# ARTICLES

## SYMPOSIUM: LEGAL PERSPECTIVES ON CONTEMPORARY LGBT ISSUES

# THE SHORT, PUZZLING(?) LIFE OF THE CIVIL UNION

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## I. INTRODUCTION

I can still recall sitting at the kitchen table one Friday morning in late December of 1999, setting out the New York Times next to me as I had my morning coffee, and then seeing—on page 1—that the Vermont Supreme Court had issued its long-awaited decision in *Baker v. State*.[1] In that case, the state's supreme court ruled, unanimously, that excluding gay couples from the rights and benefits of marriage violated the state's guarantee of equal protection. But the article went on to explain that the court had stopped just short of requiring the legislature to allow same-sex couples to marry. Remedying the inequity, the court stated, could be achieved by creating a parallel institution for same-sex couples, as long as it conferred "the *same* benefits and protections afforded by Vermont law to married opposite-sex couples."[2]

Like most people who follow this issue closely, I was surprised by the result. The expectations that the Vermont Supreme Court would become the first state supreme court to recognize its constitutional duty to provide marriage equality were high, but we realized that defeat was also possible. This strange, clever compromise hit our blind side. The state legislature, with the support and urging of then-Governor Howard Dean, took the fig leaf the court had offered, and passed into law a statute creating the civil union—a creature that, in name at least, was entirely new. Although many legislators would doubtless have preferred not to have done anything, there was also relief that the body was not being required to confer true marriage, including that word, on same-sex

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[1] 744 A.2d 864 (Vt. 1999). The *Times* article is Carey Goldberg, *Vermont High Court Backs Rights of Same-Sex Couples*, N.Y. TIMES, Dec. 21, 1999, at A1.

[2] *Baker*, 744 A.2d at 886 (emphasis added).

couples. As Governor Dean said at the time, same-sex marriage "makes me uncomfortable, the same as anybody else."[3]

The civil union attempted to do the impossible: grant same-sex couples all of the rights and benefits, and impose the same obligations, that are granted to married couples, but without the label. In the words of the statute: "Parties to a civil union shall have all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage."[4] But this union was pointedly not marriage, which, the legislators reminded us, continued to be restricted to "the legally recognized union of one man and one woman."[5]

Although many in the marriage equality community understood the political and practical reasons for the court's move—granting the legislature (and, let's face it, the court itself) political cover and giving people time to become acclimated to the notion that the unions of same-sex couples were worthy of celebration, not derision—we nonetheless believed, with concurring and dissenting Justice Denise Johnson, that the court had failed to discharge its constitutional duty to confer true equality on the couples who had come before it.[6] While others who support marriage equality might disagree with the assessment that the court had capitulated to practicalities and pressure, to me the conclusion was clear: equality is equality. Labels matter. Granting benefits while withholding the title "marriage" leaves only *pure* discrimination.

Almost exactly ten years later, I would say that I was: right and wrong. Right, I believe more than ever, in the position that equality admits of no clever compromise, and that the court had an institutional responsibility to follow the logic of equality to its conclusion. But perhaps wrong in my belief that, as a practical matter, the other moving parts of government should be left out of the process of deliberation and learning; progressive decisions advance the arguments for full marriage equality and perhaps none more so than *Baker v. State*.

Indeed, Vermont itself provides the clearest example of this movement. This

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[3] Goldberg, *supra* note 1. For a fascinating account of the politics, journalism, and citizen involvement in the process that led from the court's decision to the enactment of the civil union law, see David Moats, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004).

[4] VT. STAT. ANN. tit. 15 § 1204(a) (2009).

[5] VT. STAT. ANN. tit. 15 § 1201(4) (repealed 2009). This subsection of the statute was repealed in early 2009 when the state legislature extended the right to marry to same-sex couples. *See* Jason Szep, *Vermont Becomes 4th U.S. State to Allow Gay Marrriage*, REUTERS, Apr. 7, 2009, http://www.reuters.com/article/topNews/idUSTRE53648V20090407.

[6] *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part). I wrote admiringly of Justice Johnson's opinion in John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447 (2001). For a thoughtful article that acknowledges the court's courage and the practical benefits of the decision for many same-sex couples, see Barbara J. Cox, *But Why Not Marriage?: An Essay on Vermont's Civil Unions Law, Same-sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113 (2000).

past spring, the legislature enacted—over the governor's veto, no less—a full marriage equality law.[7] Ten years' experience with the civil union made clear that these separate-but-equal entities could not confer true equality. A commission's report to that effect ratified what most already knew.[8] Similarly, New Hampshire—never under court order of any kind respecting marriage equality—moved within a few years from civil union to marriage, all through the legislature.[9] In both California and Connecticut, statutes that conferred equality in all but name were struck down by those states' supreme courts.[10]

This article takes the position that civil unions lead inexorably to full mar-

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[7] *See* Szep, *supra* note 5. The law went into effect on September 1, 2009. *See* Editorial, *Vermont Equality*, N.Y. TIMES, Apr. 7, 2009, *available at* http://www.nytimes.com/2009/04/08/opinion/08wed3.html?scp=28&sq=gay%20marriage%20law%20takes%20effect%20in%20vermont&st=cse.

[8] *See* REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION (Apr. 21, 2008), *available at* http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf. For what it acknowledged were political reasons, the Commission declined to make a recommendation as to whether the state should allow same-sex marriages. But its findings, *id.* at 26–28, and recommendations clearly support this step. The final substantive paragraph of the report begins with this sentence: "The Commission recommends that Vermont take seriously the differences between civil marriage and civil union in terms of their practical and legal consequences for Vermont's civil union couples and their families." *Id.* at 29.

[9] Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, *available at* http://www.nytimes.com/2009/06/04/us/04marriage.html?sq=new%20hampshire%20civil%20%20union%20to%20gay%20marriage&st=cse&adxnnl=1&scp=11&adxnnlx=1254668659-UgIiBy9FpNbRtkiY/FBwoA; Pam Belluck, *Civil Unions Gain Ground as a Governor Vows Action*, N.Y. TIMES, Apr. 20, 2007, at http://query.nytimes.com/gst/fullpage.html?res=9807E7D71F3FF933A15757C0A9619C8B63&scp=4&sq=new%20hampshire%20civil%20%20union%20to%20gay%20marriage&st=cse.

[10] In June 2008, the California Supreme Court decided *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), holding that state constitutional guarantees of equal protection and the fundamental right to marry required that marriage licenses be issued to same-sex couples. After the case was decided, the California voters narrowly approved Proposition 8, which amended the state constitution to declare that marriage was the union of a man and a woman, but left the prior domestic partnership law (that granted all rights of marriage while withholding the benefits) intact. Jessicca Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, *available at* http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story. In *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court upheld Prop 8 over the objection that it constituted an impermissible revision to the state's constitution, rather than an amendment. Same-sex marriages entered into before Prop 8 went into effect, however, remained valid. *Id.* at 119–22. In *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), the Connecticut Supreme Court ruled that the state's civil union law ran afoul of the constitutional command that similarly situated couples be given the same rights, and similarly required that marriage licenses be issued forthwith.

riage equality,[11] and, perhaps more surprisingly, to the use of a heightened standard of review for assessing claims of sexual orientation discrimination generally. I develop this point largely through analysis of the language used by the California Supreme Court in *In re Marriage Cases,* and by the Connecticut Supreme Court in *Kerrigan v. Commisioner of Public Health.* These cases are significant for many reasons, not the least of which is that these two state supreme courts, writing only months apart, became the first to employ a heightened level of scrutiny to claims of discrimination based on sexual orientation. In both states, same-sex couples already enjoyed all of the state-conferred substantive rights of marriage—but without the label.

I argue that legislatures that go this far embolden courts not only to do away with the titular vestige of discrimination, but also to bump up the equal protection standard as applied to sexual orientation. Moreover, once this vital step is taken, other state courts will follow suit even without a history of relationship recognition. The Iowa Supreme Court's decision in *Varnum v. Brien*[12] was the first, but one should expect others to follow.

Until *In re Marriage Cases* was handed down, courts had viewed sexual orientation discrimination as requiring only so-called "rational basis" analysis, a highly deferential standard that almost always results in upholding the challenged legislation.[13] Once the important—and long overdue—step of applying

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[11] I use the term "civil union" in a shorthand way here, to describe the legal entity that has to date always conferred all of the substantive state rights that are conferred to married couples, but without the label. Once the Vermont legislature adopted that name, it became standard for states in the Northeast. Over time, New Hampshire, Maine, Connecticut and New Jersey adopted civil unions, as well. California's "marriage-in-all-but-name" law, by contrast, creates a "domestic partnership." Similar laws are now in effect in Oregon, Nevada, the District of Columbia, and Washington. But the domestic partnership has not consistently conferred all of the benefits of marriage. For a good, concise summary of the civil union and domestic partnership laws as they existed in June 2008, see *In re Marriage Cases*, 183 P.3d at 398 n.2. California's law expanded the rights of same-sex couples over time. *See id.* at 407–18. The same is true in Washington. Wisconsin, Colorado, and Hawaii further complicate the nomenclature picture, with limited rights and benefits going by different names: domestic partnerships (Wisconsin); domestic beneficiaries (Colorado); and the awkwardly named reciprocal beneficiaries (Hawaii). (One might even argue that this confusing proliferation of labels itself demonstrates that true marriage equality requires that label.) Nevada just joined this "limited rights" group, as the law granting many of the benefits of marriage went into effect on October 1, 2009—despite a state constitutional amendment banning same-sex marriages. Ed Vogel, *Couples Delight as Law Takes Effect*, LAS VEGAS REV.-J., Oct. 1, 2009, at 6B.

[12] 763 N.W.2d 862 (Iowa 2009).

[13] At least since 1985, when Justice Brennan's dissent from the denial of a certiorari petition was based, in part, on his view that sexual orientation should constitute a suspect class for equal protection purposes, Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985), courts had been urged to apply a higher standard of review in cases involving discrimination on that basis, but no state supreme court had accepted the argu-

stricter scrutiny to such cases was taken, it became easier for other courts to follow suit. Thus, the Connecticut Supreme Court, in *Kerrigan,* relied on *In re Marriage Cases* to become the *second* court to require a higher level of government justification for sexual orientation discrimination.[14] Both courts saw that such discrimination was of pervasive and long-standing nature and was also without connection to the abilities of gay and lesbian citizens to contribute equally to society.[15] That recognition, in turn, led in a short, straight line to the Iowa Supreme Court's dramatic—and unanimous—holding in *Varnum v. Brien*.[16] There, in a state *without* a history of relationship recognition, the court followed California and Connecticut in declaring that the guarantee of equal protection requires a heightened degree of scrutiny in sexual orientation cases, and that, under such a standard, marriage equality is required.

The remainder of this Article proceeds as follows. In Part II, I discuss federal and state precedent that began to recognize that claims of sexual orientation discrimination (among others), required a higher level of scrutiny than is typically associated with the deferential "rational basis" standard. These decisions, though, did not predictably lead to courts using greater scrutiny when deciding marriage equality cases. Since the standard continued to be called "rational basis," those courts uncomfortable with the claims before them could simply retreat to an earlier understanding of the test. Thus, with the exception of the Massachusetts Supreme Judicial Court's holding in *Goodridge v. Department of Public Health*,[17] same-sex couples continued to lose.

Part III discusses the recent trio of cases that have applied a heightened level of scrutiny to claims grounded in sexual orientation discrimination; not surprisingly, all three courts that decided these cases also found that marriage equality is required under their states' constitution. With emphasis on *In re Marriage Cases*, I make the argument that states that have gone so far as to grant equality to same-sex couples in all but name were the likeliest ones to recognize that, under application of the standard factors used to determine whether a group should be deemed a suspect (or quasi-suspect) class, sexual orientation qualifies for either strict or intermediate level scrutiny.

Moving towards the Conclusion, I then suggest that, once courts have discerned and articulated the discrimination underlying the denial of marriage

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ment. As I establish in Part II, though, by the time *In re Marriage Cases* was decided, it had become more difficult to predict a result based solely on the level of scrutiny the courts used. The sexual orientation cases are largely responsible for the practical conflation of the levels of constitutional scrutiny.

[14] *In re* Marriage Cases, 183 P.3d at 443; *Kerrigan*, 957 A.2d at 476.

[15] As Part II explains in more detail, there are (at least in name) three categories of scrutiny: rational basis anlaysis; intermediate scrutiny; and strict scrutiny. Both *Kerrigan* and *Varnum* differ from *In re Marriage Cases* in using intermediate scrutiny. For reasons I will explain, I believe that this standard is the best fit.

[16] 763 N.W.2d at 872.

[17] 798 N.E.2d 941 (Mass. 2003).

equality, other victories—in courts, in legislatures, and eventually at the polls—will follow.

## II. FOREGROUNDING HEIGHTENED SCRUTINY

Despite folklore to the contrary, breaking dramatic new ground is difficult for courts. By nature, jurists are largely incrementalists, constructing precedent in a series of small steps, and jealously guarding the credibility on which they rely. This point is dramatically illustrated by both state and federal equal protection analysis as applied to sexual orientation discrimination.

In 1996, in *Romer v. Evans*, the United States Supreme Court struck down an amendment to the Colorado state constitution that would have walled gays and lesbians off from the political process.[18] The amendment would have rescinded existing protection and, dramatically, prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians . . . ."[19]

Beginning with the "unheeded" dissenting language of Justice Harlan in *Plessy v. Ferguson*,[20] "that the Constitution 'neither knows nor tolerates classes among citizens,' "[21] Justice Kennedy wrote for the *Romer* majority in sweeping terms about the disabilities visited on gays and lesbians, but on no one else. Such animus, the Court wrote, is hardly the kind of "legitimate" interest that is necessary to support even those laws challenged under rational basis analysis.[22] Thus was the Court able to avoid the question of whether sexual orientation discrimination required a higher level of scrutiny.

Hardly were the pixels fixed on *Romer* when commentators began to opine that the Court had shown signs of departing from the rigid, tripartite classifications it had developed for resolving equal protection claims: strict scrutiny for cases involving fundamental rights or suspect classifications (primarily race, but also national origin and religion); intermediate scrutiny (created for gender discrimination and legitimacy cases); and rational basis analysis for all other classifications.[23] As Justice O'Connor later noted in her concurring opinion in *Lawrence v. Texas*, *Romer* was not the only evidence of this trend, but it became most visible, and most discussed, after that.[24]

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[18] Romer v. Evans, 516 U.S. 620 (1996).

[19] *Id.* at 624 (1996) (summarizing Amendment 2 to the Colorado Constitution, COLO. CONST. art. II, § 30(b), *amended by* COLO. CONST. amend. 2).

[20] 163 U.S. 537 (1896).

[21] *Romer*, 517 U.S. at 623 (*quoting* Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting)).

[22] *Id.* at 631.

[23] *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 59–61 (1996); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 619–22, 628–34 (2000).

[24] Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring). As far back as 1973, the Court was less deferential under rational basis review than might have been ex-

Shortly after *Romer* was decided, this erosion of the rigid category distinctions was pointedly relied on by the Vermont Supreme Court in *Baker v. State*,[25] where the court, over the strong and thoughtful objection of Justice Dooley,[26] sidestepped the difficult question of whether sexual orientation discrimination should be subjected to a higher level of equal protection scrutiny by simply doing away with the categories altogether. Hereafter, the court would use a more general balancing test, whereby it would decide whether "a classification that includes some members of the community . . . but excludes others . . . is reasonably necessary to accomplish the State's claimed objectives."[27] Perhaps the Vermont Supreme Court was only doing expressly what the U.S. Supreme Court had been doing by implication. Whatever the test used, though, the *Lawrence* decision clearly "stand gay and lesbian people up as citizens entitled to respect, dignity, and autonomy . . . ."[28]

Rather than follow the *Baker* approach, the U.S. Supreme Court in *Lawrence*, which struck down a Texas law criminalizing intimate sexual conduct between members of the same sex, continued to be coy about the standard by which the law was evaluated. Although the decision was pointedly based on fundamental rights analysis rather than equal protection, the Court made clear that its conclusion would have been the same under equal protection; substantive due process was chosen because it was *broader*, and because the Court wanted to eliminate any suggestion of permissible discrimination that a narrower focus would have left behind.[29]

Volumes have been written in efforts to discern the standard of review that the *Lawrence* court used.[30] It does seem clear to me that in both substance and

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pected. Justice O'Connor discusses two cases in making this point. In *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), the Court struck down a law that punished an entire household by denying all members food stamps where any person living there was unrelated to the others, on the grounds that the law had been enacted to discriminate against "hippies." In *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court invalidated a requirement that a home for the mentally disabled obtain a special use permit that was not required for other groups, including fraternities. In both cases, as in *Romer*, the Court saw through the asserted rational bases to uncover discrimination against a particular group. Thus, the Court struck down the laws even though the group in question was not considered a suspect class that would trigger heightened scrutiny.

[25] 744 A.2d 864 (Vt. 1999).

[26] *Id.* at 889–97 (Dooley, J., concurring).

[27] *Id.* at 878. I read the statement as including an unstated requirement that the objective also be legitimate and not based on the kind of discriminatory animus that the U.S. Supreme Court unearthed in *Romer*. Given the Vermont court's invocation of *Romer* and its treatment of the state's asserted reasons for denying the benefits of marriage to same-sex couples, this seems to me a reasonable reading.

[28] John G. Culhane, Lawrence-*ium: The Densest Known Substance?*, 11 WIDENER L. REV. 259, 265 (2005).

[29] *Id.* at 574–75.

[30] *See, e.g.*, Symposium, *Equality, Privacy and Lesbian and Gay Rights After* Lawrence

tone, the Court was using something other than rational basis analysis, and subsequent cases have shown that *Lawrence* has undoubtedly contributed to the implied raising of the bar for laws grounded in sexual orientation discrimination.

Also of direct significance here is Justice O'Connor's concurring opinion, in which she argues that the statute violates the Equal Protection Clause as it criminalized only certain sexual acts when performed by two people of the same sex, but did not criminalize the same sexual acts when performed by two people of the opposite sex.[31] To Justice Scalia's dissenting dismay,[32] Justice O'Connor straightforwardly states what the Court had *actually* been doing in equal protection cases involving the unequal treatment of targeted—but not "suspect"—groups: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[33]

Thus, in both state and federal case law, courts have lately been dancing around the issue of how to treat discrimination grounded in sexual orientation. Although, generally, most courts are too conservative to simply recognize that laws constructed on the basis of sexual orientation target a suspect class, most are also practical enough to see that "old school" equal protection analysis is too deferential.

The problem, of course, is that this "more searching form of rational basis" is subject to the whims of courts hearing equal protection challenges to statutes discriminating on the basis of sexual orientation, and can even safely be ignored. Without a clear signal from the U.S. Supreme Court, courts have been inconsistent in their approach, with most falling back on the least questioning form of rational basis analysis. On one hand, a heightened standard in practice, though not in name—was dramatically in evidence in *Goodridge v. Department of Public Health*, decided shortly after *Lawrence* was decided. In that ground-breaking decision, the Massachusetts Supreme Judicial Court ostensibly

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v. Texas, 65 OHIO ST. L.J. 1057 (2004); Symposium, *Gay Rights after* Lawrence v. Texas, 88 MINN. L. REV. 1021 (2004); Lawrence v. Texas *Symposium*, 46 S. TEX. L. REV. 245 (2004); Arthur S. Leonard, *Thoughts on* Lawrence v. Texas, 11 WIDENER L. REV. 171 (2005); Symposium, *Privacy Rights in a Post-*Lawrence *World: Responses to* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 263 (2004). Judicial decisions reveal similar disagreement over the meaning and reach of *Lawrence*. *Compare, e.g.*, Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental liberty interest from [*Lawrence*,] whose language and reasoning are inconsistent with standard fundamental-rights analysis . . . ." ) *with* United States v. Marcum, 60 M.J. 198, 205 (2004) ("What *Lawrence* requires is searching constitutional inquiry.").

[31] Lawrence v. Texas, 539 U.S. at 579–85 (O'Connor, J., concurring).

[32] *See id.* at 601 (Scalia, J., dissenting) ("Justice O'Connor simply decrees application of 'a more searching form of rational basis review' to the Texas statute.").

[33] *Id.* at 580 (O'Connor, J., concurring).

employed rational basis analysis—under both due process and equal protection—in holding that the state had no legitimate basis for preventing same-sex couples from marrying.[34] It is beyond my purposes here to canvass the reasons for the court's decision; it will suffice to note that the court preferred to take its cue from the Supreme Court's line of cases that used a kind of heightened rational basis analysis, rather than straightforwardly acknowledging that sexual orientation discrimination should be subjected to a high level of scrutiny.

Although the Massachusetts court reached its pro-marriage equality conclusion based on rational basis analysis, the perils of this approach soon became evident in decisions by other state supreme courts. In New York[35] and Washington[36] the highest courts decided that the states indeed had a rational basis—encouraging "responsible procreation"[37]—to restrict marriage rights to opposite-sex couples.[38] Although this analysis completely misses the central point of the equal protection guarantee,[39] the results in these cases graphically demonstrate the risk of rational basis analysis: If the court can find some reason it deems plausible for the exclusion (even if it's a reason that the legislature did not in fact consider), then the presumption of anti-gay animus that *Romer* and *Lawrence* relied on to upend the statutes in question disappears, and deference to the legislature is at its highest.[40]

The *Hernandez* majority answered the question of whether a heightened

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[34] *Id.*

[35] Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[36] Andersen v. King County, 138 P.3d 963 (Wash. 2006). The Maryland Supreme Court also upheld the state's marriage statute that discriminated on the basis of race. However, the court's analysis focused mostly on sex discrimination because Maryland has an Equal Rights Amendment prohibiting discrimination on this basis. Conaway v. Deane, 932 A.2d 571 (Md. 2007).

[37] *Andersen*, 138 P.3d at 991 (Johnson, J., concurring).

[38] *Hernandez*, 855 N.E.2d at 21–22; *Andersen*, 138 P.3d at 982–84.

[39] Chief Justice Kaye of the New York Court of Appeals made this point effectively in her dissenting opinion in *Hernandez*, 855 N.E.2d at 27 (Kaye, C.J., dissenting) ("Correctly framed, the question before us is not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any legitimate basis for *excluding* those who are not covered by the law.").

[40] One other case should be mentioned here, if only for the sake of completeness. In *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), the New Jersey Supreme Court took the *Baker* approach, holding that denying the rights and benefits of marriage to same-sex couples violated the state's guarantee of equality. But New Jersey has long followed its own path in equal protection cases: "When a statute is challenged on [equal protection grounds]," the court has weighed "three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." *Id.* at 212. Applying that standard, the court surgically separated the benefits of marriage from the title, and then held that the *residual* rights of the same-sex couples at stake—to have their relationships called "marriage"—was not important enough (to be blunt) to tip the balance of the factors in their favor. *See id.* ("The test [applied to equal

standard should apply in an embarrassingly circular way. According to the court, although such scrutiny might be appropriate in "some cases" (which the court did not define), it does not apply to the review of "legislation governing marriage and family relationships" because "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best."[41] Well, *we know* what the state's (asserted) interest is; the question the court leaves unanswered is whether that asserted interest might in fact be a disguise for anti-gay animus—the kind of animus that, in turn, forms a central justification for heightened scrutiny.[42] Once that issue was briskly disposed of, the court spent less than a page brushing aside the contention that the exclusion of same-sex couples from marriage did not have even a rational basis, using a pre-*Romer* standard that was "highly indulgent towards the State's classifications."[43] Expressing the point even more starkly, Justice Graffeo stated in his concurring opinion: "Given the extremely deferential standard of review, plaintiffs cannot prevail unless they establish that *no conceivable legitimate interest* is served by the statutory scheme."[44]

In a state without relationship recognition, this deference is not surprising. Yet it is not inevitable, either. In her influential dissent,[45] Chief Justice Kaye first disposed of the majority's assertion that higher scrutiny could not apply in cases involving marriage and family relationships.[46] She then straightforwardly showed how and why sexual orientation discrimination called for heightened scrutiny, using the factors set forth by the U.S. Supreme Court: a history of discrimination against the group; whether the trait is related to the individual's ability to contribute to society; and the group's (relative) political powerless-

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protection claims] is a flexible one, measuring the importance of the right against the need for the government restriction.").

[41] *Hernandez*, 855 N.E.2d at 11.

[42] The Connecticut Supreme Court later said that the *Hernandez* "approach is untenable because it turns the suspectness inquiry on its head: any group that is deemed to be entitled to heightened judicial protection . . . has the right to have *all* statutes that discriminate against its members subjected to heightened scrutiny." Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 471 (Conn. 2008).

[43] *Hernandez*, 855 N.E.2d at 12.

[44] *Id.* at 21 (Graffeo, J., concurring) (emphasis added).

[45] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 451 (Cal. 2008) (citing Chief Justice Kaye's dissent in *Hernandez*, 855 N.E.2d at 30, with approval); *Kerrigan*, 957 A.2d at 471–73 (agreeing with Chief Justice Kaye's argument that sexual orientation discrimination be evaluated under a heightened scrutiny analysis).

[46] "Correctly framed, the question before us is not whether the marriage statutes . . . benefit those they are intended to benefit . . . but whether there exists any legitimate basis for *excluding* those who are not covered by the law." *Hernandez*, 855 N.E.2d. at 27 (Kaye, C.J., dissenting).

ness.[47] Her decision accurately predicted the later approaches by the courts in *In re Marriage Cases*, *Kerrigan*, and *Varnum*.

The disagreement between the majority and dissenting opinions in New York was recapitulated less than three weeks later, when the Washington Supreme Court also used rational basis analysis in upholding its Defense of Marriage Act, restricting marriages to male-female unions.[48] Tellingly, the court began by squarely stating its heavy reliance on precedent disfavoring same-sex marriages. Then, mostly because of an idiosyncratic issue involving the Washington State Constitution's privileges and immunities clause, the court stated that it would follow federal equal protection analysis rather than its own, independent judgment. Next, in a blindingly fast and non-analytical survey of federal and state cases, the majority simply cast its lot with those courts holding that sexual orientation is not a suspect class.[49] The court then swept aside *Romer* and *Lawrence*, never mentioning Justice O'Connor's recognition that laws targeting a "politically unpopular group"—pointedly, for her, gays and lesbians—had been met with a more skeptical eye. Then, as did the New York Court of Appeals, the Washington Supreme Court applied a rational basis test that was really no test at all: "the court may assume the existence of any conceivable set of facts that could provide a rational basis for the classification."[50] As Justice Fairhurst noted in dissent, the court "focuses too greatly on the deference afforded by rational basis review and in doing so, conducts no real analysis at all."[51]

The dissenting justices were not willing to take the step New York's Chief Justice Kaye recommended—to declare sexual orientation a suspect class—but did not feel that step necessary. Taking seriously the idea of "rational basis with bite," these justices, especially Justice Bridge, provided exhaustive and

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[47] *Id.* at 28.

[48] The state's Defense of Marriage Act both amends and adds to Washington's existing code. Relevant sections are set forth in *Andersen v. King County*, 138 P.3d 963, 970 (Wash. 2006) (quoting WASH. REV. CODE § 26.04.010 (1998), amended to describe marriage as valid only "between a male and a female," and WASH. REV. CODE § 26.04.020(3) (1998), stating that a "marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited" under the sections outlawing same-sex unions).

[49] The court stated that the plaintiffs had not made the case that sexual orientation was immutable, and that immutability is a requirement for heightened scrutiny. *Andersen*, 138 P.3d at 974. But it is not, as discussed more fully in the analyses of *In re Marriage Cases*, *Kerrigan*, and *Varnum*. *In re* Marriage Cases, 183 P.3d at 442–43; *Kerrigan*, 957 A.2d at 427–28; *Varnum*, 763 N.W.2d at 892–93. The point was also effectively disputed by Justice Bridge, in dissent. *Andersen*, 138 P.3d at 1032 n.5 (Bridge, J., dissenting).

[50] *Andersen*, 138 P.3d at 980 (citing Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356, 367 (2001); Heller v. Doe by Doe 509 U.S. 312, 320 (1993); Seeley v. State, 940 P.2d 604 (Wash. 1997)).

[51] *Id.* at 1016 n.16 (Fairhurst, J., dissenting).

compelling evidence of the animus that motivated the enactment of the state's Defense of Marriage Act,[52] and then circled back to *Romer* and other state and federal cases for the simple proposition that "[a]nimus is per se irrational and cannot support a statutory classification."[53]

The upshot of these earlier marriage equality cases is that, under rational basis analysis, courts have little trouble justifying their conclusions, and results will be close. While Massachusetts ruled for the same-sex couples by a 4-3 margin, with a nod towards the *Romer* and *Lawrence* approach, the remaining courts went the other way by similarly close votes.[54]

All of these marriage equality cases were decided in states without substantially equivalent relationship recognition for same-sex couples. As I hope to demonstrate in Part III, legislative creation of "marriages-in-all-but-name" has changed the way courts view equal protection challenges based on sexual orientation discrimination in those states, and beyond. And the change is probably permanent.

## III. EQUAL PROTECTION AND DISCRIMINATION "IN NAME ONLY"

The importance of *In re Marriage Cases* has been somewhat occluded by subsequent developments—specifically, the passage of Proposition 8[55] and the court's retreat from its bold pronouncements in upholding that voter initiative.[56] But what may come to be regarded as its signal achievement has not been erased. The point emphasized in the Introduction bears repeating here: The California Supreme Court became the first state high court to recognize that sexual orientation is a suspect class for the purposes of equal protection analysis. Legislative classifications made on that basis are therefore subject to strict scrutiny and unlikely to survive.[57] What led the court to this result, which

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[52] *Id.* at 1034–36 (Bridge, J., concurring in dissent) (cataloguing mean-spirited statements made in the legislature's consideration of the bill).

[53] *Id.* at 1019 (Fairhurst, J., dissenting) (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[54] *Andersen* was decided by a 5-4 vote. 138 P.3d 963. The *Hernandez* court split, 4-2 (with one justice not taking part). 855 N.E.2d 1. *Conaway* was a 4-3 split against equality, with one of the three dissenting justices also concurring in part, and arguing for a "marriage-in-all-but-name" alternative. 932 A.2d at 636 (Raker, J., concurring in part and dissenting).

[55] On November 4, 2008, the California voters approved Proposition 8 (52%-48%), amending the state's constitution to restrict the right to marry to one man and one woman. Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2009, *available at* http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story. The decision left the state's domestic partnership law, which confers all of the benefits of marriage, intact. *Id.*

[56] Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

[57] The term "heightened scrutiny" includes both strict and intermediate scrutiny. When I use this term, I mean to include both. Otherwise, I distinguish between them. *See* Varnum v. Brien, 763 N.W.2d 862, 880 n.8 (Iowa 2009).

defies the notion of judicial incrementalism?

### A. *The California Supreme Court Heightens Equal Protection Scrutiny, Then Struggles to Hold Its Ground*

The California Supreme Court began *In re Marriage Cases* by establishing the context for its decision. Whereas other courts that had considered the issue of marriage equality were in states that did not recognize the relationships of same-sex couples, California already had granted domestic partnership recognition to these couples. Thus, the question was:

> [W]hether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship [affording the same rights to both], but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership."[58]

*In re Marriage Cases* cannot be understood without this important act of purposeful contextualizing. The court, per Chief Justice George, also noted that a battery of California laws:

> now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation, and, more generally, that an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny . . . legal rights.[59]

Thus, by the time this case came before the court, California's lesbian and gay citizens[60] were, in virtually all areas under the law's dominion, afforded treatment equal to that given the majority, heterosexual-identified, community.

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[58] *In re* Marriage Cases, 183 P.3d 384, 398 (Cal. 2008). As the court noted, this issue had arisen once before, when the Massachusetts Supreme Judicial Court was asked to opine whether, in the wake of the *Goodridge* decision, the legislature might satisfy the court's order to permit marriage equality by allowing same-sex couples to enter into civil unions. In that case, *Opinions of the Justices to the Senate,* 802 N.E.2d 565 (Mass. 2004), the court made clear that equality could only be achieved by granting the name "marriage" to same-sex couples who wished to be civilly united.

[59] *In re* Marriage Cases, 183 P.3d at 400.

[60] I pointedly leave the transgendered, or gender non-conforming community out of this formulation, but only because the court did. "Sexual orientation" is commonly thought to include same- or opposite-sex orientation, and (although courts rarely discuss this) bisexual orientation. Laws protecting against discrimination based on gender identity are beginning to appear, *see* Human Rights Campaign, Transgender Laws, http://www.hrc.org/issues/transgender/transgender_laws.asp (last visited Oct. 27, 2009), but it is fair to say that courts have exhibited little willingness to consider the broad issues of rights for this hard-to-define community.

Why, then, withhold the name "marriage," and what consequences can be expected from doing so?

For a court in a "parallel institution" state, the connection between the fundamental right to marry (substantive due process) and equal protection is tight, perhaps inextricably interwoven. There is a state constitutional right to marry, and one element of this right is "a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families."[61] Such dignity and respect, moreover, are placed at "serious risk" when the state assigns "a different designation for the family relationship of same-sex couples . . . ."[62]

Although the right to marry is richer than equal dignity,[63] this concept of dignity and respect permeates the court's decision. It is clear from the outset, and throughout the decision, that the court's starting premise is that same-sex couples, and gays and lesbians more generally, have by now been recognized as full citizens, entirely capable of participating on equal terms in the civic life of the state.

What, then, would justify the continued excision of same-sex couples from the favored institution of marriage, and by what standard should the exclusion be judged? By this time, it is hardly surprising that the *In re Marriage Cases* court was willing to do the heavy lifting required to recognize sexual orientation as a suspect class, thereby requiring the legislature to adduce compelling reasons (with no less restrictive alternative) for any law that treats people differently on this basis.[64] Once the state has recognized the equality of gays and

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[61] *In re* Marriage Cases, 183 P.3d. at 400.

[62] *Id.* That said, both the Connecticut and Iowa Supreme Courts chose to anchor their decisions in equal protection analysis only. Given the thesis and aims of this Article, most of the emphasis is on the equal protection issue. Nonetheless, the California Supreme Court's recognition that equality and fundamental rights are closely tied was vital to its holding; a holding which, in turn, inspired the courts in the other two states.

[63] Later in the opinion, the court waxed eloquent about the content of the right, as established and developed throughout history (and the history of the common law). *Id.* at 421–27. The right to marry and raise a family is thought to offer unique benefits both to the couple and to the larger society. Thus, it becomes even more important that any exclusions be supported by equally strong state interests.

[64] One still-common effort to avoid the reality that the exclusion of same-sex couples from marriage is not discrimination based on sexual orientation is the (implausible) assertion that the law, on its face, does not discriminate on that basis. The California Supreme Court gave this argument the brush-off it deserves:

> In our view, the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation . . . . [T]he marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation . . . . In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to

lesbians in virtually all aspects of the law, the film of separation that remains between opposite-sex and same-sex couples—domestic partnership, not marriage—stands revealed as "pure discrimination" that cannot be explained by anything other than animus against same-sex couples. This, in turn, naturally leads a court to consider whether heightened scrutiny is needed to protect the group. A fair reading of the case supports this conclusion.

Under California precedent, the two crucial requirements for suspect class status are that the characteristic in question "[1] bear[s] no relation to a person's ability to perform or contribute to society, and [2] [is] associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities."[65]

My thesis is that domestic partnership status, in an odd way that the court itself only obliquely acknowledged, impelled the court towards recognizing sexual orientation as a suspect class. The second requirement, as noted above, seems to have been created with just this sort of marriage/domestic partnership statutory classification in mind. Why withhold a name, and nothing else, if not to remind gays and lesbians of their inferiority and disfavored status? And few would argue that, whatever the advances today, gays and lesbians have suffered "a history of legal and social disabilities." In a related way, the "virtual equivalence" of domestic partnerships, coupled with the panoply of other rights and protections afforded over time to gays and lesbians, demonstrates that the "characteristic" is unrelated to their ability to contribute to society. Thus, the first requirement for suspect class status is also met, and arguably tied to the domestic partnership/marriage divide. One might now ask: Does the court's approach mean that the states that are the most progressive on LGBT issues are the most vulnerable to attack on equal protection grounds? (And if so, is there not something at least counterintuitive in that result?) Once a state like California—or Vermont, or Connecticut—elevates gays and lesbians to full citizenship, save for the "marriage" designation, it has in effect ceded all arguments for separate treatment, and the civil union or domestic partnership stands revealed as a fig leaf that a court can, and should, easily brush off. This point

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marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.

*Id.* at 440–41.

[65] *Id.* at 442 (citations omitted). Other considerations are whether the trait is "immutable" and whether the targeted group is politically powerless. The court, however, noted that immutability is not a requirement, and pointed to the designation of religion as a suspect class in support of that position. *Id.* Rather, the question is whether the trait in question is an "integral . . . aspect of one's identity." If so, a class defined by reference to that trait can still be defined as suspect. *Id.* at 442–43. The Attorney General also argued that gays and lesbians are not currently politically powerless, but the court briskly dismissed this as unnecessary, with this pithy observation: "[I]f a group's *current* political powerlessness were [a requirement for suspect class status], it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications." *Id.* at 443.

was not lost on dissenting Justice Baxter, who accused the majority of transforming a series of statutory steps into a constitutional principle. His language is colorful: "I cannot join this exercise in legal jujitsu, by which the Legislature's own weight is used against it to create a constitutional right from whole cloth . . . ."[66]

Justice George addressed this criticism, but his response is not fully persuasive: "[T]he numerous recent legislative enactments . . . [conferring rights and protections] on the basis of sexual orientation were not required in order to confer upon gay individuals a legal status equal to that enjoyed by heterosexuals; these measures simply provide explicit official recognition of, and affirmative support for, that equal legal status."[67] Unless Justice George means that the courts would have ensured the same panoply of rights that the legislature did (because all of those rights are protected by the state constitution), this assertion is simply false. It overlooks the very same interplay between the legislature and the judiciary that the court had leaned on earlier in its opinion. That same interplay is at the root of the explanation for the more aggressive judicial protection for the rights of same-sex couples in states that have more well-developed laws on the rights and obligations of gays and lesbians. If a same-sex marriage case were brought in Florida, for example, one would expect failure—not because the state supreme court there is conservative (it is not), but because the statutory and constitutional law is *so* anti-gay that all of the arguments against marriage equality that have been effectively abandoned in more progressive states are very much alive there.[68]

Are these arguments compelling? No, but that is not the point. Where a majority of voters and legislators believe that, say, gay parenting is harmful to

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[66] *Id.* at 458 (Baxter, J., dissenting). Justice Baxter found the majority's approach particularly unsettling in light of an already-existing voter initiative that statutorily prevented the legislature from enacting a marriage equality law. Baxter claimed that finding a constitutional right from a series of legislative steps—mostly notably, of course, the domestic partnership law—effectively allowed the legislature to achieve indirectly what it could not do directly. *Id.* at 461. This argument is flawed, though. The court did not give the legislature the "power" to do anything. Instead, it applied the state's constitutional guarantees as it construed them. It is true that the *effect* is as Baxter noted, but the result is not strictly a by-product of legislative will. The court could have ruled against the plaintiffs, and the legislature would have had no recourse.

[67] *Id.* at 428.

[68] Although the law is currently under constitutional attack, a Florida statute bars gays from adopting. FL. STAT. § 63.042 (3) (2009) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). Last November, a constitutional amendment prohibiting not only same-sex marriages but many other kinds of relationships was passed by Florida voters. *See* Jeff Brumley, *Marriage Defined; Beliefs Unclear*, FLA. TIMES-UNION, Nov. 6, 2008, at B-1; FL. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."). There is no state-wide law protecting gays and lesbians against discrimination.

children, a court in such a state will more likely try to find some evidence in support of that conclusion, so as not to get too far out ahead of public opinion. This search for validation, in turn, makes it very unlikely that a court would turn from the rational basis analysis that would support anti-gay laws to a heightened level of scrutiny that would not. So the paradox is this: In states where gays most need protection, they may be least likely to receive it.

Coming at the relationship between courts and legislatures from the other direction, is there a danger that state legislatures will refrain from enacting gay-friendly laws, for fear that their courts will outrun them? It is possible, but not likely. Legislatures respond to their constituents, and are not (despite occasional statements to the contrary) especially concerned about courts using their enactments against them at a later time. When Florida finally repeals its child-harming ban on gay adoptions, it will likely be because a consortium of interest groups has been able to persuade the law-makers that repeal is good on the merits and has sufficiently strong public backing that the legislators will not be punished for doing the right thing. Thoughts about gay marriage (for example) will be of little concern, even when attention is directed to this supposedly dire sequence of events. As a stark example, consider that not even the "sky-is-falling" jeremiad of Justice Scalia in his *Lawrence v. Texas* dissent has been capable of scaring Congress into approving a constitutional amendment against marriage equality, a result that he may have hoped to spur in stating that *Lawrence*'s logic also required same-sex marriage.[69]

The transformative power of *In re Marriage Cases* was weakened somewhat by the court's more recent decision in *Strauss v. Horton*,[70] a case that put the court in an impossible position. There, the justices had to decide whether the voter-approved Proposition 8, changing the state's constitution to limit marriage to the union of a man and a woman, was either a valid amendment to the state's constitution or an impermissible revision of that document.[71] The argu-

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[69] Lawrence v. Texas, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) ("[T]he Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it. . . . If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?' . . . Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." (second alteration in original) (citations omitted)).

[70] 207 P.3d 48 (Cal. 2009).

[71] *Id.* at 60–61. An in-depth explanation of the difference is the subject for another article. This brief summary by the court will suffice for present purposes: a revision is a "wholesale or fundamental alteration of the constitutional structure" while an amendment includes "any and all of the more discrete changes to the Constitution that . . . might be proposed." *Id.* at 61.

ment for revision was strong: By withdrawing from same-sex couples a right that the court had stated was fundamental just a year earlier, the voters had imperiled the very notion not only of equal protection, but of fundamental constitutional rights more generally.[72] Withdraw one right from one disfavored group today, another from another unpopular group tomorrow, and so on. This kind of sweeping change effects a basic change in constitutional architecture, and is therefore properly considered a revision. As such, it requires prior legislative approval before going before the voters.

The court rejected this argument. By a 6-1 vote,[73] the *Strauss* court, again in an opinion by Justice George, attempted to minimize the harm done by Proposition 8, declining to address whether the voters could effect the kind of wholesale deprivation of rights that the plaintiffs alleged was now possible.[74] Instead, the court walked back from its *In re Marriage Cases* position that the label "marriage" was a vital part of the right itself.[75]

The court's language in doing so was tortured and inconsistent. The problem it faced was of its own design: *In re Marriage Cases* was so clear and eloquent about the importance of the word "marriage" to the dignity of all committed couples that it was necessarily going to be difficult to minimize that analysis so soon thereafter. But try, the court did. In the following passage, Justice George does what he can to minimize the damage of what he felt bound to do:

> [A]lthough Proposition 8 changes the state Constitution, as interpreted in the majority opinion in the *Marriage Cases*, to provide that restricting the family designation of 'marriage' to opposite-sex couples only, and withholding that designation from same-sex couples, no longer violates the state Constitution, in all other respects same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state equal protection clause that are set forth in the majority opinion in the *Marriage Cases*, including the general principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation

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[72] *Id.* at 99.

[73] Justice Moreno was the lone dissenter. In his view, the guarantee of equality "cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect." *Id.* at 130 (Moreno, J., dissenting). For a summary of the dissent's argument, see John Culhane, *Justice Moreno: Prop 8's Lone Dissenter*, Word in Edgewise, http://wordinedgewise.org/?p=111 (May 27, 2009).

[74] The majority opinion is murky on whether a wholesale deprivation of individual liberties could ever constitute an impermissible revision. In her concurrence, Justice Werdegar criticizes the court's opacity on this point, and straightforwardly opines that a "change of sufficient scope in a foundational principle of individual liberty [would] amount to a constitutional revision." *Strauss*, 207 P.3d at 127–28 (Werdegar, J., concurring).

[75] *See id.* at 71–73.

are constitutionally permissible only if they satisfy the strict scrutiny standard of review.[76]

While the damage done by Proposition 8 to the marriage equality movement has been much bemoaned, less appreciated has been the continuing legacy of *In re Marriage Cases*—despite the *Strauss v. Horton* decision, which was issued almost exactly one year later. During that year, a tipping point on marriage equality may well have been reached, although resistance and revanchism continue. By the time *Strauss* was handed down, *Kerrigan* and *Varnum* had already leaned heavily on that case in establishing the right to marriage equality in their own states. Then, less than a week after *Varnum,* the legislative walls ruptured, as three New England States—Vermont first, then New Hampshire and Maine—by now well-educated on the inadequacies of civil union laws, became the first to enact marriage equality laws without being impelled to do so by a court.

### B. *The Enduring Legacy of In re Marriage Cases*

*Kerrigan v. Commissioner of Public Health* is a direct descendant of *In re Marriage Cases.* By a similarly divided court, the Connecticut Supreme Court followed California's lead in using a heightened equal protection standard to analyze state law that permitted same-sex couples to enter into a civil union, but not to marry.[77] Inasmuch as the *Kerrigan* court so closely tracked many of the arguments developed at length in *In re Marriage Cases,* I will be briefer here. Several important points deserve emphasis, though.

First, although the *Kerrigan* court looked at the same factors as the California court in deciding that distinctions based on sexual orientation should be subject to heightened scrutiny,[78] *Kerrigan* chose intermediate scrutiny, rather than the strict scrutiny *In re Marriage Cases* demanded.[79] In both states, the courts followed precedent for treating sex-based classifications, which may be most closely analogous case. As Justice George noted in *In re Marriage Cases*, the California Supreme Court, unlike the U.S. Supreme Court, does not use intermediate scrutiny.[80] Given the choice between strict scrutiny and the

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[76] *Id.* at 78 (citation omitted).

[77] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 472–73 (Conn. 2008).

[78] *Id.* at 426 (following U.S. Supreme Court precedent, as did the *In re Marriage Cases* court). The Connecticut court, however, also undertook a separate analysis under state law, as it felt obliged to do under *State v. Geisler*, 610 A.2d 1225 (Conn. 1992). There, the court set forth a series of additional factors it would look to in deciding whether to the Connecticut Constitution recognizes a right to a greater extent than does the U.S. Constitution. *Id.* at 1232. Much of the analysis resembles that undertaken under the federal case law, and I do not separately analyze this portion of the court's holding—with one exception, as noted in the text *infra.*

[79] *Id.* at 412.

[80] 183 P.3d 384, 436 n.55 (Cal. 2008) (noting that California courts have "not applied an

rational basis test, application of the "suspect class" factors inexorably led the California court to the higher of the two standards. Connecticut, by contrast, follows the prevailing three-tier approach. The *Kerrigan* court acknowledged that sexual orientation might be a suspect class, but (prudently, at least) opted for the "quasi-suspect" class designation that triggers intermediate scrutiny.[81] That standard requires that the statutory classification "be substantially related to an important governmental objective."[82]

A second, and crucial, point of interest on *Kerrigan* is that the court was clear about the connection between civil union status and its conclusion that sexual orientation classifications need heightened scrutiny. At the conclusion of the court's exhaustive analysis of the equal protection standard to apply, the court supplemented the central requirements for quasi-suspect class status by looking to economic and sociological considerations (which are factors relevant to "suspect class" status under Connecticut state law precedent).[83] As part of that discussion, the court quoted from the affidavits of the parents of young children concerned about the effect of their family's exclusion from marriage, even though civil union status is available.[84] The court then concluded its discussion of the justifications for heightened scrutiny by making the point, even more clearly than the California court had done, that the connection between civil unions and the long-standing bias against the gay community justifies heightened scrutiny:

> [B]ecause of the long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same sex couples will be viewed as reflecting an official state policy that that entity is inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples.[85]

This statement was immediately followed by this vital quote from *In re Marriage Cases*:

> As a consequence, "retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise [namely] . . . that gay individuals and same-sex couples

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intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classificiation").

[81] *Kerrigan*, 957 A.2d at 412.

[82] *Id.* at 423 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)). As the Court has more recently stated, the justifications proffered must be "exceedingly persuasive." United States v. Virginia, 518 U.S. 515, 532–33 (1996).

[83] *Kerrigan*, 957 A.2d at 473–76. The court held that these considerations were required by its holding in *State v. Geisler*, 610 A.2d 1225 (Conn. 1992).

[84] *Kerrigan*, 957 A.2d at 475 n.77.

[85] *Id.* at 475.

> are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples."[86]

*Kerrigan* is a long, thoughtful case that deserves much deeper treatment than I can give it here. Reading the decision in its entirety leaves the inescapable sense that the court fully understood both the enormous gains that civil union status achieved and the residual, discriminatory impulse that is thereby papered over. Consider one final example of the court's appreciation of the problem. Here, the court quotes favorably and extensively from a brief submitted by Lambda Legal, where this table-turning thought experiment is proposed:

> Any married couple [reasonably] would feel that they had lost something precious and irreplaceable if the government were to tell them that they no longer were 'married' and instead were in a 'civil union.' The sense of being 'married'—what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies—would be taken from them. These losses are part of what same sex couples are denied when government assigns them a 'civil union' status. If the tables were turned, very few heterosexuals would countenance being told that they could enter only civil unions and that marriage is reserved for lesbian and gay couples.[87]

After all of this hard work by the courts in California and Connecticut, the Iowa Supreme Court had less ground to break. In *Varnum v. Brien*,[88] the *unanimous* court hewed closely to the logic and result of *Kerrigan* especially, holding that sexual orientation classifications should be subject to intermediate scrutiny,[89] and that equal protection alone was a sufficient basis for the court's decision.[90] The court applied the same factors as did the courts in both *In re Marriage Cases* and *Kerrigan*: reinterpreting "immutability" as features "central to personal identity;" finding that gays and lesbians have historically been discriminated against (and continue to be); holding that sexual orientation is not relevant to the ability to contribute to society; and then leaning heavily on *Kerrigan*'s extensive treatment of the political powerlessness factor.[91] With *Marriage Cases* and *Kerrigan* having mapped out the terrain, even a court in a state without any kind of relationship recognition was then able to perceive that the

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[86] *Id. quoting In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008).

[87] *Id.* at 417 n.14 (quoting amicus brief submitted by Lambda Legal Defense and Education Fund).

[88] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[89] *Id.* at 895.

[90] *Id.* at 906. The decision is without independent discussion of whether same-sex couples have a fundamental right to marry. Of course, the practical result of finding that excluding such couples from marriage violates the guarantee of equal protection is that the fundamental right to marry is thus extended to them.

[91] *Id.* at 889–96.

unjustified exclusion of same-sex couples from the benefits of marriage, both tangible and intangible, was inequitable. Nor did the court find that the state's justifications (which this Article has not much discussed)[92] were sufficient under the standard that had just been adopted. *Varnum*'s great virtue is the court's simplicity and clarity in dealing with the issues before it. In a relatively brief opinion unburdened by concurring or dissenting opinion, the Iowa Supreme Court stunned the nation with a decision that has been both remarkably resistant to attack, and deemed worthy of respect even by a governor who had opposed marriage equality.[93] And no serious movement to undo the court's ruling is currently underway.

## IV. CONCLUSION

The civil union dam holding back fully marriage equality has been breached. Two commissions charged with reviewing these "all but marriage" alternatives have concluded that the two institutions are in fact quite different (and not equal).[94] And, as this article has demonstrated, courts have concurred; belatedly understanding the inequality in excluding same-sex couples from the institution of civil marriage, even where equal benefits are granted. Now, both legislatures and courts have recognized that equality requires that marriage equivalents be left behind in favor of full marriage equality. Of course, while the federal Defense of Marriage Act remains in force, no such marriages will be entitled to full recognition. But the states, one by one, are beginning to do what they can. Transitioning from civil unions to marriage is a vital step in the drive towards full equality for gay and lesbian people.

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[92] Although the justifications put forward for excluding gay couples from marrying exhibit some variation from state to state, they generally include the state's interest in procreation, the protection of the traditional institution, and, less often, the conservation of the government's scarce resources. Each of these was present, and easily disposed of, in *Varnum*. *Id.* at 897–903.

[93] *See Governor Culver Issues Statement on Supreme Court's Decision*, http://www.governor.iowa.gov/news/2009/04/7_2.php (last visited Oct. 2, 2009).

[94] *See* REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION, *supra* note 8; FINAL REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION, Dec. 10, 2008. Although the Vermont Report stopped short of a recommendation, the New Jersey Commission unanimously recommended that "The Legislature and the Governor amend the law to allow same-sex couples to marry." *Id.* at 3.