"WHAT'S IN A NAME?": WHY THE NEW JERSEY EQUAL PROTECTION GUARANTEE REQUIRES FULL RECOGNITION OF SAME-SEX MARRIAGE*

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom . . . is surely to deprive all the State's citizens of liberty without due process of law."

– Chief Justice Earl Warren in Loving v. Virginia[1]

I. Introduction

The New Jersey Supreme Court recently held in *Lewis v. Harris* that the state's constitution requires that committed same-sex couples receive the same statutory rights as married couples.[2] Although the court did not find a fundamental right to same-sex marriage, it held that under the equal protection guarantee and in light of recent legislative trends acknowledging the legitimacy of same-sex relationships, the state constitution could no longer countenance an unequal dispensation of rights.[3] Thus, the court ordered the New Jersey legislature to either extend full marriage rights to same-sex couples or create a "separate statutory structure, such as a civil union" that would grant equivalent rights as marriage, albeit under a different title.[4]

Although "family-rights" activists were quick to denounce the decision as a "violation of the separation of powers" and a measure to "appease homosexual activists,"[5] a review of New Jersey equal protection jurisprudence reveals that the *Lewis* decision was unduly restrained.[6] Despite the court's assertion that it had crafted an "extraordinary remedy" in *Lewis*,[7] the multi-factor balancing test New Jersey typically employs in equal protection cases would have required that the court go beyond civil unions and extend full marriage rights to same-

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[1] 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[2] Lewis v. Harris, 908 A.2d 196, 220-21 (N.J. 2006).

[3] *See* discussion *infra* Part II.B-C.

[4] *Lewis*, 908 A.2d at 220-21.

[5] Peter Sprigg, *Where's Judicial Restraint?*, USA Today, Oct. 27, 2006, at 19A.

[6] *See* discussion *infra* Part IV.

[7] *See Lewis*, 908 A.2d at 222.

sex couples.[8] Nevertheless, the court simply failed to apply the test at all.[9]

This Note demonstrates that New Jersey's three-factor balancing test demands that the state recognize a full constitutional right to same-sex marriage and that the inferior solution of civil unions conflicts with the equal protection guarantee. Part II provides the procedural history and a summary of the relevant arguments made by the New Jersey Appellate Division and Supreme Court in *Lewis v. Harris*. For purposes of comparison and argument, Part III discusses jurisprudence on the distinction between civil unions and marriages in Massachusetts and California. Finally, Part IV examines New Jersey equal protection case law and posits that a proper application of this case law should have guaranteed same-sex couples full marriage rights under the New Jersey Constitution.

II. *Lewis v. Harris*

A. *Procedural History*

On June 26, 2002, seven same-sex couples brought a complaint before the Hudson County Superior Court in New Jersey, alleging that the refusal of various municipal officials to grant them marriage licenses on the grounds that they were not of opposite genders violated both a fundamental right to marry and a right to equality embodied in the New Jersey Constitution.[10] In an expansive opinion, Judge Feinberg of the Superior Court granted the defendants' motion for summary judgment and dismissed the claim.[11] Judge Feinberg rejected the plaintiffs' fundamental right claim, finding that same-sex marriage was neither within the framers' intent nor deeply rooted in the state's traditions.[12] The court also rejected the equal protection claim, holding first that neither marital status nor sexual orientation were grounds for special protection under either the federal or state constitution,[13] and second, that the state's interest in protecting the traditional definition of marriage exceeded the plaintiffs' interests, which were increasingly few due to the recent expansion of gay rights legislation.[14]

The Appellate Division affirmed the lower court's dismissal of the plaintiffs' claim, holding that any legal manifestation of cultural values "must come from democratic persuasion, not judicial fiat."[15] With one judge dissenting,[16] the

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[8] *See* discussion *infra* Part IV.

[9] *See generally Lewis*, 908 A.2d at 221-24.

[10] Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at *1-2 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

[11] *Id.*

[12] *Id.* at *8-16.

[13] *Id.* at *21.

[14] *Id.* at *23-28.

[15] Lewis v. Harris, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div. 2005).

[16] *See id.* at 278-90.

case received an appeal as of right to the New Jersey Supreme Court.

B. *The New Jersey Supreme Court*

On October 25, 2006, the New Jersey Supreme Court held unanimously that the state's refusal to extend marital benefits to same-sex couples violated the New Jersey Constitution.[17] Justice Barry Albin found that current state law precluded "committed same-sex partners" from enjoying "the multitude of social and financial benefits and privileges conferred on opposite-sex married couples."[18] Holding that such an "unequal dispensation of rights" could "no longer be tolerated"[19] under the state constitution, the court ordered the legislature to amend the state's marriage statutes to rectify the inequality and gave it 180 days to do so.[20]

In rendering its opinion, the court first rejected the plaintiffs' argument that the liberty guarantee[21] of the New Jersey Constitution conferred upon the plaintiffs a fundamental right to marriage.[22] Fearing that recognition of an overly broad and expansive right would undercut the state's authority to prohibit incest or polygamy,[23] the court declined to consider whether every adult has the right to "choose whom to marry without intervention of government."[24] Instead, it limited its fundamental rights analysis to the issue of "whether the right to same-sex marriage is deeply rooted in [New Jersey's] history and its people's collective conscience."[25] That question proved simple for the court: citing framers' intent and the nearly unanimous consensus of the remaining states, the court found no support for a fundamental right to same-sex marriage.[26]

The court received the plaintiffs' equal protection argument more warmly. Justice Albin's opinion held that the state's "disparate treatment" of committed same-sex couples "bears no substantial relationship to a legitimate governmental purpose" and violated the state constitution's equal protection guarantee.[27]

[17] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).
[18] *Id.* at 200.
[19] *Id*.
[20] *Id.* at 224.
[21] N.J. Const. art. I, para. 1 ("All persons . . . have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty . . . .").
[22] *Lewis*, 908 A.2d at 206-11.
[23] *Id.* at 208 n.10.
[24] *Id.* at 206.
[25] *Id.* at 208.
[26] *Id.* at 208-11.
[27] *Id.* at 220-21. The New Jersey Constitution contains no express guarantee of equal protection equivalent to the Fourteenth Amendment of the U.S. Constitution. However, the New Jersey Supreme Court has interpreted the "unalienable rights" provision in N.J. Const. art. I, para. 1 to include an implied right to equal protection of the laws. Greenberg v. Kimmelman, 494 A.2d 294, 302-03 (N.J. 1985). Moreover, although the court eschews the "rigid, three-tiered federal equal protection methodology" in favor of a more "flexible"

To support the premise that same-sex couples fall within equal protection, the court cited several judicial rulings and legislative enactments that demonstrated a gradual increase in the recognition of gay rights in New Jersey, specifically the Domestic Partnership Act of 2003 (DPA).[28] According to the court, the DPA established the "nature of the right at stake"[29]—namely, the right to marital benefits[30]—and indicated the legislature's "clear understanding" that committed same-sex couples deserved access to rights and benefits necessary to "enabl[e] these persons to enjoy their familial relationships as domestic partners."[31] Yet the DPA did not go far enough: it failed to provide the full range of state-level marital benefits to committed same-sex couples and further denied domestic partners key workplace and familial benefits.[32] Finding that the disparity between rights afforded same-sex and opposite-sex couples served no justifiable public need, especially in light of the legislature's concession in the DPA that rights and benefits were necessary to "any reasonable conception of basic human dignity and autonomy,"[33] the court held that the state was obligated to provide committed same-sex couples with the full range of state-level marital benefits.[34]

C. *The Right to Marry vs. the Rights of Marriage*

The most jarring aspect of the *Lewis* decision (and the focus of Chief Justice Poritz's dissent) was its refusal to recognize the constitutional right of committed same-sex couples to be formally married.[35] "Plaintiffs have pursued the singular goal of obtaining the right to marry, knowing that, if successful, the rights of marriage automatically follow," observed Justice Albin.[36] "We do not have to take that all-or-nothing approach."[37] The court divided the plaintiffs' claim into two separate issues: whether the state constitution afforded the plaintiffs a right to the benefits and privileges of heterosexual married couples, and whether it also afforded them the right to have their relationship recognized as

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three-factor test, *Lewis*, 908 A.2d at 212 & n.13, the court in *Greenberg* stated its intention to "look to . . . the federal courts . . . for assistance in constitutional analysis." *Greenberg*, 494 A.2d at 302.

[28] *Lewis*, 908 A.2d 208-10.

[29] *Id.* at 212.

[30] *See id.* at 215.

[31] *Id.* (quoting the Domestic Partnership Act, N.J. STAT. ANN. § 26:8A-2(d) (West 2003)).

[32] *See id.* at 215-17.

[33] *Id.* at 217-18 (quoting the Domestic Partnership Act, N.J. STAT. ANN. § 26:8A-2(d) (West 2003)).

[34] *Id.* at 224.

[35] *Id.* at 221-24.

[36] *Id.* at 206.

[37] *Id*.

"marriage."[38] As described above, the court forcefully answered the first question in the affirmative;[39] however, its tone grew notably timorous when confronting the second. "What's in a name?" asked Justice Albin, "and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples?"[40]

The court ultimately directed the legislature to extend full marital rights to same-sex couples either by amending the marriage statutes to permit same-sex marriage, or by enacting a "separate statutory structure, such as a civil union."[41] It presented three arguments in support of its refusal to recognize a constitutional right to full same-sex marriage.[42] First, the court argued that the plaintiffs' equal protection rights would be fully satisfied by the enactment of civil unions which provide same-sex couples rights equivalent to married couples.[43] Second, the court claimed that under the United States Supreme Court case of *Plyler v. Doe,*[44] legislatures "must have substantial latitude to establish classifications" among people, as long as those classifications are not arbitrarily discriminatory.[45] Finally, the court contended that unilaterally redefining marriage would improperly disrespect the legislature's democratic role.[46] None of these arguments withstands scrutiny under New Jersey equal protection precedent.[47] Thus, the court in *Lewis* erred in refusing to find a constitutional right to same-sex marriage.[48]

III. Other State Decisions Regarding Same-Sex Civil Unions

Although the court's decision in *Lewis* implicates only the New Jersey Constitution's equal protection guarantee,[49] the court's previous decision in *Greenberg v. Kimmelman* allows it to "look to both the federal courts and other state

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[38] *Id.*

[39] *See* discussion *supra* Part II.B.

[40] *Lewis*, 908 A.2d at 221.

[41] *Id.* at 220-21. On December 21, 2006, New Jersey Governor Jon Corzine signed a bill creating civil unions. Robert Schwaneberg, *Gays Get Marriage Without the Name: Corzine Signs Bill Creating Civil Unions*, Star-Ledger (Newark, N.J.), Dec. 22, 2006, at 1. The law extends to registered domestic partners "all of the same benefits, protections and responsibilities" conferred on married couples. *Id.* Remarkably, the law would require public officials who perform weddings to also perform same-sex civil unions, although they may refuse to perform either. *Id.*

[42] *See Lewis*, 908 A.2d at 221-24.

[43] *See id.* at 221-22.

[44] 457 U.S. 202 (1982).

[45] *Lewis*, 908 A.2d at 222 (quoting *Plyler*, 457 U.S. at 216).

[46] *Lewis*, 908 A.2d at 222.

[47] *See* discussion *infra* Part IV.D.

[48] *See generally* discussion *infra* Part IV.

[49] *Lewis*, 908 A.2d at 205-06.

courts for assistance in constitutional analysis."[50] Only four states have laws conferring rights and privileges upon same-sex couples substantially equivalent to those of married heterosexual couples.[51] Because Connecticut's legislature passed that state's civil union statute without judicial intervention[52] and the Vermont Supreme Court decided on grounds very similar to *Lewis*, [53] I will first consider arguments made in the two most recent cases decided in Massachusetts and California.

A. *Massachusetts*

The Massachusetts Supreme Judicial Court became the first court in the nation to mandate same-sex marriage under a state constitution in the watershed case of *Goodridge v. Department of Public Health.*[54] The lengthy opinion held that limiting marriage to heterosexual couples failed to meet rational basis review for either due process or equal protection,[55] and it accordingly redefined common law civil marriage to mean the "voluntary union of two persons as spouses, to the exclusion of all others."[56] Entry of judgment was stayed for 180 days to allow the legislature to take action in light of the opinion.[57]

Unlike the *Lewis* decision, the *Goodridge* opinion never offered the state the alternative of a parallel statutory structure, such as a civil union, despite the fact that civil unions were already legal in neighboring Vermont and Connecticut.[58] Within months, the Massachusetts legislature prepared both a statute authorizing civil unions and a proposed constitutional amendment banning same-sex marriage, for use in the event that the court held the civil union statute unconstitutional.[59]

However, in an advisory opinion to the Senate delivered on February 3, 2004, the Supreme Judicial Court held that nothing less than full-fledged mar-

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[50] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

[51] *See* CONN. GEN. STAT. § 46b-36nn (2007); CAL. FAM. CODE § 297.5 (2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999).

[52] *See* CONN. GEN. STAT. § 46b-36nn (2007).

[53] Baker v. State, 744 A.2d 864 (Vt. 1999).

[54] *See Goodridge*, 798 N.E.2d 941.

[55] *Id.* at 960-61.

[56] *Id.* at 969.

[57] *Id.* at 970.

[58] *See* CONN. GEN. STAT. § 46b-36nn (2007); *see also* Baker v. State, 744 A.2d 864 (Vt. 1999).

[59] Raphael Lewis, *Delay Eyed on Marriage Amendment – Senate Leader Awaits SJC View on Civil Unions*, BOSTON GLOBE, Jan. 13, 2004, at A1. Although the Massachusetts Supreme Judicial Court ultimately rejected the civil union statute in Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004), to date the proposed constitutional amendment has not been passed.

riage would suffice under the Massachusetts Constitution.[60] The court ruled that the segregation of same-sex and opposite-sex unions advanced no legitimate state interest and served only to relegate same-sex couples to a separate, second-class status.[61] Such a result was irreconcilable with the equal protection demands of the state constitution, as the court explained in an overt invocation of the landmark Supreme Court case of *Brown v. Board of Education*[62]: "The history of our nation has demonstrated that separate is seldom, if ever, equal."[63]

The differences between the holdings in *Lewis* and *Goodridge* are not surprising considering the different analytical postures taken by each court toward same-sex marriage. While the court in *Lewis* confined its argument strictly to the material and statutory rights and benefits conferred upon married couples,[64] the court in *Goodridge* went to great lengths to describe the fuzzier, more intangible benefits of marriage:

> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family . . . . Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.[65]

In addition, the court in *Lewis* refused to be constrained by Supreme Court precedent, while the court in *Goodridge* embraced Supreme Court precedent as further support for its holding.[66] In holding that marriage is a civil right of "fundamental importance," the court in *Goodridge* liberally cited Supreme Court precedent regarding the freedom of marriage,[67] whereas in *Lewis* the court distinguished those same cases, finding them "fact-specific" and inapplicable to the specific question of same-sex marriage.[68]

B. *California*

In February 2004, shortly after *Goodridge*, California charged headfirst into the same-sex marriage firestorm when San Francisco Mayor Gavin Newsom

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[60] *Opinions of the Justices to the Senate*, 802 N.E.2d at 565.

[61] *Id.* at 569-70.

[62] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[63] *Opinions of the Justices to the Senate*, 802 N.E.2d at 569.

[64] *See* Lewis v. Harris, 908 A.2d 196, 206 (N.J. 2006).

[65] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954-55 (Mass. 2003).

[66] *See id.* at 957; *see also* Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006).

[67] *Goodridge*, 798 N.E.2d at 957 & n.14. As precedent, the Massachusetts court cited Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a law requiring a defendant to seek court consent to marry violated equal protection), Loving v. Virginia, 388 U.S. 1 (1967) (holding that a state's interracial marriage ban violated equal protection), and Skinner v. Oklahoma, 316 U.S. 535.

[68] *Lewis*, 908 A.2d at 210.

issued a controversial order for county marriage licenses to be issued "on a non-discriminatory basis, without regard to gender or sexual orientation."[69] The order directly defied Proposition 22, which voters approved in 2000 and which expressly limited civil marriage to opposite-sex couples.[70] Newsom justified his mutiny in an open letter to the San Francisco County Clerk, arguing that his obligation to uphold the California Constitution's equal protection clause required him to disobey a discriminatory statute.[71] After six months of highly-publicized marriage ceremonies, the California Supreme Court held that Newsom had exceeded his authority as state executive and public official and issued a writ of mandate ordering all same-sex marriages nullified.[72]

In response to the writ, the City of San Francisco and several other parties filed complaints directly challenging Proposition 22's constitutionality and other statutes prohibiting same-sex marriage.[73] The San Francisco County Superior Court consolidated the cases and issued a single opinion on March 14, 2005, in favor of the plaintiffs.[74] Writing for the court, Judge Kramer held that the state's preclusion of same-sex marriage bore no rational relationship to a legitimate state purpose, and thus violated the state's equal protection guarantee, which mirrors the Fourteenth Amendment.[75] Moreover, Judge Kramer held that the laws were subject to *strict scrutiny*—not mere rational basis review.[76] Judge Kramer further held that banning same-sex marriage was effectively a form of gender discrimination, a "suspect classification" under both California and federal constitutional law:

> If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. . . . The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications.[77]

The California Court of Appeal unequivocally reversed Judge Kramer's decision in *In re Marriage Cases*,[78] holding that the courts had no authority to

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[69] Lockyer v. City and County of San Francisco, 95 P.3d 459, 464-65 & n.4 (Cal. 2004). Because San Francisco is a consolidated city-county, the Mayor exercises executive authority over both city and county affairs.

[70] Proposition 22 has been codified as CAL. FAM. CODE § 308.5 (2004) ("Only marriage between a man and a woman is valid or recognized in California.").

[71] *Lockyer*, 95 P.3d at 464-65 & n.4.

[72] *Id.* at 499.

[73] CAL. FAM. CODE § 300(a) (2004) ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . .").

[74] *In re* Coordination Proceeding, No. 4365, 2005 WL 583129, at *1 (Cal. App. Dep't Super. Ct. Mar. 14, 2005).

[75] *See id.* at *2-3; *see also* U.S. CONST. amend. XIV.

[76] *In re Coordination Proceeding*, 2005 WL 583129, at *2-3.

[77] *Id.* at *9.

[78] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006).

recognize a right to same-sex marriage.[79] Four critical holdings grounded the opinion. First, the court held that same-sex marriage was not a historically recognized fundamental right.[80] Second, the court held that discrimination against same-sex couples was not gender discrimination as the lower court had held, as it did not single out a specific sex for unequal treatment, and thus was not entitled to strict scrutiny.[81] Third, the court ruled that gays and lesbians were not a "suspect classification" deserving of strict scrutiny, as there was inconclusive evidence that homosexuality is an "immutable" trait.[82] Finally, the court affirmed the ban on same-sex marriage under rational basis review, holding that the state's interest in preserving the traditional definition of marriage and upholding popular sentiment as expressed under Proposition 22 were both legitimate state interests.[83]

The California Supreme Court granted review on December 20, 2006.[84] A ruling is expected by the end of 2007.[85]

IV. Why Same-Sex Marriage Should Have Been Recognized Under New Jersey's Equal Protection Guarantee

Although the New Jersey Supreme Court found that the New Jersey Constitution's "liberty" guarantee did not grant a fundamental right to same-sex marriage, the court conceded that the state equal protection guarantee conferred upon the plaintiffs the *rights* of married couples.[86] Nonetheless, the court asserted that equal protection could not take the final step of endowing the plaintiffs with the *title* of married couples, instead allowing the legislature to create a "parallel statutory structure" specifically for committed same-sex couples.[87] In refusing to grant the plaintiffs the full title of marriage, the court failed properly to apply New Jersey's equal protection jurisprudence.

A. *Equal Protection in New Jersey*

Analysis of the equal protection guarantee under New Jersey constitutional

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[79] *Id.* at 726. The question of civil unions was essentially obviated by the Domestic Partner Rights and Responsibilities Act, Cal. Fam. Code § 297.5, which came into effect in 2005 and held that registered domestic partners were entitled to the same rights, responsibilities and privileges as married spouses under state law.

[80] *Id.* at 699-703.

[81] *Id.* at 706-09.

[82] *Id.* at 713.

[83] *Id.* at 717-27.

[84] *In re* Marriage Cases, No. S147999, 2006 WL 3923926, at *1 (Cal. Dec. 20, 2006) (granting petition for review).

[85] Maura Dolan, *State High Court to Review Ban on Same-Sex Marriage*, L.A. Times, Dec. 21, 2006, at A1.

[86] Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006).

[87] *Id.* at 224.

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law differs markedly from its federal counterpart.[88] The New Jersey Constitution's "Liberty Clause" holds that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty."[89] Although the Liberty Clause contains no express mention of equal protection, the New Jersey Constitution has long been read to confer a guarantee to equal protection of the laws under this broad guarantee of rights.[90]

However, in considering the scope of its equal protection guarantee, New Jersey eschews the traditional two-tiered, suspect classification analysis favored by the U.S. Supreme Court and many state courts[91] in favor of a more fluid balancing test, which pits the plaintiff's harm against the public need for the alleged inequality.[92] The New Jersey Supreme Court refined the test into a three-factor balancing test in *Greenberg v. Kimmelman*: in balancing the harm against the justification for such inequality, courts must specifically consider (1) *the nature of the right* affected by the restraint, (2) *the extent to which government restriction invades that right*, and (3) *the public need for any such restriction*.[93] The New Jersey equal protection guarantee's overarching goal is to "protect against injustice and against the unequal treatment of those who should be treated alike."[94]

In a section spanning almost fifteen pages, the court in *Lewis* argued each prong of this test in support of its decision to grant "committed same-sex couples . . . the right to the statutory benefits and privileges conferred on heterosexual married couples."[95] However, when faced with the subsequent question of whether such rights included the right to "call their committed relationships by the name of marriage,"[96] the court unceremoniously dismissed the plaintiffs' equal protection claim without considering the balancing test:

> We are mindful that in the cultural clash over same-sex marriage, the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties. Under our equal pro-

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[88] *Lewis*, 908 A.2d at 212 n.13.

[89] N.J. CONST. art. I, para. 1.

[90] *Lewis*, 908 A.2d at 211-12.

[91] *See discussion*, *supra* notes 81-83. R

[92] Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306, 314-15 (N.J. 2003).

[93] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (emphases added).

[94] *Id.* The New Jersey Supreme Court has repeatedly warned that equal protection questions are not subject to a "mechanical framework." *Lewis*, 908 A.2d at 227 (citing several cases). Nonetheless, the court consistently employs the three-prong *Greenberg* test as a means of providing a "flexible analytical framework for the evaluation of equal protection and due process claims." *Id.* (quoting *Sojourner A.*, 828 A.2d at 315). Thus, despite its seemingly mechanical nature, the test continues to be the court's overwhelming preference when balancing state and personal interests under the equal protection guarantee.

[95] *Lewis*, 908 A.2d at 212.

[96] *Id.* at 221.

tection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.[97]

This failure to apply the traditional balancing test betrays the purpose and principle behind New Jersey's equal protection guarantee. The balancing test demonstrates that the plaintiffs' right to be married outweighs any state interest in denying them the title of "marriage."[98] Thus, had the New Jersey Supreme Court faithfully applied this test to this final issue, the court would have concluded that the New Jersey equal protection guarantee requires that committed same-sex couples be granted the title of marriage, not merely its associated rights.

B. *The Nature of the Asserted Right*

The first factor of the *Greenberg* test concerns the "nature" of the plaintiffs' asserted right.[99] Under New Jersey case law, this first prong considers the extent to which New Jersey recognizes the right's existence, and fundamental and traditionally recognized rights appear to fare better in the balancing test than those which are novel or quixotically defined. For instance, in *Sojourner A. v. New Jersey Department of Human Services*, the New Jersey Supreme Court considered whether the Department's policy of refusing to increase welfare payments to a recipient after the birth of an additional child violated equal protection.[100] In analyzing this first prong of the balancing test, the court emphasized that the asserted right—the "woman's right to make reproductive decisions"—was a "most basic right," central to a principle of individual autonomy embodied within the state constitution.[101] By contrast, in *George Harms Construction Co. v. New Jersey Turnpike Authority*, the court asserted that "[t]he right to employment on a local public works project . . . is not [a] fundamental" right protected under the constitution.[102] Thus, whether the right is deemed fundamental, completely novel, or somewhere in between, its weight under this prong is commensurate with its degree of recognition under New Jersey law.

1. A Right to Marry, Not a Right to Same-Sex Marriage

How a right is defined determines the weight it will carry in a legal challenge. In analyzing the plaintiffs' initial fundamental rights claim, the court in *Lewis* recognized that the phrasing of the asserted right "may dictate whether

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[97] *Id.*

[98] *See* discussion *supra* Parts II.B-C.

[99] *Greenberg*, 494 A.2d at 302.

[100] 828 A.2d 306 (N.J. 2003).

[101] *Id.* at 315.

[102] 644 A.2d 76, 88 (N.J. 1994) (quoting United Bldg. & Constr. Trades Council v. Mayor & Council, 443 A.2d 148, 161 (N.J. 1982)).

[the alleged right] is deemed fundamental."[103] To demonstrate this, the court briefly discussed the U.S. Supreme Court case of *Washington v. Glucksberg*, which involved a challenge to a Washington law prohibiting assisted suicide.[104] According to the majority in *Lewis*, the death knell for the plaintiffs' claim sounded when the U.S. Supreme Court refused to frame the disputed right as the "liberty to choose how to die," opting instead for the significantly more narrow "right to commit suicide with another's assistance."[105] In similar fashion, the *Lewis* majority summarily rejected the plaintiffs' characterization of the right in question as a right to marriage, as well as the dissent's claim of a "liberty to choose" to marry.[106] Instead, the court framed the issue as the "right to same-sex marriage," a right which it quickly and easily found not to be fundamental.[107]

The New Jersey Supreme Court has not always been so ungenerous with its phrasing of rights in equal protection cases. In two abortion rights cases, the court accepted an expansive definition of the plaintiffs' rights that virtually assured the continued availability of abortions.[108] In *Right to Choose v. Byrne*, the court found that a woman's right to Medicare coverage of an abortion fell within a "fundamental right to privacy."[109] Likewise in *Planned Parenthood of Central New Jersey v. Farmer*, the court phrased the question of a minor's right to receive an abortion without parental notification broadly as a "woman's right to control her body and her future"—a significantly broader framing of the issue than may have been warranted.[110]

In *Lewis*, the court defended its phrasing of the issue by arguing that a more "expansively stated formulation . . . would eviscerate any logic behind the State's authority to forbid incestuous and polygamous marriages."[111] Yet this argument disregards the third prong of the *Greenberg* test—whether there exists a public need for a restriction of the right—which exists specifically to allow for government curtailing of rights in the popular interest.[112] This third prong allows the state to limit a constitutionally recognized right where its uninhibited practice would conflict with a greater public need.[113] Incest and polygamy would result in societal and public health consequences which, under

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[103] *Lewis*, 908 A.2d at 207.

[104] *Id.* (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

[105] *Id.* (quoting *Glucksberg*, 521 U.S. at 722-24).

[106] *Lewis*, 908 A.2d at 208 & n.10.

[107] *Id.* at 208, 210.

[108] *See* Planned Parenthood of Central N.J. v. Farmer, 762 A.2d 620, 632 (N.J. 2000); Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982).

[109] *Right to Choose*, 450 A.2d at 937.

[110] *Planned Parenthood*, 762 A.2d at 632.

[111] *Lewis*, 908 A.2d at 208 n.10.

[112] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985); *see also* discussion *infra* Part IV.D.

[113] *Greenberg*, 494 A.2d at 302.

Greenberg's third prong, would justify the state in imposing a limitation.[114] Few, if any, of those same consequences exist with same-sex marriage.[115] Thus, by applying the full three-prong *Greenberg* test, the court could have given due consideration to a general right to choose to marry while still filtering out socially undesirable consequences, rather than artificially limiting its discussion of civil rights.

Whether intended or not, it is ultimately apparent that the court's restrictive phrasing of the right provided a convenient means to rule against the plaintiffs, whereas a more expansive right would have forced the court to accept a right to same-sex marriage. As Chief Justice Poritz recognized in her *Lewis* dissent, the plaintiffs' asserted right "has been framed 'so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it.' "[116]

The question that the New Jersey Supreme Court should have considered was, quite simply, whether the plaintiffs had a constitutional right to marry. Though this formulation of the right may seem unduly sweeping, courts have used such phrasing in the past to recognize the marriage rights of groups who have traditionally suffered discrimination. In the most famous example of *Loving v. Virginia*, Chief Justice Warren held that Virginia's anti-miscegenation statute violated equal protection because it "restrict[ed] the *freedom to marry* solely because of racial classifications . . . ."[117] The Court's analyses regarding both equal protection and due process revolved around the "basic civil right" of marriage, not the more restrictive question of whether the plaintiff had a fundamental right to interracial marriage.[118] A decade later, the Court extended *Loving* in *Zablocki v. Redhail*, holding that a state statute requiring any resident owing child support payments to seek court approval prior to being married "interfere[s] directly and substantially with the *right to marry*."[119] In *Goodridge*, the Massachusetts Supreme Judicial Court held that "[w]ithout the *right*

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[114] *See* Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 128-32 (distinguishing polygamy from same-sex marriage due to concerns about children's, women's, and general economic welfare).

[115] *See id.*; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961-67. The *Goodridge* court rebutted several commonly asserted arguments against same-sex marriage, none of which directly involved health concerns. *Id.* The court also countered the respondents' social rationales, such as the need to provide favorable conditions for child upbringing and future procreation; it argued, *inter alia*, that stable, dual-parent households are the best environments for child-rearing regardless of sexual orientation, and that no evidence shows that same-sex couples are more likely to beget homosexual children. *Id.*

[116] *Lewis*, 908 A.2d at 228 (quoting Hernandez v. Robles, 855 N.E.2d 1, 23-24 (N.Y. 2006) (Kaye, C.J., dissenting)).

[117] 388 U.S. 1, 12 (1967) (emphasis added).

[118] *Id.*

[119] 434 U.S. 374, 387 (1978) (emphasis added).

to marry," gay and lesbian individuals are "excluded from the full range of human experience and denied full protection of the laws."[120] In none of these three opinions did the courts decline to rule on the basis of a generalized right to marry for fear that its recognition would open the floodgates to legalized incest and polygamy. Since the New Jersey Supreme Court in *Lewis* had already held that same-sex couples had a constitutional right to the legal benefits incident to marriage,[121] the first prong of the *Greenberg* test compels the court to examine the nature of the plaintiffs' right to be married.

2. The Right to Marry is a Fundamental Human Right

There is "universal agreement" that the right to marry is fundamental under New Jersey law.[122] As discussed in the preceding paragraph, the fundamental nature of this right has not historically been diminished simply because it was asserted by traditionally discriminated groups, such as racial minorities and homosexuals, or socially unsavory persons, such as prison inmates[123] and delinquent parents.[124] The majority in *Lewis* contends that the plaintiffs' rights are less critical "now that equal rights and benefits must be conferred on committed same-sex couples."[125] "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous" according to Chief Justice Marshall of the Massachusetts Supreme Judicial Court.[126] To grant the rights *of* marriage without the right *to* marry is to forget that the institution of marriage is significantly greater than the sum of its legal benefits—it is the right to *be married*, to undergo the process of marriage, to call one's union a marriage, and to demand that that marriage be recognized by others and the state.[127] Thus, the issue of whether the plaintiffs in *Lewis* have the right to call their unions "marriages" is central and critical to the universally recognized fundamental right to marry and tips the first prong of the *Greenberg* test strongly in the plaintiffs' favor under recognized legal precedent.

C. *The Extent of Government Intrusion*

Under the second prong of the *Greenberg* balancing test, a court would consider the degree to which the challenged statute actually invades the plaintiffs'

[120] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003) (emphasis added).
[121] *Lewis*, 908 A.2d at 220-21. *See also supra* notes 29-37 and accompanying text. R
[122] *Id.* at 228 (Poritz, C.J., dissenting from majority decision finding no liberty right to same-sex marriage).
[123] Turner v. Safley, 482 U.S. 78 (1987).
[124] *See supra* notes 119-120. R
[125] *Lewis*, 908 A.2d at 221.
[126] Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).
[127] *See* discussion *infra* Part IV.C.1.

asserted right.[128] In applying this factor, the majority in *Lewis* limited its discussion solely to effects of the New Jersey same-sex marriage ban on the rights and benefits of committed same-sex couples.[129] The court acknowledged that the New Jersey Domestic Partnership Act[130] gave committed same-sex couples certain rights and benefits that married couples enjoy.[131] It held, however, that the DPA was not sufficient to defeat the plaintiffs' equal protection claims, given the vast number of statutory rights afforded to married couples from which committed same-sex couples were excluded.[132] These rights included various workplace benefits, such as mandatory health insurance and sick-leave,[133] as well as parental rights, such as visitation and child support.[134] Thus, the court held that equal protection mandated that same-sex couples receive benefits and protections identical to those of their heterosexual counterparts.[135]

The majority's decision to limit discussion solely to the tangible statutory benefits and rights incident to marriage led to the conclusion that civil unions would be a sufficient remedy, and that plaintiffs would suffer no additional harm once these incidental rights were guaranteed.[136] This narrow view left the most critical constitutional question virtually unanswered: whether equal protection also guaranteed the plaintiffs the right to marry. Although the majority dismisses the issue as little more than a semantic squabble,[137] several sources demonstrate that a refusal to christen same-sex unions as marriages significantly harms the affected couples both tangibly and intangibly.[138]

1. Married Couples Enjoy Intangible Social and Emotional Benefits that Civil Union Partners Do Not

First and most importantly, marriage confers intangible benefits far beyond those enumerated in statutes.[139] Dissenting in *Lewis*, Chief Justice Poritz argues that the institution of marriage bears a "deep and symbolic significance" to married couples and their families.[140] "Civil marriage is at once a deeply personal commitment . . . and a highly public celebration of the ideals of mutu-

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[128] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).
[129] *Lewis*, 908 A.2d at 206.
[130] New Jersey's legislature amended its marriage laws in response to the *Lewis* decision. *See supra* note 41. **R**
[131] *Lewis*, 908 A.2d at 214-15.
[132] *Id.* at 217.
[133] *Id*. at 216.
[134] *Id*.
[135] *Id*. at 224.
[136] *Id.* at 223.
[137] *Id.* at 221.
[138] *See* discussion *infra* Part IV.C.1.
[139] *See* discussion *supra* Part IV.B.2.
[140] *Id.* at 225.

ality, companionship, intimacy, fidelity, and family."[141] She also quotes from the plaintiffs' affidavits, which poignantly describe the social and emotional benefits denied by New Jersey's statutory ban:

> My parents long to talk about their three married children, all with spouses, because they are proud and happy that we are all in committed relationships. They want to be able to use the common language of marriage to describe each of their children's lives. Instead they have to use a different language, which discounts and cheapens their family as well as mine.[142]

2. Civil Unions Create a "Separate but Equal" Structure

David S. Buckel, Director of the Lambda Legal Defense, further explores the harm caused by a parallel civil union scheme.[143] The crux of Buckel's argument is that civil unions confer an inferior designation on same-sex couples that reduces them to second-class status, inviting "bias and discrimination."[144] In essence, civil unions create a "separate but equal" regime no different from those the United States Supreme Court condemned in *Brown v. Board of Education* and *United States v. Virginia.*[145] Just as "[t]he official separation of the races was a stimulant to racial prejudice" and the denial of equal educational opportunities to women "hinged on the message of inferiority," the official segregation of married heterosexual couples and civilly united same-sex couples smacks of discrimination founded upon traditional intolerance.[146]

However, Professor Dwight Duncan finds *Brown* wholly inapplicable to the issue of same-sex marriage.[147] Unlike race, which is "innate, inherited, and independent of any choices that may be made," Duncan contends that sexual orientation is "behavioral," "subject to change, and is not necessarily immutable," and as such has "traditionally been regulated by moral norms as well as legal rules."[148] Moreover, Duncan draws a contrast between the discrimination

[141] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 954-55 (Mass. 2003)).
[142] *Id.* at 226.
[143] *See* David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73 (2005).
[144] *Id.* at 75.
[145] *Id.* at 74-75 (citing Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) and United States v. Virginia, 518 U.S. 515 (1996) (holding that the establishment of a separate women's military academy equivalent to the all-male Virginia Military Institute violated equal protection)).
[146] Buckel, *supra* note 143, at 75.
[147] *See* Dwight G. Duncan, *How Brown is Goodridge? The Appropriation of a Legal Icon*, 14 B.U. PUB. INT. L.J. 27 (2004).
[148] *Id.* at 34-35.

blacks suffer and that which gays and lesbians suffer, writing that gays and lesbians "do not share the same bitter legacy of slavery, lynching and disenfranchisement as African-Americans."[149]

The problem with Duncan's argument is twofold. First, it is founded on the premise that individuals *choose* their sexual orientation and that homosexuality is a mutable characteristic like a personality or a religion, a premise which science has rendered, at best, highly suspect.[150] Second, Duncan's contention that same-sex couples lack a bitter history of violent discrimination, in addition to being somewhat inaccurate, is wholly irrelevant to the issue of equal protection. Equal protection guards against "unequal treatment of those who should be treated alike,"[151] regardless of the degree to which a community may or may not deserve it.[152]

3. The New Jersey Constitution Reserves Certain Rights Specifically to Married Couples

Finally, the decision in *Lewis* raises the issue of constitutional-level marital rights. Although the court in *Lewis* mandates that same-sex couples receive all statutory and (presumably) common law rights currently enjoyed by heterosexual married couples, it is unclear whether this applies to rights and privileges explicitly reserved for "spouses" under the New Jersey constitution. The constitution reserves four rights expressly to "spouses":

(1) the right to be present at the trial of a spouse's homicide and to receive any statutory rights and remedies;[153]
(2) the right to tax deductions resulting from a spouse's service in the military;[154]
(3) the right to continued tax deductions after the death of a spouse who, at the time of his or her death, was over the age of 65 or permanently disabled;[155] and
(4) the right to property tax credits or rebates owed to a deceased spouse under a legislatively enacted homestead statute.[156]

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[149] *Id.* at 35.

[150] *See* Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How It Is Met*, 53 CLEV. ST. L. REV. 545, 557-72 (2005-06) (citing numerous psychological, biological, and genetic studies indicating that sexual orientation is not determined by choice).

[151] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

[152] *See also supra* notes 123-124 (conferring equal protection on delinquent fathers and prison inmates). R

[153] N.J. CONST. art. I, para. 22.

[154] N.J. CONST. art. VIII, § I, para. 3. This statute is admittedly of questionable relevance to this Note, as openly gay and lesbian individuals are currently barred from military service.

[155] N.J. CONST. art. VIII, § I, para. 4(c).

[156] N.J. CONST. art. VIII, § 1, para. 5.

Although the opinion in *Lewis* is silent on the question of whether partners united under a civil union can be considered "spouses" under the law or the state constitution, the decision emphatically recognized the legislature's role in establishing classifications and titles.[157] To this end, the state legislature has spoken—all of New Jersey's statutes, which have been amended to enact civil unions, no longer refer simply to "spouses," but rather "spouses or partners in a civil union."[158] Instead of simply redefining the term "spouse" to include civil union partners, the legislature found it necessary to distinguish between the two terms in every instance in its statutes.[159] Thus, the constitution's reference to spouses, and not partners, may deprive same-sex couples of constitutional-level spousal privileges. The California Court of Appeal reached the same conclusion: although California's domestic partner legislation is functionally equivalent to a civil union statute, it "does not (because it cannot) impact rights and responsibilities that are expressly reserved for married couples under the California Constitution . . . ."[160] Highly revealing in *Lewis* is the majority's choice of words in summarizing its holding: "[E]very *statutory* right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples."[161] It is not unreasonable to assume that constitutional rights, both express and inferred by case law, will continue to be denied to same-sex civil union partners.

Thus, under the second prong of the *Greenberg* balancing test, the effect of the continued statutory ban on same-sex marriage is broad and extensive. Notwithstanding the argument that a prohibition on same-sex marriage limits a person's fundamental right to marry a partner of his choice, the refusal of the legislature to recognize same-sex marriage denies gay and lesbian couples intangible social and emotional benefits, imposes a segregative regime that stamps same-sex couples with a badge of inferiority, and continues to deny tangible benefits guaranteed to spouses under the New Jersey constitution. Consequently, the second prong of the test also weighs strongly in favor of an equal protection right to same-sex marriage.

D. *The Public Need for the Restriction*

The final prong of the three-prong *Greenberg* analysis considers whether there exists a public need to restrict an asserted right.[162] Thus, even if a court finds that same-sex couples possess a clearly recognizable right to marry under the equal protection guarantee, a sufficiently strong government interest may curtail that right.

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[157] Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006).
[158] *See, e.g.*, N.J. STAT. ANN. § 37:2-32(a) (2007) (effective Feb. 19, 2007).
[159] *Id.*
[160] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 695 (Cal. Ct. App. 2006).
[161] *Lewis*, 908 A.2d at 223 (emphasis added).
[162] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

1. Civil Unions Do Not Sufficiently Extinguish the Plaintiffs' Equal Protection Claim

In *Lewis*, the majority was unable to "discern any public need that would justify" conferring lesser statutory benefits on same-sex couples and their families.[163] However, the court did articulate three reasons why its refusal to extend full marriage rights would best serve the public interest.[164] First, it argued that civil unions would fully satisfy the plaintiffs' equal protection rights, and, thus, that civil unions would not be restrictive.[165] As this Note discusses in detail above, the court's argument presumes that the equal protection guarantee requires only that the plaintiffs receive the rights *of* marriage, not the right *to marry*.[166] Thus, it fails to consider the extent to which a civil union scheme denies same-sex couples substantial rights, privileges, and benefits possessed by married couples beyond those conferred by statutory and common law.[167] If equal protection is truly intended to protect against the "unequal treatment of those who should be treated alike,"[168] the civil union solution cannot possibly satisfy equal protection requirements.

2. *Plyler v. Doe* Does Not Require that Courts Defer to Legislative Classifications that are Discriminatory and Not Based on the Furtherance of a Substantial State Goal

Second, the court contended that under the United States Supreme Court case of *Plyler v. Doe*[169] legislatures have "substantial latitude to establish classifications" among individuals.[170] Thus the court suggested that it would best serve the public interest to allow the New Jersey legislature to elect the most prudent path regarding same-sex marriage.[171]

This reliance on *Plyler* is sorely misplaced. In *Plyler*, the Court addressed the question of whether Texas could constitutionally bar undocumented Mexican children from the public school system.[172] In considering whether the bar violated equal protection, Justice Brennan appeared to acknowledge a legislature's right to establish legal classifications bearing "some fair relationship to a legitimate public purpose."[173] However, in the very next paragraph—which *Lewis* does not cite—Brennan repudiated the right, arguing that the Court

[163] *Lewis*, 908 A.2d at 218.
[164] *See* discussion *supra* Part II.C.
[165] *Lewis*, 908 A.2d at 221.
[166] *See* discussion *supra* Part IV.B.1.
[167] *See id.*
[168] *Greenberg*, 494 A.2d at 302.
[169] 457 U.S. 202 (1982).
[170] *Lewis*, 908 A.2d at 222 (quoting *Plyer*, 457 U.S. at 216).
[171] *Id.*
[172] Plyler, 457 U.S. at 205.
[173] *Id.* at 216.

"would not be faithful to [its] obligations under the Fourteenth Amendment if [it] applied so deferential a standard to every classification."[174] Indeed, even after acknowledging that undocumented aliens are not a suspect class and education not a fundamental right,[175] Brennan held that the challenged statute violated equal protection all the same, as it imposed "a lifetime hardship on a discrete class . . . not accountable for their disabling status."[176] Discrimination against such a class "can hardly be considered rational unless it furthers some substantial goal of the State."[177] Thus, although a legislature may establish classifications in a general sense, its ability to do so under *Plyler* is greatly restricted when such classifications impose "lifetime hardships" upon "a discrete class" of people not justified by the furtherance of a substantial state goal.[178] The court in *Lewis* should have applied this standard. Moreover, Justice Albin's suggestion that refusing to mandate same-sex marriage serves the proper goal of deference to the legislature is circular under the *Plyler* standard. Courts should exercise judicial restraint only in furtherance of some other compelling purpose; it is not itself an end that justifies perpetuating discrimination.

3. Discrimination Imposed by Civil Unions Does Not Outweigh the Need to Preserve Marriage's Traditional Definition

If deference itself is not a goal, what goals *do* justify a parallel civil union scheme? In *Lewis*, the court's holding that same-sex couples are entitled to full and equivalent statutory rights obviates the need to address the traditional criticisms of same-sex marriage, such as the need to promote procreation, provide optimal child-rearing environments, and so forth.[179] This leaves the majority with only one remaining argument: that permitting civil unions in lieu of marriage preserves the "shared societal meaning of marriage[,] passed down through the common law into our statutory law . . . ."[180] Any alteration of this term, according to Justice Albin, "would render a profound change in the public consciousness of a social institution of ancient origin."[181] Thus, a principled respect for the doctrine of judicial restraint requires that a change in a traditional term "come about through civil dialogue and reasoned discourse, and the considered judgment" of the legislature."[182] There is irony in Albin's argument–after a perfunctory dismissal of the plaintiffs' pleas for the right to be

[174] *Id.*
[175] *Id.* at 223.
[176] *Id.*
[177] *Id.* at 224.
[178] *Id.* at 223.
[179] Lewis v. Harris, 908 A.2d 196, 223 (N.J. 2006); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961-68 (Mass. 2003) (providing a comprehensive refutation of several traditional arguments against same-sex marriage).
[180] *Lewis*, 908 A.2d at 222.
[181] *Id.*
[182] *Id.*

married—"what's in a name?"[183]—the majority does an about-face, bestowing mythical qualities upon the "name" of marriage and waxing lyrically about its role as the keystone of society.[184] One might conclude from Albin's opinion that "marriage" is only a trivial matter in the hands of those who have never enjoyed it.

Nor is the preservation of traditional terms a sufficiently strong interest to counterbalance the infringement on the plaintiffs' right to marry. Writing for the Massachusetts Supreme Judicial Court, Chief Justice Marshall acknowledged the "deep-seated religious, moral, and ethical convictions [held by many] that marriage should be limited to the union of one man and one woman," and affirmed their right to hold those convictions."[185] Nonetheless, she maintained that civil marriage has always been "a wholly secular institution," and that "[n]o religious ceremony has ever been required to validate a . . . marriage."[186] It thus follows that where a statute seeks to deprive a class of persons from enjoying the full benefits of a legal, secular institution, that statute cannot be upheld "under the guise of protecting 'traditional' values, even if they be the traditional values of the majority . . . ."[187] The same argument is applicable to New Jersey, which also recognizes secular civil marriage; although the traditions and values of the people are entitled to deference and respect, such values have never been sufficient to perpetuate a clear violation of equal protection rights.[188] Without a compelling justification for civil unions, the third prong of the *Greenberg* test falls in favor of plaintiffs' right to marry.

V. CONCLUSION

Despite a history of support for equal protection rights in other controversial areas of the law,[189] the New Jersey Supreme Court revealed in *Lewis v. Harris* that it was not ready to grant coordinate respect to the equal protection rights of same-sex couples. The Massachusetts Supreme Judicial Court had already paved a legal road by refuting several of the most commonly asserted arguments against same-sex marriage and by holding firm to its conviction that same-sex couples were denied constitutional rights, even by a parallel civil union scheme.[190] The New Jersey Supreme Court concurred to the extent that

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[183] *Id.* at 221.

[184] *Id.*

[185] Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (quoting *Goodridge*, 798 N.E.2d at 948).

[186] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003).

[187] *Opinions of the Justices to the Senate*, 802 N.E.2d at 570.

[188] *See* discussion *supra* Part IV.B.1 (describing the extension of marriage rights to multiracial couples and delinquent fathers, despite a lack of any such historical precedent).

[189] *See* Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 632 (N.J. 2000); *see also* Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982).

[190] *See Opinions of the Justices to the Senate*, 802 N.E.2d at 570; *see also Goodridge*, 798 N.E.2d at 968.

committed same-sex couples were properly situated to receive statutory rights and benefits and that the denial of those benefits violated equal protection.[191] Nevertheless, New Jersey was unwilling to recognize the existence of any tangible harm created by a separate legal structure, even if it was equal under the law.[192] As a result, the court declined to apply its three-pronged *Greenberg* test to determine whether the rights of same-sex couples outweighed the legitimate interests of the state and the public.[193] Application of the *Greenberg* test would have required the court to recognize the constitutional right of same-sex couples to marry.

The first prong of the *Greenberg* test—the nature of the asserted right—leans strongly in the plaintiffs' favor.[194] Although the New Jersey Supreme Court sought to diminish the stature of the right being asserted by the *Lewis* plaintiffs, it was nothing more than the right to marry.[195] Both the New Jersey and United States Supreme Courts have repeatedly deemed the right to marry a "fundamental" human right.[196] Because fundamental rights are entitled to the highest degree of judicial deference under the first prong of the *Greenberg* test,[197] the court erred in its unceremonious dismissal of the plaintiffs' right to be married.

A separate civil union structure would create both tangible and intangible governmental intrusions sufficient to bend the second prong of the *Greenberg* test in the plaintiffs' favor as well.[198] Both the Massachusetts Supreme Judicial Court and the dissenters in *Lewis* recognized that a denial of full, unequivocal marriage rights would have an adverse social effect on same-sex couples and their children.[199] Moreover, civil unions are nothing more than a separate-but-equal structure, which courts have repeatedly held are inherently stained with malevolent intent.[200] Thirdly, the *Lewis* opinion's failure to discuss the status of constitution-level rights and the recognition in California that no action short of a constitutional amendment could confer constitutional rights upon civilly united couples demonstrates that nothing short of marriage can be considered truly equal before the law.[201]

Finally, neither the state nor the court can present a single legitimate public

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[191] Lewis v. Harris, 908 A.2d 196, 217-18 (N.J. 2006).

[192] *See* discussion *supra* Part II.C.

[193] *See* discussion *supra* Part IV.A.

[194] Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

[195] *See* discussion *supra* Part IV.B.1.

[196] *Lewis*, 908 A.2d at 228 (Poritz, C.J., dissenting).

[197] *See* discussion *supra* Part IV.B.

[198] *See* discussion *supra* Part IV.C.3.

[199] Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); *Lewis*, 908 A.2d at 225 (Poritz, C.J., dissenting).

[200] *See* discussion *supra* Part IV.C.2.

[201] *See* discussion *supra* Part IV.C.3.

interest that is served by a continued refusal to extend full marriage rights.[202] The court contended that the United States Supreme Court case of *Plyler v. Doe* requires due deference to legislative decisions that classify people into different groups.[203] Yet the court's characterization of the holding in *Plyler* is misleading, especially given *Plyler*'s express statement that any deference does not apply when legislative classifications would impose "lifetime hardships" upon a "discrete class."[204] The court also argued that there was a need to preserve the traditional definition of marriage.[205] Such an argument is ironic, however, given the majority's terse contention that marriage is little more than a name.[206] Moreover, the need to preserve traditional names is insignificant when balanced against a fundamental right and substantial harms which result from the denial of that right.[207] Thus, the weakness of the state's end of the balancing test compels the conclusion that same-sex couples deserve full, unabridged rights to marriage under the New Jersey Constitution. The court's failure or refusal to apply the three-part balancing test to the final issue of the right to marry obscured this otherwise patent fact.

Matthew K. Yan

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[202] *See* discussion *supra* Part IV.D.1.
[203] *Lewis*, 908 A.2d at 222.
[204] Plyler v. Doe, 457 U.S. 202, 223-24 (1982).
[205] *Lewis*, 908 A.2d at 222.
[206] *Id.* at 221.
[207] *See* discussion *supra* Part IV.D.3.