

Changing Families, Changing Times

Part I:

The Impact of *United States v. Windsor* on
Parenting Issues, Divorce, and Employment



SHAW

“Gays and lesbians getting married—haven’t they suffered enough?”

LGBT populations

(maps courtesy of www.LGBTMAP.org)



LGBT population density



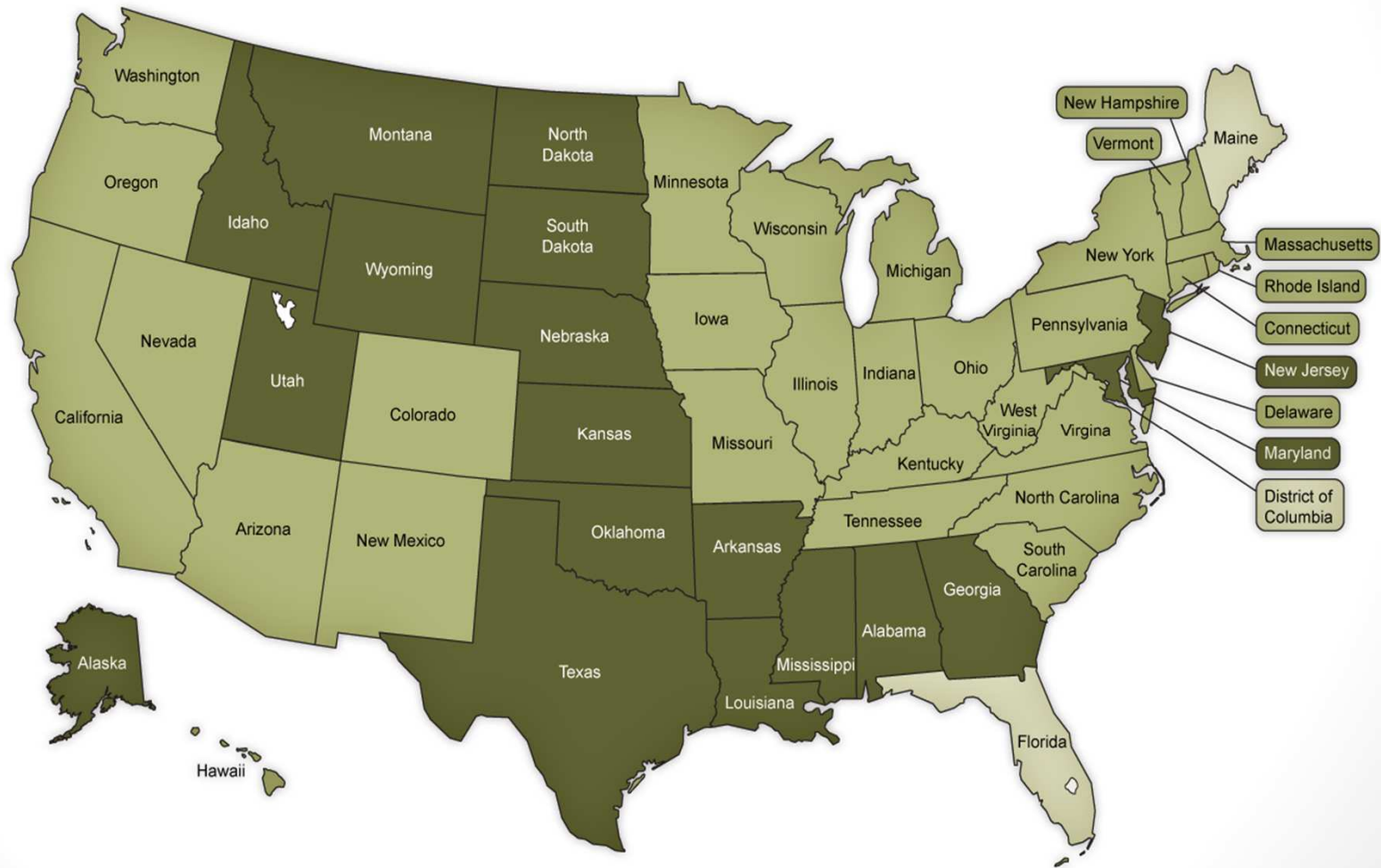
A diverse, increasingly visible population

- Total LGBT population = est. 9 million (Gary Gates, UCLA)
- Census 2012 self-reported same-sex couples
(Gary Gates, U.S. 2010 Census Snapshot, 2011)
 - 646,464 same-sex couples (not individual LGBT data)
 - ✦ 51% female couples; 49% male couples
 - 17% of the total are raising 220,000 children
 - ✦ 31% of self-identified spouses are raising 80,000 children
 - ✦ 14% of the unmarried partners are raising 140,000 children
 - ✦ Per 2008 GSS, ½ of lesbians and bisexual women, and 1/5 of gay and bisexual men, have had children

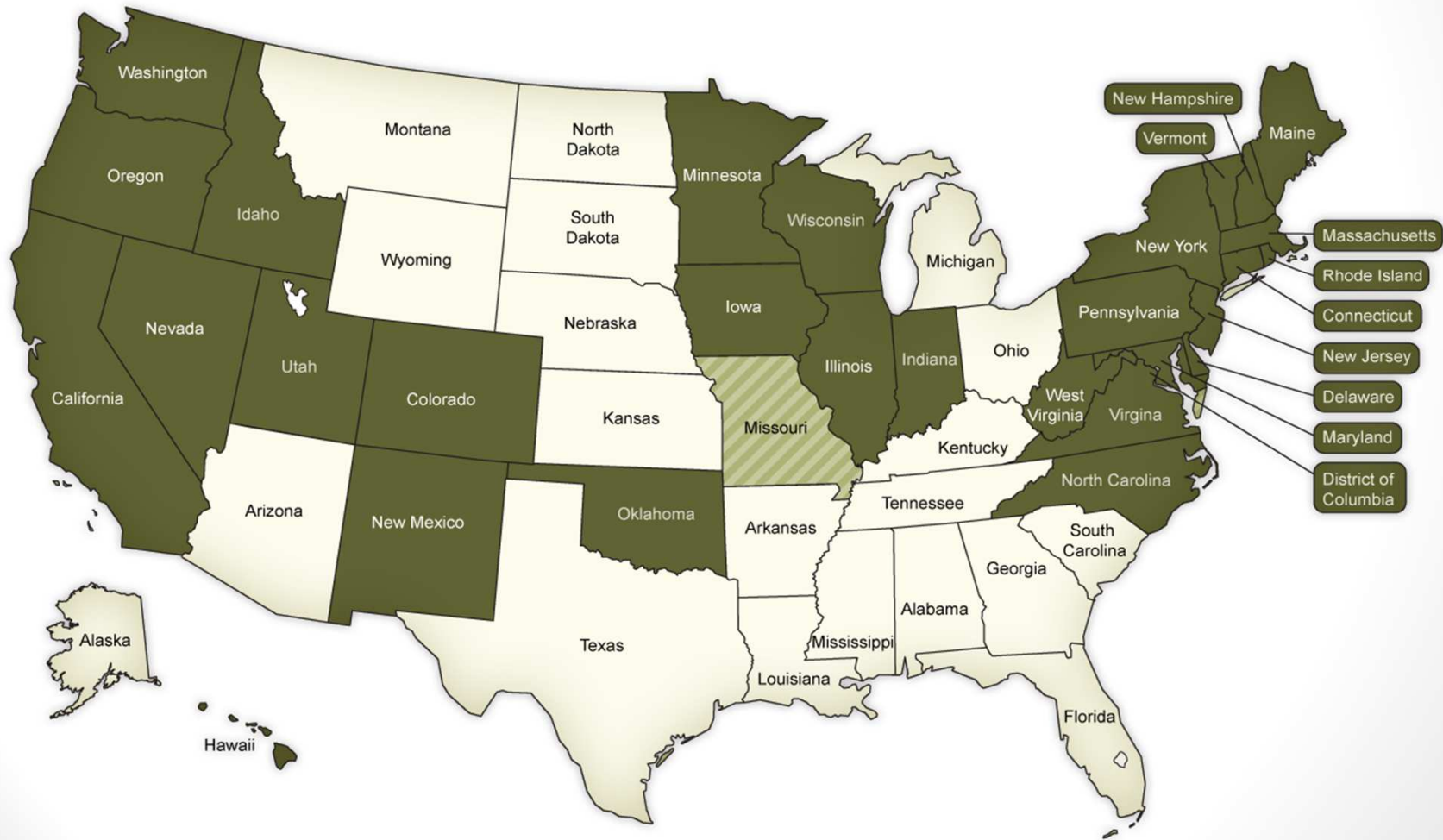
A diverse, increasingly visible population

- Per the US Census
 - Geographically diverse = in every congressional district
 - More same-sex parents living in the Southeast and other conservative areas. Why?
- 2009 American Community Survey data
 - Same-sex couples are racially and ethnically diverse
 - Greater numbers of people of color in same-sex couples are raising children:
 - African American 40% v. Latino/a 28% v. White 16%

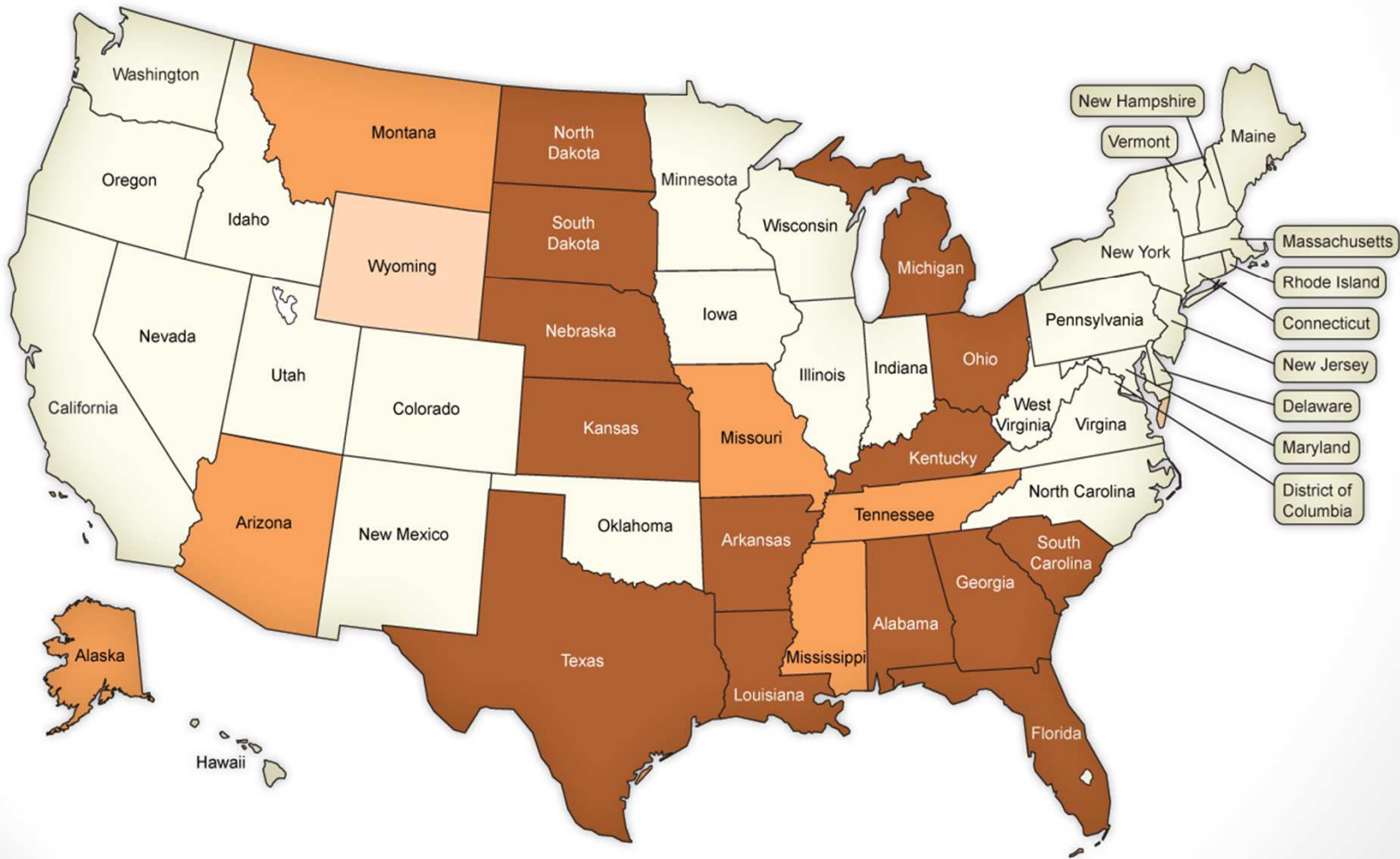
Same-sex couples raising children



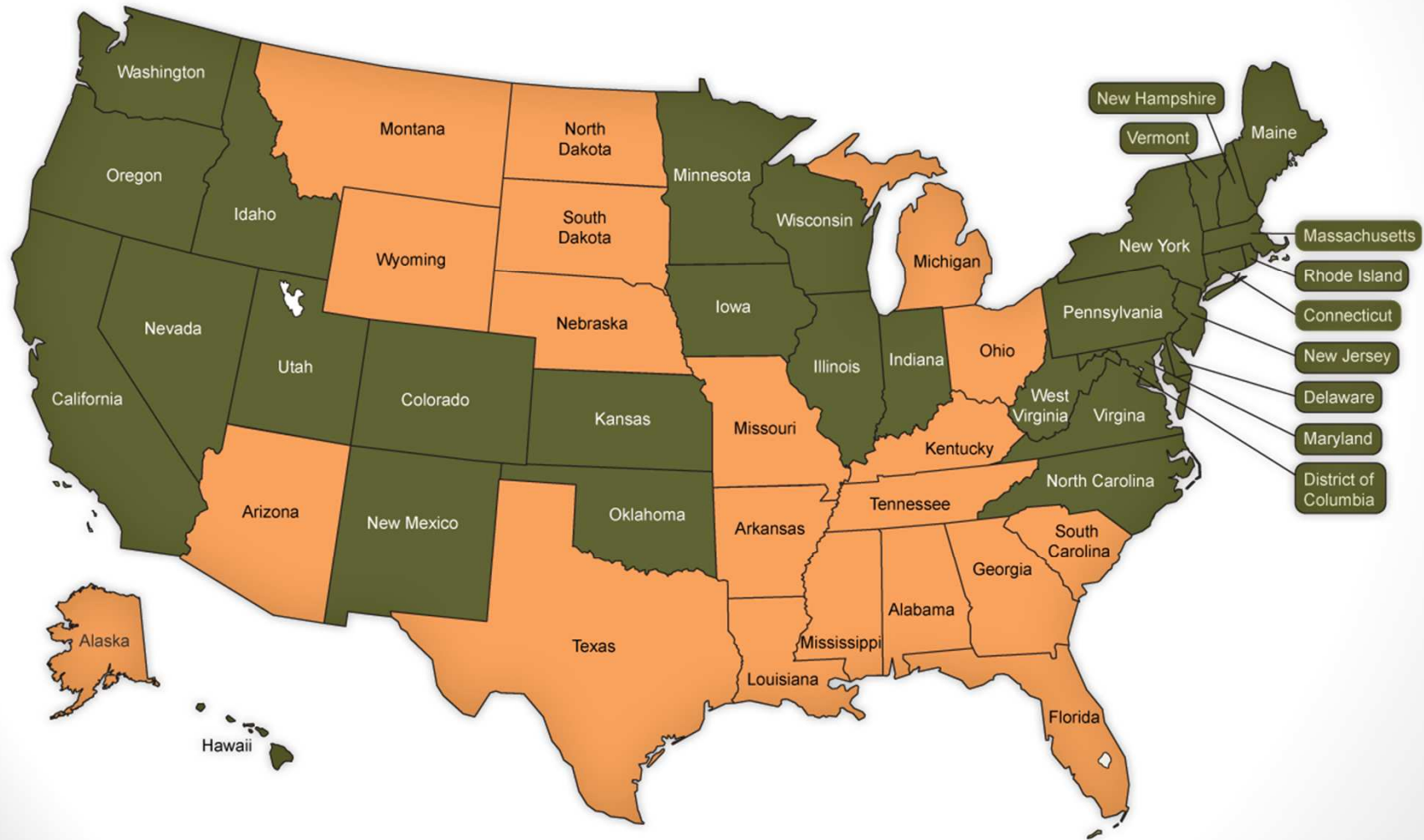
Same-sex relationship recognition



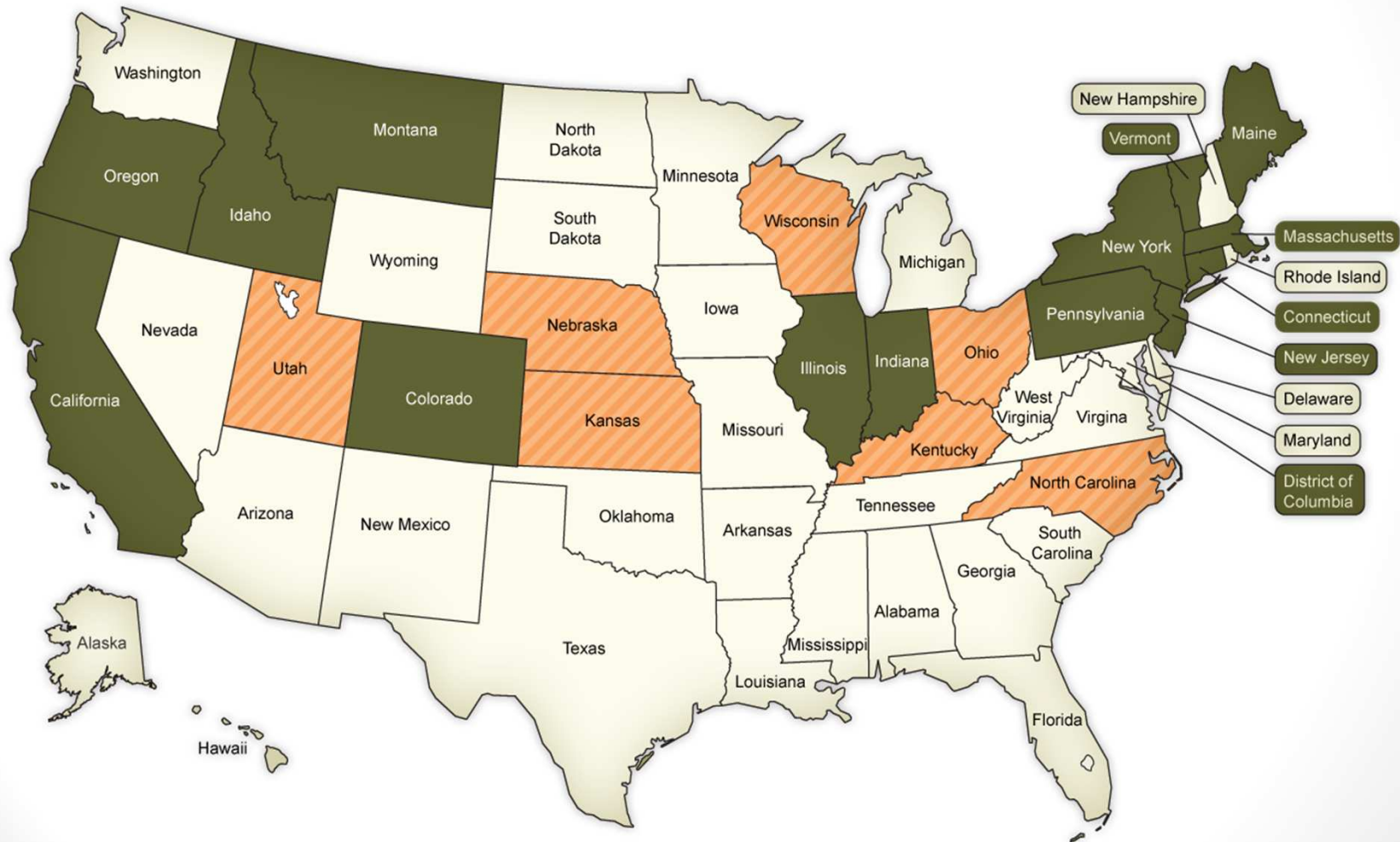
Same-sex relationship recognition bans



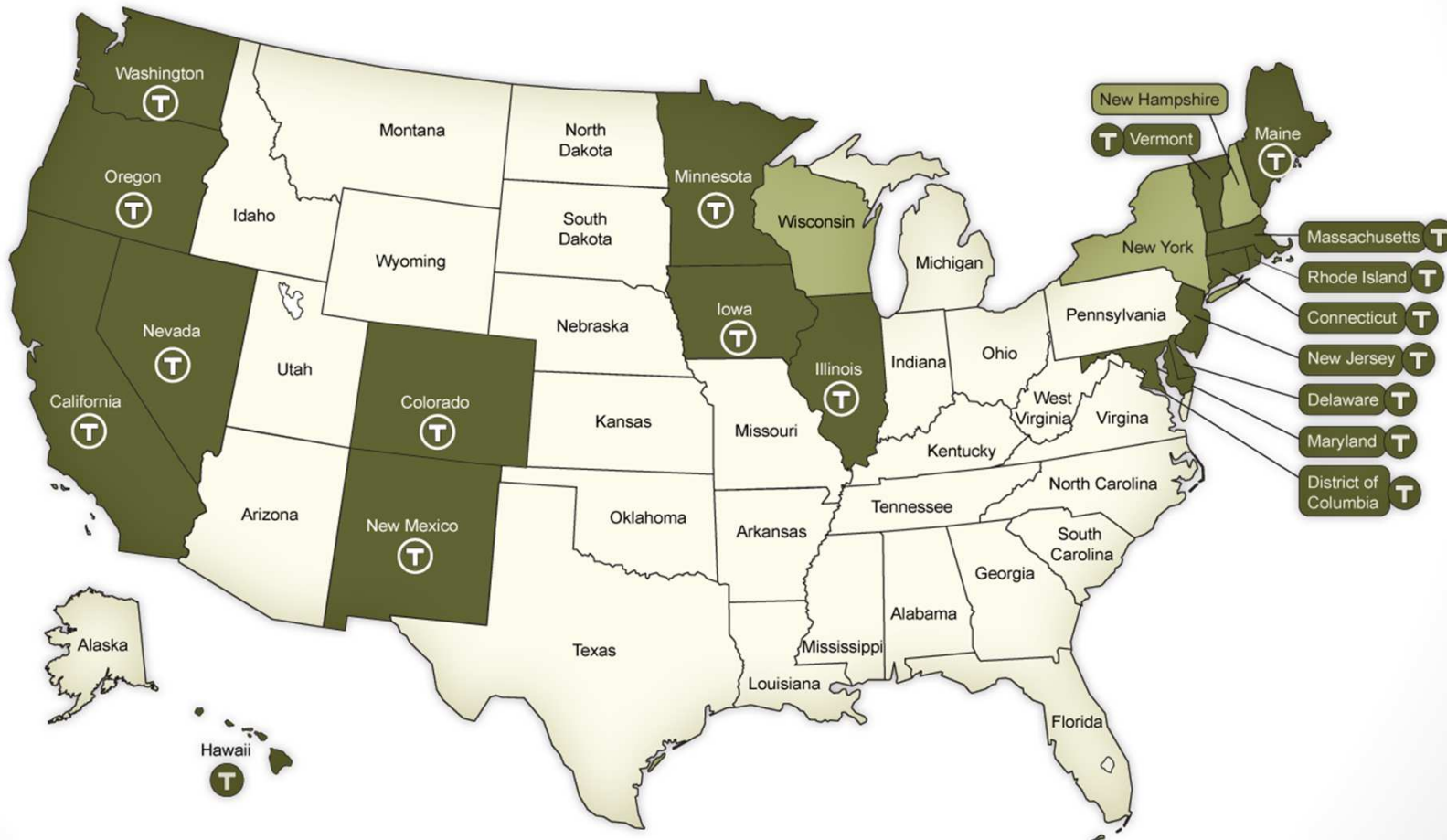
Stepparent adoption laws



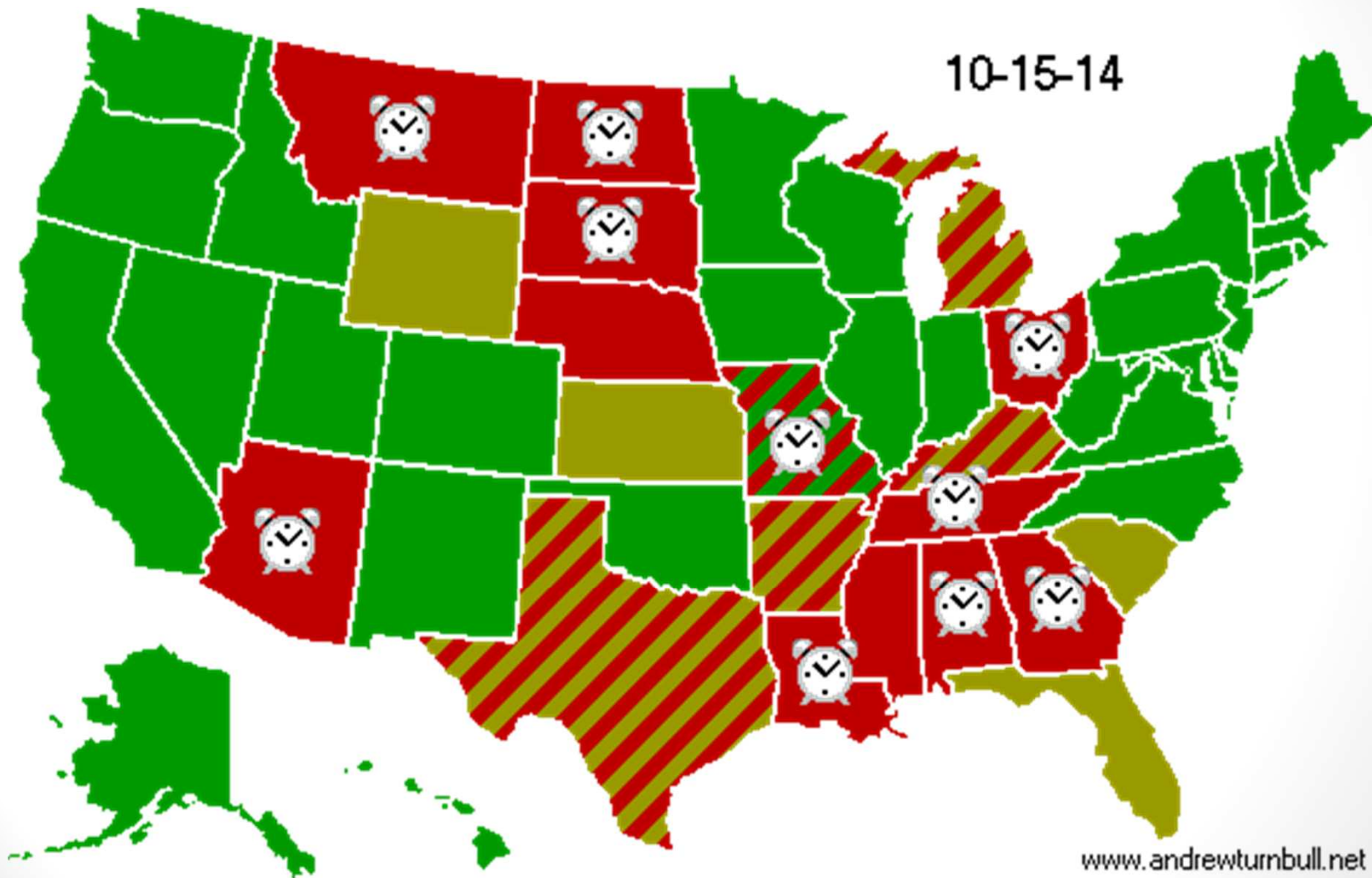
Second-parent adoption laws



Employment nondiscrimination laws



The Patchwork Marriage Map



Marriage map key (as of Oct 15, 2014)

 = Marriage equality

 = Marriage equality pending

 = Marriage banned by repealable statute

 = Marriage banned by state constitution

 = Ban in effect, but out-of-state marriages recognized.

 = Ban struck down but still in effect due to stay.



= Legal challenge to marriage ban in progress

What's happening now?

- Following the Supreme Court's denial of cert in cases from the Fourth, Seventh and Tenth Circuits, and then the Ninth Circuit's ruling in the Idaho and Nevada cases, and the Alaska decision of earlier this week, **30 states and DC** allow same-sex couples to marry.
- Estimated **61 percent** of LGBT Americans live in states that allow them to marry.
- Next: Arizona, Montana in the Ninth Circuit
- Sixth Circuit decisions pending
- Fifth Circuit briefing ongoing from Texas & Louisiana
- **Litigation underway against all state marriage bans**

Changing, confusing social expectations

- A diverse, increasingly visible population
 - Youth are coming out younger.
 - Same-sex couples are raising many children.
- Federal and state legal options for same-sex couples have been changing and confusing
 - Expectations elevated due to national media
- Significant public opinion shifts toward marriage
- Legal barriers due to backlash remain; psychological effects continue
- What's happening now? What's to come?

What's happening now?

- Federal “Defense of Marriage Act” (1996)
 - Section 2 (interstate) and Section 3 (federal)
 - *Windsor* = **end of Section 3**; Section 2 remains
- Post-DOMA, *Windsor* decision implementation
 - Fact sheets and DOJ & fed agency guidance on NAWJ website
 - Today and tomorrow = issues and discussion about:
 - What we know at this point, and what we don't know
 - How to manage unusual problems with limited precedent
 - Public expectations, past reliance, changing rules
 - Retroactivity issues and unfairness of prospective relief only
 - **MARRIAGE WITH LIMITED NONDISCRIMINATION PROTECTIONS ??**

Why does this matter to judges?

- Complex family law issues that Deborah will address
- Complex employment law issues that Denise will address
- Parties may be stressed, irrational due to discrimination at work, family rejection, surprise and anger due to unjust laws
 - Harms of the closet – at work, from relatives
 - Health consequences of stress
 - Diminished ability to be flexible, reasonable
 - Fear of reporting domestic violence or other abuse
 - Poverty and generally fewer assets due to lack of or diminished insurance, pensions, Social Security, spousal support.

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Figuring Out The Parties' Status

- Very unusual for a heterosexual family law litigant not to know if s/he is married
- Because of the complex history of relationship recognition around the country, confusion about status is much more common with lesbian, gay and trans people!

Hypothetical

- Adam and Bruce are a gay couple who have been together for 33 years and reside in San Francisco. They held a wedding in 1990, on their 10 year anniversary, to which they invited their friends and family. Rings and vows were exchanged at this time. When Vermont started allowing same sex couples to enter into Civil Unions in 2000, they flew to VT to admire the foliage and enter into a CU. When MA legalized marriage for same sex couples in 2004, they got married during a festive weekend in Provincetown. When CA made state-registered domestic partnerships equivalent to marriages in 2005, they registered with the Secretary of State's Office as domestic partners. When the CA Supreme Court ruled that same sex couples had a constitutional right to marry in 2008, they married again in the splendor of SF City Hall.
- Now, sadly, they are breaking up. What is their legal status?

Effect of Decisions on Married Same-Sex Couples with Children

- When considering parental status, must consider at least 4 factors:
 - Genetics
 - Procreative Intentions
 - Post-Birth Parenting Behavior
 - Marital/DP/CU Presumptions

Special Issues re Procreation Through ART

- Particularly relevant in LGBT community because committed couples frequently lack necessary gametes for procreation
- Law may be clear about how to “do it right,” but requires significant medical and legal intervention
 - Donor insemination with MD involvement
 - Surrogacy

3rd Party Involvement in Procreation

- Use of known 3rd parties much more common in LGBT community
- Can lead to difficulties in identifying/clarifying roles of multiple players (e.g. donor-daddies and surrogate-mommies)
- Critical importance of written agreements
 - Can provide “best evidence” of what the plan was and get everyone out of “he said/she said” land
 - Whether or not technically binding, may form basis for estoppel

Addressing Dissonance Between Intentions and Actions

- Cases get particularly complex where intentions don't match actions
 - Example: where a man is a statutory sperm donor but goes on to co-parent/or is not covered by sperm donor law but fully honors written contract
 - *Where there is a conflict between stated intentions of the adults and experiences of the children, how should this conflict be resolved?*

Effect of DOMA Decisions on Married Same-Sex Couples with Children

- **Assisted Reproduction**
 - Artificial Insemination: UPA? Which version?
 - Husband of woman being inseminated, who consents to insemination, treated as “natural” second parent
 - Does this apply to married same-sex couples?
- **Stepparent Adoptions:** should be equally available to all married couples

Effect of DOMA Decisions on Married Same-Sex Couples with Children

- Parentage
 - Marital Presumptions:
 - Conclusive
 - Rebuttable
 - Under state law, is even “conclusive” marital presumption rebutted by proof of non-paternity?
 - Lesbians & Gay men do have babies as a result of sex with someone of the opposite sex. Courts need to be ready to provide appropriate services to these families!

Parentage Issues in Dissolutions

- Disputes over legal parentage are more common in same-sex dissolutions
 - Largely because of prevalence of couples where only one has a bio connection to kids
 - “Of course I acted like you were our children’s 2nd parent while we were together, but we both knew you weren’t *really* a parent!”
- Lack of genuine belief in 2 parents often bleeds over into custody arena

Effect of DOMA Decisions on Married Same-Sex Couples with Children

- Despite marital presumptions and other favorable laws, same sex couples still need *Judgments* confirming parentage!
 - Full faith & credit clause does not apply to *status*
 - DOMA § 2 still in effect
 - Judgment of Marital Dissolution may be insufficient
 - Need specific findings and orders re: *parentage*
 - Better if sole basis is *not* marital law



"I have two mommies. I know where the apostrophe goes."

Vulnerability of Transgender Parents

- Transgender parents continue to be very much at risk in the family courts!
 - History of courts stripping trans parents of rights, denying them custody
 - Makes written agreements and confirming legal actions (e.g. adoptions, parentage actions) essential
 - *Education is much needed in all arenas of family court system!*

Vulnerability of Transgender Children

- Gender non-conforming children also very much at risk in our family courts
 - Issue of increasing importance, given prevalence of children expressing non-conforming gender identities at younger and younger age
 - Courts need to be diligent in assessing *cause vs effect* in custody disputes involving gender non-conforming children (e.g. is the child exhibiting behaviors because of conflict or is conflict a result of child's behaviors?)

Thank You!

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LGBT People & Religious Refusals -- families

- **Issue areas:**

- Assisted reproduction
- Adoption and foster care agencies
- SOCE (“sexual orientation change efforts” or so-called “reparative therapy”)
 - now banned for minors by new laws in CA, NJ and more states probably coming
- Exclusions from schools, day camps

LGBT People & Religious Refusals -- employment

- **Issue areas:**

- Title VII duty to accommodate employee religious needs but not:
 - co-worker harassment
 - refusal to serve
 - other “undue burdens” on employer
- *Hobby Lobby* re employment discrimination

Effect of *Windsor* on Employee Benefits Programs

- Health and Welfare Benefits
 - Group Health Plans
 - Cafeteria Plans
 - Health FSAs, HRAs and HSAs
 - Other benefits plans
- COBRA
- Retirement Benefits

Effect of *Windsor* on Employee Benefits Programs

- ERISA v. non-ERISA plans
- Federal employees v. private employees
- Interstate issues and the definition of spouse
- Mandated v. Non-mandated benefits

Effect of *Windsor* on Employee Benefits Programs

- Family and Medical Leave Act
 - Medical benefits during leave
- Employee Handbooks and Policies and Multi-State Employers
- Employee Mobility Issues

Effect of *Windsor* on Transgender Employees

- Expanded Definition of “Sex” Under Title VII
- Impact of Change In Marriage Recognition
- Benefits Eligibility For Transgender Spouses and Partners

Sex discrimination doctrine evolving re same-sex couples

- EEOC accepting charges re same-sex relationship discrimination
- *TerVeer v. Billington* (DDC 3/14)
 - TVII re sex stereotypes & religion
- *Hall v. BNSF* (D. WA 9/14)
 - TVII re health benefits for same-sex spouse

THANK YOU!

- Jennifer C. Pizer, Esq.
Lambda Legal
jpizer@lambdalegal.org
- Deborah H. Wald, Esq.
Wald & Thorndal, P.C.
deborah@waldlaw.net
- Denise M. Visconti, Esq.
 - Littler Mendelson
 - DVisconti@littler.com