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CONSTITUTIONAL CLASSIFICATIONS AND THE "GAY GENE"

SUSAN BECKER¹

Thank you. It is an honor to be here. It is amazing when you start planning for something like this how things change. No one needs to remind us how the world is very different today than it was prior to September 11th when we were planning this conference.

Also, as I sat here last night and listened to the Commissioner's very insightful and personal comments, and as I sat here this morning, I could pretty much throw out everything that I have prepared and start over. I am not going to do that, but I am going to try to make my remarks a little bit shorter.

I want to start out by sharing a little bit of a personal story here, because sometimes a word from the heart has more of an impact than all of the academic ideas that we put out here, and it is, indeed, relevant.

I have a niece. Her name is Rebecca. She is now 24 years old, she is married, she has two beautiful sons, and she has several congenital defects. The first thing the doctors diagnosed was a major heart defect. Her first six or seven months of life were spent mostly in intensive care, and she underwent three major operations on her heart before the age of four.

Rebecca has had some health complications throughout her life, but none of those have prevented her from developing into a wonderful young and strong woman who I'm proud to call my niece, as well as one of my best friends.

As we gather here today, Rebecca is in the hospital again. She was taken into intensive care and had emergency surgery two days ago. She has developed an intestinal obstruction that her doctors believe is linked to some of the other genetic problems that she has experienced.

Interestingly, she is in a hospital in Canada – a country with national healthcare. She is in Ontario and had surgery at the same hospital where her cardiologist who has cared for her for years practices. From this outsider's viewpoint, Rebecca has received exceptional care over the years, and I wonder what would have happened to her here if she had been born in this country with minimal insurance or no insurance available due to these congenital conditions.

In any event, Rebecca is one of the reasons that I have often thought about issues relating to genetics, especially issues that relate to prenatal testing. What would most people do if they discovered that their unborn children had "defects" like Rebecca has? Would they abort them? Would they opt for risky *in utero* procedures? If procedures were available, would insurance cover them, or deny coverage on the grounds that the testing was too inconclusive or the medical

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interventions are too experimental? I can not answer these questions, but they become more relevant with every advancement in the field of genetic research.

Being a law professor, I have also thought about these matters from a legal perspective for a long while. I readily confess that I am not a law-and-genetics scholar, nor do I have medical expertise in this area. Most of my comments today are about constitutional law. And I as look in the audience, I see Professor Candice Hoke, who will be speaking later, and other people who are certainly better qualified than I in some of these areas of constitutional analysis. But I have litigated cases in the area of sexual orientation, and of course I have Rebecca in my thoughts, so I guess I am talking both from the heart and from experience when I address you today.

What I am going to talk about is the use of genetic information to classify individuals for purposes of the law, and more specifically, the impact of the so-called "gay gene" on legal classifications. What is really important here, and the reason I need to offer you a primer on constitutional law, is so that we all start on the same page by understanding how our laws, starting with the federal constitution, classify people for the purpose of bestowing or denying rights and benefits. This leads us to an understanding of why people object to various classifications, and an appreciation of the power of the courts in determining if certain classifications are appropriate. I am, in a way, laying the groundwork for subsequent speakers who will more fully address how genetic classifications may be developed as we learn more and more from the human genome project about the specific genes that make us who we are.

It should not be a surprise to any of us when we look at our country's founding document, the United States Constitution enacted in 1787, and often described as the alpha and omega of United States law, that our laws classify people. That is simply what our legal system does. If you look at the Preamble to the United States Constitution, which we have all seen quoted thousands of times, it starts out with the promise that "We the people" who enact this constitution are – in order to form this more perfect union – and note that there's no promise of a perfect union there; the founders knew it was a work in progress and we have certainly proven that point true over the last 225 years.²

Anyway, we *promise* that, among other things, we will establish justice, we will insure domestic tranquility, and we will secure the blessing of liberty to ourselves and to our prosperity. This sounds like a veritable land of Eden, does it not?

Well, we have to stop and ask this question: Who was making those promises, and to whom were the promises made? The people who were recognized under this United States Constitution, those who were writing it and those who sought to prosper under it, were a very narrow class of people. They were mostly of European origin, white, male, wealthy, and usually landowners. It is a very narrow group of people making promises to themselves.

By definition it excluded more than 50 percent of the population, women, for example. It did not even consider Africans who had been brought over as slaves or indigenous individuals as human beings. So we start out with this document to form "a more perfect union" by excluding the vast majority of people living within this country's borders at the time. That is pretty remarkable.

²U.S. CONST. pmbl.

And so when you think about that, and what has happened ever since, we see that the evolution of our law from 1787 until today is largely the story of how we have classified people, how we have divided people and given some rights and remedies to some people, while denying those same rights and remedies and even penalizing people in other classes.

We achieve classifications a number of ways. The primary means is by enacting statutes, ordinances, and other laws through the processes of legislative bodies. For example, I was impressed with some of the material that the Commissioner brought along. These are publications from the EEOC, I believe, government publications that list various types of protections that are available in the employment context. These publications are very impressive individually and collectively, but as you can see, they all define classes of people who are deserving of protection. By listing those who have been deemed worthy of protection, they automatically exclude large classes of people who are not protected by these laws.

Take, for example, federal laws prohibiting job discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin.³

The Equal Pay Act of 1963 protects men and women who perform substantially the same jobs, protecting them in terms of getting the same pay for those same jobs.⁴

The Age Discrimination Act of 1967 protects people who are over the age of 40.⁵

Title I of the Americans with Disability Act, which the Commissioner talked about at length yesterday, prohibits discrimination against qualified individuals who have "disabilities" or are perceived as having "disabilities," and so on and so forth.⁶

So we have myriad laws, a lot of statutes that protect certain groups and individuals from oppression and discrimination, and, of course, that is a good thing. But why are laws such as these controversial and why are they so frequently challenged in court? Well, I suppose it is somewhat obvious. Not everyone is happy about being included or excluded from certain laws based on classifications made by legislatures or other decision-makers. Take, for example, a 39-year old, able-bodied, white male who believes he was unfairly terminated by his employer. He is not included in any of the classes of individuals protected by the employment discrimination laws I just cited.

Or take an issue like affirmative action, which is an extremely timely and controversial subject. Affirmative action programs identify an "historically disadvantaged minority," however that class is defined – some are based on sex, some are based on race – and they give persons within that class preferential treatment in hiring, or in admission to educational programs, or in other situations. By definition, that excludes non-minorities from getting this treatment. Those excluded from the favored class are obviously not going to be happy about it.

On the other hand, it is certainly a mistake to say that all minority people who might be eligible for affirmative action treatment favor such programs. I know some

³42 U.S.C. § 2000, *et seq.* (2003).

⁴29 U.S.C. § 206.

⁵29 U.S.C. § 621, *et seq.* (2003).

⁶29 U.S.C. § 12102(2).

people of color who are adamantly opposed to them because they believe such efforts to “benefit” minorities casts a shadow over every achievement made by a person who is a member of a minority class. So for them, inclusion in a protected class is a negative.

I want to point out that the laws that divide people into classes are not necessarily the grand laws protecting civil rights, but also things as relatively mundane as who can drive a car. The states set standards based on age, vision standards, and other criteria to decide who can drive and who cannot. So underlying all of our laws are these classifications of people, some who are included in the protected class and some that are excluded.

So what does this mean? Well, it means that some people will always be unhappy whenever a law is passed, especially laws intended to remedy injustices, because some people will inevitably be excluded. Sometimes even the included people are not happy about it. In any event, someone will be unhappy when these laws are passed or are enforced in a way that clearly includes some people and excludes others.

To determine if a challenged law is valid, we consult the Constitution. What we find is the 14th Amendment, which is applicable not only to the states but also to the federal government as well through the 5th Amendment. And the Constitution says, very simply, that no governmental entity shall deprive any person of life, liberty, or property without due process of law. It also forbids denying any person equal protection under the law.⁷

How can these two legal concepts co-exist? How can we have a system of laws that divides people into classes of those included and those excluded, but have a Constitution that promises everyone equal protection? It is because the Constitution also recognizes, as does all the case law that has been developed under it, that there are legitimate reasons for classifying people for different purposes as included and excluded. We have just accepted that. We have just accepted that as a fundamental premise in our system of ordered liberty.

But then the question becomes, how do we know when we have done it right, when we have made proper classifications? In terms of modern legal analysis, we look to the Equal Protection Clause of the 14th Amendment and the guidance provided by the U.S. Supreme Court for applying that promise of equality.

What we find is a significant, but not always consistent, body of Supreme Court 14th Amendment jurisprudence for testing the constitutionality of how statutes, laws, ordinances, policies, and the like classify people as included or excluded. In short, we test the constitutionality of the classifications created by a challenged law by seeing how the challenged law fits into classifications previously established for constitutional analysis by U.S. Supreme Court.

Let me state that again: We test the constitutionality of the classifications created by a challenged law by seeing how the challenged law fits into classifications previously established for constitutional analysis by the U.S. Supreme Court.

That sort of makes you dizzy, doesn't it? Well, if it makes you dizzy, you are in good company: it has apparently had the same effect on Supreme Court Justices.

⁷U.S. CONST. amend. XIV.

In a nutshell, and again, I am over simplifying this very complex area of law, what the U.S. Supreme Court has done has decided that certain types of classifications deserve extra care, extra scrutiny by the courts. If a classification includes or excludes persons based on race, alienage or national origin, for example, the Court applies what is known as the strict scrutiny test.

If the challenged law falls into a category which will be strictly scrutinized, the government has to show that there is a compelling interest, a compelling state interest, as to why some people are included and some are excluded. The government also has to show that the classifications are narrowly tailored to serve that compelling interest.

At the opposite end of the spectrum from classifications receiving strict scrutiny are classifications where the Supreme Court has held that a mere rational basis is needed; that means that just about any reason given by the government will suffice. And just about every classification other than those based on race, alienage, and national origin are subject to the rational basis test. So, with classifications based on sexual orientation, for example, there only has to be some nexus, some rational basis, between the classifications created by the law and the law's objectives. It is a very low threshold for testing whether challenged classifications should be upheld.

Now, the rational basis, strict scrutiny, and other tests have been widely criticized. I rarely agree with Justice Scalia, and I certainly never thought I would be doing so while my comments are being recorded. But as Justice Scalia said in his dissent in *United States v. Virginia*, a case which dealt with the admission of a female cadet to the all-male Virginia Military Institute, "these tests are no more scientific than their name suggests, and a further element of randomness is added by the fact that it is largely up to us which tests will be applied in each case."⁸

What types of classifications are we talking about today? We are talking about genetic classes, about the possibility of current and future legislative classifications of persons based upon their genetic makeup. More specifically, what I want to talk about is the so-called "gay gene."

First of all, I want to be very clear; a "gay gene" has not yet been discovered. There are some hints that a biological basis may exist for sexual orientation. There are some fascinating - yet still inconclusive - scientific studies on this matter. Studies have demonstrated, for example, a significant correlation in the sexual orientation of identical twins - that is, twins who share 100 percent identical genes. There are also studies suggesting different brain structures for heterosexual and homosexual men, and another study that suggests that genes influencing sexual orientation may reside in the q28 region of the X chromosome. These have opened doors for more research on a possible genetic/biological component of sexual orientation.

So what if this is proven? What if there is a genetic basis for sexual orientation?

As you may know, it is still legal, certainly on a national level, and in a lot of states, to discriminate in employment, in housing, in education, on a lot of different levels based on sexual orientation. Simply put, homosexuals are still second class citizens in much of the U.S. Will this be remedied if a "gay gene" is discovered?

⁸518 U.S. 515 (1996) (Scalia, J., dissenting).

Well, the jury is still out on that one. There are a lot of people who think that discovery of a "gay gene" would be a very negative development. They point to issues outside legal classifications, like political coalitions and cultural identity, that might be undermined or destroyed if sexual orientation is seen as merely a happenstance of biology. They are also concerned that this genetic variation would be labeled a "defect," thus resulting in systematic extermination through abortion. They also note that, unlike today, when no biological test is available for categorizing a person as "gay" or "straight," the discovery of a "gay gene" would provide arguably conclusive proof of an individual's sexual orientation. Whatever advantages or safe harbors gay men and lesbians currently enjoy by being able to remain essentially invisible, to keep their sexual orientation private, would be lost. I emphasize that this privacy interest is very important, not only to members of the gay and lesbian community, but to everyone who is interested in basic civil liberties.

Other people, however, think discovery of a "gay gene" would represent a very important advancement for the rights of gay and lesbian individuals. Take, for example, the classification of laws subject to strict scrutiny, that highest level of constitutional tests. One standard that the Supreme Court often uses to determine whether strict scrutiny applies is whether there is an immutable characteristic that persons within the classification cannot change or control. If a genetic component is found for sexual orientation, then it is arguably an immutable characteristic. Classifications that disadvantage or even punish homosexuals would be examined under the same harsh light now applied to classifications based on race and alienage and nationality. And even if strict scrutiny were not applied, how could a government "rationally" base discrimination against a defined class - *i.e.* homosexuals - who had no control over their sexual orientation? It is unlikely that such laws would pass constitutional muster, and thus would be struck down.

To sum up, one of the functions of the law in this country, starting and ending with our federal constitution, is to separate people into classes. Some are included, some are excluded, by every legal classification. Some get additional rights or privileges, while others have additional burdens and limitations placed upon them due to legal classifications.

Genetic testing will further define the classes and even sub-classes that are advantaged or disadvantaged under our laws. Accordingly, the issue of genetic discrimination is a topic deserving of great thoughtfulness, consideration and dialogue. I am honored to be a part of this conference that is dedicated to furthering that kind of discussion.