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LITIGATION BLUES FOR RED-STATE TRUSTS: JUDICIAL CONSTRUCTION ISSUES FOR WILLS AND TRUSTS

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Abstract

Will construction—the process wherein a trier of fact must determine the testator's probable intent because the testator's actual intent is not clear—is too little discussed and too often misunderstood in succession law jurisprudence. Yet, construction issues are becoming increasingly important due to a growing number of will and trust disputes concerning the determination of beneficiaries in a post-*Obergefell* United States. Currently, courts are being asked to construe terms like "spouse," "husband," "wife," "child," "son," "daughter," and "descendants" in estate planning documents during a time in which understandings of marriage, identity, reproduction, religious liberty, and public policy are rapidly evolving. Interestingly, these various construction cases may have disparate legal outcomes depending upon the states in which the cases are litigated, even in cases with similar underlying facts. In fact, these definitions and consequent outcomes may correlate with the views of the state's dominant political party—whether a state is red or blue. Data support the notion that red states and blue states generally have different attitudes toward LGBT issues, artificial reproductive technology, and religion. Data also support the inference that judges—particularly elected judges—tend to be influenced by their respective state's attitude. Where a judge's decision-making is influenced one way or the other—toward the red side or the blue side—her approach to will construction and her understanding of public policy may reflect that tendency. Therefore, diverging public policies in red states and in blue states may affect judicial construction and govern dispositions. Accordingly, this Article addresses real-world construction issues in the estate planning context where a particular state's approach to the redefinition of both words and policy may influence the deemed intent ascribed to a donor's words.

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INTRODUCTION

Steve executes a will, leaving the residuary estate in equal amounts "to my three sons, Mike, Robbie, and Chip." Sometime after the execution of the will but before Steve's death, Steve's son Robbie transitioned into Roberta. Roberta legally changed her name, obtained a lawful gender marker change on her forms of identification and birth certificate, and had a sex affirmation surgery. Steve did not update his will to reflect Roberta's transgender identity before his death.

When Steve dies and his executor goes to carry out the will according to its terms, the executor is confronted with a description in the will that does not exactly fit any person—Steve no longer has three sons; rather, Steve has two sons and one daughter (Roberta). Will Roberta still take an equal share of the residuary estate under the will? If the provision left the residuary estate "to my sons" without listing any individual names, would this change the result? In yet another variation, would the result change if the provision were included in an irrevocable trust created before Roberta transitioned?

Interestingly, the outcome of this hypothetical scenario may likely differ depending on the state in which the judge was construing the will.[1]

1. This hypothetical and several others within this Article are based on real-life disputes and were originally promulgated and discussed in several speeches addressing the intricacies of estate planning and testamentary interpretation in the twenty-first century. *See, e.g.*, Lee-ford Tritt, Construction Issues in a Post-Obergefell World, University of Wisconsin Law School (Oct. 12, 2018); Alicia N. Graves, Amy Morris Hess, Cara M. Koss, and Lee-ford Tritt, The Twenty-First Century Family: Drafting Wills and Trusts in a Time of Changing Concepts of Family, Gender, and Race, ABA Real Property Trust & Estate Law Section CLE Meeting (May 11, 2018); Lee-ford Tritt, Document Construction Issues Raised by Changing Concepts of Family, Gender, and Race, Southwest Florida Estate Planning Counsel Distinguished Speaker Series (Nov. 2,

Specifically, the outcome may hinge upon whether that state was red or blue. Data support the notion that red states and blue states generally have different attitudes toward LGBT issues, artificial reproductive technology (ART), and religion.[2] Data also support the inference that judges—particularly elected judges—tend to be influenced by their respective state's attitude.[3] Where a judge's decision-making is influenced one way or the other—toward the red side or the blue side—her approach to will construction and her understanding of public policy may reflect that tendency. Thus, Steve's will may be construed differently in Texas than in Massachusetts.[4]

Will construction—the process wherein a trier of fact must determine the testator's probable intent because the testator's actual intent is not clear[5]—is too little discussed and too often misunderstood in succession law jurisprudence. Yet, construction issues are becoming increasingly important due to a growing number of will and trust disputes concerning the determinative of beneficiaries in a post-*Obergefell* United States.

Obergefell v. Hodges,[6] the 2015 U.S. Supreme Court decision that made same-sex marriage retroactively legal in all fifty states[7] and required all states to recognize same-sex marriages from other states,[8] arguably triggered more questions than it answered. *Obergefell* redefined a key construct within American succession law—"marriage" includes

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2017); Amy Morris Hess, William P. LaPiana, and Lee-ford Tritt, Document Construction Issues in Old and New Instruments in a Post-Obergefell World, ABA Section of Taxation CLE Meeting (Sept. 8, 2017); Amy M. Hess, Cara M. Koss, William P. LaPiana, and Lee-ford Tritt, If My Grandson Becomes My Granddaughter, Will She Still Get the Farm?, ABA Real Property, Trust & Estate Law Section CLE Meeting, (Apr. 20, 2017) [hereinafter Tritt, *Granddaughter*].

2. *See infra* Section II.A.

3. Joanna M. Shepherd, *The Influence of Retention Policies on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009) (finding that state supreme court judges often vote in line with the stereotypical preferences of the retention agents).

4. The differing results come from different answers to the same questions. For example, judges in all fifty states will have to address complicated questions like, "How is gender defined by law? Is a person's identity rooted in their gender? Is gender even relevant in determining a testator's intention to give to their child?" *See* Ashleigh C. Rousseau, Note, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were*, 47 HOFSTRA L. REV. 813, 835 (2018) (citation omitted).

5. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 146, at 809–10 (2d ed. 1953).

6. 135 S. Ct. 2584 (2015). *Obergefell* was a consolidation of six cases from Kentucky, Michigan, Ohio, and Tennessee that involved fourteen same-sex couples and two widowers from same-sex marriages who were either denied marriage licenses or recognition of their out-of-state marriages. *See id.* at 2593.

7. *See id.* at 2604–05 (holding state laws "exclud[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" to be unconstitutional).

8. *Id.* at 2607–08 ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

marriage between spouses of the same sex.[9] By implication, *Obergefell* redefined the attendant terms that denote a marital relationship; words like "spouse," "husband," and "wife" now carry meaning that can indicate marital status between members of the same sex.[10] *Obergefell* arguably changed the legal understanding of a social concept in response to society's pre-*Obergefell* redefinition of marriage, illustrating the co-evolutionary nature of American society and American jurisprudence: Where social definitions of concepts change, legal definitions of the words that denote those concepts must also change. Here, though, those changes provide the springboard for myriad questions that will not be answered fifty states at a time—because the laws of succession and family are governed by the states.[11]

In a federalist society, each state acts as an "insulated chamber" in which the beliefs of a state's constituents can ultimately dictate the policies a state enacts.[12] Thus, federalism leaves to the states much of the law-making that affects the day-to-day lives of their citizens, including family law and the laws of succession.[13] Now that all states must redefine

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9. *Id.* For a detailed account of the historical evolution of legal status of same-sex marriage in the United States, see Lee-ford Tritt & Patrick J. Duffey, Windsor's Wake*: Non-Traditional Estate Planning Issues for Non-Traditional Families*, *in* 48 HECKERLING INSTITUTE ON ESTATE PLANNING ¶¶ 1100, 1101–02 (2014).

10. Despite having the opportunity to adjust critical language from "wife" and "husband" to the gender-neutral "spouse," the Internal Revenue Service (IRS) has declined to do so. *See* Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 913–14.

> The Treasury Department recently issued final regulations that reflect the holdings of *Windsor*, *Obergefell*, and Revenue Ruling 2013-17. The regulations define terms in the Code describing the marital status of taxpayers for federal tax purposes. As in the earlier proposed regulations (NPRM REG-148998-13), the final regulations provide that the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife" means two individuals lawfully married to each other.

Id. at 913 n.259.

11. *See* Hillman v. Maretta, 569 U.S. 483, 490 (2013) ("The regulation of domestic relations is traditionally the domain of state law."). Additionally, while most of this Article's focus lies on LGBT couples, the evolution of familial and marital relationships significantly impacts heterosexual couples as well. For example, states' reluctance to allow and recognize children born through ART affects both homosexual couples and heterosexual couples—both kinds of couples must resort to ART to fulfill their desire for children.

12. Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663, 691 (1980) (quoting Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting)).

13. *See id.* at 690–91. This state law-making derives from the "residuary and inviolable sovereignty" that states retain. Printz v. United States, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST NO. 39 (James Madison)).

marriage such that same-sex couples are included within the word's meaning, each state also must address the implications of that change without the benefit (or burden) of uniform guidance. In general, federalism causes variances from state to state in all facets of the legal field. Often times, those variances relate to some of the most hot-button issues. For example, Illinois has some of the most stringent gun control laws in the United States.[14] In contrast, Arizona implements loose gun control laws; Arizona does not even require registration of guns.[15] Many similarly controversial issues also differ widely from state to state.[16] Thus, the fact that states differ in their handling of issues that implicate LGBT rights—marriage, transitional surgery, adoption, ART—should come as no surprise.

Post-*Obergefell*, courts are now being asked to construe terms like "spouse," "husband," "wife," "child," "son," "daughter," and "descendants" during a time in which understandings of marriage, identity, reproduction, religious liberty, and public policy are evolving. This need is complicated by the fact that neither social nor legal evolution occurs uniformly. Citizens' beliefs on various issues can vary dramatically—particularly regarding LGBT issues and definitions of "family"—from state to state.[17] Thus, for example, who is legally regarded as a "child" or as a "parent" is not uniform across all states, and the same set of facts may have different outcomes depending on which state's laws govern the succession.[18] Often, these definitions and consequent outcomes correlate with the views of the state's dominant political party—whether a state is red or blue.[19] Data suggest that red states and blue states tend to reflect diverging approaches to many of the questions that stand unanswered in the wake of *Obergefell*, particularly those that implicate LGBT issues, ART, and religion.[20] In estates law, where courts regularly rely on a donor's words to determine what

14. *See* 430 ILL. COMP. STAT. 65/2 (2015) (requiring Firearm Owner's Identification Card at all times while possessing a firearm).

15. *See* ARIZ. REV. STAT. ANN. § 13-3108 (2020).

16. For example, regarding abortion, Kansas imposes strict regulations including mandatory counseling, parental consent, and a waiting period. *See An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/UWS3-9ZWH]. California, on the other hand, imposes none of those requirements and goes so far as to enjoin any requirement of parental consent. *See id.*

17. *Compare* VT. STAT. ANN. tit. 15A, § 1-102(b) (2020) (providing that, if a family unit consists of a parent and the parent's partner, the parent's partner may adopt the child without terminating the parent's rights), *with* UTAH CODE ANN. 78B-6-117(3) (2020) (prohibiting adoption of a child by any person who is cohabiting in a non-marital relationship unless that person is a relative of the child).

18. *See infra* Part V (discussing hypotheticals about same-sex marriage and ART).

19. *See infra* Part IV (comparing red and blue states).

20. *See infra* Part V.

meaning should be attributed to a donative document,[21] the color of the lens through which a judge views a donor's words is especially important. Accordingly, diverging policies in red states and in blue states—even post-*Obergefell*—may affect judicial construction and govern dispositions.

Therefore, this Article addresses real-world construction issues in the estate planning context,[22] where a particular state's approach to the redefinition of both words and policy may influence the deemed intent ascribed to a donor's words. Concrete examples of likely divergent results may be a helpful foundation; an overview of the different outcomes that might be reached in red states versus blue states informs the discussion of *why* the results differ, as well as the means red and blue judges use to reach different conclusions based on the same facts. Accordingly, Part I previews the hypothetical results of applying divergent policies in context of the introductory hypothetical. Part II begins the explanation of such results by delving into the policies that divide the red states from the blue. Part III outlines two basic doctrines of estates law—interpretation and construction—that are pertinent to judicial decision-making. Part IV expands on that doctrinal explanation to examine public policies that constrain testamentary intent: disallowing total restraints on marriage, preventing the encouragement of divorce, and disfavoring invitations for a court to enter nonjusticiable religious controversies. Finally, Part V presents two additional hypotheticals that reflect challenges under current succession laws, and more specifically, evaluates how red and blue states might vary in their approaches to such challenges.

I. A HYPOTHETICAL INTRODUCTION: PRESENTING THE CONCLUSION FIRST

This Article discusses how and why red states and blue states are likely to differ in their interpretation and construction of testamentary documents like Steve's will, discussed in the introductory hypothetical. To understand *why* results might differ, it is helpful to first understand *how* they do so. The answer to both *how* and *why* begins with will construction. In terms of Steve's will, Roberta's new identity creates an

21. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.3 cmt. b (AM. LAW INST. 2003).

22. For example, a living trust of a former Texas district judge, Vickers Cunningham, contains a provision that calls for a distribution upon "marriage to someone who is white, Christian and of the opposite sex." Alex Bollinger, *GOP Candidate Will Disinherit His Kids if They Don't Marry Straight, White Christians*, LGBTQ NATION (May 21, 2018), https://www.lgbtqnation.com/2018/05/gop-candidate-will-disinherit-kids-dont-marry-straight-white-christians/ [https://perma.cc/E4Z6-KPAJ].

ambiguity.[23] In some ways, there is no longer a son Robbie. Did Steve not change his will from "my son Robbie" to "my daughter Roberta" because Steve objected to the transition and disowned the child? Did Steve leave the language unchanged as a slight against the child? Or, did Steve simply never get around to revising his will or not think it was necessary because it was evident to him what the language meant? Because Steve's actual intention would be impossible to discern from the four corners of the instrument, interpretation would fail and the court would be required to employ the rules of construction to attribute Steve's *probable* intent.[24] The means a judge uses to determine probable intent are grounded in the rules of will construction.[25] Thus, how the court interprets and applies these rules of construction affects the likely outcome.

A. *In a Red State*

Generally, courts in red states are more likely to adhere to the "plain meaning rule"[26] and the "no reformation rule,"[27] two related rules of construction that largely reject extrinsic evidence and any reformed reading of a document's text under the general theory that the testamentary document itself provides the best evidence of a testator's probable intent. Conservatives, i.e., Christian republicans, more often subscribe to strict constructionism than do democrats.[28] Further, as discussed below, a red-state judge may be less likely to favor LGBT rights.[29] Such a court, disinclined to allow Roberta to take under the will, could use construction to reach its preferred result. The court could classify the will's failure to identify any particular person as a mistake. Under the no reformation rule, even if there was evidence that Steve made

23. *See infra* Section III.B.2.i.

24. *See infra* Section III.B.

25. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (AM. LAW INST. 2003).

26. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 PENN. L. REV. 521, 521 (1982) (quoting G. PALMER, THE LAW OF RESTITUTION § 20.1, at 158 (1978)).

27. *See* Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills. Hypothetical or imaginary mistakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him.").

28. *See* Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here are 3 Reasons Why.*, WASH. POST (June 29, 2018, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/ [https://perma.cc/NM6Z-M8Y8].

29. *See infra* Sections II.B–C.

a mistake (and actually intended for Roberta to take a share of the estate), that extrinsic evidence would be ignored, causing the bequest to Roberta to fail.[30]

Notably, even under the no reformation rule, extrinsic evidence generally is permissible to make identifications.[31] This hypothetical demonstrates an identity-related latent ambiguity: on its face, a bequest to Robbie is unambiguous, but the underlying facts—that Robbie no longer "exists"—reveal ambiguity.[32] Even with extrinsic evidence, however, Roberta will not automatically take under the will. If, in light of the evidence, the court determines Steve fundamentally disagreed with the transition and did not intend for Roberta to take, Roberta will not take under the will. If Steve knew, at the time of will execution, that Roberta was planning to transition and had not yet completed the process, the bequest to his son, Robbie, might be evidence of his intention to disinherit his daughter, Roberta. In such a situation, the judge's own biases, as well as public opinion, may seep into the construction process; a judge in a red state is more likely than a judge in a blue state to construe Steve's failure to react, after the execution of his will, to Roberta's transition, as evidence that Steve did not intend for Roberta to take.[33]

In deciding whether Roberta has a right to her share of Steve's estate, the court may have to define Roberta's identity by either her natal sex or brain sex.[34] Here, the judge must determine how to define gender identity—either by a process that refuses to validate Roberta's transgender identity or by a process that may actually serve to deprive Roberta of her inheritance. Why a judge chooses a particular approach may be influenced by public opinion and public policy in the relevant state.[35] For example, some red states, including Texas, have held that a person is bound to the sex declared at birth.[36]

What about the hypothetical's variations? If the bequest does not identify beneficiaries by name but merely says, "to my sons," a court that adheres to strict construction may refuse to admit extrinsic evidence because there is no latent ambiguity revealed in identifying the beneficiaries—Steve has two sons, Mike and Chip. In this situation,

30. *See infra* Section III.B.1.

31. Patch v. White, 117 U.S. 210, 217 (1886) ("It is settled doctrine that . . . [a latent ambiguity] may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description, or, secondly, it may arise when the will contains a misdescription of the object or subject . . . .").

32. *See infra* Section III.B.2.ii.

33. *See infra* Sections II.B–C.

34. *See* Rousseau, *supra* note 4, at 835.

35. *See id.* at 835 n.177.

36. *See id.* at 841.

Roberta would not take under the will. Courts that would tend to deny Roberta her bequest, however, may be bound by other state rulings that deny transgender persons rights in other contexts—that a person's gender at birth is controlling.[37] If so, such courts would be required to find that Roberta is still included in the class of Steve's "sons."[38] If such precedent is not binding on a red-state judge, however, the judge may have to recognize Roberta's transgender identity as legitimate to prevent her from taking under the will—and, ironically, the red-state judge would have to recognize Roberta's transgender identity to avoid setting unpopular precedent in the judge's jurisdiction. If, instead of a will, this bequest was included in an irrevocable trust, Steve would be unable to change the trust terms to include Roberta even if such a change was desired.[39] A court in a red state may be less likely than a court in a blue state to employ equitable deviation or reformation to save Roberta's inheritance.[40]

B. *In a Blue State*

By contrast, courts in blue states may be much more likely to take the modern approach and allow extrinsic evidence to shed light on Steve's actual intent.[41] Where Steve knew, when he executed his will, that Roberta was planning to transition but had not yet completed the process, a blue-state judge may be just as influenced as a red-state judge by public opinion.[42] A blue-state judge could interpret the same evidence—a failure to react to subsequent events—as Steve's intention to include Roberta in his will. The judge could reason that if Steve did not intend for Roberta to take, Steve would have updated the will to exclude Roberta entirely and leave the residuary estate in equal amounts to his two sons, Mike and Chip.

Another approach that a blue-state judge might use is to look at the transitional surgery as nothing more than a name change.[43] "[A] court will likely allow extrinsic evidence to be heard in the event that the beneficiary indicated in the will does not match the beneficiary's identity when the will is probated."[44] If Roberta can prove the name change, the bequest likely passes to her because name changes cannot defeat a vested

37. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

38. *See* Rousseau, *supra* note 4, at 841.

39. *See* 76 AM. JUR. 2D *Trusts* § 68 (2020).

40. *See* Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 89–92 (2015) (identifying and discussing the doctrine of equitable deviation).

41. *See infra* Section III.B.3.

42. *See* Shepherd, *supra* note 3, at 171.

43. *See* Rousseau, *supra* note 4, at 851.

44. *Id.*

right if the donee is the same legal person as she was at birth.[45] Under this approach, a judge could view Roberta as the same birth person as Robert, thus allowing Roberta to take the gift intended for Robert.[46] While the name-change approach might allow transgender individuals to receive the bequest that was originally provided for them, such an approach should give pause. Because names are given at birth, they do not reach the core of someone's identity. A person's gender, however, "[is] there all along," growing and evolving as the individual grows and evolves into the person they were meant to be.[47] Therefore, this approach may be unsatisfactory and demoralizing to Roberta.

In considering the second variation—simply providing a class gift "to my sons"—under liberal construction and in line with modern trends, a blue-state judge would be much more likely than a red-state judge to admit extrinsic evidence. Such evidence would show that Steve had three sons at the time of the will's execution and that Steve intended for all three of his children to take. However, blue states that have been more accepting of transgender identities do not have caselaw stating that a person's identity is defined by his or her natal sex. Ironically, if a blue-state court ultimately applied the plain meaning and no reformation rules of construction, greater acceptance of transgender identities could actually be harmful to Roberta. Roberta, by transitioning into a woman, may have effectively transitioned out of the class of "sons."

If, instead of a will, this provision was included in an irrevocable trust, equitable deviation or reformation might save the bequest. Roberta would have to show that her transition was a changed or unanticipated circumstance *and* that deviating from the explicit terms of the trust would further Steve's intent.[48] For a blue-state judge, in contrast to a red-state judge, Steve's failure to provide for Roberta's transition would reinforce the inference that Steve did not anticipate the transition.

45. *See* Frierson v. Gen. Assembly of the Presb. Church in the U.S., 54 Tenn. 683, 693 (1872) ("Subsequent changes of name in the corporate body could not defeat the right vested, the body itself remaining substantially the same legal person.").

46. Rousseau, *supra* note 4, at 859.

47. *Id.* Hence, name changes are often completed by judicial decree; a piece of paper can alter the identifying factor. A person's gender, on the other hand, must be altered surgically to fully manifest. Accordingly, for courts to view gender-transition surgery as nothing more than a name change threatens a failure to recognize the truly transformative undertaking individuals go through to change their genders.

48. RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b (2003).

II. RED STATES VS. BLUE STATES: DIFFERENCES IN JUDICIAL DECISION-MAKING

From the conclusions regarding Steve's will as handled in a red state versus a blue state emerges an example of how the same testamentary document might yield a different outcome depending on the state in which it is construed. To fully appreciate how the results differ, it is necessary to understand why they differ. Determining why such results are different begins with an analysis of the differences between red and blue states. Red states and blue states[49] differ in many respects, and diverging policies may affect judicial construction and govern dispositions. Because judges have wide discretion, especially in equity, some differences—for example, contrasting views on LGBT issues, ART, and religion—could influence how probate judges decide construction and public policy issues, particularly in the realm of marriage, divorce, religion, family ties, and homosexuality. First, this Part analyzes the differences in how red states and blue states view LGBT issues, ART, and religion. Next, this Part discusses how these views impact judicial decision-making, with a focus on how judges are influenced by public opinion and implicit bias.

49. This Article uses past presidential elections, with a focus on the 2016 election, as well as cultural differences to define red states and blue states. One article described red states as those "defined by a strict sense of right and wrong and a desire 'for clear, unbending moral and behavioral codes.'" Ashley H. Atwell, *Banging Their Heads Against "The Wall": Partisan Politics, Federal Gridlock, and State, Local, and Judicial Reactions to a Lack of Federal Immigration Reform*, 77 UMKC L. REV. 457, 458 (2008) (quoting Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 467–68 (2007)). By contrast, blue states "analyze[] political issues from a 'context-dependent rather than rule-based' perspective." *Id.* (quoting Cahn & Carbone, *supra*, at 472). Based on these definitions, as well as this Article's findings on the differences between states in their views on polarizing issues, this Article has included Virginia in the red states. Even though Virginia voted blue in the past election, it is culturally red. This Article has identified nineteen blue states and thirty-one red states.

The blue states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Zachary Crockett, *How Has Your State Voted in the Past 15 Elections?*, VOX (Nov. 9, 2016, 10:29 AM), https://www.vox.com/policy-and-politics/2016/11/8/13563106/election-map-historical-vote [https://perma.cc/3ZYZ-KMNC] (scroll down to view the data on the 2016 chart).

The red states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Idaho, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

A. *Differences Between Red States and Blue States on LGBT Issues, ART, and Religion*

Not surprisingly, red and blue states diverge in their views on LGBT issues, ART, and religion. Everyone has heard the stereotypes: red states are predominantly Christian and are opposed to same-sex marriage, while blue states care less about religion and more about LGBT rights. This section confirms these stereotypes by showing a correlation between more Christianity and less LGBT rights in red states, and a similar correlation between more LGBT rights and less Christianity in blue states. Additionally, a less obvious pattern emerges in the context of ART: blue states provide easier access to ART than do red states—although the difference between red and blue states with respect to ART is not as distinct as the differences in other areas.

1. Red States vs. Blue States: LGBT Issues

LGBT issues reveal sharp differences between red states and blue states. Some such issues include same-sex marriage, the marital presumption, the law of adoption, second-parent adoption, and antidiscrimination laws.[50]

i. Same-Sex Marriage

The majority of the first states to legalize same-sex marriage were blue.[51] Red states were the last to legalize same-sex marriage—and they

50. For a discussion concerning how the differences between the laws and social norms of red states and blue states impact LGBT and other minority stakeholders under a business entity setting, see Lee-ford Tritt & Ryan Scott Teschner, *Amazon Delivers Diversity: Geographical & Social Influences on Corporate Embeddedness*, 16 BERKELEY BUS. L.J. 1 (2019).

51. In 2003, "Massachusetts became the first state to legalize same-sex marriage." *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state [https://perma.cc/6PK7-4DVM]. In 2008, Connecticut followed suit. *Id.* (click on and drag the arrow indicator to move it to 2008). In 2009, New Hampshire and Vermont legalized same-sex marriage, along with red state Iowa. *Id.* (click on and drag the arrow indicator to move it to 2009). In 2011, New York legalized same-sex marriage. *Id.* (click on and drag the arrow indicator to move it to 2011). In 2012, Maine, Maryland, and Washington joined the movement. *Id.* (click on and drag the arrow indicator to move it to 2012). The next year, California, Delaware, Hawaii, Illinois, Minnesota, New Jersey, New Mexico, and Rhode Island legalized same-sex marriage. *Id.* (click on and drag the arrow indicator to move it to 2013). That same year, same-sex marriage was restored in California after an extensive legal battle over whether the state's constitutional amendment banning same-sex marriage was constitutional. *Id.* In 2014, the remaining blue states—Colorado, Nevada, and Oregon—legalized same-sex marriage. *Id.* (click on and drag the arrow indicator to move it to 2014). Many red states also legalized same-sex marriage in 2014, but several held on until they were forced to legalize it. *Id.*

only did so because the U.S. Supreme Court required it.[52] A 2014 study of the attitude toward same-sex marriage across states revealed that all states with a same-sex marriage approval rate below 50% were red.[53] Even today, red states are trying to create roadblocks for same-sex couples. In Texas, for example, the state's highest court recently decided that same-sex spouses are not guaranteed the state employee benefits extended to "traditional" spouses.[54] While red states must recognize same-sex marriage, some are still actively fighting against equality for same-sex couples.[55]

ii. The Marital Presumption

Another key issue in the evolving marital landscape is the marital presumption's applicability in same-sex marriages. The traditional marital presumption presumes married parents "to be the parents of any

52. *See id.* (leaving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas as the states that had not legalized same-sex marriage prior to *Obergefell*). In the 2016 election, all of these states were red states. Crockett, *supra* note 49 (scroll down to view the data on the 2016 chart). In the 2012 and 2008 elections, all but Florida, Michigan, and Ohio were red states. *Id.* (scroll down to view the data on the 2012 and 2008 charts). In the 2004 and 2000 elections, only Michigan was a blue state. *Id.* (scroll down to view the data on the 2004 and 2000 charts). This shows a red trend in these states leading up to the *Obergefell* decision in 2015 and shortly thereafter.

53. ANDREW R. FLORES & SCOTT BARCLAY, THE WILLIAMS INST., TRENDS IN PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE fig.1 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/State-Trends-Public-Support-SS-Couples-Apr-2015.pdf [https://perma.cc/7ZR2-97Z7].

54. *See* Pidgeon v. Turner, 538 S.W.3d 73, 89 (Tex. 2017) (reversing the appellate court's decision, which found that the trial court could not enjoin the City of Houston from providing employee benefits to same-sex spouses). The court concluded that *Obergefell* did not control this issue, so it would not instruct the lower court how to decide the issue on remand. *Id.* Essentially, the court approved of denying these benefits to same-sex spouses, even though different-sex spouses would receive them. The U.S. Supreme Court denied certiorari on this decision. *See* Turner v. Pidgeon, 138 S. Ct. 505 (2017) (mem.).

55. For example, Tennessee recently passed a bill that protects adoption agencies that deny LGBT adoption applications on religious-objection grounds. *See* Danielle Wallace, *Tennessee Passes Law Allowing Agencies to Deny LGBTQ Adoption Applications Because of Religious Objections*, FOX NEWS (Jan. 26, 2020), https://www.foxnews.com/us/tennessee-law-adoption-lgbtq-gay-couples-religious-objections-gov-bill-lee [https://perma.cc/2CGC-EDZK]. Texas has also recently passed bills that restrict the rights of same-sex couples. Tex. Health & Safety Code Ann. § 192.008(a) (West 2019) (providing that any "supplementary birth certificate of an adopted child must be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father"); Tex. Penal Code Ann. § 21.11(b) (West 2019) (limiting the so-called Romeo and Juliet affirmative defense to opposite-sex sexual contact).

child born into the marriage."[56] Before DNA and blood tests, the marital presumption served the purpose of establishing paternity.[57] In essence, "maternity [is] established by a woman's giving birth to a child."[58] The woman's husband—assuming there was a husband—is presumed to be the father.[59] This presumption exists to serve the public policy favoring harmonious family relations.[60]

However, *Obergefell*'s legalization of same-sex marriage complicates the applicability of the marital presumption. After all, the presumption is a common law doctrine aimed at establishing parenthood in biological terms.[61] In other words, despite the concept's use of the term "marital," the doctrine does not contemplate the validity of a marriage. Thus, while *Obergefell* evidences a shift in policy toward equal marriage rights for same-sex couples, the decision does not explicitly stand to require the marital presumption to apply to such couples.

As a result, the scope of the marital presumption in the same-sex context is for now left to the states. Of the states whose courts have allowed the marital presumption[62] to apply to same-sex couples when no other third party is involved, nineteen are blue and sixteen are red.[63] This means 100% of blue states have allowed the marital presumption to apply where no third party is involved, compared to only 52% of red states. Additionally, the states that have made their marital presumption statutes gender-neutral are all blue.[64]

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56. June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 388 (Bill Atkin ed., 2013).

57. *See id.* at 388–89 (discussing the effect of easily accessible paternity tests on the marital presumption).

58. *Id.*

59. *Id.* at 388. This presumption, however, is only a starting point in identifying a child's parents. The marital presumption can be rebutted with evidence of the mother's infidelity, the husband's absence around the time of conception, or the husband's impotence. *See id.* at 389.

60. *See* Michael H. v. Gerald D., 491 U.S. 110, 119–20 (1989) ("[A]s a matter of overriding social policy . . . the integrity of the family unit should not be impugned." (quoting Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005 (Ct. App. 1987))).

61. *See* Carbone & Cahn, *supra* note 56, at 388.

62. Under the traditional marital presumption, any child born to the wife would be presumed to be the child of the husband. *Id.* at 387.

63. *See* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 667 (2016).

64. *Cf.* Memorandum from Courtney Joslin to the Drafting Committee on Uniform Parentage Act Revisions 3 (Jan. 31, 2016), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7907c1cc-7516-73ad-5807-e0e0f87fdda3&forceDialog=0 [https://perma.cc/X5BV-9W3Y]. Those states are California, Illinois, Maine, New Hampshire, and Washington. *Id.*

iii. Law of Adoption

The redefinition of the marital relationship is not the first legal adjustment to the American understanding of family structure and inheritance law.[65] Until the late nineteenth century, law and public policy considered adopted children—much like same-sex spouses, until very recently—artificial relatives created by "unnatural" relationships.[66] Even when formal adoption was legalized in the mid-nineteenth century,[67] courts curtailed adoption's legal and economic implications under the so-called stranger-to-the-adoption doctrine.[68] This doctrine, based on social aversion, presumed that a person not directly involved in the adoption itself (i.e., a stranger to the adoption), who did not explicitly include an adoptee in a class gift, did not indicate intent for the adoptee to take simply by using language like "child," "issue," or "descendant."[69] Courts reasoned that, like a pre-*Obergefell* testator in a state that did not recognize same-sex marriage, this stranger-to-the-adoption testator used a particular word to signal its traditional meaning, not its now-expanded legal definition.[70] Under the stranger-to-the-adoption doctrine, therefore, a class gift to "descendants" excluded adopted descendants.[71]

As social acceptance of adoption increased, however, courts that failed to recognize adopted children as "children" under class gifts ran the risk of defeating donors' intent. To reconcile the gap between society's increasingly inclusionary definition of the parent–child relationship and inheritance law's presumptively exclusionary treatment of adopted children, three key exceptions emerged[72] that allowed the court to govern the definition of "child" while preserving testamentary freedom. Ultimately, the exceptions became superfluous when the stranger-to-the-adoption doctrine was abolished.[73] But until the parent–

65. For an examination of the changing face of the parent-child relationship in light of illegitimate children gaining legal recognition, see Tritt, *supra* note 10, at 907–12.

66. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1099 (2003).

67. "Massachusetts enacted what is generally characterized as the first modern adoption statute" in 1851. *Id.* at 1102–03.

68. *Id.* at 1128–29.

69. *Id.* at 1129–30.

70. *See, e.g.*, Abramovic v. Brunken, 16 Cal. App. 3d 719, 723 (Cal. Ct. App. 1971); Foley v. Evans, 570 N.E.2d 179, 182 (Mass. App. Ct. 1991).

71. *See, e.g.*, Calhoun v. Campbell, S.W.2d 744, 749 (Tenn. 1988).

72. *See infra* Section III.B.2.

73. Today, most states have abandoned the stranger-to-the-adoption doctrine. *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 154 ("The old 'stranger-to-the-adoption' rule—by which an adopted child generally could not inherit through the adoptive parent from relatives who were not themselves parties to the adoption—has largely, and properly, gone out of fashion.").

child relationship was both legally and socially understood to encompass the relationship between adoptive parents and adopted children, those exceptions allowed courts to navigate the ambiguity inherent in definitional change.[74]

While adoption itself has become more socially accepted, same-sex-couple adoption has yet to find uniform approval. For example, Georgia, a red state, is currently trying to pass legislation that would have the intended effect of preventing same-sex couples from adopting children.[75] Ten other red states already have similar laws in place.[76] Likewise, those same ten states also have laws restricting same-sex couples' ability to foster children.[77] In contrast, no blue state has legislation providing for similar restrictions in either adoption or foster parenting.[78]

iv. Second-Parent Adoption

In the same vein as traditional adoption, red and blue states differ in their approaches to second-parent adoption. The notion of second-parent adoption specifically relates to same-sex couples who use ART. "A second parent adoption . . . is a legal procedure that allows a same-sex

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74. These judicially created exceptions are but one excellent example of this Article's underlying premise—that judges are inclined to interpret the law in ways that conform to societal and cultural pressures, even if the law itself has yet to explicitly address the issue.

75. S.B. 368, 155th Gen. Assemb., Reg. Sess. (Ga. 2020). This bill is couched as a religious-freedom bill, but it would allow adoption agencies to reject same-sex couples. *See id.* Georgia's General Assembly attempted to pass similar legislation in 2018, entitled the "Keep Faith in Adoption and Foster Care Act." S.B. 375, 154th Gen. Assemb., Reg. Sess. (Ga. 2018).

76. Those states are Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. *See* ALA. CODE § 26-10D-2 (2019); KAN. STAT. ANN. § 60-5322 (2020); MICH. COMP. LAWS § 710.23g (2020); MISS. CODE ANN. § 93-17-3(5) (2020); N.D. CENT. CODE § 50-12-07.1 (2020); OKLA. STAT. tit. 10A, § 1-8-112 (2019); S.D. CODIFIED LAWS § 26-6-38 (2019); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019); VA. CODE ANN. § 63.2-1709.3 (2019); H.B. 4950, 122d Gen. Assemb., Reg. Sess. (S.C. 2019) (prohibiting licensing regulations promulgated by the Department of Social Services from "discriminat[ing] . . . on the basis . . . that a faith-based child placing agency has declined or will decline to provide any service that conflicts with . . . a sincerely-held religious belief . . . of the . . . agency."). The ACLU challenged the Michigan law in court in 2017, arguing that it is unconstitutional based on the First Amendment Establishment Clause and the Fourteenth Amendment Equal Protection Clause. Complaint at 1, Dumont v. Lyon, 341 F. Supp. 3d 706, 714 (E.D. Mich. 2018) (No. 17-cv-13080). The state settled the case in 2019 and agreed to "require all taxpayer funded, state-contracted child welfare agencies to accept all qualified families, including same-sex couples." Leslie Cooper, *Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We're Suing.*, ACLU (Sept. 20, 2017, 10:30 AM), https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are-being-turned-away-becoming-foster-and-adoptive [https://perma.cc/62WX-VM3E].

77. *See Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws [https://perma.cc/RN8H-VSXZ].

78. *See id*.

parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner's biological or adoptive child without terminating the first parent's legal status as a parent."[79] Second-parent adoption is so significant in the life of a same-sex couple because it allows—or alternatively, disallows—one partner of the same-sex couple to adopt the other partner's biological descendant without terminating the biological partner's parental rights.[80] Of the fourteen states that allow second-parent adoption, nine are blue[81] and five are red.[82]

v. Antidiscrimination Laws

Red states and blue states also differ in their LGBT antidiscrimination laws. Prior to the recent Supreme Court decision, *Bostock v. Clayton County*,[83] the majority of red states did not prohibit employment discrimination based on sexual orientation and gender identity,[84] while all blue states did—without being forced to do so.[85] Currently, all blue states prohibit housing discrimination based on sexual orientation,[86]

79. *Adoption by LGBT Parents*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [https://perma.cc/9E6D-7WFM].

80. In states that do not recognize second-parent adoption, only one of the same-sex spouses can adopt the child because in those states a child can only have one father and one mother. *See Second Parent Adoption*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/second-parent-adoption [https://perma.cc/WY3Z-F5YW].

81. These states are California, Colorado, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and Vermont. *Adoption by LGBT Parents*, *supra* note 79.

82. These states are Idaho, Indiana, Mississippi, Oklahoma, and Pennsylvania. *Id.*

83. 140 S. Ct. 1731 (2020) (holding that firing an individual based on sexuality or gender identity violates Title VII).

84. Those states were Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/employment [https://perma.cc/C3SH-TQF3]. The only red states that prohibited employment discrimination pre-*Bostock* based on both sexual orientation and gender identity were Iowa and Utah. *Id.* Wisconsin prohibited discrimination based on sexual orientation only. *Id.* A few red states prohibited gender identity and sexual orientation discrimination against only public employees. *Id.* (listing Indiana, Kentucky, Michigan, Montana, Ohio, Pennsylvania, and Virginia in this category). Additionally, Alaska, Arizona, Missouri, and North Carolina prohibited discrimination based on sexual orientation, not gender identity, for only public employees. *Id.*

85. *Id.* As a reminder, the nineteen blue states are California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

86. *State Maps of Laws & Policies: Housing*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/housing [https://perma.cc/5LEE-VR7S].

compared to only two red states with such prohibitions.[87] In addition, all red states—except for Wisconsin and Iowa—allow public accommodation discrimination based on sexual orientation.[88] North Carolina, a red state, wielded its preemption power[89] to not only allow gender identity discrimination in public accommodations, but require it.[90] South Carolina has similarly attempted this kind of preemption.[91] Meanwhile, all blue states prohibit public accommodation discrimination based on both sexual orientation and gender identity.[92]

There are also differences between red and blue states in how they address hate crimes against LGBT individuals. Only two red states address both hate crimes motivated by sexual orientation and hate crimes motivated by gender identity.[93] By contrast, every blue state except one addresses both of these types of hate crimes—New Hampshire addresses hate crimes based on sexual orientation but not gender identity.[94] Nineteen red states neither address hate crimes based on sexual

87. Those two states are Utah and Wisconsin. *Id.* Utah prohibits housing discrimination based on both gender identity and sexual orientation. *Id.* Wisconsin only prohibits housing discrimination based on sexual orientation, not gender identity. *Id.* All other red states do not prohibit housing discrimination based on sexual orientation or gender identity. *Id.*

88. *State Maps of Laws & Policies: Public Accommodations*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/public-accomodations [https://perma.cc/TT29-NQ8P]. Wisconsin prohibits public accommodation discrimination based on sexual orientation, while Iowa prohibits such discrimination based on either sexual orientation or gender identity. *Id.*

89. Even if blue cities within a red state pass ordinances providing more protection for LGBT individuals, the state can pass legislation that preempts these local ordinances. *See* William Peter Maruides, *The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill*, 69 S.C. L. REV. 977, 977 (2018). Because of this, cities can quickly become just as discriminatory as the rest of the state.

90. *See id.* at 978–79. Charlotte had passed an ordinance that did not allow public facilities to mandate that bathrooms had to be used only by those who were biologically the sex posted on the door, regardless of the sex with which they identified. *See id.* at 979. North Carolina passed legislation preempting this ordinance, so that public facilities were required to be regulated in this way. *See id.* This legislation was famously referred to as the "Charlotte Bathroom Bill." *See id.* at 978. After much public outcry, North Carolina repealed this bill, but it required Charlotte to repeal the ordinance that prevented public accommodation discrimination based on gender identity. *See id.* at 979. Many believe that this compromise left transgender individuals in the same position as if the bill had not been repealed. *See id.*

91. *See id.* at 998. A bill that was modeled after the North Carolina Bathroom Bill was struck down in 2016. *Id.* at 998–99. In 2017, South Carolina proposed another Bathroom Bill, which is still pending. *See* H.B. 3012, 122d Gen. Assemb., Reg. Sess. (2017); *see also* Maruides, *supra* note 89, at 999–1000 (discussing the pending House Bill).

92. *See id.*

93. Those states are Missouri and Utah. *State Maps of Laws & Policies: Hate Crimes*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/hate-crimes [https://perma.cc/M4G7-CAHL].

94. *See id.*

orientation nor hate crimes based on gender identity.[95] All blue states address hate crimes motivated by sexual orientation bias.[96]

2. Red States vs. Blue States: ART

Closely related to the issue of same-sex marriage and the resultant issues with adoption is the use of ART by same-sex couples.[97] While there are a few federal regulations of ART—one example is the Fertility Clinic Success Rate and Certification Act of 1992[98]—most of ART is governed by the states.[99] And most states have enacted legislation that addresses some aspect of ART,[100] including issues that range from the

95. Those states are Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Michigan, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming. *Id.* Five of these states—Arkansas, Georgia, Indiana, South Carolina, and Wyoming—do not have hate crime statutes at all. *Id.*

This is a disturbing trend based on the rates of crimes motivated by bias against sexual orientation. The FBI gathers data on hate crimes, which is not limited to crimes under a hate crime statute. For the purposes of its research, the FBI defines hate crimes as "criminal offenses that were motivated, in whole or in part, by the offender's bias against a race, gender, gender identity, religion, disability, sexual orientation, or ethnicity, and were committed against persons, property, or society." FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 2016 HATE CRIME STATISTICS: METHODOLOGY 1 (2016). In 2016, there were 7,615 reported victims of hate crimes in the United States. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 2016 HATE CRIME STATISTICS: VICTIMS 1 (2016). Of those victims, 16.7%, or approximately 1,272, were targeted because of their sexual orientation. *Id.* This makes LGBT individuals the third highest group of hate crime victims. *Id.* at 1–2. There likely are many more victims of sexual orientation hate crimes, however, because many crimes go unreported to law enforcement agencies, and law enforcement agencies are not required to report their statistics to the FBI, which compiles these statistics. *See* Jordan Dashow, *New FBI Data Shows Increased Reported Incidents of Anti-LGBTQ Hate Crimes in 2016*, HUM. RTS. CAMPAIGN (Nov. 13, 2017), https://www.hrc.org/blog/new-fbi-data-shows-increased-reported-incidents-of-anti-lgbtq-hate-crimes-i [https://perma.cc/838D-7V9Q].

96. *See State Maps of Laws & Policies: Hate Crimes*, *supra* note 93.

97. For a discussion concerning the impact of the changing nature of the American family and ART on the laws of succession, see Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 374–79 (2009) [hereinafter Tritt, *Sperms and Estates*]. *See also* Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 62 ALA. L. REV. 273, 303–12 (2010) [hereinafter Tritt, *Technical Correction*] (discussing ART's treatment under the Uniform Probate Code).

98. *See generally* Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified as amended at 42 U.S.C. § 263a-1 (2018)) (imposing reporting requirements on ART programs).

99. *See* Jonathan J. Morgan, State Regulation of Assisted Reproductive Technology 4–5 (July 9, 2010) (unpublished M.S. thesis) (on file with the Brigham Young University Scholars Archive).

100. *See, e.g.*, ALA. CODE § 26-17-701 (2019); ALASKA STAT. § 25.20.045 (2019); ARK. CODE ANN. § 9-10-201 (2019); CAL FAM. CODE § 7613 (West 2020); COLO. REV. STAT. § 19-4-106 (2019); CONN. GEN. STAT. § 45a-771 to -779 (2019); FLA. STAT. § 721.11 (2019); GA. CODE

legality of surrogacy contracts to parental and custodial challenges following the use of ART.[101]

Because ART is mostly a state issue, the red versus blue differences are more visible as compared to other issues that have at least some federal uniformity. However, the variances between red and blue states' regulation of ART are slight.[102] For example, the vast majority of both red and blue states allow surrogacy.[103] While not an absolute necessity, surrogacy plays a major role in facilitating the ART process.[104] Surrogacy can be used in many situations, including absence of uterus,[105] recurrent pregnancy loss, and excessive maternal risk.[106] Surrogacy not only improves pregnancy and live birth rates in general, it also results in better prenatal outcomes.[107] In short, a state's stance on surrogacy can seriously impact the availability of ART for couples—heterosexual and homosexual alike.

While commercial surrogacy is accepted generally in the United States,[108] state laws governing surrogacy contracts show that blue states

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ANN. § 19-7-21 (2019); IDAHO CODE § 39-5401 to -5408 (2019); 750 ILL. COMP. STAT. 46/701 (2017); LA. STAT. ANN. § 9:2718 (2019); MASS. GEN. LAWS ch. 46, § 4B (2020); MICH. COMP. LAWS § 700.2114 (2020); MINN. STAT. § 257.56 (2020); MONT. CODE ANN. § 40-6-106 (2019); NEV. REV. STAT. § 126.510 (2019); N.H. REV. STAT. ANN. § 168-B1 (2020); N.J. STAT. ANN. § 9:17-44 (West 2019); N.M. STAT. ANN. § 40-11A-701 (West 2019); N.Y. DOM. REL. LAW § 73 (McKinney 2019); N.C. GEN. STAT. § 49A-1 (2019); N.D. CENT. CODE § 14-18-01, -05 (2020); OHIO REV. CODE ANN. § 3111.88 (West 2019); OKLA. STAT. tit. 10, § 551 (2019); OR. REV. STAT. § 109.239, .243, .247 (2018); TENN. CODE ANN. § 68-3-306 (2020); TEX. FAM. CODE ANN. § 160.701 (West 2019); VA. CODE ANN. § 20-156 to -165 (2019); WASH. REV. CODE § 26.26A.600 (2020); WIS. STAT. § 891.40 (2020); WYO. STAT. ANN. § 14-2-901 to -907 (2020).

101. *See* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 162–63 (2000) (addressing the real and constructive barriers that disincentivize same-sex couples from using ART).

102. In general, both red and blue states support ART. *See Equality Maps: Other Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/other_parenting_laws [https://perma.cc/F8ZE-2TLE]. However, there are some variances in regulations that show ART is slightly more accessible in blue states. *See id.*

103. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/QFQ8-EK2D].

104. *See* Mohammad Reza Sadeghi, *Surrogacy, an Excellent Opportunity for Women with More Threats*, 20 J. REPRODUCTIVE INFERTILITY 63, 63 (2019) ("[Surrogacy] may be the only option for many couples to have a child from their own gametes . . . .").

105. Traditionally, an absence of uterus has been implicated after some need to remove a woman's uterus, like ovarian cancer. More recently, however—and more pertinent to this Article—an absence of uterus has been implicated in homosexual relationships between two men, for obvious reasons.

106. Sadeghi, *supra* note 104, at 63.

107. *See id.*

108. *Id.* By comparison, many European countries—for example, Germany, Sweden, and Italy—prohibit surrogacy. *Id.*

are generally more surrogate friendly than red states.[109] All ten states that are considered the most surrogate friendly are blue states.[110] Out of the four states that are the least surrogate friendly,[111] three are red.[112]

In terms of ART-related insurance, sixteen states have enacted legislation requiring private insurance carriers to provide or offer coverage for infertility treatment.[113] Of these sixteen states, six are red[114] and ten are blue.[115] This means that 53% of blue states have legislation requiring ART-insurance coverage, while only 20% of red states have the same requirement.

While most states support ART in general, blue states are more same-sex couple friendly in terms of accessing ART than are their red counterparts. In fact, all of the states that have made their ART statutes gender-neutral—to support same-sex couples—are blue states.[116] Additionally, certain blue states are establishing same-sex ART equality by amending their insurance statutes.[117] For example, California requires insurance coverage to apply to infertility treatments, with the exclusion

109. *See The United States Surrogacy Law Map*, *supra* note 103.

110. *See id.* (listing California, Connecticut, Delaware, Maine, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Washington as the most surrogate-friendly states). Being the most surrogate-friendly means that these states permit surrogacy "for all parents, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate." *Id.*

111. *See id.* (listing Arizona, Indiana, Michigan, and New York in the bottom tiers of surrogacy accessibility).

112. Those three are Arizona, Indiana, and Michigan. *Id*. Michigan bans surrogacy altogether. *See* MICH. COMP. LAWS § 722.855 (2018). Louisiana, another red state, restricts surrogacy to married couples using their own gametes. *See* LA. STAT. ANN. § 2718 (2018); *see also id*. § 2719 (prohibiting genetic gestational surrogacy). This has implications for same-sex couples. Gametes are defined as "a mature male or female germ cell . . . capable of initiating formation of a new diploid individual by fusion with a gamete of the opposite sex." *Gamete*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gamete [https://perma.cc/H4EE-Y7J2]. Since the parents must use their own gametes under Louisiana law, this precludes same-sex couples in Louisiana from using surrogacy to have children.

113. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. ST. LEGISLATURES (June 12, 2019), http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx [https://perma.cc/D4PY-U7YP].

114. The red states are Arkansas, Louisiana, Montana, Ohio, Texas, and West Virginia. *See id.* Texas requires health insurance carriers to offer this kind of coverage, while the others require this coverage. *See id.*

115. The blue states are California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, and Rhode Island. *See id.* California requires health insurance carriers to offer this kind of coverage while the other states require this coverage. *Id.*

116. Those states are California, Maine, Nevada, New Hampshire, New Mexico, and Washington. Memorandum from Courtney Joslin to the Drafting Committee on Uniform Parentage Act Revisions, *supra* note 64, at 1 n.2.

117. Annual Review Article, *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 346 (2019).

of in vitro fertilization.[118] Maryland took a more straightforward approach, removing a restriction that required insurance companies to cover ART procedures only if the husband's sperm was used.[119] As a result, lesbian couples in Maryland were awarded equal insurance coverage for ART procedures.

Few red states have taken similar actions to improve ART access for same-sex couples. Moreover, as red states are more inclined to adopt religious liberty laws,[120] it is uncertain whether the Court's decision in *Burwell v. Hobby Lobby*[121] will permit exemptions to providing ART coverage to same-sex couples on religious-objection grounds.[122]

3. Red States vs. Blue States: Religion

There are also religious differences between red states and blue states. In the United States, 70.6% of the population is Christian.[123] The two most prevalent types of Christianity are evangelical Protestantism, at 25.4%, and Catholicism, at 20.8%.[124] In the Southern region of the United States—which is dominated by red states and commonly referred to as

118. *See* CAL. INS. CODE § 10119.6 (West 2020). California's law is an example of what may come to pass in many more states. Because the American Medical Association declared infertility to be a disease in 2017, more states will likely require insurance companies to begin offering coverage for treatments that counteract infertility. *See* Sophie Bearman, *Fertility Treatments Are Becoming a Financial and Physical Risk for Many Americans*, CNBC (Nov. 21, 2017, 10:31 AM), https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arentcovered-by-insurance.html [https://perma.cc/6CB9-RRKM]; Sara Berg, *AMA Backs Global Health Experts in Calling Infertility a Disease*, AM. MED. ASS'N (June 13, 2017), https://www.ama-assn.org/delivering-care/public-health/ama-backs-global-health-experts-calling-infertility-disease [https://perma.cc/UY5N-JKMU]. Thus, because same-sex couples could be fairly viewed as infertile—unable to conceive children through conventional spousal reproduction—insurance coverage for infertility would allow better access for same-sex couples to ART.

119. *See* MD. CODE ANN., INS. § 15-810(b) (West 2019).

120. *See, e.g.*, ALA. CODE § 26-10D-2 (2019); MICH. COMP. LAWS § 710.23g (2020); MISS. CODE ANN. § 11-62-5 (2019).

121. 573 U.S. 682 (2014).

122. *See* Annual Review Article, *supra* note 117, at 346. In the same vein, another barrier to same-sex couples accessing ART is a physician's discretion to refuse to provide ART procedures to same-sex couples. *See, e.g.*, Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (holding that physicians have no common law duty to treat same-sex couples); *see also* 42 U.S.C. § 300a-7(d) (2018) ("No individual shall be required to perform or assist in the performance of any part of a health service program or research activity . . . if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.").

123. *See Religious Landscape Study*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/ [https://perma.cc/YW9U-PFYR].

124. *Id.*

the "Bible Belt"[125]—76% of the population is Christian.[126] In this region, there are more evangelical Protestants, at 34%, than Catholics, at only 15%.[127] In the Midwest, which is composed mostly of red states, 73% of the population is Christian.[128] The percentage of evangelical Protestants in this area is also higher than the percentage of Catholics, at 26% and 21%, respectively.[129]

In contrast to red regions averaging about 75% Christianity, blue regions hover closer to 65%. Moreover, while red regions typically have more evangelical Protestants, blue regions generally have more Catholics. For example, in the Northeast, which is dominated by blue states, 65% of the population is Christian.[130] Catholicism is more prevalent than evangelical Protestantism (30% of the population is Catholic and 13% is evangelical Protestant).[131] Additionally, in the West, another blue-dominated region, 64% of the population is Christian,[132] 22% is evangelical Protestant, and 23% is Catholic.[133] And when compared to red regions, blue regions also have higher rates of either no religion or "nothing in particular."[134]

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125. "The Bible Belt is an area of the US [sic] where evangelical Protestantism plays an especially strong role in society and politics. People in the Bible Belt tend to be socially conservative and have higher church attendance rates than people in other parts of the country." Mark Abadi & Shayanne Gal, *The US Is Split into More than a Dozen 'Belts' Defined by Industry, Weather, and Even Health*, BUS. INSIDER (May 7, 2018, 8:47 AM), http://www.businessinsider.com/regions-america-bible-belt-rust-belt-2018-4#the-bible-belt-1 [https://perma.cc/53JL-UJJW]. The Bible Belt encompasses Alabama, Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, large portions of Florida, Illinois, Louisiana, Kansas, Texas, Virginia, and West Virginia. *See id.*

126. *See Religious Landscape Study: Religious Composition of Adults in the South*, PEW RES. CTR. [hereinafter *Religious Composition in the South*], http://www.pewforum.org/religious-landscape-study/region/south/ [https://perma.cc/H8DF-THZX].

127. *See id.*

128. *See Religious Landscape Study: Religious Composition of Adults in the Midwest*, PEW RES. CTR. [hereinafter *Religious Composition in the Midwest*], http://www.pewforum.org/religious-landscape-study/region/midwest/ [https://perma.cc/2YRP-7KQJ].

129. *See id.*

130. *See Religious Landscape Study: Religious Composition of Adults in the Northeast*, PEW RES. CTR. [hereinafter *Religious Composition in the Northeast*], http://www.pewforum.org/religious-landscape-study/region/northeast/ [https://perma.cc/L4QQ-TUW2].

131. *See id.*

132. *See Religious Landscape Study: Religious Composition of Adults in the West*, PEW RES. CTR. [hereinafter *Religious Composition in the West*], http://www.pewforum.org/religious-landscape-study/region/west/ [https://perma.cc/74SQ-WJLV].

133. *See id.*

134. In the West, 28% of the population is nonreligious, and 19% of the population reported "[n]othing in particular." *Religious Composition in the West*, *supra* note 132. In the Northeast, 25% of the population is nonreligious and 16% reported "[n]othing in particular." *Religious Composition in the Northeast*, *supra* note 130. In the South, only 19% of the population is nonreligious and 14% reported "[n]othing in particular." *Religious Composition in the South*,

The above differences show a correlation between red states and higher rates of Christianity, and a correlation between blue states and lower rates of Christianity. There are also slight correlations between red states and evangelical Protestantism and blue states and Catholicism. These correlations are bolstered by studies that show evangelical Protestants are more likely to be Republican than are Catholics.[135] One study found that 56% of evangelical Protestants are Republican, while only 37% of Catholics are Republican.[136] In general, Christians are nearly twice as likely to be Republican than non-Christians.[137]

Not surprisingly, more red states than blue states have religious freedom bills—statutes that allow individuals to deny people services, goods, or accommodations if doing so would be contrary to their religious beliefs.[138] A total of twenty-one states have passed such Religious Freedom Restoration Acts (RFRAs).[139] Of these states, four are blue[140] and the remaining seventeen are red.[141] Typically, RFRAs "require strict scrutiny when a religious adherent claims that a government law or policy imposes a substantial burden on the adherent's exercise of [religious freedom.]"[142] In one case, for example, Hobby Lobby used the federal RFRA to argue that it could not be required to provide its employees with contraception because doing so was against the company's religious beliefs.[143] Companies can also use RFRAs to argue they cannot be required to serve LGBT individuals.

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supra note 126. Lastly, in the Midwest, 22% is nonreligious and 16% reported "[n]othing in particular." *Religious Composition in the Midwest*, *supra* note 128.

135. *See Religious Landscape Study: Party Affiliation*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/party-affiliation/ [https://perma.cc/VSJ2-7LYH].

136. *Id.*

137. *Compare id.* (breaking down religious denominations by political affiliation), *with Religious Landscape Study*, *supra* note 123 (showing each religious denomination's share of the general population). Running the numbers shows that about 23% of non-Christians are Republican whereas roughly 43% of Christians are Republican.

138. *See* Jacob R. McMillian, *After "I Do,"* FED. LAW., June 2015, at 45–46 (explaining that these statutes allow individuals to deny people services, goods, or accommodations if doing so would be contrary to their religious beliefs).

139. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx#RFRA [https://perma.cc/M2V6-HBEB].

140. Those states are Connecticut, Illinois, New Mexico, and Rhode Island. *Id.*

141. Those states are Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.*

142. Steve Sanders, *RFRAs and Reasonableness*, 91 IND. L.J. 243, 243 (2016).

143. *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (finding a violation of the federal RFRA).

In states with antidiscrimination statutes, an RFRA may create confusion, as a state's RFRA and its antidiscrimination statutes could conflict. For example, a state may prohibit discrimination based on sexual orientation (via statute) and simultaneously protect the right of its citizens to deny goods or services to homosexuals if that denial is rooted in religious beliefs (via an RFRA). However, blue states have found that the antidiscrimination statutes trump the RFRAs.[144] In red states, however, it appears that—notwithstanding antidiscrimination statutes—at least some discrimination may be acceptable to the extent it is based on religion: eleven states have enacted religious-freedom bills that allow child-placement agencies to discriminate against certain individuals if placing the child with those individuals would be against the agencies' religious beliefs.[145] These states specifically allow these agencies to discriminate, so there is no confusion about which statute trumps.

Due to its recency, Tennessee's RFRA is particularly noteworthy. Signed in January of this year, Tennessee's new law assures continued taxpayer funding to faith-based child-placement agencies, even if those agencies exclude LGBT families.[146] The law also provides legal protection to agencies who so discriminate.[147] Bill Lee, the Republican governor who signed the bill into law, has cited his Christianity several times during his term. Governor Lee deemed the defense of religious liberty "very important."[148] Tennessee's new law is but one example illustrating an overarching theme: Red and blue states produce varying results of the same situation simply because their public policies—heavily influenced by religion or the lack thereof—are founded upon significantly different core beliefs.

144. *See, e.g.*, Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 928–29 (Cal. 1996) (finding that the federal RFRA did not allow housing discrimination against unmarried couples); Gallo v. Salesian Soc., Inc., 676 A.2d 580, 593–94 (N.J. Super. Ct. App. Div. 1996) (finding the RFRA did not allow employment discrimination based on sex).

145. *See, e.g.*, ALA. CODE § 26-10D-2 (2019); KAN. STAT. ANN. § 60-5322 (2020); MICH. COMP. LAWS § 710.23g (2019); OKLA. STAT. tit. 10A, § 1-8-112 (2019); S.D. CODIFIED LAWS § 26-6-38 (2018); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019); VA. CODE ANN. § 63.2-1709.3 (2019). Georgia has attempted to pass similar legislation. *See, e.g.*, S.B. 375, 154th Gen. Assemb., Reg. Sess. (Ga. 2018); *see also* Amanda C. Coyne & Maya T. Prabhu, *Fight Over Same-Sex Adoptions Returns to Georgia Legislature*, ATLANTA J.-CONST. (Feb. 5, 2020), https://www.ajc.com/news/local/adoption-bill-would-allow-georgia-agencies-refuse-same-sex-couples/OYBnkqsjpb7hYcMJ2bxunO/ [https://perma.cc/32EL-BUZ6] (reporting on a newly proposed Georgia Senate bill which would "allow agencies to refuse to place children with same-sex couples or those whose religious beliefs don't align with the organization's mission").

146. Kimberlee Kruesi, *Tennessee Governor Signs Anti-Gay Adoption Bill*, ASSOCIATED PRESS (Jan. 24, 2020), https://apnews.com/977036e1758690e0473ce2665ada8b7d [https://perma.cc/8WY8-S833].

147. *Id.*

148. *Id.*

B. *The Court of Public Opinion: Elected Judges and the Influence of State Policies*

These divergent views on LGBT issues, ART, and religion may influence the way judges rule on important issues. When judges are elected, rather than appointed, they can be swayed by their constituents' opinions—since the judges seek reelection.[149] This is especially true when it comes to issues about which the public has strong opinions.[150] Thus, an elected judge may be influenced by her constituents' views on LGBT issues, ART, and religion. Twenty-nine states elect their judges, while the remaining states appoint them;[151] 42% of blue states, compared to 68% of red states, use elections rather than judicial appointment.[152]

In red states, elected judges may (likely) be influenced by the opinion of the majority of voters in their state: Christian Republicans. This means that judges may adhere to Christian-Republican opinions on LGBT issues. As discussed above, there is a correlation between red states and less rights for LGBT individuals.[153] Additionally, many Christians disapprove of homosexuality and therefore disfavor granting LGBT individuals more rights or legal protection.[154] Based on these facts, judges

149. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 766 (1995) (discussing the likelihood that an elected judge will overturn a jury-imposed death penalty); Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 756 (2018) (pointing out that judges are not immune to political forces); Shepherd, *supra* note 3, at 171 (finding that state supreme court judges often vote in line with the stereotypical preferences of the retention agents). *But see* Melanie Kalmanson, *Neither the Problem nor the Solution Lies Solely with the Judiciary: Response to Robertson's Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. F. 88, 88–89 (2018) (arguing that judicial decision-making does not always produce results that align with a judge's perceived political beliefs).

150. *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 485 (2010).

151. RON MALEGA & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2011, at 6 map 4 (2013).

152. *See id.* (indicating that eight blue states hold elections for their judges, and the remaining eleven appoint their judges, while twenty-one red states elect their judges, and the remaining ten appoint them).

153. *See* discussion *supra* Section II.A.1.

154. For an example of Christian disfavor of homosexuality, which recently appeared before the U.S. Supreme Court, see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). In *Masterpiece Cakeshop*, a Christian baker refused to bake a wedding cake for a same-sex couple. *Id.* at 1723. This became a fight over religious freedom and the state's antidiscrimination act. *Id.* While the Court did not decide whether religious freedom would trump statutes that prohibited discrimination based on sexual orientation, *id.* at 1732 (ruling instead on the facts of the case that the Colorado Civil Rights Commission violated its duty to apply laws in a manner neutral toward religion), this case is a prime example of how Christians believe same-sex marriage is abhorrent to their religion. This baker went so far as to say he would have closed his bakery over being forced to bake wedding cakes for same-sex couples. Queer Voices, *Jack*

in red states are more likely to rule—generally speaking—against LGBT individuals than are their judicial counterparts in blue states. Essentially, the data show that whether a state's citizens are majority red or majority blue tends to influence whether an elected judge rules according to red principles or blue principles. A judge seeking reelection—and a judge who wins an election—likely rules in a way that reflects the voters' views. Citizens in red states are thus more likely to see their own principles espoused from the bench: Almost 70% of red states elect their judges, compared to less than 50% of blue states.[155]

C. *Implicit Bias Shapes Judicial Opinion*

While judges are viewed as impartial decisionmakers, they can be swayed by both overt influences—like public opinion and explicit bias—and influences that are more insidious, like implicit bias. Unlike explicit bias, implicit bias silently affects people's decisions and attitudes.[156] The person with the implicit bias may not even recognize it,[157] and for this reason, implicit bias is especially dangerous.

Implicit bias can be as simple as favoring what is familiar.[158] In general, people are biased in favor of those who are similar to them and biased against people who are dissimilar.[159] One study of judges across the country provides evidence that judges are no exception. This study found that Protestant and Catholic judges are more likely to be biased against Jews.[160] These same judges are also more likely to be biased in favor of Christians.[161] This lends support to the conclusion that judges are more likely to rule in favor of individuals who are like them than for individuals who are unlike them. The majority of state judges are white, heterosexual men;[162] these classifications show who these judges will be biased for and against.

Phillips, Masterpiece Cakeshop Owner, Says He'd Rather Go to Jail Than Make Gay Wedding Cake, HUFFINGTON POST (Dec. 10, 2013, 2:01 PM), https://www.huffingtonpost.com/2013/12/10/jack-phillips-gay-wedding-cake_n_4420252.html [https://perma.cc/XY4J-MGPU].

155. *See* MALEGA & COHEN, *supra* note 151, at 6 map 4.

156. *See* Asha Amin, Note, *Implicit Bias in the Courtroom and the Need for Reform*, 30 GEO. J. LEGAL ETHICS 575, 575 (2017).

157. *Id.*

158. *See* Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43, 47 (2006).

159. *See id*.

160. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 107 (2017).

161. *Id.*

162. *See* JUDICIAL COUNCIL OF CAL., DEMOGRAPHIC DATA PROVIDED BY JUSTICES AND JUDGES RELATIVE TO GENDER, RACE/ETHNICITY, AND GENDER IDENTITY/SEXUAL ORIENTATION 1–2 (2016); TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTIONAL SOC'Y OF LAW & POLICY,

III. PERTINENT INTERPRETATION AND CONSTRUCTION DOCTRINES[163]

If key differences between red and blue states influence judges in those states, then those same differences necessarily impact will interpretation and construction—processes that require judges to either understand the meaning of, or ascribe meaning to, the terms and provisions of testamentary documents in order to reach a decision. It seems self-evident that before a court imposes a consequence on a property owner's testamentary wishes—as articulated through a will or trust agreement—there should be a normative basis for making the imposition and preferring particular consequences of the law as well as a normative guide for applying these processes. Indeed, a substantive analysis concerning the consequences of the interpretation and construction of testamentary provisions can only follow an introduction to this guide. Therefore, this Part offers an elementary overview of the foundational purposes and underlying principles of judicial interpretation and construction of estate planning instruments. With that grounding, it becomes possible to explore the application of the interpretation and construction doctrines to testamentary dispositions.

A. *Foundational Purpose and Principle of the Laws of Succession*

A substantive analysis of the judicial interpretation and construction doctrines must begin with an elementary overview of the basic principles of wills and trusts. An appreciation of these principles is necessary to understand interpretation and construction application to estate planning instruments.

The purpose of the laws of succession is simple: in a private property system, there must be a procedure to facilitate the transfer of an individual's private property upon death.[164] The very existence of private property thus perpetuates the need for the laws of succession. As Professor Richard T. Ely stated in 1914, the laws of succession advance the "continuation of the régime of private property as dominant in the

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THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 7 figs.6 & 7 (2016) (showing that 57% of state trial court judges and 58% of state appellate court judges are white men). Sexual orientation data on state judges is not readily available, but California does publish this data. *See* JUDICIAL COUNCIL OF CAL., *supra*, at 2. In California, 1.3% of state judges are lesbian, 1.5% are gay, 0.1% are bisexual, and 0.1% are transgender. *Id.* California is one of the states that embraces inclusion and protection of LGBT individuals, so the number of LGBT judges in California is likely higher than in other states.

163. For convenience, this Article discusses construction issues in terms of wills, but these approaches apply equally to trusts.

164. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 502 (1977).

social order."[165] Embedded within this notion of private property and the orderly transfer thereof is the principle that individuals have the freedom (or right) to control the disposition of their property during life and at death.[166] American society has long recognized the value inherent in protecting an individual's ability to acquire and transfer private property.[167] Testamentary freedom is derived from this well-established property right and, accordingly, is the governing principle underlying American succession law.[168] Just as individuals have the right to

165. 1 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 425 (1914) (listing this as one of four aims of the distribution of wealth through the laws of inheritance); *accord* Gaubatz, *supra* note 164, at 501–03 (expounding on this policy goal of succession law).

166. *See* Gaubatz, *supra* note 164, at 503. The right of a property owner to direct the disposition of property upon her death is commonly known as "testamentary freedom." *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1134 (2013). Rationales for testamentary freedom vary, and many theories have been proffered in support for the principle of this theory—some widely accepted, others controversial. *See e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 (1992) (noting the variety among arguments for testamentary freedom); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 116 (2006) (providing a detailed discussion on the scope and limitations of testamentary freedom). The most fundamental "rationale for testamentary freedom is that, in a society based on the theory of private property, the freedom of testation might be the least objectionable arrangement for dealing with property succession at the testator's death." Tritt, *supra* at 117; *see* Hirsch & Wang, *supra*, at 5–14. Others argue that robust testamentary freedom is natural, creates happiness, promotes wealth accumulation, encourages industry, creativity and productivity, reinforces family ties, promotes responsibility, and allows the testator to adapt to the needs and circumstances of his particular family. *See* Tritt, *supra* at 117. Each rationale has its proponents and skeptics, but the very breadth of jurisprudential and pragmatic justifications for testamentary freedom is, in itself, a testament to why this concept is at the core of Anglo-American succession law.

167. *See generally* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340 (describing the history of testamentary freedom and the disposition of private property in American law).

168. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a. (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."); Ronald Chester, *Inheritance in American Legal Thought*, *in* INHERITANCE AND WEALTH IN AMERICA 23, 23 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998); Lawrence M. Friedman, *The Law of Succession in Social Perspective*, *in* DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 9, 14 (Edward C. Halbach, Jr. ed., 1977) ("It is often said that the principle of freedom of testation dominates the law of the United States."); Tritt, *supra* note 166, at 111 ("Testamentary freedom . . . is the hallmark principle of estates law."). However, some scholars are skeptical concerning the actual deference paid to testamentary freedom in American estates law because of potentially biased results from postmortem will contests. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243 (1996) (theorizing that courts validate wills on the basis of whether testators bequeath their property to their biological family members rather than to nonrelatives); *see also* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997) (arguing that "the undue influence doctrine denies freedom of testation for people who deviate from

accumulate, consume, and transfer personal property during life, individuals generally are—and should be—free to control the disposition of personal property at death.[169] Thus, testamentary freedom can be viewed simply as one stick in the bundle of rights referred to as property rights.[170]

In addition, although the U.S. Constitution does not speak specifically about testamentary freedom as a property right, a robust public policy favoring testamentary freedom has been fostered in America.[171] For example, states' probate codes have placed very limited restrictions on the testator's ability to transfer property (mainly, a surviving spouse's elective share often acts as the greatest restriction);[172] Article III, Section Three of the U.S. Constitution prohibits corruption of blood as punishment for treason;[173] the vast majority of the states have abolished the Rule in Shelley's Case;[174] and there is a growing trend in the United States of abolishing the Rule Against Perpetuities.[175] These examples tend to demonstrate a strong public policy of favoring testamentary freedom.

In the United States, there are generally three ways to implement the disposition and transfer of private property at death: wills, will-

judicially imposed testamentary norms"). In addition to undue influence, some other legal doctrines potentially check testamentary freedom as well. *See, e.g.*, Tritt, *supra* note 166, at 112.

169. *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 160 (2008) (explaining that testamentary freedom extends the concept of absolute property ownership beyond the grave).

170. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987) (stating that the right to transmit wealth at death is a separate, identifiable stick in the bundle of rights called property).

171. *See* Friedman, *supra* note 168, at 14.

172. *See* Tritt, *supra* note 166, at 133.

173. U.S. CONST. art. III, § 3. Shortly after the Constitution was ratified, Congress extended the prohibition on corruption of blood to all federal crimes then existing. *See* Crimes Act of 1790, ch. 9, § 24, 1 Stat. 112, 177; *see also* 18 U.S.C. § 3563 (1982) ("No conviction or judgment shall work corruption of blood or any forfeiture of estate."). *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 3551 (2018)) (repealing, *inter alia*, 18 U.S.C. § 3563 (1982)).

174. *See* C.C. Marvel, Annotation, *Modern Status of the Rule in Shelley's Case*, 99 A.L.R. 2d 1161 (1965) ("In the great majority of American jurisdictions, the rule in Shelley's Case has been abolished, wholly or in part, by express statutory provisions of various wording and effect.").

175. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 4 (10th ed. 2017); Marc S. Bekerman & Gerry W. Beyer, *Trusts and Estates Practice into the Next Millennium*, PROB. & PROP., Jan./Feb. 1999, at 7, 9.

substitutes,[176] and intestacy statutes.[177] While wills, will-substitutes, and intestacy statutes differ in a variety of ways, each provides a possible means of implementing the principle of effectuating the decedent's intent. For purposes of this Article, we will discuss wills and trusts—both written manifestations of the testator's alleged intent.

B. *Interpretation and Construction*

Interpretation and construction are the two pillars upon which testamentary freedom stands. Interpretation is the process of "discovering the meaning or the intention of the testator from permissible data."[178] Construction is the process of assigning meaning to the instrument when the testator's intention cannot be fully ascertained from the proper sources.[179] Interpretation aims to uncover the donor's actual intention, whereas the rules of construction or constructional preferences *attribute* intention.[180] Historically, construction has been employed only when interpretation failed.[181]

When a valid testamentary document comes before a court, the fiduciary must manage and distribute the assets according to the terms of the governing instrument.[182] This implicates *construction* procedures—

176. Basically, a will-substitute is the functional equivalent of a will executed during life. For example, revocable *inter vivos* trusts, contracts, life insurance, pension plans, and joint accounts are all will-substitutes. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 2003).

177. *See* SITKOFF & DUKEMINIER, *supra* note 175, at 63–65; Erin J. Hoyle, Student Work, *Including the Frozen Heir: Expanding the Florida Probate Code to Include Posthumously Conceived Children's Inheritance Rights*, 43 STETSON L. REV. 325, 332 (2014).

178. ATKINSON, *supra* note 5, § 146, at 809.

179. *Id.* at 809–10.

180. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. a (AM. LAW INST. 2003).

181. *See id.* § 11.3 cmt. c.

182. *See, e.g.*, MASS. GEN. LAWS ch. 190B, § 3-703 (2020); *cf. Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[A] trustee's duties are . . . to protect and preserve the trust property, and to ensure that it is employed . . . in accordance with the directions contained in the trust instrument."). American society has long recognized the value in protecting an individual's ability to acquire and transfer property. *See supra* note 167 and accompanying text. The principle of donative freedom, the governing principle underlying American succession law, provides that individuals have the freedom to control the disposition of their property at death. *See supra* notes 168–175 and accompanying text. Any succession law disputes that arise from *Obergefell* should be viewed through this lens. For a discussion concerning the importance of the principle, see Tritt, *Sperms and Estates*, *supra* note 97, at 374–76. *See also* Lee-ford Tritt, Online Essay, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 752–54 (2014) (discussing the diversity of ways in which trusts can serve a settlor's intent); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2587–88, 2598–601 (2011) (discussing the role of trusts in effectuating donative intent and furthering

the process of determining the meaning that should be attributed to wills and trusts—which are "applied to persons and property as they exist at the testator's death."[183] As one court noted, testamentary document construction is governed by "two overriding rules[:] . . . to avoid doing any violence to the words employed in the instrument . . . [and] to effectuate the testator's intent."[184]

Rules of construction, as well as constructional preferences, set out the process by which the meaning of terms and provisions in testamentary documents are to be resolved. While rules of construction offer "particular results for particular recurring situations,"[185] "constructional preferences are more general principles upon which the specific rules are based."[186] For example, a traditional rule of construction is the doctrine of worthier title, which nullifies an *inter vivos* conveyance to the conveyor's "heirs" because such a conveyance does not designate a conveyee.[187] On the other hand, a prototypical constructional preference is that donative instruments be construed in accordance with public policy.[188] Although the rules of construction address a multitude of specific issues, each rule is premised on the overarching common goal of effectuating the testator's intent above all else. "Rules of construction are highly specific, rebuttable presumptions that dictate the meaning of particular terms in the will or the application of those terms to well-defined factual scenarios . . . ."[189] In the hypotheticals explored below, however, "well-defined factual scenarios" have yet to be developed and there are no rules of construction or constructional preferences directly on point.[190]

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the principle of donative freedom); Tritt, *Technical Correction*, *supra* note 97, at 289 (discussing the difficulties of effectuating donative intent through intestacy).

183. Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 984 (1965).

184. *In re* Estate of Cole, 621 N.W.2d 816, 818 (Minn. Ct. App. 2001).

185. Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 923 (1964).

186. Lee-ford Tritt, *The Stranger-to-the-Marriage Doctrine: Judicial Construction Issues Post*-Obergefell, 2019 WIS. L. REV. 373, 378 (2019).

187. *See* Harold E. Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 UCLA L. REV. 371, 372 (1959). The rule of worthier title has been relaxed since its inception in feudal England; a gift to "heirs" will be upheld if no good reason requires its frustration. *Id.* at 373.

188. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. b (AM. LAW INST. 2003).

189. Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 81 (2005).

190. *Id.*

In general, American succession law embraces freedom of disposition,[191] which dictates that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention."[192] Therefore, when a testamentary instrument is construed under these rules, the donor's intentions are given effect to the maximum extent allowed under the law.[193] The testator's intent at the time of the testamentary instrument's execution is controlling.[194] When applying a rule of construction, the applicable rule will be considered together with available proof of the individual testator's actual intent.[195] Since the rules aim to carry out testamentary intent by presuming what the average, similarly situated donor would desire, any party claiming that the donor's actual intent differs from that prescribed by a rule of construction will bear the burden of proof.[196]

Although effectuating intent is the primary objective of the construction process, the adherence to testamentary intent is sometimes difficult to achieve. Thus, courts dealing with the laws of succession are often compelled to analyze individual facets of the constructions in question to derive their ultimate meaning. Simply put, intent is not always clear. If donors' wishes cannot be clearly ascertained, these rules and preferences "*attribute* intention to *individual* donors in particular circumstances on the basis of *common* intention."[197] In other words, courts apply rules of construction in an attempt to implement the typical testator's *probable* intent.[198] Since the rules of construction and constructional preferences only presume intent, they can be rebutted where proof of an alternative testamentary intention is found.[199]

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191. *See, e.g.*, Gerald L. Greene & Michael J. Schmitt, Note, *The Dilemma of Adoptees in the Class Gift Structure—The Kentucky Approach: A Rule Without Reason*, 59 KY. L.J. 921, 925 (1971) ("In attempting to determine the meaning of language in private instruments the intent of the transferor is of primary importance.").

192. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

193. *Id.*

194. Halbach, *supra* note 183, at 984.

195. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3(a) (AM. LAW INST. 2003).

196. *See id.* § 11.3 cmt. a.

197. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. a (AM. LAW INST. 2003).

198. Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L. J. 643, 646 (2014).

199. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. a (AM. LAW INST. 2003). Testamentary documents may, at times, present issues to which no specific rule of construction applies. In such cases, more general constructional preferences will be used in clarifying the ambiguity. *Id.* § 11.3(b). Unlike a specific rule of construction which applies only to a particular type of ambiguity, constructional preferences provide broader

When addressing a testamentary document, what is "permissible data"[200]—data the trier of fact can consider—will depend on whether the language of the document is ambiguous. Where ambiguous or mistaken language obscures the testator's actual intent, courts have traditionally applied two interrelated rules of construction—the plain meaning rule and the no reformation rule. Adherence to the plain meaning rule is sometimes referred to as "strict construction."[201] However, modern courts increasingly repudiate these approaches and tend to allow both reformation and the introduction of extrinsic evidence. This is sometimes referred to as "liberal construction"; extrinsic evidence of the surrounding circumstances at the time of the will's execution is admitted without first resorting to the rules of construction.[202]

1. The Traditional Plain Meaning and No Reformation Rules

The practice of applying testamentary intent begins, as with many areas of law, with the plain meaning of the testator's words.[203] Under the "plain meaning" or "no-extrinsic-evidence"[204] rule, the plain meaning of a will cannot be disturbed by the introduction of extrinsic evidence to prove that another meaning was intended.[205] In essence, the plain

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guidelines which can be used to resolve various ambiguities. *Id.* § 11.3 cmt. b. Significant constructional preferences include the following: the preference for construction that accords with common intention, which is a foundational preference from which other subsidiary preferences are derived; the preference for construction that accords with the testator's general dispositive plan; the preference for construction that renders the document as effective as possible; the preference for construction that favors family over non-family, favors close family members over more remote family members, and does not disinherit a line of descent; and the preference for construction that is more in accord with public policy than other potential constructions. *Id.* § 11.3(c). Alternately, more than one rule of construction or constructional preference may be relevant to resolving a particular provision within a testamentary instrument. *Id.* § 11.3 cmt. b. Where all rules and preferences prescribe the same result, that result is merely more difficult to rebut. *Id.* § 11.3 cmt. d. Where conflicting rules and preferences apply, however, they may neutralize each other, or the trier of fact may decide that one is weightier than the other, in which case the "most persuasive in the circumstances" prevails. *Id.* § 11.3(b) cmt. d.

200. ATKINSON, *supra* note 5, § 146, at 809.

201. Storrow, *supra* note 189, at 71.

202. *Id.* at 73–74 (citing ATKINSON, *supra* note 5, § 146, at 808).

203. *In re* Clark, 417 S.E.2d 856, 857 (S.C. 1992) ("A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, should follow from such construction.").

204. Langbein & Waggoner, *supra* note 26, at 521. The plain meaning rule is sometimes called the no-extrinsic-evidence rule since it "prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'" *Id.* (quoting WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 32.9, at 270 (rev. ed. 1961)).

205. *See id.*; Sitkoff, *supra* note 198, at 651.

meaning of a testator's expressions usually controls, and courts are sometimes reluctant to look outside of a testamentary instrument to define actual intent. Put simply, a testator's words mean what they plainly say.[206] However, this doctrine involves some subjectivity—what is "plain" to one judge may not be plain to another—and the admissibility of extrinsic evidence hinges on a particular judge's understanding of a term's "plain meaning."

Under the closely related "no reformation" rule, courts may not reform a will to reflect what the testator intended to, but did not, say. Instead, a court must interpret the words the testator actually used and cannot provide its own words to correct the testator's mistakes.[207] Though courts generally refuse to correct mistakes, courts often strike erroneous language in misdescription cases—an exception to the mistake rule.[208]

2. Exceptions to the Bar on Extrinsic Evidence

Although the "no-extrinsic-evidence" rule generally applies to construction and interpretation issues, there are some noteworthy exceptions to this general rule. Accordingly, a brief overview of the more pertinent exceptions are in order.

i. Ambiguities

Traditionally, extrinsic evidence was admissible only if the evidence went to the validity of the will or if the will itself was ambiguous.[209] An ambiguity implies more than one meaning of a single word or phrase.[210] Latent ambiguities may arise when the terms used in the will

206. *See In re* Stephens' Will, 238 N.W. 900, 903 (Wis. 1931) (Fairchild, J., dissenting) ("[N]o rule of construction is more effective to discover the testator's intention than that which requires that words shall be given their plain and ordinary meaning. The words used by the testator in this instance are final and comprehensive."); *see also* May v. Riley, 305 S.E.2d 77, 78 (S.C. 1983) ("The cardinal rule of will construction is that the testator's intent should be ascertained and given effect.").

207. Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills. . . . [M]istakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him."); Sitkoff, *supra* note 198, at 651.

208. Storrow, *supra* note 189, at 78.

209. *See* Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 12 & n.52, 14 (1990); Halbach, *supra* note 183, at 975.

210. *See Ambiguity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An uncertainty of meaning based . . . on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations.").

insufficiently describe the testator's intended disposition or bequest.[211] In other words, latent ambiguities only arise when other sources besides the testamentary document are before the court.[212] For example, a testator's bequest giving "my entire estate to my cousin Benny" does not initially appear ambiguous. However, if the testator has two cousins, both named Benny, there is a latent ambiguity.[213]

While extrinsic evidence may be "generally inadmissible to add to, vary, or contradict language used in a will," it may be admitted by courts to "explain a latent ambiguity."[214] Importantly, extrinsic evidence may also be used to raise the issue of latent ambiguity, not just to resolve the ambiguity once the court recognizes its existence.[215] Thus, the same extrinsic evidence can raise and subsequently resolve a latent ambiguity. Latent ambiguities typically take one of three forms: (1) *equivocation*, where two or more persons or things fit the description exactly (like cousin Benny); (2) *personal usage*, where the testator habitually used a term in an idiosyncratic manner; or (3) *misdescription*, where a description in the will does not exactly fit any person or thing.[216]

ii. Identifications

Regardless of how plain the document's language may be, extrinsic evidence is permissible to make identifications; a testator's intent cannot be given meaning unless courts can "make connections between the words and the actual persons and property to which they refer" through the use of extrinsic evidence.[217] A failed identification would traditionally reveal either an equivocation or personal usage latent ambiguity.[218] The interpretation of the document does not preclude identifications, however.[219] The requirement of a finding of ambiguity before admitting extrinsic evidence protects against the invention of ambiguities where

211. *See* Weatherhead v. Sewell, 28 Tenn. 272, 295 (1848).

212. *See* Higgins v. Tenn. Coal, Iron & R.R. Co., 62 So. 774, 774 (Ala. 1913).

213. In contrast to latent ambiguities, which do not initially appear ambiguous, patent ambiguities are revealed on the face of the will. *Weatherhead*, 28 Tenn. at 295. So, instead of two cousins named Benny, a patent ambiguity would bequest "four-thirds of my estate to Benny." The confusion and impossibility of the gift is apparent from its face.

214. Stickley v. Carmichael, 850 S.W.2d 127, 132 (Tenn. 1992).

215. *In re* Estate of Bernstrauch, 313 N.W.2d 264, 267 (Neb. 1981) (citing authorities that hold that "extrinsic evidence is admissible both to disclose and to remove the latent ambiguity of the will").

216. SITKOFF & DUKEMINIER, *supra* note 175, at 333–34.

217. Storrow, *supra* note 189, at 75; 80 AM. JUR. 2D *Wills* § 1098.

218. *See* Storrow, *supra* note 189, at 76.

219. *See id.* at 77.

they do not already exist. Identifications do not create ambiguities; rather, they merely expose existing latent ambiguities.[220]

Because the testator's intent at the time of the document's execution controls, events after the execution of the will may be irrelevant.[221] However, a reaction or a failure to react to events following the execution of a will may constitute permissible evidence to resolve latent ambiguities that arise in attempting to identify beneficiaries.[222]

3. Modern Construction Trends

The modern trend of probate courts repudiates distinguishing between patent and latent ambiguities, the plain meaning rule, and the no reformation rule.[223] As early as 1898, some scholars criticized as "an unprofitable subtlety" the distinction between patent ambiguities, for which extrinsic evidence was not admissible, and latent ambiguities, for which it was.[224] Today, the distinction carries little weight and is often ignored or expressly rejected.[225] Distinguishing between types of ambiguities that allow or preclude the introduction of extrinsic evidence is perhaps a moot point under modern estates law because the modern trend generally rejects the no reformation rule, rendering ambiguity superfluous where mistake exists. The no reformation rule establishes a conclusive presumption of correctness for the words used in a duly executed will and thus protects against the finding of a contrived "mistake."[226] However, the rule also denies relief when there is an actual mistake, even where there is evidence of mistake and of the testator's actual intent.[227] More forgiving courts began to correct wills under the pretense of allowing extrinsic evidence to construe supposedly ambiguous terms, which has been characterized as "expressly

220. *See id.* at 76–77. For example, when a testator bequeaths a gift to "my cousin," the court is responsible for identifying who the cousin is. Moreover, a gift to a cousin is facially valid: there is no patent ambiguity. However, if in the process of identifying the "cousin," the court discovers that the testator has two cousins, the identification process reveals the latent ambiguity attendant to the word "cousin."

221. Halbach, *supra* note 183, at 984.

222. *See id.*

223. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV. 1877, 1885–86 (2000).

224. Langbein & Waggoner, *supra* note 26, at 530 n.28 (quoting J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 424 (1898)).

225. Halbach, *supra* note 223, at 1885.

226. Sitkoff, *supra* note 198, at 651.

227. *Id.*

disclaim[ing]"[228] the plain meaning rule [229] as well as moving away from the no reformation rule. Today, the Uniform Probate Code, the Restatement (Third) of Property, and several courts allow the introduction of extrinsic evidence to both clarify and reform the terms of a will.[230]

4. Interpretation and Construction of Trusts

Many of the same interpretation and construction principles applied to wills carry over to trusts. When interpreting a trust agreement, a settlor's clear intent will not be disregarded to accommodate a beneficiary's subsequent actions.[231] However, equitable deviation may be permitted where following the terms of the trust agreement would defeat settlor's intent.[232] Pursuant to the Restatement (Third) of Trusts, a court may modify a distributive provision of a private trust or permit the trustee to deviate from a distributive provision if, because of circumstances not anticipated by the settlor, the deviation will further the purposes of the trust.[233]

The granting of equitable deviation should not disregard the intention of the settlor but should rather "give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated."[234] Changed circumstances are not necessarily required—"[i]t is sufficient that the settlor was unaware of the circumstances in establishing the terms of the trust."[235] If the person seeking equitable deviation shows changed circumstances, or that relevant circumstances were unknown to the settlor at the creation of the trust, the burden of persuasion shifts to the party claiming the settlor anticipated the circumstances.[236] A failure to provide for subsequent developments

228. Langbein & Waggoner, *supra* note 26, at 521.

229. *See, e.g.*, *In re* Estate of Taff, 133 Cal. Rptr. 3d 737, 739–41 (Ct. App. 1976); Engle v. Siegel, 377 A.2d 892, 893–94 (N.J. 1977); Arnheiter v. Arnheiter, 125 A.2d 914, 915 (N.J. Super. Ct. Ch. Div. 1956) (construing "No. 304 Harrison Avenue" to mean "No. 317 Harrison Avenue"); *In re* Gibb's Estate, 111 N.W.2d 413, 415–18 (Wis. 1961) (construing "Robert J. Krause" to mean "Robert W. Krause").

230. *See* UNIF. PROBATE CODE § 2-805 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003).

231. Tritt, *Granddaughter*, *supra* note 1; *see, e.g.*, *In re* Dezell's Will, 194 N.W.2d 190, 191–92 (Minn. 1972) (holding that, absent evidence of settlor's intent to the contrary, the beneficiary could still take under the testamentary trust despite her divorce from the settlor's son following the settlor's death).

232. *See* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a (AM. LAW INST. 2003).

233. *Id.* § 66.

234. *Id.* § 66 cmt. a.

235. *Id.*

236. *Id.* § 66 cmt. b.

"reinforces an inference that the circumstances were not anticipated by the settlor."[237] Once the court has determined that there are changed or unanticipated circumstances, the court must still determine whether a proposed deviation would tend to advance the trust's purposes and the settlor's intent.[238]

IV. PUBLIC POLICY AND TESTAMENTARY FREEDOM

With great testamentary freedom comes great "dead hand" control. Wills and trusts allow testators to impose conditions on beneficiaries from beyond the grave, but the extent of these conditions are limited by public policy.[239] Thus, where a state's public policy leans red or blue, the line dividing violative from acceptable conditions tends to be drawn according to the corresponding red or blue principles. According to the Restatement (Third) of Property (Wills and Donative Transfers), the donor's intent is controlling when a court determines the meaning of a donative document.[240] A court's primary objective is to honor the testator's intent to the maximum extent allowed by law—not to question the testator's fairness, wisdom, or reasonableness in his disposition of property.[241] However, when a testator attempts to control or influence a beneficiary's intimate life choices, or disrupt his family relationships,[242] courts will strike down these provisions as void against public policy.[243] Key areas where red and blue states diverge—LGBT issues, ART, and religion—often relate closely to intimate life choices or family relationships and thus to public policy decisions.

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237. *Id.*

238. *Id.*

239. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

240. *Id.* § 10.1.

241. Christina V. Bonfanti, Note, *'Till [My Parents'] Death Do Us Part: Exposing Testamentary Restrictions Placed on Marriages that Perpetuate Prejudice*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 357, 360 (2008).

242. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.2 (AM. LAW INST. 1983) ("An otherwise effective provision in a donative transfer which is designed to permit the acquisition or retention of an interest in property only in the event of either the continuance of an existing separation or the creation of a future separation of a family relationship, other than that of husband and wife, is invalid where the dominant motive of the transferor was to promote such a separation.").

243. *See* Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1317 (2011); *see also* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (AM. LAW INST. 2003) ("A trust or a condition or other provision in the terms of a trust is ordinarily . . . invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship.").

States have recognized public policies in support of broad testamentary freedom;[244] however, testamentary bequests that impose restrictions on marriage or religion, or promote divorce, are among the most controversial.[245] The concern with public policy is that "courts have failed to establish a formulaic approach for determining what the public policy is, where it comes from, and what testamentary restrictions might be declared void or valid through its overreaching grasp."[246] Generally, courts will protect a testator's right to dispose of the testator's property as the testator wishes "while drawing a line at complete or almost total restraints on marriage, encouragements of divorce, or invitations for a court to enter nonjusticiable religious controversies."[247]

Although detailing the history, principles, and applications of public policy regarding such restraints, encouragements, and invitations lies outside the scope of this Article, the summary account that follows provides a strong platform upon which to build.

A. *Marriage*

Testamentary bequests that impose restrictions on marriage may be deemed void against public policy. In determining whether a testamentary restriction on marriage is void, courts have analyzed whether the restriction was a total restraint on marriage or a partial restraint on marriage. Total restraints on marriage are void as a matter of public policy, while partial restraints on marriage may be upheld depending on a court's reasoning. This Part further explains how courts have viewed these types of restrictions.

1. Total Restraints on Marriage

Testators may impose restraints or conditions on marriage in a variety of ways,[248] but total restraints on marriage are contrary to public policy

244. *See, e.g.*, *In re* Estate of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009); *In re* Am. Comm. for the Wiezmann Inst. of Sci. v. Dunn, 883 N.E.2d 996, 1002 (N.Y. 2008).

245. *See* Scalise, *supra* note 243, at 1327.

246. Christopher T. Elmore, *Public Policy or Political Correctness: Addressing the Dilemma of Applying Public Policy to Inheritance Issues*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 199, 201 (2009).

247. Aaron H. Kaplan, Note, *The "Jewish Clause" and Public Policy: Preserving the Testamentary Right to Oppose Religious Intermarriage*, 8 GEO. J.L. & PUB. POL'Y 295, 303 (2010).

248. Scalise, *supra* note 243, at 1327 ("The jurisprudence, in fact, provides examples of cases in which a testator imposes a condition prohibiting all marriage, prohibiting marriage at a particular time, prohibiting or encouraging marriage to a particular person or kind of person, or requiring or encouraging divorce, if one is already married." (footnotes omitted)).

and thus void.[249] The Restatement (Second) of Property states:

> An otherwise effective restriction in a donative transfer designed to prevent the acquisition or retention of an interest in the event of some, but not all, first marriages of the transferee is valid if, and only if, under the circumstances, the restraint does not unreasonably limit the transferee's opportunity to marry. If the restriction is invalid, the donative transfer takes effect as though the restriction had not been imposed.[250]

Examples of total restraints on marriage are provisions that require the beneficiary to never marry or to not remarry after becoming a widow.[251]

For example, in the very early case of *Maddox v. Maddox*,[252] the testator devised a portion of his estate to his daughter, "during her single life, and forever, if her conduct should be orderly, and she remain a member of Friends Society."[253] The rules of the Friends Society provided that a member would be expelled if the member married out of the society;[254] therefore, the provision restricted the testator's daughter to only marrying a member of the society. Given that there were no more than five or six male members of the society within the area, the court held that the provision was an undue and unreasonable restraint upon the choice of marriage.[255] In addition to holding the provision void as against public policy, the court also recognized and adhered to the idea that marriage is in the best interests of society and should be encouraged.[256]

In support of this view, comment j to the Restatement (Third) of Trusts § 29 states:

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249. WILLIAM H. PAGE, PAGE ON THE LAW OF WILLS § 44.25 (William J. Bowe & Douglas H. Parker eds., 2005); Meelad Hanna, Note, *Discriminatory Strings Attached: Reining in the Testator's Intent in Conditioning Will and Trust Bequests*, 25 U. FLA. J.L. & PUB. POL'Y 331, 336 (2014); Jeremy Macklin, Comment, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage*, 43 J. MARSHALL L. REV. 265, 271 (2009); *see also* HELENE S. SHAPO ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 211 (2019) ("A provision that amounts to a general restraint on marriage is contrary to public policy . . . .").

250. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (AM. LAW INST. 1983).

251. Macklin, *supra* note 249, at 270–71.

252. 52 Va. (11 Gratt) 804 (1854).

253. *Id.* at 805.

254. *See id.*

255. *Id.* at 809.

256. *Id.* at 806 ("It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged.").

> Consistent with the policy principles above outlined, a condition rendering a gift contingent upon not marrying anyone is invalid, unless clearly motivated by an intention to provide support until the event of marriage. Restraints limited as to persons, group, or time are excepted from the general condemnation . . . *unless the remaining sphere of permissible marriages is so small that a permitted marriage is not likely to occur.*[257]

2. Partial Restraints on Marriage

By contrast, partial restraints on marriage are limited in time or apply to a specific class of persons.[258] Generally, partial restraints on marriage are "upheld if they do not unreasonably restrict the freedom of the beneficiary's choice" of spouse.[259] When evaluating partial restraints on marriage, most courts will use a reasonableness test.[260] However, some courts may not.[261] Several cases concerning partial restraints on marriage have shed light on how courts balance public policy concerns while still honoring broad testamentary freedom. It is also important to note that many cases involving partial restraints on marriage are related to the testator's religious beliefs.[262]

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257. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003) (emphasis added) (quoting RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS ch. 6, intro. note (AM. LAW INST. 1983)). The phrase "unless the remaining sphere of permissible marriages is so small that a permitted marriage is not likely to occur" could apply to a provision requiring a gay or lesbian beneficiary to marry someone of the opposite sex. This application thus supports both the argument that such a provision would be a total restraint on marriage, and that such a provision would be unreasonable—and thus against public policy. *See* Emalee G. Popoff, Note, *Testamentary Conditions in Restraint of the Marriage of Homosexual Donees*, 7 DREXEL L. REV. 163, 170 (2014) ("[U]nreasonable limits on a donee's opportunity to marry are void as contrary to public policy.").

258. Ruth Sarah Lee, *Over My Dead Body: A New Approach to Testamentary Restraints on Marriage*, 14 MARQ. ELDER'S ADVISOR 55, 56 (2012).

259. U.S. Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 868 (Or. 1954). *See also In re* Silverstein's Will, 155 N.Y.S.2d 598, 599 (N.Y. Sur. Ct. 1956) ("Conditions in partial restraint of marriage which merely impose reasonable restrictions upon marriage are not against public policy."); Hanna, *supra* note 249, at 336–37 ("Testators can only impose reasonable conditions and this usually depends on the sphere of eligible partners available for the beneficiary to marry.").

260. *See* PAGE, *supra* note 249, § 44.25; Bonfanti, *supra* note 241, at 361; Hanna, *supra* note 249, at 336–37; Macklin, *supra* note 249, at 272.

261. Lee, *supra* note 258, at 61 ("Not every court applies the Reasonableness Test, but many do.").

262. *See generally* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 8.1 (AM. LAW INST. 1983) ("An otherwise effective provision in a donative transfer which is designed to prevent the acquisition or retention of property on account of adherence to or rejection of certain religious beliefs or practices on the part of the transferee is valid.").

In *U.S. National Bank of Portland v. Snodgrass*,[263] the testator's will provided that his daughter would only receive her bequest if she had not married a man of the Catholic faith—or become a member of the Catholic faith herself—upon the testator's death and upon her attaining the age of thirty-two.[264] After the testator's death, his daughter turned thirty-two, but she was already married to a man who was a member of the Catholic faith.[265] The critical issue regarding the validity of the testamentary restraint upon marriage was an issue of first impression for the court.[266] Ultimately, the court adhered to a very broad idea of testamentary freedom.[267] In doing so, the court relied on two general principles: (1) the great freedom the law confers on a testator to dispose of her property as she wishes, and (2) the freedom of opinion in religious matters.[268] The restraint on marriage was seen to be only a partial and temporary restraint because after reaching the age of thirty-two, the daughter was able to marry a man of the Catholic faith.[269] Therefore, the clause was not void as against public policy.[270]

In *Gordon v. Gordon*,[271] the testator's will provided, "If any of my said children shall marry a person not born in the Hebrew faith then I hereby revoke the gift or gifts and the provision or provisions herein made to or for such child."[272] One of the testator's children, Harold, married a woman who was not born in the Hebrew faith but undertook religious instructions after learning about the provision in the will.[273] Relying on the Restatement (First) of Property, the court stated, "It is generally held in this country that partial restraints on marriage are valid unless unreasonable."[274] The court found that the testator's condition did not contravene the Fourteenth Amendment because the condition was not based on anyone's religious belief at the time of marriage, rather it was based on religious beliefs at the time of the child's birth.[275] Therefore, the provision was upheld and not void as against public policy.[276]

263. 275 P.2d 860 (Or. 1954).

264. *Id.* at 862.

265. *Id.*

266. *Id.*

267. *See id.* at 865 ("It was within his power, with or without assigning any reason therefor, to have completely disinherited his daughter and left her in a state of impecunious circumstances.").

268. *Id.* at 864.

269. *Id.* at 868.

270. *Id.* at 870.

271. 124 N.E.2d 228 (Mass. 1995).

272. *Id.* at 230.

273. *Id.*

274. *Id.* at 234.

275. *Id.* at 235.

276. *See id.*

Shapira v. Union National Bank[277] is another example where a court held that partial restraints on marriage are not against public policy.[278] In *Shapira*, the testator's will provided that his son, Daniel, would only receive his share if he was married to a Jewish girl, whose parents were both Jewish, upon the testator's death.[279] After the testator's death, Daniel was twenty-one years old, unmarried, and a student at Youngtown State University.[280] Daniel claimed that the provision was unreasonable, unconstitutional, and against public policy.[281] The question before the court was not whether Daniel's constitutional right to marry was being restricted, but rather whether the testator's restriction upon his son's inheritance could be enforced.[282] The court recognized "[t]he great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable."[283]

In *Shapira*, Daniel tried to rely on the reasonableness test used in *Maddox*, but the court in *Shapira* distinguished the facts from those in *Maddox*.[284] In *Shapira*, the court focused on the testator's intent and how it was not to punish his son but rather to preserve the Jewish faith.[285] Therefore, it was the duty of the court to honor the testator's intent so long as it did not violate public policy, which the court found that it did not.[286]

On the other hand, and going against the holdings of *Snodgrass*, *Gordon*, and *Shapira*, the Illinois Court of Appeals struck down a provision in a will as void against public policy in *In re Estate of Feinberg*.[287] In *Feinberg*, the testator's trust contained a provision, known as the Jewish Clause, which stated: "A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date

277. 315 N.E. 2d 825 (Ct. Cm. Pl. Ohio 1974).

278. *Id.* at 832.

279. *See id.* at 826.

280. *Id.*

281. *Id.* at 826.

282. *See id.* at 828.

283. *Id.* at 829.

284. *Id.* at 831 ("Daniel is not at all confined in his choice to residents of this county, which is a very different circumstance in this day of travel by plane and freeway and communication by telephone, from the horse and buggy days of the 1854 Maddox v. Maddox decision.").

285. *Id.* at 832.

286. *Id.*

287. *See* 891 N.E.2d 549, 558 (Ill. App. Ct. 2008), *rev'd*, 919 N.E.2d 888 (Ill. 2009).

of such marriage."[288] The testator, Max, died in 1986 and his wife, Erla, died in 2003.[289] Max and Erla were survived by two children, Michael and Leila, and five grandchildren.[290] At the time of this lawsuit, the only grandchild who was married to a person of the Jewish faith was Jon.[291]

The court began its analysis by stating that Illinois courts have "reaffirmed the underlying principle that testamentary provisions are invalid if they discourage marriage or encourage divorce."[292] Unlike *Shapira* and *Gordon*, where provisions encouraging a partial restraint on marriage were upheld, the court of appeals did not want to depart from Illinois law because it found that the Jewish Clauses (Clause) seriously limited the beneficiaries' right to marry.[293] In *Shapira*, the court focused on the testator's intent and how it was to preserve the Jewish faith and not to punish his son.[294] However, in *Feinberg*, the court of appeals took the opposite view and found that the Clause discouraged marriage and therefore violated public policy.[295]

Ultimately, the Supreme Court of Illinois reversed the Illinois Court of Appeals decision in *Feinberg II*,[296] finding that the Clause did not violate public policy.[297] The issue before the court was to determine

> whether the holder of a power of appointment over the assets of a trust may, without violating the public policy of the state of Illinois, direct that the assets be distributed at the time of her death to then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition.[298]

More specifically, the clause in *Feinberg* exposed the tension between testamentary freedom and "dead hand" control.[299] Turning to the

288. *Id.* at 550.

289. *Id.* at 549.

290. *Id.* at 549–50.

291. *Id.* at 550.

292. *Id.* ("As early as 1898, our supreme court set forth the general rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy.").

293. *Id.* at 552.

294. *Id.* at 558.

295. *Id.* at 552 ("The provision's clear intent was to influence the marriage decisions of Max's grandchildren based on a religious criterion and thus to discourage marriage by the grandchildren other than to those of the Jewish faith. This provision violated public policy . . . .").

296. 919 N.E.2d 888 (Ill. 2009).

297. *Id.* at 905–06.

298. *Id.* at 892.

299. *Id.* at 894 ("This tension is clearly demonstrated by the three opinions of the appellate court.").

constitution, statutes, and long-standing caselaw of Illinois, the court stated, "[T]he public policy of this state values freedom of testation as well as freedom of contract . . . ."[300] Furthermore, it is evident that Illinois favors testamentary freedom.[301] The court looked at the testator's intent, stating that the purpose of the clause was to further his commitment to Judaism.[302] This rationale is also seen in *Shapira*, where the court looked at the testator's intent, claiming that his intent was to preserve the Jewish faith and not to punish his children.[303]

To determine if the Clause violated public policy, the court first noted that it did not incentivize divorce—rather, it involved the decision to marry.[304] The court went a step further by stating that Max's will and trust did not create any vested interest in his children or grandchildren and, as a result, a complete restraint on marriage would be operative.[305] The Clause did not operate as a restraint on marriage because it was only effective upon Erla's death.[306] Therefore, the provision was not contrary to public policy.[307] However, the state supreme court focused more on Erla's power of appointment, rather than on the actual validity of the clause itself.

From the cases listed above, it is evident that total restraints on marriage are void and against public policy. However, partial restraints on marriage are consistently upheld by courts, under a broad view of testamentary freedom, if such restraints are deemed to be "reasonable." Courts recognize that there is a public policy promoting the encouragement of marriage; however, courts may instead focus on the testator's intent and religious beliefs when evaluating the restraint to justify its reasonableness, as seen in *Shapira* and *Feinberg II.* If a court believes the testator's intent was to preserve his faith and not to punish the beneficiaries, the provisions will most likely be upheld. Only when a

300. *Id.* at 895 ("Under the Probate Act, Max and Erla had no obligation to make any provision at all for their grandchildren.").

301. *See id.* at 896 ("As demonstrated by the Probate Act, the Trusts Act, the Statute Concerning Perpetuities, and the Rule in Shelley's Case Abolishment Act, the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law.").

302. *Id.*

303. *See supra* note 285 and accompanying text.

304. *Feinberg*, 919 N.E.2d at 899.

305. *Id.* at 903 ("As this court noted in *Ransdell*, a condition precedent, even if a 'complete restraint' on marriage, 'will, if broken, be operative and prevent the devise from taking effect.' However, '[w]hen the condition is subsequent and void it is entirely inoperative, and the donee retains the property unaffected by its breach.'" (alteration in original) (quoting Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898))).

306. *Id*. ("Michele's choices regarding when to marry and whom to marry were entirely unrestricted, even though, as it turns out, those choices did have consequences for her.").

307. *Id*.

provision completely restricts a beneficiary's right to marry will a court strike the provision, as seen in *Maddox*. Interestingly, testamentary provisions that encourage separation or divorce from a spouse are invalid and against public policy.[308] However, when the testator's dominant intent is to provide support in the event of divorce or separation, the restraint will be valid.[309]

Feinberg II and *Shapira* have their limits, however. In both of those cases, the beneficiaries were not homosexual, and in both cases, the restraints were only partial. Furthermore, applying comment j of the Restatement (Third) of Trusts to both cases, the beneficiaries' remaining spheres of permissible marriages were not so small that marriage was not likely to occur. Thus, the court weighed the testators' intent—with regard to religious beliefs— against restrictions that arguably did not violate public policy. Therefore, the provisions were upheld.[310]

B. *Religion*

Another of the most common types of discriminatory bequests is when a testator tries to control which religion, if any, a beneficiary will practice.[311] As seen above, most cases involving religion are entangled with partial or total restraints on marriage.[312] However, that is not always

308. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 1983) ("An otherwise effective restriction in a donative transfer which is designed to permit the acquisition or retention of an interest in property by the transferee only in the event of a separation or divorce from the transferee's spouse is invalid, unless the dominant motive of the transferor is to provide support in the event of separation or divorce, in which case the restraint is valid."); *see also* Brizendine v. Am. Trust & Sav. Bank, 101 So. 618, 622 (Ala. 1924) (striking a provision encouraging the testator's son not to associate with his wife as void against public policy); *In re* Estate of Gerbing, 337 N.E.2d 29, 32 (Ill. 1975) ("In Illinois public policy as revealed by the decisions of this court holds that a condition annexed to a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy, and the condition is void."); *In re* Estate of Keffalas, 233 A.2d 248, 250 (Pa. 1967) (holding that a provision in a will was conducive to divorce because it encouraged the beneficiaries to remarry Greek men and therefore, violated public policy).

309. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 1983).

310. In upholding the provision at issue in its case, the *Shapira* court focused heavily upon the testator's intent. The court seemed to view the provision's discriminatory effect as a byproduct of the testator expressing his intent. To support this viewpoint, the court pointed out that the will's alternative provision—that the property be given to the State of Israel—demonstrated the testator's deep convictions, not an intent to discriminate against non-Jews. In contrast, the court in *Feinberg II* attached more weight to the free practice of religion. Specifically, the court's discussion of testamentary freedom was couched in the context of "dead hand" religious control. So, in *Feinberg II*, testamentary freedom was less of a driving factor than was the recognition that the testator could influence religious and marital choices posthumously.

311. Hanna, *supra* note 249, at 344.

312. *Id.* at 336–37, 344 (noting that one of the most common examples of restraints on marriage is when beneficiaries must select a spouse belonging to the testator's religion).

the case. Testators may include provisions that only apply to which religion a beneficiary will practice.[313] To uphold these types of discriminatory bequests, courts tend to rely on the reasonableness test applied in cases that involve partial restraints on marriage.[314]

For example, in *Delaware Trust Co. v. Fitzmaurice*,[315] the court upheld a will provision directing the beneficiary to live up to and observe only the faith of the Roman Catholic Church.[316] The plaintiff claimed that the clause was an invalid restriction on her rights, but the court disagreed.[317] In support of the religious provision, the court stated, "Such a condition is not contrary to any established policy of the common law, or of any law of this State, and is valid and binding . . . ."[318] The court went further and held that neither the state constitution nor the federal Constitution affected its conclusion because "the mere inducement to adopt or to adhere to a particular religious belief is not a denial of religious freedom."[319] Therefore, the provision was not against public policy.[320]

When analyzing provisions that control what religion a beneficiary will practice, some courts use the reasonableness test used when analyzing provisions that create partial restraints on marriage.[321] Further, when analyzing provisions that require beneficiaries to practice a certain religion, courts tend to uphold these provisions in support of testamentary and religious freedom. Therefore, simply requiring a beneficiary to follow the teachings of a certain religion to receive a bequest is likely not against public policy.

313. *See In re* Kempf's Will, 297 N.Y.S. 307, 312 (App. Div. 1937) (holding that a provision requiring a beneficiary to adhere to the Roman Catholic Religion was not against public policy because it did not deprive the beneficiary of his freedom of religion and reasoning that the testator was merely furthering his interests of his chosen religion), *aff'd*, 16 N.E.2d 123 (N.Y. 1938).

314. Hanna, *supra* note 249, at 344 ("The courts have traditionally abstained from encroaching on the testator's attitudes [on] this controversial subject and have also hid[den] behind the shield of the bequests' 'reasonableness.'"); *see also* Gordon v. Gordon, 124 N.E. 2d 228, 234 (Mass. 1955) (stating that a restriction conditioned upon the religious faith of the parents of a prospective wife at the time of her birth was not unreasonable because it was not conditioned on anyone's religious belief at the time of marriage).

315. 31 A.2d 383 (Del. Ch. 1943), *aff'd in part, rev'd in part sub nom.* Crumlish v. Delaware Tr. Co., 38 A.2d 463 (Del. 1944).

316. *Id.* at 389.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *See* Hanna, *supra* note 249, at 336–37; *cf.* Amin, *supra* note 156, at 580 (discussing the reasonableness standard as it relates to judicial impartiality).

In contrast, the court in *Drace v. Klinedinst*[322] struck a will provision that required the beneficiaries to remain faithful to a particular religion.[323] The court held, "The right of the citizens of the commonwealth to worship God in accordance with the dictates of their own conscience is a landmark of the old colony."[324] The provision violated public policy because it forced the beneficiaries to adhere to a certain faith, which the court viewed to be a punishment.[325] However, *Drace* is an example of the minority view and was later distinguished by the same court in *In re Estate of Laning*.[326]

In cases involving religious beliefs and marriage, courts have continued to uphold restrictive provisions in support of testamentary and religious freedom. The Comment to Restatement (Second) of Property § 8.1 states that individuals are free to advocate their theological views to others, even when it is in the form of a religious restraint attached to a donative transfer.[327] In *Shapira*, the court noted, "The great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable."[328] The court recognized that the public policy of Ohio favors freedom of religion, but that the facts of the case constituted a partial restraint on marriage and not a restraint on freedom of religion.[329] These cases illustrate how courts may sidestep the issue of religious freedom by focusing more on the testator's intent instead of the restrictive provision's impact on a beneficiary.

While a provision only discussing marriage might be easier to analyze, the issue gets more complex if the condition at issue relates to the testator's religious beliefs. In *Feinberg II* and *Shapira*, the courts focused on the testator's intent and honored his religious beliefs despite any negative impact on the beneficiary. Such focus harkens back to the potential conflict between RFRAs and antidiscrimination statutes,

322. 118 A. 907 (Pa. 1922).

323. *Id.* at 908.

324. *Id.* at 909.

325. *Id.*

326. *See* 339 A.2d 520, 523 (Pa. 1975) ("Not only would the condition in *Drace* have required improper inquiries into the content of religious doctrine, but the intrusion into the ecclesiastical domain would have been magnified by the need to probe into the beliefs of the remaindermen. In contrast, the bequest involved here requires no inquiry into either doctrine or belief. All that need be determined is whether the beneficiaries are or are not *members* of the specified church.").

327. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 8.1 cmt. a (AM. LAW INST. 1983).

328. Shapira v. Union Nat'l Bank, 315 N.E. 2d 825, 829 (Ct. Comm. Pl. Ohio 1974).

329. *Id.*; *see also In re* Silverstein's Will, 155 N.Y.S.2d 598, 599 (Sur. Ct. 1956) ("Conditions in partial restraint of marriage which merely impose reasonable restrictions upon marriage are not against public policy.").

wherein some courts appear to allow discrimination—even if it is otherwise prohibited by statute—if that discrimination is based on religious beliefs.[330]

In general, there is a strong public policy that favors religion and allows testators to impose their religious beliefs onto beneficiaries. The majority of courts have upheld restrictive provisions by focusing more on the testator's intent to preserve the testator's faith as opposed to how the provision will affect the beneficiaries. The minority case of *Drace*, however, illustrated one court's rare approach, where the court sided with the beneficiaries and viewed the provision as punitive. Instead of focusing on the testator's intent, as the court did in *Shapira*, the court in *Drace* paid attention to the long-lasting effect the provision would have on the beneficiaries if they were forced to adhere to a particular religion. Nevertheless, most courts favor broad testamentary freedom regardless of whether the provision is a partial restraint on marriage or a restraint on religion.

C. *Disruption of Family Relationships*

In addition to total restraints on marriage and limitations imposed on one's religious freedom, provisions in a will or trust that encourage the disruption of family ties are generally deemed to violate public policy.[331] The Restatement (Second) of Property states:

> An otherwise effective provision in a donative transfer which is designed to permit the acquisition or retention of an interest in property only in the event of either the continuance of an existing separation or the creation of a future separation of a family relationship, other than that of husband and wife, is invalid where the dominant motive of the transferor was to promote such a separation.[332]

On the same note, the Restatement (Third) of Trusts states, "A trust or a condition or other provision in the terms of a trust is ordinarily . . . invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship."[333] More specifically, provisions that negatively impact

330. *See supra* notes 138–145 and accompanying text.

331. *See supra* note 242 and accompanying discussion.

332. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.2 (AM. LAW INST. 1983).

333. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003).

children—by, for example, preventing a child from living with a parent or from interacting with his or her siblings—violate public policy.[334]

The majority of courts have stricken provisions that disrupt family ties where those ties involve children. For example, in *Estate of Romero*,[335] the court struck a will provision directing the testator's two minor sons to live without their mother, finding that the provision violated public policy and encouraged the dissolution of family ties.[336] Courts may also strike provisions that negatively impact adult children. In *Zdanowich v. Sherwood*,[337] the testator's will included a condition such that his wife was not allowed to use any of the funds she received from the estate to support their adult son.[338] The court held that the provision was contrary to public policy since parents have an obligation to support their children if the children cannot support themselves or are physically or mentally handicapped.[339] However, courts may uphold a provision if it is viewed as only a partial restraint. In *Latorraca v. Latorraca*,[340] for example, the testator bequeathed, to his widow, a right to reside in the family home, on the condition that she did not live in the home with her mother or any other relatives.[341] The plaintiff argued that the provision disrupted family ties; however, the court disagreed.[342] The court held that the provision did not disrupt family ties because the plaintiff was not prevented from continuing to visit or entertain her other family members.[343] Therefore, the restriction was not a total restraint.[344]

Accordingly, it seems that the majority of courts will strike provisions that encourage a disruption of family ties, especially in cases involving minor children and custody, as seen in *Romero*. However, the lines blur in cases where a court sees only a partial restraint. In these situations, courts may look at the testator's intent when determining the motive behind the provision. For example, in *Latorraca*, the court considered the testator's intent and stated that the testator may have feared that his own children "might come to take second place to his wife's kindred."[345]

334. *See id.* ("The policy against undermining family relationships applies as well to trust provisions that discourage a person from living with or caring for a parent or child or from social interaction with siblings.").

335. 847 P.2d 319 (N.M. Ct. App. 1993).

336. *See id.* at 323.

337. 110 A.2d 290 (Conn. Super. Ct. 1954).

338. *Id.* at 291.

339. *Id.* at 293.

340. 26 A.2d 522 (N.J. Ch. 1942), *aff'd per curiam*, 31 A.2d 819 (N.J. 1943).

341. *Id.* at 526.

342. *Id.*

343. *Id.*

344. *See id.*

345. *Id.*

Thus, even if a provision clearly causes a disruption of family ties, a court may look to the testator's intent to justify upholding the provision.

In light of the cases above, the most problematic conditions in wills and trusts involve marriage, religion, divorce, and the disruption of family ties. Courts recognize that public policies encourage marriage, family ties, and religion, but disfavor the promotion of divorce. More specifically, when evaluating conditions on marriage and religion, the most important distinction is whether the condition is seen to be a partial or total restraint. If the condition is a total restraint on marriage, courts will strike it. If the condition is only a partial restraint on marriage, courts will most likely uphold it in favor of testamentary freedom, but only if it is reasonable. The entanglement of religion and divorce raises more complex issues. Given the strong public policy in favor of religion, courts generally honor a testator's religious beliefs, even if doing so restricts a beneficiary's beliefs. This is most notably seen in cases involving partial restraints on marriage that require the beneficiary to marry a person of a certain faith—in which the majority of the provisions are upheld and not void as against public policy.

V. EXPLORING DIFFERENT OUTCOMES IN JUDICIAL OPINIONS IN RED AND BLUE STATES

Building upon the prior discussions of interpretation and construction doctrines; public policy regarding testamentary provisions that partially or totally restrict marriage, divorce, family ties, and religion; and how these doctrines and policies can be distorted depending on political alignment, this Article introduces a normative analysis of the application of these doctrines and policies to pertinent hypotheticals derived from real cases.

A. *Hypothetical One: Same-Sex Marriage*

Picture a trust agreement that creates a trust for the settlor's son, Kelly. The agreement provides that all income is to be distributed to the settlor's son during his life, so long as the son marries a Catholic woman and otherwise lives up to, observes, and follows the teachings and faith of the Roman Catholic Church. Failure to live up to, observe, and follow the teachings and faith of the Roman Catholic Church results in the income being donated to Catholic Charities USA. Kelly is married to another man at the time of the settlor's death. Will the provision be upheld? Will Kelly take under the trust agreement?[346]

346. This hypothetical reveals one of the unanswered questions post-*Obergefell*: Can a testator effectively undermine *Obergefell*, at least for his would-be beneficiaries, by placing a

Where courts will draw the line is a critical issue, especially in cases involving homosexual beneficiaries, and such cases have yet to be analyzed.[347] Several issues present themselves. For example, if a testator includes a provision in his will stating, "to my son only if he marries a woman," and his son is gay, will courts view that provision as a total or partial restraint on marriage? Does it encourage divorce? Does it encourage entering a "sham" marriage to a woman? In challenging this condition, will the beneficiary be able to introduce extrinsic evidence? Did this testator know that his son was gay? Courts may take a few different approaches in answering these questions. Ultimately, these very important determinations could depend on which state is reviewing the provision.

1. In a Red State

A red-state judge would likely uphold the provision as it applies to Kelly. In doing so, a red-state judge would review the provision with a focus on the testator's intent, testamentary freedom, and religious freedom. By focusing on the testator's intent to preserve his faith instead of the perceived punishment the provision creates for the beneficiary, the red-state judge can avoid the restraint on marriage issue.

Generally, there is a strong public policy in the United States that favors religion and allows testators to preserve their faith.[348] This public policy, along with opposition to same-sex marriage, is stronger in red states than in blue states. Red states tend to have citizens with strong Christian beliefs, which results in opposition to same-sex marriage. A judge in a red state knows the policies of his state. He knows that the last states to legalize same-sex marriage were red states, and he knows that most red states only legalized same-sex marriage because the U.S.

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potentially total restraint on same-sex marriage that would not be upheld if it applied to a traditional marriage?

347. Popoff, *supra* note 257, at 167 ("[N]o court has explicitly accounted for the sexual orientation of a donee in determining whether a condition in restraint of the donee's marriage is an unenforceable violation of public policy."). Close to accounting for the sexual orientation of a donee is a case where a settlor's grandson could not take unless the grandson's father—the settlor's son—married the grandson's mother. *See* Debra Cassens Weiss, *Gay Judge Contends His Dad's Marriage Mandate in Will Violates Public Policy*, ABA J. (Aug. 27, 2012), http://www.abajournal.com/news/article/gay_judge_contends_his_dads_marriage_mandate_in_will_violates_public_policy [https://perma.cc/2C3F-CVV4]. The settlor's son, a New York judge, was gay and had married his partner. *Id.* The judge in that case ultimately determined that the marriage mandate would probably stand. *See* Roger Friedman, *Alec Baldwin Irony: Judge Who Ruled for Him in Stalker Case Is Gay*, SHOWBIZ 411 (Nov. 18, 2013, 11:37 AM), https://www.showbiz411.com/2013/11/18/alec-baldwin-irony-judge-who-ruled-for-him-in-stalker-case-is-gay [https://perma.cc/L85K-WJPW].

348. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 829 (Ct. Comm. Pl. Ohio 1974).

Supreme Court required them to do so after *Obergefell*.[349] The red-state judge also knows that many red states are creating roadblocks for same-sex couples who want to adopt children. These red states have passed laws that allow an adoption agency to deny same-sex couples the opportunity to adopt based on the adoption agency's religious beliefs.[350] The red-state judge certainly knows that many of these states, along with additional red states, have also passed RFRAs.[351] He knows that these laws evidence red states' policies on same-sex marriage and religious freedom, clearly showing that red states have a strong policy in favor of religious freedom and against same-sex marriage. He knows that his red state has these policies, and he knows he must please his voters. Put another way, to remain a judge, the red-state judge will decide the case in a way that his voters would decide it: he will rule red.

To find that the provision does not violate public policy, a red-state judge would focus on the testator's intent, testamentary freedom, and religious freedom. He would rely on the reasoning in *Fitzmaurice* and conclude that this provision is simply an inducement to adopt a religion, which is not against public policy.[352] Further, a red-state judge would find that the testator's intent was to preserve the Roman Catholic Faith, not to punish his son—and the court must honor the testator's intent as long as it does not violate public policy.[353] Although the provision potentially violates public policy because of the restraint on marriage, the red-state judge would sidestep this issue by finding only a partial restraint on marriage. He would follow the reasoning in *Shapira* and find that the testator's intent was to preserve the Catholic faith, and further, find that the provision does not restrict the marriage because Kelly can marry any woman in the world, he just cannot marry a man. By analyzing the

349. *See supra* notes 51–52 and accompanying text.

350. States with these laws include Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. *See* Julie Moreau, *Religious Exemption Laws Exacerbating Foster and Adoption 'Crisis,' Report Finds*, NBC NEWS (Nov. 22, 2018, 12:23 PM), https://www.nbcnews.com/feature/nbc-out/religious-exemption-laws-exacerbating-foster-adoption-crisis-report-finds-n939326 [https://perma.cc/T24U-76JQ]. Georgia also has sought to enact such a law. *See, e.g.*, S.B. 368, 155th Gen. Assemb., Reg. Sess. (Ga. 2020); S.B. 375, 154th Gen. Assemb., Reg. Sess. (Ga. 2018).

351. Alabama, Kansas, Mississippi, Oklahoma, South Carolina, Texas, and Virginia have all passed laws that allow adoption agencies to deny same-sex couples adoption and RFRAs. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/PSA2-ALLQ].

352. Del. Tr. Co. v. Fitzmaurice, 31 A.2d 383, 389 (Del. Ch. 1943) ("[T]he mere inducement to adopt or to adhere to a particular religious belief is not a denial of religious freedom."). This is the majority view followed by most states.

353. *See* Levinson et al., *supra* note 160, at 107; *Religious Composition in the Midwest*, *supra* note 128.

provision this way, the red-state judge could uphold the provision and please the citizens of his state.

However, this leads to obvious questions: Should this be allowed? Is this not a total restraint on marriage hidden behind a guise of strong religious values? Did the testator know that Kelly was homosexual? If he did, it seems more like a total restraint on marriage or a punishment, in which case it should be void. What if Kelly was already married? Now that the provision is promoting divorce, which is against public policy, would a red-state judge be able to work around this? Does it make a difference if it is a will or a trust? Beyond the religious freedom that red-state judges are likely to recognize, a court in Kelly's hypothetical could say that a condition requiring him to marry a woman is only a partial restraint on marriage. Although Kelly is gay, a court could technically find that he is still free to marry, he is simply not free to marry a man. That approach would be loosely related to the rationale used in *Shapira*. In that case, the court found that the relevant restraint was partial (it did not totally restrict marriage) and reasonable because based on the number of potential spouses in a reasonable geographical area, a marriage permitted by the restraint was not prohibitively unlikely. Thus, the *Shapira* court found that the relevant restraint did not violate public policy. Following that reasoning, a court could also find this partial restraint reasonable based on the number of potential spouses (women) in a given area.

2. In a Blue State

As opposed to his red counterpart, a blue-state judge would likely see this provision as void against public policy. Blue-state citizens generally believe that same-sex couples should be allowed to marry.[354] In that vein, blue-state judges are more likely to reason that if a beneficiary is homosexual, a provision requiring him to marry someone of the opposite sex is a total restraint on marriage.[355]

Additionally, blue states do not have the same strong public policy in favor of freedom of religion that red states have,[356] and blue states tend to have lower rates of Christianity.[357] This combination—of individuals who generally believe that same-sex couples should be allowed to marry

354. *See* discussion *supra* Section II.A.

355. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (concluding that, in regard to marriage, homosexuals' "immutable nature dictates that same-sex marriage is their only real path to this profound commitment").

356. *See* discussion *supra* Section II.A.3; *see also* David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious-Freedom Laws*, TIME (Apr. 2, 2015), https://time.com/3766173/religious-freedom-laws-map-timeline/ [https://perma.cc/SHD6-ZRRJ].

357. However, blue states are correlated with a higher rate of Catholicism, which could play an important factor in this particular scenario. *See supra* Section II.A.3.

and a general lack of strong religious opposition to same-sex marriage—would result in a court focusing less on the testator's intent (of promoting his religious beliefs) and more on the effect the provision has on the beneficiary.

Before reaching the marriage issue, however, the blue-state judge might first analyze the religious implications behind the provision. By its express terms, the provision requires Kelly to follow "the teachings and faith of the Roman Catholic Church." Thus, Kelly must be a Roman Catholic. From that, a blue-state court—already unexcited to incorporate religion into its laws of succession—might be hesitant to require Kelly to practice Catholicism to receive his bequest. Notwithstanding this hesitancy, however, under *Shapira* and *Feinberg II*, the blue-state court might have its hands tied and be forced to uphold the provision's religious inducement.

That said, the provision is not just an inducement to practice a certain religion. The provision also creates a marital restriction. The Catholic Church believes that marriage is a sacred bond between a man and a woman.[358] By requiring Kelly to follow the teachings of the Roman Catholic Church, the testator is placing restrictions on Kelly's personal life choices because Kelly cannot marry a man if he wishes to receive from the trust. If Kelly is engaged to a man, obviously Kelly has failed to follow the teachings of the Roman Catholic Church and therefore would not take under the agreement.

Accordingly, a blue-state judge would likely find that the provision is a total restraint on marriage because blue states support same-sex marriage. Thus, although Kelly could marry any woman he pleases, a blue-state judge would find that the provision creates a total restraint since Kelly is not allowed to marry another man if he wants to receive under the trust. Finding that the provision creates a total restraint on marriage, the blue-state judge would declare the provision void as against public policy.

An elected blue-state judge would likely reach this result because, as previously discussed, he would be influenced by public opinion. Pleasing the blue voters allows the judge to keep his position; elected judges are swayed by their constituents' opinions, especially opinions on important social issues like same-sex marriage. Knowing that the blue citizens are proponents of same-sex marriage, the judge would focus on the total restrictions created by the provision rather than focusing on the testator's testamentary freedom.

358. *Why is Marriage Important to the Catholic Church?*, DIOCESE PHX. (Mar. 1, 2006), https://dphx.org/why-is-marriage-important-to-the-catholic-church/ [https://perma.cc/8TSA-FTAM].

3. Expanding on the Hypothetical Answers: Considering Future Questions

Alternatively, what if the testator did not consider same-sex marriage in his provision but instead just wanted Kelly to be Catholic? Would this change a blue-state judge's analysis? Presumably, it would not change a red-state judge's analysis because those judges would respect the testator's religious freedom with or without the provision regarding marriage. A blue-state judge, on the other hand, might have his hands tied because now—without the same-sex marriage provision explicitly included—maybe there is no longer a perceived "total restraint" on marriage.[359] Admittedly, a blue-state judge would not be far out of line to say that whether or not the marriage provision appeared explicitly, a requirement to live up to the Catholic faith is effectively a total restraint on marriage since Catholics disallow gay marriage.

Relatedly, what if there was no residual clause providing for the gift to go to the Catholic Charities USA? Would this allow a blue-state judge to sufficiently distinguish Kelly's case from *Shapira*, where the court enforced a provision that forced the beneficiary to practice a particular religion? Would the blue-state judge be inclined to so distinguish *Shapira*?

Another consideration is the fact that blue states tend to have higher rates of Catholicism than red states do. So, while traditional Catholics would disavow homosexuality, blue states are more progressive as a whole. Concomitantly, Catholics are more likely to be progressive than are, for example, evangelical Protestants. Perhaps, at least in a blue state, judges would recognize a more progressive viewpoint, allowing Kelly's same-sex marriage to stand while otherwise enforcing strict Catholicism.

359. *See, e.g.*, Barnum v. Mayor of Baltimore, 62 Md. 275, 291 (1884) (recognizing the testator's right to make the enjoyment of his bounty dependent upon the condition that the beneficiary withdraw from the priesthood and cut ties with the Catholic Church); Gordon v. Gordon, 124 N.E.2d 228, 233 (Mass. 1955) ("The basis of the majority rule seems to be that an inducement by way of gift to adopt or to adhere to a particular religious belief is not a denial of religious freedom. The beneficiary can reject the gift."); Magee v. O'Neill, 19 S.C. 170, 185, 190 (1883) ("As to that public policy which is within the cognizance of courts, we cannot conceive of a better definition than that given by a distinguished English judge, viz.: 'It cannot be the mere opinion of the judge upon any general question of public policy, or, in other words, whether the judges think that the interests of the public would be better advanced by tolerating or refusing to tolerate such provisos, but whether they are in contravention of any established law, or in contravention of the spirit, though not against the letter of the law.'") ("We can not say that the terms of this will so far exceed the license which is allowed the citizen in the disposition of his own property, as to render it void as against public policy."); *In re* James' Estate, 76 N.W.2d 553, 556 (Wis. 1956) (holding that a condition requiring a beneficiary to raise his children is not contrary to public policy). Notably, North and South Dakota have specific statutory restrictions against conditions that restrain marriage. *See* N.D. CENT. CODE § 47-02-25; S.D. CODIFIED LAWS § 43-3-4; *see also* Johnson & Steinmetz, *supra* note 356 (showing a timeline of when states passed legislation as of April 2015).

Would a red-state judge, heavily influenced by Protestant values, allow those values to seep into his interpretation of what Catholicism would require of Kelly?

B. *Hypothetical Two: Adoption of Child Born by ART*

Obergefell established a positive right for same-sex couples to marry.[360] In declaring state bans on same-sex marriage unconstitutional, the Court evidenced a shift toward a more gender-neutral rule of law. In other words, "husband" and "wife" were more appropriately replaced with "spouse." While the *Obergefell* decision has had wide impact on areas of law like marriage, employment, and social benefits, its effect on the laws of succession remains unclear.[361] Accordingly, this Part addresses one of the many issues implicated by modern concepts of family: same-sex couples and ART.

Imagine a couple: Emily and Brooke. Emily and Brooke got married in 2018, after the *Obergefell* decision allowed for the two women to wed. Brooke's parents are very wealthy. Brooke also has numerous siblings, all of whom have children. None of Brooke's siblings used ART to have their children, and all of her siblings are in opposite-sex marriages with their children's other genetic parent.

After being married for several years, Brooke and Emily decide they want to have a child of their own. Following some discussion, Brooke and Emily decide that Emily will artificially inseminate herself. The procedure works, and Emily becomes pregnant, giving birth to a baby boy, Jim. Brooke and Emily begin raising the child and, although never formally adopting him, Brooke views Jim as her own son.

Fast forward eighteen years. Brooke's father has already died, leaving all his property to his wife, Brooke's mother. Brooke's mother settles an irrevocable trust "for my benefit until I die, then for the benefit of my grandchildren." Brooke's mother puts all of her property into the trust. Shortly after creating the trust—but before any distribution is due—Brooke's mother dies unexpectedly. The trustee makes the first distribution in accordance with the trust agreement, but he refuses to distribute to Brooke and Emily's son, claiming Jim is not within the class of beneficiaries. Jim files litigation to compel the trustee to distribute to Jim an equal share.

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360. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) ("The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.").

361. In other words, because the *Obergefell* decision is so recent, few donative instruments have utilized *Obergefell*'s decision. Thus, not many donative-law concepts have been implicated in the context of same-sex couples.

1. In a Red State

Preliminarily, the key issue within Jim's litigation is whether Brooke's mother intended to include Jim in the class of "grandchildren" beneficiaries despite Jim having no genetic or legal relationship to Brooke's mother. Under the current position of applicable law in red states, it is unlikely that Jim would be included in the class of beneficiaries for Brooke's mother's trust. First, the most important reality to recognize is the public policy that drives red states' approach to ART: a hesitancy to recognize same-sex couples using ART. This hesitancy is demonstrated by red states lagging in improving same-sex couples' access to ART.[362] With that public policy surrounding a red state's court, Jim may struggle to find equal treatment as his cousins—children of different-sex, non-ART-using parents.

Second, beyond their public policy, red states are less likely to expand the marital presumption beyond its traditional form of presuming the "*husband*" of the birth mother was the father.[363] Thus, because Brooke is not Emily's husband, a red-state court may decline to expand the presumption beyond its traditional recognition of paternity rather than parentage. Further, if the red-state judge strictly adhered to statutory text, the pertinent state law may be drafted in such a way that requires the presumption only be applied to heterosexual couples.

Lastly, second-parent adoption seems unlikely to save Jim in a red state. Red states evidence general favor toward a two-parent home where one parent is male and the other is female.[364] Hence, few red states have adopted second-parent adoption statutes. The effect of no second-parent adoption prevents Brooke from adopting Jim unless Emily relinquishes parental rights. In other words, Jim can either be Brooke's legal child or Emily's, but not both. Emily—as birth mother—is unlikely to relinquish those rights, so Brooke will never have adopted Jim. Therefore, Jim would not be within the class of "grandchildren" beneficiaries.

2. In a Blue State

Under the current position of applicable law in blue states, Jim is much more likely to succeed in his desire to be classified as a "grandchild." Blue states have begun to adopt a policy of favoring equal access to ART for same-sex couples. With that equal access, equal treatment of children who result from same-sex couples using ART is likely to follow.

362. *See supra* Section II.A.2.

363. *See supra* Section II.A.1.ii.

364. *See* W. Bradford Wilcox, *Red State Families: Better Than We Knew*, INST. FOR FAM. STUD. (June 11, 2015), https://ifstudies.org/blog/red-state-families-better-than-we-knew/ [https://perma.cc/5CXB-PQ5T]; *supra* Section II.A.1.

Accordingly, blue-state courts will couch their analyses of the litigation in favor of individuals like Jim.

Driven by such a policy, a blue-state court is likely to apply the marital presumption to Jim's situation. After all, a trend has begun emerging—blue states are making their marital presumption statutes gender-neutral. Thus, instead of being the "husband" of Emily, Brooke only need be Emily's spouse to take advantage of the marital presumption. And because *Obergefell* mandates recognition of Brooke as Emily's spouse, a court with a gender-neutral marital presumption statute would easily find Jim to be Brooke's child and thus within the class of "grandchildren." In the same vein, even without a gender-neutral statute, 100% of blue states have allowed the marital presumption to apply to same-sex couples absent an involved third party. Thus, either way, a blue-state court would likely rule Jim a "grandchild."

In addition to the marital presumption, in a blue state, Brooke would likely have been able to adopt Jim without Emily relinquishing parental rights because blue states are more likely to permit second-parent adoption. Consequently, Brooke could have adopted Jim, and he would legally be considered Brooke's mother's grandchild. If the blue state did not allow second-parent adoption—as not all blue states have—Jim would struggle absent some persuasive argument of equitable adoption.[365] Nonetheless, Jim would likely be covered under the marital presumption and, accordingly, be a trust beneficiary.

3. Expanding on the Hypothetical Answers: Considering Future Questions

Emily and Brooke's situation is not the only example of uncertainty in the laws of succession when it comes to the evolving outlook of marriage and family. For example, what if Emily and Brooke were two males married as a gay couple? In that case, the marital presumption might less credibly apply. In Emily and Brooke's hypothetical, Jim is most certainly Emily's son—she birthed him, which is all the marital presumption requires of the biological mother. As to Brooke, a strong argument could be made that the marital presumption applies to any spouse of the birth mother. Thus, Brooke, as the birth mother's spouse, could take advantage of the marital presumption.

365. For a concise description of equitable adoption and its differing theories of justification, see Tritt, *Sperms and Estates*, *supra* note 97, at 383–86. In essence, whether under the contract theory or estoppel theory of equitable adoption, courts have difficulty finding all the required elements for formally proving equitable adoption. *Id.* at 384–85. Thus, "both of the purported theoretical bases for equitable adoption are very limited in application and may produce inconsistent and inequitable results." *Id.* at 385–86. Accordingly, Jim's success under an equitable adoption theory of recovery is far from guaranteed.

However, the same cannot be as easily said for a gay couple. With two married males, neither is the biological mother. Thus, even if a state were to gender-neutralize its marital presumption statute, neither individual in a gay couple could claim to be the spouse of the birth mother. What happens then? Does the policy of equality and familial harmony prevail? Or would a strict adherence to the text of a marital presumption statute—even a gender-neutral one—prevent the presumption from applying to a gay couple who has taken advantage of ART?[366]

Take another complication: What if Emily removed an egg, had that egg inseminated in a petri dish, then placed the fertilized egg in Brooke's womb? Would then every state have to apply the marital presumption on the notion that—because both Brooke and Emily are "birth mothers"—both women are equally the spouse of the birth mother and the birth mother themselves? Would either Brooke or Emily even need to adopt Jim if both play a role in his conception and carriage? How would a red state's public policy regarding same-sex ART create a result different from that of a blue state?

From a different perspective, how does the fact that Brooke's mother settled an irrevocable trust affect the analysis? Does it matter that the trust was settled after Emily and Brooke had Jim? What if the trust had been revocable or had been written into a will such that it could be altered any time before Brooke's mother's death? Would that change in facts evidence the mother's acceptance of Jim as one of her "grandchildren" because she did not change the terms to specifically exclude Jim? Does it matter whether the mother subscribed to a more conservative or liberal point of view and how that viewpoint affected her understanding of the term "grandchildren"? Would a court even consider such outside evidence in determining the meaning of the trust's terms?

Or, what if instead of a trust for grandchildren, the hypothetical concerned Brooke's mother's will? Assume Brooke predeceases her mother; does Jim stand in place of Brooke to take her share of the mother's bequest to Brooke? If second-parent adoption is allowed and Brooke adopted Jim before dying, it seems like the answer is yes because

366. An argument could be made that a total gender-neutralized marital presumption statute would also remove the term "mother," thus reading the "spouse of the birth parent." Through this approach, perhaps a gay couple could take advantage of the marital presumption, assuming one of the men had used his own sperm to conceive the child. However, a problem arises in this approach. The marital presumption's initial policy was one of efficiency: It focused on paternity because maternity was easily established. In short, the traditional marital presumption allowed a potential legal fiction to apply to one parent (the father) in favor of familial harmony. With a gay couple, on the other hand, the legal fiction would have to apply to both parents because neither parent can point to birth as conclusive evidence of paternity. Some may argue—and some states may be inclined to accept such argument—that this would be an inappropriate extension of the marital presumption.

of the abandonment of the stranger-to-adoption doctrine.[367] However, what result if second-parent adoption is not allowed or Brooke did not otherwise adopt Jim? Would a court recognize different rules for taking by representation versus being in a class of beneficiaries?

CONCLUSION

As demonstrated by the Court's holding in *Obergefell,* any attempt to answer a specific question in the context of ongoing social and legal evolution is destined to implicate further questions. Where red and blue states evolve in different directions—both socially and legally—questions that have already been asked, as well as those that remain as yet unarticulated, stand to be answered differently from state to state. Indeed, all the hypotheticals offered in this Article ask more questions than they answer. That result is unavoidable; after all, differences between red and blue states are the natural outcome of a federalist system of government.[368] Federalism's natural differences are not problematic, however. Rather, as this Article illustrates, *Obergefell*'s effect on the future of American succession law can be well-predicted with a proper understanding of will construction, the different approaches to applying relevant rules and policies, and the influence of public opinion on judges.

Although a clear picture of future succession law is not yet possible—indeed, one cannot even tell what color the picture would be—will construction suggests that it is possible to sketch versions of the picture rather than simply wait for the actual picture to appear. In fact, the first step to understanding the future may be understanding different potential versions thereof, and the best way to begin that process may be by finding questions rather than answers. In the spirit of that solution, this Article concludes where it began: with more questions that have yet to be answered.

> 1. A trust provides that adopted children will not be recognized as descendants. Alice, a trust beneficiary, freezes her eggs prior to undergoing chemotherapy. She later uses those eggs to bear a child using a gestational carrier but must legally adopt the child since she is not the "birth mother." Will the child be treated as a descendant under the trust since child is genetically related but had to be adopted by genetic parent?
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> 2. A trust is held for the benefit of "descendants." Henry, a trust beneficiary, has his sperm preserved prior to undergoing chemotherapy. He dies as a result of his cancer,

367. For a discussion of the development and eventual abandonment of the stranger-to-the-adoption rule, see Tritt, *supra* note 186, at 383–90.

368. *See* Danforth v. Minnesota, 552 U.S. 264, 290 (2008) ("[N]onuniformity is a necessary consequence of a federalist system of government.").

but eighteen months after his death, his wife gives birth to a child conceived with the wife's egg and Henry's sperm. Will the resulting child be recognized as a "descendant"?