

Gender, Sexual Orientation, and the Law

Fall 2010

Final Exam

Instructions

Your exam should have your exam identification number at the top. Do not include your name on your exam answer.

You may use your book and any materials I passed out in class to complete the exam. You should not do any outside research.

You do not need to cite cases in the exam, though referring to specific cases by name may be helpful in answering the questions.

Please read the attached memo from the El Paso District Attorney to the Attorney General of Texas (AG). Answer the following questions:

1. How should the AG respond to the Questions Presented? Remember that the AG must also consider Texas' mini-DOMA in responding to the questions.
2. Assume that Hill is denied a marriage license and wishes to bring a challenge to the denial under the United States Constitution. You are the federal judge who received Hill's complaint. Please draft an opinion accepting or rejecting her claims.
 - a. First, state Hill's potential claims.
 - b. State the standard of review and the rationale for the standard of review for each potential claim.
 - c. Address the arguments pro and con on each claim.
 - d. Give your holding and reasoning on each claim.

SAMPLE ANSWER OUTLINE

Summary of the Main Issue(s):

The big problem under Texas law raised by the facts is whether Texas is going to approve same-sex marriage in some form, thus violating its own mini-statute. Under the precedents, it looks like Hill is legally male according to her birth certificate even though she now appears female. Therefore, she can marry another woman, arguably resulting in a same-sex marriage. On the other hand, if she is treated as legally as a female for marriage purposes so she could legally marry a man, but her birth certificate says she is male, will that marriage also run afoul of Texas' DOMA? Who can she marry?

The case presents the problem of how the legal system defines gender as well as all of the legal questions surrounding same-sex marriage.

QUESTIONS PRESENTED

There is no one correct answer here. However, I expected answers to the questions to discuss the following issues:

- how gender should be defined as a legal matter
- policy considerations around what documents can be used to prove gender
- whether the applicant has any say in choosing which documents to provide, and, by implication, in choosing her gender as a legal matter
- how the potential gender definition selected by the state may conflict with Texas' mini-DOMA and how the legal system might resolve the conflict
- an ultimate decision on whether Hill should get the marriage license

HILL'S CONSTITUTIONAL CHALLENGE

Hill has two potential constitutional claims to the denial of the marriage license: 1) sex discrimination and 2) sexual orientation discrimination. Each of these claims involves a fundamental right and equal protection dimension.

Again, there is not a correct answer here. Whether the exam writer found for or against Hill, good exam answers contained a discussion of the following issues and provide an analysis of the arguments for both Hill and Texas based on the cases we discussed during the semester.

Here is an outline of the issues involved:

1) Sex discrimination claim

a. Fundamental right

1. How do you frame the right?
2. Is it a fundamental right? What is the test?

Glucksberg analysis

Lawrence analysis (note that *Lawrence* did not use the *Glucksberg* test)

3. What standard of review should apply?
4. Apply the standard to the state's arguments.

b. Equal protection

1. Is there a suspect class?

a. How do you define the class? Is discrimination against trans people sex discrimination? There are cases on both sides of this issue. The state will argue there is no sex discrimination here because of equal application. Alternatively, they may argue this is trans discrimination or sexual orientation discrimination and those claims receive a lower level of scrutiny.

2. Is the class suspect?

a. What is the traditional test?

3. What level of scrutiny should apply?
4. Apply the standard to the state's arguments.

Here the state would argue this isn't a case of sex discrimination.

2) Sexual orientation discrimination

a. Fundamental right

1. How do you frame the right?

Is this about the right to marriage or the right to same-sex marriage? Note that we have read cases on both sides.

2. Is it a fundamental right? What is the test?

Glucksberg analysis – compare *Perry* with *Hernandez*

Lawrence analysis (note that *Lawrence* did not use the *Glucksberg* test)

3. What standard of review should apply?
4. Apply the standard to the state's arguments.

b. equal protection

1. Is there a suspect class?

a. how do you define the class? Is discrimination a MTF trans person who identifies as lesbian sexual orientation discrimination?

2. Is the class suspect?
 - a. What is the traditional test?
 - b. How does *Romer* factor in?
3. What level of scrutiny should apply?
4. Apply the standard to the state's arguments.

The state's arguments in restricting marriage should include the following:

- 1) the mechanism argument
- 2) the dual gender argument
- 3) tradition and morality

Because Hill is transgender, she has some different counterarguments to the state's arguments depending on whether she is arguing from the sex discrimination or sexual orientation discrimination perspective. For example, how does the dual gender argument apply in a marriage involving a MTF transgender person and a male?

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OPINION COMMITTEE



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April 19, 2010

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OPEN RECORDS DIVISION

FILE # ML-46443-10
I.D. # 46443

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7009 1680 0001 9160 0857

Re: REQUEST FOR AN OPINION REGARDING MARRIAGE LICENSE
REQUIREMENTS
(CA File #OP-10-075)

Dear General Abbott:

I am seeking your opinion regarding the authority of the El Paso County Clerk to issue a marriage license in the following circumstance.

I. Background

Virgil Eugene Hill, Jr. was born in Oceanside, New York; his birth certificate identifies his sex as male. He subsequently underwent sex change surgery, and on July 2, 1991, Judge Richard B. White, of the District Court of the State of Washington and for the County of Spokane, issued an Order, changing the name of Virgil Eugene Hill, Jr. to Sabrina Jeanne Hill (hereafter "Hill") for all intents and purposes. In February of this year, Sabrina J. Hill sought a marriage license from the County Clerk of the County of El Paso, Texas, presenting as identification the New York birth certificate; the Washington State court order; and an Arizona driver's license, which also identified her as a female (the second applicant for the marriage license presented a Texas drivers license identifying her as a female).

In evaluating the various proofs of identity offered by Hill, the County Clerk was unsure as to the eligibility of the applicants for a marriage license. Upon further discussion, it was agreed to submit the question of their eligibility to your office for an opinion. At issue is whether or not, under Texas law, the county clerk may issue them a marriage license based on Hill's birth certificate.

II. Legal Arguments and Authorities

Pursuant to Texas Family Code section 2.005¹, in order to obtain a marriage license, the county clerk shall require proof of identity and age of each applicant for a marriage license; nineteen documents that will each satisfy the proof requirement are listed. Included among the nineteen listed documents are an original or certified copy of a birth certificate issued by a bureau of vital statistics for a state or foreign government²; an original or certified copy of a court order relating to the applicant's name change or sex change³; and a current driver's license or identification card issued by this state or another state.⁴

A. Texas Case Law and Defense of Marriage Act

1). *Littleton v. Prange*

The question of whether a transsexual is male or female, and therefore capable of entering into a valid marriage with a member of the opposite sex, was first raised in Texas in *Littleton v. Prange*, 9 S.W.3rd 223 (Tex. App.—San Antonio 1999, pet. denied). Lee Cavazos, born a male, underwent a four-year program, including psychological and psychiatric treatment at the University of Texas Health Science Center, and legal name change to Christie Lee Cavazos prior to sex reassignment surgeries. Christie Lee became Christie Lee Littleton when she married Jonathan Mark Littleton. They were married for seven years, until Jonathan's death. Christie Lee Littleton filed a medical malpractice suit under the wrongful death statute as a surviving spouse against a doctor who then filed for summary judgment, alleging that Christie Lee Littleton was a male, therefore could not be the surviving spouse of a male, and therefore could not be a wrongful death beneficiary. In response, Littleton provided an amended birth certificate, obtained after the sex reassignment surgery, which indicated her sex as female.

¹ All references are to the Texas Family Code unless otherwise indicated.

² § 2.005(b) (6).

³ § 2.005(b) (8).

⁴ § 2.005(b)(1).

In its analysis, the appellate court indicated that it would have preferred to defer to the Legislature.

“In our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case where the claim being asserted is statutorily-based.

“It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. ...But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists; we can only interpret the written word of our sister branch of government, the legislature.

Littleton, 9 S.W.3d 223, 230.

Lacking legislative guidance, the court decided that the solution was to stand on Littleton’s original Texas birth certificate, and reject the amended birth certificate. The court held that, as a matter of law, Littleton was immutably a male.⁵

Subsequently, in what was perhaps an unintended consequence of *Littleton*, the Bexar County Clerk’s office issued a marriage license to at least two couples in which both parties were apparently women, because one of each couple was able to produce a birth certificate showing she was born a man.⁶

2) *The Federal Defense of Marriage Act and Texas Family Code section 6.204 and Texas Constitution, Article I, Section 32*

In 1996, the United States Congress passed the Defense of Marriage Act, 28 U.S.C.A. §1738C (2010) (DOMA). DOMA defined marriage for federal purposes as a legal union between one man and one woman, and provided that no state shall be required to give any effect to any public act, record, or judicial proceeding of any other

⁵ The amended certificate had been obtained pursuant to Texas Health & Safety Code section 191.028, which permitted amendment of the birth certificate if the record was “incomplete or proved by satisfactory evidence to be inaccurate.” The appellate court found that the trial court had misconstrued the statutory term “inaccurate”; its role had been a ministerial one only, and its decision was based neither on fact findings or the result of policy considerations. Instead, the appellate court interpreted the term “inaccurate” to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth, which the original birth certificate was not. *Littleton*, 9 S.W.3d 223, 231.

⁶ Gutierrez-Mier, John, San Antonio Express-News, *2 More Women Obtain County Marriage License*, published 09/20/2000, available at <http://www.christielee.net/same15.htm> (accessed March 2, 2010)

state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or a right or claim arising from such relationship. DOMA permitted states to adopt laws which exempted them from recognizing same sex marriages even if they were lawful and permitted in another state.

Pursuant to DOMA, in 2003, the Texas 78th Legislature, Regular Session, added Section 6.204 to the Texas Family Code, including section 6.204(b):

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

TEX. FAM. CODE ANN. §6.204(b) (Vernon 2009).

At the next legislative session, in 2005, the Texas 79th Legislature, Regular Session, approved H.J.R. No. 6, which proposed a Texas constitutional amendment that the authors believed would “protect” section 6.204 from legal challenge.⁷ The proposed constitutional amendment was approved by the voters on November 8, 2005, and added section 32 to Article I of the Texas Constitution, as follows:

Section 32. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

TEX. CONST. art.I §32.

However, DOMA faces numerous legal challenges, including challenges to its constitutionality under the U.S. Constitution, particularly the Due Process, Equal Protection, and Full Faith and Credit provisions, from both conservative and liberal sources.⁸ Although marriage is traditionally regulated by state law, it is a fundamental right under the U.S. Constitution, *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving* struck down as unconstitutional a Virginia law that criminalized marriages between white persons and “colored” persons. Other U.S. Supreme Court cases have established that any government action resting on a distinction between discrete classes must be rationally related to a legitimate government purpose. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Romer v. Evans*, 517 U.S. 620, 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)).

⁷ Author’s Sponsor’s Statement of Intent, H.J.R. 6, Bill Analysis, Senate Research Center, available at <http://www.legis.state.tx.us/tlodocs/79R/analysis/doc/HJ00006E.doc> (accessed March 2, 2010)

⁸ See, Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 Vt. L.Rev.291 (2009).

3) *Mireles v. Mireles*

Subsequent to DOMA and its Texas counterparts, another case, *Mireles v. Mireles*, 2009 Tex. App. LEXIS 2225 (Tex. App. Houston 1st Dist. Apr. 2 2009—pet. denied) considered the validity of a marriage based on the disputed legal gender of the parties. In *Mireles*, an ex-wife sought, by collateral attack, to have a divorce decree set aside and vacated because her ex-husband was born a female. The appellate court sought to follow the requirements of Section 6.204 and Article I, Section 32 of the Texas Constitution, but neither provided guidelines for determining whether a transsexual is a man or a woman. The *Mireles* court looked to *Littleton* for guidance, and adopted *Littleton*'s holding that a party's gender is immutably determined by a true and accurate original birth certificate, regardless of subsequent facts. On that basis, the appellate court found that both parties were of the same gender and the marriage between them was void as a matter of law under Tex. Const. art. I section 32; and Tex. Family Code section 6.204(b).

4) *Under Texas law, Hill is a male*

In the instant case, Hill's "true and accurate birth certificate" identifies him as a male. Based on *Mireles*, Hill is immutably and irrevocably a male, and, under Texas law, can marry a female. His application for a marriage license to marry a female and their marriage would not be in violation of Tex. Const. art. I §32, or Tex. Family Code §6.204(b).

B. 2009 Changes to the Family Code

Prior to 2009, Section 2.005(b) provided that the marriage license applicant must provide proof of identity and age by a certified copy of the applicant's birth certificate or by some certificate, license, or document issued by this state or another state, the United States, or a foreign government. But in 2009, the Legislature amended section 2.005(b) to expand the acceptable list of documents to prove identity and age.⁹ In so doing, the 81st Legislature, perhaps in response to the request for guidance in *Littleton*¹⁰, implicitly rejected both *Littleton* and *Mireles*. The amendments to 2.005(b) list a wide variety of acceptable documents, including two rejected by the *Littleton* court: Section 2.005(b)(6) permits the use of an original or certified copy of a birth certificate issued by a state; and Section 2.005(b)(8) specifically permits the use of an original or certified copy of a court order relating to the applicant's name change or sex change to provide proof of identity

⁹For example, Section 2.005(b) includes (1) driver's license; (5) unexpired military identification card for active duty, reserve or retired personnel; (9) school records from a secondary school or institution of higher learning; (11) motor vehicle certificate of title; (12) military records; (15) voter registration certificate.

¹⁰*Littleton*, 9 S.W.223, 230.

and age. The new state law permits an applicant for a marriage license to prove identity with a court order regarding a sex change, nullifying the “true and accurate birth certificate” test as the immutable determinant of gender.

That interpretation is further supported by the fact that the documents acceptable to establish proof of identity and age in Section 2.005(b) are not ranked by probative value or otherwise distinguished. If the circumstances mirror the fact situations in *Littleton* and *Mireles*, conflicting information may arise not from fraud or mistake, but by deliberate action of the party, allowing the applicants themselves to identify their gender.

It may be that the Legislature recognized the difficulty of a simple definition of gender, and has chosen to accept court orders as determinative. Previous cases, law review articles, and other reference works have all struggled with the proper analysis. As the case of first impression in Texas, *Littleton* reviewed an English case, *Corbett v. Corbett*, 2 All E.R. 33 (P.1970), which they identified as the first case to consider the issue. *Littleton* considered *Corbett's* four criteria for assessing the sexual identity of the individual: chromosomal factors, gonadal factors, genital factors, and psychological factors. Chromosomal factors are particularly tricky, as there exist chromosomal disorders and hormonal disorders in which the chromosomal sex does not match the outward, physical appearance; in fact, a person may be unaware of the mismatch until a rude awakening after genetic testing. Such is the case in a hormonal disorder called Androgen Insensitivity Disorder (AIS), in which, for example, a person may appear to be female in all respects, but whose chromosomal pattern is one typical of males (XY) and not that of females (XX); people who have this condition are often called “intersexuals.”¹¹

*1) Court Order Relating To The Applicant's Name Change as Proof of Identity:
Hill is a Female*

The 2009 changes to the Texas Family Code include section 2.005(b)(8), which provides that proof and identity and age of an applicant for a marriage license can be provided by an original or certified copy of a court order relating to the applicant's name change or sex change. In this case, Hill produced a copy of an Order Changing Name issued by Judge Richard B. White, District Court of the State of Washington in and for the County of Spokane, In the Matter of the Petition of Virgil Eugene Hill, Jr., A/K/A Sabrina Jeanne Hill for Change of Name, No. 910005. If the Order Changing Name is used as proof of identity and age, Hill is a female, and is not eligible to obtain a marriage license in Texas to marry another female, *see* Tex. Const. art. I §32; Tex. Family Code Ann §6.204(b).

¹¹ 52 Baylor L. Rev. 727, NOTE: Littleton v Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage, Summer, 2000, 727-736.

2) Driver's License as Proof of Identity: Hill is a Female

The 2009 changes to the Texas Family Code also include 2.005(b)(1), which provides that proof and identity and age of an applicant for a marriage license can be provided by a current driver's license or identification card issued by another state. In this case, Hill produced a current Arizona driver's license, which identifies Sabrina J. Hill as a female. If the driver's license is used as proof of identity and age, Hill is a female, and is not eligible to obtain a marriage license in Texas to marry another female. See, Tex. Const. art. I §32, and Tex. Family Code §6.204(b).

III. Questions presented.

1. Is Hill's birth certificate determinative as to gender for the purpose of proof of identity required for a marriage license under the Family Code?
2. How does the 2009 amendment to Texas Family Code section 2.005(b) affect the *Littleton* and *Mireles* precedents regarding determination of a person's gender for purposes of a marriage license?
3. Do the documents listed in Texas Family Code section 2.005(b) as proof of identity and age have equal value in making the determination of a person's gender?
4. If a person has several documents listed in Texas Family Code section 2.005(b), may the person choose which document to provide, and not disclose the others?
5. Is Tex. Fam. Code section 2.005 (c)¹² implied if, as in the instant case, the marriage license applicant is in the possession of identity documents that indicate different genders based on different time periods in that person's life?
6. May the El Paso County Clerk issue a marriage license based on Hill's providing proof of identity as a male by his birth certificate?

IV. Conclusion

In 2009, the Legislature enacted new laws under the Texas Family Code to expand the list of documents acceptable to establish proof of identity and age for purposes of obtaining a marriage license.

¹² "A person commits an offense if the person knowingly provides false, fraudulent, or otherwise inaccurate proof of an applicant's identity or age under this section. An offense under this subsection is a Class A misdemeanor."

The Honorable Greg Abbott
February 19, 2010
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We believe that the 2009 changes to the Family Code provide, for the purposes of a marriage license application, that the identity of a person as a man or woman may be established by any one of the nineteen documents listed in section 2.005(b); and the County Clerk is bound to accept whichever document the applicant submits under section 2.005(b) as proper proof of identity and age.

I respectfully request your opinion regarding these issues.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jo Anne Bernal".

Jo Anne Bernal
El Paso County Attorney