Lewis v. Harris
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Nov. 5, 2003. (Approx. 17 pages)

2003 WL 23191114 (N.J.Super.L.)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Law Division.
Mark LEWIS and Dennis Winslow; Saundra Heath and Clarita Alicia Toby; Craig Hutchison and Chris Lodewyks; Maureen Kilian and Cindy Meneghin; Sarah and Suyin Lael; Marilyn Maneely and Diane Marini; and Karen and Marcye Nicholson-McFadden, Plaintiffs,
v.
Gwendolyn L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; Commissioner of the New Jersey Department of Health and Senior Services; and Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services, Defendants.
No. MER-L-15-03.
Nov. 5, 2003.

OPINION

FEINBERG, J.

BACKGROUND

On June 26, 2002, plaintiffs filed a complaint in the Superior Court, Law Division in Hudson County. An amended complaint was filed on October 9, 2002 and by consent, on November 22, 2002, venue was transferred to Mercer County. Plaintiffs are seven same-sex couples who live in New Jersey and wish to enter into a civil marriage recognized by the State. Each couple has been together in excess of ten years and four of the couples have children. Except for the fact that they are of the same gender, each couple is legally qualified to marry under New Jersey law. In June 2002, each couple appeared before the appropriate licensing officer in their respective municipalities and requested a marriage license. Their requests were denied based on the fact that the couples were of the same gender.

The defendants are named in their official capacities, as a result of their roles in implementing and enforcing New Jersey's marriage licensing and vital records law; the Commissioner of the Department of Human Services, the Commissioner of the Department of Health and Senior Services, and the acting Registrar of Vital Statistics.

Plaintiffs allege that the State's failure to permit them to marry deprives them of statutory protections, benefits, and mutual responsibilities accorded to heterosexual married couples. According to plaintiffs, they are being denied rights and benefits that flow from marriage, including rights and benefits relating to taxation, health insurance, victim's rights, education financing, incapacitation, tort remedies, health care, family medical leave, hospital visitation, spousal financial obligations, workers' compensation, burial rights, property rights, alimony, and parenting matters in the event that a same-sex couple terminates their relationship.

In addition, plaintiffs assert that third-party entities including insurance companies and private employers, accord certain benefits to individuals based on their marital status under State law and that same-sex couples are being denied these benefits.

The amended complaint is grounded solely on Article I, paragraph 1 of the State Constitution. Plaintiffs allege that the refusal to issue marriage licenses to same-sex couples offends their rights to privacy, and equal protection. Plaintiffs assert no federal

constitutional or statutory claims. The amended complaint seeks no monetary damages. Plaintiffs request a declaration that their rights have been violated and that they are entitled to the same treatment as heterosexual couples regarding access to marriage and the rights that flow from marriage.
Several parties filed motions seeking to intervene as a matter of right or, in the alternative, with the court's permission, pursuant to *R.* 4:33-1 and *R.* 4:33-2 respectively. The New Jersey Family Policy Council, the New Jersey Marriage Coalition, United Family International, United Families New Jersey, Russell S. Tompkins, Jamie L. Tompkins, David C. Heslington, and Linda K. Heslington ("Coalition for Traditional Marriage"), Monmouth Rubber and Plastics, Corporation and John M. Bonforte, Sr. and Clare M. Farragher, John E. Rooney, Michael J. Doherty, Anthony Bucco and Gerald Cardinale ("State Legislators for Traditional Marriage"). [FN1]

FN1. On May 31, 2003, in separate orders, the court denied each of the motions to intervene but permitted participation in accordance with *R.* 1:13-9.

On February 24, 2003, defendants filed a motion to dismiss the amended complaint pursuant to *R.* 4:6-2(e). Defendants assert that: (1) the plaintiffs cannot overcome the presumption that New Jersey Marriage laws are constitutional; (2) New Jersey Marriage laws do not permit same-sex couples to marry; (3) the Federal government and all fifty states do not recognize same-sex marriages; (4) plaintiffs' privacy rights are not violated by their inability to enter into a same-sex marriage; and (5) the plaintiffs' equal protection rights are not violated by an inability to enter into a same-sex marriage.
Plaintiffs filed opposition to defendants' motion to dismiss. In response, plaintiffs argue that: (1) the motion to dismiss should be denied; (2) the marriage laws like all Legislative decisions must comply with the New Jersey State Constitution; (3) the fundamental right to marry does not include an exception for same-sex couples and therefore the State must justify its decision with a compelling governmental reason, a burden that cannot be met on a motion to dismiss; (4) the State is violating the plaintiffs' right to equality as determined by the Balancing of Interests Test.
Plaintiffs seek an injunction requiring defendants to grant them marriage licenses and access to marriage on the same terms and conditions as mixed-gender couples. Oral argument was held on June 27, 2003 and supplemental briefs have been filed. By consent, subsequent to oral argument, the motion to dismiss has been converted to cross-motions for summary judgment.

I.

STANDARD OF REVIEW

When faced with a constitutional challenge, a statute is presumed to be constitutional. To overcome this presumption, the plaintiff must demonstrate that there are no conceivable grounds to support its validity. *Brown v. State,* 356 *N.J.Super.* 71 (App.Div.2002). This deferential standard is rooted in separation of power principles, which are even stronger when a court is asked to invalidate, rather than simply interpret, a legislative intent. Out of respect for the democratic process and in recognition of the Legislature's status as a co-equal branch of government, statutes under attack are "entitled to great weight by the courts." *New Jersey Sports & Exposition Auth. v. McCrane,* 119 *N.J.Super.* 457, 474 (Law Div.1971), *aff'd,* 61 *N.J.* 1 (1972) (quoting *Roe v. Kervick,* 42 *N.J.* 191, 229-30 (1964)). Significantly, courts will not second-guess the Legislature's policy decisions regarding economic, social and philosophical issues. *Brown, supra,* 356 *N.J.Super.* at 80 (quoting *Reiser v. Pension Comm'n of the Employees Ret. Sys.,* 147 *N.J.Super.* 168, 183 (Law Div.1976).
"Legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one." *Bell v. Township of Stafford,* 110 *N.J.* 384, 394 (1988). The Legislature has broad discretion in determining the perimeters of legislation. *Brown, supra,* 356 *N.J.Super.* at 86; *Harvey v. Essex Cty. Bd. Of Freeholders,* 30 *N.J.* 381, 390 (1959). "In considering constitutionality of legislation courts do not weigh its efficacy or wisdom."

State Farm Mut. Auto. Ins. Co., 124 N.J. 32, 45 (1991). In New Jersey, as in all of the states in this country, marriage statutes permit only mixed-gender couples the right to marry. Despite challenges in many states, based on statutory and constitutional grounds, there are no states that permit same-sex couples to marry.

II.

MARRIAGE STATUTES IN NEW JERSEY DO NOT PERMIT SAME-SEX MARRIAGES

The institution of marriage is state-created; it is a construct sanctioned and wholly created by state laws. The State submits that marriage is not defined in New Jersey statutes as a union between a man and a woman. The State argues that the absence of an express statutory prohibition on same-sex marriage is evidence not of the acceptance of such unions, but of the fact that same-sex marriage was so foreign a concept to lawmakers in 1912 when *N.J.S.A.* 37:1-1 was enacted, that a ban hardly needed mention. *See* *M.T. v. J.T.,* 140 *N.J.Super.* 77, 84-85 (App.Div.1976), *certif. denied,* 71 *N.J.* 345 (1976) (it's so firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed.").

All courts adhere to the rule of statutory construction that words of a statute must be understood in their usual and ordinary sense in the absence of a statutory definition to the contrary. *State v. Fearick,* 69 *N.J.* 32, 37, 38 (1976). This court finds that the marriage laws in this State, taken as a whole, do not support a conclusion that the legislature intended for same-sex couples to have the authority to marry. *See* *N.J.S.A.* 1:1-1. When evaluating statutes courts are tasked with interpreting statutes as written not with the duty of creating law. Therefore, in reviewing legislation courts should be careful not to act as a super-legislature but only strive to fill the gaps in the law. *Brown, supra,* 356 *N.J.Super.* at 80; *Newark Superior Officers Ass'n v. City of Newark,* 98 *N.J.* 212, 222) (citing *Burton v. Sills,* 53 *N.J.* 86, 95 (1968).

Generally when interpreting a statute that is clear upon its face, the court should effectuate the plain meaning of the words. *In re Sussex County Mun. Util. Auth.,* 198 *N.J.Super.* 214, 216 (1995). A statute's words should be interpreted in the same manner throughout, barring a clear indication of another intent. *Perez v. Pantasote,* 95 *N.J.* 105 (1984). The court's responsibility is not to question the wisdom of the statute but to enforce the legislation as written. *Dacunzo v. Edgye,* 19 *N.J.* 443, 451 (1955). Ultimately, when interpreting a statute the court's goal is to ensure that the legislature's intent is met. *Sussex County Mun. Util. Auth., supra,* 198 *N.J. Super.* at 219. Therefore, based on the general rules of statutory construction it seems clear the Legislature intended marriage certificates to be granted only to couples of the opposite sex. *M.T., supra,* 140 *N.J.Super.* at 84, 85.

While the specific language "man and woman" has not been used in relation to the issuance of a marriage license, *N.J.S.A.* 37:1-2, the statutory scheme in New Jersey, since its inception, has defined a marriage and married persons as a relationship between members of the opposite sex. It is abundantly clear to this court, that in Title 37, Chapter 1, entitled "Marriage," there are two sections that support the conclusion that marriage has always been considered to be a union between a man and a woman. These references include: *N.J.S.A.* 37:1-1, "a man shall not marry any of his ancestors or descendants or his sister, or the daughter of his brother or sister, or the sister of his father or mother; a woman shall not marry any of her ancestors or descendants, or her brother, or the son of her brother or sister, or the brother of her father or mother"; and *N.J.S.A.* 37:1-3, "the license shall be obtained in the municipality where the female party resides or the municipality in which the male party resides."

***4** Furthermore, in Title 37, Chapter 2, entitled "Married Persons," there are twenty-eight separate sections that include a specific reference to either the term "married woman and a married man" or to the term "husband and wife." Clearly, the Legislature intended and understood that marriage resulted from the union between a man and a woman. Married persons, as defined in the aforementioned sections, refer to the status of a married man and a married woman. The statutes include: *N.J.S.A.* 37:2-2 (married woman may make a will to which her husband may be entitled); *N.J.S.A.* 37:2-5 (right

of husband and wife to contract with or sue each other); *N.J.S.A.* 37:2-6 (actions or suits by or against married woman without joining husband); N.J.S.A. 37:2-8 (married woman solely responsible for her torts and husband shall not be responsible); *N.J.S.A.* 37:2-9 (action by married woman for torts without joining husband); *N.J.S .A.* 37:2-10 (husband shall not be liable for the debts of his wife contracted before their marriage or contracted by her, in her own name, after their marriage); *N.J.S.A.* 37:2-11 (no judgment against married woman shall affect any right of husband in her real property); *N.J.S.A.* 37:2-13 (wages and earnings); *N.J.S.A.* 37:2-14 (paraphernalia); *N.J.S.A.* 37:2-15 (separate property); *N.J.S.A.* 37:2-16 (contracts of married woman without consent of husband); *N.J.S.A.* 37:2-17 (execution of instruments affecting real property); *N.J.S.A.* 37:2-18 (conveyance of real estate between husband and wife); *N.J.S.A.* 37:2-19 (conveyances); *N.J .S.A.* 37:2-20 through *N.J.S.A.* 37:2-18 (separate statutes that relate to the power to convey, mortgage or lease real property). Admittedly, the legal landscape of marriage, in terms of the legal relationships of spouses and married women's rights, has changed dramatically since the turn of the century. What has not changed, however, is the gendered definition of marriage. This is true in this State and throughout the country.

III.

THE RIGHT TO MARRY DOES NOT INCLUDE A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE

A.

FEDERAL CONSTITUTIONAL ANALYSIS

Having determined that New Jersey marriage laws afford only a man and woman the ability to marry is only the first step in the court's analysis. Clearly, the Legislature may not enact a statute that permits it to violate the Federal or State Constitution. *General Assembly of the State of New Jersey v. Byrne,* 90 *N.J.* 376 (1982). There is no doubt that, at a minimum, Article I, Paragraph 1, of the New Jersey Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. *Right to Choose v. Byrne,* 91 *N.J.* 287 (1982). The issue in the present case is, therefore, whether the right to marry in New Jersey extends to same-sex couples. Our analysis begins with the State Constitution:

***5** All 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, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[*N.J. Const.* art. I, ¶ I.]

Since there are no New Jersey cases that have delineated the fundamental right to marry, this court must look to federal cases for guidance.

Over sixty-five years ago, the United States Supreme Court initially identified fundamental rights under the Due Process Clause. Significantly, the Court held that these fundamental rights were entitled to heightened judicial scrutiny. In a case that involved the double jeopardy clause the Court held:

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

[*Palco v. Connecticut,* 302 *U.S.* 319, 325 (1937).]

The Court recognized that some of the personal rights safeguarded by the Constitution against national action are safeguarded against state action, because a denial of them would be a denial of due process of law. *Id.* at 327. "Fundamental rights are those privileges and immunities that belong to someone as a citizen of the United States and thus cannot be denied by the states because they are 'implicit in the concept of ordered liberty." ' *Id.* at 325.

The United States Supreme Court first characterized the right of marriage as

fundamental in *Skinner v. Oklahoma ex rel. Williamson,* 316 *U.S.* 535, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655, 1660 (1942). In *Skinner,* the petitioner challenged an Oklahoma statute that allowed the state to sterilize habitual criminals without their consent. While the Court held that the legislation ran afoul of the equal protection clause, the Court focused on the fundamental right to marry. In striking down the statute, the Court held "we are dealing with legislation that involves one of the basic civil rights of man." *Id.* at 541.

The Court noted that marriage was "fundamental to the very existence and survival of the race." *Ibid.* At the time *Skinner* was decided, clearly the definition of marriage was limited to the common and traditional meaning of a relationship between a man and a woman. Finding that the relationship between married persons; to wit, a man and a woman, was fundamental to the very existence and survival of the race, the Court struck down the statute on equal protection grounds. *Id.* at 543. While *Skinner* was decided over sixty years ago, the fundamental right to marry has survived. The federal courts, however, have never extended this right to same-sex couples.

***6** Twenty-three years later, in *Griswold v. Connecticut,* 381 *U .S.* 479, 85 *S.Ct.* 1678, 14 *L.Ed.*2d 510 (1965), the appellants provided information, instruction and medical advice to married persons as to the means of preventing conception. Charged with violating a statute that prohibited the distribution of information for the purpose of preventing conception, the appellants were found guilty. *Id.* at 480. On appeal, appellants challenged the statute on the grounds that it unconstitutionally intruded upon the right of marital privacy. The Court held that a Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy. *Id.* at 486. Justice Douglas, writing for the majority, noted:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

[*Id.* at. 484 (citation omitted).]

Justice Goldberg, joined by the Chief Justice and Justice Brennan, concurring in the judgment, agreed with the notion of fundamental rights and wrote, the "Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' *Id.* at 487 (quoting *Snyder v. Com. of Massachusetts,* 291 *U.S.* 97, 105, 54 *S.Ct.* 330, 332, 78 *L.Ed.* 674). Recognizing the right to privacy, the Justices noted:

[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

[*Id.* at 488.]

Justice Harlan, in his well-known and separate concurring opinion, made it abundantly clear that "fundamental rights are implicit in the concept of liberty, and limits on substantive due process rights center on respect for teachings of history." *Id.* at 500-01. A leading decision by the United States Supreme Court on the right to marry is *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967). In that case, an interracial couple convicted of violating Virginia's miscegenation laws challenged the statutory scheme on both equal protection and due process grounds. *Id.* at 2. The Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. However, the Court went further and held that the law arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry.

The Court held:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a

person of another race resides with the individual and cannot be infringed by the State.
*7 [*Id.* at 12 (citations omitted).]
In *Zablocki v. Redhail,* 434 *U.S.* 374, 98 *S.Ct.* 673, 680, 54 *L.Ed.*2d 618 (1978), the United States Supreme Court set forth its most detailed discussion of the fundamental right to marry. The plaintiff, was unemployed, indigent and in arrears of his support obligations to his illegitimate daughter. *Id.* at 378. Denied a marriage license until all outstanding child support obligations were paid, plaintiff challenged the Wisconsin statute that required a resident to satisfy all child support payments before obtaining a marriage license. *Id.* at 378-79. The Court held that the statute burdened the fundamental right to marry thereby violating the Fourteenth Amendment to the United States Constitution. *Id.* at 387. Once again, the Court recognized the fundamental right to marry and the importance of striking any law that substantially interfered with that right. *Id.* at 388. While the issue of same-sex marriage was never raised, the facts in the case related to a planned marriage between a man and a woman.
The United States Constitution has never been interpreted to guarantee same-sex couples the right to marry. A Due Process Clause challenge to a same-sex marriage ban under the Federal Constitution was rejected in *Dean v. District of Columbia,* 653 *A.*2d 307 (D.C.1995). In *Dean,* two homosexual men appealed from an order of the court rejecting their complaint for an injunction to require that the clerk issue them a marriage license. The court concluded that same sex marriage was not a fundamental right protected by the Due Process Clause. *Id.* at 331. While recognizing that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness, the court noted that the right to same-sex marriages is not a fundamental right that is deeply rooted in our nation's history. *Ibid.*
Parts of the decision are worthy of review:
The question, then, is whether there is a constitutional basis under the due process clause for saying that this recognized fundamental right of heterosexual couples to marry also extends to gay and lesbian couples. The answer, very simply is 'No.' Even without reference to Hardwick's constitutional approval of statutes criminalizing consensual sodomy, we cannot say that same-sex marriage 'is deeply rooted in this Nation's history and tradition.'
[*Id.* at 333 (internal citations omitted).]
Applying that standard, both the Federal and State courts consider as fundamental, those rights and liberties deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. The established method of substantive due process analysis has two primary features. "First, the Due Process Clause specifically protects those fundamental rights and liberties that are objectively rooted in this Nations history and tradition. Second, courts require in substantive-due process cases a careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg et al.,* 521 *U.S.* 702, 720-21, 117 *S.Ct.* 2258, *L.Ed.*2d 772 (1997) (citations omitted) (asserted right to assistance in committing suicide is not fundamental liberty protected by due process clause). "Our Nation's history, legal traditions, and practices thus provide the critical guideposts for responsible decision-making." *Ibid.*
*8 Recognizing the potential danger of expanding fundamental rights without a sufficient basis, courts have historically recognized the role of the court compared to the role of an elected representative legislature. To restrain an un-elected judiciary from usurping the power of the legislature, the Supreme Court articulated fundamental rights are only found if a right is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland,* 431 *U.S.* 494, 503 (1977).
Not surprisingly, the reluctance on the part of courts to expand fundamental rights is based on the long-standing history that fundamental rights are those rights and benefits rooted in tradition and history. Most significantly, it is for the legislature, not the courts, to define or redefine the definition of marriage. Furthermore, implicit in the concept of the separation of powers is the notion that the three coequal branches of government must respect the inherent authority of each branch.
Congress has unequivocally stated that federal law does not recognize same-sex

marriages and that the Federal Constitution should not be interpreted to embrace same-sex marriage. In 1996, Congress enacted the Defense of Marriage Act (DOMA). *Pub.L.* 104-109, § 2(a), 110 *Stat.* 2419 (1996). The DOMA provides that all acts of Congress that refer to marriage or spouse shall be interpreted to apply only to mixed-gender couples. 1 *U.S.C.A.* § 7. In addition, DOMA provides that no state shall be required to give effect under the Full Faith and Credit Clause of the United States Constitution, to any other State law that recognizes same-sex marriage. *U.S. Const.* art. IV, ¶ 1, 28 *U.S.C.A.* § 1738C.

B.

OTHER STATES

States do not recognize same-sex marriage either as a statutory or constitutional right. To the contrary, states across the country have affirmatively prohibited the recognition of same-sex marriages. "[B]etween 1995 and 2001 alone, thirty-three states enacted legislation that both defined marriage as the union of a man and a woman and provided that their states would not recognize a same-sex marriage performed in another jurisdiction. William C. Duncan, *Whither Marriage in the Law?,* 15 *Regent U.L.Rev.* 119, 120 & n.9 (2003).

In addition to the Constitutional amendments to be discussed later in this opinion, both Nebraska and Nevada recently amended their State Constitutions to prohibit same-sex marriages. *Id.* at 121 & n.10; Ed Vogel, *Same-Sex Marriage Ban Wins for Second Time,* Las Vegas Review-Journal, Nov. 15, 2002. In California, a successful ballot measure added similar restrictions into statutory law. Duncan, *supra,* 15 *Regent U.L.Rev.* at 121; *Cal. Fam.Code* § 308.5 (West 2001). Nowhere has any legal challenge to a prohibition on same-sex marriage resulted in a right for couples of the same gender to marry.

Other sister states, faced with the same issue, have declined to recognize a fundamental right to same-sex marriage. In *Baker v. Nelson,* 191 *N.W.*2d 185 (Minn.1971), appeal dismissed, 409 *U .S.* 810, 93 *S.Ct.* 37, *L.Ed.*2d 65 (1972), a male couple, argued that the absence of sex-specific language in the Minnesota statute was evidence of the Legislature's intent to authorize same-sex marriages. *Ibid.* The couple also claimed that prohibiting them from marrying was a denial of their due process and equal protection rights under the Constitution. *Id.* at 186

***9** Recognizing the historic definition of marriage and expressing an unwillingness to expand the definition of marriage, in *Baker,* the court simply stated, "we do not find support for [these arguments] in any decision of the United States Supreme Court." *Id.* at 186. The court rejected the argument that the absence of an express statutory prohibition against same-sex marriages showed a legislative intent to authorize such marriages. *Ibid.* Most significantly, the court held "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." *Ibid.* (emphasis added.)

Courts that have considered the issue have rejected the notion that same-sex marriage is a fundamental right. Relying on the traditional and long-standing definition of marriage courts across the nation have declined to expand the definition of marriage to same-sex couples. In *Anonymous v. Anonymous,* 325 *N.Y.S.*2d 499 (Sup.Ct.1971), the court held that a marriage ceremony between two males did not in fact or in law create a marriage. The plaintiff sought a declaration of marital status because, while he had thought he was marrying a woman, the defendant turned out to be a man. The court, looking to case law and dictionary definitions, held that "[m]arriage is and always has been a contract between a man and a woman." *Id.* at 500.

Similarly, in *Jones v. Hallahan,* 501 *S.W.*2d 588 (Ky.App.1973), a lesbian couple argued that denying them a marriage license deprived them of three basic constitutional rights, the right to marry, the right to associate and the right to freely exercise their religion. *Id.* at 589. The court refused to address the constitutional issues, holding that the "relationship proposed does not authorize the issuance of a marriage license because what they propose is not a marriage." *Id.* at 590.

Noting that marriage has always been considered as a union between a man and a woman, the court in *Jones* stated:

Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church. Some states even now recognize a common-law marriage that has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.
[*Id.* at 589.]
See also Singer v. Hara, 522 *P.*2d 1187, 1191 (Wash.Ct.App.1974) (marriage statute "clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman."); *Thorton v. Timers* (Ohio, 1975) (denying a request by a lesbian couple to order the clerk to issue them a license, finding that "it is the express legislative intent that those persons who may be joined in marriage must be of different sexes.")
Courts have also considered the issue of same-sex marriage in a different context. The issue of same-sex partnerships arose in a case related to an immigration application twenty years ago. The case involved a review by the court of the denial of "immediate relative" status for immigration purposes to a male Australian citizen who went through a purported marriage ceremony with a male American citizen. The federal court rejected the claimed marriage under both Colorado and federal statutory law. *Adams v. Howerton,* 486 *F.Supp.* 1119 (C.D.Cal.1980); *aff'd* 673 *F.2d* 1036 (9th Cir.1982), *certif. denied,* 458 *U.S.* 1111, 102 *S.Ct.* 3494, 73 *L.Ed.*2d 1373 (1982).
***10** In *DeSanto v. Barnsley,* 476 *A.*2d 952 (Pa.1984), when the couple separated, the plaintiff filed suit for divorce claiming the couple had a common-law marriage. A common-law marriage is one where the partners live together, intend to be married and hold themselves out as married, without going through a formal marriage ceremony. Only a handful of states recognize common-law marriages; Pennsylvania is one of those states. The court dismissed the case and held that if the Pennsylvania common law statute is to be expanded to include same-sex couples, the legislature will have to make that change. *Id.* at 953. On appeal, the Appellate Court affirmed. Understanding the limited role of the judiciary, the court noted:
If, under the guise of expanding the common-law, we were to create a form of marriage forbidden by statute, we should abuse our judicial power: our decision would have no support in precedent, ad its practical effect would be to amend the Marriage Law, something only the Legislature can do.
[*Id.* at 956.]
In *Matter of Estate of Cooper,* 564 *N.Y.S.*2d 684 (N.Y.Sur.1990), the decedent left the bulk of his property to his ex-lover. His current lover sued to inherit as a "surviving spouse" under New York's inheritance laws. The court concluded that only a lawfully recognized husband or wife qualified as a "surviving spouse" and that persons of the same-sex had no constitutional rights to enter into a marriage with each other. *Id.* at 688. Once again, the court refused to expand the definition of marriage beyond the traditional definition of a union between a man and a woman.
In *Baehr v. Lewin,* 852 *P.*2d 44 (Haw.1993), three same-sex couples filed applications for marriage licenses with the Hawaii Department of Health {"DOH"). The DOH refused to grant marriage licenses. *Id.* at 49. In response, the three couples filed a complaint for injunctive and declaratory relief forbidding subsequent denial of marriage licenses to same-sex couples. On a motion to dismiss by the Director of the DOH, the circuit court concluded that the plaintiffs had failed to state a claim upon which relief could be granted. *Id.* at 52.
To determine what the fundamental right to privacy meant under Hawaii's Constitution, the majority again turned to federal precedents. [FN2] Because the right to privacy, according to federal cases dealt with a right older than the Bill of Rights, the majority concluded that it was required to look to the traditions and collective conscience of the people to determine whether the asserted right is so firmly established as to qualify as fundamental. *Id.* at 55. According to the majority, the privacy question presented was whether to extend the present boundaries of the right to marry to include same-sex couples or, more specifically, whether to hold that same-sex couples, like heterosexual

couples, had a fundamental right to marry. *Id.* at 56-57. The majority claimed that it was being asked to recognize a new fundamental right. *Id.* at 57. Although acknowledging that it had the power to extend broader privacy protection under the Hawaii Constitution than that currently provided under the Federal Constitution, the majority nevertheless determined that Hawaii's right to privacy was similar to its Federal counterpart. *Id.* at 57.

FN2. Article I, § 5 of the Hawaii Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

[*Haw. Const.* art. I, § 5 (1978) (emphasis added).]

***11** Applying the federal standards it had adopted to the facts of the case, the trial court in Hawaii ultimately concluded the plaintiffs did not have a fundamental right to marry under Hawaii's right to privacy. The majority concluded:
[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that liberty nor justice would exist if it were sacrificed.
[*Id.* at 57.]
On appeal, the court rejected the argument that the right to marry included in Hawaii's right to privacy clause extended to same-sex couples. *Ibid.* Significantly, the court reiterated the holding by the trial court and concluded that the appellants did not have a fundamental right to marry under Hawaii's right to privacy. *Ibid.* While unwilling to find a fundamental right to marry, the majority of the Hawaii Supreme Court determined that the construction of Hawaii's marriage statutes ran afoul of the state's equal protection clause. *Id.* at 68.
In finding that the statutes offended the state's equal protection clause, the majority concluded that the circuit court erred in dismissing plaintiff's complaint because issues of fact existed that precluded granting judgment as a matter of law. The case was accordingly remanded to the circuit court for further proceedings. On remand, the majority stated, and upon motion for reconsideration or clarification filed by the State reiterated, that the burden would be on the State to demonstrate that Hawaii Revised Statutes furthered compelling state interests and was narrowly tailored to avoid infringing on constitutional rights. *Ibid.*
On remand in *Baehr v. Miike,* 1996 W.L.694235 (Hawaii Cir. Ct.) the court held:
[T]he] Defendant failed to sustain the burden to overcome the presumption that [the statute] is unconstitutional by demonstrating or proving that the statute furthered a compelling state interest. Further, even assuming arguendo that defendant was able to demonstrate that the sex-based classification of [the statute] is justified because it furthers a compelling state interest, Defendant has failed to establish that [the statute] is narrowly tailored to avoid unnecessary abridgements of constitutional rights.
[*Id.* at 21.]
Despite this ruling, marriage licenses did not issue to same-sex couples in the State of Hawaii. While the State awaited a ruling on its appeal to the Hawaii Supreme Court, the Hawaii Legislature put forward, and the people of the state approved, an amendment to the State Constitution that reserved for the legislature the right to define a marriage as the union of a man and a woman. *Haw. Const.* art. I, § 23. A similar decision by an Alaska trial court, *Brause v. Bureau of Vital Statistics,* 1998 WL 88743 (Alaska

Super.Ct.1998), also triggered the rapid adoption of a constitutional amendment barring same-sex marriage in that State. *See Alaska Const.* art. I, § 25; Coolidge, *supra,* 23 *Harv. J.L. & Pub. Pol'y* at 628.

***12** In addition, although the Vermont Supreme Court, in *Baker v. Vermont,* 744 *A.*2d 864 (Vt.1999), held that a ban on same-sex marriage violated the Common Benefits provision of that State's Constitution, the court stayed its decision to give the Vermont Legislature the opportunity to either amend the Vermont marriage statutes or provide same-sex couples with a set of rights equivalent to marriage. The Vermont Legislature did not provide same-sex couples with the right to marry. Instead, Vermont enacted laws that allow for civil unions between people of the same gender effective July 1, 2000. *Vt. Stat. Ann.* tit. 15, § 1201, *et seq.* (2001). The Vermont Legislature specifically retained the definition of marriage as the legally recognized union of one man and one woman. *Vt. Stat. Ann.* tit. 15, § 1201(4) (2001).

Most recently, in *Goodridge v. Dep't of Pub. Health,* 2002 WL 1299135 (Mass.Super.2002), *appeal pending,* seven same-sex couples applied for and were denied a marriage license in the State of Massachusetts. The plaintiffs filed [a] complaint in April 2001 seeking a declaration that their exclusion from marriage violated the present statutory scheme, the exercise of their fundamental right to marry the partner of their choice, the equality protections under the State Constitution and their expressive rights. *Id.* at 2.

The matter proceeded by way of an application for summary judgment. Id. at 2. The trial court declined to recognize a fundamental right to same-sex marriage under that Commonwealth's Constitution. *Id.* at 11. Ruling on the statutory claim, the court concluded that "based on the legal application of the word 'marriage,' the construction of the marriage statutes and the history of marriage, Massachusetts' marriage statutes cannot support same-sex marriage." *Id.* at 5.

Finding no fundamental right to same-sex marriage, the court held, "while this court understands the reasons for the plaintiff's request to reverse the Commonwealth's centuries-old legal tradition of restricting marriage to opposite-sex couples, their request should be directed to the Legislature, not the courts." *Id.* at 11. An initiative is underway to amend the Massachusetts Constitution by popular referendum to prohibit the recognition of same-sex marriage to ensure the continued validity of the trial court's decision. *Albano v. Attorney General,* 769 *N.E.*2d 1242 (Mass.2002).

C.

NEW JERSEY ANALYSIS

A.

PRIVACY RIGHTS ARE NOT VIOLATED

Only matters of "particular state interest" afford an appropriate basis for expansion of a State constitutional provision beyond the protections afforded by its Federal counterpart. *State v. Novembrino,* 105 *N.J.* 95, 146 (1987) (quoting *State v. Hunt,* 91 *N.J.* 338, 366 (1982) (Handler, J., concurring)). Even under the extraordinary circumstances in which particular state interests are implicated, extension of State constitutional provisions beyond their Federal equivalents should take place only when justified by "'[s]ound policy reasons." ' *See State v. Stever,* 107 *N.J.* 543, 557, *cert. denied,* 484 *U.S.* 954, 108 *S.Ct.* 348, 98 *L.Ed.*2d 373 (1987); *see also State v. Williams,* 93 *N.J.* 39, 59 (1983).

For the reasons set forth herein, this court finds that like the federal law, in the State of New Jersey there is no statutory or constitutional basis to recognize same-sex marriage. The avenue for reform, if any, is with the elected representatives in the Legislature; not the courts.

***13** The State Constitution does not guarantee same-sex couples the right to enter into a government-sanctioned marriage. The Constitution provides that:

[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[*N.J. Const.* art. I, ¶ 1.]

The language of that paragraph incorporates within its terms the right of privacy and its concomitant rights. *Planned Parenthood, supra,* 165 *N.J.* at 629; *Right to Choose v. Byrne,* 91 *N .J.* 287 (1982). Our courts have defined the right of privacy as "the right of an individual to be ... protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Hennessey v. Coastal Eagle Point Oil Co.,* 129 *N.J.* 81, 94 (1992) (quoting *McGovern v. Van Riper,* 137 *N.J. Eq.* 24, 32 (Ch. Div.1945), *aff'd,* 137 *N.J. Eq.* 548 (E. & A.1946)).

Essentially, the New Jersey Constitution provides citizens with a "zone of privacy" to conduct their affairs without government interference, unless such interference promotes a valid State interest. *Doe v. Poritz,* 142 *N.J.* 1, 77- 78 (1995). The State Constitutional right to privacy embraces an array of personal freedoms, including the right to make procreative decisions, *Right to Choose, supra,* 91 *N.J.* at 303-10; the right to decide whether to be sterilized, *In re Grady,* 85 *N.J.* 235, 249 (1981); the right of adults to engage in consensual sexual conduct; *State v. Saunders,* 75 *N.J.* 200, 224-28 (1977) (Schreiber, J., concurring) and the right to terminate one's life in certain circumstances, *In re Quinlan,* 70 *N.J.* 10, 40-41, *cert. denied,* 429 *U.S.* 922, 97 *S.Ct.* 319, 50 *L. Ed.*2d 289 (1976).

"As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution." *Greenberg v. Kimmelman,* 99 *N.J.* 552, 572 (1985). Significantly, the scope of protection afforded by Article I, paragraph 1, however, does not extend to the right to enter into a state-sanctioned, same-sex marriage. While the Supreme Court has recognized that the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution, that right by its very essence includes only the union of persons of different genders. Thus, a prohibition on same-sex marriage is not so much a limitation on the right to marry, but a defining element of that right accepted for generations as an essential characteristic of marriage. The right to marry has always been understood in law and tradition to apply only to couples of different genders. A change in that basic understanding would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intent of the Framers of the 1947 Constitution. Significantly, such a change would contradict the established and universally accepted legal precept that marriage is the union of people of different genders.

***14** Article I, paragraph 1 encompasses a general recognition of those absolute rights of the citizen that were a part of the common law. "The standard to be applied in determining whether a fundamental constitutional right exists requires the reviewing court to look to the traditions and (collective) conscience of our people' to determine whether a principle is so rooted (there) ... as to be ranked as fundamental." *King v. South Jersey Nat'l Bank,* 66 *N .J.* 161, 178 (1974) (quoting *Griswold v. Connecticut,* 381 *U.S .* 479, 493, 85 *S.Ct.* 1678, 1686, 14 *L.Ed.*2d 510, 520 (1965) (Goldberg, J., concurring) (quoting *Ransom v. Black,* 54 *N.J.L.* 446, 448 (Sup.Ct.1892), *aff'd,* 65 *N.J.L.* 688 (E. & A. 1893)).

Recognition of a particular right as fundamental is limited and "cannot be based on the social importance of the interest." *Cold Indian Springs Corp. v. Township of Ocean,* 154 *N.J.Super.* 75, 107 (Law Div.1977), *aff'd,* 81 *N.J.* 502 (1980). Courts must take care not to read the constitution to embrace subjects never thought to be within its reach. *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.,* 298 *N.J.Super.* 442, 464 (App.Div.1997) (Baime, J.A.D., concurring), *cert. denied,* 153 *N.J.* 48 (1998).

The United States Supreme Court has oftentimes held that State Constitutions may provide more expansive protection of individual liberties than the United States Constitution. Importantly, the New Jersey Supreme Court has recognized that our Constitution may provide greater protection than the Federal Constitution. *See, State v. Alston,* 88 *N.J.* 211, 227-28 (1981) (standing to challenge search and seizures); *In re Grady,* 85 *N.J.* 235, 249 (1981) (the right to sterilization); *State v. Schmid,* 84 *N .J.* 535, 559 (1980) (free speech protected in some instances against private interference); *State*

v. Baker, 81 *N.J.* 99, 112-13 (1979) (the right of unrelated persons to live as a single unit); *State v. Johnson,* 68 *N.J.* 349, 353 (1975) (consent to search).
Significantly, in *Right to Choose, supra,* 91 *N.J.* 287, 301, the Court held, "[n]onetheless, we proceed cautiously before declaring rights under our State Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the Federal Constitution." The concept of same-sex marriage certainly was not recognized at common law. The historic limitation of marriage to individuals of different genders demands the conclusion that same-sex marriage is not a recognized fundamental right in New Jersey. The concept of same-sex marriage certainly was not recognized at common law. As the Appellate Division explained:
The historic assumption in the application of common law and statutory strictures relating to marriages is that only persons who can become "man and wife" have the capacity to enter marriage.
[*M.T. v. J.T.,* 140 *N.J.Super.* 77, 84 (App.Div.1976), *certif. denied,* 71 *N.J.* 345 (1976) (citations omitted).]
***15** *M.T.* is the only reported decision in this State to address the question of same-sex marriages. There, defendant husband defended plaintiff wife's complaint for support on the ground that wife was a male and the marriage was therefore void. The court held:
We accept and it is not disputed as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal. In the matrimonial field the heterosexual union is usually regarded as the only one entitled to legal recognition and public sanction.
[*Id.* at 83-84.]
Importantly, in *M.T.* the court voiced no doubt that the term "married persons" was limited to a sanctioned legal union between a man and a woman. The court held:
There is not the slightest doubt that New Jersey follows the overwhelming authority. The historic assumption in the application of the common law and statutory strictures relating to marriages is that only persons who can become man and wife have the capacity to enter marriage.
[*Ibid.* at 84.]
The court recently reiterated that, under New Jersey law, the "commonplace meaning of marriage [which] envisions a man and a woman joined in wedlock" remains the only marriage entitled to statutory recognition. *Lee v. General Accident Ins. Co.,* 337 *N .J.Super.* 509, 514 (App.Div.2001) (citing *Lopez v. Santiago,* 125 *N.J.Super.* 268, 270 (App.Div.1973)); *accord* *Rutgers Council, supra,* 298 *N.J.Super.* at 455.
Nor can it be said that same-sex marriage is so rooted in the traditions of this State that it must be deemed to be a fundamental right. Indeed, the concept of two individuals of the same gender entering into a state sanctioned marriage was inconceivable to the vast majority of people, including gay men and lesbians, until well into the latter half of the twentieth century. The Framers of the New Jersey Constitution of 1947 could not possibly have fathomed same-sex marriage at all, let alone as a fundamental right cloaked in constitutional protection. One cannot reasonably conclude that the Framers of the 1947 Constitution intended to bestow on same-sex couples the fundamental right to marry.
As noted heretofore, the courts in other states have recognized the historic understanding that marriage includes only the union of persons of different genders. For example, in *Baker v. Nelson,* 191 *N.W.*2d 185 (Minn.1971), *app. diss.,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972), the Supreme Court of Minnesota rejected a challenge to that State's marriage statute by two men who wished to marry. In reaching its decision, the court reasoned that the historic understanding of marriage as a union of a man and a woman is "as old as the book of Genesis," and that "[t]he due process clause ... is not a charter for restructuring "fundamental understandings by judicial legislation." *Id.* at 186 (emphasis added); *See also* *Storrs v. Holcomb,* 645 *N.Y.S.*2d 286, 287 (Sup.Ct.1996) (declining to identify a new fundamental right to same-sex marriage because "the long tradition of marriage, understood as a union of male and female, testifies to a contrary

political, cultural, religious and legal consensus"), *diss. on other grounds,* 666 *N.Y.S.*2d 835 (App.Div.1997); *Constant A. v. Paul C.A.,* 496 *A.*2d 1, 6 (Pa.Super.Ct.1985) (homosexual marriages are not permitted and the relationship is not to be equated with heterosexual relations); *Singer v. Hara,* 522 *P.*2d 1187, 1197 (Wash.Ct.App.), *rev. denied,* 84 *Wash.*2d 1008 (1974) (a historical definition of marriage is deeply rooted in our society and does not include a constitutionally protected right to same-sex marriage); *Jones v. Hallahan,* 501 *S.W.*2d 588, 590 (Ky.1973) (finding no constitutional sanction or protection of the right of marriage between persons of the same sex); *Anonymous v. Anonymous,* 325 *N.Y.S.*2d 499 (Sup.Ct.1971) (the law makes no provision for a "marriage" between persons of the same sex because marriage is and always has been a contract between a man and a woman).

***16** Importantly, courts must not read the constitution to embrace subjects never thought to be within its reach. As noted in the concurring opinion by Judge Baime:

Nor does the New Jersey Constitution afford a remedy. Appellants point to a lengthening line of decisions in which the courts have relied upon state constitutional provisions in creating new rights and remedies. They argue that good law is simply a matter of fairness, and what is just in a given case merely requires us to summon the state constitution to rationalize the appropriate result ... We must take care not to read the constitution to embrace subjects never thought to be within its reach.... The most cherished principle in our system is that government rests on the consent of the governed. The central idea is that in the meandering course of history, there is time for visions and revisions---, for mistakes to be made by the people and rectified by the people.

[*Rutgers, supra,* 298 *N.J.Super.* at 463-464.]

There is nothing in the New Jersey Constitution or the judicial decisions in this State to support the conclusion that same-sex marriage is a fundamental right. As will be discussed later in this opinion, the forum to change the definition of marriage is with the Legislature, not the courts.

IV.

EQUAL PROTECTION CLAIM

EQUAL PROTECTION RIGHTS ARE NOT VIOLATED BY THE INABILITY TO ENTER INTO A SAME-SEX MARRIAGE

As cited heretofore, the New Jersey Constitution states:

All 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, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[*N.J. Const.* art. I, ¶ 1.]

While the specific phrase, "equal protection," is not included in the New Jersey Constitution, it has long been recognized that Article I, paragraph I of the State Constitution, requires that there be an "appropriate governmental interest suitably furthered by [any] differential treatment." *Borough of Collingswood,* 66 *N.J.* 350, 370 (1975), *app. diss.,* 426 *U.S.* 901, 96 *S.Ct.* 2220, 48 *L.Ed.*2d 826 (1976). Furthermore, "like the Fourteenth Amendment, [this provision] seeks to protect against injustice and against the unequal treatment of those who should be treated alike." *Barone v. Dep't of Human Services,* 107 *N.J.* 355, 367 (1987) (quoting *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568 (1985).

When conducting an equal protection analysis under the Federal Constitution, a statute that regulates a fundamental right or a suspect class is subject to strict scrutiny. To withstand strict scrutiny, the statue must further a compelling state interest and there must be no less restrictive means of accomplishing that objective. If a statute regulates a semi-suspect class or substantially affects a fundamental right in an indirect manner, it will be subject to intermediate scrutiny. *Barone, supra,* 107 *N.J.* at 364-65 (citing *Graham v. Richardson,* 403 *U.S.* 365, 91 *S.Ct.* 1848, 29 *L.Ed.*2d 534 (1971).

***17** To withstand intermediate scrutiny, the court must be satisfied that the classification

serves an important governmental objective and must be substantially related to the achievement of those objectives. *Plyer v. Doe,* 457 *U.S.* 202, 218 n.16, 102 *S.Ct* . 2382, 2395 n.16, 72 *L.Ed.*2d 786, 800 n.16 1982; *Craig v. Boren,* 429 *U.S.* 190, 97 *S.Ct.* 451, 50, *L.Ed.*2d 397 (1976). If neither strict nor intermediate scrutiny applies, the statute will be subjected to a rational basis test. To withstand this level of review, the statute must be rationally related to the achievement of a legitimate state interest. *Greenberg, supra,* 99 *N.J.* at 564-65 (citing *Minnesota v. Clover Leaf Creamery Co.,* 449 *U.S.* 456, 461-66, 101 *S.Ct.* 715, 722-25, 66 *L.Ed.*2d 659, 667- 69 (1981); *City of Cleburne, Texas v. Cleburne Living Ctr., Inc.,* 473 *U.S.* 432, 440, 105 *S.Ct.* 3249, 3254, 87 *L.Ed.*2d 313, 320 (1985).

An analysis of fundamental rights under the New Jersey Constitution differs from analysis of those rights under the United States Constitution. *Right to Choose v. Byrne, supra,* 91 *N .J.* at 308-09. Starting with the decision in *Robinson v. Cahill,* 62 *N.J.* 473, 491-92, *cert. denied sub nom, Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973), the Court began to develop an independent analysis of rights under article 1, paragraph 1. Thereafter, the Court rejected a two-tiered equal protection analysis, *Collingswood, supra,* 66 *N.J.* at 370, and employed a balancing test for analyzing claims under the State Constitution. *Taxpayers Ass'n of Weymouth Township v. Weymouth Township,* 80 *N.J.* 6 (1976). In striking the balance, courts have considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. *Right to Choose, supra,* 91 *N.J.* at 299-300; *Robinson v. Cahill, supra,* 62 *N.J.* at 491-92; *Greenberg, supra,* 99 *N.J.* at 567.

The crucial issue under New Jersey law is "whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Collingswood, supra,* 66 *N.J.* at 370 (1975). A "real and substantial relationship between the classification and the governmental purpose which it purportedly serves" must be shown to sustain the classification. *Barone, supra,* 107 *N.J.* at 368 (internal quotations omitted).

New Jersey courts have recognized that this balancing test is particularly appropriate if the statutory classification indirectly infringes on a fundamental right. *Right to Choose, supra,* 91 at 310, *Planned Parenthood v. Farmer,* 165 *N.J.* 609, 630 (2000). "When legislation impinges on a constitutionally protected right, [the Court] has looked more closely at the State's purported justification" for the statute. *Id.* at 619. The same concerns are inherent in classifications that are considered "suspect." "New Jersey courts will examine a classification closely if it discriminates on an invidious basis--that is, if the class is "suspect." *Robinson v. Cahill,* 62 *N.J.* 473, 491, *cert. denied sub nom., Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973). Importantly, the nature of the right is the crucial consideration in determining the type of review a court should apply when evaluating a governmental regulation.

***18** In *Greenberg v. Kimmelman, supra,* 99 *N.J.* 552, the Court upheld a casino ethics amendment that prohibits virtually all state officers and employees, including full-time members of the judiciary and their immediate families, from employment with casinos. Plaintiff, the wife of a Superior Court judge, received a license for employment as a casino hotel employee. Although free to work elsewhere, plaintiff was not permitted to work in the casino industry. *Id.* at 559. The Court recognized that the right to employment is protected under the New Jersey Constitution. *Id.* at 570 (citing *Cameron v. Int'l Alliance of Theatrical State Employees,* 118 *N.J.Eq.* 11, 22-23 (E. & A.1935). The Court, held, however, that the right to employment opportunity was subject to reasonable measures to promote the general welfare under both the Federal Constitution, *Schware v. Bd. of Bar Examiners,* 353 *U.S* . 232, 238- 39, 77 *S.Ct.* 752, 755-56, 1 *L.Ed.*2d 796, 801-02 (1957), and the New Jersey Constitution, *In re Polk,* 90 *N.J.* 550, 562 (1982).

In finding that the right to a particular job, unlike the right to work in general, has never been regarded as fundamental, the Court applied a rational basis analysis. "From that perspective our task is to discern whether a rational basis supports the ban on the employment of judicial spouses in the casino industry." *Greenberg, supra,* 99 *N.J.* at 574. Applying that standard, the Court determined that the statute was supported by a

legitimate state interest in preserving the integrity of the judiciary and confidence in the casino industry and that the state interest in preserving the integrity of the judiciary outweighed plaintiff's interest in unrestricted employment opportunities. *Id.* at 578-79.
Two years after *Greenberg,* in *Barone v. Dep't of Human Servcices, supra,* 107 *N.J.* at 355, the Court held that the Pharmaceutical Assistance to the Aged and Disabled Act did not affect a suspect class or fundamental rights. As a result, the Court held that the classification requiring receipt of social security disability ("SSDI") benefits as a prerequisite for eligibility for pharmaceutical assistance only required a rational basis standard of review. *Id.* at 367 Justice Garibaldi noted, "plaintiffs are not members of a suspect or semi-suspect class and there is no federal fundamental right at issue. Accordingly, the classification based upon receipt of SSDI benefits will be sustained under the equal protection clause if it is rationally related to a legitimate governmental purpose." *Ibid.*
While our courts have held gender-based classifications to be suspect, until the decision in *Rutgers,* no court had addressed classifications based on marital status or sexual orientation. The Appellate Division in *Rutgers* considered, but rejected, the notion that sexual orientation classifications are suspect. As the Appellate Division explained:
***19** Our courts ... have not addressed classifications based on marital status or sexual orientation. However, the federal courts have held that sexual orientation classifications are not suspect. *Ben-Shalom v. Marsh,* 881 *F.*2d 454, 465-66 (7th Cir.1989) *cert. denied,* 494 *U.S.* 1004, 110 *S.Ct.* 1296, 108 *L.Ed.*2d 473 (1990); *High Tech Gays v. Def. Indus. Sec. Clearance Off.,* 895 *F.*2d 563, 573-574 (9th Cir.1990). We have not created suspect classifications where the federal courts have refused to do so, and therefore, have no reason to view sexual orientation or marital status as deserving of heightened scrutiny.
[*Rutgers, supra,* 298 *N.J.Super.* at 453 (emphasis added).]
The decision in *Rutgers,* unequivocally holds that classifications based on sexual orientation are not subject to strict scrutiny in New Jersey, but may be upheld under the less strict balancing-of-interests test.
In *Rutgers,* five employees of Rutgers University and the collective-bargaining agent, Rutgers Council of AAUP Chapters, appealed the Division of Pensions' ("DOP") denial of health insurance coverage ("benefits under the State Health Benefit Program") to the employees' same-sex domestic partners. The denial by the DOP was based on the failure of the parties to satisfy the statutory definition of "dependents," that is, they were not "spouses" under New Jersey law. *Id.* at 446. On appeal, the plaintiffs alleged, among other things, that the denial of health benefits to the domestic partners of gay and lesbian state employees violated the New Jersey Law Against Discrimination and the employees' right to equal protection under the New Jersey Constitution. *Ibid.*
Applying the balancing test, the court in *Rutgers* balanced the "nature of the affected right, the extent to which the governmental restriction intruded upon it and the public need for the restriction." *Id.* at 454 (citing *Greenberg, supra,* 99 *N.J.* at 567). The court undertook an extensive review of the definition of marriage in New Jersey, reviewed cases from other jurisdictions that addressed the issue of same-sex marriages and held that a marriage required the performance of a ceremonial marriage of two persons of the opposite sex. The court held:
We accept the administrative and financial policy reasons offered by the State as the basis for limited benefits afforded by the SHBP Act. It is not for this court to agree or disagree with the Legislature's decision on such issues. There are political and economic issues to be decided by the elected representatives of the people. Nor is it for this court to weigh how great or small the additional cost of benefits is, or to weigh the difficulty of administration unless it be de minimus, which we do not believe it to be. That employers in the private sector or that other states have led the way in exploring methods of administering extended health benefits in a convenient cost-effective way is not a reason for this court to substitute its judgment for that of the Legislature.
***20** [*Id.* at 461-462.]
Although the equal protection review under the New Jersey Constitution differs somewhat from federal standards, the New Jersey Supreme Court has recognized that

the two approaches are "substantially the same" and "will often yield the same result." *Drew Associates of New Jersey, LP v. Travisano,* 122 *N.J.* 249, 259 (1991); *Barone, supra,* 107 *N.J.* at 368. Where a statute neither treats a "suspect" or "semi-suspect" class disparately nor affects a fundamental right, then the provision is subject to a "rational basis" analysis. *State v. Lagares,* 127 *N.J.* 20, 34 (1992) (citing *Dandridge v. Williams,* 397 *U.S.* 471, 90 *S.Ct.* 1153, 25 *L.Ed.*2d 491 (1970); *Barone, supra,* 107 *N.J.* at 365. Under the rational basis analysis, the governmental action must be rationally related to the achievement of a legitimate state interest. *State v. Livingston,* 172 *N.J.* 209, 224 (2002) (citing *Right to Choose, supra,* 91 *N.J.* at 305; *Sojourner v. Dep't of Human Services,* 177 *N.J.* 318 (2003) (family cap did not deny recipients of welfare benefits equal protection under the law).
Plaintiffs seek to alter that fundamental understanding. The redefinition of rights, however, is not properly accomplished through an equal protection challenge in the courts. Rights are defined by the Legislature, not the Judiciary. Plaintiffs must take their request for an alteration in the definition of marriage to the elected officials responsible for drafting the marriage statutes. Judicial intervention is warranted only where the Legislature has placed an unreasonable restriction on access to the legislatively defined right. That is not the case here.
Plaintiffs' reliance on decisions striking down statutes that prohibited interracial marriage is misplaced. These decisions derive from Constitutional amendments prohibiting racial discrimination and subjecting laws that classify individuals based on race to the highest level of scrutiny. No similar Constitutional provisions outlaw statutory classifications based on sexual orientation, the primary focus of plaintiffs' amended complaint. Comparing the State's marriage statutes to laws perpetuating racial prejudices, therefore, is inapposite.
Individuals challenging bans on interracial marriage had a powerful weapon: Federal Constitutional provisions, passed by Congress and adopted by State Legislatures, that expressly prohibited States from denying recognized rights based on race. It was entirely appropriate for the courts to enforce those duly enacted Constitutional provisions by striking down statutes that made race a qualifying condition for access to a recognized right to marry. Plaintiffs, on the other hand, assert their claims in the absence of express Constitutional provisions supporting their position, and ask the court to circumvent the Legislative process by creating a right that has never before been recognized in this country.
***21** The mandate for racial equality is firmly enshrined in both the Federal and State Constitutions. Importantly, two amendments to the United States Constitution expressly address racial equality, *U.S. Const.* amends. XIII, XIV. To enforce those provisions, the United States Supreme Court has reserved the most stringent judicial scrutiny for statutes that classify rights based on race. *Adarand Constructors, Inc. v. Pena,* 515 *U.S.* 200, 237, 115 *S.Ct.* 2097, 2117, 132 *L.Ed.*2d 158 (1995). Similarly, New Jersey courts will examine a classification closely if it discriminates against a suspect class, including race. *See* Robinson v. Cahill, 62 *N.J.* 473, 491, *cert. denied sub nom.,* Dickey v. Robinson, 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973).
The Supreme Court's decision in *Loving v. Virginia,* 388 *U.S* . 1, 87 *S.Ct.* 1817, 18 *L.Ed* 2d 1010 (1967), is predicated entirely on the Fourteenth Amendment's prohibition of racial classifications. As the Court explained, the "racial classifications embodied" in the Virginia statute that banned interracial marriage were "directly subversive of the principle of equality at the heart of the Fourteenth Amendment...." *Id.* 388 *U.S.* at 12, 87 *S.Ct.* at 1824, 18 *L.Ed* 2d 1010.
No similar Constitutional provision accords heightened protection to individuals who claims that statutes discriminate on the basis of sexual orientation. As the Appellate Division explained in *Rutgers,* in rejecting an equal protection challenge to a statute that does not provide health insurance coverage to the same-sex partners of employees in the State Health Benefits Plan:
Our courts ... have not addressed classifications based on marital status or sexual orientation. However, the federal courts have held that sexual orientation classifications

are not suspect. *Ben-Shalom v. Marsh,* 881 *F.*2d 454, 465-66 (7th Cir.1989) *cert. denied,* 494 *U.S.* 1004, 110 *S.Ct.* 1296, 108 *L.Ed.*2d 473 (1990); *High Tech Gays v. Def. Indus. Sec. Clearance Off.,* 895 *F.*2d 563, 573-574 (9th Cir.1990). We have not created suspect classifications where the federal courts have refused to do so, and therefore, have no reason to view sexual orientation or marital status as deserving of heightened scrutiny. [*Rutgers, supra,* 298 *N.J.Super.* at 453.]

The comparison plaintiffs seek to draw between New Jersey's statute limiting marriage to mixed-gender couples and Virginia's law prohibiting interracial marriage is flawed as a matter of legal principle. Numerous courts have rejected the analogy advanced by plaintiffs in this regard. *See* *Baker v. Vermont,* 744 *A.*2d 864, 880 n.13 (Vt.1999); *Baker v. Nelson,* 191 *N.W.*2d 185, 187 (Minn.1971), *app. diss.,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972); *Singer v. Hara,* 522 *P.*2d 1187, 1197 (Wash.Ct.App.1974), *rev. denied,* 84 *Wash.*2d 1008 (1974); *Goodridge v. Dep't of Pub. Health,* 2002 WL 1299135, *10, n.22 (Mass.Super.2002), *appeal pending.* While plaintiffs make a sympathetic case for government recognition of their relationships, they lack the significant legal foundation that was available to the plaintiffs in *Loving* to demand judicial recognition of the rights they seek.

***22** The State also asserts that the marriage statutes in New Jersey are facially neutral and that the plaintiffs have failed to establish any intent by the Legislature to discriminate against same-sex couples. When a statute is facially neutral, in New Jersey, even if it has a disparate impact on a class of individuals, an equal protection analysis based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class. *Greenberg, supra,* 99 *N.J.* at 580.

In *Greenberg,* the Court found that the Legislature did not intend to discriminate against women when enacting a casino ethics amendment that prohibited spouses of judges, most of whom were women, from working in the casino industry. *Id.* at 579-80. *See* *Rutgers, supra,* 298 *N.J.Super.* at 461 (we see no intent by the Legislature in enacting SHBP, to discriminate against lesbian or gay male persons). The State submits that plaintiffs have failed to establish a discriminatory intent and, therefore cannot succeed in their equal protection claim.

Here, New Jersey's marriage statutes are facially neutral; they apply with equal force to all men and all women in the state. Plaintiffs, like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. Plaintiffs are, in that sense, in the same position as all other New Jersey residents. The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis. Whether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute's validity. It is the availability of the right on equal terms, not the equal use of the right that is central to the constitutional analysis. Plaintiffs seek not to lift a barrier to marriage, but to change its very essence. This objective is Legislative in nature and finds no support in the equal protection provisions of the State Constitution.

As explained more fully above, the long-standing meaning of marriage is a union between a man and a woman. *M.T., supra,* 140 *N.J.Super.* at 84; *Lee, supra,* 337 *N.J.Super.* at 514; *Baker, supra,* 191 *N.W.*2d at 186. The State's marriage statutes, therefore, belie a claim that the Legislature intended to discriminate against plaintiffs. Instead, the Legislature merely intended to enact laws that are in complete conformity with the universally held legal definition of marriage.

In addition, plaintiffs cannot establish that they are similarly situated to those individuals who wish to enter into a mixed-gender marriage, and therefore, should be accorded the same access to marriage as their counterparts. The universally accepted understanding reflected in the laws of this country is that marriage is between a man and a woman, therefore, plaintiffs cannot establish that the Constitution demands that they and individuals seeking to enter into mixed-gender marriages "should be treated alike." *See* *Greenberg, supra,* 99 *N.J.* at 568. Plaintiffs' desire to enter into a same-sex marriage sets them apart from the historic understanding of the institution of marriage.

***23** This distinction puts plaintiffs sufficiently dissimilar to individuals who wish to enter

into a mixed-gender marriage to invalidate their equal protection arguments. Those individuals who wish to enter into mixed-gender marriage seek access to the historically defined concept of marriage. Plaintiffs, on the other hand, are in a class of individuals who wish to alter the fundamental nature of marriage itself. From a legal standpoint, the differences between these classes of individuals are stark, fully justifying the Legislature's determination that marriage in New Jersey shall take the same form that has long been accepted under the laws of this and every other State in the Union.
While the court is sympathetic to the interests of the plaintiffs, the appropriate action is for the plaintiffs to take appropriate steps to convince the Legislature to sanction their relationships through legislation. Social change of the type sought by plaintiffs is properly accomplished in the legislative arena. Great strides have already been made in protecting same-sex partners in New Jersey. These legislative enactments, to be reviewed in the next section of this opinion, are evidence that tangible accomplishments can be achieved through the appropriate avenue of government redress for social change; the Legislature.
Finally, the recent decision by the United States Supreme Court in *Lawrence v. Texas,* 537 *U.S.* 1102, 123 *S.Ct.* 953, 154 *L.Ed.*2d 770 (2003), does not alter the determination by this court. In *Lawrence,* the Court held that a same-sex couple's right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in the home without government intervention.

V.

THE INTEREST OF THE STATE OUTWEIGHS ANY HARM TO SAME-SEX COUPLES.

It has always been recognized that the right to marry is not absolute. Although constitutionally based, the right to marry remains subject to reasonable state regulation. Indeed, that right traditionally has been subject to pervasive regulation. When balancing the affected right of the plaintiffs; one not recognized as "fundamental" and not a classification that is entitled to heightened scrutiny, this court is satisfied that the restriction satisfies a legitimate governmental purpose.
The test for determining whether a restriction on marriage will survive a constitutional challenge is straightforward: the effect of the challenged statute on the right to marry is weighed in light of the state interest furthered by the law. Applying this standard, the State has articulated more than adequate reasons to support the public need for such restriction. The State has an interest in fostering and facilitating the traditional notions of family and to be in harmony with other states that have evaluated and considered the same issue.
Thus, the prohibition on same-sex marriage is similar to the statute affecting marital rights already upheld by the Supreme Court of New Jersey. As noted heretofore, in that case, plaintiff challenged a statutory amendment that prohibited the plaintiff from casino employment because she was the spouse of a judge. *Greenberg, supra,* 99 *N.J.* at 578. The Court was not persuaded by the argument that the statute interfered with the State Constitutional right to marry:
***24** The amendment, which was adopted sixteen years after her marriage, could not have affected plaintiff's decision to marry, and she does not intimate that her inability to obtain casino employment might affect her decision to remain married. Any interference with her marital rights is but an indirect consequence of the ban on the employment of judicial spouses.
[*Ibid.*]
Having found that plaintiff's right to marry was only indirectly affected by the challenged statute, the Court went on to uphold the law because it bore a rational relationship to the valid governmental "objective of preserving the public confidence in casino gambling" by preventing the appearance of casino influence on the Judiciary. *Ibid.*
Granted, the ban on same-sex marriage is a more significant limitation on the right to marry than the statute examined in *Greenberg.* However, in light of the statutory protections afforded to same-sex couples and their ability to protect their rights through the methods described above, New Jersey's ban on same-sex marriage has, at most, a minimal effect on the ability of these couples to maintain their relationships. *See* also

Rutgers, supra, 298 *N.J.Super.* at 454 ("Balancing the parties' and the public's interest in the marital status classification causes us to conclude that the State's interest should prevail. The present classification avoids the State getting involved in a subjective analysis and avoids certain conflict that would arise from establishing and analyzing subjective criteria.").

Numerous restrictions on marriage have been upheld against challenges under the right to privacy. New Jersey statutes ban bigamous marriages, *N.J.S.A.* 2C:24-1, common law marriages, *N.J.S.A.* 37:1-10, incestuous marriages, *N.J.S.A.* 37:1-1, and marriages to persons adjudged to be mentally incompetent or with a venereal disease in a communicable stage, *N.J.S.A.* 37:1-9. The governmental interests in these restrictions have been repeatedly recognized. The ban on common law marriage has been found to discourage unions that are marked by [a] lack of commitment and which ... may dissolve at any moment. The uncertainty as to economic support and dependency are the primary concerns of the State. *Torres v. Torres,* 144 *N.J.Super.* 540, 543 (Ch. Div.1976). The government has been found to have a compelling interest in banning polygamy because [m]onogamy is inextricably woven into the fabric of our society and is the bedrock upon which our culture is built. *Potter v. City of Murray City,* 760 *F.*2d 1065, 1070 (10th Cir.), *cert. denied,* 474 *U.S.* 849, 106 *S.Ct.* 145, 88 *L.Ed.*2d 120 (1985). The State's interest in a ban on incestuous marriages is self-evident: preventing the dilution of the genetic makeup of the offspring of the marriage. In addition, protection of mentally incompetent persons from manipulation and the prevention of the spread of disease support the limitations that address those circumstances.

***25** While a ban on same-sex marriage differs from those listed above, nonetheless, the interest of the State in limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority. While it is true that plaintiffs cannot marry one another, the Legislature and the courts have taken significant steps to protect the rights of same-sex couples. The rights afforded to same-sex couples are significant and represent a decision by the Legislature and the courts to extend to same-sex partners many of the benefits enjoyed by mixed-gender couples. While same-sex couples are not allowed to marry in New Jersey, there is nothing to preclude these couples from forming relationships and making personal commitments to one another.

Although plaintiffs submit that their familial rights are effected by the ban on same-sex marriage, over the past three decades, New Jersey has strengthened the protections afforded to same-sex couples. Nearly 30 years ago, it was established in New Jersey that the parental rights of an unmarried gay person are constitutionally protected. *In re J.S. & C.,* 129 *N.J.Super.* 486, 489 (Ch.1974), *aff'd,* 142 *N.J.Super.* 499 (App.Div.1976). In addition, in this State, members of same-sex couples are permitted to adopt their partner's biological children. *In re Adoption by H.N.R.,* 285 *N.J.Super.* 1, 6 (App.Div.1995) (allowing lesbian to adopt biological child of her partner conceived with mutual planning during same-sex relationship); *In re Adoption by J.M.G.,* 267 *N.J.Super.* 622, 625-26 (Ch.1993).

Recently, our Supreme Court held that a lesbian was a "psychological parent" to the children of her former partner, with whom she lived in a "familial setting," and accorded her visitation rights. *V.C. v. M.J.B.,* 163 *N.J.* 200, 224, *cert. denied,* 531 *U.S.* 926, 121 *S.Ct.* 302, 148 *L. Ed.*2d 243 (2000). In a 1997 case that did not generate a published opinion, a Bergen County Judge, with the consent of the State, allowed a gay male couple to adopt a child who was not related to either man but for whom they were State-authorized foster parents. *See http://archive.aclu.org/news/n121797a.html.*

In addition, a person may change their last name to that of their same-sex partner to announce their relationship to the world. *In re Application for Name Change by Bacharach,* 344 *N.J.Super.* 126, 134 (App.Div.2001). As the court correctly observed, same-sex couples can exchange rings, proclaim devotion in a public or private ceremony, call their relationship a marriage, use the same surname, adopt and rear children. All these actions may be taken in full public view. None are offensive to the laws or stated policies of this state.

[*Id.* at 135.]

Furthermore, the Prevention of Domestic Violence Act, *N.J.S.A.* 2C:25-17, affords the same protection to victims in same-sex relationships as in other relationships covered by the Act. And, more generally, the Law Against Discrimination, *N.J.S.A.* 10:5-4, protects individuals from discrimination in employment, and access to public accommodations and housing based on marital status, affectional or sexual orientation, [and] familial status....
***26** In addition, plaintiffs can take steps available to any persons to ameliorate the harms they allege to suffer with respect to property rights, inheritance, and health care decision-making. The Advance Directives Act authorizes any competent adult to execute an advanced directive designating any individual as a legal representative to make health care decisions in the event the declarant subsequently lacks decision-making capacity. *N.J.S.A.* 26:2H-55 and -56; *see also* *In re Roche,* 296 *N.J.Super.* 583 (Ch. Div.1996). In addition, same-sex partners can execute wills to control the inheritance of their property upon death, purchase property as joint tenants with a right of survivorship, and enter into agreements with respect to the distribution of property upon the termination of their relationships.
An agreement between unmarried adults to provide lifetime support after cohabitation may be enforceable for same-sex couples. *See generally* *In re Estate of Roccamonte,* 174 *N.J.* 381 (2002). In addition, the New Jersey Supreme Court has recognized that in some circumstances the "familial relationship" to an injured party necessary to allege certain tort claims need not be based on marriage or blood. *See* *Dunphy v. Gregor,* 136 *N.J.* 99 (1994).
While this court is sympathetic to and recognizes the strong commitment the plaintiffs have made to one another and to their families, the appropriate avenue of redress to secure statutory benefits is to seek a legislative response. As a general proposition, the Legislature is accorded vast deference in determining eligibility for statutory benefits. The Legislature is the body most responsive to the will of the people and best suited to forge the practical compromises necessary to preserve unity in a changing and pluralistic society. Nothing prevents plaintiffs from seeking from the Legislature a change in the tax laws, workers' compensation statutes, pension laws, tort laws, and insurance provisions to change the availability of benefits. Indeed, the numerous statutory advances in recent years with respect to the protection of gay men and lesbians is strong evidence that the Legislature is prepared to tackle the difficult social issues surrounding same-sex relationships in this State. The Judiciary should permit the vital debate and delicate political negotiations to continue without interruption from the courts.
The State's interest in preserving the long-accepted definition of marriage, on the other hand, is substantial. It is entirely rational for the Legislature to conclude that the rights of gay men and lesbians can be protected in ways other than alteration of the traditional understanding of marriage. The institution of marriage has played a unique role in the formation of our society. Its status as the union of people of different genders has remained unchanged throughout history. While the Legislature has demonstrated its desire to recognize the rights of individuals in same-sex relationships, it is not unreasonable for the Legislature to conclude that a fundamental change in the centuries-old meaning of marriage is necessary to protect same-sex couples.
***27** It is entirely reasonable for the Legislature to enact legislative changes to protect same-sex couples without disturbing the marriage statute. Impatience with the scope or pace of change is an insufficient basis upon which to justify the judicial creation of a new constitutional right. Moreover, it is reasonable for the Legislature to conclude that this State has an interest in preserving uniformity among the States with respect to the definition of marriage. This rationale for New Jersey's ban on same-sex marriage has particular resonance given the fact that such unions are valid nowhere in the United States and that New Jersey's recognition of same-sex marriage would raise significant legal issues under the Full Faith and Credit Clause regarding the validity of those marriages in other States.
It is no small matter for the New Jersey Legislature to sanction a form of marriage that is expressly prohibited in either the statutes or Constitutions of each of its sister States, as well as in the laws enacted by Congress. While New Jersey may well take the role of

national trailblazer when the circumstances for such a bold move are right, the decision to stand-alone among the States in recognizing a right belongs to the Legislature. But, where history, common law, and the uniform laws of the United States all reach the conclusion that marriage does not extend to same-sex couples, it is entirely reasonable for the New Jersey Legislature to decide that the rights of gay men and lesbians can be protected short of creating the unique right to enter into a same-sex marriage.

The Supreme Court has held that legislative bodies are presumed to act on the basis of adequate factual support and that "[t]his presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest." *Hutton Park Gardens v. W. Orange Town Council,* 68 *N.J.* 543, 565 (1975). The "government does not have a heavy burden to satisfy" this test. *Hamilton Amusement Ctr. v. Verniero,* 156 *N.J.* 254, 270- 271 (1998), *cert. denied,* 527 *U.S.* 1021, 119 *S.Ct.* 2365, 144 *L.Ed.*2d 770 (1999). Therefore, the Court has held that the Legislature may establish adequate support for its enactments by pointing to United States Supreme Court decisions on the subject, the decisions of New Jersey courts, the decisions of Federal courts, the decisions of courts in other states, the legislative findings set forth in the statute itself, other State laws and "simple common sense." *Ibid.* As discussed throughout this brief, New Jersey's marriage statutes plainly have overwhelming support in all of these areas.

In striking the balance, courts look at the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for restriction. It is against this backdrop the analysis is based. This court has already concluded that the right to marry someone of the same gender is not a fundamental right in this state or other states. Furthermore, same-sex couples enjoy many benefits and privileges enjoyed by married couples. Complete mathematical equality is not required. The restriction by the government, although restricting the right to marry, does not preclude same-sex couples from forming relationships, adopting children and enjoying many other benefits traditionally enjoyed by married couples.

***28** This court is satisfied that the State's interest does not interfere with a recognized fundamental right, that the prohibition against same-sex marriage does not offend the equal protection guarantees in the State Constitution, and that the reasons advanced by the State are sufficient to withstand judicial scrutiny. The appropriate avenue for a change in the meaning of marriage is the Legislature, where social changes of the magnitude contemplated by the amended complaint are best addressed.

VI.

CONCLUSION

With the consent of the parties, the motion to dismiss filed by the State is now before the court on cross-motions for summary judgment. For all the reasons set forth herein, the court grants the State's motion for summary judgment.

Although this court has rejected the constitutional arguments advanced by the plaintiffs, the court commends the Legislature to carefully examine and consider the expanded rights afforded to same-sex couples in other jurisdictions. Similar to the case at bar, the court in *Rutgers* denied benefits to same-sex partners. Judge Levy (retired J.A.D.) in his concurring opinion stated:

As Justice Handler recognized in *M.T. v. J.T.,* there are winds of change sometimes to be considered. Accordingly, I also commend to the Legislature its examination of the marriage laws to consider the creation of legal responsibilities between domestic partners, both homosexual as well as heterosexual, perhaps based on objective criteria to permit registration of a domestic partnership as is recognized in New York City, pursuant to Mayoral Executive Order 48 of 1993.

[*Rutgers, supra,* 298 *N.J.Super.* at 467.]

There are a number of states that have created new legal statutes whereby benefits traditionally provided to married couples can be extended to unmarried couples. Hawaii's law creates a new legal status of "reciprocal beneficiaries." The law provides a number of benefits to state employees and citizens, although its effect on private employers is

limited. *HAW. REV.* Stat. § 572C-7 (2001). The California law, enacted in 1999, provides benefits including the following: stepparent adoption for domestic partners, death and survivorship benefits, certain health insurance benefits, family leave, the right to file for disability benefits and the right to sue for wrongful death.2001, *Cal.* Stat. 893.
Vermont's law is the most expansive. As noted heretofore, it was enacted in response to a court order. It creates a new status of "civil unions." *Vt. Stat. Ann.* tit 15, § 1201 (2001). It provides that town and county clerks may issue "certificates of civil union" to same sex couples. The law provides that parties to a civil union will have the same benefits, protections and responsibilities under the law as are granted to spouses in a marriage. *Id.* at § 1204(a). It also provides that the terms "spouse," family," and similar terms in the law will be construed to include couples in civil unions and outlines a list of twenty-four nonexclusive kinds of law that will not be applied to same-sex couples on the same terms as married persons. *Id.* at § 1204(e). The Vermont law also contains a requirement for all employers that insurers shall provide dependent coverage to parties to a civil union that is equivalent to that provided to married couples. *Ibid.*
***29** Almost seven years has passed since the holding by the Appellate Division in *Rutgers.* In June of this year two bills related to same-sex couples and the extension of benefits were introduced before the Assembly. On June 5, 2003, the "Family Equality Act" to establish domestic partnerships was introduced and on June 9, 2003 a second bill, to establish "Civil Unions" was introduced. *See* B. 3743, 210th Leg. (N.J.2003); B. 3762, 210th Leg. (N.J.2003). Both bills, if passed, would extend to same-sex partners the same benefits and protections as a spouse under the laws of this State.
N.J.Super.L.,2003.
Lewis v. Harris
2003 WL 23191114 (N.J.Super.L.)
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