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Same-Sex Relationships and State Constitutional Analysis

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SAME-SEX RELATIONSHIPS AND STATE CONSTITUTIONAL ANALYSIS

JOSEPH R. GRODIN *

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Justice Hans Linde's contributions to the law and theory of state constitutionalism are widely known and justly praised.[1] His fundamental teaching—that state constitutions are historically and analytically independent from, and may give rise to different and in some cases greater protection for claims of rights, than the federal constitution—has by now become well embedded in our legal culture. And the logic underlying his corollary proposition—that state courts should in principle approach constitutional claims in the first instance through their own state constitutions, rather than through the federal constitution, "First Things First"—has never been seriously questioned in theory, even if in practice it is often ignored.

My focus in this essay is upon a second but related corollary to the axiom of state constitutional independence: that state courts bear responsibility for developing a state constitutional jurisprudence which does not simply follow, in blind lock-step, the most recent pronouncements of the United States Supreme Court with respect to similar or even identically worded provisions, but which instead make a serious attempt to ascribe meaning to the provisions of the respective state constitutions in a principled but independent way. This precept, Linde's Second Corollary[2] we might call it, has yet to be

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1. He has rightfully been called the "intellectual godfather" of the state constitutional branch of "New Federalism" and by now his articles and judicial opinions on the subject have made him an intellectual grand-godfather, if such a thing is possible. Jeffery Toobin, *Better than Burger*, NEW REPUBLIC Mar. 4, 1985, at 10.

2. While the argument can be found in many places, it was well and early stated by

fully accepted by state courts. Indeed, it is probably fair to say that it is most honored in the breach.

Application of the Second Corollary is particularly problematic when courts engage the question of what in federal constitutional parlance is referred to as "levels of scrutiny." The United States Supreme Court, in determining which level of analysis is appropriate—"strict scrutiny," "rational basis" scrutiny, or intermediate scrutiny, when applying the Equal Protection Clause or the substantive aspects of the Due Process Clause—inquires as to whether the right in question is "fundamental" or (in the case of the Equal Protection Clause) whether the persons asserting the right are part of a "suspect class." This methodology has been criticized at times from both within and outside the Court as being overly rigid, and in practice, productive of inconsistent results. Notwithstanding that criticism, and given the fact that state courts are free under their state constitutions to reject or modify that methodology, a majority of state courts have persisted in following the federal model. Some states, however, have begun to develop their own independent jurisprudence with respect to level-of-scrutiny methodology.

These differences in approach can be seen with particular clarity in the recent spate of decisions involving constitutional claims by same-sex couples to the right of marriage and/or the legal attributes of marriage. As it happens, the courts which have undertaken to decide whether there is a constitutional right to the status of marriage per se have followed, or at least purported to follow, the federal model, while those which have limited their focus to the right of same-sex couples to the legal attributes of marriage appear to have departed from that model in significant ways. It is not my purpose here to critique the reasoning or the results in these cases, but only to examine the methodology with a view to the light it may shed upon future developments.

Justice Linde in his article, *E Pluribus – Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1988). Professor Robert Williams has been a frequent contributor to the dialogue. *E.g.*, Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX L. REV. 1195 (1985); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992); Robert F. Williams, *A Row of Shadows: Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993). For a recent and fairly comprehensive view, see Jeffery M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013 (2003).

I.

I begin by recalling the federal experience, though briefly, since it is presumably familiar to most readers. In the 1930s, the United States Supreme Court reconsidered and ultimately rejected the substantive due process reasoning which underlay its opinion in *Lochner v. New York*.[3] There followed a period in which the New Deal Court displayed a high degree of deference to legislative judgment in the area of economic regulation, inquiring only whether the statute under challenge had a "rational basis," which it defined in terms of whether it could be supported by "any state of facts either known or which could reasonably be assumed."[4] With respect to economic regulation challenged under the Due Process Clause, that level of deference continued for succeeding decades.[5]

With respect to classifications challenged under the Equal Protection Clause, the Supreme Court declared in *Korematsu v. United States*[6] that since racial classifications were "immediately suspect," the Court would subject them to the "most rigid scrutiny;" a term which came to require a showing that the classification serves a "compelling governmental interest" that it is "narrowly tailored" to that interest, in other words, that the objectives of the statute could not be achieved by less intrusive means. While the Court has so far been unwilling to declare sex a "suspect class," it has brought to bear a form of "intermediate scrutiny" for classifications based on gender, insisting that the classification be shown to serve "important governmental objectives" by means that are "substantially related to the achievement of those objectives."[7]

The Supreme Court has also brought heightened scrutiny to bear under the Equal Protection Clause upon classifications that impinge upon rights deemed to be "fundamental," such as the right to participate in the political process, or the right of access to courts.

3. 198 U.S. 45 (1905) (invalidating New York legislation imposing maximum working hours for bakers, on the ground that it interfered with freedom of contract and deprived employers and bakers due process of law in violation of the Fourteenth Amendment).

4. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

5. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The Court's view under the Equal Protection Clause had not always been so deferential. In *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), the Court stated the test as being whether the classification rested upon a difference having a "fair and substantial relation" to the object of the legislation.

6. 323 U.S. 214, 216 (1944).

7. Craig v. Boren, 429 U.S. 190, 197 (1976).

The notion of "fundamentality" has also served to identify those interests that, notwithstanding the Court's rejection of *Lochner*, have come to be protected through a higher level of scrutiny under the rubric of "substantive due process."[8] Protected interests include personal and important choices such as marriage, procreation, contraception, family relationships, child rearing, and education.[9] In the absence of either a "suspect class" or a "fundamental right," both Due Process and Equal Protection challenges are said to be subject to "rational basis" review under which a law will be upheld if any facts could be imagined that would justify its enactment as a means to achieve some legitimate legislative objective. It is irrelevant whether those facts or that objective could be shown to have played any role in the actual legislative process.[10] Since the imagination of judges is virtually limitless, the "rational basis" test, in its classic form, would logically result in the Supreme Court's upholding all, or almost all, laws to which that test was deemed to apply.

However, the rational basis test has not always worked that way. Especially with respect to the Equal Protection Clause, there are anomalies in the case law. In *U. S. Department of Agriculture v. Moreno*,[11] for example, the Burger Court relied upon the equal protection clause to strike down a provision of the federal food stamp program confining assistance to households of "related" persons. While purporting to apply rationality review, and declining to recognize what the opinion referred to as "hippies" as a "suspect class," the opinion rested heavily upon the proposition that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[12] And in *Cleburne v. Cleburne Living Center, Inc.*,[13] the Court, while refusing to recognize mental retardation as either a suspect or quasi-suspect class, nevertheless struck down a municipal zoning ordinance which required special use permits for the operation of homes for the mentally retarded, purporting to apply rational basis scrutiny.

Within the United States Supreme Court there has been frequent criticism of the federal analytical schema, especially as it relates to

8. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

9. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

10. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 178 (1980).

11. 413 U.S. 528 (1973).

12. *Id.* at 534 (emphasis added).

13. 473 U.S. 432 (1985).

so-called rationality review. The opinion in *Cleburne* provoked two separate concurrences: one by Justice Stevens, joined by Chief Justice Burger; the other by Justice Marshall, joined by Justices Brennan and Blackmun. Justice Stevens argued that the "standards" which the Court had adopted to describe varying levels of scrutiny did not adequately explain the decisions, which reflected "a continuum of judgmental responses to differing classifications."[14] Justice Marshall followed a similar tack: "Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification."[15]

Two recent decisions of the Court involving gays and lesbians reflect continuing blurring of lines within the traditional categories. In *Romer v. Evans*, [16] the Court struck down, on Equal Protection grounds, an amendment to the Colorado Constitution adopted through the initiative process, precluding the adoption of any law that protected "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationship" from discrimination. Rejecting the invitation to characterize the law as burdening a fundamental right or targeting a suspect class, and purporting to apply rational basis review, the Court held the constitutional amendment invalid on two grounds: first, because it "has the peculiar property of imposing a

14. *Id.* at 451.

15. Massachusets Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (dissenting opinion by Justice Marshall).; *see also* U.S. R.R. Ret. Bd. v. Fritz, in which the majority upheld classifications contained in federal legislation pertaining to railroad retirement. Justice Marshall joined a dissenting opinion by Justice Brennan which insisted that the rational basis standard "is not a toothless one," and could not be satisfied by hypothetical objectives that are not shown to have been considered by Congress. 449 U.S. at 184. Justice Stevens, who concurred in the majority opinion, nevertheless wrote separately to say he agreed that "we must discover a correlation between the classification and either the actual purpose of the statute or *a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.*" 449 U.S. at 180-81 (emphasis added). Professor Gerald Gunther famously argued in favor of explicitly recognizing a rational basis scrutiny with a "bite." Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1976).

16. 517 U.S. 620 (1996). For analysis of *Romer* as an example of the Court's occasional departure from classic rational basis scrutiny see Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

broad and undifferentiated disability on a single named group," and second, because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects . . . ."[17]

Seven years later, in *Lawrence v. Texas*,[18] the Court, reversing its prior decision in *Bowers v. Hardwick*,[19] relied on the Due Process Clause to hold invalid a Texas law making homosexual sodomy a crime. "Liberty," the Court declared, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and the Texas law "furthers no legitimate state interest."[20] The opinion does not articulate a particular level of scrutiny, nor does it use the term "fundamental right," which gives rise to some room for argument as to what test the Court was applying.

It is against the background of this somewhat muddled and ambivalent federal constitutional history that the matter of same-sex relationships comes before the courts of the various states.

II

All state constitutions contain provisions declaring the rights people have against the state (or, in some cases, the duties of the state toward the people), but there is considerable variation among states in the language used to describe these rights. In some instances the language is the same as or similar to that used in the federal Bill of Rights, while in others it is quite different. No state constitution contained the phrase "equal protection of the laws" before that language made its way into the Fourteenth Amendment of the federal Constitution, but many contained other language which suggested some equal treatment principle. The term "due process of law" was often confined, in early state constitutions, to the context of criminal proceedings. The notion of "substantive due process" did not emerge until the latter part of the nineteenth century, but many state constitutions contained other language—declarative of pre-existing "natural" rights—which could be, and have been, relied upon to protect certain kinds of interests against state interference. Some state

17. *Romer*, 517 U.S. at 623.
18. 539 U.S. 558 (2003).
19. 478 U.S. 186 (1986).
20. *Lawrence*, 539 U.S. at 562, 578.

constitutions contain express protection for a right of "privacy" which may be interpreted, similarly, to describe an area of autonomy free, or relatively free, of state interference.

The challenge posed by cases in which same-sex couples make a claim as to the status or legal benefits of marriage has not been what particular constitutional language applies—for there are typically a number of provisions under which protection can reasonably be claimed—nor has it been a question of what a particular constitutional provision "means" as a matter of interpretation. Most often, what is at issue in such cases is, at one level, a question of analytical methodology: the "level of scrutiny" to be applied by courts in evaluating the relationship between legislative means and ends. At a deeper level, the cases address the question of constitutional structure: What is the appropriate role of the judicial branch in the face of an apparent legislative judgment that a particular law should be enacted? The constitutionality of a statute may be said to turn, for example, on such factors as the motivation underlying its enactment, the goals sought to be achieved, the relationship between the provisions of the statute and the achievement of those goals, the nature of the interests that might be asserted in challenging the constitutionality of the statute, and the impact of the statute upon those interests. To the extent that a court defers to the legislative determination of such factors, the scope of judicial review is by definition minimized and, to the extent that a court undertakes an independent assessment of such factors the scope of judicial review is enlarged. So, whether or not it is made explicit under the federal or state constitutions, there must be some standard or criteria by which a court determines what degree of deference or scrutiny is appropriate.

The majority of courts that have addressed state constitutional claims by same-sex couples to a right to marry—or to the legal incidents of marriage—have done so utilizing federal levels of scrutiny. Early on in the same-sex marriage debate, the Hawaii Supreme Court declared that a statute restricting marriage to opposite sex couples created a sex-based classification subject to strict scrutiny, thus requiring a compelling governmental interest as justification.[21] On remand, the trial court found the State had not met that burden.[22] However, before that decision could be considered on

21. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

22. Baehr v. Miike, 910 P.2d 112, 113 (Haw. 1996).

appeal, voters amended the State Constitution to validate the statute.[23] Since that decision, all other courts applying the federal model have done so either by finding that there is no "fundamental right" or "suspect class," such as to justify strict scrutiny, or (in the case of the Massachusetts Supreme Court) by deciding that it is unnecessary to make such a finding.[24] As a consequence, courts have undertaken the constitutionality of such a ban by application of the "rational basis" test. And, except for Massachusetts, all these courts have found the ban to be "rational" on the basis of a highly deferential application of that standard.

The decision of the New York Court of Appeals in *Hernandez v. Robles*[25] is fairly typical. The court held that the State of New York could constitutionally withhold from same-sex couples both the status and the legal incidents of marriage on the basis that the legislature "could rationally decide" that it wanted to encourage the birthing and rearing of children within a stable relationship.[26] Further, the court found that the legislature "could rationally find" that this goal was served by offering an "inducement" to heterosexual couples to marry while withholding that "inducement" from homosexual couples.[27] The fact that social scientific studies showed no marked difference on the raising of children in heterosexual and homosexual relationships had no bearing on the issue, as such studies did not "conclusively" show that such differences did not exist.

The Supreme Court of Washington, applying what it characterized as a "highly deferential standard of review," has upheld that state's Defense of Marriage Act (hereinafter DOMA) on similar reasoning[28] as have intermediate appellate courts in Arizona.[29] The

23. HAW. CONST. art. 1, § 23.

24. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

25. 855 N.E.2.d 1 (N.Y. 2006).

26. *Id.* at 7.

27. *Id.*

28. Anderson v. King County, 138 P.3d 963 (Wash. 2006). Washington's constitution, like the constitutions of many states, does not contain an "equal protection" clause per se. It does contain a "Privileges and Immunities Clause," providing that "[n]o law shall be passed granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." Justice Madsen, who wrote the plurality opinion, construed the Washington privileges and immunities clause in light of state precedent to mean that, unless the law is a grant of "positive favoritism to a minority class," the court should apply the "same analysis applied under the federal constitution's equal protection clause." 138 P.3d at 972. Since plaintiffs could not establish their membership in a suspect class or a fundamental right to

California Court of Appeal, declining to consider the welfare-of-children rationale, since it had not been advanced by the Attorney General, found instead a rational basis for the restriction of marriage to oppose-sex couples in the fact that that had been the traditional view.[30] The Indiana Court of Appeals rejected a challenge to that state's marriage laws applying a deferential test under state's Privileges and Immunities Clause, which had been interpreted to require only that the legislation be "reasonably related to inherent characteristics which distinguish the unequally treated classes" and be "uniformly applicable to all persons similarly situated."[31] The burden was placed on the challengers to "negative every conceivable basis which might have supported the classification."[32] The effect, the Indiana court acknowledged, is that statutes will survive scrutiny "if they pass the most basic rational relationship test."[33]

The Massachusetts Supreme Court, invoking the rational basis standard of review but applying it in a strikingly different manner, reached the opposite conclusion as to the validity of that state's DOMA in *Goodridge v. Department of Public Health.*[34] It rejected the Commonwealth's procreation rationale based on the ground that it was inconsistent both with the Commonwealth's acceptance of marriage between partners who are incapable of or do not contemplate reproduction, and its acceptance of non-coital reproduction on the part of married couples. The court rejected the "optimal setting for children" argument on the ground that the Commonwealth had "offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise

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marriage that includes the right to marry a person of the same sex, the court applied the "highly deferential rational basis standard of review." The court found the rational basis standard satisfied on the basis of the State's interest in procreation: "[P]artners in a marriage are expected to engage in exclusive sexual relations with children the probable result," and with children who are biologically related to their parents. *Id.* at 982. In addition, the opinion argues, the legislature could have found that having children raised by parents of the opposite sex is better than having them raised by parents of the same sex.

29. Stanhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003).

30. In re Marriage Cases, 49 Cal.Rptr.3d 675 (2006). The California Supreme Court has granted review.

31. Morrison v. Sadler, 821 N.E. 2d 15, 21 (Ind. Ct. App. 2005).

32. *Id.* at 22.

33. *Id.* at 21-22.

34. 798 N.E.2d 941 (Mass. 2003).

children."[35] It rejected the Commonwealth's further argument that prohibiting same-sex marriage furthers the legislature's interest in conserving scarce State and private financial resources, concluding that the ban "bears no rational relationship to the goal of economy."[36] Finally, the Court dismissed arguments of some amici that allowing same-sex couples to marry would trivialize or destroy the institution of marriage by insisting that it would do nothing of the sort.

If rationality review means that a court must uphold legislation if a rational legislator could have voted for it on some conceivable premise, no matter how lacking in plausibility, then the courts which have upheld same-sex marriage bans as "rational" are correct, even if their decisions are subject to the criticism that they lack foundation in reality. It seems obvious that the Massachusetts court, while not acknowledging the fact explicitly, utilized the rational basis language but applied a far more rigorous scrutiny. The decision was in line with those occasional United States Supreme Court decisions like *Cleburne*, *Moreno*, and *Romer* which seem inexplicable in "rational basis" terms. Indeed, the court likened the "marriage as procreation" argument to the law struck down in *Romer*, observing that "the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and not worthy of respect."[37]

III

In contrast to these cases, same sex couples' claims to the tangible benefits of marriage provided stimulus for courts in several states to develop an independent jurisprudence of judicial scrutiny. In *Baker v. Vermont*, two same-sex couples sued for a declaration that they were statutorily and constitutionally entitled to be issued a marriage license.[38] The Vermont Supreme Court, without passing upon that issue, instead addressed the question of whether the State of Vermont could constitutionally exclude them from the "benefits and protections that its laws provide to opposite-sex married couples."[39] Relying upon Vermont's "Common Benefits Clause," the Court held

35. *Id.* at 963.
36. *Id.* at 964.
37. *Id.* at 961.
38. 744 A.2d 864 (Vt. 1999).
39. *Id.* at 867.

that it could not.[40] The Court acknowledged that it had, on occasion, applied the Common Benefits Clause as if it had the same content and was subject to the same interpretive methodology as the Equal Protection Clause of the Fourteenth Amendment, including the federal rational basis/strict scrutiny tests. However, the Court pointed to other state precedent that supported a "more stringent test" than the deferential rational basis test would afford.[41] After a careful exploration of the history of the Common Benefits Clause, the Court concluded that proper analysis should identify the "part of the community" disadvantaged by the law and inquire whether exclusion of that part of the community from the benefits and protections of the challenged law "is reasonably necessary to accomplish the State's claimed objectives."[42] The test is stated later to be "whether the omission . . . bears a reasonable and just relation to the governmental purpose," taking into account the significance of the benefits and whether the classification is significantly over- or under-inclusive.[43] Considering a variety of sources bearing upon the factual predicates for the State's asserted objectives, the Court concluded that Vermont's law failed the applicable test.[44]

In *Alaska Civil Liberties Union v. State*,[45] the Alaska Supreme Court reached a similar conclusion in an action brought by same-sex couples employed by the state and municipalities claiming a state constitutional right to the same domestic partner benefits enjoyed by married couples. The challenge was brought under Article 1, section 1 of the state constitution, which provides that "all persons are equal

40. V.T. CONST. art. 1, § 7 (providing in part that "government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community").

41. *Baker*, 744 A.2d at 872.

42. *Id.* at 878.

43. *Id.* at 878-79.

44. *Id.* at 881-86. In an unusually candid reflection upon the case, former Chief Justice Jeffrey L. Amestoy, author of the opinion, acknowledged that for him, at least, one legitimate consideration was "the extent to which a state constitutional decision predicated upon a 'suspect class/fundamental rights' test would be persuasive to those with 'extra-judicial authority' to change the result (i.e., the Legislature and citizens of Vermont)." Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249, 1263 (2004). He suggested that a decision "premised on the rationale that gays in Vermont were a 'suspect class,' was likely to trigger a divisive legislative debate . . . ." *Id.*

45. 122 P.3d 781 (Alaska 2005).

and entitled to equal rights, opportunities, and protection under the law."[46] Prior case law had characterized this language as more protective than the Equal Protection Clause,[47] and had established a "sliding scale analysis" for the evaluation of claims under that guarantee.[48] That analysis initially called for a determination as to "what weight should be afforded the constitutional interest impaired by the challenged enactment."[49] That factor was then used to determine the level of the burden on the state to justify its legislation, ranging from a showing that the objective was "legitimate" to a showing of a "compelling state interest."[50] Finally, the court examined the relationship between the state's objectives and the means used to obtain them based on the weight of the interest asserted by plaintiff. This is essentially a means-end "fit;" ranging from a "substantial relationship between means and ends" at the low end of the scale, to a showing that there exists no less restrictive alternative. Finding it unnecessary to decide whether a higher level of scrutiny might be appropriate, the Court concluded that the exclusion of same-sex couples from benefits accorded married couples failed to satisfy the "substantial relationship" test and was therefore unconstitutional.[51]

The Supreme Court of New Jersey has adopted a similar sliding scale approach under the state's constitution, which declares that "all persons . . . have certain national and unalienable rights" including "enjoying and defending life and liberty . . . and of pursuing and obtaining safety and happiness."[52] New Jersey courts have read that provision to contain an equal protection principle and have departed from federal precedent by insisting that there be a "real and substantial relationship" between the differential treatment and the State's articulated interest in the classification. Further, the courts have held that the inquiry entails a balancing of the "nature of the affected right, the extent to which the government restriction intrudes upon it, and the public need for the restriction."[53] In a recent

46. ALASKA CONST. art. 1, § 1.
47. Malabed v. N. Slope Borough, 70 P.3d 416, 429 (Alaska 2003).
48. Alaska Pac. Assur. Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984).
49. *Id.*
50. *Id.*
51. *Id.* at 274.
52. N.J. CONST. art. 1, ¶ 1.
53. Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. Sup. Ct. 1985). *See also*

decision, *Lewis v. Harris*, holding that gay couples have a state constitutional right to the legal attributes of marriage (but stopping short of a holding that they have a right to "marriage" per se), the New Jersey Supreme Court found it unnecessary to engage in that sort of balancing because the state had advanced no reason for denying same-sex couples the tangible benefits of marriage, other than a desire to be in conformity with the majority of states, and that was not a sufficient justification.[54]

IV.

If so-called rationality review is either incoherent or no review at all, as close examination reveals, and if the fundamental rights/suspect class/strict scrutiny analysis developed by the federal courts is overly rigid, which it appears to be, then the situation is one that cries out for creative doctrinal development at the state level. For state courts to undertake such a development is hardly a manifestation of judicial "activism." What is at stake is not some novel interpretation of constitutional language, for no language in any constitution—federal or state—purports to identify the level of deference or scrutiny which a court ought to bring to bear in reviewing legislative enactments against constitutional mandates. Nor is it "activism" even for those courts that insist upon some reason for departing from federal precedent, since the sort of doctrinal development adopted by courts such as those in Vermont, Alaska, and New Jersey, is grounded in views which have been expressed at times by a majority of United States Supreme Court justices, and reflected in some decisions even if not explicitly recognized. The fact that the Court has been reluctant to depart explicitly from its categorical approach may be due in part to concerns over its ability to effectively review and supervise the development of constitutional law through the complex mix of federal and state court decisions throughout the country. However, those concerns are less significant for state courts, which typically operate within more manageable judicial systems.

In any event, the field is open for state courts to consider other alternatives. The term "rationality review," with its overtones of some sort of lunacy test, is probably not useful, whether used in its

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Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 364 A.2d 1016, 1037 (N.J. Sup. Ct. 1976); Right to Choose v. Byrne, 450 A.2d 925, 936 (N.J. Sup. Ct. 1982); N.J. State Bar Ass'n v. State, 902 A.2d 944, 954 (N.J. Sup. Ct. App. Div. 2006).

54. 857 A.2d 259, 272 (N.J. 2005).

highly deferential or more intrusive mode. Despite state courts' articulation of multi-factored balancing tests as a substitute form of analysis, state courts have seldom actually relied upon those tests either to uphold or strike down a statute.[55]

It might be useful for state courts to return to first principles and inquire why some cases are thought to require a higher level of judicial scrutiny. In the context of applying some version of the equality principle, for example, the proposition commends itself that greater scrutiny is required when a statute withholds some benefit or imposes some detriment upon a group defined by inherent characteristics since in such cases there is greater risk that the classification is the product of stereotyping or prejudicial views. Even if the characteristic is the product of choice rather than genes, as in the case of religious affiliation or, as some apparently still believe, in the case of sexual orientation, historical discrimination may provide an equivalent basis for suspicion. Where the claim is based upon some version of liberty or autonomy—whether cast in substantive due process or privacy terms—there exists a greater claim for protection, and consequently a greater burden of justification, in the case of state interference with respect to choices that, to borrow the language of the *Casey* plurality, are "central to personal dignity and autonomy."[56] Finally, it should be recognized that there is a relationship between the equality principle and the liberty principle such that they should be considered together, rather than as distinct categories for purposes of constitutional analysis.

In the context of constitutional challenges to laws that confine marriage to couples of opposite sex, the claim that is being asserted is one of access to a status created by the state.[57] Insofar as the claim relates to the intangible aspects of that status, as distinct from the legal consequences of that status, it is similar in some respects to the claim asserted by the black plaintiffs who sought access to whites-only railroad cars in *Plessy v. Ferguson*[58]—the assertion of a right not to be regarded as second-class citizens,[59] except that the claim is

55. Significantly, the Vermont court in *Baker* acknowledged that "[t]he balance between individual liberty and organized society . . . does not lend itself to the precision of a scale." 744 A.2d at 879.

56. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion).

57. *Romer*, 517 U.S. 620.

58. 163 U.S. 537 (1896).

59. In *Plessy*, Justice Brown rejected the plaintiff's argument that the enforced separation of races stamps the colored race with a "badge of inferiority" by saying: "If this be

weightier by virtue of the significance which our society attaches to the status of marriage,[60] as compared to railroad cars. And, even if a court ascribes sexual orientation to choice rather than genetics, it is clearly the sort of choice that falls within the concept of personhood. Finally, the proposition that homosexuals have historically been the subject of prejudice and discrimination can hardly be denied. One might well consider these elements, considered together, sufficient to support a requirement for some form of "strict" scrutiny, but a court unwilling to accept that conclusion ought nevertheless to be open to alternatives other than the virtually meaningless—and judicially demeaning—concept of deferential rationality review.

so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." (*Id*, at 551)

60. Loving v. Virginia, 388 U.S. 1 (1967).