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Marriage Equality in New Jersey: Love, Law, and Political Appointments

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Love, Law, and Political Appointments*

“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.”¹

Introduction

Names are important. So important, in fact, that most studies show that despite the feminist upsurge of the 1970’s, the horror of notifying multiple credit card carriers, and the torture of dealing with Social Security, at least 85% of women today change their surnames after marriage.² Traditionally, changing one’s name marked the beginning of a new journey—a “changed life course or purpose.”³ Most importantly, implicit in this notion is the concept that the name of marriage, itself, is important. That by choosing to marry rather than date or cohabitate, we choose a new life direction that is reflected in the words we use to describe ourselves and our lives together.

In a 2006 landmark challenge to New Jersey’s marriage laws, the state Supreme Court held in *Lewis v. Harris* that refusing to extend the benefits and responsibilities of marriage to same-sex couples violated New Jersey’s state constitution.⁴ However, the decision was only a partial victory for marriage equality advocates. While the members of the bench unanimously agreed that state marriage laws violated the Equal Protection Clause, the court divided regarding the remedy.⁵ A four-justice majority ultimately held that the legislature could choose to extend

¹ In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (*quoting* De Burgh v. De Burgh, 39 Cal.2d 858, 863–864 (Cal. 1952)) (internal quotations omitted).

² Laura Dawn Lewis, *Why Brides Change Last Names*, Couplescompany.com, October 3, 2005, <http://www.couplescompany.com/features/changename.htm>.

³ *Id.*

⁴ *Lewis v. Harris*, 908 A.2d 196 (2006).

⁵ *Id.* at 224 - 30.

the state of marriage to same-sex couples or create civil unions, a “parallel statutory structure.”⁶

The legislature chose the lesser of two conservative evils, and same-sex couples were once again denied the right to marry.⁷

In December 2006, the Legislature enacted the Civil Union Act and established the New Jersey Civil Union Review Commission (“the Commission”), an independent body charged with evaluating the efficacy of the Act in securing equal rights for same-sex couples.⁸ Less than two years after the Civil Union Act was enacted, the Commission reported (not surprisingly) that civil unions did not in fact confer equal rights upon same-sex couples.⁹ Instead, it found that civil unions “invite and encourage unequal treatment of same-sex couples and their children.”¹⁰ Ultimately, the Commission recommended that the state of New Jersey maintain the institution of Domestic Partnerships,¹¹ but abolish Civil Unions and amend state marriage laws to allow same-sex couples to marry.¹²

For the briefest of windows between the Commission issuing its report and former Democrat Governor Jon Corzine leaving office, it seemed that marriage equality might truly be realized.¹³ Governor Corzine promised that he would sign a same-sex marriage bill if it was passed by the New Jersey Senate.¹⁴ Unfortunately, the Senate rejected a marriage amendment on

⁶ *Id.* at 224.

⁷ The Legislature enacted Public Law 2006, Chapter 103, establishing civil unions effective February 19, 2007 (the “Civil Union Act”). New Jersey Civil Union Review Commission, *THE LEGAL, MEDICAL, ECONOMIC, & SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW: FINAL REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION 1* (2008), available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf>; Civil Union Act, N.J. STAT. ANN. §§ 37:1-28 (e)-(f) (West 2010).

⁸ *Id.*

⁹ *Id.* at 1.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² New Jersey Civil Union Review Commission, *supra* note 7, at 3.

¹³ John Appezzato, *Corzine: N.J. Should Establish Same-Sex Marriage “Sooner Rather Than Later,”* NJ.COM, Dec. 10, 2008, http://www.nj.com/news/index.ssf/2008/12/corzine_nj_should_establish_sa.html.

¹⁴ *Id.*

January 7, 2010, and newly-elected Republican Governor Chris Christie took office shortly thereafter on January 19.¹⁵ Governor Christie has openly opposed same-sex marriage, stating that marriage should remain between a man and a woman.¹⁶ In the wake of the amendment's defeat, six of the plaintiffs from *Lewis v. Harris* returned to the New Jersey Supreme Court on March 18, 2010, arguing that the Legislature had failed to comply with *Lewis*'s order.¹⁷ However, while the fate of same-sex marriage now rests once again in the hands of the New Jersey Supreme Court, Governor Christie has a very real opportunity to stack the bench and deny equal rights to same-sex couples for another four years or more.¹⁸

This paper argues that while a separate institution can never truly equal traditional marriage, politics may ultimately have more of an impact on same-sex marriage than the law itself. Part I reviews the *Lewis* decision, the enactment of the Civil Union Act, and the subsequent findings of the Commission. Part II analyzes arguments on both sides of the same-sex marriage divide, ultimately concluding that separate but parallel statutory schemes cannot confer the same benefits and responsibilities as marriage. Part III discusses the current members of the New Jersey Supreme Court, including Governor Christie's potential impact on the structure of the bench, and addresses the possible influence that the Commission's report will

¹⁵ David Kocieniewski, *New Jersey Senate Defeats Gay Marriage Bill*, NY TIMES, Jan. 8, 2010 at A18, available at <http://www.nytimes.com/2010/01/08/nyregion/08trenton.html>.

¹⁶ Christ Christie, *Shared Values*, Chris Christie Governor, <http://christiefornj.com/issues/shared-values.html> (last visited May 3, 2010) ("I...believe marriage should be exclusively between one man and one woman.... If a bill legalizing same sex marriage came to my desk as Governor, I would veto it. If the law were changed by judicial fiat, I would be in favor of a constitutional amendment on the ballot so that voters, not judges, would decide this important social question.").

¹⁷ Lambda Legal, *Lambda Legal Returns to New Jersey Supreme Court Seeking Marriage Equality*, Mar. 18 2010, http://www.lambdalegal.org/news/pr/xnj_20100318_lambda-returns-nj.html. The *Lewis v. Harris* Plaintiffs were (and continue to be) aided and funded by Lambda Legal and Garden State Equality. *Id.* The motion will be made directly to the New Jersey Supreme Court because a motion in aid of litigants' rights must be filed "before the court that issued that order, here the Supreme Court." *Asbury Park Bd. of Educ. v. New Jersey Dept. of Educ.*, 369 N.J. Super. 481, 487 (App. Div. 2004).

¹⁸ Tom Howell Jr., *Christie Could Reshape State Court*, NJ HERALD, Nov. 8, 2009, available at <http://www.njherald.com/story/news/08SIDEBAR>.

have on a challenge to the *Lewis* holding. Ultimately, this paper concludes by analyzing how changes in the court are likely to have an impact on the future of same-sex marriage.

Part I: *Lewis v. Harris* and New Jersey's Failed Compromise

In *Lewis v. Harris*, the Plaintiffs were seven same-sex couples who had been in committed relationships for over ten years.¹⁹ Each couple was denied a marriage license by the state, and the couples ultimately joined together to challenge the constitutionality of New Jersey's marriage statutes.²⁰ After suing at the trial level, the trial judge granted summary judgment on the State's behalf and a divided Appellate Division affirmed.²¹ The Appellate Division concluded that New Jersey's marriage laws do not violate substantive due process or equal protection, and opined that it was the true province of the Legislature to determine whether relief should be provided.²² In a partial victory for marriage equality advocates, the New Jersey Supreme Court held that denying same-sex couples the rights and benefits of marriage violated New Jersey's equal protection clause.²³ However, rather than requiring the state of New Jersey to allow same-sex couples to marry, the court concluded that the Legislature could rectify the constitutional error by amending the state's existing marriage laws or creating a parallel statutory structure designed to provide the same rights and benefits.²⁴

The court first dealt with the Plaintiffs' due process challenge and disappointingly concluded that because there was no fundamental right at issue, there was no constitutional

¹⁹ *Lewis*, 908 A.2d at 200-202. The Court presented moving details about each of the couples, including one couple who had been together for fourteen years, who had both officiated at weddings and signed marriage certificates, yet could not have their relationship sanctioned under New Jersey law.

²⁰ *Id.*

²¹ *Id.* at 203-05.

²² *Id.*

²³ *Lewis*, 908 A.2d at 203-05.

²⁴ *Id.* at 200.

violation.²⁵ However, the court then moved to the Plaintiffs’ equal protection argument and found that the marriage laws violated the State’s constitution.²⁶ The court looked to three factors to determine whether a violation had occurred: the nature of the right, the extent to which the right was restricted by the marriage laws, and the public need for such restrictions.²⁷ Notably, the court analyzed the first factor by again framing the issue quite narrowly.²⁸ The court asked two distinct questions: first, whether same-sex couples had a right to the statutory benefits conferred on opposite-sex couples by the state of marriage, and second, whether that right also entailed a right to the name of marriage itself.²⁹ Next, the court analyzed the second factor and concluded that while New Jersey had attempted to combat discrimination based on sexual orientation in a number of different ways, the Domestic Partnership Act “failed to bridge the inequality gap” between opposite- and same-sex couples in several significant ways.³⁰

Finally, the court analyzed the third factor by examining the state’s interests.³¹ The court first noted that the State had not successfully made any arguments concerning heterosexual couples creating the optimal family setting for children, and found that to the contrary,

²⁵ *Id.* at 206-211 (holding that despite the “tolerance and goodness” of New Jersey’s citizens, the Plaintiffs could not establish that the right to same-sex marriage was deeply rooted in the traditions and history of the State); *contra id.* at 227-29 (Poritz, J., dissenting) (“I would hold that plaintiffs have a liberty interest in civil marriage that cannot be withheld by the State”), and *In re Marriage Cases*, 183 P.3d at 431 (holding that the right to marriage is a fundamental right regardless of sex, and noting that had the issue been so narrowly framed in the case of interracial marriage, no such right would exist); and

²⁶ *Id.* at 211.

²⁷ *Id.* at 212. New Jersey’s Equal Protection test differs from its federal counterpart under the Fourteenth Amendment’s Equal Protection Clause, which applies one of three tiers of review (strict, intermediate, or rational basis scrutiny) depending on whether the issue involves a fundamental right or protected class. *Id.* n.13.

²⁸ *Lewis*, 908 A.2d at 212-15.

²⁹ *Id.*

³⁰ See *Lewis v. Harris* for a litany of rights denied to same-sex couples by the Domestic Partnership Act including the right to change one’s surname without petitioning the court, certain automatic property rights, a variety of benefits, and family law protections. *Id.* at 215-16. These differences resulted in financial inequalities that were borne by both the couples and their children. *Id.* at 216. Lastly, despite the fact that Domestic Partnerships afford less protections, they are subject to more rigid entry requirements. *Id.* at 216.

³¹ *Id.* at 216-20.

encouraging monogamy strengthened *any* family, whether opposite- or same-sex.³² The court then dismissed the State’s second argument regarding uniformity with other state marriage laws,³³ finding that New Jersey’s protective stance on sexual orientation placed it in the company of more liberal states that had extended the benefits and privilege of marriage to same-sex couples.³⁴ In making this finding, the court noted that the equal rights guarantee of the State constitution protected not only the rights of the majority, but also “the rights of the disfavored and disadvantaged.”³⁵ Finally, the court held that the Legislature had two options: either amend the marriage laws, or create a separate but parallel statutory structure.³⁶ Disappointingly, they declined to consider whether the difference in names would present a constitutional violation.³⁷

The Legislature responded by enacting the Civil Union Act,³⁸ which established civil unions for same-sex couples effective February 19, 2007,³⁹ and establishing the New Jersey Civil Union Review Commission to evaluate the efficacy of the enactment.⁴⁰ The intent of the Civil Union Act was to follow the court’s mandate by providing all the benefits and responsibilities of marriage to same-sex couples through a parallel statutory structure.⁴¹ Among their duties, the Commission was charged with determining whether additional protections were needed,

³² *Id.* at 217.

³³ *Lewis*, 908 A.2d at 218 (arguing that New Jersey should refuse to honor same-sex relationships because the majority of other states had done so).

³⁴ *Id.* 218-20.

³⁵ *Id.* at 220.

³⁶ *Id.* at 220-23 (mandating that the Legislature must respond within 180 days).

³⁷ *Id.* at 221-22. (“Because this State has no experience with a civil union construct...we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.”).

³⁸ Civil Union Act, N.J. STAT. ANN. §§ 37:1-28 (e)-(f) (West 2010).

³⁹ *Id.*

⁴⁰ §§ 37:1-36 (a), (c)(1)-(7).

⁴¹ New Jersey Civil Union Review Commission, *supra* note 7, at 3; § 37:1-28 (e)-(f).

evaluating how civil unions were treated by other states and jurisdictions,⁴² evaluating the separate structure's impact on same-sex couples and their children, and evaluating the financial impact of the separate statutory structure on the state of New Jersey.⁴³ The Commission heard testimony from same-sex couples and their families, advocacy organizations on both sides of the divide, and experts in psychology, social work, finance, law, and statistics.⁴⁴

The Commission issued its final report on December 10, 2008, and concluded that by enacting a separate statutory structure, the Legislature had failed to extend the benefits and responsibilities of marriage to same-sex couples.⁴⁵ It found that despite the court's mandate that same-sex couples receive the benefits and privileges of marriage, there were several tangible differences in how married and civil unioned couples were treated.⁴⁶ In addition, it noted that since the Civil Union Act's enactment, a number of marriage equality developments had taken place in New Jersey's more liberal sister states.⁴⁷

The Commission found that there were several economic harms in denying same-sex couples the right to marry.⁴⁸ First, both self-insured companies⁴⁹ and employers who provide benefits through unionized collective bargaining agreements⁵⁰ are able to deny providing the

⁴² The Commission also looked at International laws. New Jersey Civil Union Review Commission, *supra* note 7, at 37. They found that Belgium, Canada, the Netherlands, Norway, South Africa, and Spain allow same-sex marriage and Great Britain, New Zealand, Iceland, and Sweden offer parallel statutory structures. *Id.*

⁴³ New Jersey Civil Union Review Commission, *supra* note 7, at 5.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 5-6.

⁴⁷ *Id.* at 6-7. National advancements included the California Supreme Court's holding that excluding same-sex couples from marriage was unconstitutional, passage of Proposition 8 denying same-sex couples the right to marry, Massachusetts' repeal of a law which prohibited non-resident couples (both opposite- and same-sex) from marrying in Massachusetts if their marriage would be void in their home state, and the Connecticut Supreme Court's holding that excluding same-sex couples from the full rights, responsibilities, and name of marriage violated the state's equal protection guarantees. *Id.*

⁴⁸ New Jersey Civil Union Review Commission, *supra* note 7, at 25-28.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 12.

same benefits to employees' civil union partners that they extend to marital spouses.⁵¹ Under the federal Employee Retirement Insurance Security Act ("ERISA"), both employers who create their own insurance plans and employers who provide insurance through collective bargaining agreements are governed by the federal Defense of Marriage Act ("DOMA").⁵² DOMA provides that any federal statute or regulation that grants benefits to spouses only applies to marriages between one man and one woman,⁵³ and employers therefore have the option of choosing whether or not to grant benefits to civil union partners.⁵⁴ An employer's choice not to provide benefits, whether that choice is made because of discriminatory beliefs or financial considerations, will be sanctioned by the government.⁵⁵

In the majority of cases for self-insured companies, the Commission received testimony that employers were using the federal loophole to deny benefits to same-sex partners as a form of cost-savings.⁵⁶ For unionized companies, unions have increasingly bargained away health and pension benefits for civil union partners to protect the majority.⁵⁷ Even more disturbingly, an employer's failure to provide benefits under ERISA might in fact encourage couples to dissolve their unions by putting an entire couple's estate at risk in the event of an injury.⁵⁸ Additionally, the Commission received testimony that a further economic burden was created by the necessity of obtaining legal representation due to discrimination.⁵⁹ However, evidence from New Jersey's

⁵¹ *Id.* at 11-12.

⁵² *Id.*

⁵³ Federal Defense of Marriage Act, 1 U.S.C. § 7 (2010) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.").

⁵⁴ New Jersey Civil Union Review Commission, *supra* note 7, at 11.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 12-13.

⁵⁸ *Id.* at 12 (nurse testifying to the fact that she had seriously considered dissolving her civil union due to the potential financial impact on her estate).

⁵⁹ New Jersey Civil Union Review Commission, *supra* note 7, at 13-14.

sister state Massachusetts (which began allowing same-sex couples to marry in 2004) indicated that enacting same-sex marriage laws would provide a partial remedy to the ERISA loophole by refusing to mask employers' discriminatory practices behind convenient statutory distinctions.⁶⁰ The stigma of discriminating against homosexuals in same-sex marriages would encourage many employers to provide equal benefits.⁶¹

The Commission also found that same-sex couples received shockingly unequal treatment regarding access to healthcare.⁶² Hospital employees and other healthcare providers had refused to honor requests that partners be consulted in the event of medical emergencies, had refused admission to civil union partners during visiting hours, and had even refused to allow partners to make final arrangements for their deceased spouses.⁶³ Additionally, despite the dictates of the Civil Union Act, couples had difficulty obtaining healthcare for both partners.⁶⁴ Perhaps the greatest burden was that same-sex couples confronted these obstacles in times of crisis, when no person should be forced to explain the technicalities of his or her relationship.⁶⁵ As one witness stated during the proceedings, "marriage is...the coin of the realm," and carries with it a universally understood meaning.⁶⁶ Civil unions do not carry the same weight, and many unionized couples have been forced to explain their status in order to receive the same treatment.⁶⁷

⁶⁰ *Id.* at 21 ("ERISA-covered employers in Massachusetts ... understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination. And employers in a progressive state like Massachusetts are loathe to do that, as they would be in a similarly progressive state like New Jersey.").

⁶¹ *Id.*

⁶² *Id.* at 14-15.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ New Jersey Civil Union Review Commission, *supra* note 7, at 14-15.

⁶⁶ *Id.* at 9.

⁶⁷ *Id.*

The Commission also found that there were intangible differences that had a devastating psychological impact upon same-sex unionized couples, their families, and the homosexual population as a whole.⁶⁸ Psychiatrists testified that the difference in terminology led both society and the couples to question their own legitimacy.⁶⁹ The Commission found that because marriage indicates society's acceptance of a couple, refusing to allow same-sex couples to marry stigmatizes homosexuality and encourages society to treat same-sex couples as having an inferior status.⁷⁰ This stigma has a detrimental impact on the mental well-being of homosexual population as a whole.⁷¹ As one psychiatrist testified, "Nothing is more basic from a mental health perspective to happiness and liberty than the right to love another human being with the same privileges and responsibilities as everyone else."⁷² This stigma further traumatizes our youth because it extends to both young homosexuals and the children of same-sex couples.⁷³

In addition to testimony in favor of same-sex marriage, the Commission also heard from marriage-equality opponents.⁷⁴ One common argument was simply that marriage should remain between a man and a woman, consistent with the history and origins of the word.⁷⁵ One opponent argued that marriage had a transcendent meaning to society beyond the legal institution itself, and that children were better off raised in a traditional family.⁷⁶ Other witnesses further argued that marriage is derived from biblical teachings, and that the state should not sanction

⁶⁸ *Id.* at 15-20.

⁶⁹ *Id.* at 16.

⁷⁰ *Id.*

⁷¹ New Jersey Civil Union Review Commission, *supra* note 7, at 16.

⁷² *Id.*

⁷³ The Commission also noted that children faced the stigma of being viewed as bastards, or children of unmarried couples. *Id.* at 16-17. Additionally, young homosexuals faced the pain of not being able to envision marriage in their futures. *Id.* at 18.

⁷⁴ *Id.* at 39-41.

⁷⁵ *Id.* at 39.

⁷⁶ New Jersey Civil Union Review Commission, *supra* note 7, at 39.

same-sex couples' lifestyle choices.⁷⁷ Witnesses expressed skepticism with the notion that the Civil Union Act was an insufficient remedy, and even argued that amending marriage laws would create a backlash that would ultimately do more harm than good.⁷⁸ These witnesses felt that the fate of same-sex marriage should be left to the voters, rather than the courts or the Legislature.⁷⁹ Despite this testimony, the Commission concluded that amending marriage laws would provide an appropriate remedy for the tangible and intangible shortfalls of civil unions, would enhance New Jersey's economy, and enhance recognition of same-sex couples' unions in other states and jurisdictions.⁸⁰

The Commission's final report details a history of discrimination against same-sex couples. Despite the creation of civil unions, or maybe even because of them, the discrimination continues. And despite the dictates of *Lewis*, civil unions do not extend equal rights to same-sex couples. The Commission's report is evidence that the New Jersey Legislature has failed to comply with a court order, and the *Lewis* Plaintiffs are returning to court to compel the state to do what it has promised.⁸¹ However, while the simplest solution would be to amend the marriage laws, same-sex marriage is one topic that is frequently more driven by morality and politics than love or law.

Part II: Why Separate Can Never Be Equal

The Commission did not give much credit to opponents' arguments that marriage should remain between a man and a woman, but these arguments have had better luck in many other

⁷⁷ *Id.* at 40

⁷⁸ *Id.*

⁷⁹ *Id.* at 41.

⁸⁰ *Id.* at 25. One study found that not only would extending marriage to same-sex couples not result in increased costs to the state, but doing so could in fact boost state and local revenues by approximately \$19 million dollars over the next three years, and spending on weddings and tourism could boost the New Jersey economy by approximately \$248 million over three years and create or sustain over 800 new jobs. *Id.* at 27, 48.

⁸¹ *See* Part III *infra*.

states and jurisdictions. Should New Jersey pass a law allowing same-sex marriage, it would be in limited company. Currently, only five states and one federal district allow same-sex marriage.⁸² Unfortunately, the majority of states have adopted versions of the Federal Defense of Marriage Act, which defines marriage as a union between a man and a woman.⁸³ Although an amendment to the United States Constitution prohibiting same-sex marriage was ultimately defeated in 2006,⁸⁴ thirty states have passed state amendments.⁸⁵

Although the United States Supreme Court may find itself revisiting the issue in the near future,⁸⁶ the only precedent currently from the Court is a thirty-eight year old case by the name of *Baker v. Nelson*.⁸⁷ In *Baker*, Plaintiffs appealed a Minnesota state law limiting marriage to opposite-sex couples as a violation of their 9th and 14th Amendment rights.⁸⁸ Their appeal was dismissed “for want of a substantial federal question” on mandatory appellate review, and therefore the dismissal was a decision on the merits of the case.⁸⁹ The state court’s decision finding that the statute was not unconstitutional is binding federal precedent.⁹⁰

Despite the New Jersey Civil Union Review Commission’s failure to credit the argument that marriage is traditionally a union between a man and a woman, many courts are not so quick

⁸² Same-sex marriages are allowed in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and Washington D.C.. Wikipedia, *Same Sex Marriage In the United States*, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States#cite_ref-Adams_.26_Crary_11-03-2009_5-2 (last visited May 3, 2010).

⁸³ William N. Eskridge, Jr. & Nan D. Hunter, *SEXUALITY, GENDER, AND THE LAW* 1078 (2d. ed. 2004).

⁸⁴ Wikipedia, *Same Sex Marriage in the United States*, *supra* note 81.

⁸⁵ William N. Eskridge, Jr. & Nan D. Hunter, *SEXUALITY, GENDER, AND THE LAW SUPPLEMENT* 129-30 (2d. ed. 2004).

⁸⁶ Margaret Talbot, A Risky Proposal, *THE NEW YORKER*, Jan. 18 2010, *available at* http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot.

⁸⁷ *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

⁸⁸ Plaintiffs argued that the statutes abridged their fundamental right to marry under the Fourteenth Amendment’s Due Process Clause, discriminated based on gender contrary to the Equal Protection Clause (also Fourteenth Amendment), and deprived them of privacy rights flowing from the Ninth Amendment (311-315)

⁸⁹ *Baker v. Nelson*, 409 U.S. 810 (U.S. 1972).

⁹⁰ Peter Hay, *Civil Law, Procedure, and Private International Law: Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 269 (2006) (“A dismissal may or may not be on the merits and constitute a precedent. Procedural dismissals are not on the merits. The dismissal in *Baker*, however, had to consider the issue to arrive at the reason for the dismissal.”).

to discount the value of tradition. In *Singer v. Hara*, a Washington state case that followed quickly on the heels of *Baker*, the court found that banning same-sex marriage does not violate equal rights guarantees.⁹¹ In order to reach that conclusion, the court first succinctly found that “marriage” in the legal sense simply refers to “the legal union of one man and one woman.”⁹² They therefore found that appellants were not being denied the right to marry on the basis of their sex, but instead simply did not fit the traditional definition of marriage.⁹³ The court quoted *Jones v. Hallahan*, another state case decided in 1973, when it noted that “[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”⁹⁴

Contrary to the Commission, courts have also accepted the argument that the union of marriage is also inextricably linked with the act of procreation and child rearing.⁹⁵ According to the *Singer* court, the act of procreation is the primary reason for the institution of marriage, despite “exceptional situations” where heterosexual couples do not have children due to choice or sterility, and therefore the refusal of the state to allow same-sex marriage “results from...[the] impossibility of reproduction rather than from an invidious discrimination.”⁹⁶ The court noted that the institution of marriage itself is clearly related to creating a favorable environment for children.⁹⁷ It followed, therefore, that because marriage is a union between a man and a woman, opposite-sex couples must create more favorable environments for the purposes of child

⁹¹ *Singer v. Hara*, 11 Wn. App. 247 (1974).

⁹² *Id.* at 253.

⁹³ *Id.* at 254-55.

⁹⁴ *Id.* at 255 (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973)).

⁹⁵ See, e.g., *Hernandez v. Robles*, 7 N.Y.3d 338, 363-65 (2006); but compare *In re Marriage Cases*, 183 P.3d at 431 (arguing that because *Griswold v. Connecticut*, 381 U.S. 479 (1965) established the fundamental right to for marital couples to use contraceptives, the institution of marriage must be about more than furthering procreation).

⁹⁶ *Singer*, 11 Wn. App. at 259-260.

⁹⁷ *Id.*

rearing.⁹⁸ And in a truly bizarre argument, New York's Court of Appeals has found that because same-sex couples are less likely to have accidental pregnancies, they do not need the protections of marriage.⁹⁹

Finally, courts have also accepted the argument that the institution of marriage is rooted in religious morality and that to extend it to same-sex couples is somehow to corrupt its original meaning. In *Adams v. Howerton*, an early 9th circuit case, the court held that a same-sex partner is not a spouse under the Immigration and Nationality Act.¹⁰⁰ In so holding, the court noted that marriage was based on common law, which in turn was derived from Judeo-Christian morality.¹⁰¹ Because Judeo-Christian morality would not have sanctioned same-sex marriage,¹⁰² to allow same-sex spouses under the Immigration and Nationality Act would corrupt the very societal values protected by the institution.¹⁰³

Still, separate institutions such as civil unions are an insufficient remedy because despite the best efforts of the states that provide them, a separate institution can never confer truly equal rights and benefits. In *Lewis v. Harris*, the 2006 New Jersey Supreme Court pointedly included itself in the company of more liberal states like Massachusetts, Connecticut, and Vermont, concluding that the state constitution guaranteed equality of treatment regardless of one's

⁹⁸ *Id.*

⁹⁹ *Hernandez*, 7 N.Y.3d at 359. ("It is more important to promote stability...in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not."). This argument is bizarre because it turns on its head the traditional notion that marriage is about the celebration of commitment, and instead argues that marriage is an inducement for those who are not really committed but who might accidentally procreate. The court has also refused to accept studies that show there are no marked differences between children raised by same-sex couples and children raised in traditional family structures. *Id.* at 360.

¹⁰⁰ *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982)).

¹⁰¹ *Id.* at 1123.

¹⁰² *Id.*

¹⁰³ *Id.* ("If one is to articulate the federal public policy involved and the reasons for refusing to recognize that a "marriage" can exist between two people of the same sex, one ought to explore the societal values which underlie the recognition of marriage and the reasons that it has been a preferred and protected legal institution.").

sexuality.¹⁰⁴ All of these states now allow same-sex couples to partake not only in the benefits and responsibilities of marriage, but in the name of marriage itself.¹⁰⁵

Of these states, Massachusetts has made tremendously important contributions by pioneering marriage equality and abolishing the notion that a separate statutory structure can ever equal the union of marriage. In *Goodridge v. Department of Public Health*, a 2003 decision, the Massachusetts Supreme Court found that limiting marriage to heterosexual couples was unconstitutional and became the first state in America to recognize same-sex marriage.¹⁰⁶ Following *Goodridge*, the Senate prepared and drafted a bill which would establish civil unions for same-sex couples in lieu of marriage.¹⁰⁷ In an advisory opinion, the Massachusetts Supreme Judicial Court advised the state legislature that the bill would violate the equal protection and due process requirements of the state Constitution and Declaration of Rights.¹⁰⁸

Importantly, like the New Jersey Civil Union Review Commission,¹⁰⁹ the justices highlighted the tangible and intangible rights of marriage, and concluded that the same deficiencies that made the pre-*Goodridge* marriage ban unconstitutional were actually exacerbated by any attempt to create a separate statutory structure.¹¹⁰ The Justices opined that differences between the two institutions were more than mere semantics. Instead, to create a separate statutory structure would stigmatize homosexuality and relegate same-sex couples to a

¹⁰⁴ New Jersey Civil Union Review Commission, *supra* note 7, at 456-57. (“Vermont, Massachusetts, and Connecticut represent a distinct minority view. Nevertheless, our current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states.”).

¹⁰⁵ See discussion *infra* Part II.

¹⁰⁶ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). In so holding, the Court rejected the Department’s arguments that heterosexual marriages provided the best setting for procreation and child rearing, and were necessary to preserve the State’s financial resources. *Id.* at 961-64.

¹⁰⁷ Opinions of the Justices to the Senate, 802 N.E.2d 565 (2004).

¹⁰⁸ *Id.* at 566, 72.

¹⁰⁹ See *supra* Part I.

¹¹⁰ *Id.* at 569.

second-class status.¹¹¹ Ultimately, the Justices found that creating a distinction could not possibly be found to advance the state interests asserted in *Goodridge*,¹¹² stating that “no amount of tinkering with language will eradicate that stain.”¹¹³ In so finding, the Justices symbolically linked the struggle of same-sex couples with that of African Americans during the civil rights movement by citing *Brown v. Board of Education* for the proposition that a separate but parallel scheme is rarely equal.¹¹⁴ The bill was never passed, and despite opposition, same-sex marriage continues in Massachusetts.¹¹⁵

Though the decisions to legalize marriage came after *Lewis v. Harris* was decided, both of New Jersey’s other comparable states have also come to the conclusion that a separate statutory structure cannot provide the same benefits and responsibilities as traditional marriage.¹¹⁶ Though Vermont did not legalize marriage until 2009,¹¹⁷ the groundwork for the decision was laid ten years earlier when the Vermont Supreme Court held in *Baker v. Vermont* that in order to comply with the state equal protection guarantee, the Legislature was required to extend the benefits and protections of marriage to same-sex couples.¹¹⁸ Like New Jersey, the court held that the Legislature could comply with its ruling by amending marriage laws or

¹¹¹ *Id.* at 570.

¹¹² *Id.* at 569 (“Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or “preserve” what we stated in *Goodridge* were the Commonwealth’s legitimate interests in procreation, child rearing, and the conservation of resources.”).

¹¹³ *Opinions of the Justices*, 802 N.E.2d at 570.

¹¹⁴ *Id.* at 569 n.3 (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)) (“The history of our nation has demonstrated that separate is seldom, if ever, equal.”).

¹¹⁵ The most recent movement for a constitutional ban on same-sex marriage was defeated in June 2007. Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban*, BOSTON GLOBE, June 14, 2007, available at http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html. Then Governor Deval Patrick stated, “Whenever we affirm the equality of anyone, we affirm the equality of everyone.” *Id.*

¹¹⁶ See *supra* note 87, where the court compared New Jersey to Massachusetts, Connecticut, and Vermont.

¹¹⁷ Alan Silverleib, *Vermont Senate Votes to Legalize Same-sex Marriage*, CNN.com, Mar. 23, 2009, <http://www.cnn.com/2009/US/03/23/vermont.samesex.marriage/index.html>.

¹¹⁸ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

creating a separate institution.¹¹⁹ And like New Jersey, the legislature decided on a parallel statutory scheme and Vermont began granting civil union status to same-sex couples in 2000.¹²⁰ In July 2007, the Vermont Commission on Family Recognition and Protection was appointed to study whether Vermont should allow same-sex marriage instead of civil unions.¹²¹ Like New Jersey's Civil Union Review Commission, Vermont found that there were several tangible and intangible benefits that were reserved for heterosexual couples who were legally married.¹²² Ultimately, a bill to legalize same-sex marriage was introduced in February 2009, and Vermont became the first state to legalize marriage by legislative action effective September 1, 2009.¹²³

Unlike Vermont, Connecticut legalized marriage by way of court order after determining that civil unions could not afford the same rights and benefits as same-sex marriage. One year before New Jersey's *Lewis v. Harris* was decided in 2006, Connecticut became the second state following Vermont to adopt civil unions.¹²⁴ In 2008, however, the Connecticut Supreme Court held in *Kerrigan v. Commissioner of Public Health* that failing to allow same-sex couples the right to marry violated the state's equal protection clause because it discriminated on the basis of sexual orientation which, like gender, was a quasi-suspect classification.¹²⁵ In so holding, the court found that the institution of marriage had an intangible status and significance that could not be replicated by a parallel statutory scheme, and further found that homosexuals had been

¹¹⁹ *Id.*

¹²⁰ Wikipedia, *Same Sex Marriage In Vermont*, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Vermont (last visited May 3, 2010).

¹²¹ Vermont Civil Union Review Commission, REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION 1 (2001), available at <http://www.leg.state.vt.us/baker/cureport.htm>.

¹²² While the Vermont Commission declined to make an ultimate recommendation regarding whether or not the state should grant same-sex couples marriage licenses, they did find that some intangibles included the terminology of marriage, its social culture, and its historical significance. *Id.* at 26-29. Tangibles included recognition by other jurisdictions. *Id.*

¹²³ Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, NY TIMES, April 7, 2009 available at http://www.nytimes.com/2009/04/08/us/08vermont.html?_r=.

¹²⁴ Wikipedia, *Same Sex Marriage in Connecticut*, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Connecticut#cite_note-8 (last visited May 3, 2010).

¹²⁵ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008).

subjected to a history of “pernicious discrimination” that would only be continued by refusing to allow them to marry.¹²⁶

Though the New Jersey *Lewis* court did not mention it in its discussion of the more liberal states, California has also been at the forefront of the discussion regarding whether offering a parallel statutory scheme like civil unions can ever truly equal the institution of marriage. In 2008, the California Supreme Court decided *In re Marriage Cases* and held that limiting marriage to same-sex couples violated the state constitution.¹²⁷ The case is an important decision in the body of the same-sex marriage cases because California became the first court to find that marriage was a fundamental right,¹²⁸ and became the first state to apply strict scrutiny to classifications made on the basis of sexual orientation.¹²⁹ Among the many arguments dismissed by the court, the majority rejected the notion that the state’s Domestic Partnership Act could satisfy same-sex couples’ constitutional marriage rights.¹³⁰ Despite the fact that the Act provided virtually all of the same legal benefits and duties, the court held that marriage was about more than benefits and duties.¹³¹ Instead, the name of marriage gave legal recognition to a couple’s union and afforded it dignity, respect, and stature.¹³² The court argued that this historic

¹²⁶ *Id.* (“We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.”).

¹²⁷ *In re Marriage Cases*, 183 P.3d at 446.

¹²⁸ *Id.* at 427.

¹²⁹ In holding that the right to marry was a fundamental right regardless of gender, the court noted that America’s judicial history of asking whether same-sex marriage was a part of our traditions was disingenuous, because in no other marriage debate had the question been so narrowly phrased. *Id.* at 420-21. Instead, the court noted that in cases dealing with interracial marriages, the right in question had been the right to marry a person of one’s choosing, not the right to marry a person of another race. *Id.*

¹³⁰ *Id.* at 444-47 (finding that only offering same-sex couples the institution of domestic partnership impinged upon their respect and dignity because the term marriage was historical and symbolic, a separate statutory structure increased the risk of discrimination, and domestic partnerships are not well understood by the public).

¹³¹ *Id.*

¹³² *In re Marriage Cases*, 183 P.3d at 434-35.

foundation was at the core of the very right, itself, and could not be recreated under a parallel statutory scheme.¹³³

Unfortunately and despite the support of many, Californian citizens fought back by constitutional amendment and overrode the court by popular initiative.¹³⁴ Proposition 8 stated that “[o]nly marriage between a man and a woman is valid or recognized in California,” and was passed by a narrow 52.3 to 47.7% margin.¹³⁵ However, the court subsequently held that any same-sex marriages that had taken place prior to the amendment would be valid, and the decision has also spurred a federal challenge that may permanently alter the landscape of traditional marriage laws.¹³⁶ *Perry v. Schwarzenegger*, a constitutional challenge to the validity of Proposition 8 currently before the United States District Court for the Northern District of California, is almost certain to make its way to the United States Supreme Court, whose decision, good or bad, will bind the entire nation.¹³⁷

In summary, many of the courts and legislators who have favorably addressed the issue of same-sex marriage have rested their decisions on a variety of different holdings, rationales, and beliefs. However, all courts that have ruled favorably on the issue of same-sex marriage

¹³³ *Id.*

¹³⁴ Eskridge & Hunter, *supra* note 84, at 60. Opponents’ main argument to same-sex marriage was not only that marriage was being forced onto Californian citizens, but also that it was being forced onto children, as well, who would be taught that same-sex marriage was the same (and therefore just as acceptable) as heterosexual marriage. *Id.*

¹³⁵ *Id.* The validity of the constitutional amendment was later upheld by the same court that decided the *In Re Marriage Cases* in *Strauss v. Horton*, 46 Cal.4th 364 (2009) (holding that Proposition 8 was a constitutional amendment rather than a revision, and that therefore the change was lawfully adopted through the state’s initiative process).

¹³⁶ See *Perry v. Schwarzenegger*, 2010 U.S. App. LEXIS 7492 (9th Cir. 2010) (dismissing the plaintiff’s appeal in challenging the constitutionality of Proposition 8 and denying a petition for a writ of mandamus).

¹³⁷ Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18 2010, available at http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot. While some hail *Perry v. Schwarzenegger* as a potential landmark case, many LGBT activist groups contend that state-by-state attacks are far more effective. Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CALIFORNIA LAWYER MAGAZINE, Jan. 2010, available at <http://www.callawyer.com/story.cfm?eid=906575&evid=1>. For an interesting look at the challenge to Proposition 8, the argument behind the notion that the fight for same-sex marriage has been hijacked by Hollywood, and the argument that a federal challenge will ultimately harm the cause, see *id.*

agree that there is more to marriage than a body of rights and responsibilities. In addition to the tangible benefits of marriage, there are intangible benefits that simply cannot be replicated by a parallel statutory structure. Therefore, to deny same-sex couples the opportunity to marry is to deny them equal treatment in the eyes of both the law and society.

Part III: How Politics May Affect the Future of Marriage-Equality in New Jersey

New Jersey's same-sex battle began in the courtroom with *Lewis v. Harris*, and may end unfavorably there as well.¹³⁸ In the wake of the Commission's findings that civil unions did not confer equal rights to same-sex couples, a bill legalizing same-sex marriage was sent to the State Senate.¹³⁹ However, the measure was ultimately defeated on January 7, 2010, in a 20 to 14 vote.¹⁴⁰ While then-Democrat Governor Jon Corzine had promised that he would sign a bill if it was passed, Corzine was replaced on January 19, 2010 by Republican Governor Christopher Christie.¹⁴¹ Governor Christie based part of his election platform on preserving traditional values and has publically opposed same-sex marriage.¹⁴² Not only would Governor Christie have final veto power over any bill that passed his desk during his tenure, but he also has a unique and potentially devastating opportunity to shape the face of New Jersey law.¹⁴³ At least four seats on the New Jersey Supreme Court will be at stake during Christie's tenure, one due to mandatory retirement and three due to reappointment after completion of their terms.¹⁴⁴ Christie's opportunity to appoint four new justices to the bench has the potential to alter the existing

¹³⁸ David Kocieniewski, *New Jersey Senate Defeats Gay Marriage Bill*, NY TIMES, January 8, 2010, A18, available at <http://www.nytimes.com/2010/01/08/nyregion/08trenton.html>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* See also Chris Christie Governor, "Shared Values", *supra* note 16.

¹⁴³ Tom Howell Jr., *Christie Could Reshape State Court*, NJ HERALD, November 8, 2009, available at <http://www.njherald.com/story/news/08SIDEBAR>.

¹⁴⁴ See discussion *infra* Part III.

balance of the New Jersey Supreme Court and further bury the issue of same-sex marriage for another four years or more.

On March 18, 2010, six of the plaintiffs from *Lewis v. Harris* returned to the New Jersey Supreme Court with a motion in aid of litigants' rights, arguing that the Legislature had failed to comply with the court-ordered equality promised to same-sex couples in 2006.¹⁴⁵ Plaintiffs rely heavily on the findings of the Commission, a group ironically created by the very same Legislature that may now potentially be overridden by the New Jersey Supreme Court.¹⁴⁶ The Plaintiffs argue that same-sex couples lack equal workplace benefits and protections, recognition from the public, and equal family law protections.¹⁴⁷ Additionally, they argue that same-sex couples and their children suffer unfair financial burdens, and that both same-sex couples and their children are harmed psychologically by the separate status and unequal treatment.¹⁴⁸ The Plaintiffs are seeking amendment of the marriage laws as an enforcement of *Lewis's* 2006 judgment. They argue that at the very least the court should appoint a Special Master to evaluate the Legislature's compliance and make independent fact-findings about whether civil unions give same-sex couples equal rights.¹⁴⁹

As noted above, Plaintiffs are using a motion in aid of litigants' rights as the vehicle to demand same-sex marriage, and urge that the court is required to act when compliance with New Jersey's constitution is at stake.¹⁵⁰ Plaintiffs draw from a body of cases dealing with various

¹⁴⁵ See *supra* note 17.

¹⁴⁶ Brief in Support of Plaintiffs' Motion in Aid of Litigants' Rights at 71, *Lewis v. Harris*, No. 58,389 (A.2d Mar. 18, 2010), available at http://data.lambdalegal.org/in-court/downloads/lewis_nj_20100318_brief-iso-plaintiffs-motion-in-aid-of-litigants-rights.pdf ("Because the Legislature has ignored the findings and refused to follow the recommendations of the very Commission it created in order to assure compliance with *Lewis*, it is now plain that enforcement of the constitutional mandate can only be effected by this Court.").

¹⁴⁷ *Id.* at 24-48.

¹⁴⁸ *Id.* at 49-69.

¹⁴⁹ *Id.* at 70-87.

¹⁵⁰ *Id.* at 72.

educational directives where the Legislature failed to comply with the court's orders¹⁵¹ to argue that given the record reflected by the Commission's report, the Legislature's acts, and the failure of the *Lewis* plaintiffs in securing equal treatment, the State should be ordered to allow same-sex couples to marry.¹⁵² In particular, Plaintiffs argue that a line of cases dealing with declaring the education financing system unconstitutional¹⁵³ are very similar to the case presented by *Lewis*, because in both situations the court mandated that the Legislature cure constitutional violations within a certain period of time without designating a specific remedy.¹⁵⁴ However, Plaintiffs note that even though the *Lewis* court failed to require the Legislature to amend the marriage laws, the court did contemplate the possibility that a separate statutory structure would not comply with the constitutional mandate.¹⁵⁵ Plaintiffs ultimately deem the Legislature's attempts to create a parallel statutory structure a failed experiment, and argue that marriage laws must be amended without delay to rectify the error.¹⁵⁶

Lambda Legal speculates that briefing will be completed on Plaintiffs' motion as early as June 2010, and the court will hear argument shortly thereafter.¹⁵⁷ However, since *Lewis* was decided in 2006, the New Jersey Supreme Court has undergone a dramatic shift. The New

¹⁵¹ *Brief in Support of Plaintiffs' Motion*, *supra* note 144, at 73-75. The brief cites *Abbott v. Burke*, 693 A.2d 417 (1997) ("*Abbott IV*"), where the court granted a motion in aid of litigants' rights after finding that the Legislature's statutory enactments in response to a court order in "*Abbott III*" (*Abbott v. Burke*, 643 A.2d 575 (1994)) were insufficient to cure a constitutional violation; and *Abbott v. Burke*, 889 A.2d 1063 (2005) ("*Abbott XIV*") where despite the State's "substantial effort," the Court granted the Plaintiff's motion after concluding that the Legislature had failed to comply with court orders from previous cases that identified constitutional violations. *Id.*

¹⁵² *Id.* at 77-79.

¹⁵³ *Id.* at 74-75 (arguing that *Lewis*'s failed remedy is similar to *Robinson v. Cahill*, 351 A.2d 713 (1975) ("*Robinson IV*"), because the *Robinson IV* court intervened to remedy a constitutional violation where it had previously failed to specify a remedy in *Robinson v. Cahill*, 303 A.2d 273 (1973) ("*Robinson II*") and *Robinson v. Cahill*, 335 A.2d 6 (1975) ("*Robinson III*").

¹⁵⁴ *Id.* at 74-75.

¹⁵⁵ *Id.* at 76 (pointing out the Court's speculation in *Lewis* that a separate but identical scheme might nonetheless offend the state constitution, and noting the "well-settled principle that separate, purportedly equal legal classifications may not withstand constitutional scrutiny if, in practice, they fail to deliver equal treatment.") (citing *Lewis*, 908 A.2d at 221-22) (internal citations omitted).

¹⁵⁶ *Brief in Support of Plaintiffs' Motion*, *supra* note 144, at 75-76.

¹⁵⁷ Telephone Interview with Christina Izaguirre, Lambda Legal Help Desk, Christina Izaguirre (Mar. 29, 2010).

Jersey Supreme Court is comprised of seven Justices who are all originally nominated by the Governor for an initial term of seven years.¹⁵⁸ At the completion of their terms, the Governor may then nominate them for tenure.¹⁵⁹ If a Justice is tenured, she may serve until the age of 70, the age of mandatory retirement.¹⁶⁰ There were four members of the *Lewis* majority, and three members of the court (Chief Justice Poritz, Justice Zazzali, and Justice Long) who concurred and dissented on grounds that the New Jersey state marriage laws did violate the state's equal rights guarantee, but that a parallel statutory structure would not provide a sufficient remedy.¹⁶¹ While three members of the majority have continued to serve on the court,¹⁶² only one member of the separate concurrence and dissent currently remains.¹⁶³ In October 2006, Chief Justice Poritz reached the age of mandatory retirement, and her replacement Chief Justice Zazzali reached the age of mandatory retirement in 2007.¹⁶⁴ They have been replaced by Chief Justice Rabner, a Democrat, and Justice Hoens, a Republican.¹⁶⁵

While one might think that generally, a Democrat would be more sympathetic than a Republican, it is difficult to predict how the change in the court's structure will affect the Plaintiffs' motion. If *Lewis*'s 2006 decision is any indication, then party lines are no indication. Both the majority and separate concurrence and dissent included Republican and Democratic Justices, and every member of the court seemed to analyze the question independently of

¹⁵⁸ Wikipedia, *New Jersey Supreme Court*, http://en.wikipedia.org/wiki/New_Jersey_Supreme_Court (last visited May 3, 2010).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (unless the Justice dies, resigns, retires, or is impeached and removed). *Id.*

¹⁶¹ Justices Albin, LaVecchia, Long, and Wallace took part in the majority. *Lewis*, 908 A.2d at 200.

¹⁶² While Justice Wallace is currently a member of the court, his term expires on May 20, 2010 and Governor Christie has nominated a new candidate, Republican Anne Murray Paterson, as his replacement. Terrence Dopp, *Christie May be Blocked in Replacing New Jersey Justice Wallace*, BLOOMBERG BUSINESSWEEK, May 3, 2010, available at <http://www.businessweek.com/news/2010-05-03/christie-may-be-blocked-in-replacing-new-jersey-justice-wallace.html>.

¹⁶³ Wikipedia, *New Jersey Supreme Court*, *supra* note 156.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

partisan alliances.¹⁶⁶ As one commentator has noted, every member of the separate concurrence and dissent was appointed by a Republican governor, while three members of the majority opinion were actually appointed by a gay man, then-Governor James McGreevey.¹⁶⁷

Some analysts have urged that the court's independence is due in part to the fact that many of its members have come from the state's executive branch.¹⁶⁸ While Republican Justice Hoens has served exclusively in the judicial branch,¹⁶⁹ she was appointed by Democrat Jon Corzine and he has stated that she has the ability to decide a case based on the law, the facts, and the existing precedent of the court.¹⁷⁰ However, Chief Justice Stuart Rabner was formerly Attorney General of the State of New Jersey, and has authored several advisory opinions on the status of civil union law in New Jersey. While not all of Chief Justice Rabner's opinions are clearly favorable to the LGBT community,¹⁷¹ several of his opinions have had the effect of applying and upholding *Lewis's* court order.¹⁷² In one particular opinion, Chief Justice Rabner advised that New Jersey must recognize same-sex marriages, civil unions, and domestic partnerships formed in other jurisdictions without requirement of an additional in-state ceremony.¹⁷³ Importantly, Chief Justice Rabner advised that the name of the relationship given

¹⁶⁶ Laura Mansnerus, *Ruling on Same-sex Marriage; Party Lines are No Guide to Opinions by Justices*, NY TIMES, Oct. 26, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9402E2DB143FF935A15753C1A9609C8B63>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* When *Lewis* was decided in 2006, Chief Justice Poritz and Justices LaVecchia, Long, and Zazzali had all served in the executive branch in some capacity. *Id.*

¹⁶⁹ New Jersey Judiciary, *Justice Helen E. Hoens*, NJCourtsonline.com, <http://www.judiciary.state.nj.us/supreme/hhoens.htm> (last visited May 3, 2010). Justice Hoens started in the Superior Court in 1994 and moved to the Appellate Division in 2002. *Id.*

¹⁷⁰ Mary Fuchs, *N.J. Gubernatorial Candidates Address Social Issues Including Medical Marijuana, Gay Marriage*, NJ.COM, Oct. 8, 2009, http://www.nj.com/news/index.ssf/2009/10/nj_gubernatorial_candidates_ad_1.html

¹⁷¹ See, e.g., 2007 Op. N.J. Att'y Gen. 3 (2007) (advising that public officials may decline to officiate at civil unions, though also advising that these officials must decline to officiate at opposite-sex marriages).

¹⁷² See *id.*; and 2007 Op. N.J. Att'y Gen 2 (2007) (stating that marriages, civil unions, and domestic partnerships performed in other jurisdictions may be recognized in New Jersey depending on the benefits and rights conferred).

¹⁷³ 2007 Op. N.J. Att'y Gen 2 (2007).

by another jurisdiction would not control.¹⁷⁴ Instead, the state would be required to carefully assess the nature of the rights conferred by the other jurisdiction to determine whether the relationship would be deemed a civil union or a domestic partnership under New Jersey state law.¹⁷⁵

On one hand, this opinion hardly seems to be a positive indication of Chief Justice Rabner's viewpoints, because it minimizes the importance of the designation of marriage by refusing to honor the name given to a relationship by another jurisdiction. However, on the other hand, it shows that Chief Justice Rabner advocates carefully assessing each of the rights and benefits granted to a relationship, regardless of its title. In conducting a careful weighing of the rights and benefits granted by marriage versus those granted by civil unions, it is possible that he may realize the scales fail to balance. At the very least, Chief Justice Rabner's opinions while acting as an officer of the executive branch show that he is able to independently assess an issue based on the legal merits of the argument.

Regarding the other four members of the court who were originally a part of the *Lewis* decision, it is hard to determine whether they will be swayed by the Plaintiffs' motion. However, many view the court as leaning more towards the moderate to liberal side of the political scale, particularly when it comes to civil rights issues.¹⁷⁶ Even if the court shirked from flat-out requiring the state to amend marriage laws in *Lewis*, the fact that it ordered the Legislature to allow same-sex marriage or create a parallel statutory structure at all is an indication that its members are either sympathetic, or at the very least willing to apply the law

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Mary Fuchs, *State Justices Have Work Cut Out for Them*, NORTHJERSEY.COM, Sept. 13, 2009, http://www.northjersey.com/news/State_justices_have_work_cut_out_for_them.html?c=y&page=1.

(rather than their own biases).¹⁷⁷ This is particularly true given the fact that the court did so in lieu of waiting for legislative action or popular vote.

In fact, Republicans have criticized the entire court, including members of their own party, as far too activist.¹⁷⁸ Governor Christie has publically stated that regardless of party lines, none of the members on the current court have the qualities that he values in a Justice.¹⁷⁹ Christie's views on the issue are incredibly important because he has the potential to dramatically alter the face of the Supreme Court bench by appointing four new justices during the course of his tenure.¹⁸⁰ Governor Christie has already indicated that he will not reappoint Justice Wallace after his term expires on May 20, 2010,¹⁸¹ and Justices Rivera-Soto and Hoens will be up for reappointment in 2011 and 2013 respectively.¹⁸² Justice Long will face mandatory retirement on March 1, 2012.¹⁸³

Historically, the court has always been balanced to include no more than four members of any political party, and Governor Christie has indicated that he will honor that tradition.¹⁸⁴ However, he has indicated that he would like to make some significant changes.¹⁸⁵ Perhaps unluckily for *Lewis* Plaintiffs, Governor Christie has stated that his chief concern are justices

¹⁷⁷ *See id.*

¹⁷⁸ Fuchs, *Next Governor Will Reshape N.J. Supreme Court*, NJ.COM, Oct. 29, 2009, http://www.nj.com/news/index.ssf/2009/10/next_nj_governor_could_impact.html

¹⁷⁹ Fuchs, *Face of Supreme Court Lies in Next Governor's Hands*, NORTHJERSEY.COM, Oct. 29, 2009 (Governor Christie: "On the New Jersey Supreme Court right now? No," he said. "I want someone who is extraordinarily bright, and I want someone who will interpret laws and the [state] Constitution, not legislate from the bench.").

¹⁸⁰ *Id.* (When referring to election between Corzine and Christie: "The next governor could remake the state Supreme Court by appointing as many as four justices to the seven-member panel — and loading a majority of the bench to suit his political philosophy.").

¹⁸¹ *Dopp, supra* note 160.

¹⁸² Wikipedia, *supra* note 156. Wallace will face reappointment on May 20, 2010, Justice Rivera-Soto on September 1, 2011, and Justice Hoens on October 26, 2013. *Id.*

¹⁸³ *Id.*

¹⁸⁴ Fuchs, *Next Governor Will Reshape NJ Supreme Court, supra* note 176.

¹⁸⁵ *Id.* (Governor Christie regarding the bench: "I think there's room for significant change, and there needs to be.").

who “legislate from the bench,”¹⁸⁶ something that the original *Lewis* court members very certainly did.¹⁸⁷ Governor Christie has indicated that he will not simply reappoint each justice up for tenure, but will instead “examin[e] their entire judicial record, determining whether they have been justices who faithfully interpret the law and the constitution or justices who legislate from the bench.”¹⁸⁸ The Governor has expressed his outward disapproval of Republican Justice Rivera-Soto,¹⁸⁹ and it is likely that he will be replaced when his term expires September 1, 2011.¹⁹⁰ And as noted below, given Governor Christie’s choice to decline Justice Wallace’s tenure even in the face of tradition and severe opposition,¹⁹¹ Justice Hoens’ removal from the bench seems like a foregone conclusion. Should the court delay in deciding the *Lewis* Plaintiffs’ motion, Governor Christie’s desire to appoint justices who will defer to the Legislature could have an adverse impact on the motion.

As noted above, one member of the original *Lewis* majority is already in limbo as a result of Governor Christie’s agenda. Though there is a longstanding tradition of tenuring justices up for reappointment, Governor Christie has stated that he will be retiring Justice Wallace on May

¹⁸⁶ See *supra* note 177.

¹⁸⁷ Arguably, a Court order requiring the Legislature to amend marriage laws after the Senate has very clearly vetoed a same-sex marriage bill would be even more forward and aggressive than the original *Lewis* decision, itself.

¹⁸⁸ Fuchs, *State Justices Have Work Cut Out for Them*, *supra* note 174.

¹⁸⁹ Fuchs, *Next Governor Will Reshape NJ Supreme Court*, *supra* note 176 (“[Christie] has also said he has serious concerns about Rivera-Soto’s temperament but has not indicated how, as governor, he would handle his reappointment.”). Rivera-Soto was publically censured for wielding his power as a Supreme Court Justice after the Supreme Court Advisory Committee found that he interfered in a high school rivalry between his son and another football player, contacted police, prosecutors, and trial judges regarding an altercation between the two boys, and even insulted the boy’s father. In the Matter of Rivera-Soto, Docket No. [ACJC 2007-097](#), available at http://www.judiciary.state.nj.us/pressrel/2007-097_Rivera-Soto%20Presentment.pdf. (insert page numbers). After the incident, Justice Rivera-Soto was then investigated (though not sanctioned) for using the name of an investigator involved in the manslaughter trial of NBA star Jayson Williams during oral argument, despite the fact that the information was under seal. Michael Rispoli, *Justice Rivera-Soto Will Not Face Sanctions for Violating Court Order*, STAR-LEDGER, Mar. 27, 2009, available at http://www.nj.com/news/index.ssf/2009/03/justice_riverasoto_will_not_fa.html. The investigator had made a racial slur about Williams during the investigation. *Id.*

¹⁹⁰ See Peter J. McDonough, *Roberto Rivera-Soto: Dead Man Walking*, NJ.COM, July 20, 2007 (pointing out that Justice Rivera-Soto’s “censure marks only the second time in more than 30 years that the court has taken action against one of its members” and arguing that he will certainly not be reappointed once his term expires).

¹⁹¹ See notes *infra* 188-194

20, 2010.¹⁹² Despite strong opposition,¹⁹³ Governor Christie has stated that he will not reappoint Justice Wallace because the court has invaded the provinces of the legislative and executive branches.¹⁹⁴ While he declined to comment specifically on any particular decision (including *Lewis v. Harris*), he did cite the *Abbott v. Burke* school-funding cases relied upon by the *Lewis* plaintiffs in their March 2010 motion as an example of the Supreme Court “legislating from the bench.”¹⁹⁵ If the Governor is setting the stage to persuade the court to overrule or distinguish existing precedent, the reference may not bode well for the *Lewis* plaintiffs.

The Governor has nominated Republican attorney and former member of the Attorney General’s Office Anne Murray Patterson.¹⁹⁶ Should Patterson’s nomination be approved, it would bring the bench to three Republicans, three Democrats. She has a strong executive background and thus might be hoped to exercise an independence in judgment similar to Chief Justice Rabner’s.¹⁹⁷ However, Governor Christie has stated that her record indicates a broader deference for being a member of “a co-equal branch of government” than Justice Wallace.¹⁹⁸ Given the Governor’s disapproving remarks regarding the original *Lewis v. Harris* decision, that deference may call for defeating the *Lewis* plaintiff’s motion.

The Plaintiffs’ legal arguments are sound. However, regardless of the court’s composition, the safest bet is probably to take the middle road and grant the Plaintiff’s motion,

¹⁹² *Dopp, supra* note 160.

¹⁹³ Justice Wallace is the first sitting Justice in the history of the New Jersey Supreme Court not to be reappointed, and the only African American member of the bench. *Id.* Governor Christie’s failure to reappoint him has been deemed a “slap in the face to the huge African- American population in this state,” and Senate President Stephen Sweeney has said that he will not authorize confirmation hearings on the nomination of Justice Wallace’s replacement. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Claire Heining & Lisa Fleisher, *Governor Christie Nominates Lawyer Anne M. Patterson to N.J. Supreme Court*, NJ.COM, May 3, 2010, available at http://www.nj.com/news/index.ssf/2010/05/gov_chris_christie_nominates_1.html.

¹⁹⁷ See discussion *supra* notes 163-167.

¹⁹⁸ *Heining & Fleisher, supra* note 194.

but only in part: refuse to order amendment of the marriage laws based solely on the report of the Commission, appoint a Special Magistrate to further develop the factual record, and defer the decision for another few years until New Jersey has a court, a Governor, and a public who are comfortable with the idea of celebrating the relationships of all of its citizens.¹⁹⁹ Given recent inactivity in the Senate and our current Governor's openly hostile views on same-sex marriage, even the more liberal members of the court may hesitate to openly lock horns with the legislative and executive branches. Appointing a Special Magistrate might seem like the easy way out, but then again, the court has already dodged the issue of same-sex marriage once in the original *Lewis v. Harris* holding. But on the up side, it means that a marriage amendment will at least live to fight another day.

Conclusion

In *Lewis v. Harris*, the New Jersey Supreme Court found that the State's discriminatory practices towards same-sex couples violated the equal rights guarantee of the state constitution and ordered the Legislature to rectify the constitutional violation within 180 days.²⁰⁰ Despite the court's clear order in *Lewis*, state-sanctioned discrimination continues almost four years later. The Civil Union Review Commission has found that civil unions do not confer the same rights and benefits as marriage, and their findings are in keeping with a slowly emerging body of national law which suggests something that the courts long-ago purported to deduce: separate is

¹⁹⁹ Arguably, based on the results of the latest polls from Quinnipiac University, the public is comfortable with same-sex marriage. Quinnipiac University, *More New Jersey Voters Back Same-Sex Marriage, Quinnipiac University Poll Finds; Voters Back Civil Unions 2-1, Gay Adoption Almost 2-1*, Apr. 23, 2009, available at, <http://www.quinnipiac.edu/x1299.xml?ReleaseID=1289>. As of April 23, 2009, New Jersey voters supported a marriage amendment by a 49 to 43 percent margin. *Id.* However, based on the same poll, voters are even more satisfied with the civil union laws. *Id.* The margin was higher, rising to 60 to 30 percent. *Id.*

²⁰⁰ *Lewis*, 908 A.2d 196.

not equal.²⁰¹ Despite best intentions, civil unions do not correct a constitutional wrong. Instead, they only intensify it by highlighting the differences between how heterosexual and homosexual couples are viewed by society.

Nonetheless, in spite of the fact that the New Jersey legislature has violated a Supreme Court Order, a marriage amendment may still be further off than equality advocates would like to admit. *Lewis* Plaintiffs will be returning to the Supreme Court in June 2010 for a motion in aid of litigants' rights to enforce the original order, but the court's ultimate decision may turn on a mixture of law, politics, and bravado. The court has changed since *Lewis* was originally decided, and is likely to change again within the next two years as its members face reappointment and retirement. While *Lewis* Plaintiffs have a good case based on the Commission's findings, there are a few wildcards on the bench and the court may ultimately decide to further develop the factual record before locking horns with both the legislative and executive branches.

Despite the outcome of *Lewis II*, this state must continue to fight for the equality of all of its citizens. Same-sex marriage is important to the dignity of everyone, regardless of sexual orientation. As the Commission noted, there are both tangible and intangible differences in the ways in which opposite- and same-sex couples' unions are treated. While the tangible differences may have an impact on a couple's wallet, the intangible differences amount to far more than dollars and cents. George Bernard Shaw once said that "[t]here is no subject on which more dangerous nonsense is talked and thought than marriage."²⁰² Certainly, of all the nonsense spoken on the subject, perhaps the most dangerous of all is to allow politics and ignorance to prevail in matters of the heart.

²⁰¹ See *Brown*, 347 U.S. 483.

²⁰² George Bernard Shaw, GETTING MARRIED 7 (BiblioBazaar 2007) (1931).