

*Lewis v. Harris: Same-Sex Marriage Is a Question for the Legislature, Not the Courts*

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I. INTRODUCTION

The plaintiffs in the noted case, seven committed same-sex couples, each requested marriage licenses from their respective municipalities in New Jersey.<sup>1</sup> Each of the municipalities refused to issue the marriage licenses, stating that the laws of New Jersey prohibited marriages of same-sex couples.<sup>2</sup> The plaintiffs had all been in committed relationships for more than ten years and many of them had children together.<sup>3</sup> The plaintiffs were nurses, businesswomen, pastors, PTA members, and active members of their communities.<sup>4</sup> Unlike their married, heterosexual counterparts, the plaintiffs in the noted case had to cross-adopt their partners’ children, an expensive and time-consuming ordeal.<sup>5</sup> Hospitals had denied them access to their partners in times of sickness and denied them the right to visit their newborn children in the nursery.<sup>6</sup> The plaintiffs had to pay more for medical insurance than their heterosexual counterparts, as many employers do not extend benefits to same-sex partners.<sup>7</sup>

The couples filed a complaint with the Superior Court of New Jersey, Law Division, Mercer County, seeking both declaratory and injunctive relief, stating that New Jersey’s marriage laws prohibiting “same-sex marriage violated the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution.”<sup>8</sup> The trial court granted summary judgment for the state, finding that there was no fundamental right to same-sex marriage and that the New Jersey

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1. See *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).  
2. See *id.* at 200-01.  
3. *Id.* at 200-02.  
4. *Id.*  
5. *Id.* at 202.  
6. *Id.*  
7. *Id.*  
8. *Id.*

marriage laws did not violate the plaintiffs' equal protection guarantees.<sup>9</sup> Instead, "the court suggested that plaintiffs . . . seek relief from the Legislature, which at the time was considering the passage of a domestic partnership act."<sup>10</sup> The Superior Court of New Jersey, Appellate Division, affirmed the decision.<sup>11</sup> The Supreme Court of New Jersey *held* that although there was no fundamental right to same-sex marriage, the equal protection guarantee of the state constitution required that same-sex couples receive the same benefits of marriage as opposite-sex couples and instructed the legislature to either amend the marriage statutes to include same-sex couples or create similar rights for same-sex couples. *Lewis v. Harris*, 908 A.2d 196, 220-21 (N.J. 2006).

## II. BACKGROUND

The right to marry is one of the oldest and most fundamental rights recognized by the United States Constitution under the umbrella of the right to privacy. In *Griswold v. Connecticut*, the Supreme Court of the United States questioned the constitutionality of a state law making it criminal to aid a married couple in using or obtaining contraceptives.<sup>12</sup> The Court explained that the Constitution does not explicitly mention every right it is recognized to contain but turned to the "zones of privacy" promised by the Constitution and Bill of Rights to be impenetrable by the state.<sup>13</sup> Noting the potential repulsiveness of "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," the Court demonstrated how the extremely intimate nature of marriage prevents excessive governmental intrusion.<sup>14</sup> Because the state could not justify such broad government regulation of this highly private and revered institution, the Court struck down the statutes.<sup>15</sup>

The Supreme Court once again protected marriage from state interference in *Loving v. Virginia*.<sup>16</sup> There, the Supreme Court struck down Virginia's antimiscegenation laws.<sup>17</sup> The Lovings, a white man and a black woman, married in Washington, D.C., and then returned to

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9. *See id.* at 203.

10. *Id.*

11. *See id.*

12. *See* 381 U.S. 479, 480 (1965).

13. *See id.* at 482, 484.

14. *Id.* at 485-86.

15. *See id.* at 485.

16. 388 U.S. 1 (1967).

17. *See id.* at 12.

Virginia to begin their life together as a married couple.<sup>18</sup> They faced criminal charges in Virginia, which still had active antimiscegenation laws.<sup>19</sup> The Lovings filed a complaint, arguing that Virginia's marriage laws prohibiting interracial marriages violated the Fourteenth Amendment, and the Supreme Court agreed.<sup>20</sup> Not only did the statutes violate the Equal Protection Clause, but also "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."<sup>21</sup> The Court went on to state, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>22</sup> Because the discriminatory laws in question rendered the right to marry meaningless by unjustifiably placing limits on a person's choice of whom to marry, the Court did not let them stand.<sup>23</sup>

In addition to protecting the privacy of marriage, courts have also protected the individual's right to make personal choices concerning intimate relationships. In *State v. Saunders*, the New Jersey Supreme Court considered its state's laws forbidding fornication, defined as "an act of illicit sexual intercourse by a man, married or single, with an unmarried woman."<sup>24</sup> The court turned its analysis to privacy rights protected by the New Jersey and United States Constitutions.<sup>25</sup> Included in these rights, the court stated, was "the protection of personal decisions."<sup>26</sup> The court concluded that the decision to fornicate was one of these personal choices protected by the right to privacy.<sup>27</sup>

The Supreme Court extended this right to make personal choices to homosexuals in *Lawrence v. Texas*.<sup>28</sup> In so doing, the Court overruled its prior decision in *Bowers v. Hardwick*, which upheld the constitutionality of a Georgia statute criminalizing sodomy.<sup>29</sup> The *Bowers* Court had defined the right at stake as the right to engage in homosexual sodomy.<sup>30</sup> In *Lawrence*, however, the Court rejected this definition, claiming that "[t]o say that the issue in *Bowers* was simply the right to engage in

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18. *Id.* at 2.

19. *Id.* at 3.

20. *See id.* at 3, 12.

21. *Id.*

22. *Id.*

23. *See id.*

24. 381 A.2d 333, 335 (N.J. 1977).

25. *See id.* at 337.

26. *Id.* at 339 (quoting *In re Quinlan*, 355 A.2d 647, 662 (N.J. 1976)).

27. *See id.*

28. *See* 539 U.S. 558, 578 (2003).

29. *Id.* at 566-67, 578.

30. *See id.* at 566.

certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>31</sup> Instead, the Court stated that the right at stake was the right to engage in “intimate conduct with another person,” a right well within one’s constitutionally protected liberties.<sup>32</sup>

Before its substantive-due-process-based decision in *Lawrence*, the Supreme Court had relied on equal protection analysis to protect individuals from discrimination based on their sexual orientation. In *Romer v. Evans*, it ruled that laws denying protection to individuals based on their sexual orientation violated the Equal Protection Clause.<sup>33</sup> The law at issue in *Romer* was an amendment to the Colorado constitution (Amendment 2) entitled “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.”<sup>34</sup> Under equal protection analysis, if the statute in question does not violate a fundamental right or involve a suspect class, as was the case in *Romer*, then it only has to be rationally related to a legitimate governmental purpose.<sup>35</sup> The Supreme Court found that the classification proposed in Amendment 2 had no rational relationship to any legitimate state interests and had likely been proposed out of animus towards homosexuals, lesbians, and bisexuals.<sup>36</sup> The Court struck down Amendment 2, stating that “[a] State cannot so deem a class of persons a stranger to its laws.”<sup>37</sup> New Jersey demonstrated its support for the decision in *Romer* by enacting its own Law Against Discrimination in 2004 that added sexual orientation to the list of categories of persons protected from discrimination.<sup>38</sup>

New Jersey was not the first state to decide that committed same-sex couples were entitled to the same rights and benefits as married, opposite-sex couples. In *Baker v. State*, the Supreme Court of Vermont, in 1999, decided that there was no “reasonable and just basis” to deny the rights and benefits of civil marriage to same-sex couples.<sup>39</sup> The court then asked the legislature to create proper legislation, citing other states’ domestic partnership and civil union acts as possible guides.<sup>40</sup>

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31. *Id.* at 567.

32. *Id.*

33. *See* 517 U.S. 620, 635 (1996).

34. *Id.* at 624.

35. *See id.* at 631.

36. *See id.* at 632.

37. *Id.* at 635.

38. *See* N.J. STAT. ANN. § 10:5-4 (West 2006).

39. 744 A.2d 864, 886 (Vt. 1996).

40. *See id.*

In *Goodridge v. Department of Public Health*, Massachusetts went one step further in granting same-sex couples the same rights as married, opposite-sex couples.<sup>41</sup> Like the Supreme Court of Vermont, the Supreme Judicial Court of Massachusetts decided that “[t]he [same-sex] marriage ban work[ed] a deep and scarring hardship on a very real segment of the community for no rational reason” and thus failed under the Massachusetts Constitution’s equality guarantee.<sup>42</sup> In contemplating a proper remedy, however, the court chose to change the common law definition of civil marriage to “the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>43</sup>

After *Goodridge*, the Massachusetts Senate requested an opinion from the Supreme Judicial Court of Massachusetts concerning a proposed bill that would limit marriage to opposite-sex couples, but would create a parallel civil union structure for same-sex couples.<sup>44</sup> The court concluded that the bill would only “maintain[] an unconstitutional, inferior, and discriminatory status for same-sex couples” in violation of the equal protection and due process guarantees of the Massachusetts Constitution.<sup>45</sup>

### III. COURT’S DECISION

In the noted case, the Supreme Court of New Jersey first addressed whether same-sex couples had a fundamental right to marry, applying the test set forth in *Washington v. Glucksberg*.<sup>46</sup> The plaintiffs claimed that a fundamental right to same-sex marriage was ensured by the liberty guarantee in Article I, Paragraph 1 of the New Jersey Constitution.<sup>47</sup> In deciding whether to define a new fundamental right, the court applied the two-step test set forth in *Glucksberg*.<sup>48</sup> First, the test required that the right in question be clearly defined.<sup>49</sup> Second, the test required that that right be “objectively and deeply rooted in the traditions, history, and conscience of the people” of New Jersey.<sup>50</sup>

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41. 798 N.E.2d 941, 968 (Mass. 2003).

42. *Id.* at 968.

43. *Id.* at 969.

44. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

45. *Id.* at 572.

46. *See* *Lewis v. Harris*, 908 A.2d 196, 207 (N.J. 2006) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

47. *Id.* at 206.

48. *See id.* at 207.

49. *See id.*

50. *Id.*

The court recognized that the manner in which a right is defined dictates whether or not that right will be classified as fundamental.<sup>51</sup> The right to marry, the court acknowledged, is a fundamental right subject to some state regulation.<sup>52</sup> The court, however, did not find that the plaintiffs were seeking some “abstract right to marriage, but rather the right of people of the same sex to marry,” and so it next analyzed whether same-sex marriage is a historically protected right in New Jersey.<sup>53</sup>

The court agreed with the plaintiffs that New Jersey’s marriage statutes limit marriage to opposite-sex couples and that the legislature maintained this view in passing the Domestic Partnership Act, which extended some of the rights enjoyed by married heterosexual couples to committed same-sex couples.<sup>54</sup> The court also looked to the intent of the original drafters of the marriage statutes as well as the Federal Defense of Marriage Act, which limits marriage to a union between people of the opposite sex.<sup>55</sup> The court acknowledged that cases such as *Romer v. Evans* and *Lawrence v. Texas* had accomplished much in fighting discrimination and promoting civil liberties for gays and lesbians.<sup>56</sup> It explained, however, that these cases “fall far short of establishing a right to same-sex marriage deeply rooted in the traditions, history, and conscience of the people” of New Jersey.<sup>57</sup> The court, likewise, was not persuaded by the decision in *Loving v. Virginia*, which reaffirmed marriage as a fundamental right and extended that right to include marriage between whites and people of other races.<sup>58</sup> The issue in *Loving*, the court argued, was actually about combating racial discrimination after passage of the Fourteenth Amendment, not a fundamental right to marry.<sup>59</sup>

Finally, the court explained that it “must ‘exercise the utmost care’ before finding new rights, which place important social issues beyond public debate, ‘lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court.’”<sup>60</sup> Deciding that the issue of same-sex marriage was one of social

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51. *See id.*

52. *See id.*

53. *Id.* at 208.

54. N.J. STAT. ANN. § 26:8C-2 (West 2004) (stating that people in domestic partnerships are entitled to the benefits that are afforded to married couples).

55. *See Lewis*, 908 A.2d at 208-09; 28 U.S.C. § 1738C (2000) (stating that a state is not required to recognize a same-sex marriage that is legally entered into in another state).

56. *See Lewis*, 908 A.2d at 209-10.

57. *Id.* at 210.

58. *See id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

59. *See id.*

60. *Id.* at 210-11 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

policy and that the right to same-sex marriage was not a traditionally protected right in New Jersey, the court declined to extend the fundamental right to marry to same-sex couples.<sup>61</sup>

Next, the court turned its analysis to the plaintiffs' claim that the marriage statutes violate the equal protection guarantee of the New Jersey Constitution.<sup>62</sup> The court relied on the three-part test established in *Greenberg v. Kimmelman* that balances "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction."<sup>63</sup> The court determined there were two rights at issue in the case: the right to the statutory benefits of marriage and the right to call same-sex unions by the name of marriage.<sup>64</sup>

Under the first prong, in contemplating the right of same-sex couples to have access to the same benefits of marriage as opposite-sex couples, the court began by discussing the state's history of combating discrimination based on sexual orientation.<sup>65</sup> The court cited decisions and statutes which prevented the state from denying custody or visitation rights to homosexual parents, gave parental rights to nonbiological parents, and allowed a partner in a same-sex couple to adopt the other's surname.<sup>66</sup> Furthermore, the court noted that sexual orientation became a protected category when the state enacted the Law Against Discrimination.<sup>67</sup> In 2004, New Jersey passed its Domestic Partnership

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61. See *id.* at 211.

62. See *id.*; N.J. STAT. ANN. § 10:5-4 (West 2004) (stating that it is unlawful to discriminate on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income").

63. *Lewis*, 908 A.2d at 212 (citing *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985); *Robinson v. Cahill*, 303 A.2d 273, 282-83 (N.J. 1973)).

64. *Id.* at 206.

65. *Id.* at 212-13.

66. See *id.* at 213 (citing *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) ("[T]he fact that one of the parents is a homosexual does not *per se* provide sufficient basis for a deprivation of visitation rights."); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (concluding that a court could not deny custody rights to a mother only because she was a lesbian); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (concluding that a biological mother's former same-sex partner could become a "psychological parent" of the child and be entitled to visitation with the child); *In re Adoption of Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993) (deciding that the child's best interest was served by allowing the biological mother's same-sex partner to adopt her); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (encouraging broad interpretation of the New Jersey adoption statutes when a biological mother's same-sex partner, with her support, has assumed a parental role with her child and the adoption is in the best interest of the child); *In re Application for Change of Name by Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001) (deciding that the New Jersey change of name statute did not prohibit same-sex partners from assuming each other's surnames)).

67. See *id.* at 213-14.

Act, recognizing that committed same-sex couples should be entitled to some of the same rights as married, opposite-sex couples.<sup>68</sup> In short, the court concluded that New Jersey's policy of nondiscrimination based on sexual orientation gave same-sex couples a strong interest in obtaining the same treatment under the marriage statutes as married opposite-sex couples.<sup>69</sup>

The second prong of the *Greenberg* test under an equal protection claim is to examine the extent to which the marriage statutes prevent same-sex couples from enjoying the same benefits of married, opposite-sex couples.<sup>70</sup> The court proceeded to make a list of all of the rights afforded to married couples but denied to same-sex couples under the Domestic Partnership Act.<sup>71</sup> These rights included surname changes without petitioning the court, property ownership as tenants by the entirety, and the right not to testify against a spouse in a criminal action, among others.<sup>72</sup> In addition, under the Domestic Partnership Act, same-sex couples would still have to go through second-parent adoption of each other's children and, should a partnership end, the state could not force the nonbiological parent to pay any child support to the former partner.<sup>73</sup> The inequities in the marriage statute, therefore, extended to the children of committed, same-sex couples.<sup>74</sup> The court also noted that it is more difficult for committed, same-sex couples to enter a domestic partnership than it is for opposite-sex couples to obtain a marriage license.<sup>75</sup> The court concluded that "committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households."<sup>76</sup>

The third prong of the *Greenberg* test examines the public need to limit the rights granted to committed, same-sex couples. In its analysis, the court removed the issue of whether same-sex couples should be allowed to marry from the discussion and focused only on the public need to limit the rights and benefits of marriage granted to same-sex couples.<sup>77</sup> Because the state had asserted no interest in limiting these rights other than the maintenance of the "traditional definition of

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68. *See id.* at 214.

69. *See id.* at 215.

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.* at 216.

74. *See id.*

75. *See id.* at 217.

76. *Id.*

77. *See id.*

marriage,” the court decided that the state had no legitimate reason for limiting the rights granted to committed, same-sex couples.<sup>78</sup> It then questioned the state’s logic in granting some rights but not others when it was clearly the policy of the state to eliminate sexual-orientation-based discrimination.<sup>79</sup> Moreover, the court viewed as completely unfair the policy of allowing same-sex couples to raise children together while denying those children the same rights afforded to children raised in heterosexual families.<sup>80</sup> The court concluded that there was no legitimate public need for unequal treatment of married, opposite-sex couples and committed same-sex couples.<sup>81</sup>

The state asserted a further interest in maintaining its current system of marriage statutes and domestic partnerships to ensure “uniformity with other states’ laws.”<sup>82</sup> The court was quick to respond, however, that New Jersey was not like most other states.<sup>83</sup> Rather, with respect to its antidiscrimination laws, New Jersey was more like states such as Massachusetts, Vermont, and Connecticut, which all sanction either same-sex unions or same-sex marriage.<sup>84</sup> Because the plaintiffs had a strong interest in receiving the benefits of marriage that the state failed to demonstrate any need to restrict, the court held that under the equal protection guarantee of the New Jersey Constitution, “committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.”<sup>85</sup>

The court declined to rule on whether committed, same-sex couples were entitled to call their unions by the name of marriage.<sup>86</sup> Instead, the court decided to defer this question to the legislature.<sup>87</sup> The court concluded that the question is not of a constitutional nature, but rather a social nature, and thus is best answered through the democratic process.<sup>88</sup> The legislature would be free to either amend the current marriage statutes to include same-sex couples or create a separate parallel statute for same-sex unions.<sup>89</sup> The court noted that through the legislative process the concept of marriage and the marriage statutes had undergone

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78. *See id.*

79. *See id.*

80. *See id.* at 218.

81. *See id.*

82. *Id.*

83. *See id.*

84. *See id.* at 218-20.

85. *Id.* at 220-21.

86. *See id.* at 221.

87. *Id.*

88. *See id.*

89. *Id.*

significant positive changes without the courts' involvement.<sup>90</sup> The court directed the plaintiffs to "appeal . . . to their fellow citizens whose voices are heard through their popularly elected representatives."<sup>91</sup>

Chief Justice Poritz concurred with the court's decision concerning the equal protection violations, but dissented regarding the court's ruling that the current marriage statutes did not violate the plaintiffs' substantive due process rights.<sup>92</sup> She felt that the right at issue, that of same-sex couples to marry, was too narrowly defined.<sup>93</sup> The plaintiffs, she argued, were simply asking to exercise their fundamental right to marry.<sup>94</sup> While the plaintiffs did want all of the statutory benefits of civil marriage, they were really seeking to take part in the institution of marriage.<sup>95</sup> The Chief Justice, contrary to the majority, felt that same-sex marriage was not a social question to be decided by the legislature, but a constitutional question open to the court's judgment.<sup>96</sup>

#### IV. ANALYSIS

New Jersey, like other states that have decided to extend the benefits of civil marriage to same-sex couples, did not create a new fundamental right to same-sex marriage, which would have introduced strict scrutiny into the court's analysis.<sup>97</sup> Indeed, since *Washington v. Glucksberg*, creating new fundamental rights under substantive due process analysis has been an uphill battle. Rather than ask whether there is a fundamental right to marry the person of one's choice, the courts have narrowed their definition of the right. The courts now inquire whether there is a fundamental right rooted in history and tradition to marry a person of the same-sex, and the answer to such a strict a definition must inherently be "no."<sup>98</sup> In earlier cases concerning the right to marry, the Supreme Court did not use such a narrow definition of the right.<sup>99</sup> Even so, *Lawrence v.*

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90. *See id.* at 222.

91. *Id.* at 223.

92. *See id.* at 224-25 (Poritz, C.J., concurring and dissenting).

93. *See id.* at 224.

94. *See id.* at 225.

95. *See id.*

96. *See id.* at 229-30.

97. *See id.* at 211; *see also* *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

98. As Chief Justice Poritz explained in her opinion, asking whether there is a fundamental right of same-sex couples to marry deeply rooted in our history and traditions suggests that the answer must be "no." Same-sex couples have not traditionally been allowed to marry. But by broadening the question to whether there is a fundamental right to marry, the answer becomes "yes." *See Lewis*, 908 A.2d at 227-28 (Poritz, D.J., concurring and dissenting).

99. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free

Texas recognized the right of homosexuals to make intimate decisions concerning their private lives.<sup>100</sup> It seems that the private, intimate decision of how to structure one's family and with whom to create this family would extend the right to marry to same-sex couples. Instead, however, courts have focused their discussion on equal protection analysis, as in the noted case.

Invoking the Equal Protection Clause rather than the Due Process Clause led the court in the noted case to give the legislature the choice of either amending the current marriage statutes to include same-sex couples or creating a separate but equal statute for same-sex couples.<sup>101</sup> Given the current public debate over same-sex marriages, however, it may first test the constitutionality of a separate statute for same-sex couples.<sup>102</sup> In December 2006, the New Jersey Legislature passed a civil union statute providing same-sex couples with all of the rights and benefits of marriage except for the name "marriage."<sup>103</sup> At a later point, the Supreme Court of New Jersey may have to decide if the separate statute is in fact an equal statute.<sup>104</sup> The Supreme Court of the United States has been reluctant to find that separate but equal treatment can in fact exist.<sup>105</sup> The Supreme Judicial Court of Massachusetts has already determined that there can be no separate but equal treatment for same-sex couples, stating that the difference between a civil marriage and a civil union is more than just a name, "it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely

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men."); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[R]eaffirming the fundamental character of the right to marry.").

100. See 539 U.S. 558, 578 (2003).

101. See *Lewis*, 908 A.2d at 200.

102. See, e.g., Tina Kelley, *2 Months After New Jersey's Civil Union Law, Problems Finding True Equality*, N.Y. TIMES, Apr. 13, 2007, at A15.

103. See 2006 N.J. Sess. Law Serv. 455 (West) ("'Civil union' means the legally recognized union of two eligible individuals of the same sex established pursuant to this act. Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.").

104. See generally N.J. State Bar Ass'n, *State Bar Favors Equal Rights for Same-Sex Couples*, Dec. 8, 2006, [http://www.njsba.com/press/press\\_title\\_link.cfm?pressid=668](http://www.njsba.com/press/press_title_link.cfm?pressid=668) (stating that the new civil union statute "would create a separate, unequal and unnecessarily complex legal scheme"); N.J. Stonewall Democrats, *New Jersey Enacts Strong Same Sex Civil Union Statute*, Dec. 14, 2006, [http://www.njstonewalldemocrats.org/061214\\_unions.htm](http://www.njstonewalldemocrats.org/061214_unions.htm) ("[T]rue equality will only be achieved when gay, lesbian, bisexual, transgender and intersex citizens have the same access to enter a civil marriage contract as . . . heterosexual [couples]. . .").

105. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); see also *United States v. Virginia*, 518 U.S. 515, 554 (1996) (deciding that Virginia had not created a separate school for women equivalent to the all-male Virginia Military Institute).

homosexual, couples to second-class status.”<sup>106</sup> While the plaintiffs in the noted case surely will benefit from the court’s ruling, what they were ultimately seeking was to be a part of the sacred institution of marriage.<sup>107</sup>

Even without the establishment of a new fundamental right, it seems that the “separate but equal” statute for same-sex couples may fail under the New Jersey Constitution’s equal protection guarantee because of the *Greenberg* balancing test. The court already concluded in the noted case under the first prong of the test that New Jersey’s policy of nondiscrimination based on sexual orientation gives same-sex couples a strong interest in obtaining the same treatment as married opposite-sex couples.<sup>108</sup> The second prong would entail examination of the extent to which the statutes limit committed, same-sex couples from receiving the same benefits as married, opposite-sex couples.<sup>109</sup> In this case, that benefit is simply being married. The current marriage statutes deny this benefit to committed, same-sex couples completely—they are not allowed to marry. For the final prong, the state would have to demonstrate, first, that there is a sufficient public need for such a sweeping denial of this benefit and, second, that the statutes denying that benefit are substantially related to that public need.<sup>110</sup> Given the high bar that the New Jersey Supreme Court has set for establishing a public need to deny rights to homosexuals, this may be a difficult task.<sup>111</sup> The court will be left to decide if the state has met that burden.

Sarah Eaton\*

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106. Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

107. *See Lewis*, 908 A.2d at 225 (Poritz, C.J., concurring and dissenting).

108. *See id.* at 212.

109. *See id.* at 215.

110. *See id.* at 217.

111. *See id.* at 218.

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