen, agrees.[290]

The legal issues are different. General Lautenschlager's opinion addresses whether the anti-marriage amendment precludes municipal domestic parntership registries,[291] while *Helgeland* claims that failure to provide benefits to the same-sex partners of public employees violates the equal protection of the laws.[292] Lautenschlater was careful at the end of her letter to note this difference.[293] 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.

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[288] *See supra* notes 279, 281.

[289] Opinion letter, Peggy A. Lautenschlater, Attorney General, State of Wisconsin, to Michael P. May, City Attorney, City of Madison, Wis., Dec. 27, 2006, available at http://www.doj.state.wi.us/ag/opinions/2006_12_27%20may.pdf (last visited Feb. 15, 2007) (hereinafter, Lautenschlater Letter).

[290] Mark Pitsch, *Attorney General's Role in Ethics Cases*, WIS. STATE J., Jan. 13, 2007.

[291] *Supra* note 289.

[292] *Supra* notes 267-71 and accompanying text.

[293] Lautenschlager Letter at 6.