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Gay Marriage Update: New England, Iowa, Wisconsin, and California

INSIDE

Updates on Gay Marriage in New England, Iowa, Wisconsin, and California

*by John Shu**

Litigation regarding gay marriage and other gay rights issues continues throughout the several states, and it is increasingly likely that the Supreme Court of the United States will rule on whether the United States Constitution guarantees a right to gay marriage. This article, a synopsis of the status of gay marriage in various states, analyzes recent court decisions in hopes of illuminating the relevant legal arguments. This article also highlights the most well-organized efforts and key players in the campaigns to legalize gay marriage at the state level.

CONNECTICUT: *Kerrigan v. Commissioner of Public Health*

On October 28, 2008, the Connecticut Supreme Court ruled 4-3 in *Kerrigan* that Connecticut's constitution protects the right to same-gender marriage.[1] On August 24, 2004 the organization Gay & Lesbian Advocates & Defenders ("GLAD") sued on behalf of seven same-gender couples when the town clerk in Madison, CT denied them marriage licenses.[2] Connecticut enacted a civil-union law in 2005, which granted the same rights and privileges as marriage but defined marriage as "the union of one man and one woman."[3] The plaintiffs amended their complaint, adding an eighth couple but not mentioning the civil-union act.[4] The plaintiffs claimed that denying them marriage violated their equal protection, due process, and intimate and expressive association rights under Connecticut's constitution; they made no federal claims.[5] On July 12, 2006 the trial court granted the state's summary judgment motion and denied the plaintiffs'.[6] On April 12, 2007 the state senate judiciary committee passed HB 7395, which would have given Connecticut's same-gender couples full marriage rights. Before the entire legislature could consider the bill, however, the Connecticut Supreme Court reversed the trial court on October 28, 2008, stating that Connecticut law discriminated on the basis of sexual orientation, which is subject to intermediate judicial scrutiny, and the state failed to provide sufficient justification for excluding same-gender couples from the institution of marriage; the decision rendered HB 7395 and any related legislative process moot.[7, 8]

The court noted that the state's constitution "was meant to be, and is, a living document with current effectiveness . . . [it] is an instrument of progress . . . and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens."[9] The court further stated that "our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection."[10]

The state maintained that the plaintiffs were not similarly situated to opposite-gender couples because same-gender marriage is "fundamentally different" from opposite-gender marriage.[11] The court rejected this, stating that both types of couples "share the same interest in a committed and loving relationship" and "share the same interest in having a family and raising their children in a loving and supportive environment."[12] The court also rejected the state's claim that gay persons were not entitled to heightened scrutiny because the state constitution expressly prohibited discrimination against eight specific

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FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

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classes, of which sexual orientation was not one, and thus the constitution's drafters did not envision same-gender marriage.[13] The court interpreted the provision's legislative history to include sexual orientation, and in any event the court ruled sexual orientation a quasi-suspect class.[14]

The state proffered two governmental objectives: "(1) to promote uniformity and consistency with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as a union between one man and one woman."[15] The court dismissed the first objective, stating that "the defendants have offered no reason . . . and we know of none."[16] The court went on to say that the second objective "is the overriding reason why same sex couples have been barred from marrying in this state" and that the state expressly "disavowed" the "best interests of children" and promoting "responsible heterosexual procreation" as governmental objectives.[17] The court also dismissed the second governmental objective, simply stating that tradition alone was insufficient reason to prohibit gay marriage.[18]

The court also rejected the state's claim that "the authority to define marriage rests with the people and their elected representatives, and the courts should not appropriate to themselves the power to change that definition," stating that same-gender couples are a quasi-suspect class deserving of "heightened judicial protection from laws that discriminate against them."[19] The court went on to declare that such recognition "does not alter the nature of marriage" and essentially claimed that it had no choice *but* to expand the traditional definition of marriage to include same-gender couples because the state failed to advance "a sufficiently persuasive justification for denying same sex couples the right to marry."[20] The court also declared that same-gender marriage would not deprive opposite-gender couples nor religious organizations of any rights.[21]

Justice Borden's dissent focused on his view that sexual orientation is not a quasi-suspect class, and that the law would survive the rational basis review standard.[22] Justice Vertefeuille joined, and also wrote separately to emphasize her belief that the majority failed to grant the statute "a strong presumption of constitutionality" and that the plaintiffs failed to meet "the heavy burden of proving its constitutionality . . . ."[23]

Justice Zarella's dissent focused on procreation as a governmental objective, stating that the majority intentionally declined to address the argument that "marriage was intended to privilege and regulate sexual conduct that may result in the birth of a child" and "simply assumes that loving commitment between two adults is the essence of marriage, even though the essence of marriage is the very question at the heart of this case."[24] Justice Zarella further stated that "[t]he ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry. If the state no longer has an interest in the regulation of procreation, then that is a decision for the legislature or the people of the state and not this court."[25]

IOWA: *Varnum v. Brien*

On April 3, 2009, the Iowa Supreme Court in *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009), unanimously struck Iowa Code § 595.2, which provided that "[o]nly a marriage between a male and a female is valid."[26, 27] The court also directed that the remaining statutory language be interpreted and applied in a manner allowing same-gender couples full access to the institution of marriage. In *Varnum,* six same-gender couples filed suit against Timothy Brien, the Polk County Recorder, for refusing to grant marriage licenses to them as per § 595.2. The trial court granted summary judgment in favor of the plaintiffs, stating that § 595.2 violated the plaintiffs' due process and equal protection rights.

The Iowa Supreme Court, like the trial court, pointed out the plaintiffs' strong evidentiary record for summary judgment, and the state's weak record.[28] The court devoted an entire section to separation of powers and the judiciary's role in government, perhaps to preempt any "legislating from the bench" accusations.[29]

The court, like the *Kerrigan* court on which it leaned, applied intermediate scrutiny, which means that "the law must not only further an important governmental interest and be

substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations."[30] The court linked its equal protection analysis with its first reported case, *In re Ralph,* which ruled that a person could not be treated as property in order to enforce a slavery contract.[31] Polk County argued that the plaintiffs and heterosexuals were not similarly situated because the plaintiffs could not "procreate naturally," and thus the statute treated dissimilarly persons differently. The court rejected that argument, stating that "to truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated *with respect to the purposes of the law* alike."[32] The court recognized that marriage laws are deeply rooted in society. It stated that the plaintiffs, like heterosexual couples, were in committed and loving relationships, raising families, and that their marriages would create a stable framework beneficial to society by creating an "institutional basis or defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples."[33]

Polk County further claimed that the statute did not prohibit gays or lesbians from marrying, it only required them to marry someone of the opposite gender; the County does not inquire into whether two people entering into a civil marriage are attracted to each other. The court also rejected this, stating that "the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all."[34] Thus, the court stated that the statute discriminated on the basis of sexual orientation.[35, 36]

The County proffered five governmental objectives of limiting marriage to opposite-gender couples: (1) support for the traditional institution for marriage, and promotion of the optimal environment in which to (2) procreate and (3) raise children; (4) promoting stability in opposite-sex relationships; and (5) conserving government resources.[37] The Court rapidly rejected the County's proffers and stated that none of the governmental objectives "are furthered in a substantial way by the exclusion of same-sex couples from civil marriage."[38] In short, the Court ruled that (1) the County offered no governmental reason underlying the tradition of limiting marriage to heterosexual couples; limiting marriage to opposite-gender couples does not promote the optimal environment in which to (2) procreate and (3) raise children because (a) the state does not exclude less-than-optimal parents such as child abusers, sexual predators, and violet felons from marrying, (b) the state does not forbid same-gender couples from raising children, (c) Polk County failed to show how the statute serves the interests of children of same-gender couples or children of heterosexual parents, and (d) Polk County failed to show whether excluding same-gender marriages would "substantially further" additional procreation; (4) Polk County failed to show that excluding same-gender marriages makes opposite-gender marriages more stable; (5) Polk County failed to show (a) how same-gender couples, if allowed to marry, would use more state resources than unmarried heterosexual couples, (b) why the state does not exclude other groups from marriage, and (c) whether married same-gender couples would use more state resources than married opposite-gender couples.[39]

The court, *sua sponte*, addressed what it called "Religious Opposition to Same-Sex Marriage."[40] The court referenced the free exercise and establishment clauses of the Iowa constitution and noted that the state codified that "marriage is a civil contract" and regulates that contract.[41] The court also stated that "[m]any religions recognize same-sex marriage, such as Buddhists, Quakers, Unitarians, and Reform and Reconstructionist Jews."[42]

WISCONSIN: *McConkey v. Van Hollen*[43]

By 2006, Wisconsin state law limited marriage to unions of one man and one woman.[44] In the face of multiple legal challenges to similar statutes in other states, on November 7, 2006 Wisconsin voters, via a 59% to 41% ballot referendum vote, amended the Wisconsin constitution to say that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."[45]

In 2007 William McConkey, a University of Wisconsin-Oshkosh political science professor, sued the State of Wisconsin and Attorney General J.B. Van Hollen, arguing (1) that the marriage amendment violated the due process and equal protection guarantees in the Wisconsin and U.S. constitutions, and (2) violated the Wisconsin constitution's "separate amendment rule," which requires that citizens vote separately on different amendments.[46, 47] McConkey argued that the marriage amendment contained two sentences, the first defining marriage as between a man and a woman and the second defining the legal status of relationships such as civil unions, and thus was actually two separate amendments which the voters had to vote on separately.[48] The trial court held that McConkey had standing to bring his separate amendment rule claim but not his due process and equal protection claims.[49] The trial court also held that the marriage amendment satisfied the separate amendment rule.[50]

The court unanimously upheld the marriage amendment. The court first addressed whether McConkey had standing to sue as a voter; it concluded that he did, stating that "whether as a matter of judicial policy, or because McConkey has at least a trifling interest in his voting rights, we believe the unique circumstances of this case render the merits of McConkey's claim fit for adjudication."[51]

The court then analyzed McConkey's "separate amendment rule" claim. The court had long-ago held in *State ex rel. Hudd v. Timme* that the rule required separate votes only on "amendments which have different objects and purposes in view . . . [i]n order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other."[52] The court explained that "both sentences of the marriage amendment relate to marriage and tend to effect or carry out the same general purpose of preserving

the legal status of marriage in Wisconsin as between only one man and one woman."[53] Moreover, because Wisconsin statute already limited marriage to one man and one woman, the court stated that the marriage amendment was "an effort to preserve and constitutionalize the status quo, not to alter the existing character or legal status of marriage."[54] The court held that both of the marriage amendment's sentences carried out this general purpose.[55] The court thus held that the marriage amendment did not violate the separate amendment rule of Article XII, § 1 of Wisconsin's constitution, and therefore was properly adopted.[56]

CALIFORNIA: Proposition 8

On May 15, 2008 the California Supreme Court, in *In re Marriage Cases,* 43 Cal. 4th 757 (2008) (consolidating several gay marriage gases), struck California's statutory limitation of the term "marriage" to opposite-gender couples.[57] In response, California voters put forth and passed Proposition 8 ("Prop 8"), which amended California's state constitution with the language "Only marriage between a man and a woman is valid or recognized in California."[58, 59] Out of the over 13 million people who voted, 52.3 % voted in favor of Prop 8 and 47.7% voted against,[60] controversy and unusual political alliances.[61, 62]

In the first few days after November 4, 2008, Prop 8 opponents vigorously and sometimes violently protested in Los Angeles, Long Beach, Newport Beach, Oakland, Sacramento, San Diego, Palm Springs, and San Francisco, especially in front of Mormon temples; many Prop 8 opponents blamed the Church of Jesus Christ of Latter-Day Saints and its members for Prop 8's passage.[63]

Groups in favor of gay marriage immediately sued to block Prop 8, claiming in part that it was not a constitutional amendment, but rather an impermissible constitutional revision requiring a constitutional convention.[64] California Attorney General Jerry Brown, opted not to defend Prop 8, instead joined the petitioners and advanced some arguments that they themselves did not.[65] The California Supreme Court rejected all of their arguments.[66] The court also held that the approximately 18,000 same-gender marriages performed between mid-June 2008 and November 4, 2008 remain valid and recognized in California.[67]

On May 26, 2009, the same day that the California Supreme Court issued *Strauss v. Horton,* the American Foundation for Equal Rights ("AFER") filed suit in the U.S. District Court for the Northern District of California; the case is *Perry v. Schwarzenegger.*[68] The suit claimed that Prop 8 violated the due process and equal protection clauses of the U.S. Constitution. California Attorney General Jerry Brown chose not to defend the lawsuit, claiming that Prop 8 violated the 14th Amendment of the U.S. Constitution.[69] Governor Schwarzenegger also did not seek to defend the law in court. Chief Judge Vaughn Walker ordered a full bench trial, which began on January 11, 2010.[70] On August 4, 2010, Judge Walker issued a 138-page opinion ruling that Prop 8 violated both the due process and equal protection clauses of the U.S. Constitution.[71] On August 16, 2010, the U.S. Court of Appeals for the 9th Circuit stayed Judge Walker's decision, and scheduled oral argument for the week of December 6, 2010.[72]

The plaintiffs claimed that Prop 8 discriminated against gays and lesbians on the basis of both sexual orientation and gender.[73] They claimed that Prop 8 violated their fundamental right of marriage because (1) it prevented them from marrying the person of his/her choice, (2) the 14th Amendment protected that choice from the state's unwarranted usurpation, and (3) California's domestic partnership law did not provide an adequate marriage substitute.[74] The plaintiffs claimed that Prop 8 violated the equal protection clause because (1) it prevented gay men and lesbians from marrying the person of their choice, unlike heterosexuals, and thus (2) disadvantaged a suspect class.[75] The Prop 8 proponents asserted that Prop 8 has the following objectives: (1) reserving marriage as an union between a man and a woman; (2) proceeding with caution when implementing social changes; (3) promoting opposite-gender parenting over same-gender parenting; (4) protecting the freedom of those who oppose marriage for same-gender couples; (5) treating same-gender couples differently from opposite-gender couples.[76]

The plaintiffs established a very detailed factual record. Judge Walker entitled an entire section of his opinion "Credibility Determinations," where he found the plaintiffs' witnesses credible and the defendants' witnesses not credible, especially with respect to the expert witnesses.[77] As a result, Judge Walker issued a long string of "Findings of Fact."[78]

Judge Walker did not differentiate between same-gender marriage and opposite-gender marriage; thus, he found that Prop 8 violated the plaintiffs' right to marriage, as opposed to right to same-gender marriage.[79] Judge Walker further stated that Prop 8 could not withstand rational basis review, let alone the strict scrutiny which the plaintiffs' due process claim required.[80] Judge Walker stated that "the Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review," thus sidestepping the difficult question of whether sexual orientation should be analyzed under a rational basis or intermediate level of review.[81] Judge Walker, however, stated that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation."[82] Judge Walker used the factual record to rapidly dispose of all of defendants' proffered objectives.[83] He went on to say that "[many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples,"[84] and that "moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians."[85]

There seems to be little doubt that *Perry* will eventually end up in the U.S. Supreme Court. There may be, however, some speed bumps along the way. For example, because Governor Schwarzenegger and Attorney General Brown refused to defend Prop 8, there is some question as to whether Prop 8's official sponsors, who were the only ones to defend it at trial, have the requisite standing to participate as they did.[86] In fact, the Pacific Justice Institute moved to order Governor Schwarzenegger and Attorney General Brown to appeal Judge Walker's ruling to the 9th Circuit; the trial court denied the motion, the intermediate court summarily dismissed the appeal without hearing, and the

California Supreme Court declined to hear the case.[87] The parties argued before the 9th Circuit on December 6, 2010.[88] Judges Stephen Reinhardt, N. Randy Smith, and Michael Hawkins comprised the three-judge panel.[89]

Three other recent federal cases regarding gay rights are *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (2010) (D. Mass 2010) (Tauro, J.) (§ 3 of Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, violates equal protection); *Commonwealth of Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass 2010) (Tauro, J.) (DOMA violates 10th Amendment and Spending Clause); and *Log Cabin Republicans v. United States*, Case No. CV-04-08425-VAP, Phillips, J. (Sept. 9, 2010) ("Don't Ask, Don't Tell," 10 U.S.C. § 654, violates 5th Amendment substantive due process and 1st Amendment.). As of this writing the lame-duck Congress and the Department of Defense are struggling with the "Don't Ask, Don't Tell" policy and the related court rulings.[90] Like *Perry,* more controversy is sure to follow as these cases wind their way through the appellate process.

RELATED EVENTS: D.C., New Hampshire, Maine, Vermont, Rhode Island

WASHINGTON, D.C.: Gay marriages in Washington, D.C. began on March 9, 2010, after contentious legal battles regarding whether the D.C. Board of Elections & Ethics could prohibit a ballot initiative stating "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia."[91] Mayor Adrian Fenty invoked his parents' interracial marriage with respect to this issue.[92] On May 5, 2009, the D.C. Council passed the Jury and Marriage Amendment Act of 2009 ("JAMA"), which amended D.C.'s marriage laws such that D.C. recognized same-sex marriages from other jurisdictions.[93] Congress did not disapprove it, so JAMA became law on July 7, 2009.[94] On September 1, 2009 gay marriage opponents filed their proposed "Marriage Initiative of 2009" with the D.C. Board of Elections and Ethics, a ballot initiative which sought to undo JAMA and instead state "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia."[95] The Board rejected the proposed initiative, finding that it would violate D.C.'s Human Rights Act. The initiative's proponents sought mandamus from the trial court; on January 14, 2010, Judge Judith N. Macaluso refused, stating that the city could prevent the referendum from going forward because "the proposed initiative, if passed, would violate the Human Rights Act provides an independent basis for upholding the Board's decision: the initiative runs afoul of an implied exclusion barring provisions that violates the state's law."[96] On December 15, 2009, the D.C. Council in an 11-2 vote approved the "Religious Freedom and Civil Marriage Equality Amendment Act of 2009," which expanded the definition of marriage to include same-gender couples, making civil marriage available to them. [97, 98] Congress received the Act on January 5, 2010.[99] The Act became law on March 3, 2010.[100] The initiative proponents appealed Judge Macaluso's order. On July 15, 2010, the D.C. Court of Appeals upheld the trial court's order in *Jackson v. Dist. of Columbia Bd. of Elections and Ethics,* 999 A.2d 89 (D.C. Ct. App. 2010).[101]

As of this writing gay marriages in D.C. will continue unless Congress intervenes or the appellants get a stay from the U.S. Supreme Court. In September 2010, voters chose Vincent Gray, chairman of the D.C. Council, over Mayor Fenty in the Democrat primary.[102]

NEW ENGLAND: Gay & Lesbian Advocates & Defenders ("GLAD") began its "Six by Twelve" campaign on November 18, 2008. The campaign plans to bring same-gender marriage to all of New England by 2012.[103]

MAINE: In May 2009 Governor John E. Baldacci signed into law LD 1020, "An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom," which legalized gay marriage in Maine. On November 4, 2009, however, Maine voters rejected gay marriage via popular referendum, 53% to 47%.[104] As of this writing Maine does not permit gay marriage.

NEW HAMPSHIRE: On June 4, 2009 Governor John Lynch, a former gay marriage opponent, signed revised legislation which legalized same-gender marriage.[105] The revisions contains specific language protecting religious freedoms.[106] The law took effect on January 1, 2010.[107]

VERMONT: On April 7, 2009, Vermont's legislature overrode Governor Jim Douglas' veto and voted to make same-gender marriage legal. The law took effect on September 1, 2009. Vermont is the first state to legalize same-gender marriage through the legislative process and not court action.[108]

RHODE ISLAND: Currently, same-gender marriages cannot be performed in Rhode Island, though state attorney general Patrick Lynch stated in a February 2007 legal opinion that the state would recognize legal same-gender marriages from other jurisdictions. Rhode Island has "domestic partnerships." Lincoln Chafee defeated John Robitaille and Frank Caprio in Rhode Island's 2010 gubernatorial race, 35.9% to 33.5% to 23.2%, respectively.[109] Chafee is a well-known supporter of gay marriage.[110]

CONCLUSION

Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and Washington, D.C. currently permit same-gender marriage. Legal and political battles continue to rage on several fronts with respect to gay marriage and other gay rights issues such as DOMA and "Don't Ask, Don't Tell."[111]

Endnotes

1 957 A.2d 407 (Conn. 2008). Justice Richard N. Palmer wrote the majority opinion; Justice Joette Katz, Justice Flemming Norcott, and Connecticut Appellate Judge Lubbie Harper, Jr. joined. Chief Justice Chase Rogers and Justice Barry Schaller did not participate in the decision. Justices David Borden, Christine Vertefeuille, and Peter Zarella each wrote separate dissents.

2 Kerrigan v. Connecticut, 909 A.2d 89, 91 (Conn. Super. Ct. (New Haven), Jul. 12, 2006, Patty Jenkins Pittman, J.).

3 Conn. Gen. Stat. § 46b – 38oo (2008).

4 *Kerrigan,* 909 A.2d at 93.

5 *Id.*

6 *Id.* at 102. The trial court stated that "it would be the elevation of form over substance to hold unconstitutional Connecticut's current statutory scheme . . . [t]he Connecticut constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process." *Id.* at 101-102.

7 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008). On appeal, the plaintiffs abandoned their intimate and expressive association claims.

8 The court leaned heavily on *Goodridge v. Dep't of Public Health,* 440 Mass. 309 (2003); *In re Marriage Cases,* 43 Cal. 4th 757 (2008); *Frontiero v. Richardson,* 411 U.S. 677 (1973); and Chief Judge Kaye's dissent in *Hernandez v. Robles,* 7. N.Y.3d 338 (2006) (Kaye, C.J., dissenting).

9 *Kerrigan,* 957 A.2d at 420-21 (citations omitted).

10 *Id.* at 482.

11 *Id.* at 424.

12 *Id*.

13 *Id*. at 425. The classes are race, color, ancestry, national origin, sex or physical or mental disability.

14 *Id*. at 425-31, 473. The court spent much of its opinion on its rationale for classifying sexual orientation as quasi-suspect subject to intermediate scrutiny. The court avoided the difficulty question of whether sexual orientation is an immutable characteristic, stating that it is a "central, defining trait of personhood" which cannot be altered without "significant damage to the individual's sense of self." *Id.* at 438-39 (citations omitted). The court also described the gay community's political influence as "relatively modest." *Id.* at 461.

15 *Id*. at 476-77.

16 *Id.* at 477.

17 *Id.* at 477-78.

18 *Id*. at 478-79. While the court stated that it "must determine [whether] the *reasons* underlying" the traditional definition of marriage satisfies scrutiny, the court does not discuss any. *Id*. at 479 (emphasis in original).

19 *Id*. at 479-480.

20 *Id.* at 480-81. The court also claimed that, but for the state's insufficient governmental objectives, it would have "preserve[d] the institution of marriage as a union between a man and a woman." *Id.* at 480.

21 *Id. at* 473-74 (citations omitted).

22 *Id.* at 483.

23 *Id.* at 515.

24 *Id.* at 516, 524.

25 *Id.* at 516.

26 Justice Mark S. Cady wrote the unanimous opinion. Governor Terry Branstad (R) appointed Justice Cady in 1998; Justice Cady's term expires on December 31, 2016.

27 For details on the trial court's opinion, *see* John Shu, "Gay Marriage Update: Iowa and Maryland," State Court Docket Watch, Nov. 20, 2007; Varnum v. Brien, 2007 WL 2468667 No. CV5965 (Iowa Dist. Ct. Polk County, Aug. 30, 2007).

28 *See, e.g.*, Op. at 10.

29 *See, e.g.*, Op. at 13. The court, however, hinted at its "living Constitution" bent. For example, it described *Lawrence v. Texas*, 539 U.S. 558 (2003) as "acknowledging intent of framers of Federal Constitution that Constitution endure and be interpreted by future generations [sic];" and quoted from *Callender v. Skiles,* 591 N.W.2d 182, 190 (Iowa 1999), stating that "[o]ur constitution is not merely tied to tradition, but **recognizes the changing nature of society** (emphasis added)."

30 Op. at 22 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).

31 Op. at 17 (citing *In re* Ralph, 1 Morris 1 (Iowa 1839)). Interestingly, a large percentage of blacks do not support gay marriage, primarily because they view sexual orientation as different from race. *See, e.g.,* William Saletan, *Original Skin: Blacks, Gays, and Immutability*, Slate, Nov. 13, 2008, *available at* http://www.slate.com/id/2204534/. All seven of Iowa's Supreme Court justices are white.

32 Op. at 27 (citing Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 7 (Iowa 2004) (emphasis in original)).

33 Op. at 28.

34 Op. at 30.

35 Op. at 31. The court once again cited *Lawrence v. Texas* and also stated that *Romer v. Evans,* 517 U.S. 620, 632 (1996), "can be read to imply that sexual orientation is a trait that defines an individual and is not merely a means to associate a group with a type of behavior."

36 The court sidestepped the difficult question of whether homosexuality is an immutable trait, stating that "courts need not definitively resolve the nature-versus nurture debate currently raging over the origin of sexual orientation . . . a person's sexual orientation is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it." Op. at 43-44 (citations omitted). Interestingly, the court recognized that gays and lesbians have a significant amount of political power, but used the fact that "no legislature has secured the right to civil marriage for gay and lesbian people without court order" as an indication of political powerlessness. Op. at 47 (citations, footnotes, and emphasis omitted).

37 Op. at 51-63. With respect to the state's fisc, the theory is that married couples enjoy governmental benefits, therefore excluding same-gender couples from marrying reduces the state's fiscal burden.

38 Op. at 63.

39 Op. at 51-63.

40 Op. at 63. Op. at 66. If so, the court failed. *See infra.*

41 Op. at 65 (citing Iowa Code § 595A.1 and Iowa Const. art. I, § 3). First Amendment traditionalists would likely be particularly interested in the court's statement that "government can have no religious views . . . expressed through its legislation. This proposition is the essence of the separation of church and state." Op. at 66.

42 Op. at 65 n.31 (citations omitted).

43 Special thanks to colleagues in Wisconsin for their invaluable assistance with this section.

44 McConkey v. Hollen, 783 N.W.2d 855, 868 (Wis. 2010) (citing Wis. Stat. § 765.001(2) (2005-06) ("Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife."), and § 765.01 ("Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.").

45 Bill Glauber, *State Voters Say 'I do' to Marriage Amendment*, Milwaukee – Wisconsin J. Sentinel, Nov. 8, 2006, *available at* http://www.jsonline.com/news/statepolitics/29199949.html; Stacy Forster, *Professor Challenges Amendment Banning Gay Marriage*, Milwaukee – Wisconsin J. Sentinel, Dec. 30, 2007, *available at* http://www.jsonline.com/news/wisconsin/29386344.html. *See also* Wis. Const. art. XIII, § 13. The Wisconsin State Assembly and State Senate, in the 2003-04 and 2005-06 sessions, adopted a joint resolution in back-to-back legislative sessions to amend the state constitution; because two successive legislatures passed the joint resolution, the amendment went before the people for ratification. *McConkey,* 783 N.W.2d at 858.

46 Wis. Const. art. XII, § 1 provides that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

47 Patrick Marley, *State Supreme Court Hears Arguments on Gay Marriage*, Milwaukee – Wisconsin J. Sentinel, Nov. 3, 2009, *available at* http://www.jsonline.com/news/statepolitics/68894217.html.

48 *McConkey,* 783 N.W.2d at 859.

49 *Id*.

50 *Id.*

51 *Id*. at 860.

52 *Id.* at 862 (citing State *ex rel.* Hudd v. Timme, 54 Wis. 318, 336 (1882)).

53 *Id.* at 870.

54 *Id*. at 868.

55 *Id*. at 868-69.

56 *Id.* at 870.

57 *See generally* John Shu, *California:* In re Marriage Cases, State Court Docket Watch, Aug. 18, 2008.

58 Cal. Const. art. I, § 7.5.

59 Florida and Arizona voters also passed constitutional amendments defining marriage as between one man and one woman at the same time California voters did. Florida voters voted 61.9% in favor of the constitutional amendment and 38.1% against. Fla. Div. of Elections, *available at* http://election.dos.state.fl.us/index.shtml; *see also* Fla. Const. art. I, § 27. Arizona voters voted 56.2% in favor of the constitutional amendment and 43.8% against. Ariz. Dep't of State, *available at* http://www.azsos.gov/results/2008/general/BM102.htm; *see also* Ariz. Const. art. 30.

60 Election results from the California Secretary of State's office.

61 For example, Proposition 8's proponents originally entitled it "California Marriage Protection Act," but California Attorney General Jerry Brown changed the name to "Eliminates Right of Same-Sex Couples to Marry."

62 According to a study the National Gay & Lesbian Task Force Policy Institute released on January 6, 2009, African-Americans and Latinos, who generally vote Democrat in

California, voted for Prop 8 by 58% and 59%, respectively. The November 4, 2008 National Election Pool exit poll, however, indicated that nearly 70% of African-Americans voted for Prop 8. Many political commentators believe that the increased African-American voter turnout for Barack Obama helped usher in Obama and other Democrat candidates, but likely had a negative effect on Prop 8.

63 *See, e.g., Same-Sex Marriage Rowdies Single Out Mormons*, World Net Daily, Nov. 8, 2008, *available at* http://www.wnd.com/index.php?fa=PAGE.view&pageId=80406; *Prop. 8 Supporters Suffer Harassment, Assaults from Homosexual Activists*, Catholic News Agency, Nov. 10, 2008, *available at* http://www.catholicnewsagency.com/news/prop._8_supporters_suffer_harassment_assaults_from_homosexual_activists/; Audrey Kuo, *UCLA Activists Protest Proposition 8 Decision*, Daily Bruin, Nov. 7, 2008, *available at* http://www.cbsnews.com/stories/2008/11/07/politics/uwire/main4581430.shtml.

64 Strauss v. Horton, 46 Cal. 4th 364, 387 (2009).

65 *Id*. at 390. Again, many political observers accused Brown of having ulterior political motives for his behavior.

66 *Id*. at 391. The court stated that "petitioners and the Attorney General's complaint is that it is just too easy to amend the California Constitution through the initiative process." *Id.* at 391-92.

67 *Id*. at 392.

68 *See, e.g*., Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story*, Calif. Lawyer, Jan. 2010, *available at* http://www.callawyer.com/story.cfm?eid=906575&evid=1. While *Perry* is a federal case, it is sufficiently tied to state court issues to be reviewed here.

69 Maura Dolan and Carol J. Williams, *Jerry Brown Again Says Prop. 8 Should Be Struck Down*, L.A. Times, Jun. 13, 2009, *available at* http://articles.latimes.com/2009/jun/13/local/me-gay-marriage13.

70 Michael B. Farrell, *Gay Marriage Trial Begins With Tough Questions For Both Sides*, Christian Science Monitor, Jan. 11, 2010, *available at* http://www.csmonitor.com/USA/Justice/2010/0111/Gay-marriage-trial-begins-with-tough-questions-for-both-sides.

71 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). President George H.W. Bush appointed Judge Walker to the bench in 1989. Some claim that Judge Walker was biased because he is gay. *See, e.g.,* Ashby Jones, *A New Prop 8 Debate: On Judge Walker and Recusal*, Wall St. J., Aug. 11, 2010, *available at* http://blogs.wsj.com/law/2010/08/11/a-new-prop-8-debate-on-judge-walker-and-recusal.

72 Ben Adler, *Ninth Circuit Stays Pro-Gay-Marriage Ruling, Takes Away GOP Issue*, Newsweek, Aug. 17, 2010, *available at* http://www.newsweek.com/blogs/the-gaggle/2010/08/16/9th-circuit-stays-pro-gay-marriage-ruling-takes-away-gop-issue.print.html.

73 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), Op. at 6.

74 Op. at 5.

75 *Id*.

76 Op. at 123; *see also* Op. at 8.

77 *See, e.g.*, Op. at 29, 37, 41. For example, Judge Walker wrote, "none of [defendants' witness'] opinions is reliable." Op. at 41.

78 Op. at 54-109.

79 Op. at 114.

80 Op. at 117.

81 Op. at 121.

82 Op. at 122.

83 *See, e.g.*, Op. at 127.

84 Op. at 132.

85 Op. at 135.

86 *See, e.g.*, Vikram David Amar, *Musings On Some Procedural, But Potentially Momentous, Aspects of the Proposition 8 Case As It Goes To The Ninth Circuit*, FindLaw, Aug. 13, 2010, *available at* http://writ.news.findlaw.com/amar/20100813.html.

87 Bob Egelko, *High Court Won't Order State to Defend Prop. 8*, S.F. Chron., Sept. 9, 2010, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/09/09/MNE81FATL8.DTL&type=printable.

88 Maura Dolan, *Gay Marriage: All Eyes on 9th Circuit Panel*, L.A. Times, Dec. 6, 2010, *available at* latimes.com/news/local/la-me-prop8-20101206,0,7205214.story.

89 *Id*.

90 *See, e.g.*, Anne Gearan, *Generals Oppose White House On DADT*, Associated Press / Time, Dec. 3, 2010, *available at* http://www.time.com/time/printout/0,8816,2035085,00.html.

91 Ann E. Marimow and Keith L. Alexander, *First Gay Marriages In District Performed*, Wash. Post, Mar. 10, 2010, at B01, *available at* http://wapo.st/aBzz0W.

92 Thus invoking *Loving v. Virginia*, 388 U.S. 1 (1967).

93 Jackson v. Dist. of Columbia Bd. of Elections and Ethics, 999 A.2d 89, 93 (D.C. Ct. App. 2010).

94 *Id.* Congress has the constitutional authority:

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. Const. art. I, § 8, cl. 17.

95 The Charter Amendments Act's initiative right is defined thusly: "'Initiative' means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code § 1-204.101(a).

96 Jackson v. Dist. of Columbia Bd. of Elections and Ethics, CV-2009-CA-008613B, "Order Granting District of Columbia's Motion for Summary Judgment and Denying Petitioners' Motion for Summary Judgment," Macaluso, J., at 15. The trial court granted D.C.'s motion for summary judgment, stating that the proposed initiative would authorize discrimination against same-gender couples and thus the Board could prevent the initiative.

97 Ann E. Marimow and Keith L. Alexander, *First Gay Marriages In District Performed*, Wash. Post Mar. 10, 2010, at B01, *available at* http://wapo.st/aBzz0W. Interestingly, 80% of white D.C. residents supported gay marriage and 51% of black residents did not. *Id.*

98 *Jackson*, 999 A.2d at 93-94.

99 *Id*.

100 *Id.*

101 The issue on appeal was whether the Human Rights Act validly restricted the right of initiative. The 5-4 court held that it did because "appellants' proposed initiative would authorize, or have the effect of authorizing, discrimination on a basis prohibited by the Human Rights Act … [t]herefore, the Board acted lawfully in refusing to accept the initiative on that basis." *Jackson,* 999 A.2d at 120.

102 *D.C. Voters Mayor During Dem Primary*, WDNU, *available at* http://www.wndu.com/politics/headlines/102941074.html.

103 *See, e.g.*, GLAD New England Marriage Campaign, *available a*t http://www.glad.org/work/initiatives/c/new-england-marriage-campaign.

104 Devin Dwyer, *Maine Gay Marriage Law Repealed*, ABC News, Nov. 4, 2009, *available at* http://abcnews.go.com/Politics/maine-gay-marriage-law-repealed/story?id=8992720.

105 Eric Moskowitz, "N.H. Ties Gay-Marriage Knot," Boston Globe, Jun. 4, 2009, *available at* http://www.boston.com/news/local/new_hampshire/articles/2009/06/04/nh_ties_gay_marriage_knot/?page=full.

106 *Id*.

107 *Id*. Governor Lynch won re-election on November 2, 2010. N.H. Sec'y of State's Election Div., *available at* http://www.sos.nh.gov/general%202010/index2010.htm. Governor Lynch was a guest speaker at the Denver-based Gill Action Fund's May 2010 Political Outgiving conference in Chicago, a national conference of wealthy gay donors. Daniel Barrick, *Lynch Speaks at National Gay Donor Event*, Concord Monitor, Jul. 10, 2010, *available at* http://www.concordmonitor.com/article/lynch-speaks-at-national-gay-donor-event.

108 Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, Wash. Post, Apr. 7, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html.

109 President Obama refused to endorse the Democrat candidate, Caprio, or any other candidate, which led to Caprio saying on talk radio that President Obama "can take his endorsement and really shove it, as far as I'm concerned." Bill Haberman, Caprio *Tells WPRO President Can "Shove" His Endorsement*, WPRO (630 AM), Oct. 25, 2010, *available at* http://www.630wpro.com/Article.asp?id=1996875&spid=.

110 At the federal level, David Cicilline will become the fourth openly gay member of Congress, joining Tammy Baldwin (WI), Barney Frank (MA), and Jared Polis (CO); the Providence mayor defeated John Loughlin to take Patrick Kennedy's seat.

111 Many lesbian, gay, bisexual, and transgender voters are unhappy with President Obama. *See, e.g.,* Dyana Bagby, *Are LGBT Voters Over Obama?*, GA Voice, Oct. 29, 2010, *available at* http://www.thegavoice.com/index.php/news/national-news-menu/1408-are-lgbt-voters-over-obama. During the 2008 campaign, President Obama, Vice-President Biden, and Secretary of State Hillary Clinton all flatly stated that they oppose same-gender marriage.

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