
CHAPTER 8

FAMILIES WE CHOOSE: PRIVATIZATION AND PLURALITY IN FAMILY LAW

SECTION 2

THE EXPANSION OF MARRIAGE TO INCLUDE SAME-SEX COUPLES (AND OTHERS?)

Page 1086. Insert the following Cases and Notes at the end of Section 2,
Part B:

Hillary Goodridge et al. v. Department of Public Health

Supreme Judicial Court of Massachusetts, 2003.

[Excerpted in Appendix 7 of the Casebook, pp. 1553–63]

Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). Immediately after the Massachusetts Supreme Judicial Court's *Goodridge* decision (Casebook, pp. 1553–63), opponents focused on the mandated 180-day stay contained in the opinion, made “to permit the Legislature to take such action as it may deem appropriate in light of” the Court’s holding that the state discrimination against same-sex couples was

unconstitutional. Why had the Court included the stay? Why not put the decision into effect immediately, if not because the Court wanted to give the legislature some room to maneuver and provide a remedy other than marriage? Some commentators proposed that *Goodridge* left it open for the state to limit marriage to one man and one woman if they would state clearly the rational basis for such a limitation. See Hadley Arkes & Mary Ann Glendon, "Goodridge Case has Alternative to Gay Marriage," *Boston Herald*, January 8, 2004.

Another option, proffered by the Massachusetts attorney general and the Senate President, was to pass a bill creating civil unions for same-sex couples that had all the benefits of marriage but withheld the name "marriage." The State Senate requested an advisory opinion from the Supreme Judicial Court asking about the constitutionality of a civil union law in light of *Goodridge*. The question they submitted read (in part):

Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows the to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth . . . ?

In another opinion by **Chief Justice Margaret Marshall**, the Court answered no. The stay was likely intended, not to induce a compromise, or to sway a weak fourth vote, but to encourage a legislative endorsement of the decision and to allow time for administrative adjustments in the wake of the decisions (none was made, but the decision went into effect May 17th notwithstanding).

The opinion summarized the holding in *Goodridge* and went on to say that the "same defects of rationality evident in the marriage ban considered in *Goodridge*" were evident in the Senate bill. The group classifications implied by the distinction between (heterosexual) marriage and (same-sex) civil unions were therefore "unsupportable." The strongest language of the opinion was against the idea, proposed by the dissent, that the difference in name was simply a semantic one, a difference in language that didn't make any real difference: "The bill's absolute prohibition of the use of the word 'marriage' by 'spouses' who are the same sex is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second class status. The demonstration of this difference by the separate opinion of Justice Sosman . . . as merely a 'squabble over the name to be used' so clearly misses the point that further discussion appears to be useless. . . . The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages."

The Court's opinion concluded with an assertion that the distinction between civil unions and marriage is not merely a difference in tangible benefits, but in intangible benefits as well: "We recognize that the pending bill palliates some of the financial and other concrete manifestations of the discrimination at issue in *Goodridge*. But the question the court considered in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue."

NOTES ON THE MASSACHUSETTS SAME-SEX MARRIAGE OPINIONS

1. *What's in a Name?* In dissent in the second marriage case, Justice Sosman wrote that both sides "appear to have ignored the fundamental import of the proposed legislation, namely, that same-sex couples who are civilly 'united' will have literally every single right, privilege, benefit and obligation of every sort that our State law confers on opposite-sex couples who are civilly 'married' " and quoted Shakespeare: "What's in a name? That which we call a rose/By any other name would smell as sweet." The proposed bill provided that a civil union will give "those joined in it a legal status equivalent to marriage and shall be treated under law as a marriage." The dissent noted, further, that there is a large difference between the situation the original *Goodridge* court confronted and the bill creating civil unions: it is the difference between no bundle of rights and benefits to same-sex couples and a bundle of rights and benefits that is equivalent to the rights and benefits conferred on a couple by marriage. Is the remaining name difference evidence of a desire to stigmatize gays, or is it evidence of good faith on the part of the legislature?

What are the intangible benefits of marriage? The dissent went on to say that the difference between civil unions and marriage is merely one of "form" and not of "content." The majority opinion, by contrast, seemed to suggest that the difference of form represents part of the good of marriage, the "intangible benefits" of marriage. As an *amicus* brief put it, *Goodridge* held that "the civil institution of marriage is indeed greater than the sum of its legal parts." But what are the "intangible" benefits of marriage? Why would the intangible benefits of civil unions be any less? If one of the intangible benefits of marriage is social recognition, as several of the *amicus* briefs maintained, is this something that the legislature can confer, just like that, by choosing one name for institution rather than another?

Consider again the debate over whether the distinction between “civil union” and “marriage” is merely a semantic one. The flip side of the intangible benefits of marriage claim is that denying the name “marriage” to same-sex unions entails stigmatizing gay and lesbians and giving them a second class status. Not only does marriage give intangible benefits, the deprivation of the title marriage constitutes an intangible harm. Or so says the majority in its response to the Senate. Could those in favor of the distinction claim that civil unions are not themselves stigmatizing and that the name “civil union” connotes no stamp of inferiority, and if it does, this is a construction that gays and lesbians have chosen to put on it? Cf. the majority in *Plessy v. Ferguson*? That is, is the act of limiting marriage to one man and one woman inherently discriminatory, especially if exactly the same benefits are given to same-sex couples, albeit under a different name? Is it saying that same-sex unions are worse (less stable?) than heterosexual marriages?

2. *A Possible Rational Basis?* Justice Sosman’s opinion offered the following point in favor of distinguishing marriages from civil unions: even though same-sex marriages might be recognized in Massachusetts, they will not be recognized in other states, and not federally. Therefore, there will remain an ineliminable difference between straight and gay marriages. Justice Sosman wrote: “Those differences are real, and, in some cases, quite stark. Their very existence makes it rational to call the licenses issued to same-sex couples by a different name, as it unavoidably—and, to many, regrettably—cannot confer a truly equal package of rights, privileges, and benefits on those couples, no matter what name it is given.” The distinction between civil unions and marriages, then, does not create a difference, but reflects a difference in status that is already there. The majority labeled this argument, “irrelevant,” and wrote: “That there may remain personal residual prejudice against same-sex couples is a proposition all too familiar to other disadvantaged groups. That such prejudice exists is not a reason to insist on less than the Constitution requires.” Who has the better of the argument? Is the argument by Sosman really just a *post hoc* rationalization (it was not offered by the legislature)?

3. *Getting the State Out of “Marriage”?* The *Goodridge* decision contemplated the possibility that the state may simply get out of the marriage business altogether. The “right to marry,” it said, “is different form rights deemed ‘fundamental’ for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.” But it went on to conclude that “[e]liminating civil marriage would be wholly inconsistent with the Legislature’s deep commitment to fostering stable families and would dismantle a vital organizing principle of our society.” What about keeping the institution but changing the name? In the Opinions of the Justices to the Senate, Justice Sosman raised this point, and it was also taken up by the majority. Sosman remarked that the legislature might simply rename the institution of heterosexual marriage, and that indeed “there is much to

be said for the argument that the secular legal institution, which has gradually come to mean something very different from its original religious counterpart, be given a name that distinguishes it from the religious sacrament of 'marriage.'” Is this a possible solution to the disagreement between Sosman and the majority, i.e., doing away with the term marriage altogether, at least when talking about state supported unions (as opposed to, e.g., religiously sanctioned ones)? The majority opinion went so far as to suggest that if heterosexual marriages were given a name other than marriage, and same-sex marriages were called civil unions, the justification given by Sosman might pass constitutional muster. “What is not permissible,” says the majority, “*is to retain the word for some and not for others, with all the distinctions thereby engendered*” (emphasis added).

Cote-Whitacre v. Department of Public Health, 844 N.E.2d 623 (Mass. 2006). Attempts were made not only to re-write the holding in *Goodridge* (by making it compatible with same-sex unions but not same-sex marriage) but also to limit its impact. In the wake of *Goodridge*, Governor Mitt Romney invoked a 1913 law that prevented marrying out-of-state couples if the marriage would be considered void under the laws of their home state. The relevant law reads:

Section 11. No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Thus, those same-sex couples who came from outside Massachusetts but who resided in states which did not recognize same sex marriage would be barred from getting married.

Opponents of the law argued, *inter alia*, that the law had racist origins, passed originally (at least in part) to prevent black-white couples from getting married in Massachusetts, which permitted interracial marriage and it was an archaic law that was being selectively applied only to same-sex couples. (Town clerks since the late 1970s had not been asked to verify the residency of couples. This changed after *Goodridge*). Several towns, however, defied the governor and refused to ask couples for proof of residency. Provincetown had couples sign a statement that they knew of no impediment to their marriage in their own state, but did not make any effort to verify the statements. On May 18, the day after *Goodridge* went into effect, Romney demanded to see copies of the marriage applications from the cities that went against his order. Romney stated that he did not want Massachusetts to become “the Las Vegas of same-sex marriage,” that is, one where couples might come for a “quickie” marriage with no intention of residing in the state where they were married.

In June 2004, eight same-sex couples filed a law suit seeking to enjoin the state from enforcing the 1913 law. The suit argued that Romney’s application of the law was unconstitutionally selective; it also argued that

the 1913 law ran afoul of the Privileges and Immunities Clause of the U.S. constitution. The Supreme Judicial Court denied the plaintiffs' motion.

The decision noted that *Goodridge* limited its holding to Massachusetts "residents" or "citizens," e.g., "[o]ur concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach." Moreover, the Court ruled that the plaintiffs had not proved the selective enforcement claim: the clerks were instructed to check for all couples and all impediments to marriage for out-of-state couples, not just same-sex couples, although it found "troubling the timing of the resurrection of the [1913 law] immediately after the Supreme Juridical Court declared the prohibition against gay marriages unconstitutional."

"Massachusetts has a legitimate interest in protecting the interest served by the Commonwealth's creation and regulation of the marriage relationship with the requirement that there be an approving state ready to enforce marital rights and duties for the protection of the public, the spouses, and their children. . . . Thus, it is rational for the Commonwealth to require that in order to marry her, persons must reside here or in a jurisdiction where their marriage is similarly recognized and regulated. . . . Safeguarding the benefits, obligations, and protections of the parties, including the children, of a marriage that the commonwealth has helped create, is a legitimate governmental objective."

The Court also denied that the right to travel from other states to Massachusetts in order to marry was a "fundamental right," and so the 1913 law did not violate the Privileges and Immunities Clause of the U.S. Constitution.

Postscript. The Massachusetts Legislature repealed the 1913 law in July 2008.

NOTE ON EFFORTS TO AMEND THE MASSACHUSETTS AND FEDERAL CONSTITUTIONS

1. *Proposals to Amend the Massachusetts Constitution.* Originally after *Goodridge*, opponents sought to pass a two pronged amendment to the Massachusetts constitution: civil unions for same-sex couples, but no gay marriage. That amendment passed the first round vote in March 2004 and was afterwards abandoned. The original amendment read in its relevant part:

It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same sex persons are established by this Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of commonwealth.

Now (2007) running for President, former Governor Romney no longer endorses previous amendment, saying it was “somewhat confused or muddled” due to its support of civil unions.

Romney subsequently favored what he called a “clean, straightforward” amendment. The new amendment would simply have defined marriage as one man, one woman and would have left the issue of civil unions unaddressed. Because it was a “citizen’s initiative” and not one proposed by the Legislature, the new amendment faced a lower threshold for going onto the ballot: the signatures of 65,825 residents and the support of one-quarter of the Legislature in consecutive sessions. In June 2007, the Legislature killed this second amendment, when it failed to achieve support from even one-quarter of the Legislature (50 members). Why did this measure fail so completely?

2. *The Proposed Federal Marriage Amendment.* On February 24, 2004, President Bush declared his support for a Federal Marriage Amendment. In his statement, Bush did not endorse any particular version of the amendment, but he was believed to have favored the language initially proposed by Representative Marilyn Musgrave of Colorado, which reads:

Marriage in the United States shall consist only of the union of a man a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status of the legal incidents thereof be conferred upon unmarried couples or groups.

President Bush, in part, defended the amendment as necessary as a response to the decisions of state courts, in particular Massachusetts, which recognized gay marriage. He added that there was no assurance that the Defense of Marriage Act (DOMA) might not also be struck down by “activist courts.” Hence, a federal amendment was needed.

The risk that DOMA might be overturned was echoed by Representative DeLay in his remarks during the Fall 2004 debate over the amendment in the House of Representatives:

Those who know me know I am not a fan of constitutional amendments in general. And at first I resisted this amendment in particular. But the fact can no longer be denied. If marriage is to be protected in this country, it can only be protected by constitutional amendment. The timing, substance and necessity of the marriage protection amendment have been forced by the courts and their refusal to be bound by the clear and absolute limits of their constitutional authority to interpret the law. This amendment is the only way marriage will be protected.

Both President Bush and Members of Congress argued that the FMA was needed to defend the institution of marriage, the same argument underlying DOMA. There was a twist, however, in the 2004 congressional debates: the FMA proponents looked to experience abroad. Specifically,

they argued that registered partnerships, close to marriage, for same-sex couples in Scandinavia had destroyed marriage in that region. Agreeing that the decline of marriage has several causes, Senator Rick Santorum maintained that same-sex marriage exacerbates the decline because it reinforces the notion that marriage is all about the pleasure and happiness of adults, and not about adult responsibility toward rearing children under the best possible circumstances. This is the reason, Santorum concluded, that the out-of-wedlock birth rate in Nordic countries is over 60%. 150 Cong. Rec. S7906-08 (July 12, 2004); for other statements to the same effect, see *id.* at S7926 (Senator Brownback); *id.* at S7967 (Senator Inhofe).

The Scandinavian argument against same-sex marriage originated with Stanley Kurtz, "The End of Marriage in Scandinavia," *Weekly Standard*, Feb. 2, 2004, and is empirically and normatively questioned by William Eskridge, Jr. and Darren Spedale, *Gay Marriage: For Better or For Worse? What We've Learned from the Evidence* chap. 5 (2006), which demonstrates that after same-sex "registered partnerships" (civil unions) were recognized in Denmark in 1989 the national marriage rate went up dramatically after two decades of steady decline, the divorce rate went down a little after two decades of increases, and the rate of non-martial births plateaued and then declined after two decades of geometric increases. In other words, Eskridge and Spedale argue, the defense of marriage argument, especially with the new Scandinavian twist, is a lavender herring.

3. *The Defeat and Revival of the FMA.* In 2004, the Senate voted 48-50 against the FMA, well short of the two-thirds majority is needed to be approved by both chambers of Congress. The House voted in favor of the FMA, but not by the two-thirds needed to propose a constitutional amendment. Notwithstanding its failure in 2004, the Republican leadership brought the FMA back as the "Marriage Protection Amendment" in 2006, again shortly before the November elections. Again, the amendment failed to achieve anything close to the majorities needed under Article V.

These efforts, and their failure, reflect a familiar historical pattern. Edward Stein, "Past and Present Proposed Amendments to the United States Constitution Regarding Marriage," 82 *Wash. U.L.Q.* 611 (2004), demonstrates that for two hundred years Members of Congress have shown interest in amending the Constitution to "protect marriage" (usually against interracial couples in the past)—and never with any success. The impulse to amend the Constitution to enshrine traditional family law exclusions seems eternal—but that impulse runs up against arguments that such matters should be left to state-by-state policy and even experimentation.

Even with no chance of adoption, the FMA or the MPA might remain alive on the national political agenda if popular opinion remains hostile to same-sex marriages and people are nervous that courts will impose it upon unwilling populations. So far, the opposite seems to be occurring. Popular opposition to same-sex marriage is waning, and popular support for civil

unions is waxing. And post-*Goodridge*, judges remain unwilling to require same-sex "marriage," even in jurisdictions that are gay-friendly. Consider the following case.

Daniel L. Hernandez v. Victor L. Robles et al.

New York Court of Appeals, 2006.
7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770.

■ JUDGE R.S. SMITH (joined by JUDGES G.B. SMITH and by READ).

[Forty-four (44) lesbian and gay couples challenged New York's exclusion of them from civil marriage. Judge Smith asked whether there might be a rational basis for excluding them and then asked whether the New York or U.S. Constitution subjects this discrimination to heightened scrutiny requiring more than a rational basis.]

III. It is undisputed that the benefits of marriage are many. The diligence of counsel has identified 316 such benefits in New York law, of which it is enough to summarize some of the most important: Married people receive significant tax advantages, rights in probate and intestacy proceedings, rights to support from their spouses both during the marriage and after it is dissolved, and rights to be treated as family members in obtaining insurance coverage and making health care decisions. Beyond this, they receive the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State.

The critical question is whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples. The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature may (subject to the effect of the Federal Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419) extend marriage or some or all of its benefits to same-sex couples. We conclude, however, that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted. Others have been advanced, but we will discuss only these two, both of which are derived from the undisputed assumption that marriage is important to the welfare of children.

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the

relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.

Plaintiffs, and *amici* supporting them, argue that the proposition asserted is simply untrue: that a home with two parents of different sexes has no advantage, from the point of view of raising children, over a home with two parents of the same sex. Perhaps they are right, but the Legislature could rationally think otherwise.

To support their argument, plaintiffs and *amici* supporting them refer to social science literature reporting studies of same-sex parents and their children. Some opponents of same-sex marriage criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences. More definitive results could hardly be expected, for until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing.

Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home. (See *Goodridge* [Sosman, J., dissenting].) And a legislature proceeding on that premise could rationally decide to offer a special inducement,

the legal recognition of marriage, to encourage the formation of opposite-sex households.

In sum, there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex. Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals. This is the question on which these cases turn. If we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice—if we agreed with the plaintiffs that it is comparable to the restriction in *Loving v. Virginia*, a prohibition on interracial marriage that was plainly “designed to maintain White Supremacy”—we would hold it invalid, no matter how long its history. As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving*.

But the historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism’s worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950’s and 1960’s, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

It is true that there has been serious injustice in the treatment of homosexuals also, a wrong that has been widely recognized only in the relatively recent past, and one our Legislature tried to address when it enacted the Sexual Orientation Non-Discrimination Act four years ago (L 2002, ch. 2). But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

[In Part IV, Judge Smith found that constitutional precedents did not require more than rational basis for the state’s exclusionary rule. Part IV.A found no fundamental right, “deeply rooted in this Nation’s history and tradition” (*Washington v. Glucksberg* (1997) (Casebook, pp. 74–76)), that would trigger strict scrutiny under the Due Process Clause.] The difference between *Lawrence* and *Glucksberg* is that in *Glucksberg* the relatively narrow definition of the right at issue was based on rational line-drawing. In *Lawrence*, by contrast, the court found the distinction between homosexual sodomy and intimate relations generally to be essentially arbitrary. Here, there are, as we have explained, rational grounds for limiting the definition of marriage to opposite-sex couples. This case is therefore, in the relevant way, like *Glucksberg* and not at all like *Lawrence*. Plaintiffs here

do not, as the petitioners in *Lawrence* did, seek protection against State intrusion on intimate, private activity. They seek from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples. We conclude that, by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right.

[In Part IV.B, Judge Smith concluded that the Equal Protection Clause also did not require strict scrutiny, because there was no "suspect classification." Judge Smith rejected plaintiffs' sex discrimination argument on the ground that both sexes were treated the same *and* there was no sex-based class subordinated by the sex-based classification (therefore completely unlike *Loving*). He then observed that the Court of Appeals had reserved the issue whether "sexual preference" is a suspect classification.] We resolve this question in this case on the basis of the Supreme Court's observation that no more than rational basis scrutiny is generally appropriate "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement" (*City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)). Perhaps that principle would lead us to apply heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best. In this area, therefore, we conclude that rational basis scrutiny is appropriate. * * *

■ JUDGE GRAFFEO (joined by JUDGE G.B. SMITH) concurring. [Judge Graffeo also found strict scrutiny inapplicable under either substantive due process or equal protection precedents, largely for the reasons adduced by the plurality opinion. (Unlike Judge Smith, however, Judge Graffeo believed there was no "sexual preference" discrimination on the face of the statute.) The exclusion had a rational basis: "Since marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth, the Legislature's decision to focus on opposite-sex couples is understandable. 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. Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children."]

■ CHIEF JUDGE KAYE (joined by JUDGE CIPARICK) dissenting. [Chief Judge Kaye argued that strict scrutiny should apply, for three reasons: (1) Plaintiffs could invoke *Loving's* "fundamental right to marry." It was

circular for the majority to frame the fundamental right as “same-sex marriage,” just as it would have been circular for the *Loving* Court to frame the right as “inter-racial marriage,” also historically disapproved. (2) The exclusion falls upon sexual orientation minorities; sexual orientation is a “suspect classification” for the reasons developed in *Watkins* (Casebook, pp. 230–38), and this also triggers strict scrutiny. (3) The exclusion is on its face a sex discrimination, also triggering strict scrutiny. Chief Judge Kaye also argued that the discrimination did not even further a rational basis, for the following reasons.]

Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, 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.

Nor does this exclusion rationally further the State’s legitimate interest in encouraging heterosexual married couples to procreate. Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children. Thus, the statutory classification here—which prohibits only same-sex couples, and no one else, from marrying—is so grossly underinclusive and overinclusive as to make the asserted rationale in promoting procreation “impossible to credit” (*Romer*). Indeed, even the *Lawrence* dissenters observed that “encouragement of procreation” could not “possibly” be a justification for denying marriage to gay and lesbian couples, “since the sterile and the elderly are allowed to marry.” * * *

■ JUDGE ROSENBLATT did not participate.

Table 8-1. State Law Regarding Same-Sex Marriages, Unions, and Partnerships, 2009

State	Statute or Constitutional Limitation of Marriage to One Man, One Woman?	Constitutional Marriage Litigation (Appellate Level)?	Statewide Recognition?
Alabama	Statutory (1998) and Constitutional (2006) Limits	None	None
Alaska	Statutory (1996) and Constitutional (1998) Limits	None	None
Arizona	Statutory (1996) and Constitutional (2008) Limits	<i>Stanhardt v. Superior Court</i> (2004) (unsuccessful challenge)	None
Arkansas	Statutory (1997) and Constitutional (2004) Limits, including nonrecognition of relationships “substantially similar to marital status” (2004)	None	None
California	Statutory (2000) and Constitutional (2008) Limits	<i>Marriage Cases</i> (2008) (successful challenge, overridden by a Constitutional initiative)	Domestic Partnership* (1999, upgraded 2003)
Colorado	Statutory (2000) and Constitutional (2006) Limits	<i>Ross v. Denver Dep’t of Health & Hosp.</i> (1994) (unsuccessful)	None
Connecticut	Statutory (2005) Limit	<i>Kerrigan v. State</i> (2008) (successful)	Marriage (2008)

State	Statute or Constitutional Limitation of Marriage to One Man, One Woman?	Constitutional Marriage Litigation (Appellate Level)?	Statewide Recognition?
Delaware	Statutory (1996) Limit	None	None
District of Columbia	None	<i>Dean v. District of Columbia</i> (1995) (unsuccessful)	Domestic Partnership* (1992, upgraded 2004-06)
Florida	Statutory (1997) and Constitutional (2008) Limits.	None	None
Georgia	Statutory (1996) and Constitutional (2004) Limits, including nonrecognition of same-sex "unions" as well as marriages (2004)	<i>Van Dyck v. van Dyck</i> (1993) (unsuccessful)	None
Hawaii	Statutory (1997) and Constitutional (1998) Limits, allowing Legislature authority to confine marriage to one man, one woman (1998)	<i>Baehr v. Lewin</i> (1993) (preliminary success, overridden by constitutional amendment [1998])	Reciprocal Beneficiaries (1997)
Idaho	Statutory (1996) and Constitutional (2006) Limits	None	None
Illinois	Statutory (1996) Limit	None	None
Indiana	Statutory (1997) Limit	<i>Morrison v. Sadler</i> (2005) (unsuccessful challenge)	None
Iowa	Statutory (1998) Limit	<i>Varnum v. State</i> (2009) (successful)	Marriage (2009)
Kansas	Statutory (1996) and Constitutional (2005) Limits, including nonrecognition of any relationship entitling parties to "rights or incidents of marriage" (2005)	<i>In re Estate of Gardiner</i> (2002) (unsuccessful suit by transsexual stripped of her marriage rights)	None
Kentucky	1998 (Statutory) and Constitutional (2004) Limits, including nonrecognition of "legal status identical or substantially similar to that of marriage for unmarried individuals" (2004)	<i>Jones v. Hallahan</i> (1973) (unsuccessful)	None
Louisiana	Statutory (1999) and Constitutional (2004) Limits, including nonrecognition of "legal status identical or substantially similar to that of marriage for unmarried individuals" (2004)	<i>In re Succession of Bacot</i> (1987) (unsuccessful)	None
Maine	None	None	Marriage (2009)
Maryland	Statutory (1984) Limit	<i>Conaway v. Deane & Polyak</i> (2007) (unsuccessful)	None
Massachusetts	None	<i>Goodridge v. Dep't Pub. Health</i> (2003) (same-sex marriages required)	Marriage (2004)
Michigan	Statutory (1996) and Constitutional (2004) Limits, including nonrecognition of "legal status identical or substantially similar to that of marriage for unmarried individuals" (2004)	None	None
Minnesota	Statutory (1997) Limit	<i>Baker v. Nelson</i> (1971, U.S. Supreme Court appeal denied, 1972) (unsuccessful)	None
Mississippi	Statutory (1997) and Constitutional (2004) Limits	None	None
Missouri	Constitutional (2004) Limit	None	None
Montana	Statutory (1997) and Constitutional (2004) Limits	None	None
Nebraska	Constitutional (2000) Limit, including nonrecognition of any "civil union, domestic partnership, or any other same-sex relationship"	<i>Bruning v. Citizens for Equal Protection</i> (10th Cir. 2006) (unsuccessful challenge to 2000 amendment)	None
Nevada	Constitutional (2002) Limit	None	None

State	Statute or Constitutional Limitation of Marriage to One Man, One Woman?	Constitutional Marriage Litigation (Appellate Level)?	Statewide Recognition?
<i>New Hampshire</i>	None	None	Marriage (2009)
<i>New Jersey</i>	None	<i>Lewis v. State</i> (2006) (successful challenge requiring equal treatment)	Civil Unions (2006)
<i>New Mexico</i>	None	None	None
<i>New York</i>	None	<i>Hernandez v. State</i> (2006) (unsuccessful challenge)	None
<i>North Carolina</i>	Statutory (1996) Limit	None	None
<i>North Dakota</i>	Statutory (1997) and Constitutional (2004) Limits. "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." (2004)	<i>Jacobson v. Jacobson</i> (1981) (unsuccessful)	None
<i>Ohio</i>	Constitutional (2004) Limit, voiding any public act or judicial order extending "the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex"	<i>Gajovski v. Gajovski</i> (1991) (unsuccessful)	None
<i>Oklahoma</i>	Statutory (1996) and Constitutional (2004) Limits	None	None
<i>Oregon</i>	Constitutional (2004) Limit	<i>Li v. State</i> (2004) (voiding local marriage licenses)	Domestic Partnership* (2007)
<i>Pennsylvania</i>	Statutory (1996) Limit	None	None
<i>Rhode Island</i>	None	None	None
<i>South Carolina</i>	Statutory (1996) and Constitutional (2006) Limits. State and political subdivisions can neither create nor recognize a "legal status, right or claim respecting any other domestic union however denominated" (2006).	None	None
<i>South Dakota</i>	Statutory (2000) and Constitutional (2006) Limits. "The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota." (2006)	None	None
<i>Tennessee</i>	Statutory (1996) and Constitutional (2006) Limits	None	None
<i>Texas</i>	Statutory (2003) and Constitutional (2005) Limits. "This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." (2005)	None	None
<i>Utah</i>	Statutory (1995) and Constitutional (2004) Limits. "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." (2004)	None	None
<i>Vermont</i>	None	<i>Baker v. State</i> (1999) (successful challenge requiring equal treatment)	Marriage (2009)

State	Statute or Constitutional Limitation of Marriage to One Man, One Woman?	Constitutional Marriage Litigation (Appellate Level)?	Statewide Recognition?
Virginia	Statutory (1997) and Constitutional (2006) Limits. "This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." (2006)	None	None
Washington	Statutory (1998) Limit.	<i>Andersen v. King County</i> (2006) (unsuccessful challenge)	Domestic Partnerships* (2007)
West Virginia	Statutory (2001,2003) Limit.	None	None
Wisconsin	Statutory (1979) and Constitutional (2006) Limits.	None	None
Wyoming	Statutory Limit.	None	None

* "Domestic partnership" laws in California and Oregon are very similar to "civil unions," for they grant almost all the legal rights and duties of marriage to same-sex partners. The partnership laws of the District of Columbia and Washington are somewhat similar. See Table 8-2 below.

Sources: William Eskridge, Jr. & Darren Spedale, *Gay Marriage: For Better or For Worse? What We've Learned from the Evidence* (2006); www.lambdalegal.org (viewed June 2007), and various media sources. Darsana Srinivasan (Yale Law School, Class of 2007) did most of the work compiling this table.

NOTE ON STATE RECOGNITION OF SAME-SEX RELATIONSHIPS (2009)

1. *The Dominant Pattern: State Judges, Legislators, and Voters Reject Marriage Equality.* As *Hernandez* illustrates, the press for same-sex marriage or civil unions does not necessarily attract the support of judges, even in gay-tolerant states such as New York. Generally, even gay-friendly courts are applying rational basis scrutiny and are finding some kind of rational basis, therefore not following *Baker* or *Goodridge*. As Table 8-1 demonstrates, the odds are so slim in many states that marriage equality for lesbian and gay couples has not even been worth litigating.

Table 8-1 also reveals that most states have adopted statutory bars to same-sex marriage. Problem 8-4 (Casebook, pp. 1092-93) raises interpretive questions relating to some of these marriage bars. Table 8-1 also shows that increasing numbers are amending their state constitutions to head off state constitutional litigation such as *Baker* and *Goodridge*. In every ballot initiative but one (Arizona, 2006), voters have endorsed anti-marriage constitutional amendments, usually by super-majorities of 60% or more.

2. *A New Rational Basis for Limiting Marriage to Different-Sex Couples.* Notice the new argument against same-sex marriage that surfaces in *Hernandez*. Rather than focusing on natural law definitions of marriage, or anti-homosexual stereotyping (homosexuals are promiscuous, predatory, etc.), or even the Clinton-Bush defense of marriage argument, the *new argument against gay marriage* is that the homosexuals just don't need the incentives and protections of marriage as much as heterosexuals, because they are less likely to have children. Marriage is much about children, and the state really needs to shore up those shaky heterosexuals-with-children relationships. Could the state be more gay-friendly than this? Sure, this

justification is wildly over- and under-inclusive, especially as regards lesbians, who are raising children in large numbers. But genuine rational basis review allows a lot of over- and under-inclusion. (In *Hernandez*, this argument, made in the opinions of both Judges R.S. Smith and Graffeo, commands a majority. The child-needs-mother-and-father argument advanced by Judge R.S. Smith is only a plurality view; it might have been too close to sex or gender stereotyping for Judge Graffeo to join.)

3. *Equal Treatment, but Not the Name—Is this “Separate but Equal”?* A common pattern in gay-tolerant states is for judges to insist upon equal treatment of lesbian and gay couples by the state, but to leave the precise nature of the reform to legislatures, which have thus far eschewed the term “marriage” for such couples. This is the Vermont approach. In *Lewis v. Harris*, 908 A.2d 196 (N.J.2006), the New Jersey Supreme Court followed *Baker* to rule that denial of state marriage-based rights and duties to lesbian and gay couples *and* that the Legislature should have the first crack at a remedy. In dissent, Chief Justice Poritz argued that there was no valid reason not to grant lesbian and gay couples *full marriage equality*. No Justice took the position that the statewide discrimination was constitutional. In December 2006, the New Jersey Legislature enacted a civil unions law, without much controversy.

Other states have adopted civil unions laws *without* judicial prodding, namely, Connecticut in 2005 and New Hampshire in 2007. California’s Legislature enacted a statewide domestic partnership law in 1999 and expanded it in 2003 to include almost all the same rights and benefits of marriage (Casebook, p. 1051). In 2007, both Oregon and Washington adopted domestic partnership laws after their state supreme courts refused to require same-sex marriage. As in California, these “domestic partnership” laws give almost all the legal rights and duties of marriage to same-sex partners—and so might usefully be thought of as “civil union” laws like those of Vermont and Connecticut in the East. Table 8–2 (below) provides some useful information about how much equality those laws actually provide.

Lesbian and gay couples—and a number of openly straight allies—have complained that civil unions and domestic partnerships constitute a “separate but equal” regime that denies full equality. This tag phrase seriously distorts the legal and political realities.

On the one hand, the “separate” institutions are generally *not* “equal” to marriage. Table 8–2 reveals some striking differences between marriage and domestic partnerships/civil unions in recent legislation. For example, in Maine and Oregon, “domestic partners” must cohabit before the state will recognize their relationships; such a prerequisite has never existed for marriage (indeed, it is inconsistent with the traditional notion of marriage). In DC, Maine, and Washington, domestic partnerships can be dissolved if one partner files a “notice of termination,” with reasonable notice to the other party. Such an easy dissolution process assures that partnerships will

be more short-lived than marriages, or New Jersey/New Hampshire civil unions and Oregon partnerships, which can only be dissolved by divorce proceedings in those states' marriage laws. Likewise, in Maine and Washington, the support rights of dependent partners is unclear upon dissolution, apparently left to state contract law.

On the other hand, notwithstanding different terminologies and these important legal distinctions, William Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (2002), argues that the "separate but equal" rhetoric must be abandoned. "Separate but equal" invokes apartheid, which was a violent regime designed to subordinate African Americans socially, economically, and legally. It is an inapposite comparison for civil unions, a major advancement for gay rights. Civil unions treat lesbian and gay couples with respect, not violent and systematic suppression. Professor Eskridge maintains that the more apt terminology is "equality practice": not complete equality now, but practice for possible equality in the future, after further normative persuasion of non-gay Americans, including at least some traditionalists. Note that "equality practice" laws in Vermont, New Hampshire, and Maine were all upgraded to marriage equality by state legislatures in those three states in 2009.

4. *The Symbolic Politics of Relationship "Upgrades."* Several of the new state relationship recognition laws provide for automatic switching between relationships regimes. In all instances, this automatic switching is unidirectional, in that it only allows for switching away from something less like marriage to something more like it. This phenomenon of "automatic upgrading" appears in Washington's, Maine's, and DC's's domestic partnership laws and in New Jersey's civil union law. All offer the ability to upgrade to something more like marriage but do not provide for the ability to move in the opposite direction. A relationship form that is less like marriage is, by implication, a "downgrade." New Jersey is particularly interesting in this regard. Since 2004, it has recognized lesbian and gay domestic partnerships, with some but not many of the legal features of marriage. If under the 2006 law two lesbian partners enter into a civil union, their domestic partnership is automatically terminated. But spouses joined in civil union cannot go in reverse, converting their union into a domestic partnership (which has the advantage for some couples of being easier to dissolve).

These arrangements may reflect the fact that marriage remains our society's normative anchor: the more "like" marriage a state institution is, the more beneficial, and rewarded, that institution is considered. This reflects the normalization of "committed relationship" in the United States, a normalization that is questioned by feminist theorists like Martha Fineman in the United States and Brenda Cossman in Canada. It also reflects the ways in which institutions called something else than marriage and offering fewer legal benefits and duties might be considered indicia of second-class citizenship.

5. *The Menu of Options for Straight Couples.* In DC, Maine, and (for older couples) Washington, domestic partnerships are available statewide to straight as well as gay couples. In those jurisdictions, much as in France, straight couples now have a menu of options: cohabitation, domestic partnership, and marriage. Eskridge, *Equality Practice*, argues that this is an important trend throughout western family law, with Europe and Canada leading the way. Eskridge's menu theory posits that the same options will ultimately be available to gay as well as straight couples, as they are in Canada and The Netherlands.

6. *How About Same-Sex Marriage?* Progressives have pressed for full marriage equality in civil union states. In recent years, lawsuits have been successful in California (2008), Connecticut (2008), and Iowa (2009). See *In re Marriage Cases* excerpted on pages 44–60 of this Supplement.

NOTE ON INTERPRETATION OF STATE ANTI-MARRIAGE AMENDMENTS

As Table 8–1 demonstrates, 30 states now have constitutional provisions defining marriage as one man, one woman (or, in the case of Hawaii, allowing the Legislature to do so). The publicized effect of these provisions is to head off state constitutional marriage litigation such as *Goodridge* and *Hernandez*. Table 8–1 quotes the state constitutional provisions that go further, also barring the state from recognizing civil unions and other relationships that are not termed “marriage” but that are “similar” to marriage. A big issue in many of these states (such as Arkansas, Kentucky, Louisiana, Michigan, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, and Virginia) is whether these new constitutional provisions foreclose domestic partnership benefits supplied by county and municipal employers.

In 2004, Michigan added a provision to its state constitution barring the state from recognizing or giving effect to same-sex marriage or any “legal status identical or substantially similar to that of marriage for unmarried individuals.” On its face, this provision would head off not only constitutional marriage litigation (*Goodridge*), but also constitutional litigation seeking civil unions (*Baker*) or even legislation recognizing same-sex marriages or civil unions. As the decision below illustrates, however, Michigan judges have interpreted this provision to bar public employers from providing domestic partnership benefits to same-sex couples.

National Pride at Work v. Governor of Michigan

Michigan Supreme Court, 2008.
481 Mich. 56, 748 N.W.2d 524.

■ MARKMAN, J., for the Court [joined by the CHIEF JUSTICE and three other Justices].

We granted leave to appeal to consider whether the marriage amendment, Const. 1963, art. 1, § 25, which states that “the union of one man