

# Wyoming Law Review

---

Volume 23  
Number 2 *Transboundary Waters: The Río Silala  
& the International Court of Justice*

---

Article 22

8-1-2023

## Surrogacy in the Equality State: Lessons from the Code of the West

James Bell  
*University of Wyoming College of Law*

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Bell, James (2023) "Surrogacy in the Equality State: Lessons from the Code of the West," *Wyoming Law Review*. Vol. 23: No. 2, Article 22.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol23/iss2/22>

This Comment is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

---

# WYOMING LAW REVIEW

VOLUME 23

2023

NUMBER 2

---

## SURROGACY IN THE EQUALITY STATE: LESSONS FROM THE CODE OF THE WEST

*James Bell\**

I. INTRODUCTION .....	218
II. THE CODE OF THE WEST APPLIED TO § 35-1-410 .....	222
A. <i>Take pride in your work: § 35-1-410 fails to conform with substantive         due process.</i> .....	223
1. <i>The U.S. Constitution guarantees rights concerning marriage and            parentage to same-sex couples.</i> .....	224
2. <i>Section 35-1-410 fails to provide the constitutional rights guaranteed            to same-sex couples.</i> .....	227
3. <i>Taking pride in your work requires conforming with            judicial precedent.</i> .....	232
B. <i>When you make a promise, keep it: § 35-1-410 causes expressive harm.</i> ...	233
1. <i>Promise-keeping under the equal protection clauses requires            minimizing expressive harm.</i> .....	234
2. <i>Expressive harm conforms with societal expectations of equality.</i> ..	235
3. <i>Section 35-1-410 causes expressive harm, breaking the promises            of equal protection.</i> .....	236
C. <i>Live each day with courage: § 35-1-410 causes economic harm.</i> .....	238
1. <i>Wyoming's partisan nature works against progressive change.</i> .....	238
2. <i>Promoting equality works to promote economic growth within the            State.</i> .....	240
III. GENDER-SILENT LEGISLATIVE DRAFTING.....	243
A. <i>This legislative solution creates expressive benefits.</i> .....	247
B. <i>This legislative solution forgoes the harms of the judicial process.</i> .....	248
C. <i>This legislative solution sets the stage for future equality.</i> .....	248
IV. CONCLUSION.....	249

---

\* J.D. Candidate, University of Wyoming College of Law, Class of 2024. As a Wyomingite, I love this State, and I hope discussions such as this will help the State grow and improve. I would like to thank Professor Melissa Alexander for her guidance through the early stages of this Comment and the legal nuance of the subject matter, the Editorial Board of the *Wyoming Law Review* for bringing this Comment to its true potential, and to my wife who helped me procrastinate when needed.

## ABSTRACT

The Wyoming legislature recently passed Wyoming Statute § 35-1-410 promoting gestational surrogacy agreements and allowing for the intended parents' names on their child's birth certificate. This filled a gap in Wyoming law where intended fathers were allowed onto the birth certificate, but intended mothers were left to adopt their children. However, § 35-1-410 excludes same-sex couples and many others in the LGBTQ+ community by claiming the intended parents will be the "mother and father" of the child. While Wyoming has a history of exclusion, the underlying philosophies of the State do not require such narrow and exclusive language. This Comment looks to ground Wyoming legislative practice in the official state code: the Code of the West. The Code of the West urges promise-keeping, courage, and taking pride in one's work. These tenets point to legislative inclusion through their inroads with substantive due process, equal protection, and economic analyses. The Code can be satisfied through gender-silent legislative drafting that promotes inclusion, equality, and economic growth.

## I. INTRODUCTION

Wyoming recently passed House Bill 73 legislating gestational agreements and allowing intended parents to be listed on the birth certificate of their child.<sup>1</sup> However, the passage of House Bill 73 continues a legacy of exclusivity targeting LGBTQ+<sup>2</sup> persons in the State.<sup>3</sup> Wyoming is one of only two states in the United States without a state hate crimes law,<sup>4</sup> despite that a hate crime in Wyoming incited the federal government to pass hate crimes legislation: the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>5</sup> Matthew Shepard was a student at the

---

<sup>1</sup> Birth Certificates-Gestational Agreements, ch. 87, § 2(a), 2021 Wyo. Sess. Laws 321, 322 (codified as amended at WYO. STAT. ANN. §§ 35-1-401, 410 (2023)).

<sup>2</sup> Throughout this Comment the term LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) is used to refer to persons who identify with any of these identities. The "+" in "LGBTQ+" signifies that the discussion pertains to many people who do not fall under the umbrella term "LGBTQ" but still exist in our society as sexual minorities. This "+" works as a catch-all, but is not meant to ignore the experiences of persons who fall outside of the explicit letters. Additionally, throughout this Comment the term "same-sex couples" is used to describe persons most affected by the language of Wyoming Statute § 35-1-410; however, the exclusive language of § 35-1-410 also works to ignore the existence of non-binary parents who would identify as neither a mother nor a father.

<sup>3</sup> Compare Ellen Trachman, *Wyoming Has its First Surrogacy Law, for Better and for Worse*, ABOVE THE L. (Aug. 25, 2021, 5:17 PM), <https://abovethelaw.com/2021/08/wyoming-has-its-first-surrogacy-law-for-better-and-for-worse/> [<https://perma.cc/H5CA-4GXX>].

<sup>4</sup> *Hate Crimes: Laws and Policies*, U.S. DEP'T JUST. (Jan. 27, 2023), <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/9BJA-XGFN>] (the other state is South Carolina).

<sup>5</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009) (codified as amended at 18 U.S.C. § 249); see *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. DEP'T JUST. (Oct. 18, 2018), <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> [<https://perma.cc/5NBA-4WMJ>].

University of Wyoming and a gay man.<sup>6</sup> Aaron McKinney and Russell Henderson kidnapped Shepard, drove him out of town, assaulted him, and left him tied to a fence outside of Laramie, Wyoming.<sup>7</sup> He died five days later.<sup>8</sup> A couple months after Shepard died, the Wyoming legislature considered three bills looking to create a sentencing enhancement for “bias crimes.”<sup>9</sup> Another bill sought to form a “human diversity task force” that would analyze “bias crime” within the state.<sup>10</sup> Each of these bills died in the legislature, and Wyoming has yet to pass any law defining or specially penalizing hate crimes.<sup>11</sup> Not only has Wyoming refused to pass hate crime legislation, but the State has yet to enact any law protecting LGBTQ+ persons from discrimination.<sup>12</sup> Since 2011, legislators introduced five bills looking to protect against sexual orientation and gender discrimination, but none of the bills passed.<sup>13</sup>

Hate crimes and discrimination in Wyoming did not stop with Matthew Shepard.<sup>14</sup> In 2001, a queer couple was chased down a street in Rock Springs by four trucks.<sup>15</sup> The couple found a group of teenage partiers to help them, and the situation escalated into a “full-blown brawl.”<sup>16</sup> In 2015, five men in Gillette attacked Trevor O’Brien for being gay.<sup>17</sup> Trevor killed himself three months later.<sup>18</sup> In 2021, a Cheyenne bar sold t-shirts reading, “In Wyoming we have a cure for AIDS, we shoot f\*ck’n f\*ggots,” before public outcry caused them to pull the shirt.<sup>19</sup> Wyoming also exports hate to the surrounding states: in 2016, Eric Johnson and Chad Doak of Wyoming attacked a gay couple in Salt Lake City.<sup>20</sup> Wyoming’s

---

<sup>6</sup> *Our Mission*, MATTHEW SHEPARD FOUND., <https://www.matthewshepard.org/about-us/our-story/> [<https://perma.cc/2SFE-HW68>] (last visited Apr. 20, 2023).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> H.B. 0117, 55th Leg., Gen. Sess. (Wyo. 1999); H.B. 0132, 55th Leg., Gen. Sess. (Wyo. 1999); H.B. 0206, 55th Leg., Gen. Sess. (Wyo. 1999).

<sup>10</sup> H.B. 0193, 55th Leg., Gen. Sess. (Wyo. 1999).

<sup>11</sup> See *Hate Crimes: Laws and Policies*, *supra* note 4.

<sup>12</sup> See *Wyoming’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/WY](https://www.lgbtmap.org/equality_maps/profile_state/WY) [<https://perma.cc/L9JC-2NLL>] (last visited Apr. 20, 2023).

<sup>13</sup> H.B. 0142, 61st Leg., Gen. Sess. (Wyo. 2011); S. File 0131, 62nd Leg., Gen. Sess. (Wyo. 2013); S. File 0115, 63rd Leg., Gen. Sess. (Wyo. 2015); S. File 0153, 64th Leg., Gen. Sess. (Wyo. 2017); H.B. 0183, 66th Leg., Gen. Sess. (Wyo. 2021).

<sup>14</sup> See Nathan C. Martin, *It’s Still Dangerous to be Gay in Wyoming*, HIGH CNTY. NEWS (May 14, 2016), <https://www.hcn.org/issues/48.9/its-still-dangerous-to-be-gay-in-wyoming> [<https://perma.cc/V653-QSWT>].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Brody Levesque, *Wyoming Bar Sold “We Shoot Fuck’n Faggots” T-Shirts*, L.A. BLADE (July 13, 2021), <https://www.losangelesblade.com/2021/07/13/wyoming-bar-sold-we-shoot-fuckn-faggots-t-shirts/> [<https://perma.cc/BJ7R-2SMM>].

<sup>20</sup> Jennifer Dobner, *Wyoming Men Charged in Gay Utah Men’s Beatings—But Not with Hate Crime*, SALT LAKE TRIB. (July 20, 2016, 10:53 PM), <https://archive.slttrib.com/article.php?id=4139842&itype=CMSID> [<https://perma.cc/A7RW-U6AA>].

legacy of violence and hate against LGBTQ+ persons extends through its entire history and up to the present.<sup>21</sup>

This legacy extends to Wyoming's law on gestational surrogacy.<sup>22</sup> The story begins with Janell Donley and her husband, who entered into a gestational surrogacy agreement with Donley's sister-in-law.<sup>23</sup> A gestational agreement is a contract in which a woman agrees to carry a pregnancy for the intended parent or parents.<sup>24</sup> This often works through in-vitro fertilization and may involve the gametes of the intended parents, one intended parent, or third-party donations.<sup>25</sup> Many states have statutory schemes limiting gestational agreements;<sup>26</sup> one state even explicitly disallows such agreements.<sup>27</sup> Before House Bill 73, Wyoming law specified, "For purposes of birth registration, unless a court of competent jurisdiction orders otherwise at any time, *the woman who gives birth* to the child shall be deemed the mother."<sup>28</sup> Through gestational surrogacy, Donley was the genetic and intended mother of the child, but she had not given birth.<sup>29</sup> State paternity rules allowed Donley's husband's name to be listed on their child's birth certificate through a simple affidavit of paternity or a determination by a court.<sup>30</sup> Donley, however, had to adopt the child in order to be the legal mother and entered on the birth certificate.<sup>31</sup> Upon this realization, Donley contacted her state representative Mike Greear, and he began working on a bill to solve the gender discrepancy for couples like the Donleys.<sup>32</sup> In the spring of 2021, Greear introduced House Bill 73: "AN ACT relating to vital records; specifying how parents are listed on a birth certificate upon delivery by a surrogate; providing definitions; making conforming amendments; specifying applicability; and providing for an effective date."<sup>33</sup>

House Bill 73 defined gestational surrogacy agreements and provided that the intended parents under these agreements would be the legal parents and included on the birth certificates.<sup>34</sup> However, the bill included the following language: "Upon the birth of a child under a gestational agreement, the intended parents of the child born under the gestational agreement shall be deemed to be the *mother and father* of

<sup>21</sup> See *supra* notes 14–20 and accompanying text.

<sup>22</sup> See Birth Certificates-Gestational Agreements, ch. 87, 2021 Wyo. Sess. Laws 321, 321–323 (codified as amended at WYO. STAT. ANN. §§ 35-1-401, 410 (2023)).

<sup>23</sup> Trachman, *supra* note 3.

<sup>24</sup> See WYO. STAT. ANN. § 35-1-401(a)(xiv) (2023).

<sup>25</sup> Amanda M. Herman, *The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts*, 18 CHAP. L. REV. 553, 556 (2015).

<sup>26</sup> Ashley W. Pittman, *Navigating the Diverse and Evolving Law of Gestational Surrogacy*, 81 MISS L.J. SUPRA 1, 4–5 (2011).

<sup>27</sup> MICH. COMP. LAWS § 722.855 (2023).

<sup>28</sup> WYO. STAT. ANN. § 35-1-410(d) (2003) (amended 2021) (emphasis added).

<sup>29</sup> Trachman, *supra* note 3.

<sup>30</sup> See *id.*; WYO. STAT. ANN. § 35-1-411 (2023).

<sup>31</sup> Trachman, *supra* note 3.

<sup>32</sup> *Id.*

<sup>33</sup> Birth Certificates-Gestational Agreements, ch. 87, 2021 Wyo. Sess. Laws 321, 321–323 (codified as amended at WYO. STAT. ANN. §§ 35-1-401, 410 (2023)).

<sup>34</sup> *Id.*

the child, including for purposes of birth registration and the birth certificate . . . .”<sup>35</sup> While this language provides protection for opposite-sex couples like Janell Donley and her husband, it denies same-sex couples the same protection.<sup>36</sup> During the third reading of the bill, Senator Case offered, in part, that the italicized language above be altered to “parents.”<sup>37</sup> This would allow same-sex couples to benefit from the legislation.<sup>38</sup> But this amendment was rejected by the legislature.<sup>39</sup> House Bill 73 successfully passed the Wyoming State Legislature and is codified in the Wyoming Statutes as § 35-1-401 and § 35-1-410.<sup>40</sup>

Section two of House Bill 73 included a clarification that the bill would not alter the rights of any person not specifically addressed within the bill.<sup>41</sup> This clarification of legislative intent has been considered a saving grace as the bill did not remove rights from same-sex couples.<sup>42</sup> However, this elucidation does not provide for a gender-neutral reading of the resultant statutes, and it does not provide same-sex couples the benefits afford to opposite-sex couples.<sup>43</sup> Section two ensured that the legal rights of LGBTQ+ persons did not decrease, but the Section does not provide LGBTQ+ persons the legal process granted to opposite-sex couples under § 35-1-410.<sup>44</sup>

This Comment seeks to provide a Wyoming-based ethical grounding for gender-silent legislative drafting within the State through a critique of Wyoming’s current laws surrounding gestational surrogacy and, more specifically, the exclusion of same-sex couples from these laws. The ethical lens of this Comment is the Code of the West as detailed by James Owen in his *Cowboy Ethics*<sup>45</sup> and adopted by Wyoming as the official state code in 2010.<sup>46</sup> Part II discusses three tenets of the Code of the West: “Take pride in your work”; “When you make a promise, keep it”; and “Live each day with courage.” These tenets are then applied directly to the

---

<sup>35</sup> *Id.* at 322 (emphasis added).

<sup>36</sup> Trachman, *supra* note 3; *see In re Gestational Agreement*, 2019 UT 40, ¶ 36, 449 P.3d 69, 80.

<sup>37</sup> H.B. 0073S3001, 66th Leg., Gen. Sess. (Wyo. 2021).

<sup>38</sup> *See generally In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69 (showing that gendered language creates disparate impacts for couples on the ground).

<sup>39</sup> H.B. 0073S3001, 66th Leg., Gen. Sess. (Wyo. 2021).

<sup>40</sup> Section 35-1-401 details definitions and the legal requirements for a gestational surrogacy agreement, and § 35-1-410 details how birth certificates are handled under gestational surrogacy agreements. Though §§ 35-1-401 and 35-1-410 are intrinsically linked, the specific language that causes the problems discussed in this Comment is present exclusively in § 35-1-410. Therefore, this Comment will discuss § 35-1-410 alone while § 35-1-401 remains merely a background consideration. Birth Certificates-Gestational Agreements, ch. 87, 2021 Wyo. Sess. Laws 321, 321–23 (codified as amended at WYO. STAT. ANN. §§ 35-1-401, 410 (2023)).

<sup>41</sup> H.B. 0073, 66th Leg., Gen. Sess. (Wyo. 2021).

<sup>42</sup> Trachman, *supra* note 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> JAMES P. OWEN, *COWBOY ETHICS: WHAT WALL STREET CAN LEARN FROM THE CODE OF THE WEST* 24 (Carrie Lightner ed., 2004).

<sup>46</sup> Act of Mar. 3, 2010, ch. 4, 2010 Wyo. Sess. Laws 5 (codified as amended at WYO. STAT. ANN. § 8-3-123 (2023)).

provisions of § 35-1-410, seeking to promote equality for same-sex couples within the State. Part III offers a solution through gender-silent legislative drafting and details why the problems discussed throughout this Comment require a legislative solution as opposed to a judicial remedy.

## II. THE CODE OF THE WEST APPLIED TO § 35-1-410

In 2010, Wyoming passed the Code of the West from James Owen's *Cowboy Ethics* as the official code of the State.<sup>47</sup> This code includes the following tenets:

- (i) Live each day with courage;
- (ii) Take pride in your work;
- (iii) Always finish what you start;
- (iv) Do what has to be done;
- (v) Be tough, but fair;
- (vi) When you make a promise, keep it;
- (vii) Ride for the brand;
- (viii) Talk less, say more;
- (ix) Remember that some things are not for sale;
- (x) Know where to draw the line.<sup>48</sup>

Owen wrote *Cowboy Ethics* as a response to a wave of ethical violations on that exposed a “dark side” of Wall street.<sup>49</sup> Owen looked to the idea of the “real-life working cowboy” and sought to expand this idea to ethical practice in the investment management industry.<sup>50</sup> The Code of the West was an attempt by Owen to find a way to instill ethics in a profession that had lost all public trust.<sup>51</sup> Surely, in the current political climate, legislators and politicians are in desperate need of public trust, and perhaps the rough-and-tumble mentality of the West still has a place in promoting equality.<sup>52</sup>

This Comment focuses on three of the ten tenets in the Code of the West: take pride in your work; when you make a promise, keep it; and live each day with courage. These specific tenets intersect with the legal principles of substantive due process and equal protection, as well as economic concerns. These intersections ground the argument in law and tangible concerns for the State—not simply opinion. Section A discusses the intersection between taking pride in legislation and the U.S. Constitution through a substantive due process analysis. Section B discusses the intersection between keeping promises and the equal protection guarantees in

---

<sup>47</sup> *Id.*

<sup>48</sup> WYO. STAT. ANN. § 8-3-123 (2023).

<sup>49</sup> OWEN, *supra* note 45, at i.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See Public Trust in Government 1958-2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [https://perma.cc/KQ6K-BC2P] (showing a steady decline in public trust of the federal government since the early 2000s to the current rate of 20%).



both the U.S. Constitution and the Wyoming Constitution. Section C discusses the tangible concerns of politics and economics and pushes for legislative courage.

*A. Take pride in your work: § 35-1-410 fails to conform with substantive due process.*

The Code of the West requires taking pride in one's work.<sup>53</sup> This means the cowboy would need to build fences sturdy, straight, and to stand the test of time.<sup>54</sup> Standing the test of time requires understanding the natural elements and the inherent threats to the fence.<sup>55</sup> This exemplifies the maxim: "Anything worth doing is worth doing well."<sup>56</sup> Taking pride in one's work applies just as readily to legislation as it applies to fence-building. In this extended analogy, the fence is legislation and the cowboy is a legislator.<sup>57</sup> If legislation is worth putting the pen to paper, the legislature is required to make sure the law will stand the test of time and judicial scrutiny.<sup>58</sup> This section will analyze how § 35-1-410 stands up to judicial scrutiny and whether this metaphorical fence was built sturdily and with pride.<sup>59</sup>

The Fourteenth Amendment of the U.S. Constitution declares: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."<sup>60</sup> The U.S. Supreme Court interpreted this clause to grant two distinct rights: the right to procedural due process and the right to substantive due process.<sup>61</sup> Procedural due process guarantees notice or an opportunity to contest government action when it would deprive an individual of some liberty or property interest—procedural due process is not the focus of this Comment.<sup>62</sup> Substantive due process is the right through which the Court guarantees citizens the right to marry,<sup>63</sup> parental rights,<sup>64</sup> and the right to use contraceptives.<sup>65</sup> The substantive rights for same-sex couples and gay persons have been largely conceived of under both substantive due process and equal protection.<sup>66</sup> Notably, *Obergefell v. Hodges*, the landmark

<sup>53</sup> OWEN, *supra* note 45, at 30; WYO. STAT. ANN. § 8-3-123 (a)(ii) (2023).

<sup>54</sup> OWEN, *supra* note 45, at 31 (describing a poem by Red Steagall: "The fence that me and Shorty built").

<sup>55</sup> *See id.* at 31.

<sup>56</sup> *Id.* at 33.

<sup>57</sup> This complements Owen's extended analogy of showing the similarities between the ideals of the west and the solution on Wall Street. *See id.* at i.

<sup>58</sup> *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (creating the doctrine of judicial review).

<sup>59</sup> *See infra* notes 60–183 and accompanying text.

<sup>60</sup> U.S. CONST. amend. XIV, § 1.

<sup>61</sup> 16C C.J.S. *Constitutional Law* § 1884 (2023).

<sup>62</sup> *Karem v. Trump*, 404 F. Supp. 3d 203, 209 (D.D.C. Cir. 2019), *aff'd as modified*, 960 F.3d 656 (D.C. Cir. 2020).

<sup>63</sup> *See Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>64</sup> *See Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>65</sup> *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>66</sup> Kenji Yoshino, *A Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 152–54 (2015); *see e.g.*, *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (striking down an amendment to the Colorado State Constitution that would forbid protections for people based on their sexual



precedent for LGBTQ+ couples' substantive rights, is regarded as a substantive due process case "infected with equal protection concerns."<sup>67</sup> There are two methods of interpretation surrounding substantive due process at the Supreme Court level: a narrow approach and a broad approach.<sup>68</sup> The narrow approach focuses on history and tradition of a due process right,<sup>69</sup> while the broad approach focuses on two protected interests: (1) the interest in making important personal decisions, and (2) the interest in intimate associations.<sup>70</sup> The Supreme Court has recently favored the broad approach in cases such as *Obergefell* when analyzing the substantive due process rights of same-sex couples.<sup>71</sup> However, the Supreme Court has favored the narrow approach in analyzing other substantive due process rights, as shown by the Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*.<sup>72</sup> Despite the holding in *Dobbs*, the majority maintained that the substantive due process rights found for same-sex couples in *Obergefell v. Hodges* are still protected.<sup>73</sup>

1. *The U.S. Constitution guarantees rights concerning marriage and parentage to same-sex couples.*

Historically, same-sex couples were prosecuted for having sex,<sup>74</sup> denied access to marriage under state laws,<sup>75</sup> and denied federal marriage benefits even if their state laws allowed same-sex marriage.<sup>76</sup> This line of discrimination began to crumble in 2003 with the U.S. Supreme Court's decision in *Lawrence v. Texas*.<sup>77</sup> *Lawrence* made it unconstitutional for states to criminally penalize same-sex intercourse, overruling the previous decision of *Bowers v. Hardwick*.<sup>78</sup> *Lawrence* got the proverbial ball rolling for due process rights for same-sex couples in the United States,<sup>79</sup> but the keystone case for same-sex rights was decided 12 years later in *Obergefell v. Hodges*.<sup>80</sup> *Obergefell* held that same-sex couples have the constitutional right to marry and to

---

orientation under the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2013) (holding that the Due Process Clause gives the full right to engage in "sexual practices common to a homosexual lifestyle").

<sup>67</sup> Yoshino, *supra* note 66, at 173.

<sup>68</sup> Compare *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (majority opinion) (rejecting the right to abortion under the narrow approach to substantive due process), with *id.* (Kagan, J., dissenting) (upholding a woman's right to choose under the broad approach to substantive due process).

<sup>69</sup> See *id.* at 2244 (majority opinion).

<sup>70</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

<sup>71</sup> See, e.g., *id.*; *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>72</sup> See, e.g., *Dobbs*, 142 S. Ct. at 2242.

<sup>73</sup> *Id.* at 2261; but see *id.* at 2319 (Kagan J., dissenting); *id.* at 2301 (Thomas J., concurring).

<sup>74</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>75</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015).

<sup>76</sup> See *United States v. Windsor*, 570 U.S. 744, 744 (2013).

<sup>77</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>78</sup> *Id.*

<sup>79</sup> Yoshino, *supra* note 66, at 153.

<sup>80</sup> *Id.* at 147–48.

the benefits attached to marriage.<sup>81</sup> Gay rights have been incrementally expanded since *Obergefell* through decisions such as *Pavan v. Smith* and *In re Gestational Agreement*—to be discussed below.<sup>82</sup> This section summarizes the holdings of these landmark cases, and argues that these precedents would apply to § 35-1-410 and, consequently, a court may strike its language down as unconstitutional.<sup>83</sup>

*Obergefell* began when same-sex couples across the United States sued in their respective states to expand the definition of marriage.<sup>84</sup> Fourteen same-sex couples filed suits in Kentucky, Michigan, Ohio, and Tennessee over the States' definitions of marriage as a union between a man and a woman.<sup>85</sup> The couples claimed these laws violated the protections under the Fourteenth Amendment of the U.S. Constitution.<sup>86</sup> The state courts held in favor of the couples, but the Sixth Circuit brought the cases together and reversed in favor of the state laws.<sup>87</sup> The same-sex couples appealed the reversal to the U.S. Supreme Court, where Justice Kennedy wrote the majority opinion, ruling in favor of the couples.<sup>88</sup> Justice Kennedy's analysis of substantive due process rested largely on four factors: (1) personal autonomy; (2) marriage as a fundamental union between two people; (3) marriage as a safeguard for children and families; and (4) marriage as a keystone for social order.<sup>89</sup> Kennedy connected these factors to the right to same-sex marriage through there being "no difference between same- and opposite-sex couples with respect to [these] principle[s]."<sup>90</sup> Kennedy combined this understanding of equality with the comprehensive right to marry to find a fundamental right for same-sex couples to marry.<sup>91</sup> Therefore, same-sex couples are guaranteed the right to marry under the Constitution, and same-sex married couples are guaranteed the "constellation of benefits" states have linked to marriage.<sup>92</sup>

The rule in *Obergefell* has been extended to protect same-sex married couples from discrimination related to parentage.<sup>93</sup> The U.S. Supreme Court in *Pavan v. Smith* held unconstitutional an Arkansas law requiring a mother's *male* spouse to appear on the child's birth certificate, despite the law allowing for the omission of a mother's *female* spouse.<sup>94</sup> The analysis fell under *Obergefell*'s requirement to provide

---

<sup>81</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

<sup>82</sup> See *infra* notes 93–112 and accompanying text; *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017); *In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69.

<sup>83</sup> See *infra* notes 84–184 and accompanying text.

<sup>84</sup> *Obergefell*, 576 U.S. at 653–56.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 656.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 656, 681.

<sup>89</sup> *Id.* at 665–67, 669.

<sup>90</sup> *Id.* at 670.

<sup>91</sup> *Id.* at 671 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>92</sup> *Id.* at 670.

<sup>93</sup> See generally *Pavan v. Smith*, 137 S. Ct. 2075 (2017). See *infra* notes 94–98 and accompanying text.

<sup>94</sup> *Pavan*, 137 S. Ct. at 2077.

same-sex couples those benefits that states have linked to marriage.<sup>95</sup> The Court in *Pavan* found that *Obergefell* explicitly listed the right to be identified on birth certificates as part of the constellation of rights attached to marriage.<sup>96</sup> Therefore, same-sex married couples are entitled to the same rights to be included on birth certificates as opposite-sex married couples.<sup>97</sup> This holding secured the right of married same-sex couples to have the same rights and responsibilities as married opposite-sex couples in regard to parentage on birth certificates.<sup>98</sup>

In *In re Gestational agreement*, Utah applied *Obergefell* and *Pavan* to a statute similar to Wyoming Statute § 35-1-410, concerning restrictions on who can enter into gestational agreements.<sup>99</sup> A male same-sex couple had entered into a gestational agreement with a surrogate, but Utah law required court approval for the gestational agreement to be enforceable.<sup>100</sup> The district court denied approval for this agreement because the Utah statute at issue required “medical evidence show[ing] that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child.”<sup>101</sup> According to the district court, this gendered language made the law inapplicable to same-sex male couples.<sup>102</sup> On appeal, the Utah Supreme Court analyzed two issues: (1) whether the statute can be read in a gender-neutral fashion; and (2) whether the law is unconstitutional if the statute cannot be read in a gender-neutral fashion because *Obergefell* entitles same-sex married couples to the same protections as opposite sex married couples.<sup>103</sup>

On appeal, both the same-sex couple and the State of Utah petitioned the Utah Supreme Court to find that the statute can be read in a gender-neutral way.<sup>104</sup> A gender-neutral reading of the statute would exclude the requirement of an “intended mother” who cannot bear a child, allowing the statute to apply equally to the male couple and ensuring Utah’s statute does not violate the Constitution.<sup>105</sup> However, the court rejected this interpretation, as there was no evidence that the Utah legislature intended the statute to be gender-neutral.<sup>106</sup> Additionally, this gender-neutral reading was inconsistent with the intent of the legislature in creating

---

<sup>95</sup> *Obergefell*, 576 U.S. at 670.

<sup>96</sup> *Pavan*, 137 S. Ct. at 2078.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 2078–79.

<sup>99</sup> *See generally In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69.

<sup>100</sup> *Id.* ¶ 1–2, 449 P.3d at 71–72 (citing UTAH CODE ANN. § 78B-15-809(1)(2019)).

<sup>101</sup> *Id.*; UTAH CODE ANN. § 78B-15-803(2)(b) (2019) (amended 2020).

<sup>102</sup> The law was inapplicable specifically to male couples because they could not make a showing of the “intended mother.” *See In re Gestational Agreement*, 2019 UT 40, ¶¶ 1–2, 449 P.3d at 71–72.

<sup>103</sup> *Id.* ¶ 19, 35, 449 P.3d at 77, 80.

<sup>104</sup> *Id.* ¶ 3, 449 P.3d at 72.

<sup>105</sup> *Id.* ¶ 3–5, 449 P.3d at 72–73.

<sup>106</sup> *Id.* ¶ 19–28, 449 P.3d at 77–79.

the statute.<sup>107</sup> The court held that the inclusion of the specific term “mother” was intentional and indicated an intent to exclude other terms such as “parent.”<sup>108</sup>

The court then applied the constitutional guarantees under *Obergefell* and *Pavan* to Utah’s statute.<sup>109</sup> The court found gestational agreements to be benefits of marriage, holding that “[a] valid gestational agreement is undoubtedly a benefit linked to marriage,” as a gestational agreement is “one of the most important benefits afforded to couples who may not be medically capable of having a biological child.”<sup>110</sup> Because “married same-sex male couples are treated differently than married opposite-sex couples” under the statute, the court found the statute unconstitutional.<sup>111</sup> In response, Utah passed an updated version of the law in 2020, removing the portion requiring an “intended mother” and allowing same-sex couples to enter into gestational surrogacy agreements.<sup>112</sup>

2. *Section 35-1-410 fails to provide the constitutional rights guaranteed to same-sex couples.*

*Obergefell*, *Pavan*, and *In re Gestational Agreement* require only that the rights of same-sex married couples be equal to those of opposite-sex married couples.<sup>113</sup> These rights are entrenched within the “benefits that the States have linked to marriage.”<sup>114</sup> In considering Wyoming’s law on surrogacy, there is no language expressly stating that the intended parents need to be married.<sup>115</sup> The law on its face allows a man and a woman who are not in a relationship (let alone married) better access to being parents under a gestational surrogacy agreement than a married same-sex couple.<sup>116</sup> This lack of connection to marriage seems to disconnect § 35-1-410 from the *Obergefell* line of cases;<sup>117</sup> however, the rationales within *Obergefell* showing marriage to be a fundamental right apply similarly to parentage rights and, by extension, the right to enter into a gestational agreement.<sup>118</sup>

Justice Kennedy championed four rationales for extending due process rights to same-sex marriage: (1) personal choice in marriage is inherent to the concept of

---

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 23–28, 449 P.3d at 78–79.

<sup>109</sup> *Id.* ¶ 35–45, 449 P.3d at 80–82 (citing *Obergefell v. Hodges*, 576 U.S. 644 (2015); and then citing *Pavan v. Smith*, 137 S. Ct. 2075 (2017)).

<sup>110</sup> *Id.* ¶ 43, 449 P.3d at 82.

<sup>111</sup> *Id.* ¶ 45, 449 P.3d at 82.

<sup>112</sup> Compare UTAH CODE ANN. § 78B-15-803 (2023), with § 78B-15-803 (2019).

<sup>113</sup> See generally *Obergefell*, 576 U.S. 644; *Pavan*, 137 S. Ct. 2075; *In re Gestational Agreement*, 449 P.3d 69.

<sup>114</sup> *Obergefell*, 576 U.S. at 670.

<sup>115</sup> WYO. STAT. ANN. § 35-1-401 (2023); § 35-1-410.

<sup>116</sup> See § 35-1-410; Trachman, *supra* note 3.

<sup>117</sup> See *Obergefell*, 576 U.S. at 670.

<sup>118</sup> While this Comment does not argue that entering into a gestational agreement is a fundamental right, the rationales promoting the fundamental right of marriage bolster the importance of parentage and highlight the importance of equality within laws that pertain to parentage. See *infra* notes 121–84 and accompanying text.

individual autonomy; (2) marriage supports a union unlike any other; (3) marriage safeguards children and families; and (4) marriage is a keystone of our social order.<sup>119</sup> Although these rationales are rooted in marriage, marriage and parentage run parallel in respect to these aspects.<sup>120</sup> Therefore, the judicial precedent set by the *Obergefell* line of cases extends to § 35-1-410 and the legality of the statute should be analyzed through that lens.<sup>121</sup> Consistent with *Obergefell* and *Pavan*, same-sex couples should be afforded equal protection under the law in entering a gestational agreement.<sup>122</sup> And consistent with *In re Gestational Agreement*, if the language cannot be read in a way to afford such protections—i.e., as gender-neutral—the statute would be struck down as unconstitutional.<sup>123</sup>

First, gestational surrogacy as a path to parentage inherently bolsters individual autonomy regarding family planning.<sup>124</sup> As individual autonomy bolstered the argument for same-sex marriage being a fundamental right, individual autonomy also bolsters the argument for inclusivity in § 35-1-410.<sup>125</sup> For § 35-1-410, the inciting incident was the unfairness in the State of Wyoming allowing Donley's husband on the birth certificate, but requiring Donley to adopt her own child.<sup>126</sup> Donley and her husband, in their capacity as autonomous beings, sought to become parents in the way best suited to them, and in the end it was the law standing in the way of their decision.<sup>127</sup> In much the same way, same-sex couples in Wyoming are still required to either rely on adoption or enter into a gestational agreement and rely on the courts of the State to adjudicate the agreement and birth certificates.<sup>128</sup> While opposite-sex couples are allowed to exercise their autonomy to have a child through gestational surrogacy and have both intended parents legally recognized,<sup>129</sup> this law does not extend the same autonomy to LGBTQ+ couples.<sup>130</sup> Justice Kennedy even explicitly describes the choices surrounding procreation and childrearing alongside marriage as “among the most intimate that an individual can make.”<sup>131</sup> The autonomy interests present in marriage are parallel to those in parentage and procreation.<sup>132</sup>

---

<sup>119</sup> *Obergefell*, 576 U.S. at 665–67, 669.

<sup>120</sup> See *infra* notes 124–58 and accompanying text.

<sup>121</sup> See *infra* notes 124–58 and accompanying text.

<sup>122</sup> See *infra* notes 124–76 and accompanying text.

<sup>123</sup> See *infra* notes 124–58 and accompanying text.

<sup>124</sup> See *infra* notes 125–32 and accompanying text.

<sup>125</sup> See *infra* notes 126–32 and accompanying text.

<sup>126</sup> Trachman, *supra* note 3.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> WYO. STAT. ANN. § 35-1-410 (2023).

<sup>130</sup> See *id.*; *In re Gestational Agreement*, 2019 UT 40, ¶ 19–28, 449 P.3d 69, 77–79 (showing how a court will refuse to apply a statute to persons not explicitly enumerated within the statute).

<sup>131</sup> *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

<sup>132</sup> See *supra* notes 124–31 and accompanying text.

Second, just as marriage supports a union unlike any other, parentage creates a union of utmost importance for a couple and for the child.<sup>133</sup> Justice Kennedy describes: “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”<sup>134</sup> Section 35-1-410 places unnecessary restrictions on a child’s union with the child’s intended parents, while it strengthens this union for children of opposite-sex couples, leaving children of same-sex couples with less security.<sup>135</sup> Children look to their parents for companionship, understanding, and assurance.<sup>136</sup> Parents also have legal responsibilities for the protection and security of their children.<sup>137</sup> This bond between parent and child is described in *Obergefell* as second only to marriage.<sup>138</sup> Just as marriage creates a bond unlike any other, parentage creates similarly strong bonds between parents and their children.<sup>139</sup> Section 35-1-410 weakens the parent-child relationship for same-sex couples, and thereby denigrates this fundamental union between parent and child.<sup>140</sup>

Third, while marriage safeguards children and families, this safeguarding would not be possible without the intrinsic importance of parentage.<sup>141</sup> Justice Kennedy uses the importance of parentage to elevate marriage,<sup>142</sup> just as this Comment uses the right of marriage to elevate parentage. These two bonds of society are intrinsically linked, and when one of these bonds is disallowed or denigrated by society, those most vulnerable lose safety and security.<sup>143</sup> Marriage creates “permanency and stability,”<sup>144</sup> but parentage attaches to this a legal duty of protection.<sup>145</sup> The right to marry and the right to “establish a home and bring up children” have been connected from the earliest analyses of substantive due process.<sup>146</sup> And while marriage is no less meaningful without children,<sup>147</sup> the interest of safeguarding children is more pronounced through the right to parentage.<sup>148</sup>

---

<sup>133</sup> See *infra* notes 134–40 and accompanying text.

<sup>134</sup> *Obergefell*, 576 U.S. at 667.

<sup>135</sup> See Trachman, *supra* note 3.

<sup>136</sup> Children possess rights to care and support from their parents. This includes rights of supervision and it follows that children look to their parents to secure the children’s right to support. James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CALIF. L. REV. 1371, 1422–23 (1994).

<sup>137</sup> See WYO. STAT. ANN. § 6-4-403 (2023).

<sup>138</sup> *Obergefell*, 576 U.S. at 657.

<sup>139</sup> See *supra* notes 136–37 and accompanying text.

<sup>140</sup> See *supra* notes 133–39 and accompanying text.

<sup>141</sup> See *infra* notes 142–52 and accompanying text.

<sup>142</sup> *Obergefell*, 576 U.S. at 667.

<sup>143</sup> See *id.* at 666.

<sup>144</sup> *Id.* at 668.

<sup>145</sup> WYO. STAT. ANN. § 6-4-403 (2023).

<sup>146</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>147</sup> *Obergefell*, 576 U.S. at 669.

<sup>148</sup> See *supra* notes 143–46 and accompanying text.

Section 35-1-410 restricts the ability for same-sex couples to establish parentage.<sup>149</sup> Opposite-sex couples and their families may enjoy the permanence and stability of parentage under § 35-1-410, but same-sex couples cannot safeguard their intended family in the same way.<sup>150</sup> The children born to same-sex couples under a gestational agreement are not immediately granted the status of family, a status which comes with security and safety, and attaches legal requirements to promote security and safety.<sup>151</sup> This distinction between same-sex and opposite-sex couples reduces the guarantees of safety for children of same-sex couples without a compelling distinction between the groups, and as shown in *Obergefell*, there are no grounds for this distinction when safeguarding families is concerned.<sup>152</sup>

Fourth, Justice Kennedy describes marriage as a keystone of our society to show how fundamental the right to marriage is; in comparison, parentage is another keystone of American society.<sup>153</sup> Kennedy's keystone analogy works to show how foundational marriage is to the legal structure of the nation: marriage is the basis for many government benefits, medical decision making authority, and many others.<sup>154</sup> Parentage implicates many of the same legal structures.<sup>155</sup> Kennedy also elevates marriage through its implication of the family: marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>156</sup> But parentage is another, albeit separate, foundation of the family, and therefore directly implicates the family similarly to marriage.<sup>157</sup> Parentage is a keystone of society much like marriage.<sup>158</sup>

Underlying Justice Kennedy's analysis is the inherent equality of homosexual persons with heterosexual persons.<sup>159</sup> Kennedy blends equal protection with substantive due process for his analysis in *Obergefell*.<sup>160</sup> Despite reaching the conclusion that marriage is a fundamental right under substantive due process,

<sup>149</sup> Trachman, *supra* note 3 (describing the double standard for same-sex couples versus opposite-sex couples in establishing parentage under a gestational surrogacy agreement).

<sup>150</sup> "Marriage also affords the permanency and stability important to children's best interests." *Obergefell*, 576 U.S. at 668.

<sup>151</sup> *See id.* at 658–59 (discussing how the DeBoer/Rowse family would suffer if either parent died while both parents were not legally recognized as parents).

<sup>152</sup> *Id.* at 670.

<sup>153</sup> *See id.* at 669.

<sup>154</sup> *Id.* at 670.

<sup>155</sup> Parentage implicates government benefits. *See e.g.*, 26 U.S.C. § 24 (describing tax credits for parents with children). Parentage implicates medical decision making. *See e.g.*, *In re Phillip B. v. Warren B.*, 156 Cal. Rptr. 48, 50–51 (Cal. Ct. App. 1979) (describing the constitutional right to parental autonomy in the medical context).

<sup>156</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

<sup>157</sup> Contemporary American families are becoming less connected to marriage. This includes children being raised by unmarried parents and single parents. A type of family is created upon marriage, but often it is child rearing which evokes the prototypical family. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 1–2 (5th ed. 2019).

<sup>158</sup> *See supra* notes 153–57 and accompanying text.

<sup>159</sup> *See Obergefell*, 576 U.S. 644.

<sup>160</sup> Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksberg*, 21 LEWIS & CLARK L. REV. 245, 253 (2017).



Kennedy still needed to assure a divided public that same-sex marriage was rooted in this right to marriage, not a “right to same-sex marriage.”<sup>161</sup> The crux of this connection was equal protection and that there is no “sufficient justification for excluding [same-sex couples] from the right [to marriage].”<sup>162</sup> Research collected by the American Psychological Association shows “sexual minority adults have not been found to substantially differ in their parenting approaches or efficacy in ways that negatively impact children.”<sup>163</sup> These children develop at least as well as children raised by opposite-sex parents.<sup>164</sup> Despite proponents of the “traditional family” having concerns about outcomes for children, there is consistent evidence to the contrary.<sup>165</sup> Therefore, there is no sufficient justification to exclude same-sex couples from the benefits of § 35-1-410 and these couples are owed equality based on Kennedy’s analysis in *Obergefell*.<sup>166</sup>

Justice Kennedy also argued that the liberty interests under due process extend more generally to “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>167</sup> In this sense, these liberties do not stop once the provision is no longer about marriage.<sup>168</sup> In *Obergefell*, the states had refused to grant the benefits associated with marriage to same-sex couples and this is precisely why the Court’s language reflects the “constellation of benefits” linked with marriage.<sup>169</sup> This language should be read as an expansion of rights for same-sex couples, not an effort to limit such rights to only those associated with marriage.<sup>170</sup> And just as *Obergefell* connects the right to marry to the inherent rights of same-sex couples,<sup>171</sup> the rights of parents to the custody of their own children is granted to same-sex couples through the same process.<sup>172</sup> Section 35-1-410 does not link gestational agreements to marriage (there is no mention of marriage within the statute); however, this should not remove

---

<sup>161</sup> *Obergefell*, 576 U.S. at 670–71.

<sup>162</sup> *Id.*

<sup>163</sup> AM. PSYCH. ASS’N, APA RESOLUTION ON SEXUAL ORIENTATION, GENDER IDENTITY (SOGI), PARENTS AND THEIR CHILDREN 1 (2020), <https://www.apa.org/about/policy/resolution-sexual-orientation-parents-children.pdf> [<https://perma.cc/Z4M6-JWCK>].

<sup>164</sup> *Id.* The domains explicitly detailed are: “academic achievement, peer relationships, behavioral adjustment, [and] emotional well-being.” *Id.*

<sup>165</sup> *Id.* at 2.

<sup>166</sup> Compare *supra* notes 159–65 and accompanying text, with *Obergefell*, 576 U.S. at 671.

<sup>167</sup> *Obergefell*, 576 U.S. at 663.

<sup>168</sup> *Id.* at 673–74 (speaking to the connection of liberty and equality outside the context of marriage).

<sup>169</sup> *Id.* at 657 (detailing the respondents’ arguments about the degradation of marriage).

<sup>170</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (showing the right to sexual relations for same-sex couples outside of marriage).

<sup>171</sup> *Obergefell*, 576 U.S. at 664.

<sup>172</sup> See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (detailing the right of an unmarried father to a fitness hearing for custody of his children); *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (detailing the rights of same-sex couples to the same birth certificate procedures as opposite sex couples).

§ 35-1-410 from scrutiny under the *Obergefell* line of cases, as *Obergefell* sought equality within marriage, not inequality without marriage.<sup>173</sup>

The rights of same-sex couples under *Obergefell* apply directly to § 35-1-410.<sup>174</sup> However, Wyoming's law on surrogacy creates an untenable and unconstitutional division between same-sex couples and the rest of the State.<sup>175</sup> Section 35-1-410 would be struck down if a court cannot read it in a gender-neutral way, just as Utah's gestational agreement statute in *In re Gestational Agreement*.<sup>176</sup>

### 3. *Taking pride in your work requires conforming with judicial precedent.*

The Code of the West requires taking pride in one's work.<sup>177</sup> Just as taking pride in building a fence results in the fence standing the test of time,<sup>178</sup> taking pride in legislating results in the law standing up to judicial scrutiny and complying with judicial precedent. If the law cannot stand up to judicial scrutiny and the court strikes it down, the law cannot fulfil its intended purpose.<sup>179</sup> Representative Greear fashioned House Bill 73, and the resultant § 35-1-410, to protect couples like the Donleys, but if this law is struck down, those couples are vulnerable again and the work will have been for naught.<sup>180</sup> The current state of § 35-1-410 does not comply with the promises of *Obergefell* and *Pavan*, and would be struck down as unconstitutional.<sup>181</sup> In passing future legislation, consideration must be given to judicial precedent, the Constitution, and the chances that the law will succeed to fulfil its intended purpose.<sup>182</sup> Taking pride in legislating requires creating laws that conform with substantive due process and, by extension, protect the substantive rights of same-sex couples within the State.<sup>183</sup> This shift in legislative mentality will create laws with lasting impact and demonstrate the pride Wyoming has in its laws.<sup>184</sup>

<sup>173</sup> See *supra* notes 167–72 and accompanying text.

<sup>174</sup> See *supra* notes 124–73 and accompanying text.

<sup>175</sup> See *supra* notes 159–66 and accompanying text.

<sup>176</sup> Compare *supra* notes 53–175 and accompanying text, with *In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69.

<sup>177</sup> WYO. STAT. ANN. § 8-3-123(a)(ii) (2023).

<sup>178</sup> See OWEN, *supra* note 45, at 31.

<sup>179</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (creating the doctrine of judicial review).

<sup>180</sup> See Trachman, *supra* note 3 (detailing the purpose for House Bill 73).

<sup>181</sup> See *supra* notes 115–75 and accompanying text.

<sup>182</sup> See *supra* notes 177–81 and accompanying text.

<sup>183</sup> See *supra* notes 177–82 and accompanying text.

<sup>184</sup> Just as the fence Steagall describes: “And someday you’ll come ridin’ through / And look across this land, / And see a fence that’s laid out straight / And know you had a hand, / In something that’s withstood the years. / Then proud and free of guilt, / You’ll smile and say, “Boys, that’s / The fence that me and Shorty built.” OWEN, *supra* note 45, at 31 (citing RED STEAGALL, *THE FENCE THAT ME AND SHORTY BUILT* (1993)).

*B. When you make a promise, keep it: § 35-1-410 causes expressive harm.*

The Code of the West also requires cowboys to keep their promises.<sup>185</sup> According to Owen, this promise-keeping was intrinsic to survival in the West.<sup>186</sup> The only way for the archetypal cowboys to survive in the harsh landscape and survive among other people was to stand true to their promises and keep their word.<sup>187</sup> This works to build trust between persons, and this trust-building is just as important in governance.<sup>188</sup> The U.S. government requires its people to trust its decisions, and trust can be built and maintained by the government's ability to keep promises.<sup>189</sup> This section discusses how the promise-keeping required by the Code of the West applies to the legal ideals of equal protection, and how the State working against equality causes harm both to those deemed unequal and the government as an institution built on trust.<sup>190</sup>

This section also aligns the duty to keep promises under the Code of the West with the equal protection clauses of both the Wyoming Constitution and the U.S. Constitution.<sup>191</sup> These equal protection clauses act as a promise to the people of Wyoming and the country at large, that the respective governments will work to ensure equality and not express inequality between groups.<sup>192</sup> This section looks more specifically at the concept of “expressive harm” as a litmus test for promise-keeping under the equal protection clauses.<sup>193</sup> Finally, this section connects expressive harm to § 35-1-410, analyzing whether this law keeps the promises of equal protection.<sup>194</sup>

---

<sup>185</sup> *Id.* at 46.

<sup>186</sup> *Id.* at 42–49.

<sup>187</sup> *Id.*

<sup>188</sup> Public trust has been linked to the ability of a government to respond to health and economic crises. Additionally, if public trust is sufficiently high, the government gains reductions in transaction costs and increased compliance with public policy directives. Citizens who trust the government are more likely to vote and engage with the political system, while citizens who lack trust in government are more likely to resort to violence and boycotts. The culmination of these trust-based benefits confirms that public trust is instrumental in preserving democratic institutions. OECD DIRECTORATE FOR PUB. GOVERNANCE, BUILDING TRUST TO REINFORCE DEMOCRACY: MAIN FINDINGS FROM THE 2021 OECD SURVEY ON DRIVERS OF TRUST IN PUBLIC INSTITUTIONS §§ 1, 6.1.1 (2022), <https://www.oecd-ilibrary.org/sites/b407f99c-en/index.html?itemId=/content/publication/b407f99c-en> [<https://perma.cc/M5QX-VUJ8>].

<sup>189</sup> Studies in economics have shown the importance in the end result of political power is more impactful on public trust than the structural issues of how power is organized. Trust is directly impacted by whether the outcomes of the political system show integrity, openness, and fairness. The integrity of political institutions goes directly to the government's ability to safeguard the public interest and show credibility. OECD, *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*, in OECD PUBLIC GOVERNANCE REVIEWS 20–23 (2017).

<sup>190</sup> See *infra* notes 195–249 and accompanying text.

<sup>191</sup> See *infra* notes 195–249 and accompanying text.

<sup>192</sup> See Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 2 (2021).

<sup>193</sup> See *infra* notes 195–249 and accompanying text.

<sup>194</sup> See *infra* notes 233–49 and accompanying text.

1. *Promise-keeping under the equal protection clauses requires minimizing expressive harm.*

The Fourteenth Amendment of the Constitution provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>195</sup> The Equal Protection Clause grants protections to discrete and insular minorities from overt discrimination,<sup>196</sup> as well as limited protections against covert discrimination.<sup>197</sup> Section 35-1-410 may implicate overt discrimination, as the statute discriminates against same-sex couples on its face;<sup>198</sup> however, same-sex couples may not be protected against this discrimination because the Equal Protection Clause grants protections along a spectrum.<sup>199</sup> The most protections are granted to suspect classes such as race and national origin,<sup>200</sup> less protections are granted to so-called quasi-suspect classes such as gender,<sup>201</sup> and even less protections are granted to non-suspect classes.<sup>202</sup> Sexual orientation and gender identity have not been categorized on this spectrum.<sup>203</sup> Some argue that sexual orientation should be a suspect class, but such analysis is outside the scope of this Comment.<sup>204</sup> Rather, this Comment looks to an emerging line of analysis under equal protection called expressive harm.<sup>205</sup>

Expressive harm is the harm that occurs to a group and society simply by the government not treating a group with equal concern.<sup>206</sup> Ronald Dworkin coined the phrase “equal concern,” defined by two separate but intertwined prongs: “The first is the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given. . . . The second is the right to treatment as an equal.”<sup>207</sup> Expressive harm analyses focus on the “treatment as an equal” prong.<sup>208</sup>

---

<sup>195</sup> U.S. CONST. amend. XIV, § 1.

<sup>196</sup> See e.g., *Rack Room Shoes v. United States*, 821 F. Supp. 2d 1341, 1344 n.5 (Ct. Int’l Trade 2012).

<sup>197</sup> *Washington v. Davis*, 426 U.S. 229, 241 (1976).

<sup>198</sup> WYO. STAT. ANN. § 35-1-410 (2023).

<sup>199</sup> Daniel J. Galvin Jr., *There’s Nothing Rational About It: Heightened Scrutiny for Sexual Orientation is Long Overdue*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 405, 409–10 (2019).

<sup>200</sup> *Id.* at 410.

<sup>201</sup> *Id.* at 409–10.

<sup>202</sup> *Id.* at 409.

<sup>203</sup> Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL’Y 385, 387 (2010).

<sup>204</sup> Galvin Jr., *supra* note 199, at 431.

<sup>205</sup> See *infra* notes 206–49 and accompanying text.

<sup>206</sup> Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2–3 (2000); see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000).

<sup>207</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977).

<sup>208</sup> Anderson & Pildes, *supra* note 206, at 1520.

When legislation separates a group and conveys an underlying negative attitude towards the group, the group suffers expressive harm.<sup>209</sup> But importantly, this separation and conveyance need not be communicated to the injured party—the act of the expression creates the harm inherently.<sup>210</sup> The harm is present through animus, or a disregard, for the group at the moment of expression.<sup>211</sup> The harm happens at the moment of expression since this is when the group was not treated as equals.<sup>212</sup> The conveyance is a form of social damage that outlines norms and values of the institution and clarifies that some are not worthy of societal protection.<sup>213</sup>

## 2. *Expressive harm conforms with societal expectations of equality.*

Expressive harm makes sense as a philosophical grounding for equal protection because this is quite simply how people think about equal protection in their day-to-day lives.<sup>214</sup> For instance, this notion of equal concern is enshrined in Wyoming's Constitution: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal," and "the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance."<sup>215</sup> These provisions are most often analyzed through their tangible effects on suspect classes,<sup>216</sup> but the promises espoused in the language speak to a right to engage and be engaged with as an equal.

Some find expressive harm counter to how harm works in the world.<sup>217</sup> The expectation is that harm occurs on the ground, and while it does, there are examples of other harms that occur without tangible, on-the-ground effects.<sup>218</sup> Expressive harms function in much the same way as posthumous harms.<sup>219</sup> It is very common for people to talk about harm to a dead person's reputation and standing in society, despite this seeming to be an impossibility.<sup>220</sup> One of the rationales for this "illogical" fear of posthumous harm is that it contravenes the desires of the once-living person.<sup>221</sup> Living persons typically want friends, family, and society to hold them in high esteem even after death; posthumous slander contravenes this

<sup>209</sup> *Id.* at 1527.

<sup>210</sup> Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L. REV. 467, 470 (2001).

<sup>211</sup> Anderson & Pildes, *supra* note 206, at 1530; Blackburn, *supra* note 210, at 470.

<sup>212</sup> The harm does not require actual communication. The harm occurs within the "negativity expressed, not in its effects." Blackburn, *supra* note 210, at 470.

<sup>213</sup> See generally Hellman, *supra* note 206..

<sup>214</sup> See *infra* notes 215–27 and accompanying text.

<sup>215</sup> WYO. CONST. art. 1, §§ 2, 3.

<sup>216</sup> See *Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 886 (Wyo. 1995) (applying the state constitution's equality provisions requires disparate treatment).

<sup>217</sup> See Notes, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1313 (1999).

<sup>218</sup> See *id.*

<sup>219</sup> See Blackburn, *supra* note 210, at 470 (speaking to Aristotle's belief that people are harmed by derogatory words after death).

<sup>220</sup> See Dorothy Grover, *Posthumous Harm*, 39 PHIL. Q. 334, 334–35 (1989) (speaking to Partridge's argument against posthumous harm).

<sup>221</sup> *Id.* at 339–40.

want.<sup>222</sup> The theory requires that the person was sufficiently invested in this want for harm to occur.<sup>223</sup> Expressive harm largely works in this same way.<sup>224</sup> People invest in being someone worthy of equal concern and pursue being treated with equal concern by pushing for legal equity.<sup>225</sup> As an example, this is a basic underlying principle of the Civil Rights Movement.<sup>226</sup> This want for equal concern runs deep within individuals and societal groups, and when the government makes laws holding a group to be inferior, it contravenes this societal want.<sup>227</sup>

Beyond the in-and-of-itself harm posited by expressive harm theories, the expressions and repudiations of governing bodies through legislation do not go unnoticed and produce emotional harm.<sup>228</sup> Legislation such as § 35-1-410 signals to society what and, more specifically, who Wyoming values.<sup>229</sup> Much like the Code of the West's "[t]alk less, say more" tenet,<sup>230</sup> words can convey more than the immediate substance. This conveyance and signaling creates harm not only in its inherent nature, but through societal ramifications as well.<sup>231</sup> Additionally, this signaling demonstrates the willingness of the State to enforce inequalities.<sup>232</sup>

### 3. *Section 35-1-410 causes expressive harm, breaking the promises of equal protection.*

Testing § 35-1-410 for whether it inflicts expressive harm requires asking: (1) what is the law's meaning (what does it express), and (2) is that meaning consistent with the mandate of equal concern?<sup>233</sup> As far as the law's meaning, § 35-1-410 specifies the intended parents "shall be deemed to be the *mother* and *father* of the child."<sup>234</sup> This language is objectively limiting the people who are protected by the law.<sup>235</sup> If a couple does not fit directly into the identity of "mother and father," this law either does not apply or the law requires individuals to take on a label with which they do not identify.<sup>236</sup> Importantly, House Bill 73 specified that § 35-1-410 "is not intended to alter the rights and legal status of any person or unborn child

<sup>222</sup> *Id.* at 340.

<sup>223</sup> *Id.* at 342.

<sup>224</sup> Expressive harm also requires care and investment. *See* Blackburn, *supra* note 210, at 470–71.

<sup>225</sup> *E.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>226</sup> *See e.g.*, TA-NEHISI COATES, BETWEEN THE WORLD AND ME 137–38 (2015) (speaking to the distance from society and inequality felt by Black Americans).

<sup>227</sup> *See supra* notes 214–226 and accompanying text.

<sup>228</sup> *See generally* Anderson & Pildes, *supra* note 206; Hellman, *supra* note 206.

<sup>229</sup> *See* WYO. STAT. ANN. § 35-1-401 (2023); § 35-1-410.

<sup>230</sup> § 8-3-123(a)(viii).

<sup>231</sup> *See* Anderson & Pildes, *supra* note 206, at 1528.

<sup>232</sup> *See* Blackburn, *supra* note 210, at 474 (describing how open affirmations from a group, such as a legislature, shows a willingness to accept the expressed affirmation).

<sup>233</sup> Hellman, *supra* note 206, at 65.

<sup>234</sup> § 35-1-410(e) (emphasis added).

<sup>235</sup> Trachman, *supra* note 3.

<sup>236</sup> *See In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69; *supra* notes 99–114 and accompanying text.

not specifically addressed by the provisions of this act.”<sup>237</sup> While this may seem to be the saving grace of § 35-1-410, the provision demonstrates an objective intent that this law does not apply to couples without a “mother and father” relationship.<sup>238</sup> The language expresses that only opposite-sex couples identifying as “mother and father” are protected under the statute, and, by extension, that same-sex couples and those couples who do not identify as “mother and father” are not.<sup>239</sup> More generally, this law expresses that LGBTQ+ couples are not the intended group for legal gestational surrogacy, and are less fit to be included on the birth certificates of their children.<sup>240</sup>

The second prong in evaluating the expressive harm of legislative action requires that the law conform with the mandate of equal concern.<sup>241</sup> The mandate of equal concern requires treatment as an equal and not treating a group as a pariah.<sup>242</sup> Section 35-1-410 has an objective intent to only protect opposite-sex couples, leaving LGBTQ+ couples to the uncertainty of the courts and the costs of the adoption process.<sup>243</sup> While § 35-1-410 does not condone worse treatment for this population than before its passage,<sup>244</sup> the law intends to leave this population behind while other populations reap the benefit of being worthy of the legislature’s time and effort.<sup>245</sup> Removing a class of people from equal concern is treating a group as a pariah and certainly not as an equal.<sup>246</sup> The meaning of the law is clearly not consistent with equal concern.<sup>247</sup>

Section 35-1-410 does not uphold the promise of equal concern under the Equal Protection Clause of the U.S. Constitution and does not uphold the equality principle promised in the Wyoming Constitution.<sup>248</sup> This inequality, and the broken promises inherent therein, falls short of the Code of the West’s requirement to keep your promises.<sup>249</sup>

---

<sup>237</sup> Birth Certificates-Gestational Agreements, ch. 87, § 2(a), 2021 Wyo. Sess. Laws 321, 322 (codified as amended at WYO. STAT. ANN. §§ 35-1-401, 410 (2023)).

<sup>238</sup> *But see* Trachman, *supra* note 3 (expressing that this law does not expressly exclude same-sex couples).

<sup>239</sup> Compare § 35-1-410, with *supra* notes 99–114 and accompanying text.

<sup>240</sup> *Cf.* Hellman, *supra* note 206, at 13 (describing the parallel example of *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)).

<sup>241</sup> *Id.* at 65.

<sup>242</sup> DWORKIN, *supra* note 207, at 273; Hellman, *supra* note 206, at 51.

<sup>243</sup> WYO. STAT. ANN. § 35-1-410 (2023).

<sup>244</sup> Trachman, *supra* note 3.

<sup>245</sup> *See id.*

<sup>246</sup> Hellman *supra* note 206 at 51 n.212 (defining “pariah” as treating a group as unworthy to participate in society).

<sup>247</sup> *See supra* notes 242–46 and accompanying text.

<sup>248</sup> *See* WYO. CONST. art. 1 § 2.

<sup>249</sup> *See supra* notes 185–247 and accompanying text.



*C. Live each day with courage: § 35-1-410 causes economic harm.*

As demonstrated by the first two tenets—taking pride in one’s work and keeping promises—excluding same-sex couples and other LGBTQ+ persons from § 35-1-410 is directly opposed to the Code of the West.<sup>250</sup> This demanded inclusion is not so simple to enact, however,<sup>251</sup> as the politics of Wyoming work to create a chilling effect over LGBTQ+ inclusion. But the Code of the West requires living each day with courage.<sup>252</sup> This includes “being willing to speak up and say that something isn’t right—even if that means going up against partners, colleagues, or superiors.”<sup>253</sup>

Acknowledging the difficulties of living courageously in a deeply partisan state, this section seeks to create political space for Republican legislators to support inclusion by aligning the goals of the Republican Party with inclusion.<sup>254</sup> For instance, the Republican Party platform espouses: “Every citizen is equal before, equally protected by, and equally subject to, the law,” and “[t]he only purpose of government is to protect [life, liberty, property, and the pursuit of happiness] for all.”<sup>255</sup> However, this section focuses more on the economic planks of the state Republican Party and how Wyoming’s culture of exclusivity creates economic losses for the State.<sup>256</sup> Through this lens, this section demonstrates how the Republican Party’s goal of economic strength comport with, and demand, a culture of inclusivity. Living each day with courage requires state legislators to strive to make Wyoming the best it can be.<sup>257</sup>

*1. Wyoming’s partisan nature works against progressive change.*

As of the 2022 midterm election, nearly 80% of Wyoming voters are registered in the Republican Party.<sup>258</sup> Wyomingites register in the Republican Party as much as

<sup>250</sup> See *supra* notes 53–249 and accompanying text.

<sup>251</sup> See *infra* notes 337–42 and accompanying text.

<sup>252</sup> WYO. STAT. ANN. § 8-3-123(a)(i) (2023).

<sup>253</sup> OWEN, *supra* note 45, at 29.

<sup>254</sup> See *infra* notes 258–69 and accompanying text.

<sup>255</sup> *Platform of the Wyoming Republican Party*, WYO. REPUBLICAN PARTY 1, 2 (Jan. 13, 2023), <https://www.wyoming.gov/post/platform-of-the-wyoming-republican-party> [https://perma.cc/PXG8-D4GR].

<sup>256</sup> See *infra* notes 258–69 and accompanying text.

<sup>257</sup> See *infra* notes 258–302 and accompanying text.

<sup>258</sup> *Statewide Summary: Wyoming Voter Registration*, WYO. SEC’Y STATE (Nov. 8, 2022), [https://sos.wyo.gov/Elections/Docs/VRStats/2022/22GeneralVR\\_stats.pdf](https://sos.wyo.gov/Elections/Docs/VRStats/2022/22GeneralVR_stats.pdf) [https://perma.cc/XFH6-B3EM] (showing 232,653 registered Republicans out of 297,639 total registered voters; however, these numbers are likely inflated specifically due to the political climate of the 2022 midterm elections. See Reid J. Epstein, *Liz Cheney Encourages Wyoming Democrats to Change Parties to Vote for Her*, N.Y. TIMES (June 23, 2022), <https://www.proquest.com/docview/2679792023?parentSessionId=Rt7w3K4WZfnzCJl2ccvP8wnNBqM%2FInMW9G%2FSJdLVEcE%3D&pq-origsite=summon&accountid=14793> [https://perma.cc/X4ER-JDJ9]; Isabella Murray, *2 Democratic Lawmakers Encourage Wyoming Voters: Change Parties and Back Cheney*, ABC NEWS (Aug. 8, 2022, 4:35 PM), <https://abcnews.go.com/Politics/democratic-lawmakers-encourage-wyoming-voters-change-parties-back/story?id=88109078> [https://perma.cc/ZR92-DS6Y].

any other state in the United States,<sup>259</sup> and Wyoming has the highest percentage of citizens who consider themselves Republican.<sup>260</sup> This Republican control is reflected in state elections, as 28 of the 31 state senators and 57 of the 62 state representatives are members of the Republican Party.<sup>261</sup> Wyoming has the most Republican state senate, the second most Republican state house, and the second most partisan legislative chamber.<sup>262</sup>

This political hegemony creates political tension with the requirements of the Code of the West, detailed above, as the Wyoming Republican Party declares: “Marriage is defined as the union of one man and one woman,” and “[t]he traditional family, based on the foundation of marriage between one man and one woman, is the best institution and is the authority providing children with education and training.”<sup>263</sup> And the State party is vigilant to enforce these planks as binding upon Republicans elected in the State.<sup>264</sup> In combination, the State legislature is heavily incentivized to create laws excluding LGBTQ+ persons.<sup>265</sup> If the Republican legislature follows its platform, LGBTQ+ persons will not experience the rights guaranteed under the Wyoming Constitution or the U.S. Constitution.<sup>266</sup>

---

<sup>259</sup> See 2017 U.S. Party Affiliation by State, GALLUP, <https://news.gallup.com/poll/226643/2017-party-affiliation-state.aspx> [<https://perma.cc/4XB9-XQNZ>] (last visited Apr. 20, 2023) (56% of Wyomingites were registered as Republican in 2017); Mark Blumenthal & Ariel Edwards-Levy, *HUFFPOLLSTER: A State-By-State Guide to Party Registration*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/state-party-registration\\_n\\_5399977](https://www.huffpost.com/entry/state-party-registration_n_5399977) [<https://perma.cc/V6M7-ZDC5>] (65% of Wyomingites were registered as Republican in 2014).

<sup>260</sup> When asked, “[D]o you consider yourself a Republican, Democrat, or Independent?” 57% of Wyomingites responded with “Republican.” *Compare Party Affiliation by State*, PEW RSCH. CTR. <https://www.pewresearch.org/religion/religious-landscape-study/compare/party-affiliation/by/state/> [<https://perma.cc/6KKX-DYTF>] (last visited Apr. 20, 2023), with PEW RSCH. CTR., 2014 RELIGIOUS LANDSCAPE STUDY (RLS-II) MAIN SURVEY OF NATIONALLY REPRESENTATIVE SAMPLE OF ADULTS FINAL QUESTIONNAIRE 41 (2014), [https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2015/11/2011.03\\_rls\\_ii\\_questionnaire.pdf](https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2015/11/2011.03_rls_ii_questionnaire.pdf) [<https://perma.cc/9CFX-46NT>].

<sup>261</sup> *Legislator List: Senators*, STATE OF WYOMING 67TH LEGISLATURE, <https://www.wyoleg.gov/Legislators/2023/S> (last visited May 18, 2023); *Legislator List: Representatives*, STATE OF WYOMING 67TH LEGISLATURE, <https://www.wyoleg.gov/Legislators/2023/H> (last visited May 18, 2023).

<sup>262</sup> See 2022 State Legislative Chamber Seats and Partisan Splits, STATESIDE (Oct. 31, 2022), <https://www.stateside.com/sites/default/files/2022-10/2022%20Partisan%20Control.pdf> [<https://perma.cc/5MLU-Q92L>] (Wyoming’s state house is second to South Dakota’s, 85% and 89% respectively. Hawaii’s state senate is 96% Democratic).

<sup>263</sup> *Platform of the Wyoming Republican Party*, WYO. REPUBLICAN PARTY 9 (Jan. 13, 2023), <https://www.wyoming.gop/post/platform-of-the-wyoming-republican-party> [<https://perma.cc/PXG8-D4GR>] (adopted unanimously by the state Republican Party).

<sup>264</sup> See *Support the 2022 Wyoming GOP Platform: The Wyoming Republican Platform Guides Good Policy Decisions!*, WYO. REPUBLICAN PARTY: PARTY NEWS (Nov. 17, 2022), <https://www.wyoming.gop/post/support-the-2022-wyoming-gop-platform> [<https://perma.cc/CK8C-TJUA>] (describing the disappointment with U.S. Senator Lummis voting in favor of the “Respect for Marriage Act”).

<sup>265</sup> See *supra* notes 258–64 and accompanying text.

<sup>266</sup> See WYO. CONST. art. 1 § 2; U.S. CONST. amend. XIV, § 1; *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Additional political disincentive comes from the fact that only 3.3% of the State's residents identify within the LGBTQ+ community.<sup>267</sup> This creates very little in the way of political backlash from the LGBTQ+ community for state legislators when they enact objectively discriminatory laws.<sup>268</sup> However, the vast majority of the State's residents have allied themselves with the LGBTQ+ community, as 76% of Wyomingites report that the State needs anti-discrimination laws to protect LGBTQ+ persons.<sup>269</sup>

## 2. *Promoting equality works to promote economic growth within the State.*

In addition to the social and legal losses discussed above, § 35-1-410 brings about additional losses of business and economic development that can hardly be justified through the fiscal lens espoused by the Wyoming Republican Party.<sup>270</sup> Creating non-inclusive legislation may cost the State hundreds of millions of dollars in revenue.<sup>271</sup> For example, in 2016, North Carolina passed the Public Facilities Privacy and Security Act (commonly called HB2) in response to Charlotte passing an anti-discriminatory ordinance for the city.<sup>272</sup> HB2 prohibited people from using bathrooms that did not match their birth gender, and prohibited cities from passing laws to the opposite effect.<sup>273</sup> After North Carolina passed HB2, the State lost an estimated \$3.76 billion in projected revenue.<sup>274</sup> This loss was largely due to organizations boycotting the State in response to HB2: the NCAA pulled its championships out of the State and the NAACP instigated a national economic

<sup>267</sup> *Wyoming's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/WY](https://www.lgbtmap.org/equality_maps/profile_state/WY) [<https://perma.cc/L9JC-2NLL>] (last visited Apr. 20, 2023).

<sup>268</sup> When discussing gerrymandering and the ability for a minority population to elect a representative that aligns with the values of the minority population, scholars suggest that as much as 65% of the voting population must be the intended minority in order to hold real electoral power. Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43, 44 (1988). Comparing this need for a supermajority with the intense minority of LGBTQ+ persons within the state, the inability for LGBTQ+ persons to exert political power becomes clear. See *id.*; *Wyoming's Equality Profile*, *supra* note 267.

<sup>269</sup> *The American Values Atlas*, PRRI, <https://ava.prri.org/#lgbt/2021/States/lgbtdis/m/US-WY> [<https://perma.cc/FQ6Y-BJZD>] (last visited Apr. 20, 2023) (when asked: "All in all, do you strongly favor, favor, oppose or strongly oppose laws that would protect gay, lesbian, bisexual, and transgender people against discrimination in jobs, public accommodations, and housing?").

<sup>270</sup> See *Platform of the Wyoming Republican Party*, *supra* note 263, at 11 (discussing the fiscal irresponsibility of the government as it relates to economic inequality).

<sup>271</sup> See *infra* notes 272–76 and accompanying text.

<sup>272</sup> Public Facilities Privacy and Security Act, No. 2016-3, 2016 N.C. Sess. Laws 12; Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), <https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> [<https://perma.cc/D8L8-Z3A2>].

<sup>273</sup> Public Facilities Privacy and Security Act, No. 2016-3; Philipps, *supra* note 272.

<sup>274</sup> Emery P. Dalesio & Jonathan Drew, *AP Exclusive: Price Tag of North Carolina's LGBT Law: \$3.76B*, ASSOCIATED PRESS (Mar. 27, 2017, 5:29 PM), <https://web.archive.org/web/20170331211506/http://bigstory.ap.org/article/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b> [<https://perma.cc/H45H-7WS2>].

boycott of the State.<sup>275</sup> For comparison, in 2022 Wyoming had a real GDP of \$36.35 billion.<sup>276</sup>

Not only has anti-LGBTQ+ legislation been linked to economic losses,<sup>277</sup> but bolstering rights for LGBTQ+ persons has been linked to economic development.<sup>278</sup> In a comparison between countries rated for their LGBTQ+ inclusivity, “one additional right is associated with \$1,400 more in per capita GDP and with a higher [human development index] value.”<sup>279</sup> In a country with a population comparable to Wyoming’s, the extension of one additional right would result in an over \$800 million boost in GDP.<sup>280</sup> Wyoming is not a country, and the legal rights discussed in the study above are broader and more encompassing than equality rights in the context of gestational agreements.<sup>281</sup> However, this study points to a general principle that legal inclusion promotes economic growth.<sup>282</sup>

Wyoming also suffers from “brain drain,” or graduates leaving the State after receiving an education.<sup>283</sup> Wyoming loses 57% of graduates from Wyoming

<sup>275</sup> *Id.*

<sup>276</sup> *Real Gross Domestic Product of Wyoming from 2000 to 2022*, STATISTA (Apr. 18, 2023), <https://www.statista.com/statistics/188152/gdp-of-the-us-federal-state-of-wyoming-since-1997/#:~:text=In%202021%2C%20the%20real%20Gross,at%2039.26%20billion%20U.S.%20dollars> *Real Gross Domestic Product of Wyoming from 2000 to 2021*, STATISTA (Apr. 18, 2023), <https://www.statista.com/statistics/188152/gdp-of-the-us-federal-state-of-wyoming-since-1997/#:~:text=In%202021%2C%20the%20real%20Gross,at%2039.26%20billion%20U.S.%20dollars> [https://perma.cc/7LLB-4HHJ].

<sup>277</sup> See Dalesio & Drew, *supra* note 274.

<sup>278</sup> The study cited here has only analyzed the effects on LGBT inclusive laws, but in the interest of consistency this Comment uses LGBTQ+ throughout. M.V. LEE BADJETT ET AL., *THE RELATIONSHIP BETWEEN LGBT INCLUSION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF EMERGING ECONOMIES* 47 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Inclusion-Economic-Dev-Nov-2014.pdf> [https://perma.cc/QAL9-HG7C].

<sup>279</sup> *Id.* The Global Index on Legal Recognition of Homosexual Orientation (“GILRHO”) specifies eight legal rights used to compare different countries. These eight rights are: (1) “Legality of consensual homosexual acts between adults”; (2) “Equality of age limits for consensual homosexual and heterosexual acts”; (3) “Explicit legislative prohibition of sexual orientation discrimination in employment”; (4) “Explicit legislative prohibition of sexual orientation discrimination regarding goods and/or services”; (5) “Any legal recognition of the non-registered cohabitation of same-sex couples”; (6) “Availability of registered partnership for same-sex couples”; (7) “Possibility of second-parent and/or joint adoption by same-sex partner(s)”; and (8) “Availability of marriage for same-sex couples.” *Id.* at 29. When the study details that “one additional right” correlates with economic growth, the study is looking specifically at the eight GILRHO rights; however, these rights are illustrative of equality in family planning and marriage rights and should be similarly analogous to rights to parentage under gestational surrogacy agreements. *Id.* at 28–29.

<sup>280</sup> Wyoming had a population of 576,851 as of the 2020 census. *2020 Census Apportionment Results*, tbl.2: Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> [https://perma.cc/H4U7-FBBP]. Multiplying a population of 576,851 by \$1,400 per capita equates to \$807,591,400 in predicted economic growth. See BADJETT ET AL., *supra* note 278, at 47.

<sup>281</sup> See *id.* at 28–29.

<sup>282</sup> See *supra* note 279.

<sup>283</sup> David Luther, *Leaked State Secret: How to Stop the Brain Drain*, ZIPPIA (May 16, 2017), <https://www.zippia.com/advice/states-that-lose-graduates/> [https://perma.cc/4HPQ-BGRJ].

colleges.<sup>284</sup> This ranks Wyoming as the 10th worst state in the United States for brain drain.<sup>285</sup> According to interviews with Wyoming high school students, this is due in part to the State's lack of inclusivity and resistance to change.<sup>286</sup> These students expressed that they still loved the State, but they could not see themselves living in a state that prioritizes non-inclusivity and does not promote safety for minorities.<sup>287</sup> This impacts the State through lost scholarship funds meant to invest in the education of the State and through the loss of a young working population.<sup>288</sup> For example, the Hathaway Scholarship is a \$400 million endowment for Wyoming middle and high school students who attend Wyoming colleges.<sup>289</sup> When students use Hathaway funds to earn a degree but leave the State to use that degree, Wyoming effectively loses that investment.<sup>290</sup> Fifty-seven percent of college students leave Wyoming after graduating, which means at least 24% of Wyoming high school graduates who attend Wyoming colleges will leave the State.<sup>291</sup> This statistic illustrates the scholarship funds flowing out of state, a tangible impact of brain drain.<sup>292</sup> In total, Wyoming's lack of inclusivity contributes to a shortage of young people, an aging population, and ultimately a labor shortage within the State.<sup>293</sup> Between 2014 and 2018, "the number of millennials working in Wyoming decreased by 13%."<sup>294</sup>

Discriminatory legislation causes economic harm both in loss of education investments and loss of economic development.<sup>295</sup> These issues are surely impacting each other, as the loss of educated young people will result in a loss of economic

---

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Dustin Bleizeffer, *'Love it and Leave': The Choices Facing Wyoming's Youth*, WYOFILE (Apr. 30, 2021), <https://wyofile.com/love-it-and-leave-the-choices-facing-wyomings-youth/> [<https://perma.cc/LEV5-DZ6S>].

<sup>287</sup> *See id.*

<sup>288</sup> *See infra* notes 289–92 and accompanying text.

<sup>289</sup> *History of the Hathaway Scholarship*, WYO. DEPT EDUC., <https://hathaway scholarship.org/about/> [<https://perma.cc/ZLM9-ABJ3>] (last visited Apr. 20, 2023).

<sup>290</sup> *See id.* (describing the Hathaway Scholarship as an investment in Wyoming's economic future).

<sup>291</sup> Forty-three percent of the University of Wyoming graduates stay in the state. This is 5,267 students. But 6,984 students at the University of Wyoming are Wyomingites. This gap of 1,717 students is the equivalent of 24.6% of the Wyomingites attending the University of Wyoming leaving the state for greener pastures. To be clear, this is based on the assumption that all out-of-state students at the University of Wyoming leave the state. This assumption is not true but sets a useful baseline. The number of Wyomingites who attend the University of Wyoming and then leave the state is *at the bare minimum* 24.6%. Compare Luther, *supra* note 283, with *University of Wyoming Diversity Efforts*, UNIV. WYO., <https://www.uwyo.edu/diversity/today/> [<https://perma.cc/D833-724T>] (last visited Apr. 20, 2023).

<sup>292</sup> *See supra* notes 289–91 and accompanying text.

<sup>293</sup> Michael Moore, *Changes in Wyoming's Workforce Demographics: 2014–2018*, 56 WYO. LAB. FORCE TRENDS Aug. 2019, at 8, 15.

<sup>294</sup> *Id.* at 13.

<sup>295</sup> *See supra* notes 270–94 and accompanying text.

development,<sup>296</sup> and the State's economy is a major reason young, educated people leave the State.<sup>297</sup> These harms are impacting Wyomingites, while the benefits remain unclear.<sup>298</sup>

The Code of the West requires living with courage.<sup>299</sup> This means standing up for what is right regardless of political backlash.<sup>300</sup> The economic impacts of laws such as § 35-1-410 will help to align what is right for the State and the goals of the prevailing party,<sup>301</sup> but even if the Republican Party cannot align with LGBTQ+ persons within the State over economic incentives, the Code requires each legislator to “saddle up” and promote the law, equality, and the interests of the State.<sup>302</sup>

### III. GENDER-SILENT LEGISLATIVE DRAFTING

The Code of the West demands a different mentality in response to inclusion in Wyoming.<sup>303</sup> This mentality change should promote inclusion, long-term legality, and economic growth.<sup>304</sup> These goals can be accomplished through gender-silent legislative drafting.<sup>305</sup> Gender-*neutral* legislative drafting is a method of drafting legislation without a gender in mind.<sup>306</sup> Largely, this has been used to eliminate the preference for male-centric pronouns (he and him) and to promote inclusion of females within legislative drafting.<sup>307</sup> Gender-neutral drafting removes the “universal he” and shifts gendered nouns to neutral nouns (such as “actress” to “actor”).<sup>308</sup> Forty-two states officially use gender-neutral language while drafting legislation, and two others have unofficially adopted a gender-neutral preference.<sup>309</sup> This makes Wyoming one of six states that have no requirement to draft legislation with a gender-neutral lens.<sup>310</sup> But the issue present in § 35-1-410 is not readily fixed by removing a preference for men over women within legislative drafting; the issue here is using gendered terms over gender-

---

<sup>296</sup> See Moore, *supra* note 293, at 15.

<sup>297</sup> See Bleizeffer, *supra* note 286.

<sup>298</sup> See *supra* notes 270–97 and accompanying text.

<sup>299</sup> WYO. STAT. ANN. § 8-3-123(i) (2023).

<sup>300</sup> See *supra* notes 250–56 and accompanying text.

<sup>301</sup> See *Platform of the Wyoming Republican Party*, *supra* note 263, at 11.

<sup>302</sup> See OWEN, *supra* note 45, at 26–29.

<sup>303</sup> See *supra* notes 53–302 and accompanying text.

<sup>304</sup> See *supra* 53–302.

<sup>305</sup> See generally Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislation Drafting in a Non-Binary World*, 48 CAP. U.L. REV. 103 (2020).

<sup>306</sup> *Id.* at 106–08.

<sup>307</sup> *Id.* at 106; see David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437, 2449 (1996).

<sup>308</sup> Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislation Drafting in a Non-Binary World*, 48 CAP. U.L. REV. 103, 104–05 (2020).

<sup>309</sup> *Id.* at 119, 119 n.82 (Idaho and Nevada have unofficially adopted gender-neutral drafting).

<sup>310</sup> *Id.* at 119 nn.82–83 (Wyoming is among Georgia, Louisiana, New York, Oklahoma, and South Carolina).



*silent* terms.<sup>311</sup> Donald Revell and Jessica Vapnek offer up gender-silent language as the next evolution of legal drafting, claiming this will also work to promote the interests of non-binary persons and shore up any gaps within gender-neutral drafting, particularly when it comes to clarity.<sup>312</sup> Where gender-neutral drafting changed the universal “he” into “he or she,” gender-silent drafting will prioritize concise language without regard to “hes” or “shes.”<sup>313</sup>

Wyoming has already taken steps to bring gender-silent language into law.<sup>314</sup> In 2021, an amendment to ballot language changed “his” to “the person’s” in the voting instructions.<sup>315</sup> However, the State’s standards for statutory interpretation still provide: “Words in the masculine gender include the feminine and neuter genders.”<sup>316</sup> This standard promotes the “universal he” and has made the State resistant to change in its drafting principles.<sup>317</sup>

This Comment suggests the following language adapted from the drafting rules of Colorado, Nebraska, and Utah, as well as suggestions from Revell and Vapnek:

- (a) A gender-based distinction is rarely appropriate and gender-silent language should be used when possible.<sup>318</sup> All bills, amendments, resolutions, memorials, and proposals for legislation to be introduced in the Wyoming legislature shall use a gender-silent style, avoiding male or female gender terms.<sup>319</sup>
- (b) The drafter should avoid using nouns that are gender-specific and instead use substitutes that are generally accepted by recognized authorities on correct English usage.<sup>320</sup> The ultimate goal is to produce a clear, well-drafted statute. To this end, choose the method that best accomplishes this goal.<sup>321</sup>

---

<sup>311</sup> As this statute is not using the “universal he” or a preference for men over women. The language creates a problem for same-sex couples because of the use of gender alone. The solution must eliminate the gendered language of “mother” and “father” in order to create a broader application to all persons. *Compare* WYO. STAT. ANN. § 35-1-410 (2023), *with In re Gestational Agreement*, 2019 UT 40, ¶ 55, 449 P.3d 69, 84.

<sup>312</sup> See generally Revell & Vapnek, *supra* note 308.

<sup>313</sup> *Id.* at 113.

<sup>314</sup> See *infra* notes 315–17 and accompanying text.

<sup>315</sup> Inclusive Ballot Language, ch. 145, 2021 Wyo. Sess. Laws 462, 462–463.

<sup>316</sup> WYO. STAT. ANN. § 8-1-103(a)(vi).

<sup>317</sup> See Gregory Nickerson, *Wyo Women Lawmakers Advance Bill to Stop Being Called ‘He’*, WYOFILE (Jan. 27, 2015), <https://wyofile.com/wyo-women-lawmakers-advance-bill-stop-called/> [<https://perma.cc/5SFP-CRR7>].

<sup>318</sup> UTAH LEGISLATURE, LEGISLATIVE DRAFTING STYLE MANUAL § 2(e) (n.d.), <https://le.utah.gov/documents/ldm/draftingmanual.html> [<https://perma.cc/P2GD-V5SV>].

<sup>319</sup> *Cf.* OFF. LEGIS. LEGAL SERVS., COLO. GEN. ASSEMBLY, COLORADO LEGISLATIVE DRAFTING MANUAL 5-34 (2020), <https://leg.colorado.gov/sites/default/files/drafting-manual-20230220.pdf> [<https://perma.cc/A8MV-CQU7>].

<sup>320</sup> *Id.* at 5–35.

<sup>321</sup> UTAH LEGISLATURE, *supra* note 318, § 2(e).



- (i) Use the singular “they”;<sup>322</sup>
  - (ii) Replace a possessive noun with a definite article;<sup>323</sup>
  - (iii) Replace gendered language with gender-silent language;<sup>324</sup>
  - (iv) Repeat the gender-silent noun;<sup>325</sup>
  - (v) Recast the provision;<sup>326</sup>
  - (vi) Draft in the plural;<sup>327</sup>
  - (vii) Eliminate the pronoun;<sup>328</sup>
  - (viii) Use the passive voice;<sup>329</sup>
  - (ix) Use a verb in place of a noun.<sup>330</sup>
- (c) The following are examples of preferred gender-silent terms:
- (i) Replace “brother” or “sister” with “sibling”;
  - (ii) Replace “chairman” with “chair”;
  - (iii) Replace “daughter” or “son” with “child” or “children”;
  - (iv) Replace “father” or “mother” with “parent”; and
  - (v) Replace “widow” or “widower” with “surviving spouse.”<sup>331</sup>
- (d) This policy fulfills the goal of clearly expressing the legislature’s intent in an accurate, non-discriminatory manner.<sup>332</sup>
- (e) To this end, the legislative service office has the authority to

---

<sup>322</sup> For example, replace, “Every taxpayer shall file his tax return no later than April 30 of the year following the year in which he earned the income on which he is paying tax” with, “Every taxpayer shall file their tax return no later than April 30 of the year following the year in which they earned the income on which they are paying taxes.” Revell & Vapnek, *supra* note 308, at 136.

<sup>323</sup> For example, replace, “The investigator must give a copy of his or her report to the supervisor” with, “The investigator must give a copy of the report to the supervisor.” *Id.* at 136–37.

<sup>324</sup> For example, replace, “If the occupational nurse is absent, the foreman must assign a workman who is a qualified first aid responder to man the safety office” with, “If the occupational nurse is absent, the supervisor must assign a worker who is a qualified first aid responder to staff the safety office.” *Id.* at 137.

<sup>325</sup> For example, replace “The commissioner must write a report setting out his or her findings regarding his or her refusal to grant a permit, and he or she must give a copy to him or her” with, “The commissioner must write a report setting out the commissioner’s findings in respect of the refusal to grant a permit and must give a copy to the applicant.” *Id.*

<sup>326</sup> For example, replace, “A person may be fined up to \$100 if he or she contravenes subsection (1)” with, “A person who contravenes subsection (1) may be fined up to \$100.” *Id.*

<sup>327</sup> For example, replace, “A director shall be paid his or her reasonable expenses” with, “The directors shall be paid their reasonable expenses.” *Id.*

<sup>328</sup> For example, replace, “The director must give his or her opinion” with, “The director must give an opinion.” *Id.* at 138.

<sup>329</sup> For example, replace, “The applicant must include his or her mailing address in his or her application” with, “The applicant’s address must be included in the application.” *Id.*

<sup>330</sup> For example, replace, “An inspector may not enter any residence unless the occupant has given his or her consent” with, “An inspector may not enter any residence unless the occupant has consented.” *Id.*

<sup>331</sup> UTAH LEGISLATURE, *supra* note 318, § 2(e)(viii) (examples for gender-neutral terms).

<sup>332</sup> *Id.* § 2(e).

convert masculine or feminine referents to neutral gender when appropriate.<sup>333</sup>

Making this change to Wyoming's statutory construction rules would provide inclusive language, increased difficulty in passing non-inclusive legislation, and a potential safeguard in allowing the legislative service office to change those terms that slip through the cracks.<sup>334</sup> Applying the adapted drafting rule to § 35-1-410 would simply require replacing "mother and father" with "parents," as was proposed by Senator Case in an amendment to House Bill 73.<sup>335</sup>

Incorporating this gender-silent language should be a legislative fix; however, some may advocate for a judicial fix, citing how unlikely the legislature is to fix this particular issue.<sup>336</sup> For instance, Wyoming rejected bill advocating for gender-silent language in 2015: House Bill 99.<sup>337</sup> This bill died in its third reading at a vote of 24 to 36.<sup>338</sup> House Bill 99 was simply a requirement that future legislation be written with gender-neutral language,<sup>339</sup> but the bill suffered from rhetoric surrounding political correctness.<sup>340</sup> As one Wyoming state representative said, "I would urge you all to stick a thumb in the eye of the political correctness police and vote this bill down."<sup>341</sup> While another said, "I don't think there is anyone in this body that doesn't believe that women are equal in every respect to me. My concern with passing this bill is I wonder if we are delving into the world of political correctness."<sup>342</sup> The specter of political correctness hangs over this proposed gender-silent statute, but, as this Comment proposes, the combination of using a Wyoming-focused lens—the Code of the West—and arguments based in precedent, equality, and economic harm, the legislature has more reason to accept gender-silent drafting and more tangible reasons beyond mere political correctness to sign on to this change.<sup>343</sup>

Despite the potential downsides, legislative action is the way forward.<sup>344</sup> This may seem less effective and unlikely by those who would look to the judiciary for a legal solution because it was Supreme Court Justice Kennedy who brought about *Obergefell*<sup>345</sup> and District Court Judge Skavdahl who brought gay marriage to Wyoming, not the legislature.<sup>346</sup> The judiciary has the power to strike a law

---

<sup>333</sup> RULES OF THE NEBRASKA UNICAMERAL LEGISLATURE, 108th Leg., Rule 3, § 4 (d)(iii)(A), at 15 (2023).

<sup>334</sup> See *supra* 319–33 and accompanying text.

<sup>335</sup> H.B. 0073S3001, 66th Leg., Gen. Sess. (Wyo. 2021).

<sup>336</sup> See *infra* notes 337–45 and accompanying text.

<sup>337</sup> See H. JOURNAL, 63rd Leg., Gen. Sess. 217–19 (Wyo. 2015) (H.B. No. 0099). H.B. 0099, 63d Leg. Gen. Sess. (Wyo. 2015).

<sup>338</sup> *Id.* at 218–19.

<sup>339</sup> *Id.* at 217–19.

<sup>340</sup> See Nickerson, *supra* note 317.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> See *supra* notes 53–302 and accompanying text.

<sup>344</sup> See *infra* notes 348–69 and accompanying text.

<sup>345</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>346</sup> *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014);

down as unconstitutional,<sup>347</sup> but the judiciary is often a blunt instrument. The judiciary can effect change, but often this change is limited, invokes backlash, and cannot promote future changes in mentality.<sup>348</sup> Below, this Comment discusses how legislative action will (1) create expressive benefits, (2) forgo the harms creating lawsuits, and (3) promote the future of the equality state.<sup>349</sup>

*A. This legislative solution creates expressive benefits.*

Just as a law that brands people as inferior will cause expressive harm, a law that promotes inclusion will create expressive benefits.<sup>350</sup> The legislature will portray to the State that women, same-sex couples, and non-binary persons are worthy of legal protections, creating expressive benefits through the same process as expressive harm.<sup>351</sup> A new legislative rule creates a requirement reaching into the future and signals a shift to a new mentality for Wyoming's legislature.<sup>352</sup> If the exclusivity of § 35-1-410 was solved by the judiciary striking down the will of the legislature, there would be no showing of a shift in legislative mentality, political equality, or the backing of State representatives—there would only be a showing of a legal right.<sup>353</sup> On the contrary, when a judge steps in to declare a law unconstitutional, history shows that while elected officials may abide by the ruling, the rhetoric surrounding the morality of the decision stays the same.<sup>354</sup> This judicial action can even cause increased expressive harm as groups rally and publish politically charged statements after a judicial defeat.<sup>355</sup> Creating a simple drafting requirement removes much of the political weight that incentivizes the resistance.<sup>356</sup> Gender-silent drafting can

---

*Federal Judge Rules in Favor of Marriage Equality in Wyoming*, NAT'L CTR. FOR LESBIAN RTS. (Oct. 17, 2014), <https://www.nclrights.org/about-us/press-release/federal-judge-rules-in-favor-of-marriage-equality-in-wyoming/> [<https://perma.cc/W3SG-GSJ6>].

<sup>347</sup> See *In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69.

<sup>348</sup> See Joseph Daniel Ura & Matthew Hall, *When the Supreme Court Loses Americans' Loyalty, Chaos – Even Violence – Can Follow*, THE CONVERSATION (Oct. 31, 2022, 8:34 AM), <https://theconversation.com/when-the-supreme-court-loses-americans-loyalty-chaos-even-violence-can-follow-192384> [<https://perma.cc/PV48-HUWD>].

<sup>349</sup> See *infra* notes 350–69 and accompanying text.

<sup>350</sup> Expressive benefits work as a natural extension of expressive harms. Expressive harms, *supra* notes 185–249 and accompanying text, require the government to make an expression of inferiority to cause harm. Expressive benefits exist as removing the expression of inferiority will ameliorate some of the harm, if not create benefit. See Hellman, *supra* note 206, at 54.

<sup>351</sup> See *supra* notes 185–249 and accompanying text.

<sup>352</sup> See *supra* notes 319–33 and accompanying text.

<sup>353</sup> See *infra* notes 354–56 and accompanying text.

<sup>354</sup> See CJ Baker, *County GOP Blasts Mead on Gay Marriage*, POWELL TRIB. (Jan. 22, 2015, 3:17 PM), <https://www.powelltribune.com/stories/county-gop-blasts-mead-on-gay-marriage,3820> [<https://perma.cc/UC5N-C9TT>] (showing Governor Matt Mead continued his stance that marriage is between a man and a woman, but recognized the authority of the court).

<sup>355</sup> See *id.*; Associated Press, *GOP Group Criticizes Mead Over Gay Marriage*, K2 RADIO (Dec. 18, 2014), <https://k2radio.com/gop-groups-criticizes-mead-over-gay-marriage/> [<https://perma.cc/UC5N-C9TT>].

<sup>356</sup> See *supra* notes 250–302 and accompanying text.

be discussed from many different angles, such as promoting clarity and easing disagreement.<sup>357</sup>

*B. This legislative solution forgoes the harms of the judicial process.*

The judiciary requires a lawsuit to even consider the constitutionality of a law.<sup>358</sup> This reactive stance requires couples striving for a family through a gestational agreement to experience harm to their family before the law can be challenged.<sup>359</sup> If this was taken on as legislative action, no family would have to go through the strain of the judicial process nor would they risk the chance that their case would not resolve in their favor.<sup>360</sup> The harms can and should be eliminated extrajudicially in order to achieve the most benefit and the least harm.<sup>361</sup>

*C. This legislative solution sets the stage for future equality.*

This proposed gender-silent drafting rule would not simply impact § 35-1-410, but would set the stage for future laws.<sup>362</sup> The change would promote a legally inclusive Wyoming: one where LGBTQ+ persons are treated equally under the law from the start, one where women and non-binary persons do not have to read themselves in when they see “he” in legislation, and one where the State considers how to create laws that promote the interests of all, not just men or opposite-sex couples.<sup>363</sup> While a judicial solution could surely effect a change in this specific law, each new law created would require another lawsuit and another narrow fix.<sup>364</sup> This “solution” would not promote a change in mentality and would not promote the State as the equality state.<sup>365</sup> Only a legislative fix would ensure a cascade of benefits into the future and promote long-standing equality.<sup>366</sup>

Gender-silent drafting is one solution to some of the harms experienced by the LGBTQ+ community in this State and helps ensure future compliance with due process.<sup>367</sup> Passing a gender-silent drafting requirement will also signal a shift in Wyoming’s mentality from non-inclusion to inclusion, solving the economic consequences of non-inclusivity.<sup>368</sup> While a judicial solution may be more direct and

<sup>357</sup> Revell & Vapnek, *supra* note 308, at 121.

<sup>358</sup> See *Standing*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/standing> [<https://perma.cc/5NFZ-59SQ>] (last visited Apr. 20, 2023).

<sup>359</sup> See *id.*

<sup>360</sup> See *id.*

<sup>361</sup> See *supra* notes 358–60 and accompanying text.

<sup>362</sup> See *supra* notes 319–33 and accompanying text (the creation of a future-reaching rule will impact future legislative practices).

<sup>363</sup> See Revell & Vapnek, *supra* note 308, at 104–05.

<sup>364</sup> See *supra* notes 358–61 and accompanying text.

<sup>365</sup> See *supra* notes 362–64 and accompanying text.

<sup>366</sup> See *supra* notes 362–65 and accompanying text.

<sup>367</sup> As in *Obergefell*, the triggering of substantive due process involves a lacking in legal protections for a group when the right itself is foundational to liberty and autonomy. Gender-silent legislation creates a barrier protecting laws from distinctions between protected groups based on gender and sexual orientation. See *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015).

<sup>368</sup> See *supra* notes 270–98 and accompanying text.

perhaps inevitable, the long-term effects of expressed equality and future inclusivity gained from a legislative solution dramatically outweigh the professed protection of the judiciary.<sup>369</sup>

#### IV. CONCLUSION

The Code of the West demands taking pride in your work, keeping your promises, and living with courage.<sup>370</sup> These tenets each promote gender-inclusive and LGBTQ+ friendly language in legislation.<sup>371</sup> More specifically, these tenets require a change to § 35-1-410 where the State specifies that only a “mother and father” can be included on a birth certificate after a legal gestational agreement.<sup>372</sup> The purpose of § 35-1-410 was to promote the equality of intended mothers when a couple has a child through gestational surrogacy, but this language excludes many LGBTQ+ persons and couples from its legal benefits.<sup>373</sup>

Taking pride in your work requires the Wyoming legislature to build laws that conform with legal precedent and follow the Constitution as the supreme law of the land.<sup>374</sup> Keeping the promises you make includes keeping the promises of the Wyoming Constitution as well as the U.S. Constitution regarding equal treatment under the law.<sup>375</sup> Living with courage demands upholding the previous two tenets and creating laws that help the State, despite party platforms and political backlash.<sup>376</sup>

Section 35-1-410 fails to uphold any of these three requirements under the Code of the West.<sup>377</sup> And the path forward requires a change in mentality for the legislature.<sup>378</sup> This change in mentality should begin with gender-silent legislative drafting, in which the legislature is required to draft laws without gendered terms such as “mother” and “father,” and focus on creating laws that apply to all genders and couples equally.<sup>379</sup> Ultimately, Wyoming should live up to its self-proclaimed identity as the Equality State.

---

<sup>369</sup> See *supra* notes 348–68 and accompanying text.

<sup>370</sup> WYO. STAT. ANN. § 8-3-123(ii), (vi), (i) (2023).

<sup>371</sup> See *supra* notes 53–302 and accompanying text.

<sup>372</sup> § 35-1-410.

<sup>373</sup> Compare discussion *supra* notes 35–45, with *In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69 (showing how language matters on the ground for same-sex couples). But see Trachman, *supra* note 3.

<sup>374</sup> See Burton Caine, *Judicial Review—Democracy Versus Constitutionality*, 56 TEMP. L.Q. 297, 323 (1983).

<sup>375</sup> See *supra* notes 185–249 and accompanying text.

<sup>376</sup> See *supra* notes 250–302 and accompanying text.

<sup>377</sup> See *supra* notes 53–302 and accompanying text.

<sup>378</sup> See *supra* notes 303–69 and accompanying text.

<sup>379</sup> See *supra* notes 303–69 and accompanying text.