

# New York State Bar Association

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#### **COMMITTEE ON CIVIL RIGHTS**

FERNANDO A. BOHORQUEZ, JR.

June 9, 2009

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Michael Getnick President New York State Bar Association One Elk Street Albany, NY 12207

Re:

Report of the Special Committee on LGBT People and the Law Letter in Support submitted by the Committee on Civil Rights

Dear Mr. Getnick:

The New York State Bar Association (the "Association") and the Committee on Civil Rights (the "Committee") have long supported the equal rights for New Yorkers under state and federal law. The Committee was established in 1952 to provide a forum for information and advocacy concerning the rights of due process and equal protection under the law guaranteed to all persons. The Committee addresses civil rights issues affecting all New Yorkers on the local, state and national levels. In this capacity, the Committee strongly supports the Report and Recommendation on Marriage Rights for Same-Sex Couples (the "Report") authored by the Special Committee on LGBT People and the Law (the "Special Committee"), and recommends that the Association fully adopt the Report and its recommendation and proposed resolution endorsing full marriage rights for same-sex couples. \(^1\)

Denial of full marriage rights for same-sex couples raises fundamental Equal Protection and Due Process concerns under both the State and Federal Constitutions. In the five years since the Special Committee's initial 2004 report to the Association, a number of state courts, including our own, have addressed the Equal Protection and Due Process questions raised by a state's denial of marriage rights for same-sex couples. In *Hernandez v. Robles*, the New York Court of Appeals held that the state's refusal to permit same-sex couples to marry did not violate Equal Protection or Due Process provisions of the State Constitution, and, in the same breath invited the State legislature to craft such a right.<sup>2</sup> In an eloquent dissent, then-Chief Judge Judith Kaye rejected the majority's holding in all respects, predicting that the court's decision to "avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic" would one day be looked on by future generations "as an unfortunate misstep."<sup>3</sup>

<sup>&</sup>lt;sup>1</sup> The Chair would like to thank and recognize Committee members Stephen Lessard, Jeremiah Frei-Pearson and Amber Long for their contributions to the Committee's Letter in Support of the Report of the Special Committee on LGBT People and The Law.

Hernandez v. Robles, 7 N.Y.3d 338 (2006).

<sup>&</sup>lt;sup>3</sup> Id. at 397 (Kaye, J. dissenting).

A majority of the other state courts reviewing the issue—before and since *Hernandez*—have agreed with Judge Kaye. In November 2003, the Massachusetts Supreme Judicial Court concluded that a marriage ban for same-sex couples did not meet the rational basis test for either due process or equal protection under the Massachusetts Constitution.<sup>4</sup> In May 2008, applying a standard of strict scrutiny, the California Supreme Court held that although the state's domestic partnership law gave same-sex couples most of the "substantive elements embodied in the constitutional right to marry," the statute nonetheless violated same-sex couples' constitutional right of equal protection to marry under the California Constitution.<sup>5</sup> In October 2008, applying an intermediate level of scrutiny, the Connecticut Supreme Court ruled that the equal protection clause of that state's constitution required that same-sex couples be given full marriage rights.<sup>6</sup> In April 2009, Iowa became the fourth state in the Union to permit same-sex couples to marry when the Iowa Supreme Court, under a heightened level of scrutiny, ruled unanimously that a state statute restricting marriage to "one man and one woman" violated the equal protection rights of same-sex couples under the Iowa Constitution.<sup>7</sup>

The Committee concludes that the arc of history will side with the foresight of those state courts holding that denial of the right of marriage to same-sex couples is a fundamental violation of Equal Protection and Due Process. We agree with Judge Kaye that the denial of marriage to same-sex couples is in violation of the State Constitution and believe that *Hernandez* was wrongly decided. Although the battle before the Court of Appeals may have ended, the Committee believes that a review of the competing arguments in *Hernandez* is instructive to the present debate over whether the State Legislature should enact a law granting same-sex couples the right to marriage.

# **Equal Protection**

Equal Protection under both State and Federal Constitutions is triggered whenever the government treats two groups differently.<sup>8</sup> By virtue of their being denied entry into civil

<sup>&</sup>lt;sup>4</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

In re Marriage Cases, 183 P.3d 384, 400 (Cal. 2008). Following the ruling, in the 2008 November election, California passed by a vote of 52%-48% Proposition 8, a state-wide referendum amending the California state constitution to define marriage as a union between one man and one woman. The constitutionality of Proposition 8 was challenged and, in a 6-1 ruling delivered on May 26, 2009, the California Supreme Court upheld the validity of Proposition 8 merely stating that it "carves out a narrow and limited exception" to the state constitutional protection gays and lesbians now receive. Strauss v. Horton, 2009 Cal. LEXIS 4626, \*31 (Cal. 2009). The court unanimously decided that an estimated 18,000 same-sex couples who married before the November election would continue to have their marriages recognized by the state. Id. at \*253.

<sup>&</sup>lt;sup>6</sup> Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481-82 (Conn. 2008).

<sup>&</sup>lt;sup>7</sup> Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009). In addition to Massachusetts, Iowa, and Connecticut, same sex couples can also marry in Maine, New Hampshire, and Vermont due to recently enacted marriage equality legislation—some as recently as June 3, 2009. On April 16, 2009, Governor Paterson introduced a legislative proposal for marriage equality that would amend the Domestic Relations Law to provide that "[n]o application for a marriage license shall be denied on the ground that the parties are of the same or different sex." Governor's Program Bill No. 10 § 3 (2009). The Assembly passed the marriage equality bill on May 12, 2009 by a vote of 89-52. A. 07732, 2009-2010 Reg. Sess. (N.Y. 2009). The Senate has until June 22, 2009 to act on a similar bill. S. 4401, 2009-2010 Reg. Sess. (N.Y. 2009).

<sup>&</sup>lt;sup>8</sup> The New York Equal Protection clause is very similar to the Equal Protection clause of the Fourteenth Amendment and "is no more broad in coverage than its Federal prototype." Esler v. Walters, 56 N.Y.2d 306, 313-14 (1982) (citing Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530-31 (1949)).

marriage, same-sex couples are deprived of a number of statutory benefits and protections extended to married couples under New York law. These statutory inequities, as well as the discriminatory exclusion of same-sex couples from the benefits and protections of civil marriage as a whole, violate their constitutional right to equal protection of the laws. In Equal Protection cases, the government must justify the differential treatment by showing that it relates, at a minimum, to a legitimate state interest. Although there is question as to the appropriate standard of scrutiny that should be applied to such a showing, the Committee finds that while strict scrutiny is the correct standard, even the lowest standard of rational basis review fails to show that the denial of marriage to same-sex couples is rationally related to a legitimate state interest.

The key governmental interests that have been raised in support of maintaining marriage as a heterosexual institution generally fall within four categories: procreation, the well-being of children, maintaining the tradition of marriage as a heterosexual institution, and the preservation of public resources. Judge Kaye correctly found that none of these interests is rationally furthered by the exclusion of same-sex couples from marriage and some fail even to meet the threshold test of legitimacy. For instance, marriage equality opponents frequently trumpet the "procreative and child welfare concerns," which states rely on to justify opposite-sex only marriage laws. But there is no evidence to support that excluding same-sex couples from marriage rationally advances this interest. In fact, as Judge Kaye found, refusing to extend marriage rights to same-sex couples undercuts child welfare by depriving thousands of children being raised by same-sex couples of benefits available to their peers with opposite sex parents. Additionally, New York now legally recognizes the marriages of same-sex couples contracted in other jurisdictions, creating the inherent inequality that same-sex couples can live as married partners in New York but they cannot enter into a valid marriage in the State.

Practically speaking, by virtue of their being refused the right to marry, same-sex couples are deprived of a significant number of statutory benefits and protections extended to married couples under New York law. Unlike married spouses, same-sex partners may be denied hospital visitation of their critically ill life partners. They must spend more of their joint income to obtain equivalent levels of health care coverage. They may, upon the death of their partners, find themselves at risk of losing the family home. There are hundreds of ways in which committed same-sex couples and their children are deprived of equal benefits under New York law. Same-sex families are, among other things, denied equal treatment with respect to:

- intestacy,
- inheritance,
- tenancy by the entirety,
- taxes,
- insurance,

<sup>&</sup>lt;sup>9</sup> The majority in *Hernandez* applied the lowest level of scrutiny, rational basis review, to reach its decision. However, Judge Kaye noted that, "[a]lthough the classification challenged here should be analyzed using heightened scrutiny, it does not satisfy even rational-basis review, which requires that the classification 'rationally further a legitimate state interest.' Rational-basis review requires both the existence of a legitimate interest and that the classification rationally advance that interest." *Hernandez*, 7 N.Y.3d at 390-91 (Kaye, J. dissenting) (citations omitted). The opposing party conceded they could not pass heightened scrutiny review. *Id.* at 386.

<sup>&</sup>lt;sup>10</sup> Hernandez v. Robles, 7 N.Y.3d 338, 392 (2006) (Kaye, J. dissenting).

<sup>11</sup> Id. at 391-95 (Kaye, J. dissenting).

- health benefits,
- · medical decision making,
- workers' compensation,
- the right to sue for wrongful death, and
- spousal privilege.

### **Due Process**

The purpose of Due Process under both State and Federal Constitutions is to ensure that no group or individual is deprived of a fundamental right absent a narrowly tailored approach that satisfies a compelling governmental interest. There is no question that marriage is a fundamental civil right under the Constitution for all citizens. 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 United States Supreme Court described marriage as "the most important relation in life" and "the foundation of the family and society."

Opponents of marriage by same-sex couples try to reframe the fundamental right at issue as an attempt by same-sex couples to create a new fundamental right of "same-sex marriage," rather than simply the freedom of same-sex couples to enjoy the fundamental right of "marriage." Recasting the fundamental right to marry as a request for recognition of a new right to "same-sex marriage" misapprehends the nature of the liberty interest at stake. The *Hernandez* court erroneously adopted this conclusory definition which led to its holding that the refusal of same-sex marriage rights did not violate due process. But as the Massachusetts court explained in *Goodridge*, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide." Judge Kaye probably stated it best, "[s]imply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them."

The United States Supreme Court has rejected the notion that recognized fundamental rights can be restricted based on "traditional" assumptions about who should be permitted their protection. The right to marry is no different. In *Loving*, the Court held that a right as fundamental as the right to marry, must be afforded even to those who have previously been excluded from its scope. <sup>17</sup> Many of the arguments raised in opposition to marriage by same-sex

The New York Constitution provides that "no person shall be deprived of life, liberty or property without due process of law," which is nearly identical to the Federal Due Process Clause of the Fifth and Fourteenth Amendments. However, the New York State Due Process clause has a broader reach, protecting individuals from both state and non-state actors, rather than just state actors. Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 161 (1978).

<sup>13</sup> Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

<sup>14</sup> Maynard v. Hill, 125 U.S. 190, 205, 211 (1888).

<sup>15</sup> Goodridge v. Department of Pub. Health, 798 NE2d 941, 972-973 (Mass. 2003).

<sup>16</sup> Hernandez v. Robles, 7 N.Y.3d 338, 382 (2006) (Kaye, J. dissenting).

<sup>&</sup>lt;sup>17</sup> See, e.g., Loving v. Virginia, 388 U.S. 1 (1967). In other contexts, the Court of Appeals has recognized that due process rights must be afforded to all, including historically excluded groups. See, e.g., Matter of Raquel Marie X., 76 N.Y.2d 387, 397 (1990) (affording children custody rights to unwed fathers, despite a long history of excluding

couples are identical to those made in support of anti-miscegenation laws in the last century. Central to the fundamental right to marry is the right to marry the person of one's choice. "[D]iscriminatory views about proper marriage partners can no more prevent same-sex couples from marrying than they could different-race couples." Once again, the key governmental interests that have been raised in support of maintaining marriage as a heterosexual institution fail to qualify as compelling governmental interests that justify denying the fundamental right of marriage to same-sex couples.

## Marriage Equality in Practice

The experiences of states that have legalized marriage for same-sex couples further show that in practice no legitimate governmental interest is advanced by prohibiting these unions. According to a 2008 article in The Boston Globe discussing the fifth anniversary of the Massachusetts decision allowing same-sex couples to marry, the marriage rate of same-sex couples had leveled off, accounting for 4% of all state marriages performed in 2006 and 2007; likewise, the divorce rate in Massachusetts for all couples has remained steady and is still the lowest in the country. 19 Other studies indicate that the recognition of marriage by same-sex couples in Massachusetts is beneficial to the well-being of the children of same-sex couples. A UCLA Williams Institute study on the impact of allowing same-sex marriage in Massachusetts indicates that of the 28% of married same-sex couples surveyed who have children, 93% agreed or somewhat agreed that their children are happier and better off as a result of their marriage.20 Many parents who responded to the survey reported that their children felt more secure and protected, or gained a sense of stability. Another common response was that marriage allowed children to see their families as being validated or legitimated by society or the government.<sup>21</sup> As for more material benefits, married same-sex parents reported that their children gained legal protection, and in some instances health insurance, as a result of their marriage.<sup>22</sup>

Furthermore, the argument that the denial of marriage to same-sex couples is necessary for the preservation of public resources has been refuted by public officials and scholars who have weighed in on the economic impact of marriage. For example, far from negatively impacting public resources, studies conducted by scholars from UCLA's Williams Institute on the impact of marriage equality and other forms of recognition of same-sex couples' relationships, in Vermont, California, Connecticut, New Hampshire, Massachusetts, Washington, New Mexico, and Colorado show that legal recognition had a net positive effect on the budgets

unwed fathers from that right); Rivers v. Katz, 67 N.Y.2d 485, 495-496 (1986) (affording the right to refuse medical treatment to the mentally disabled, despite a long history of excluding the mentally ill from that right).

<sup>&</sup>lt;sup>18</sup> Hernandez, 7 N.Y.3d at 384 (2006) (Kaye, J. dissenting). The Committee also disagrees with critics that same-sex marriage rights would necessarily infringe on the free exercise of religion. For instance, the Marriage Equality Bill pending before the New York State Legislature explicitly provides that religious institutions would not be compelled to perform same-sex marriages.

<sup>&</sup>lt;sup>19</sup> David Filipov, "5 Years Later, Views Shift Subtly on Gay Marriage," THE BOSTON GLOBE, Nov. 17, 2008.

<sup>&</sup>lt;sup>20</sup> M.V. LEE BADGETT, THE EFFECTS OF MARRIAGE EQUALITY IN MASSASHUSETTS: A SURVEY OF THE EXPERIENCES OF MARRIAGE ON SAME SEX COUPLES 8 (2009), available at http://www.law.ucla.

 $<sup>\</sup>underline{edu/williams institute/publications/Effects\_FINAL.pdf}$ 

<sup>&</sup>lt;sup>21</sup> *Id.* at 9.

<sup>&</sup>lt;sup>22</sup> *Id*.

of those states.<sup>23</sup> In June 2004, the Congressional Budget Office ("CBO") released a report on the budgetary impact of permitting same-sex couples to marry, estimating that, on net, recognizing this as a right would improve the nation's budget by just under \$1 billion in each of the next ten years.<sup>24</sup> The report, submitted to the United States House Judiciary Committee, estimates federal tax revenues would increase by \$400 million per year from 2005 through 2010 and increase \$500 to \$700 million per year from 2011 to 2014. In addition, legalization of same-sex marriage would save the Supplemental Security Income program roughly \$100 million per year by 2014; save Medicare around \$50 million per year through 2014; and cost the Federal Employees Health Benefits Program less than \$50 million per year through 2014.

Based on several studies conducted in other states, the New York State Comptroller has testified that permitting same-sex couples to marry will provide economic benefits to the State.<sup>25</sup> One study estimated an \$11.5 million per year reduction in spending on "means-tested public assistance benefits" in California "even if only a small percentage of individuals living with partners were to marry." A second study conducted in Vermont based its figures on the assumption that only one percent of same-sex unions would involve a partner who would be able to come off of public assistance, and still estimated a savings of \$2 million over five years. More recently, the New York City Comptroller's Office estimated that the economic impact of marriage equality would add \$140 million to New York City's economy during the three years following legislative approval, and would add about \$210 million, in spending to the State's economy.<sup>26</sup> The New York City Comptroller's Office also estimated that the State would collect about \$8 million more in taxes and save more than \$100 million in outlays on health care, while the City would collect about \$7 million in taxes and fees and experience no impact on outlays.<sup>27</sup> These figures more than offset the estimate that New York City firms would pay a total of about \$37 million in increased health insurance costs for employee spouses and families, while New York State firms as a whole would pay about \$69 million for this additional coverage.

#### Conclusion

The Report of the Special Committee finds that extending equal marriage rights to samesex couples is the only legally and pragmatically viable way to vest same-sex couples with the full panoply of rights and responsibilities enjoyed by married opposite-sex couples. The Report recommends that the Association modify its current position to endorse marriage as the only systemic structure that can adequately remedy the exclusion of tens of thousands of the State's citizens from the rights, responsibilities, and dignity that attend the right to marry. Specifically,

<sup>&</sup>lt;sup>23</sup> M.V. Lee Badgett, Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-Sex Couples in New Jersey, 4 RUTGERS J.L. & PUB. POL'Y 8, 11 (2006).

<sup>&</sup>lt;sup>24</sup> CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES, (June 21, 2004), available at http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

<sup>&</sup>lt;sup>25</sup> On March 3, 2004, State Comptroller Alan G. Hevesi testified before a New York State legislative forum on marriage equality.

<sup>&</sup>lt;sup>26</sup> See Office of the New York City Comptroller, "Thompson: NYS Economy Would Gain \$210 Million After Legalization of Marriage for Same Sex Couples," PR09-05-131 (May 26, 2009) available at <a href="http://www.comptroller.nyc.gov/press/2009\_releases/pr09-05-131.shtm">http://www.comptroller.nyc.gov/press/2009\_releases/pr09-05-131.shtm</a>.

<sup>&</sup>lt;sup>27</sup> OFFICE OF THE NEW YORK CITY COMPTROLLER, LOVE COUNTS: THE ECONOMIC BENEFITS OF MARRIAGE EQUALITY FOR NEW YORK, (June 2007), available at http://www.comptroller.nyc.gov/bureaus/bud/07reports/Jun07LoveCountBudgetnotes.pdf.

it recommends that the Association should abandon its prior support for civil unions or domestic partnerships and advocate for amendment of the Domestic Relations Law to permit marriage by same-sex couples, as full equal marriage rights cannot be conveyed by a status different from and inferior to legal marriage. By taking such action, the New York Legislature would join the good company of other state legislatures who have placed the protection of the equal rights of all their state's citizens above political expediency.<sup>28</sup>

The Committee fully endorses the conclusion and recommendation of the Special Marriage equality is the only position consistent with our State's and our Committee. Association's long and deep commitment to equal protection of all its citizens under the law.

In closing, we believe this issue was most eloquently addressed by Mildred Loving, the lead plaintiff in the landmark case allowing marriage for interracial couples, on the 40th anniversary of the ruling in Loving v. Virginia:

My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said, that it was God's plan to keep people apart, and that government should discriminate against people in But I have lived long enough now to see big changes. generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry.

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of [my husband] and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.

I am still not a political person, but I am proud that [my husband]'s and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and loving, are all about.<sup>29</sup>

Respectfully,

Fernando A. Bohorquez, Jr.

Chair, Committee on Civil Rights

<sup>&</sup>lt;sup>28</sup> Maine, New Hampshire, and Vermont have enacted laws permitting marriage by same-sex couples. 2009 Me. P.L. Ch. 82; H.B. 436, 2009 Legis. Sess. (N.H. 2009); S. 115, 2009-2010 Leg. Sess. (Vt. 2009). New Jersey has pending marriage equality legislation that is supported by the state's governor. <sup>29</sup> Mildred Loving, "Loving For All," (June 12, 2007), available at

http://www.freedomtomarry.org/pdfs/mildred loving-statement.pdf.