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“A Painful Process of Waiting”: The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand that “Same-Sex Marriage” is Not What Same-Sex Couples Are Seeking

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ESSAY

“A PAINFUL PROCESS OF WAITING”:^{*} THE NEW YORK, WASHINGTON, NEW JERSEY, AND MARYLAND DISSENTING JUSTICES UNDERSTAND THAT “SAME-SEX MARRIAGE” IS NOT WHAT SAME-SEX COUPLES ARE SEEKING

BARBARA J. COX^{**}

This essay focuses on the recent decisions by the highest courts of four states rejecting the claims of individuals in same-sex relationships that they must be permitted to marry the partner of their choice. In the cases of *Hernandez v. Robles*,¹ *Andersen v. King County*,² *Lewis v. Harris*,³ and *Conaway v. Deane*,⁴ a majority or plurality of each court determined that the bans preventing individuals in same-sex couples from marrying were constitutional. Understanding these cases is particularly important as additional state

^{*} *Andersen v. King County*, 138 P.3d 963, 1025 (Wash. 2006) (Fairhurst, J., dissenting). Justice Fairhurst was describing how same-sex couples should not be forced to go through “the same painful process of waiting for popular opinion to catch up with the constitution to declare denial of the right to marry unconstitutional” that interracial couples had to go through while waiting for public opinion to recognize that anti-miscegenation laws were “pure ignorance, discrimination, and hate.” *Id.*

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1. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).
2. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).
3. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).
4. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

supreme courts address the cases of similar plaintiffs pending before them. Currently, the Iowa Supreme Court is considering an appeal by same-sex couples to be allowed to marry their partners.⁵

Additionally, marriage equality for same-sex couples has broadened significantly since those four courts issued their decisions. In May 2008, the California Supreme Court released its opinion concerning the consolidated appeals arising after Mayor Gavin Newsom ordered the City of San Francisco to begin issuing marriage licenses to same-sex couples in 2004.⁶ The California Supreme Court stated:

[T]he constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. . . . We therefore conclude that . . . the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as opposite-sex couples.⁷

On October 10, 2008, the Connecticut Supreme Court held that limiting same-sex couples to civil unions and denying them the

5. *Varnum v. Brien*, No. CV 5965 (D. Iowa Aug. 30, 2007) (order granting motion for summary judgment).

6. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, rev'd, 183 P.3d 384 (Cal. 2008). This consolidated appeal of six separate cases includes the suit by the City and County of San Francisco against the State of California following the California Supreme Court's decision ending and invalidating the marriage licenses issued in San Francisco in 2004. *Id.*; see also *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

7. *In re Marriage Cases*, 183 P.3d 384, 399-400 (Cal. 2008). This case was released while this essay was being prepared for publication. Although it is impossible to incorporate the court's opinion at this time, references are noted when the decision is particularly relevant to the issues raised by the essay. Furthermore, as this essay was preparing for press, the citizens of California adopted Proposition 8 by a 52% to 48% margin, which amended the California Constitution, overruled the California Supreme Court decision, and excluded same-sex couples from marriage. State Election Results, Election Center 2008, CNN.com, <http://www.cnn.com/ELECTION/2008/results/state/#CA> (last visited Nov. 8, 2008).

freedom to marry violated the Connecticut equal protection clause.⁸ Massachusetts also opened marriage to same-sex couples from other jurisdictions with the repeal of its 1913 statute that permitted couples to marry in Massachusetts only when they were permitted to marry in their domicile.⁹ Thus, same-sex couples from across the country will now be able to marry regardless of where they live.¹⁰ These developments underscore the importance of understanding the reasoning used by different justices when deciding whether individuals in same-sex couples have a constitutional right to marry their partners. The decisions from New York, Washington, New Jersey, and Maryland become even more important as other courts, legislatures, and the public continue to consider these issues.

Each opinion, whether majority, plurality, or dissent, grapples with the appropriate level of scrutiny to be used when considering state laws that prevent individuals in same-sex couples from marrying. For example, in *Conaway*, seventeen pages in the majority opinion and thirty-six pages in the dissenting opinions are spent discussing whether the ban violates Maryland's equal rights amendment and therefore requires strict scrutiny.¹¹ In each case, the arguments

8. *Kerrigan v. Comm'r of Pub. Health*, No. 17716, 2008 WL 4530885, at *47 (Conn. Oct. 28, 2008) (“Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.”).

9. Michael Levenson, *Governor Signs Law Allowing Out-of-State Gays to Wed*, THE BOSTON GLOBE, July 31, 2008, http://www.boston.com/news/local/breaking_news/2008/07/gov_to_sign_bil.html.

10. Whether those marriages will be recognized by their home states is unknown. For a discussion of the issues arising from interstate recognition of marriages of same-sex couples in states other their home domicile, see ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

11. *Compare* *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007), *with id.* at 655-89 (Battaglia, J., dissenting), *and id.* at 693-94 (Bell, C.J., dissenting). The Maryland majority opinion also spends another fourteen pages determining that the laws are not entitled to strict scrutiny because the plaintiffs are not members of a suspect class. *Id.* at 602-16 (majority opinion).

presented by the dissenting justices¹² are more cogent and persuasive. As explained below, statutes excluding individuals in same-sex couples from marriage violate each individual's fundamental right to marry the person of his or her choice. Thus, such statutes should be subject to strict scrutiny.¹³ But, I leave the in-depth analysis of these issues to other writers.¹⁴ Instead, this essay focuses on the dissenting justices' understanding of why each plaintiff was seeking to marry his or her partner. In contrast, the majority and plurality justices work hard to convince the citizens of their states that individuals in same-sex couples are not entitled to the fundamental right to marry protected by our state and Federal Constitutions. Since the majority and plurality justices find no fundamental right is violated, they subject the States' rationales for banning these individuals from marrying to mere rational basis review. This step is vital because of

12. This essay refers to all the justices or judges of these states' highest courts as justices when referring to all four courts together to simplify the language used. Their actual titles are used when discussing each case individually. They are known as justices on the New Jersey and Washington Supreme Courts and as judges on the New York and Maryland Courts of Appeals. All four courts are the highest court in each state.

13. See *infra* section I(A).

14. See, e.g., Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813, 843-56 (2007) (discussing *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) and *Andersen v. King County*, 138 P.3d 963 (Wash. 2006)); John B. Mitchell, *Chatting with the Lady in the Grocery Store About Hernandez v. Robles, The New York Same-Sex Marriage Case*, 6 SEATTLE J. FOR SOC. JUST. 255 (2007); Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291 (2007); Thomas Hoff Prol, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, 52 N.Y.L. SCH. L. REV. 169 (2008); Yvonne A. Tamayo, *I Just Can't Handle It: The Case of Hernandez v. Robles*, 28 WOMEN'S RTS. L. REP. 61 (2007); Dov Berger, Note, *Separating Civil Unions and Religious Marriage—A New Paradigm for Recognizing Same-Sex Relationships*, 6 CARDOZO PUB. L. POL'Y. & ETHICS J. 163 (2007); Sarah Eaton, Note, *Lewis v. Harris: Same-Sex Marriage is a Question for the Legislature, Not the Courts*, 16 LAW & SEX. 157 (2007); Matthew K. Yan, Note, *"What's in a Name?": Why the New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage*, 17 B.U. PUB. INT. L.J. 179 (2007); Sigrid Ulve, Note, *Hernandez v. Robles and Goodridge v. Department of Public Health: The Irrationality of the Rational Basis Test*, 11 J. GENDER RACE & JUST. 149 (2007); Robert M. Zaleski, Commentary, *What's In a Name? Civil Union Fails the Test*, 188 N.J.L.J. 23 (2007).

the feebleness of the rationales used to justify the bans. Rather than leaving the reader with respect for marriage and the important role the institution plays in our society, one almost feels sorrow about the circumscribed purpose left for marriage after these courts and state governments do their best to retain it as an exclusively heterosexual institution. Instead of celebrating the importance that these plaintiffs ascribe to marriage, the majority and plurality opinions leave the reader saddened by the harm done to marriage by continuing its exclusive nature. It is the dissenting opinions that show respect for marriage and understand why the plaintiffs seek this important choice that is denied to them.

The first section of this essay discusses how the constant use of the term, “same-sex marriage,” by advocates and opponents alike, seems to have convinced each majority or plurality that the plaintiffs were not seeking recognition of their fundamental right to marry, but instead were seeking a new fundamental right to “same-sex marriage.” By framing the question so narrowly, rather than asking whether the fundamental right to marry is violated by refusing to allow individuals in same-sex couples to marry, the courts err when analyzing these bans. Since they do not believe that “a right to same-sex marriage” can be seen as fundamental, they deny each individual in a same-sex couple the opportunity to marry the one person he or she chooses to marry.

The second section looks closely at the primary dissenting opinions from New York, Washington, and New Jersey,¹⁵ focusing on why those justices concluded that the plaintiffs’ constitutional right to marry was violated.¹⁶ In particular, this section focuses on why the

15. I have chosen not to analyze the Maryland Supreme Court’s opinion closely for two reasons. First, as noted previously, *supra* note 11, that court spends much of its lengthy opinions debating whether Maryland’s interpretation of its equal rights amendment and equal protection clause in previous cases requires it to uphold or strike down section 2-201 of the Family Law Code that states “[o]nly a marriage between a man and a woman is valid in this State.” Second, *Conaway* was issued almost a year after the other three cases and all the opinions include significant references to the other courts’ opinions. However, some points are particularly persuasive and will be noted throughout this essay.

16. In *Hernandez*, the court considered whether limiting marriage to individuals in opposite-sex couples is valid under the due process and equal protection clauses of the New York Constitution. *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006). In *Andersen*, the plaintiffs challenged Washington’s Defense of

dissenting justices of each court rejected the rationales espoused by the states, and accepted by the majorities or pluralities, in support of each state's refusal to allow individuals in same-sex couples to marry while allowing those in opposite-sex couples to do so. While the dissenting justices concluded that the statutes should be subject to strict scrutiny for violating the plaintiffs' constitutional rights, each also determined that the states' rationales for continuing the ban would not survive even rational scrutiny.¹⁷

Section three discusses how the effort to distinguish opposite-sex couples from same-sex couples, so that the former may marry while the latter may not, has denigrated the institution of marriage. Opponents of "same-sex marriage" claim that marriage as an institution needs to be "defended" from the harm that would be caused by allowing individuals in same-sex couples to marry.¹⁸ Instead, it is the proponents for continuing the ban who describe marriage in such limited ways as to rob it of much of its possibility. Their willingness to retain marriage for only opposite-sex couples by accepting any

Marriage Act as violating their fundamental right to marry, their rights under the privileges and immunities and due process clauses of the Washington Constitution, their privacy rights, and the state's equal rights amendment. *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006). In *Lewis*, the plaintiffs challenged the denial of their fundamental right to marry and violation of the equal protection clause under the New Jersey Constitution. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006). In *Conaway*, the plaintiffs claimed that the denial of marriage licenses violated that state's equal rights amendment, and inhibited and burdened their fundamental rights to marriage, privacy, autonomy, and intimate association under the equal protection and due process clauses of the Maryland Declaration of Rights. *Conaway v. Deane*, 932 A.2d 571, 583 (Md. 2007).

17. While many of the rationales are not closely tailored and are both over-inclusive and under-inclusive and as such would fail strict scrutiny review, the dissenting opinions do not limit their analysis to this review, but also reject the rationales under rational basis review. See discussion *infra* section II.

18. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)) [hereinafter DOMA]; see also Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005) (providing language of "Defense of Marriage" statutes and constitutional amendments in 43 states); *Conaway*, 933 A.2d at 627 n.67 (listing statutes and constitutional amendments). As Justice Fairhurst noted, "[m]any individuals and organizations have prophesized the downfall of society as we know it if and when Washington recognizes that the fundamental right to marry extends to same-sex couples." *Andersen*, 138 P.3d at 1026 (Fairhurst, J., dissenting).

conceivable rationale to do so underscores the harm caused by continuing discrimination when faced with reasonable, fair-minded challenges. Ultimately, it is the dissenting justices’ opinions that best protect marriage and it is how the dissenting justices understand marriage that best explains why individuals in same-sex couples seek the right to choose it for ourselves.¹⁹

I. THE IMPORTANCE OF LANGUAGE IN FRAMING THE ISSUE FOR MARRIAGE EQUALITY

After reading why these four states’ highest courts rejected the plaintiffs’ claims that the bans preventing marriage equality violated their constitutional rights, those of us who advocate for such rights have discovered that our language may have prevented the justices from understanding their claims. The New York, Washington, New Jersey, and Maryland courts all rejected the claim that individuals in same-sex couples should have the same fundamental right to marry that individuals in opposite-sex couples enjoy. Each court framed the question as whether the plaintiffs had a fundamental right to “same-sex marriage.” When narrowed in this way, it seemed clear to the pluralities or majorities, although not to the dissents, that such a right has not traditionally existed in their states, and thus does not exist now. But this analysis, rejected by the United States Supreme Court in *Lawrence v. Texas*,²⁰ is not persuasive. The California Supreme Court agreed. As that court recently held:

19. My spouse, Peg Habetler, and I were married in Canada in July 2003, are registered domestic partners in Madison, Wisconsin, and California, and had a private commitment ceremony in 1992. From June 17, 2008 until November 4, 2008, our marriage was valid and recognized in California following the California Supreme Court’s decision. See Barbara J. Cox, *Equal Rights are Now Promised Every Californian*, SAN DIEGO UNION-TRIBUNE, May 16, 2008 at B5. *But see supra* note 7 (explaining how Proposition 8 overruled the California Supreme Court decision). Our marriage is not recognized by most states in the country or by the federal government. A description of why we chose to marry, even after receiving comprehensive domestic partnership rights, can be found in Barbara J. Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 702-06 (2004) and Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 27-29 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

20. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down state sodomy

In *Perez v. Sharp*—this court’s 1948 decision holding that the California statutory provisions prohibiting interracial marriage were unconstitutional—the court did not characterize the constitutional right that the plaintiffs in that case sought to obtain as “a right to interracial marriage” and did not dismiss the plaintiffs’ constitutional challenge on the ground that such marriages never had been permitted in California. Instead, the *Perez* decision focused on the *substance* of the constitutional right at issue—that is, the importance to an individual of the freedom “to join in marriage *with the person of one’s choice*” – in determining whether the statute impinged upon the plaintiffs’ fundamental constitutional right.²¹

A. The Mistake Caused by Referring to “Same-Sex Marriage”

When first starting to advocate for marriage equality, I too, used the term “same-sex marriage” in my articles. For example, in 1994, when I wrote one of the first articles about interstate recognition of same-sex couples’ marriages celebrated in one state by couples domiciled in another state, I titled the article: *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*²² Although the Hawaii Supreme Court found that banning same-sex couples from entering into marriages violated the plaintiffs’ equal protection rights, the court refused to find that individuals in same-sex couples enjoy a fundamental right to marry.²³

statutes as violating the U.S. Constitution). *But see* *Washington v. Glucksberg*, 521 U.S. 702, 722-723 (1997) (criticizing the lower federal court for defining the right at issue in the case too broadly as “a right to die,” when the Court thought the issue was “a right to commit suicide” and have assistance in doing so). *See also* *Hernandez*, 855 N.E.2d at 9; *Andersen*, 138 P.3d at 976-77; *Lewis*, 908 A.2d at 207; *Conaway*, 932 A.2d at 618; *In re Marriage Cases*, 183 P.3d 384, 459-60 (Cal. 2008) (Baxter, J., concurring and dissenting) (all using *Glucksberg* as support for framing the issue as “whether there is a fundamental right to enter into a same-sex marriage”). Of course, *Lawrence* is more recent than *Glucksberg*, and thus provides better guidance on how best to frame these issues.

21. *In re Marriage Cases*, 183 P.3d at 420 (citing *Perez v. Sharp*, 198 P.2d 17 (1948)).

22. Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 [hereinafter *If We Marry*].

23. *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993). The court asked the question

I likened the *Baehr* court's mistake to that of the United States Supreme Court in *Bowers v. Hardwick*,²⁴ almost ten years before the Supreme Court agreed, in *Lawrence v. Texas*,²⁵ that the *Bowers* Court had erred. In *Bowers*, the Supreme Court questioned whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”²⁶ instead of asking whether the Constitution recognized a fundamental right to privacy in the choice of one's sexual partners.²⁷ In overruling *Bowers*, the *Lawrence* Court explained:

That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said marriage is simply about the right to have sexual intercourse.²⁸

Even while discussing the *Baehr* court's error, I did not recognize that I was making one myself. By repeatedly referring to what individuals in same-sex couples are seeking as “same-sex marriage” instead of marriage equality or the freedom to marry, I may have contributed to the problem that this essay now critiques. When those of us who advocate for marriage equality refer to the marriages we want as “same-sex marriage” or “gay marriage,”²⁹ we may be encouraging the courts, the legislatures, and the public to understand what we are seeking as something different from the fundamental right to marry that individuals in opposite-sex couples enjoy. Now that the *Lawrence* Court has exposed the *Bowers* Court's error, we must

whether “same-sex couples possess a fundamental right to marry.” *Id.*

24. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

25. *Lawrence v. Texas*, 539 U.S. 558 (2003).

26. *Bowers*, 478 U.S. at 190.

27. *If We Marry*, *supra* note 22, at 1056-57.

28. *Lawrence*, 539 U.S. at 567.

29. See, e.g., Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Q.L.R. 61 (1996) [hereinafter *Public Policy Exception*]; Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997); Cox, “*The Little Project*”: *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77 (2000).

continually explain this error to those from whom we seek marriage equality.

Of course, I am not the only person who used the term “same-sex marriage” or “gay marriage.” A search for articles using either of these terms resulted in thousands of references.³⁰ One of the earliest symposia on these issues was entitled “Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis.” It was held in 1996 at Quinnipiac College School of Law and the first nine articles in the published remarks all include references to “same-sex marriage” or “gay marriage.”³¹ Of all the scholars and activists present during that symposium, only Evan Wolfson, now Executive Director of Freedom to Marry, did not include these terms in his talk or articles.³²

B. “Freedom to Marry” Rather than “Same-Sex Marriage”

From the beginning, Evan Wolfson has been talking about the freedom to marry for same-sex couples. As early as 1996, when he prepared to go to trial as one of the plaintiffs’ attorneys in the remand from the Hawaii Supreme Court in the *Baehr* case, Wolfson used this term while explaining why the State’s attorneys were unable to explain convincingly Hawaii’s reasons for preventing individuals in same-sex couples from marrying.³³ Recently, on February 12, 2008, National Freedom to Marry Day, Wolfson published an article entitled “Today is Freedom to Marry Day—Just Don’t Say ‘Gay Marriage.’”³⁴

30. My research assistant, Patrick Wingfield, did a search using the terms “same-sex marriage” and found over 4000 documents on Westlaw and over 3000 documents on Lexis. The search was run on April 6, 2008. Results are on file with the author.

31. Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIPIAC L. REV. 1 (1996).

32. In the interest of full disclosure, I have co-chaired the Executive Committee and the Steering Committee of the national Freedom to Marry organization since it began in 2003. This organization is the only national organization whose sole purpose is to win the freedom to marry for same-sex couples. It was imagined and created by Evan Wolfson and he continues to serve as its Executive Director.

33. Evan Wolfson, *The Freedom to Marry: Our Struggle for the Map of the Country*, 16 Q.L.R. 209, 210 (1996).

34. Evan Wolfson, *Today is Freedom to Marry Day—Just Don’t Say “Gay Marriage”!*, Feb. 12, 2008, <http://www.huffingtonpost.com/evan-wolfson/today-is->

As he explained, same-sex couples are not seeking “gay marriage.” “We are working to win the freedom to marry, ending the current unfair denial of marriage to those who are already doing the work of marriage in their own lives.”³⁵ Using phrases such as “gay marriage” or “same-sex marriage” is harmful because they “imply that same-sex couples deserve something different or lesser than the security, protections, safety-net, and respect that married couples cherish.”³⁶

Contrary to claims by opponents, same-sex couples are not seeking to redefine marriage. As we celebrate the 60th anniversary of *Perez v. Sharp*,³⁷ where the California Supreme Court struck down the ban preventing individuals in interracial couples from marrying and declared that “the right to marry is the right to join in marriage with the person of one’s choice,”³⁸ it is clear that same-sex couples are seeking the right to marry in the same way that interracial couples sought it before us. In fact, according to Wolfson, if “gay marriage” exists, it is found in the civil unions and domestic partnerships where states separate same-sex couples from the opposite-sex couples who are entitled to “marriage itself.”³⁹ Although same-sex couples receive important recognition and protections in California, Connecticut, New Hampshire, New Jersey, Oregon, Vermont, and Washington, in all of these states; “awareness is deepening [that] civil unions don’t work,

freedom-to-marry_b_86282.html.

35. *Id.*

36. *Id.*

37. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), *sub nom.* *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

38. *Id.* at 19. Wolfson noted that the same-sex couples then before the California Supreme Court seeking the freedom to marry were “not seeking ‘gay marriage,’ any more than Mrs. Perez sought ‘black marriage’ or her husband sought ‘Latino marriage.’” Wolfson, *supra* note 34. In referring to *Perez* and other California marriage cases, the California Supreme Court noted: “[t]he right to marry represents the right of an individual to establish a legally recognized family with the person of one’s choice, and, as such, is of fundamental significance both to society and to the individual.” *In re Marriage Cases*, 183 P.3d 384, 423 (Cal. 2008).

39. Wolfson, *supra* note 34. *But see* Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891 (2006); Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315 (2002); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (all arguing that civil unions provide equal rights as marriage and are good alternatives to marriage for same-sex couples).

separate is not equal, and it's time to finish the job of ending exclusion from marriage, not just repackaging it."⁴⁰

C. How Using the Term, "Same-Sex Marriage," has Misshaped the Courts' Understanding of What the Plaintiffs Seek

It might be possible to conclude that these linguistic niceties are not all that important. Surely, it should not matter whether we talk about the freedom to marry or marriage equality, instead of "same-sex marriage" or "gay marriage." It seems obvious that courts, especially a state's highest court, should understand that recognizing the fundamental right of individuals in same-sex couples to marry should not depend on the language used when seeking that right. But, after reading these four decisions rejecting such a right, the majority or plurality justices do seem to interpret "same-sex marriage" to be something different from the "marriages" of opposite-sex couples.

One realizes as well, that by working so hard to accept the reasons proffered by the states to differentiate between marriages of opposite-sex couples and marriages of same-sex couples, the pluralities and majorities end up diminishing "marriage" beyond even the worst fears of those who believe that heterosexual marriages need to be *defended*.⁴¹ The next section looks closely at the dissenting opinions and demonstrates that more harm is done to "marriage" by the majorities' and pluralities' efforts to restrict it than would occur if same-sex couples were simply allowed access to it.

II. SAME-SEX COUPLES WANT MARRIAGE AS UNDERSTOOD BY THE
DISSENTS, NOT BY THE MAJORITIES

After re-reading all four supreme court opinions in one sitting, I realized that "marriage," as described by the dissenting justices, sounded much more like the marriage that my partner and I have. Each dissenting justice's opinion expressed a belief in marriage resembling those expressed in precedent from the United States

40. Wolfson, *supra* note 34; *see also infra* section II(C) (discussing the findings of the New Jersey Commission on Civil Unions and detailing significant problems with that institution).

41. *See, e.g.*, DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

Supreme Court, the Ontario Supreme Court, and the Massachusetts Supreme Judicial Court.⁴²

In contrast, “marriage,” as constricted by the pluralities’ and majorities’ efforts to emphasize those few, limited spaces where it might differ between opposite-sex couples and same-sex couples, cannot be reconciled with the eloquent, inspiring language from these earlier cases. Instead, in these four cases, marriage has become something needed by government to harness the casual, sexual appetites of heterosexual couples and to repair the problems that arise from their sexual conduct.

This section analyzes the dissenting opinions of New York Court of Appeals Chief Judge Judith A. Kaye, Washington Supreme Court Justice Mary E. Fairhurst, and New Jersey Supreme Court Chief Justice Deborah T. Poritz as each rejected their colleagues’ decisions to retain the bans preventing individuals in same-sex couples from marrying.⁴³ While the discussion of each opinion spends some time

42. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[M]arriages . . . are expressions of emotional support and public commitment.”); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. . . .”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) (“Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another [person] of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions.”); *Halpern v. Toronto*, [2003] 65 O.R.3d 161, 196 (Can.) (holding that the government failed to show how a ban on marriage of same-sex couples is “reasonable and justified in a free and democratic society”).

43. It is hard to ignore that women wrote these three dissenting opinions. It would be interesting to speculate on why these women understood the plaintiffs’ claims better than some of their male colleagues. (The concurring and dissenting judges in the Maryland case were Judges Irma S. Baker, Lynne A. Battaglia, and Robert M. Bell.) Justice Barbara Madsen wrote the majority opinion in *Washington Andersen v. King County*, 138 P.3d 963 (Wash. 2006). Perhaps it is the discrimination each is likely to have encountered on her way to her state’s highest court. Regardless of the reason, these three women’s opinions show a remarkable

focused on the disagreement between the justices on the correct level of scrutiny, it spends more time on each justice's understanding of marriage in such a way that would support opening it to individuals in same-sex couples.

A. *Hernandez v. Robles*

Chief Judge Judith S. Kaye dissented from the plurality's opinion in an eloquent, persuasive opinion that exposed the fallacies within the plurality's conclusion that banning individuals in same-sex couples from marrying does not violate the New York Constitution.⁴⁴ Noting that the Due Process Clauses of both the state and Federal Constitutions protect the fundamental right to marry, she cited prior New York cases declaring that “clearly falling within (the right of privacy) are matters relating to the decision of whom one will marry,”⁴⁵ and “the government has been prevented from interfering with an individual's decision about whom to marry.”⁴⁶

Chief Judge Kaye chided the plurality for framing the plaintiffs' lawsuit as requiring the court to recognize a “new' right to same-sex marriage,”⁴⁷ explaining that, once fundamental rights are recognized, they “cannot be denied to particular groups on the ground that these groups have historically been denied those rights.”⁴⁸ Using the reasoning outlined above for why the *Lawrence* Court overruled *Bowers*,⁴⁹ she found that the *Hernandez* plurality made the same mistake.

An asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who

understanding of marriage not found in many courts' decisions.

44. *Hernandez v. Robles*, 855 N.E.2d 1, 22-34 (N.Y. 2006) (Kaye, C.J., dissenting). Judge Carmen Beauchamp Ciparick joined in Chief Judge Kaye's dissent. *Id.* at 34.

45. *Id.* at 23 (quoting *Crosby v. State Workers' Comp. Bd.*, 442 N.E.2d 1191, 1194 (N.Y. 1982)).

46. *Id.* (quoting *People v. Shepard*, 409 N.E.2d 840, 842 (N.Y. 1980)).

47. *Id.*

48. *Id.*

49. *See supra* section I(A).

now seek to exercise it. . . . *Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.*⁵⁰

As was true with the ban preventing individuals in interracial couples from marrying, Chief Judge Kaye explained that the history of excluding individuals from expressing their fundamental rights cannot be the basis for denying them access to those rights once they challenge their exclusion.⁵¹ Noting that 96% of Americans were opposed to interracial couples' marriages ten years before *Loving v. Virginia*⁵² struck down the remaining anti-miscegenation statutes in the country, Chief Judge Kaye found many of the same arguments used then being used now to exclude same-sex couples from marriage.⁵³ Illustrating the significant shift that occurred in access to marriage just forty years ago, she noted that “during the lifetime of every Judge on this Court, interracial marriage was forbidden in at least a third of American jurisdictions.”⁵⁴ Rejecting as circular the notion that “same-sex couples can be excluded from marriage because ‘marriage,’ by definition, does not include them,” Chief Judge Kaye concluded that “[t]he long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it.”⁵⁵

After finding that the plaintiffs' fundamental right to marry was violated by preventing them from marrying the person of their choice, Chief Judge Kaye next explained that same-sex couples' exclusion from marriage also violated their individual equal protection rights.⁵⁶

50. *Hernandez*, 855 N.E.2d at 23-24 (emphasis added).

51. *Id.* at 23; see also *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (citing Chief Judge Kaye's opinion).

52. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

53. *Hernandez*, 855 N.E.2d at 20.

54. *Id.* at 25. New York was one of eighteen states that did not ban such marriages in 1948, when the California Supreme Court became the first court in the country to strike down its ban in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948). *Id.*; see also Suzanne B. Goldberg, *And Justice for All? Litigation, Politics, and the State of Marriage Equality Today*, 1 ADVANCE 33, 47 (2007) (noting the “tremendous public pressure” placed on the California Supreme Court not to overturn the state's ban preventing interracial couples from marrying).

55. *Hernandez*, 855 N.E.2d at 26.

56. *Id.* at 27.

She said that, properly framed, the question before the court was whether any legitimate basis existed for excluding individuals in same-sex couples from the state's Domestic Relations Law.⁵⁷ Although she believed that the exclusion should be analyzed under heightened scrutiny,⁵⁸ she found the exclusion could not survive even rational basis review because it did not further any legitimate state interest.⁵⁹ Chief Judge Kaye stated that:

[I]t is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.⁶⁰

Chief Judge Kaye's dissent was all the more persuasive because of the feebleness of the State of New York's reasons for banning individuals in same-sex couples from marrying. The plurality stated:

[T]he current definition of marriage is rationally related to the State's legitimate interest in channeling opposite-sex relationships

57. *Id.*

58. Kaye made three arguments for heightened scrutiny: sexual orientation discrimination should be considered using a "suspect" class analysis and thus entitled to heightened scrutiny; exclusion from marriage is based on sex discrimination (already entitled to heightened scrutiny); and violation of the fundamental right to marry requires heightened scrutiny of the legislature's reasoning. *Id.* at 27-30.

59. *Id.* at 30.

60. *Id.*; see also *Conaway v. Deane*, 932 A.2d 571, 650 n.25 (Md. 2007) (Raker, J., concurring). Noting that "Maryland's equal protection jurisprudence requires that the legislative *distinction further* a legitimate state interest," Justice Raker cited Chief Judge Kaye on whether a rational basis exists for excluding individuals in same-sex couples from marriage, and concluded that "the State's proffered interest—providing a stable environment for procreation and child rearing—is actually compromised by denying same-sex families the benefits and rights that flow from marriage." *Id.* at 650. *But see Andersen v. King County*, 138 P.3d 963, 969 n.2 (Wash. 2006). Justice Madsen's plurality opinion noted: "Justice Fairhurst's dissent attempts to shift the focus from whether limiting marriage to opposite-sex couples furthers these interests to whether excluding same-sex couples furthers these interests. By doing so the dissent fails to give the legislature the deference required under the constitution." *Id.*

into marriage because of the natural propensity of sexual contact between opposite-sex couples to result in pregnancy and childbirth.⁶¹

While acknowledging that marriage also serves “individual interests . . . such as companionship and emotional fulfillment,” the plurality concluded that marriage “was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth.”⁶²

The plurality also found persuasive the dissenting opinion of Justice Robert J. Cordy in *Goodridge v. Department of Public Health*, where he noted that one of the functions of marriage is to serve as a “mechanism for coping with the fact that [heterosexual] sexual intercourse commonly results in pregnancy and childbirth.”⁶³ The *Hernandez* plurality described marriage as an institution needed primarily to address the results from the casual sexual conduct of opposite-sex couples.

It is not irrational for the Legislature to provide an incentive for opposite-sex couples—for whom children may be conceived from casual, even momentary intimate relationships—to marry, create a family environment, and support their children. . . . The Legislature has granted the benefits (and responsibilities) of marriage to the class—opposite-sex couples—that it concluded most required the privileges and burdens the institution entails due to inherent procreative capabilities.⁶⁴

Chief Judge Kaye forcefully rejected the plurality’s reasoning, stating that, while encouraging procreation within marriage is a legitimate state interest, excluding individuals in same-sex couples from marriage in no way furthers that interest.⁶⁵ While noting the many ways the Legislature could promote procreation in marriage, such as providing tax breaks, subsidized child care, or mandated family leave to married couples who procreate, she argued that “no

61. *Hernandez*, 855 N.E.2d at 21.

62. *Id.*

63. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).

64. *Hernandez*, 855 N.E.2d at 21-22.

65. *Id.* at 30-31.

one rationally decides to have children because gays and lesbians are excluded from marriage.”⁶⁶

Chief Judge Kaye understood the United States Supreme Court case of *Turner v. Safley* to have established that “procreation is not the sine qua non of marriage” because prisoners were permitted to marry despite their inability to engage in sexual conduct.⁶⁷ Unlike the *Hernandez* plurality, the *Turner* Court recognized that “many important attributes of marriage remain” even assuming the limitations of prison life, such as marriage’s “expressions of emotional support and public commitment.”⁶⁸ Judge Kaye explained:

Marriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage—purportedly to encourage other people to procreate. Indeed, the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship, rather than on the couple’s possible role as parents. Nor does the plurality even attempt to explain how offering only heterosexuals the right to visit a sick loved one in the hospital, for example, conceivably furthers the State’s interest in encouraging opposite-sex couples to have children. . . . *The breadth of protections that the marriage laws make unavailable to gays and lesbians is “so far removed” from the State’s asserted goal of promoting procreation that the justification is, again, “impossible to credit.”*⁶⁹

66. *Id.* at 31.

67. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), which holds that denying a prisoner the right to marry is unconstitutional).

68. *Hernandez*, 855 N.E.2d at 31. Chief Judge Kaye also pointed out that it cannot be the ability to procreate once released from prison that underlies the fundamental right to marry being protected for inmates, but not gays and lesbians. Once inmates are released, they have the right to marry simply by being nonprisoners. *Id.*; see also *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008).

69. *Hernandez*, 855 N.E.2d at 31-32 (emphasis added) (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)); see also *In re Marriage Cases*, 183 P.3d at 432 (“None of the past cases discussing the right to marry . . . contain any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally . . .”).

After dismissing the State’s other rationales, such as moral disapproval and tradition, for continuing the ban, Chief Judge Kaye also rejected the State’s argument that uniformity with other jurisdictions would support the plurality’s decision. She noted that six of the seven jurisdictions bordering New York afford statewide legal status to same-sex couples’ relationships: Massachusetts and the Canadian provinces of Ontario and Quebec permit same-sex couples to marry, Vermont and Connecticut provide them with civil unions, and New Jersey provides domestic partnerships.⁷⁰ Thus, excluding same-sex couples from the right to marry because “‘others do it too’ is no more a justification for the discriminatory classification than the contention that the discrimination is rational because it has existed for a long time. As history has well taught us, separate is inherently unequal.”⁷¹

Despite the court of appeals’ decision in *Hernandez*, New York has started to recognize the marriages of same-sex couples. On May 14, 2008, New York Governor David A. Patterson ordered all state agencies to revise their policies to recognize same-sex couples’ marriages from other jurisdictions.⁷² The Governor’s directive cited the recent state appellate court decision that recognized the Canadian marriages of same-sex couples as valid in New York.⁷³ In 2008, two New York lower courts recognized the Canadian marriages of same-sex couples as valid in New York. In *Martinez v. County of Monroe*, an appellate court determined that an employee of Monroe Community College was entitled to obtain health benefits for her same-sex spouse because New York was required to recognize their marriage from Canada.⁷⁴ The court stated that New York law recognizes marriages solemnized outside New York unless they are prohibited by positive law or prohibited by natural law, such as incestuous or polygamous marriages.⁷⁵ Otherwise, a marriage that is

70. *Hernandez*, 855 N.E.2d at 33-34 (citing statutes). As of October 10, 2008, Connecticut also permits same-sex couples to marry. See *Kerrigan v. Comm’r of Pub. Health*, No. 17716, 2008 WL 4530885, at *47 (Conn. Oct. 28, 2008).

71. *Hernandez*, 855 N.E.2d at 34.

72. Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

73. *Id.*

74. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008).

75. *Id.* at 742.

valid where entered into is valid in New York.⁷⁶ Consequently, because Canada permits same-sex couples to marry⁷⁷ and no New York statutes prohibit recognition of marriages by same-sex couples, the plaintiff was entitled to have her Canadian marriage recognized in New York.⁷⁸

The same result was reached in *Beth R. v. Donna M.*, where the Supreme Court of New York County held that the plaintiff was entitled to obtain a divorce in New York of her Canadian marriage to her same-sex spouse.⁷⁹ Since *Hernandez* did not address whether New York courts should recognize valid out-of-state marriages the court held that, absent litigation, the question should be controlled by common law doctrines and comity.⁸⁰ New York law respects out-of-state marriages, even if the marriage would be void if entered into within the state, unless the marriages were “abhorrent to New York public policy.”⁸¹ Since only incestuous marriages and polygamous marriages have been held by New York courts to violate public policy, there was no reason not to recognize the parties’ Canadian marriage.⁸² The court also considered the numerous recent “pronouncements by statewide and local executive branch offices” as supporting the conclusion that valid Canadian marriages between same-sex couples must be recognized in New York.⁸³ Thus, the court denied defendant’s

76. *Id.*

77. Civil Marriage Act, 2005 S.C., ch. 33 (Can.); *see also* Halpern v. Toronto, [2003] 65 O.R.3d 161, 199-200 (Can.) (permitting individuals in same-sex couples to marry in the Canadian province of Ontario prior to the Civil Marriage Act).

78. *Martinez*, 850 N.Y.S.2d at 742. The defendant argued that *Hernandez* determined that marriages by same-sex couples violated the state’s public policy, but the court concluded that it simply indicated that same-sex couples did not have a constitutional right to marry within New York. *Id.* at 743.

79. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. 2008).

80. *Id.* at 504.

81. *Id.*

82. *Id.*

83. *Id.* at 505. The court cited two Attorney General opinions by Elliott Spitzer and Andrew Cuomo concluding that “parties (to same-sex marriages from other jurisdictions) must be treated as spouses for purposes of New York law.” *Id.* (citing 1 Op. Att’y Gen. 34-35 (2004); *Godfrey v. Hevesi*, No. 5896/06 (N.Y. App. Div. 2007) (reply memorandum in further support of defendant’s motion to dismiss)). Additionally, the New York State Comptroller, New York City Corporate Counsel, and New York State Department of Civil Service all reached similar results. *See*

motion to dismiss the divorce action on the grounds that the parties' Canadian marriage was void.⁸⁴

While it is distressing that the New York Court of Appeals rejected the same-sex couples' pleas to be permitted to marry in their home state, it appears that those couples who can afford a trip to Massachusetts, California, or Connecticut may be able to obtain the status they seek when they return to New York.⁸⁵ Perhaps what history teaches us is that, as discrimination slowly starts to dissipate over time, those jurisdictions that first end the discrimination become havens for couples prevented from marrying at home. Courts then realize that couples are entitled to obtain externally what they are prevented from having internally, and as more and more courts recognize the out-of-state marriages, whether from Canada, Massachusetts, California, or Connecticut, the number of same-sex couples who are considered married in New York will continue to increase.

Beth R., 853 N.Y.S.2d at 505-06 (citing Letter from Alan G. Hevesi, N.Y. State Comptroller to Mark Daigneault, state employee (Oct. 8, 2004); Letter from Michael A. Cardozo, Corporation Counsel, to Hon. Michael R. Bloomberg (Nov. 17, 2004); Memorandum from the N.Y. State Dep't of Civil Serv. on Employee Benefits Div. Policy (May 1, 2007)). A challenge to this revision by the State Civil Service was rejected in *Lewis v. New York State Department of Civil Service*, No. 4078-07, 2008 N.Y. Misc. LEXIS 1623 (N.Y. Sup. Ct. Mar. 3, 2008) (where the trial court held that the policy memorandum was both lawful and within the Department's authority). Also, the Governor of New York, David A. Paterson, defended the recognition of out-of-state marriages by same-sex couples. See Joel Stashenko, *N.Y. Governor Defends Recognition of Other Jurisdictions' Gay Marriages*, N.Y. L.J., May 30, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202421798174#>.

84. *Beth R.*, 853 N.Y.S.2d at 506. The court also considered the question of parental rights to custodial care and obligations of financial support by the plaintiff over the parties' two minor children. Ruling that the artificial insemination during the marriage might result in the child being the legitimate child of both parents, the court continued the case for determination in March 2008. *Id.* at 506-09.

85. I must note some small satisfaction with these two recent cases since I have written about interstate recognition of out-of-state marriages since 1994. The lower New York courts used exactly the same analysis that I predicted could be used in those initial articles. See, e.g., *If We Marry*, *supra* note 22; *Public Policy Exception*, *supra* note 29.

B. Andersen v. King County

Justice Mary E. Fairhurst's powerful dissent in *Andersen* shares the understanding of marriage expressed by Chief Judge Kaye and the plaintiffs in that case.⁸⁶ Justice Fairhurst found it unacceptable that the plurality upheld Washington's exclusionary marriage statutes.

The plurality and concurrence condone blatant discrimination against Washington's gay and lesbian citizens in the name of encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents, while ignoring the fact that *denying same-sex couples the right to marry has no prospect of furthering any of those interests.*⁸⁷

Justice Fairhurst explained that civil marriage is the "legal status given to individuals who seek the State's recognition of their committed relationships," and is accompanied in Washington by at least 423 state-defined rights or duties, many of which cannot be obtained outside of marriage.⁸⁸ More importantly, "[t]here is no equally respected social union. Nor is there a comparable public acknowledgment of a couple's decision to commit their lives to each other."⁸⁹

Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right,

86. *Andersen v. King County*, 138 P.3d 963, 1012 (Wash. 2006) (Fairhurst, J., dissenting). Justices Bobbe J. Bridge, Susan Owens and Tom Chambers also joined in Justice Fairhurst's dissent. *See id.* at 1027 (Bridge, J., dissenting) (chastising the plurality for being unwilling to protect the constitutional rights of those disenfranchised from the political process); *id.* at 1040 (Chambers, J., dissenting) (questioning Justice Madsen's analytical approach toward the Washington Constitution's privileges and immunities clause).

87. *Andersen*, 138 P.3d at 1012-13 (Fairhurst, J., dissenting) (emphasis added) (referring to *id.* at 983 (plurality opinion) and *id.* at 1006 (Alexander, C.J., concurring)).

88. *Id.* at 1013-14.

89. *Id.* at 1014.

but whether the freedom to choose one’s own life partner is so rooted in our traditions.⁹⁰

After reviewing the analysis used by Washington courts for determining when a statute lacks a rational basis sufficient to uphold its constitutionality,⁹¹ Fairhurst discussed the State of Washington’s proffered interests for restricting marriage to opposite-sex couples.⁹² Those interests are “encouraging procreation, encouraging marriage

90. *Id.* at 1022 (citing *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) (unpublished order)).

91. *Id.* at 1015-19.

92. *Id.* at 1017-20. The plurality and the dissent differed on whether the analysis should be that the State’s interests must be furthered by denying marriage to same-sex couples (dissent’s view, *id.* at 1017), or whether they must be furthered by allowing opposite-sex couples to marry (plurality’s view, *id.* at 984). *See also supra* note 60, indicating the same disagreement between the New York and Maryland justices. While it is true, as the plurality stated, that “[g]ranting the right to marry to opposite-sex couples clearly furthers the governmental interests advanced by the State,” *Andersen*, 138 P.3d at 984-85, doing so does not explain why those interests are furthered by denying the right to marry to individuals in same-sex couples. Since the State’s interests can be furthered even if both sets of couples are permitted to marry, there must be some other reason for the ban on marriage by same-sex couples. As Justice Kaye noted, “the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.” *Hernandez v. Robles*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting); *see also Conaway v. Deane*, 932 A.2d 571, 696 (Md. 2007) (Bell, C.J., dissenting); *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008) (both agreeing with Justice Kaye). That is Justice Fairhurst’s point: the State’s reasons are not furthered by denying marriage to individuals in same-sex couples, thus providing no rational basis for the ban. *Andersen*, 138 P.3d at 1018. The plaintiffs were not seeking to end marriage for individuals in opposite-sex couples, only to have it extended to themselves. They did not challenge the marriage statutes in general, but only the Defense of Marriage Act (DOMA) (*see supra* notes 18 and 41), which amended RCW 26.04.010, to describe marriage as only valid if between a male and a female, and provided in RCW 26.04.020(1)(c) that marriage is prohibited for couples other than a male and a female. Since the plaintiffs challenged only those statutes preventing them from marrying their same-sex partners and not the marriage statutes extending rights to individuals in opposite-sex couples, the plurality’s statement of the issue is unpersuasive. *Id.* at 1015-19; *see also Carlos A. Ball, The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1203-08 (2004) (discussing the question of whether the fundamental right to marry includes a positive component requiring states to recognize marital relationships, beyond a duty not to interfere with those relationships).

for individuals in relationships that result in children, and encouraging the raising of children in homes headed by opposite-sex parents.”⁹³ Essentially, the State argued that marriage is provided to opposite-sex couples so they will have children, will marry when children result from their sexual activity, and will raise their children with both a male and a female parent in the home.⁹⁴ While the dissent questioned whether those interests are legitimate,⁹⁵ even if they are, they focus only on the procreative results of opposite-sex sexual activity, without focusing on what most people would say is the real keystone of marriage: the relationship between the adults.

Even though most people in the United States would define “marriage” as describing the relationship with their spouse and “family” as being more expansive to include the relationship with their spouse, children, and extended relatives or friends, the plurality expressly rejected this understanding.

93. *Andersen*, 138 P.3d at 1017 (Fairhurst, J., dissenting) (citing *id.* at 982-85 (plurality opinion)).

94. *See id.* at 982-85 (plurality opinion).

95. *Id.* at 1017 n.18 (Fairhurst, J., dissenting). See also the majority opinion in *Conaway*, which acknowledged that the plaintiffs’ argument that Maryland’s DOMA is not rationally related to the governmental objective of fostering optimal relationships for procreation has some merit. *Conaway*, 932 A.2d at 632. There, the majority noted that, of the 104.7 million U.S. households counted by the 2000 Census Bureau, “only 24.1 percent were represented by the nuclear family (married couples with their own children). This number represented a drastic decline from the 40 percent of all households in 1970.” *Id.* (citing JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: MARCH 2000, P20-537, at 3 (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>). As of 2000, there were an equal number of married households without marital children as there were with marital children. *Id.* “Thus, reasonable doubt exists that the traditional model of what constitutes a family does not constitute the majority of households any longer.” *Id.* at 633. Despite this reality, the *Conaway* majority held that legislative enactments reviewed under rational basis scrutiny “need not be drawn with mathematical exactitude, and may contain imperfections that result in some degree of inequality.” *Id.* (citing *Piscatelli v. Bd. of Liquor License Comm’rs*, 837 A.2d 931, 944 (Md. 2003); *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178, 185 (Md. 1985)). Justice Raker’s concurrence challenged the majority and said the law banning individuals in same-sex couples from marrying “creates more than merely ‘some inequality’—it creates a grossly unequal distribution of benefits and privileges to two similarly situated classes of people.” *Id.* at 651 (Raker, J., concurring).

Contrary to the view expressed in Justice Fairhurst’s dissent [and most of the United States Supreme Court’s previous marriage opinions], the right to marry is not grounded in the State’s interest in promoting loving, committed relationships. While desirable, nowhere in any marriage statute of this state has the legislature expressed this goal.⁹⁶

This statement is amazing. It seems that, in an effort to differentiate between the relationships of married, opposite-sex couples and those of same-sex couples seeking to enter into marriages, a plurality of the Washington Supreme Court ignored the central reason why most individuals marry: to express their hopes and dreams with the one person with whom they hope to share their lives. Most marriage vows say little about encouraging procreation, procreative relationships, or families with both male and female parents. Perhaps most opposite-sex couples do want to have children within their marital relationship, but few think that is the *only* reason for getting married.

Most couples do not understand their marriages in these ways because the rationales proffered by the State are unconvincing. The State sought to continue the ban preventing individuals in same-sex couples from marrying, and the plurality did so by focusing on those few limited aspects of marriage that distinguish same-sex couples from opposite-sex couples.

In contrast, Justice Fairhurst cited *Griswold v. Connecticut* as providing a richer description of the marriages that most couples hope they are entering.

“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”⁹⁷

The plurality’s willingness to seize on the only thing in marriage that cannot result from same-sex unions is evident while discussing the State’s reasons for limiting marriage to opposite-sex couples. After noting that “partners in marriage are expected to engage in exclusive

96. *Andersen*, 138 P.3d at 979 n.12 (plurality opinion) (emphasis added).

97. *Id.* at 1024 (Fairhurst, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

sexual relations with children the probable result and paternity presumed,” the State “reasons that no other relationship has the potential to create, without third party involvement,⁹⁸ a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples.”⁹⁹

While deference to the legislature is required under rational basis review,¹⁰⁰ it is nonsensical to speculate that the Washington legislature granted marriage rights to opposite-sex couples for this reason. What is surprising is that the plurality and the State believe they are protecting marriage and not denigrating it, even while limiting the reasons for its existence to such a circumscribed purpose. Even if the State’s reasons were why Washington provides marriage rights, duties, and responsibilities to married couples, it has taken a strange approach for doing so, since a significant number of the marital rights and duties concern only the two adults involved in the relationship and

98. *Id.* at 982 (plurality opinion). *But see id.* at 1017 n.19 (Fairhurst, J., dissenting) (noting that numerous infertile opposite-sex couples cannot procreate without third party involvement through in vitro fertilization or surrogacy, but they are allowed to marry). Countless lesbians and gay men use these same techniques to have their own children. To provide marital benefits only to those who are able to procreate on their own is ludicrous, as it is also mean-spirited to exclude from marriage some who use modern medical techniques to enjoy the benefits of parenthood, while allowing others who use those techniques to marry. *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 *BUFF. L. REV.* 341, 342-44 (2002).

99. *Andersen*, 138 P.3d at 982 (plurality opinion).

100. Under this level of review, the plaintiffs must show that “the classification drawn by the law is not rationally related to a legitimate state interest.” *Id.* at 980. The plurality explained that, under rational basis review, “the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification,” and the standard may be satisfied “where the legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data.” *Id.* Of course, use of the rational basis standard was derided by the dissent and is questionable given the plaintiffs’ claim that they were being denied their fundamental right to marry. *Id.* at 1013 (Fairhurst, J., dissenting); *see also Conaway*, 932 A.2d at 649 (Raker, J., concurring) (“[W]here a legislative enactment ‘invades protected rights to life, liberty, property or other interests secured by the fundamental doctrines of our jurisprudence, there is reason to be especially vigilant’ in the exercise of rational basis review.”) (quoting *Att’y Gen. of Md. v. Waldron*, 426 A.2d 929, 940 (Md. 1981)).

not their children or their families. In fact, all of the statutes focusing on spousal rights and duties have little importance if marriage is understood as the plurality and the State understand it.

Again agreeing with Chief Judge Kaye, Justice Fairhurst found the U.S. Supreme Court's decision in *Turner v. Safley*¹⁰¹ to provide a more accurate vision of marriage than the one described by the *Andersen* plurality.¹⁰² Unlike the narrow vision of marriage, focusing primarily on children, that the plurality used to exclude individuals in same-sex couples from marriage, Justice Fairhurst focused on the *Turner* Court's description of this society's shared understanding of the fundamental right to marry.¹⁰³ In *Turner*, the Supreme Court understood marriage to be an "expression of emotional support and public commitment . . . [which is] an important and significant aspect of the marital relationship,"¹⁰⁴ as well as the "religious and personal aspects of the marriage commitment."¹⁰⁵ Justice Fairhurst found *Turner* most closely related to *Goodridge*, where the Massachusetts Supreme Judicial Court held that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."¹⁰⁶

Both *Turner* and *Goodridge* more accurately describe the reasons that most couples marry. Rather than seeing procreation and child-rearing as the reason marriage plays such an important role in society, marriage is initially, and sometimes primarily, concerned with

101. See *supra* note 67 and accompanying text (discussing Chief Judge Kaye's interpretation of *Turner v. Safely*, 482 U.S. 78 (1987)).

102. *Andersen*, 138 P.3d at 1023 (Fairhurst, J., dissenting).

103. *Id.*

104. *Id.* (quoting *Turner*, 482 U.S. at 95-96).

105. *Id.* (quoting *Turner*, 482 U.S. at 96).

106. *Id.* (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003)). Massachusetts Supreme Court Chief Justice Marshall noted that it was not surprising that, historically, marriage had been a heterosexual institution because unassisted heterosexual intercourse was the only way, except adoption, to procreate, and children frequently resulted from heterosexual sexual conduct because contraceptives were either unavailable or ineffective. She continued: "But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in 'the modern age,' 'heterosexual intercourse, procreation, and child care are not necessarily conjoined.'" *Goodridge*, 798 N.E.2d at 961-62 n.23 (quoting *id.* at 995-96 (Cordy, J., dissenting)).

creating social support for a relationship in which the adult partners hope to love and support each other. While many marriages result in having children, for both opposite-sex and same-sex couples, it is the relationship between the adults that allows them to create a home for the children with whom they ultimately share their lives. Without recognizing the adult relationship as primary, the plurality negates the most important reason that most people marry.

The dissent then discussed several other U.S. Supreme Court marriage cases. Without repeating that lengthy discussion here, it is useful to consider some of Justice Fairhurst's comments. She noted that *Griswold*, an opinion about the freedom of married couples to use contraceptives, "omitted any reference to procreation or even the gender of the spouses."¹⁰⁷ To Fairhurst, *Griswold* was an important case because it held that "the right of marital privacy included the right *not* to conceive children."¹⁰⁸ She concluded that "there is nothing inherent in the fundamental right to marry that would justify a law that excludes same-sex couples from also enjoying that right."¹⁰⁹

Fairhurst explained that cases by individuals in same-sex couples seeking the freedom to marry fall "at the intersection between the fundamental right to marry and the fundamental liberty interest in making one's own personal decisions relating to intimate partners."¹¹⁰ This liberty interest in choosing one's partner and the members of one's family was affirmed by the U.S. Supreme Court in countless cases because it involves "the *most intimate and personal choices* a person may make in a lifetime."¹¹¹

"It is at least erroneous, if not disingenuous, for the plurality to read the Supreme Court's repeated recognition of the fundamental right to marry as only a means to further the fundamental right to procreate."¹¹² Even if the right to marry is linked to procreation and child-rearing, "that link cannot be a basis to deny the right to marry to

107. *Andersen*, 138 P.3d at 1024.

108. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

109. *Id.*

110. *Id.*

111. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) and citing *Lawrence v. Texas*, 539 U.S. 558, 577-79 (2003); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974); *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

112. *Andersen*, 138 P.3d at 1023 (citing *id.* at 978-79 (plurality opinion)).

same-sex couples because we allow them to adopt and rear children. The same liberty and privacy interests historically recognized in decision making pertaining to the family [are] at stake here.”¹¹³

Although individuals in same-sex couples were denied the right to marry, the Washington Legislature and Governor Chris Gregoire expanded the rights provided to couples in domestic partnerships significantly on March 12, 2008. Governor Gregoire signed House Bill 3104, Expanding Rights and Responsibilities for Domestic Partnerships, which provides more than 170 additional benefits and responsibilities to couples in domestic partnerships.¹¹⁴ These additional rights will help couples protect and strengthen their relationships, but separates them into “gay marriages,” lacking many of the rights, recognition, and responsibilities that opposite-sex couples receive in “marriage.”

C. Lewis v. Harris

The New Jersey Supreme Court’s decision in *Lewis* differs from both *Hernandez* and *Andersen* because the court ordered the legislature to offer same-sex couples the same rights and benefits enjoyed by married, opposite-sex couples.¹¹⁵ But again, the majority rejected the notion that gay men and lesbians enjoy a fundamental right to marry the person of their choosing if that person is a member of the same sex.

Another difference in the *Lewis* case is that “[t]he State concede[d] that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children.”¹¹⁶ As the majority noted, this concession was required because New Jersey already recognizes the rights of gay men and lesbians to raise their own children and have foster children placed

113. *Id.* at 1023 n.27.

114. See H.B. 3104, 60th Leg., Reg. Sess. (Wash. 2008), available at <http://www.statesurge.com/bills/370386-hb3104-washington> (follow “original bill” hyperlink). The bill took effect on June 12, 2008 and makes domestic partnerships available to same-sex couples and opposite-sex couples over the age of 62. *Id.*

115. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

116. *Id.* at 205-06.

with them.¹¹⁷ Instead, the State looked to “age-old traditions, beliefs, and laws which have defined the essential nature of marriage to be the union of a man and a woman” and argued that “same-sex marriage has no historical roots in the traditions or collective conscience of the people of New Jersey to give it the ranking of a fundamental right.”¹¹⁸ Unfortunately, the majority found this argument persuasive.

Chief Justice Deborah T. Poritz concurred in the result that same-sex couples must receive the rights and benefits provided to married couples based on the equal protection clause of the New Jersey Constitution.¹¹⁹ But Poritz dissented because she could “find no principled basis, however, on which to distinguish those rights and benefits from the right to the title of marriage.”¹²⁰ Poritz agreed with the majority finding that the “universally accepted fundamental right to marriage [is] ‘deeply rooted in the traditions, history, and conscience of the people.’”¹²¹ But she challenged the majority’s formulation of the issue, saying that the question of whether a right to “same-sex marriage” exists inappropriately narrows the question.

Under the majority opinion, it appears that persons who exercise their individual liberty interest to choose same-sex partners can be denied the fundamental right to participate in a state-sanctioned civil marriage. I would hold that plaintiffs’ due process rights are violated when the State so burdens their liberty interests.¹²²

117. *Id.* at 206. Unfortunately, this reasoning did not lead the New York, Washington, and Maryland pluralities to alter their decisions to deny individuals in same-sex couples the right to marry despite similar parenting rights existing in those states. *See, e.g., In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (permitting second parent adoptions); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (N.Y. App. Div. 2004) (recognizing joint adoption); *see also* State Pages for Washington and Maryland, <http://lambdalegal.org/our-work/states> (showing some second parent adoption rights in Washington and Maryland and a positive climate for visitation cases in Maryland).

118. *Lewis*, 908 A.2d at 205-06.

119. *Id.* at 224 (Poritz, C.J., concurring and dissenting) (Long & Zazzali, JJ., joined in the dissent) (citing N.J. CONST. art. 1, ¶ 1, which is equivalent to the Due Process and Equal Protection Clauses of the U.S. Constitution).

120. *Id.*

121. *Id.* (citing *id.* at 200 (majority opinion)).

122. *Id.* at 225 (Poritz, C.J., concurring and dissenting).

Chief Justice Poritz understood that while the plaintiffs needed the rights, benefits, and responsibilities that come with marriage, it was the right to marry, and not the rights, that was their focus. Acknowledging “another dimension to the relief plaintiffs’ seek,” Poritz recognized that they “speak of the deep and symbolic significance to them of the institution of marriage.”¹²³ She began by quoting the eloquent description of marriage that Chief Justice Marshall used in her opinion in *Goodridge*:

Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.¹²⁴

Then, Poritz recognized that the plaintiffs were no less articulate in describing their desire to marry, as expressed in the affidavits they presented to the court:

In our relationship, Sandra and I have the same level of love and commitment as our married friends. But being able to proudly say that we are married is important to us. Marriage is the ultimate expression of love, commitment, and honor that you can give to another human being.

. . . .

I am proud that Alicia and I have the courage and the values to take on the responsibility to love and cherish and provide for each other. When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained.

. . . .

Society endows the institution of marriage with not only a host of rights and responsibilities, but with a significant respect for the relationship of the married couple. When you say that you are

123. *Id.*

124. *Id.* (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003)).

married, others know immediately that you have taken steps to create something special. . . . The word “married” gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don’t have to wonder what kind of relationship it is or how to refer to it or how much to respect it.¹²⁵

Justice Poritz understood the plaintiffs to be expressing their “deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word.”¹²⁶ She thought that telling the legislature to give the plaintiffs the rights and responsibilities of marriage while withholding the word, “marriage,” and placing same-sex couples into a separate statutory scheme, such as civil unions, demeaned their request.¹²⁷ Recognizing that a separate scheme “set[s] people apart as surely as physical separation on a bus or in school facilities,” the State was sending the message that “what same-sex couples have is not as important or as significant as real marriage, that such lesser relationships cannot have the name of marriage.”¹²⁸

Chief Justice Poritz also found that asking about a fundamental right to same-sex marriage so narrowed the issue as to make it inevitable that such a right was not deeply rooted in the traditions of the country.¹²⁹ She found it obvious that such a right did not exist: “Of

125. *Id.* at 225-26. Of course, marriage is not the only way to express these feelings and countless couples have chosen to do so outside the institution of marriage. *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (Beacon Press 2008). The point of this essay is not to claim marriage as the only or best locus for expressing these feelings or to ignore that relationships outside marriage also deserve societal respect and support. Instead, its purpose is to claim the right to marry for individuals in same-sex couples if those individuals choose to express their feelings by joining this institution.

126. *Lewis*, 908 A.2d at 226.

127. *Id.*

128. *Id.* at 226-27. Chief Justice Poritz referred to the Birmingham, Alabama boycott that occurred when Rosa Parks, an African-American woman, refused to give up her seat in the front of the bus to a white person and move to the back of the bus where African-Americans were required to sit. She also referred to the segregated school facilities determined to be unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Lewis*, 908 A.2d at 226-27.

129. *Id.* at 227-28.

course there is no history or tradition including same-sex couples; if there were, there would have been no need to bring this case to the courts.”¹³⁰ Agreeing with Judge Collester’s dissent in the court of appeals opinion below, she found that the argument was circular and believed that *Loving v. Virginia* should have ended any notion that fundamental rights can be restricted by the traditions of the country.¹³¹ If the Supreme Court had used Virginia’s tradition of preventing interracial couples from marrying, it would have sustained its law, rather than finding the law to violate the couple’s fundamental right to marry.¹³² Instead, *Loving* should teach that the fundamental right to marry cannot be limited to opposite-sex couples any more than it could be limited to same-race couples.¹³³

Chief Justice Poritz found it to be incongruous that, following the conclusion of this case, New Jersey’s statutes would reflect “both abhorrence of sexual orientation discrimination and a desire to prevent same-sex couples from having access to one of society’s most cherished institutions, the institution of marriage.”¹³⁴ In fact, she concluded that it was not surprising that the State was reduced to using tradition alone to justify continuing the ban because social science data would not support using either promotion of procreation, or the notion that heterosexual households are the optimal environment for raising children, as bases to do so.¹³⁵ Thus, the State, she concluded, was left to argue “but that is the way it has always been,” as its only rationale for continuing the ban.¹³⁶

130. *Id.* at 228.

131. *Id.* (referring to *Loving v. Virginia*, 388 U.S. 1 (1967)).

132. *Id.* (citing *Loving*, 388 U.S. at 12).

133. *Id.*

134. *Id.* at 229-30.

135. *Id.* at 230 (citing Gregory N. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOL. 607, 611 (2006) (indicating that same-sex couples are increasingly forming families into which children are conceived, born, and raised, and studies of those families have not found reliable disparities in mental health or social adjustment of children raised in those families)).

136. *Lewis*, 908 A.2d at 230. The California Supreme Court also rejected the argument that tradition alone could support the exclusion of same-sex couples from marriage. The court noted:

[i]f we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority

Chief Justice Poritz ended her dissent with a long quote from Professor Ronald Dworkin's essay, *Three Questions for America*.¹³⁷ While recognizing that civil union status with the rights and benefits of marriage would significantly lessen the discrimination that same-sex couples endure in a society which bans our marriages, Dworkin stated that it is marriage's "long traditions of historical, social, and personal meaning" that make it impossible to replicate in a newly-created, separate status for these couples.¹³⁸

We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed. . . . If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.¹³⁹

Recently, Dworkin's conclusion that civil unions cannot be equal to marriages has been confirmed by the New Jersey Civil Union Review Commission.¹⁴⁰ The Commission issued its report on February 19, 2008, based on hearings held around the state on whether providing civil unions did give same-sex couples the same rights afforded to married couples.¹⁴¹ The Commission's findings detailed

ances and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.

In re Marriage Cases, 183 P.3d 384, 451 (Cal. 2008).

137. Ronald Dworkin, *Three Questions for America*, THE N.Y. REVIEW OF BOOKS, Sept. 21, 2006, <http://www.nybooks.com/articles/19271>.

138. *Lewis*, 908 A.2d at 231 (citing Dworkin, *supra* note 137, at 24, 30).

139. *Id.* (citing Dworkin, *supra* note 137, at 24, 30).

140. The Commission was created by Public Law 2006, chapter 103, as part of the Civil Union Act establishing civil unions for individuals in same-sex couples. N.J. STAT. ANN. § 37:1-36 (West 2006).

141. See N.J. CIVIL UNION REVIEW COMM'N, FIRST INTERIM REPORT OF THE N.J. CIVIL UNION REVIEW COMM'N, (Feb. 19, 2008), <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf> [hereinafter N.J. COMM'N REPORT];

the numerous ways in which couples in civil unions encountered discrimination that would not have occurred had they been married.

Three of the ten findings focused on problems raised in obtaining employment-related benefits and health insurance because employers did not offer these benefits to their employees in civil unions.¹⁴² Attorney Beth Robinson, Chair of Vermont Freedom to Marry and one of the lawyers who won the case of *Baker v. State*,¹⁴³ testified that her work with same-sex couples who entered into civil unions in Vermont shows that these couples continue to encounter discrimination from their employers.¹⁴⁴ After seven years of civil unions in Vermont, Ms. Robinson testified: “it’s just not true that if enough time passes, civil unions will achieve parity with marriage.”¹⁴⁵ She provided the example that employers failed to provide tax exemptions on health insurance because they do not have the appropriate software to recognize employees’ civil unions.¹⁴⁶

Tina Kelley, *Commission Report Cites Flaws in New Jersey Civil Union Law*, N.Y. TIMES, Feb. 20, 2008, http://www.nytimes.com/2008/02/20/nyregion/20union.html?_r=2&ref=nyregion&oref=slogin&oref=slogin.

142. Frequently, the problem was the Employment Retirement Income Security Act (ERISA), 29 U.S.C. ch. 18, which controls the insurance plans of fifty percent of New Jersey companies who are self-insured. Since ERISA controls these plans and looks to federal law rather than state law, requiring equal treatment under New Jersey law does not solve the problem for couples in civil unions. N.J. COMM’N REPORT, *supra* note 141, at 6. DOMA, *see supra* note 18, which only recognizes heterosexual married couples for all federal law purposes, might prevent recognition of New Jersey marriages as well as civil unions. This same problem exists for same-sex couples who are married in Massachusetts, California, and Connecticut, and are denied federal rights available to all other married couples.

143. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

144. The Vermont legislature also created civil unions for same-sex couples, after the Supreme Court required it to either open the marriage statutes to same-sex couples or provide them with “some equivalent statutory alternative.” *Id.* at 867; *see also* 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, 136-46 (2000) (discussing problems with portability of civil unions and denial of federal recognition as additional reasons why civil unions are not equal to marriage).

145. N.J. COMM’N REPORT, *supra* note 141, at 9.

146. *Id.* at 10. She noted that it is impossible to know how many people encounter these problems because they do not fully understand their rights or know what is happening. *Id.* Again, these couples would not obtain federal tax relief even if they were married, due to DOMA. *See* DOMA, *supra* note 18, § 7.

Other findings concerned the second-class status that partners in civil unions encounter when dealing with medical personnel, school officials, government workers, and others in positions of authority. Repeatedly having to explain the legal status of civil unions to others who provide vital services is more than a mere inconvenience. Those with whom these same-sex couples interact take their cues from the government's decision to exclude them from marriage, thereby, apparently endorsing discriminatory treatment against them.¹⁴⁷

Perhaps most distressing were the reports from the parents of children being raised by same-sex couples. Parents testified that their children struggled to understand why their parents could not marry, like the parents of their friends, and one even asked his parents if people in same-sex relationships were criminals because they could not marry.¹⁴⁸ During a symposium held in 1999 at Harvard Law School, I argued that same-sex couples should not accept domestic partnership or civil unions as a more politically-expedient compromise (even though they would provide those couples with necessary rights and recognition), rather than maintaining the fight for marriage equality, because I was afraid that exactly these harms would be caused to our children. An important part of the *Brown v. Board of Education* litigation focused on the social-science findings on how segregation negatively impacted children of color who were prevented from attending schools with white children.¹⁴⁹ The same problems arise for children of parents in same-sex relationships, whether registered in civil unions or not. These children understand clearly that society is telling them that their parents are not good enough to be married like their friends' parents may be, and this causes repeated and severe injury to these children.

147. See N.J. COMM'N REPORT, *supra* note 141, at 10-11. Testimony centered on interactions with banks, hospitals, and even courtrooms where a judge only asked jurors whether they were single or married, not partners in a civil union. *Id.* at 12-15.

148. *Id.* at 12. Of course, *Turner v. Safley* tells us that criminals can, in fact, marry. See *supra* notes 67 and 68.

149. Cox, *supra* note 144, at 118. Psychologist Kenneth Clark's research showed that African-American children were harmed by segregated school facilities, saying that "the damage wrought by the mere existence of segregation causes inequality. Separate could never be equal, no matter how comparable the separate schools were." *Id.* at 118 n.27 (citing JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, 21 (1987)).

This result is particularly problematic because the *Lewis* majority specifically stated:

There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households. . . . *There is no rational basis for visiting on those children a flawed and unfair scheme directed at their parents.* To the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.¹⁵⁰

If the court meant what it said, one could hope that the Commission’s report would lead the state’s legislature to conclude that civil unions cannot provide equal rights to same-sex couples in New Jersey. The majority refused to reach that conclusion, stating instead:

Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article 1, Paragraph 1. *We will not presume that a difference in name alone is of constitutional magnitude.*¹⁵¹

But Chief Justice Poritz anticipated the problems raised before the Commission when she said in her dissent, “What we ‘name’ things matters, language matters.”¹⁵²

Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choice and responsibility for those consequences. . . . Language and labels

150. *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) (emphasis added).

151. *Id.* at 221-22 (emphasis added).

152. *Id.* at 226 (Poritz, C.J., dissenting).

play a special role in the perpetuation of prejudice about differences.¹⁵³

Now that the New Jersey Civil Union Review Commission has confirmed what Chief Justice Poritz anticipated, the New Jersey Legislature must fulfill the requirement stated by the *Lewis* majority—to equalize committed, same-sex couples with their opposite-sex counterparts—by putting an end to the separate system of civil unions and ending the ban preventing these couples from marrying. If the majority truly believed that equality is required by the New Jersey Constitution, then individuals in same-sex couples must be allowed to marry. Only in this way can the equal protection violation be cured.

III. WHY WE WANT “MARRIAGE” AS UNDERSTOOD BY THE DISSENTING JUSTICES

More than eleven years after my partner, Peg, and I had a private ceremony to express our love for and pledge our long-term commitment to one another, we were married in Canada in July 2003. We were finally able to call ourselves spouses as of June 17, 2008, after almost eighteen years of being together, because our home state of California considers that marriage to be valid and recognized here.¹⁵⁴ After reading these four cases, I am grateful that the marriage we share is one that seeks to achieve the vision described by the dissenting justices. They view marriage in much the same way that the Ontario Court of Appeal did when it stated:

Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes

153. *Id.* (citing MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 4, 6 (1990)).

154. After the November 2008 election, it is likely that our marriage is no longer valid and recognized in the state of California, despite the California Supreme Court decision. *See supra* note 7. Proposition 8 was passed by a simple majority of voters to rewrite the California Constitution to state: “Only marriage between a man and a woman is valid or recognized in California.” California Marriage Protection Act, Prop. 8 (2008), available at <http://voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.

expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.¹⁵⁵

This eloquent language describes an institution important enough and flexible enough to welcome the same-sex couples who wish to join it. Compare this with “marriage” as described by the four plurality and majority opinions from New York, Washington, New Jersey, and Maryland. For them, marriage is an institution that must be protected from same-sex couples, and one that is limited to opposite-sex couples either by tradition alone or to encourage solidifying those relationships that may be based on casual sexual contact and the children that may result. I doubt the descriptions of marriage used by the pluralities and majorities would appeal to most opposite-sex couples, who have been told all of their lives that marriage is something sacred, that adults should join in marriage with the one person with whom each chooses to share his or her life, and that marriage embodies individuals’ strongest yearnings for connection, sharing, and love. They too probably thought that they were entering marriages similar to those described by the dissenting justices.

As Justice Bridge stated in her *Andersen* dissent: “If the [Washington] DOMA purports to further some State purpose of preserving the family unit, as the plurality would interpret it, then I cannot imagine better candidates to fulfill that purpose than those same-sex couples who are the plaintiffs in these consolidated actions.”¹⁵⁶ It saddens me to find these courts willing to “redefine” marriage in order to justify the exclusion of individuals in same-sex couples. I expect these courts will rue the day they issued these opinions, as society looks back on them with disdain and dismay, in much the same way that we currently view the Virginia court’s opinion in *Loving*, and the Supreme Court’s opinions in *Plessy v. Ferguson*, *Bradwell v. Illinois*, and *Naim v. Naim*.¹⁵⁷

155. *Halpern v. Toronto*, [2003] 65 O.R.3d 161, 167-68 (Can.).

156. *Andersen v. King County*, 138 P.3d 963, 1028 (Wash. 2006) (Bridge, J., dissenting).

157. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana statute

This essay has focused on the dissenting justices' opinions because it is those justices who best understood why the plaintiff same-sex couples were seeking the freedom to marry. When other courts face similar challenges by same-sex couples excluded from marriage, those courts should pay close attention to the compelling reasoning and inspiring language used by the dissenting justices, and embrace an inclusive vision of marriage.

requiring separate railroad carriages for white and non-white passengers); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding Illinois decision preventing women from entering the legal profession); *Loving v. Commonwealth*, 147 S.E.2d 78 (1966) (upholding Virginia anti-miscegenation statute), *rev'd*, 388 U.S. 1 (1967); *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955) (upholding Virginia law banning individuals in interracial couples from marrying), *vacated*, 350 U.S. 891 (1955). These earlier decisions are now understood to be harmful errors by their courts. *Compare Hernandez v. Robles*, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting) ("I am confident that future generations will look back on today's decision as an unfortunate misstep."), *with* 885 N.E.2d at 12 (majority opinion) ("We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives."), *and Andersen*, 138 P.3d at 1040 (Bridge, J., dissenting) ("Future generations of justices on this court and future generations of Washingtonians will undoubtedly look back on our holding today with regret and even shame, in the same way that our nation now looks with shame upon our past acts of discrimination."), *with* 138 P.3d at 969 (majority opinion) ("[W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.").