

NOTE ON THE FLORIDA HOMOSEXUAL ADOPTION CASE

Lofton is a useful case, because it requires the judge (and the law student) to figure out how the holdings of Romer (on the equal protection issue) and Lawrence (on the substantive due process issue) should apply to a statutory policy excluding all practicing lesbians, gay men, and bisexuals from adopting children in Florida. Both Supreme Court decisions can be read narrowly (as Birch does) or broadly (as Barkett does)—so the key inquiry becomes: How broadly should we read Romer or Lawrence?

Arguments for Reading the Precedents Broadly include: (1) The Florida statute has the same outlier look as the Colorado initiative. No other state (as of 2007) has such a focused anti-gay exclusion. (2) The Bryant "Save Our Children" campaign demonized homosexuals as disgusting and subhuman, and it was the backdrop of the statute. Can that be entirely ignored? Isn't this the kind of prejudice-based discourse the Court ought to be discouraging? (3) Romer/Lawrence end the regime where homosexuals were second-class citizens. The Florida statute is a result of the old regime's ideology. Lose it for the same reasons important race- and sex-discriminations were swept away after Brown and Craig.

Arguments for Reading the Precedents Narrowly include: (1) The new norm to replace Bowers might be, tolerate homosexuality and don't make sodomy a crime, but the state still has a lot of room to promote and encourage heterosexuality. The adoption law is an example. (2) Adoption is a special creature of the state, and not some fundamental right, so the state ought to have leeway in defining its nature and terms. (3) A lower court should not make the move Barkett advocates; the Supreme Court is better situated to accomplish such a norm shift, but should not do so immediately. Let the issue percolate for a while. If other states do not follow Florida, then perhaps the Court should settle the issue for challenges like Lofton's.

Page 297. Insert the following Cases and Notes at the end of Section 2:

In re Marriage Cases

California Supreme Court, 2008. 43 Cal.4th 757, 183 P.3d 384, 76 Cal.Rptr.3d 683.

CHIEF JUSTICE GEORGE delivered the opinion for the Court. * * *

[These appeals consolidated six cases where lesbian and gay couples sought recognition of their committed relationships as marriages. Since statehood in 1850, California's family law had implicitly limited civil marriage to different-sex relationships. A 1977 statute limited marriage to unions between one man and one woman, and a 2000 initiative reaffirmed the limitation of marriage to different-sex couples and provided that the state would not recognize out-of-state same-sex marriages. Plaintiffs argued that the discrimination against their relationships violated the equality guarantee of the California Constitution. They argued that the discrimina-

tion was subject to strict scrutiny for three independent reasons: the exclusion of same-sex couples from state marriage law rested upon two "suspect" classifications, namely, (1) sex and (2) sexual orientation and, moreover, (3) denied those couples a "fundamental" interest in marriage. Under California's constitutional jurisprudence, the Court would apply strict scrutiny if either the classification were suspect or the excluded group were denied a fundamental right.]

[Part IV of the Chief Justice's opinion held that the plaintiff lesbian and gay couples have a "fundamental right to marry." Unlike the U.S. Constitution, the California Constitution mentions privacy rights, in Article I, section 1, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Added 1972, emphasis added.) Like the U.S. Constitution, however, the California Constitution does not explicitly protect a fundamental right to marry, but the state supreme court has inferred such a right from the 1972 amendment, which was meant to codify Griswold v. Connecticut in the state constitution.

[The lower court had rejected plaintiffs' claim on the ground that lesbian and gay couples enjoyed no "fundamental right to marriage," because marriage had traditionally not included them. Although all other state appeals courts had accepted or acquiesced in a similar argument, Chief Justice George rejected it as circular.] In Perez v. Sharp, this court's 1948 decision holding that the California statutory provisions prohibiting interracial marriage were unconstitutional—the court did not characterize the constitutional right that the plaintiffs in that case sought to obtain as "a right to interracial marriage" and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages never had been permitted in California. Instead, the Perez decision focused on the substance of the constitutional right at issue—that is, the importance to an individual of the freedom "to join in marriage with the person of one's choice"—in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right. * * * And, in addressing a somewhat analogous point, the United States Supreme Court in Lawrence v. Texas concluded that its prior decision in Bowers v. Hardwick had erred in narrowly characterizing the constitutional right sought to be invoked in that case as the right to engage in intimate homosexual conduct, determining instead that the constitutional right there at issue properly should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect.

[When understood at the proper level of generality, the question becomes, what is the point of the important constitutional interest in marriage? Perez and other cases established a linkage between marriage, establishing a home, and raising children in identifying civil marriage as

the means available to an individual to establish, with a loved one of his or her choice, an officially recognized family relationship. In *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, for example, in explaining "the public interest in the institution of marriage," this court stated: "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage."

[The Chief Justice emphasized the social utility of marriage as a broadly available institution. *De Burgh* and other cases described marriage as the "building block" of society, by providing a good structure for rearing children as well as channeling adult behaviors in productive ways. And of course many cases recognized marriage as the most important individual right, for marriage is typically "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." These values of marriage, and its critical role as an enforceable individual right, are recognized in Article 16 of the U.N. Universal Declaration of Human Rights; Article 23 of the International Covenant of Civil and Political Rights; Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 17 of the American Convention on Human Rights; and the constitutions of many other countries. See Lynn Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 *BYU J. Pub. L.* 439, 453-61 (2006).]

[In response to the argument that marriage had traditionally been reserved for different-sex couples only, the Chief Justice noted that precisely that argument had been rejected in *Perez*. The point of constitutional review is to subject tradition to normative scrutiny.] There can be no question but that, in recent decades, there has been a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples. California has repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals of gay individuals, and at one time even characterized homosexuality as a mental illness rather than as simply one of the numerous variables of our common and diverse humanity. This state's current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation, and, more specifically, recognize that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.

[*Amici* argued that the main point of marriage is procreation, and that the valid state interest in channeling reproductive activity into marriage justified the omission of same-sex couples, who could not produce children through their sexual activities. The Chief Justice was unpersuaded, in part because as many as 70,000 children were being raised in California by same-sex couples (citing study that found that 28.4 percent of California lesbian and gay couples were raising children). Some of these children were adopted, others came through surrogates and artificial insemination, but the fact remained, for the Court, that even this traditional value of marriage was not served by excluding so many families from the state marriage law.]

Furthermore, although promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry, past cases make clear that this right is not confined to, or restrictively defined by, that purpose alone. As noted above, our past cases have recognized that the right to marry is the right to enter into a relationship that is "the center of the personal affections that ennoble and enrich human life" (*De Burgh*)—a relationship that is "at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marvin v. Marvin*.) The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children, and the right to marry never has been limited to those who plan or desire to have children. Indeed, in *Griswold v. Connecticut*—one of the seminal federal cases striking down a state law as violative of the federal constitutional right of privacy—the high court upheld a married couple's right to use contraception to prevent procreation, demonstrating quite clearly that the promotion of procreation is not the sole or defining purpose of marriage. Similarly, in *Turner v. Safley*, the court held that the constitutional right to marry extends to an individual confined in state prison—even a prisoner who has no right to conjugal visits with his would-be spouse—emphasizing that "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public commitment [that] are an important and significant aspect of the marital relationship." Although *Griswold* and *Turner* relate to the right to marry under the federal Constitution, they accurately reflect the scope of the state constitutional right to marry as well. Accordingly, this right cannot properly be defined by or limited to the state's interest in fostering a favorable environment for the procreation and raising of children.

The Proposition 22 Legal Defense Fund and the Campaign also rely upon several academic commentators who maintain that the constitutional right to marry should be viewed as inapplicable to same-sex couples because a contrary interpretation assertedly would sever the link that marriage provides between procreation and child rearing and would "send

a message” to the public that it is immaterial to the state whether children are raised by their biological mother and father. (See, e.g., Blankenhorn, *The Future of Marriage* (2007); Wardle, “*Multiply and Replenish*.” *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation* (2001) 24 HARV J.L. & PUB. POL’Y 771, 797-799; Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law* (2002) 62 La. L.Rev. 773, 779-780, 790-791.) Although we appreciate the genuine concern for the well-being of children underlying that position, we conclude this claim lacks merit. Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or her biological mother and father. By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child’s biological parents to enter into and raise their child in a stable, long-term committed relationship. Instead, such an interpretation of the constitutional right to marry simply confirms that a stable two-parent family relationship, supported by the state’s official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents). This interpretation also guarantees individuals who are in a same-sex relationship, and who are raising children, the opportunity to obtain from the state the official recognition and support accorded a family by agreeing to take on the substantial and long-term mutual obligations and responsibilities that are an essential and inseparable part of a family relationship.

[Finally, the Chief Justice rejected the Attorney General’s argument that the Domestic Partnership Act, as amended to provide virtually all the legal benefits and duties of marriage for same-sex couples, satisfied the constitutional marriage right.] Whether or not the name “marriage,” in the abstract, is considered a core element of the state constitutional right to marry, one of the core elements of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships. The current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry. As observed by the City [and County] of San Francisco at oral argument, this court’s conclusion in *Perez* that the statutory provision barring interracial marriage was unconstitu-

tional, undoubtedly would have been the same even if alternative nomenclature, such as “transracial union,” had been made available to interracial couples

[Sex-based classifications have long been subject to strict scrutiny under the California Constitution, see *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1 (1971). In **Part V.A.** of his opinion (excerpted below, in Section 3 of this chapter of the Supplement), the Chief Justice dismissed plaintiffs’ argument that the marriage exclusion was subject to strict scrutiny as a sex discrimination. The California Supreme Court had not decided what level of scrutiny to apply to *sexual orientation* classifications. In **Part V.B.**, the Chief Justice answered that question.]

In arguing that the marriage statutes do not discriminate on the basis of sexual orientation, defendants rely upon the circumstance that these statutes, on their face, do not refer explicitly to sexual orientation and do not prohibit gay individuals from marrying a person of the opposite sex. Defendants contend that under these circumstances, the marriage statutes should not be viewed as directly classifying or discriminating on the basis of sexual orientation but at most should be viewed as having a “disparate impact” on gay persons.

In our view, the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender.⁵⁹ A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside

59. As explained in the amicus curiae brief filed by a number of leading mental health organizations, including the American Psychological Association and the American Psychiatric Association: “Sexual orientation is commonly discussed as a characteristic of the *individual*, like biological sex, gender identity, or age. This perspective is incomplete because sexual orientation is always defined in relational terms and necessarily involves relationships with other individuals. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting—or desiring to act—with another person that individuals express their heterosexuality, homosexuality, or bisexuality. . . . Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. In addition to sexual behavior, these bonds encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment. [.] Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one’s sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.”

the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation. * * *

Having concluded that the California marriage statutes treat persons differently on the basis of sexual orientation, we must determine whether sexual orientation should be considered a "suspect classification" under the California equal protection clause, so that statutes drawing a distinction on this basis are subject to strict scrutiny. * * *

In addressing this issue, the majority in the Court of Appeal stated: "For a statutory classification to be considered 'suspect' for equal protection purposes, generally three requirements must be met. The defining characteristic must (1) be based upon an 'immutable trait'; (2) 'bear[] no relation to [a person's] ability to perform or contribute to society'; and (3) be associated with a 'stigma of inferiority and second class citizenship,' manifested by the group's history of legal and social disabilities. (*Sail'er Inn.*) While the latter two requirements would seem to be readily satisfied in the case of gays and lesbians, the first is more controversial." Concluding that "whether sexual orientation is immutable presents a factual question" as to which an adequate record had not been presented in the trial court, the Court of Appeal ultimately held that "[l]acking guidance from our Supreme Court or decisions from our sister Courts of Appeal," the court would review the marriage statutes under the rational basis, rather than the strict scrutiny, standard.

Past California cases fully support the Court of Appeal's conclusion that sexual orientation is a characteristic (1) that bears no relation to a person's ability to perform or contribute to society, and (2) that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities. [See *People v. Garcia* (2000) 77 Cal.App.4th 1269, treating lesbians and gay men as a social group like blacks and women that prosecutors could not exclude from juries through peremptory challenges.]

We disagree, however, with the Court of Appeal's conclusion that it is appropriate to reject sexual orientation as a suspect classification, in applying the California Constitution's equal protection clause, on the ground that there is a question as to whether this characteristic is or is not "immutable." Although we noted in *Sail'er Inn* that generally a person's gender is viewed as an immutable trait, immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes. California cases establish that a person's religion is a suspect classification for equal protection purposes, and one's religion, of course, is not immutable but is a matter over which an individual has control. (See also *Raffaelli v. Committee of Bar Examiners*

(1972) 7 Cal.3d 288, 292 [alienage treated as a suspect classification notwithstanding circumstance that alien can become a citizen].) Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.

In his briefing before this court, the Attorney General does not maintain that sexual orientation fails to satisfy the three requirements for a suspect classification discussed by the Court of Appeal, but instead argues that a *fourth* requirement should be imposed before a characteristic is considered a constitutionally suspect basis for classification for equal protection purposes—namely, that "a 'suspect' classification is appropriately recognized only for minorities who are unable to use the political process to address their needs." The Attorney General's brief asserts that "[s]ince the gay and lesbian community in California is obviously able to wield political power in defense of its interests, this Court should not hold that sexual orientation constitutes a suspect classification."

Although some California decisions in discussing suspect classifications have referred to a group's "political powerlessness" (see, e.g., *Raffaelli*), our cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class. Indeed, if a group's *current* political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications. Instead, our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society. Thus, "courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices." (*Sail'er Inn.*) This rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation. In sum, we conclude that statutes imposing differential treatment on the basis of sexual orientation should be viewed as constitutionally suspect under the California Constitution's equal protection clause. * * *

There is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous than that applied to statutes that classify on the basis of the suspect classifications of gender, race, or religion. Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate

with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation. * * *

[Part V.D.] [I]n circumstances, as here, in which the strict scrutiny standard of review applies, the state bears a heavy burden of justification. In order to satisfy that standard, the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question. Furthermore, unlike instances in which the rational basis test applies, the state does not meet its burden of justification under the strict scrutiny standard merely by showing that the classification established by the statute is rationally or reasonably related to such a compelling state interest. Instead, the state must demonstrate that the distinctions drawn by the statute (or statutory scheme) are necessary to further that interest.

[The Chief Justice summarily rejected the argument made by the Proposition 22 Legal Defense Fund that the California Constitution required the Legislature to follow the traditional definition of "marriage" as one man, one woman, as well as the Attorney General's argument that constitutional separation of powers precluded the judiciary from second-guessing legislative policy judgments. The Court gave greater attention to the argument that it ought to defer to the popular judgment, reflected in the Knight Initiative approved by a large majority in 2000, that the state ought to preserve the traditional definition of marriage.]

Although defendants maintain that this court has an obligation to defer to the statutory definition of marriage contained in section 308.5 because that statute—having been adopted through the initiative process—represents the expression of the "people's will," this argument fails to take into account the very basic point that the provisions of the California Constitution itself constitute the ultimate expression of the people's will, and that the fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process. As the United States Supreme Court explained in *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[The Chief Justice then treated the Attorney General's argument that the state had a compelling interest in following the definition of marriage followed almost everywhere else in the United States, and indeed in the world.] Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment. As the United States Supreme Court observed in its decision in *Lawrence v. Texas*, the expansive and protective provisions of our constitutions, such as the due process clause, were drafted with the knowledge that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." For this reason, the interest in retaining a tradition that excludes an historically disfavored minority group from a status that is extended to all others—even when the tradition is long-standing and widely shared—does not necessarily represent a compelling state interest for purposes of equal protection analysis.

After carefully evaluating the pertinent considerations in the present case, we conclude that the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes. To begin with, the limitation clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples and their children. As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez v. Robles*: "There are enough marriage licenses to go around for everyone." Further, permitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution of marriage; same-sex couples who choose to enter into the relationship with that designation will be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes upon opposite-sex couples who marry. Finally, affording same-sex couples the opportunity to obtain the designa-

tion of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.

While retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children. As discussed above, because of the long and celebrated history of the term "marriage" and the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community, the statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples. Furthermore, because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term "marriage" is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship. Finally, in addition to the potential harm flowing from the lesser stature that is likely to be afforded to the family relationships of same-sex couples by designating them domestic partnerships, there exists a substantial risk that a judicial decision upholding the differential treatment of opposite-sex and same-sex couples would be understood as *validating* a more general proposition that our state by now has repudiated: that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples. * * *

[We omit the concurring opinion of JUSTICE KENNARD as well as the concurring and dissenting opinions of JUSTICE BAXTER and JUSTICE CORRIGAN. Four Justices joined the opinion for the Court; three dissented.]

NOTES ON THE CALIFORNIA SAME-SEX MARRIAGE CASES

1. *The Right to Marry Argument*. Lesbian and gay couples have been arguing for their "fundamental right to marry" since 1971, see William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 42-62 (1996) (history of right to marry litigation), but no appellate court in the United States had ever ruled that lesbian and gay couples qualified for such a right. *E.g.*, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (requiring that the marriage exclusion be subjected to strict scrutiny on suspect classification grounds but explicitly rejecting the argument that strict scrutiny was also required

on fundamental right grounds). This uniformity was especially frustrating in light of the Rehnquist Court's ruling, with no dissent, that the right to marry extended to convicted rapists, murderers, and other felons. *Turner v. Safley*, 482 U.S. 78 (1987).

Why did it take so long for a court to accept that argument, even as some courts were striking down the marriage exclusion for other equal protection reasons?

One reason was apparently the fear of the slippery slope: if all Americans have a "fundamental right to marry" the person(s) of their choice, then judges would strictly examine not only the state's refusal to give marriage licenses to lesbian and gay couples, but also to couples who are underage or closely related, as well as polyamorous sets. (A number of pundits made further analogies that probably cross the line between provocative and insulting, such as the argument that if a woman can marry a woman, Richard Posner can marry his cat.) The slippery slope argument has always been an implausible one, in part because the state does have important interests in refusing to issue marriage licenses to underage and polyamorous couples. See Eskridge, *Case for Same-Sex Marriage*, 144-52.

Perhaps a deeper concern was judicial reluctance to say that something so novel—gay marriage—was "fundamental," a term that the United States Supreme Court and most state high courts have reserved for rights or privileges that have a traditional roots in American society. (Even different-race marriages, long barred in the southern states, were allowed in other parts of the country.) Linguistically, many judges could not bring themselves to put "gay" and "marriage" in the same sentence, and the judges who were supple enough to put the terms together usually bracketed them with quote marks and the like (same-sex "marriages" or so-called "gay marriages"). See Mae Kuykendall, "Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language," 34 *Harv. C.R.-C.L. L. Rev.* 385 (1999).

As lesbian and gay couples (especially those with children) have come out of the closet since the 1990s, more and more people (including judges) are capable of saying and thinking same-sex marriage without the quote marks. Kuykendall, *supra*. Once Denmark legalized same-sex partnerships in 1989, and The Netherlands same-sex marriages in 2001 (followed by Belgium, Massachusetts, Canada, Spain, and South Africa in short order), not only did more people become comfortable with putting same-sex together with marriage, but in many circles it came to look like "prejudice," not to do so. Hence, the Chief Justice's remarkable Part IV. Are there other reasons why judicial practice may have shifted?

2. *State Constitutional Marriage Cases and the Level of Scrutiny for Sexual Orientation*. In the pre-2008 marriage cases, courts (with the exception of the Hawaii Supreme Court) evaluated the sexual orientation discrimination along *Romer v. Evans* rational-basis-with-bite lines. See *Baker v. State*, 744 A.2d 864 (Vt. 1999) (unanimously striking down the

discrimination, divided 4-1 against requiring marriage); *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (split court requiring same-sex marriage); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y.2006) (split court upholding the discrimination as rational); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (unanimously striking down the discrimination, divided 4-3 against requiring marriage). The California Supreme Court's opinion disagreed this pattern—and essentially followed Judge Norris's reasoning in *Watkins* to hold that sexual orientation classifications require strict scrutiny.* Courts since the *California Marriage Cases* have tended to apply some form of heightened scrutiny.

Shortly after the California decision, the Connecticut Supreme Court (divided 4-3) struck down its marriage exclusion in *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407, 425-61 (Conn. 2008), and the Iowa Supreme Court unanimously (7-0) invalidated its discriminatory marriage law in *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009). In both *Kerrigan* and *Varnum*, the state essentially conceded (1) the history of discrimination against lesbian and gay citizens and (2) the relationship between sexual orientation and one's ability to contribute to society, but disputed (3) and the relative immutability of sexual orientation and argued that there was a fourth criterion, namely political powerlessness, that was a prerequisite for heightened scrutiny. The Connecticut and Iowa courts ruled that sexual orientation met all these requirements; *Kerrigan* also discussed constitutional text, decisions from other states, and public policy advantages, all supporting heightened scrutiny.

Both courts ruled that sexual orientation was subject to heightened but not necessarily strict scrutiny. *Kerrigan's* verbal formulation of "intermediate" scrutiny accorded quasi-suspect classifications borrowed language from the U.S. Supreme Court's VMI Case evaluating sex discriminations under the U.S. Constitution (quotation marks omitted):

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and it rests entirely on the [state] The [state] must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives The justification must be genuine, not hypothesized or invented post hoc in response to [the] litigation. And it must not rely on

* California was not the first state to say sexual orientation classifications were "suspect" ones triggering strict scrutiny. In *Commonwealth v. Wasson*, 842 S.W.2d 487, 499-500 (Ky. 1992), a sodomy case, the Kentucky Supreme Court reasoned in dictum, that sexual orientation discriminations should be treated as suspect.

overbroad generalizations about the different talents, capacities, or preferences of [the groups being classified].

How is this different from strict scrutiny? (In the VMI Case, Chief Justice Rehnquist and dissenting Justice Scalia worried that the majority was applying strict scrutiny under the aegis of intermediate scrutiny.)

3. *Strict/Heightened Scrutiny for Sexual Orientation Classifications: The Immutability Argument.* The Casebook's notes following *Tanner* critically discuss the immutability "requirement" for strict scrutiny. Many academics agree with Judge Landau's argument that immutability can be neither necessary nor sufficient for strict scrutiny, but judges tend to treat immutability as a requirement, or at least a big plus, in the level-of-scrutiny inquiry. State judges are following the approach to immutability taken by Judge Norris in *Watkins*, that is, viewing it through the prism of identity: a trait is "effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity." The *California Marriage Cases* follow this approach, as do *Kerrigan* and *Varnum*.

Under an identity-based view of immutability, is this criterion doing any real "work" in the level-of-scrutiny inquiry? Judge Norris's approach seems to be saying: look, this group has been subjected to pervasive state discrimination and private prejudices that are not rational; under these circumstances, who should be accommodated by state policy, the citizen who finds other people's (or his own) homosexuality creepy? Or productive lesbian and gay citizens, as well as anyone else who is attracted to persons of the same sex?

Should the immutability criterion be retired? If so, why are judges clinging to it?

4. *Strict Scrutiny for Sexual Orientation Classifications: The Political Powerlessness Argument.* In the *California Marriage Cases*, Attorney General Jerry Brown argued that sexual orientation could not be a suspect classification because lesbians and gay men are no longer "politically powerless"; the Legislature had adopted one statute after another granting this minority rights and repealing discriminations (including two bills recognizing same-sex marriages that were successfully vetoed by the state Governor). The Chief Justice responded that the Attorney General's theory would negate the suspectness of "race, sex, and religion." Not so clear. When the California Supreme Court overruled the state different-race marriage bar in 1948, racial minorities were politically powerless in the state. Sex was rendered suspect in California by a constitutional amendment, albeit one codifying the California Supreme Court's holding in *Sail'er Inn*. While mainstream religion is hardly powerless, a reason religion is a suspect classification is that *minority religions* like the Jehovah's Witnesses have been and probably remain politically marginalized.

As Justice Baxter's dissent emphasized, the utility of a "political powerlessness" criterion is that it restrains judges from interfering in the political process *unless* that process is working inadequately. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (making this point in some detail). Judges were best situated to resist apartheid, because African and Latino Americans were literally excluded from political participation in the apartheid states. Lesbians and gay men, in contrast, have not been excluded from participation and, in California, have had many political successes. Does the Chief Justice have a persuasive answer to this concern?

Justice Palmer's opinion for the Connecticut Supreme Court in *Kerrigan* was a more sophisticated response to the "political powerlessness" argument. He recharacterized the relevant inquiry as "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *Kerrigan*, 957 A.2d at 444. The inquiry then becomes who should bear the *burden of inertia* as regards discriminatory laws: Should the minority subjected to prejudice and persecution bear the burden? Or should the mainstream majority bear the burden? Whichever way the Court ruled in Connecticut and Iowa, it appears that the losing side was unable to bear the high burden of imposing its viewpoint against opposition in the political process—so Justice Palmer's approach leaves courts in a powerful position on this issue.

5. *Is a Same-Sex Marriage Bar a "Discrimination" against Sexual Orientation Minorities?* In dissent, Justice Baxter argued that there was actually no "discrimination" against lesbian and gay couples when the Legislature and the voters limited civil marriage to one man, one woman, because the gay couple is not "similarly situated" to the straight couple. This kind of argument is circular in the sense that it assumes the answer to the legal issue presented. That is, Justice Baxter believes that marriage is inherently one man, one woman; anything else is not "marriage." Being excluded from an institution that you cannot be a part of by definition is not "discrimination" in the Aristotelian sense (treat like things alike). Indeed, it is "discrimination" to provide similar treatment to dissimilar things, as Justice Baxter believes gay and straight unions to be.

Justice Baxter further argued that the marriage law does not even technically discriminate against gay people: the lesbian is free to marry a man! This kind of argument has an off-the-wall quality to it, especially in light of *Loving v. Virginia* (rejecting Virginia's argument that its anti-miscegenation law does not discriminate against people of color, because its bar applies to white people as well). But a lot of intelligent Americans literally cannot see this as discrimination (a term stuffed with normative significance), and this is the kind of argument that pops up under such circumstances. Cf. *Lawrence v. Texas* (Scalia, J., dissenting) (arguing that Texas's "Homosexual Conduct Law" does not discriminate based on homo-

sexuality, because it prohibits "homosexual conduct" by straight people as well as by gay people).

6. *Popular Constitutionalism.* Justice Baxter's dissenting opinion objected that the Court's result not only ran against the state's traditional understanding of the definition of marriage and repeated affirmations of that traditional understanding in legislative enactments, but also against the will of the people. In 2000, voters by a wide margin passed the Knight Initiative, which added this language to the California Family Code: "Only marriage between a man and a woman is valid or recognized in California." Under the California Constitution, the Legislature could not retract any part of this Knight Initiative without putting the matter to another vote of the people. Justice Baxter suggested that this deepens the countermajoritarian difficulty with the majority's activism. The Chief Justice responded that the Constitution itself is a supermajoritarian expression of the people's will and trumps the Knight Initiative as well as legislated portions of the Family Code.

An *amicus* brief one of us filed in the *Marriage Cases* suggested another response to the countermajoritarian difficulty. The brief recounted the history of state regulation of sexual and gender minorities in California, demonstrating that the Legislature was responsible for decades of oppressive anti-gay measures that reinforced social beliefs that gay people were predatory and anti-family. The only relief came from California court decisions overturning or narrowly construing measures criminalizing homosexual solicitation, cross-dressing, etc. and excluding gay people from teaching positions, as well as decisions affirmatively prohibiting anti-gay discrimination:

The California Legislature would not have enacted laws accomplishing what this Court * * * did in that period. By protecting sexual minorities, this Court * * * reversed the *burden of inertia*: Did the Legislature or the People really believe gay people were such immediate threats that majorities in both chambers were willing to override the Court? Reversing the burden of inertia also created *conditions for disproving stereotypes*. Popular fears, long fanned by the State, that homosexuals prey on schoolchildren proved unfounded in the wake of [court decisions protecting gay schoolteachers]; myths that homosexuals disrupted workplaces, accepted by the federal as well as state governments, also failed to materialize after [court decisions and an executive order protecting them from job discrimination]. By creating a tolerant space for gay people within the State itself, this Court and the Governor gave gay people opportunities to contribute to public projects, sometimes as openly gay people. That was educational for all concerned.**

** Brief of Professor William N. Eskridge, Jr., as *Amicus Curiae*, in *The Marriage Cases* (California Supreme Court, Case No. S147999).

Less than six months after *The Marriage Cases* were decided, California voters had an opportunity to amend the state constitution to override the Court through a constitutional initiative, Proposition 8, on the November 2008 ballot. Prop 8 stated: "Only marriage between a man and a woman is valid or recognized in California." Unlike the Knight Initiative, however, voters were able to consider the 2008 initiative in light of some experience with same-sex marriage in their state. On June 17, the state issued the first official marriage licenses to lesbian and gay couples, and no catastrophe occurred. How could Justice Baxter respond to this argument, that popular opinion is shaped by the state, and the Court was right to give gay marriage a chance?

In any event, to the surprise of many observers (but not to Justice Baxter), the California voters passed Prop 8 by a 52.3–47.7% margin. Supporters of marriage equality were disappointed in this result, and some complained that the margin of victory was due to Prop 8 supporters' appeals to anti-gay prejudices and stereotypes. However, the Prop 8 arguments were much more civil and respectful of gay people than had been the case in earlier anti-gay initiative campaigns, especially the Briggs Initiative defeated in 1978 and even the Knight Initiative adopted in 2000. Probably the main argument for Prop 8 was that the Court (or "four Justices from San Francisco," as the official Prop 8 website inaccurately put it) was not only forcing gay marriage onto citizens, but were forcing it on schoolchildren, who would be taught that gay marriage was just as good as straight marriage, even if parents objected.*** The argument misstated the law of California and exploited concerns that "impressionable" youth would be seduced by gay marriage, but this was not the kind of open appeal to prejudice traditionally made in popular initiative campaigns. On the other hand, some of the commercials and ads run by some supporters were more open appeals to anti-gay prejudice. Should they be "attributed" to the official supporters? Could they have made a difference in such a close vote?

Karen L. Strauss v. Mark B. Horton

California Supreme Court, 2009.
46 Cal.4th 364, 207 P.3d 48.

■ CHIEF JUSTICE GEORGE delivered the opinion for the Court. * * *

The federal Constitution provides that an amendment to that Constitution may be proposed either by two-thirds of both houses of Congress or by a convention called on the application of two-thirds of the state legislatures,

*** www.ProtectMarriage.com (primary website for Prop 8 supporters, with a pop-up cartoon making the protect-schoolchildren-from-being-forced-to-like-homosexual-marriage argument and inaccurately charging "four Justices from San Francisco" with foisting this upon the citizenry). The campaign is discussed in William N. Eskridge, Jr., "The Supreme Court, 2007 Term—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy," *Calif. L. Rev.* (forthcoming, 2009).

and requires, in either instance, that any proposed amendment be ratified by the legislatures of (or by conventions held in) three-fourths of the states. (U.S. Const., art. V.) In contrast, the California Constitution provides that an amendment to that Constitution may be proposed either by two-thirds of the membership of each house of the Legislature (Cal. Const., art. XVIII, § 1) or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election (Cal. Const., art. II, § 8, subd. (b); *id.*, art. XVIII, § 3), and further specifies that, once an amendment is proposed by either means, the amendment becomes part of the state Constitution if it is approved by a simple majority of the voters who cast votes on the measure at a statewide election. (*Id.*, art. XVIII, § 4.)

As is evident from the foregoing description, the process for amending our state Constitution is considerably less arduous and restrictive than the amendment process embodied in the federal Constitution, a difference dramatically demonstrated by the circumstance that only 27 amendments to the United States Constitution have been adopted since the federal Constitution was ratified in 1788, whereas more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879. (See Council of State Governments, *The Book of the States* (2008 ed.) p. 10.)

At the same time, as numerous decisions of this court have explained, although the initiative process may be used to propose and adopt amendments to the California Constitution, under its governing provisions that process may not be used to revise the state Constitution. (See, e.g., *McFadden v. Jordan* (1948) 32 Cal.2d 330; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208; *Raven v. Deukmejian* (1990) 52 Cal.3d 336.) Petitioners' principal argument rests on the claim that Proposition 8 should be viewed as a constitutional revision rather than as a constitutional amendment, and that this change in the state Constitution therefore could not lawfully be adopted through the initiative process.

* * * [I]n determining whether Proposition 8 constitutes a constitutional amendment or, instead, a constitutional revision, we by no means write on a clean slate. Although the issue arises in this case in the context of an initiative measure, the distinction drawn in the California Constitution between constitutional amendments and constitutional revisions long predates the adoption in 1911 of the initiative process as part of the California Constitution. The origin and history in the pre-initiative era of this distinction between an amendment and a revision shed considerable light upon the contemplated scope of the two categories. [O]ur state's original 1849 California Constitution provided that the Legislature could propose constitutional amendments, but * * * a constitutional revision could be proposed only by means of a constitutional convention, the method used in 1849 to draft the initial constitution in anticipation of California's

laws, without significant backlash. See Randall Kennedy, "Marriage and the Struggle for Gay, Lesbian, and Black Liberation," 2005 *Utah L. Rev.* 781.

Page 320. Insert the following Case and Note at the end of Section 3:

In re Marriage Cases

California Supreme Court, 2008.
43 Cal.4th 757, 183 P.3d 384, 76 Cal.Rptr.3d 683.

■ CHIEF JUSTICE GEORGE delivered the opinion for the Court.

[Our earlier excerpt from the Chief Justice's opinion omitted his discussion of the appellants' argument that the state's exclusion of same-sex couples from marriage was subject to strict scrutiny because it was a "sex discrimination." Part V.A. of the Chief Justice's opinion for the Court discusses this issue.]

* * * In drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently. Persons of either gender are treated equally and are permitted to marry only a person of the opposite gender. In light of the equality of treatment between genders, the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood.

Plaintiffs contend, however, that the statutory distinction nonetheless should be viewed as sex or gender discrimination because the statutory limitation upon marriage in a particular case is dependent upon an individual person's sex or gender. Plaintiffs argue that because a woman who wishes to marry another woman would be permitted to do so if she were a man rather than a woman, and a man who wishes to marry another man would be permitted to do so if he were a woman rather than a man, the statutes must be seen as embodying discrimination on the basis of sex. Plaintiffs rely on the decisions in *Perez v. Sharp*, 32 Cal.2d 711 (1948), and *Loving v. Virginia*, in which this court and subsequently the United States Supreme Court found that the antimiscegenation statutes at issue in those cases discriminated on the basis of race, even though the statutes prohibited White persons from marrying Black persons and Black persons from marrying White persons.

The decisions in *Perez* and *Loving v. Virginia*, however, are clearly distinguishable from this case, because the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in *Perez*) "the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." (*Perez*; see also *Loving*.) Under these circumstances, there can be no

doubt that the reference to race in the statutes at issue in *Perez* and *Loving* unquestionably reflected the kind of racial discrimination that always has been recognized as calling for strict scrutiny under equal protection analysis.

In *Perez*, *Loving*, and a number of other decisions (see, e.g., *McLaughlin v. Florida* (1964) 379 U.S. 184, 192), courts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of the same race or of different races generally reflects a policy disapproving of the integration or close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of *racial discrimination* with respect to the interracial couple and both of its members. By contrast, past judicial decisions, in California and elsewhere, virtually uniformly hold that a statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the former ground. These cases recognize that, in realistic terms, a statute or policy that treats same-sex couples differently from opposite-sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently *because of his or her gender* but rather accords differential treatment *because of the individual's sexual orientation*. * * *

Although plaintiffs further contend that the difference in treatment prescribed by the relevant statutes should be treated as sex discrimination for equal protection purposes because the differential treatment reflects illegitimate gender-related stereotyping based on the view that men are attracted to women and women are attracted to men, this argument again improperly conflates two concepts—discrimination on the basis of sex, and discrimination on the basis of sexual orientation—that traditionally have been viewed as distinct phenomena. Under plaintiffs' argument, discrimination on the basis of sexual orientation always would constitute a subset of discrimination on the basis of sex. * * *

Accordingly, we conclude that in the context of California's equal protection clause, the differential treatment prescribed by the relevant statutes cannot properly be found to constitute discrimination on the basis of sex, and thus that the statutory classification embodied in the marriage statutes is not subject to strict scrutiny on that ground.

[There was no dissent from this portion of the Chief Justice's opinion.]

NOTE ON THE CURRENT STATUS OF THE SEX DISCRIMINATION ARGUMENT FOR GAY RIGHTS

Are the *Marriage Cases* the Waterloo for the sex discrimination argument for gay rights that was given a judicial push in *Baehr v. Lewin* (1993)?

One might dispute much of the Chief Justice's logic. His attempt to distinguish *Perez* and *Loving* is questionable. The Chief Justice found those race discriminations motivated by an ideology of racism—but he did not deny that California's exclusion of same-sex couples from marriage was explicitly motivated by a sexist ideology. The Bill Digest for the 1977 statutory amendment, that explicitly excluded same-sex couples from marriage, said that the “special benefits” of marriage were “designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children. . . . Why extend the same windfall to homosexual couples except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children?” Isn't this confirmation of the core argument, namely, that gender stereotyping through sex-based classifications is intimately related to homophobia and anti-gay policies?

The Chief Justice's apparent aversion to “conflating” different forms of discrimination is at odds with the rich literature on “intersectionality” (excerpted in Chapter 4): many Americans are subject to discrimination for more than one reason. An observant Jew might be discriminated against *either* because of his religion *or* because of his ethnicity. Shouldn't *both* forms of discrimination be recognized? Or is that “conflating” two different forms of discrimination?

Whatever the logical objections to the Chief Justice's opinion, it represented the considered judgment of all seven Justices (themselves representing a variety of perspectives). Its message was clear: LGBT advocates need to focus on their argument that sexual orientation is a (quasi-) suspect classification; the sex discrimination argument is a diversion. Is that right? Is there still value in making the sex discrimination argument for gay rights?