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NOTE

DUE PROCESS AND EQUAL PROTECTION: A CONSTITUTIONAL APPROACH TO SAME-SEX MARRIAGE

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I. Introduction

On July 6, 2006, the Court of Appeals of New York decided *Hernandez v. Robles*.[2] At issue in that case was whether New York's Domestic Relations Law violated the Due Process Clause and the Equal Protection Clause of the New York constitution by limiting marriage to opposite-sex couples.[3] The plaintiffs were members of forty-four same-

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[2] Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006).

[3] *Id.* at 6. The *Hernandez* decision was not the first decision to address the issue of the constitutionality of barring same-sex marriage under state law. Prior to the *Hernandez* decision, a number of states had already ruled on the constitutionality of same-sex marriage restrictions. In fact, by the time of the *Hernandez* decision, Arizona, Hawaii, Indiana, Massachusetts, New Jersey, and Vermont had all been asked to determine whether laws banning same-sex marriages violated their state constitutions. *Id.*

In *Baehr v. Lewin*, the Supreme Court of Hawaii vacated and remanded the Circuit Court's judgment. Hawaii's highest court declared that "the burden will rest on [the state official] to overcome the presumption that [the Hawaii statute] is unconstitutional . . . ." Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). The Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, went so far as to recognize that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." Goodridge v. Department of Public Health, 798 N.E.2d 941, 968 (Mass. 2003). Similarly, the Supreme Court of Vermont, in *Baker v. State*, held that same-sex couples "may not be deprived of the statutory benefits and protections afforded

sex couples who unsuccessfully attempted to obtain marriage licenses in the State of New York.[4] The case began as four separate lawsuits in which the plaintiffs sought a declaratory judgment against "the license-issuing authorities of New York City, Albany, and Ithaca; the State Department of Health, which instructs local authorities about the issuance of marriage licenses; and the State itself," for refusing to issue marriage licenses to same-sex couples, while issuing licenses to opposite-sex couples.[5] In the end, the Court of Appeals of New York held that "the New York Constitution does not compel recognition of marriages between members of the same sex."[6] The court emphasized that "[w]hether such marriages should be recognized is a question to be addressed by the Legislature"[7] and not by the courts.

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persons of the opposite sex who choose to marry." Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

The Vermont court, unlike its Massachusetts counterpart, explicitly left it to the Legislature to determine whether same-sex couples would be granted such rights under traditional marriage laws or under a new domestic partnership law. *Id.* The Court of Appeals of Indiana held, in *Morrison v. Sadler*, that "the Indiana Constitution does not require the governmental recognition of same-sex marriage . . . ." Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005). Similarly, the Arizona Court of Appeals, in *Standhardt v. Superior Court*, held that "the fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same-sex partner." Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. 2003). Finally, the Superior Court of New Jersey, in *Lewis v. Harris*, held that its "statutory limitation of the institution of marriage to members of the opposite sex does not violate our Constitution." Lewis v. Harris, 875 A.2d 259, 262 (N.J. Super. Ct. App. Div. 2005).

[4] *Id.* at 5.

[5] *Id.* In the original suits, the Supreme Court of New York granted summary judgment for the defendant, and the Appellate Division affirmed the ruling in every case except *Hernandez*. There the Supreme Court of New York granted summary judgment for the plaintiff, but the decision was reversed by the Appellate Division. *Id.*

[6] *Id.*

[7] *Id.*

The *Hernandez* decision is important because laws affording benefits to married couples are wide-ranging. The General Accounting Office (GAO) listed family law, taxation, health care law, probate, torts, government benefits and programs, private sector benefits, labor law, real estate, bankruptcy, immigration, and criminal law as areas where rights and responsibilities are automatically granted to married couples.[8] Moreover, state and local governments as well as private organizations provide hundreds of additional rights based on marital status.[9] Without the ability to marry, same-sex couples are unable to obtain benefits, which are automatically afforded opposite-sex couples when they marry. In fact, the GAO estimates that "[i]f recognition is given to same-sex marriages . . . more than one thousand rights and responsibilities of different-sex couples will be extended to cover couples of the same sex."[10] These statistics thus make it clear that decisions like *Hernandez* have the potential to affect every aspect of life for same-sex couples.

In addition, the *Hernandez* decision is important because the New York Constitution's Due Process and Equal Protection Clauses mirror the language found in the United States Constitution's versions of those same Clauses. Because the New York courts have used the same analytical framework for Due Process as the United States Supreme Court, the analysis would be the same.[11] Similarly, the New York Equal Protection Clause is no broader than that found in the Fourteenth Amendment[12]; thus, this analysis is applicable to the United States Constitution's Due Process and Equal Protection Clauses.

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[8] American Bar Association Section of Family Law, *A White Paper Analysis of the Laws Regarding Same-Sex Marriages, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 367-70 (2004).
[9] *Id.* at 347-48.
[10] *Id.* at 347.
[11] *Hernandez*, 855 N.E.2d at 9.
[12] *Id.*

Keeping in mind that the analysis of this New York decision parallels the federal constitutional analysis, this note will show that the reasoning of the *Hernandez* majority is flawed and that the repercussions of this flawed reasoning are grave. First, I will explain why the *Hernandez* majority made an unreasonable argument when it claimed that the Domestic Relations Law can be defended as a rational legislative decision. Second, I will show that the *Hernandez* majority used an incorrect standard of review in evaluating the constitutionality of the Domestic Relations Law by using a rational basis test when the proper standard for such a case is a strict scrutiny test. Last, I will demonstrate that by applying the correct standard of review, the New York Court of Appeals should have found that the Domestic Relations Law violates the New York constitution's Due Process and Equal Protection Clauses.

II. Repercussions of the *Hernandez* Decision

New York's Domestic Relations Law was adopted in 1909.[13] The law limits marriage to opposite-sex couples.[14] Specifically, §12 of New York's Domestic Relations Law states that marriage requires "[n]o particular form or ceremony . . . but [states that] the parties must solemnly declare in the presence of a clergy man or magistrate and the attending witness or witnesses that they take each other as *husband* and *wife*."[15] Section 15(1)(a) requires that certain duties be performed by the *groom* and the *bride*.[16] Additionally, §50 states that "[p]roperty . . . owned by a *woman* at the time of *her* marriage . . . shall continue to be *her* sole and separate property as if *she* were

[13] *Id.* at 6.
[14] *Id.* at 1.
[15] N.Y. DOM. REL. LAW §12 (Consol. 2007) (emphasis added).
[16] *Id.* at §15(1)(a).

unmarried, and shall not be subject to *her husband's* control or disposal nor liable for *his* debts."[17] As the New York Court of Appeal noted in the *Hernandez* decision, it is clear that the original intent of the law was to limit marriage to members of the opposite sex.[18]

The plaintiffs in the *Hernandez* case claimed that the Domestic Relations Law violates the New York constitution's Due Process Clause[19] and the New York constitution's Equal Protection Clause.[20] However, the New York Court of Appeals held that the Domestic Relations Law does not violate the state constitution. As a result, the court determined that there is no constitutional protection affording same-sex couples the right to marry under New York law.[21]

The repercussions of this decision are significant. Obviously one of the reasons that same-sex couples want to marry is so that they, like opposite-sex couples, may participate in marriage benefits. The benefits of marriage are widespread; in fact, it is estimated that "[m]ore than one thousand rights and responsibilities are automatically accorded to couples based on marital status."[22] In 2004, the GAO estimated that 1,138 federal statutes existed in which marital status was a factor.[23] A number of states have conducted their own studies and have found that while "[s]ome of these rights and responsibilities can be

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[17] *Id.* at §50 (emphasis added).
[18] *Hernandez*, 855 N.E.2d at 6.
[19] *Id.* New York's Due Process Clause states that "No person shall be deprived of life, liberty or property without due process of law."
[20] *Id.* New York's Equal Protection Clause states that "No person shall be denied the equal protection of the laws of this State or any subdivision thereof."
[21] *Id.*
[22] American Bar Association Section of Family Law, *supra* note 8, at 366.
[23] *Id.*

replicated partially by private agreements . . . most such rights and responsibilities cannot."[24]

Laws affected by marital status cover almost every aspect of life. For example, marital status affects family law.[25] Rights that automatically apply to married couples include the right to seek spousal support, the right to seek custody and visitation, the right to adopt, the duty to support one's spouse, the liability for family expenses, and the automatic coverage of spouses under most automobile policies.[26] Taxation is also affected by marital status.[27] The GAO lists the right to file jointly and the right to transfer property between partners without tax consequences as rights automatically afforded to married couples.[28] Health care laws affected by marital status include the right to automatically have access to medical records and the right to hospital visitation.[29] Married couples are also granted reciprocal rights to make funeral arrangements, dispose of remains, and consent to organ donation.[30] Marital status also affects probate.[31] Marriage automatically confers protection from disinheritance to intestate succession.[32] Under tort law, married couples can seek compensation for wrongful death and loss of consortium.[33]

Additionally, government benefits and programs automatically afforded to married couples include survivor's benefits and military benefits.[34] In the private

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[24] *Id.* at 367.
[25] *Id.*
[26] *Id.* at 367-68.
[27] *Id.* at 368.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 369.

sector, automatic benefits for married couples include eligibility for life insurance and disability insurance, the right to take sick leave to care for a seriously ill partner, the right to family health insurance, and the ability to roll over a spouse's 401(k) or other retirement accounts.[35] Real estate law is also affected by marital status.[36] Eligibility for tenancy by the entirety, homestead rights, rent-control protections, and exemptions from transfer taxes are automatically afforded married couples.[37] Spouses can file jointly under bankruptcy laws.[38] Spouses can file joint petitions to immigrate under immigration laws.[39] Additionally, married couples have protections under criminal laws, including the privilege not to testify against a spouse and the protection of domestic violence laws.[40]

These privileges and protections illustrate that marriage comes with an "extensive legal structure that honors and protects a couple's relationship, helps support the family and its children through an unparalleled array of rights and responsibilities, and privileges a married couple as a single financial and legal unit."[41]

Fortunately, a few benefits afforded married couples have been granted to same-sex couples in New York.[42] In fact, three New York cases, two executive orders, and an act passed by the New York legislature have granted same-sex couples some rights and protections. In *Braschi v. Stahl Associates Co.*, the New York Court of

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 370.
[39] *Id.*
[40] *Id.*
[41] Jon W. Davidson, *Winning Marriage Equality: Lessons from Court*, 17 YALE J.L. & FEMINISM 297, 304 (2005).
[42] *See* The Association of the Bar of the City of New York Committee on Lesbian and Gay Rights, Committee on Sex and Law, and Committee on Civil Rights, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 70, 76-77 (2004).

Appeals declared that "the gay life partner of a tenant in a rent-controlled apartment is to be considered a family member under the rent control statute and entitled to protection from eviction."[43] In another case, *In re Jacob/In re Dana*, the Court of Appeals granted the right of "second parent" adoptions to same-sex couples.[44] The Court explained that "second-parent adoptions can be granted because they permit the creation of stable legal ties between one partner and the biological or adopted children of the other partner."[45] Additionally, in *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*, a surviving same-sex partner was allowed to "honor his deceased gay partner's preference for the treatment of his remains, over the objections of the decedent's mother and brother," despite a rule that "only the surviving spouse or next of kin may determine disposition absent testamentary directives to the contrary."[46]

Additionally, two recent executive orders and an act passed by the New York legislature granted New York same-sex couples rights and protections. An executive order, promulgated in 1983, prohibited discrimination based on sexual orientation when "providing health insurance benefits to same-sex domestic partners of state employees."[47] By 2001, health care benefits for same-sex partners were made available to all state employees.[48] In New York City, an executive order banning discrimination based on sexual orientation was implemented.[49] In addition, the New York legislature enacted the *Hate Crimes Act of 2000*, which imposed stricter penalties for crimes

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[43] *Id.* at 76.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 77.
[47] *Id.* at 80.
[48] *Id.*
[49] *Id.*

based on, among other things, discrimination based on sexual orientation.[50]

Despite the benefits that New York same-sex couples have won, it is important to remember that none of these rights were *automatically* afforded to same-sex couples as they would be if same-sex couples could marry. More importantly, while court decisions, statutes, and executive orders may be able to grant same-sex couples *some* rights, without recognition of their right to marry, many of the benefits of marriage will remain unattainable to same-sex couples. Therefore, it is clear that the implications of decisions like *Hernandez v. Robles* are momentous.

III. The Flawed Reasoning of the *Hernandez* Majority

The majority's reasoning in *Hernandez* is flawed. The majority uses an incorrect standard of review in both its Due Process and Equal Protection analyses. By applying the correct standard of review, the New York Court of Appeals should have found that the Domestic Relations Law violates the state's constitution. Therefore, under a correct reading of New York's constitution, same-sex couples should be allowed to marry, and the above-mentioned rights should be automatically afforded to same-sex couples.

A. A Rational Legislative Decision?

Although the focus of the *Hernandez* decision was whether the Domestic Relations Law violates the Equal Protection or Due Process Clauses, the *Hernandez* majority first considered whether the challenged limitation could be defined as a rational legislative decision. Because the

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[50] *Id.*

answer to this question is "critical in every stage of a due process and equal protection analysis,"[51] I will also begin my analysis by exploring whether the challenged limitation can be defined as a rational legislative decision.

In determining whether a there is a rationally related government interest in a limitation, "[t]he crucial question is whether a rational legislature could decide that [the benefits of marriage] should be given to members of opposite-sex couples, but not same-sex couples."[52] The majority offers two justifications for conveying such benefits to opposite-sex couples but not same-sex couples.[53] Both justifications are derived from the supposition that marriage is important to the welfare of children,[54] and both justifications are seriously flawed.

The majority's first argument is that "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships."[55] The majority explained that because heterosexual intercourse can lead to childbirth, while homosexual intercourse cannot, the legislature could rationally decide that it should grant opposite-sex couples the benefits of marriage, which creates stability in a child's life.[56] The majority then explained that the legislature could rationally find that same-sex relationships are more casual and more temporary than opposite-sex relationships.[57] Thus, the legislature could conclude that because "an important function of marriage is to create more stability and permanence in the relationships that cause children to be born," opposite-sex couples should be

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[51] *Hernandez*, 855 N.E.2d at 9.
[52] *Id.* at 7.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

offered "an inducement—in the form of marriage and its attendant benefits."[58]

The majority's first argument is flawed for a number of reasons. First, there is no evidence to support the majority's assertion that opposite-sex couples have more stable and less temporary relationships than same-sex couples. In fact, this assertion indicates a misperception of the gay and lesbian community in general and reflects a bigoted and biased belief. Further, it is unjust and irrational to place all homosexuals into a group as generally having unstable and temporary relationships and then to base a law on this generalization.

In addition, while it is true that homosexual intercourse cannot lead to childbirth, it is also clear that homosexuals can and do have children of their own. In addition to having their own children, some same-sex couples adopt children. Therefore, the majority's argument that opposite-sex couples need or deserve the institution of marriage because they can have children applies with equal force to same-sex couples and renders the majority's argument unpersuasive.

The majority's second argument is that "[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and father."[59] The majority explained, "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[60] The majority concluded that this is a "rational ground[] on which the Legislature could choose to restrict marriage to couples of opposite sex."[61]

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 8.

This argument is also seriously flawed. The majority cannot believe that children will only be exposed to male and female role models if their parents are in opposite-sex relationships. Surely the majority would agree that in addition to parents, people outside of a marital relationship are also role models for children. Therefore, while it may be true that an opposite-sex marriage would automatically supply a male and a female "role model," male and female role models from outside of a same-sex couples' marital relationship are still available to children of same-sex couples. More importantly, even if parents were the only role models available to children, there is no reason to believe that having both a male and female parent will automatically benefit children. Many would agree that having two positive same-sex role models is better than two negative opposite-sex role models. In such a case, the welfare of a child would be better protected in a same-sex home than an opposite-sex home.

Most importantly the majority rests its entire argument on the incorrect premise that the function of marriage is to promote the welfare of children.[62] The function of marriage is not, nor has it ever been, to create stable relationships for the benefit of children. While the creation of stable relationships that benefit children is definitely a *product* of marriage in many cases, the *function* of marriage is not to promote the welfare of children. Clearly not all couples marry to have and raise children. In fact, there are many married couples who cannot have children. In their case, the function of marriage *cannot* be to promote the welfare of children. Additionally, many couples are married for considerable periods of time before they have children. Can the majority seriously make the argument that the function of these childless couples' marriages is to promote the welfare of children?

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[62] *See id.* at 7.

Alternatively, if the function of marriage were really to promote the welfare of children, then why not reserve marriage for couples who have or intend to have children? Even the majority would not suggest this, because a rational argument could also be made that if the function of marriage were really to promote the welfare of children, homosexuals with children should be allowed to marry as well.

B. Due Process and Equal Protection Standards of Review

It is clear that the *Hernandez* majority's argument that the Domestic Relations Law can be defended as a rational legislative decision is flawed. This flawed argument led the majority to conclude that the law is valid under the New York Due Process and Equal Protection Clauses.[63] I will now explore the problems with the *Hernandez* majority's Due Process and Equal Protection analyses.

1. Due Process

When determining whether a right is properly protected under the Due Process Clause, it is necessary to first define the right asserted.[64] According to the *Hernandez* court, the right asserted could be broadly defined as "the right to marry" or narrowly defined as "the right to marry someone of the same sex."[65] In determining which "right" was at issue, the *Hernandez* majority looked to the Supreme Court cases of *Lawrence v. Texas* and

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[63] *Id.* at 9.

[64] *See generally*, Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986).

[65] *Hernandez*, 855 N.E.2d. at 9.

Washington v. Glucksberg.[66] The *Hernandez* majority claimed that these cases indicate that the "right" in question should be defined narrowly as "the right to marry someone of the same sex."[67]

In *Lawrence*, the Supreme Court held that the right in question should be defined broadly because a narrow definition of the right at issue would be arbitrary.[68] In *Glucksberg*, the Supreme Court held that the right in question should be defined narrowly because "the narrow definition of the right at issue was based on rational line-drawing."[69] Based on these Supreme Court cases, the *Hernandez* majority argued that the "right" at issue in that case was more like the "right" at issue in *Glucksberg*; thus, the majority concluded that the right should be narrowly defined.[70]

The *Hernandez* majority erred in defining the "right" asserted. A closer look at *Glucksberg* and *Lawrence* indicates that the *Hernandez* majority should have used *Lawrence's* broad definition rule rather than *Glucksberg's* narrow definition rule. The right asserted should have been defined as the "right to marry." This is because *Lawrence* overturns *Bowers v. Hardwick*,[71] a case where the Court used a narrow definition to define the right involved.[72] *Bowers's* treatment of the Due Process Clause mirrors *Glucksberg's* in at least three important ways.[73] First, both *Bowers* and *Glucksberg* held that the court is to "proceed with caution—and even skepticism—when asked

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[66] *Id.* at 10.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 9.
[71] *Lawrence*, 539 U.S. at 566-67.
[72] *See Bowers*, 478 U.S. at 191.
[73] *See* Brian Hawkins, *The* Glucksberg *Renaissance: Substantive Due Process since* Lawrence v. Texas, 15 MICH. L. REV. 409, 415 (2006).

to recognize a new constitutional right."[74] Second, both required a court to "define the proposed new right in the narrowest fashion possible, usually as the right to engage in an activity specifically forbidden by the statute."[75] Third, both "treat[ed] past decisions declaring new substantive due process rights as protecting no more than the specific right declared, rather than reflecting some overarching constitutional principle."[76] Given these important similarities in *Bowers's* and *Glucksberg's* treatment of the Due Process Clause, it is clear that when *Lawrence* overruled *Bowers's* narrow definition of the right involved, *Lawrence* also implicitly overruled *Glucksberg's* narrow application test. Therefore, the *Hernandez* majority ignored Supreme Court precedent in choosing the narrow definition over the broad definition of the right involved. Supreme Court precedent actually requires the court to use the broad definition of the right involved—"the right to marry"—over the narrow definition.

Under a Due Process analysis, once the right is defined, the next question is "whether the legislation restricts the exercise of a fundamental right."[77] According to the Supreme Court, a fundamental right is one that is "deeply rooted in this Nation's history and tradition."[78] Because the *Hernandez* majority defined the right involved as "the right to marry someone of the same sex," the majority argued the right at issue is not a fundamental right.[79] It explained that "the right to marry someone of the same sex" is not "deeply rooted" in our nation's history and "has not even been asserted until relatively recent times."[80]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Glucksberg*, 521 U.S. at 721 (citations omitted).
[78] *Id.* at 720-21 (citations omitted).
[79] *Hernandez*, 855 N.E.2d. at 9-10.
[80] *Id.* at 9.

However, if the majority had properly defined the right involved as "the right to marry" it is clear that the Domestic Relations Law clearly restricts a fundamental right. For, as the history of New York marriage law indicates, marriage is deeply rooted in history and tradition, even though it has undergone widespread changes over the years.[81] In fact, even the *Hernandez* majority conceded:

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[81] The history of marriage laws in New York is not static, but reflects adjustment and change. Not only have the marriage laws themselves changed, but the understanding of what marriage means has also undergone regular transformation. In fact, "marriage has undergone near-constant evolution to the point that marriage today bears little resemblance to marriage in the past." *See* Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 251 (2006). For example, under the New York Common Law, in the nineteenth and early twentieth centuries, "the wife . . . and her husband constitute[d] but one person." *Id.* at 257. This meant that once married, a woman's property and ability to contract became her husband's. *Id.* In fact, in 1820, the Supreme Court of Judicature stated, "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife." *Id.* at 258. However, "by the middle nineteenth century, the institution of marriage had changed considerably." *Id.* In 1848, New York passed legislation allowing women to own property independent of their husbands, and in 1849, the act was amended to allow women to make contracts independent of their husbands as well. *Id.* at 258-59.

In the 1850's and 1860's, New York passed the Earnings Act, which "protect[ed] married women's savings deposits, ensur[ed] married women the right to vote as stockholders in elections, and protect[ed] a woman's right to sue and be sued and to keep her earnings during marriage." *Id.* at 259. In 1908, New York Courts recognized "the separate existence of a husband and his wife . . . and [gave] to each the same right and remedies." *Id.* at 260. The New York Courts also struck down "[t]raditional requirements that a husband be joined to any tort action against a married woman" and "recognized a married woman's right to sue third parties for personal torts." *Id.* Soon after, the doctrine of inter-spousal immunity under which "neither spouse could sue the other civilly for injuries wrongfully inflicted upon the other . . . was written out of existence." *Id.* at 261-62. In 1954, the New York Court of Appeals, "extend[ed] the abrogation of inter-

"The right to marry is unquestionably a fundamental right."[82]

i. Due Process Under a Strict Scrutiny Test

Had the *Hernandez* majority correctly defined the right involved and correctly deemed the right to be fundamental, the court should have proceeded under a strict scrutiny test. This is because the Supreme Court has determined that "classifications affecting fundamental rights are given the most exacting scrutiny."[83] Therefore, if a fundamental right is restricted, a strict scrutiny test must

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spousal immunity to include criminal cases so that husbands could be convicted of larceny for theft of his wife's property." *Id.* at 262.

In 1958, the New York Court of Appeals upheld loss of consortium rules, which traditionally allowed husbands but not wives to recover for the loss of a spouse. *Id.* at 262-63. But the Court of Appeals soon rejected this rule, holding that loss of consortium applied equally to husbands and wives. *Id.* at 263. The doctrine of necessaries, which held that "husbands, but not wives, were obligated to support the family," was declared outmoded in 1989. *Id.*

In addition, "the treatment of sexual relations between spouses as an element of marriage has also undergone significant change." *Id.* at 264. Under the Common Law, "a man could have sexual relations with his wife any time he chose," and the wife was presumed to have given consent. *Id.* However, in 1984, the New York Court of Appeals rejected this rule. *Id.*

Traditional rules regarding gender roles also changed. For example, the Common Law rule that fathers "[were] entitled to the custody of their children" was statutorily changed in 1860 to "grant[] married women joint custody of their children." *Id.* at 266. By the late 1800's, the presumption that fathers should have the children "gave way to a maternal presumption in child custody disputes." *Id.* at 267. However, the New York Courts later declared: "[W]hile the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law." *Id.*

[82] *Id.*

[83] Clark v. Jeter, 486 U.S. 456, 461 (1988). *See also*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966).

be applied.[84] When a strict scrutiny test is applied, the law must "further a compelling government purpose" and cannot be justified if there is a "less restrictive alternative."[85] Under a strict scrutiny test, "the ordinary presumption of constitutionality is reversed."[86] In such a case, the government must show that there is a compelling government interest in furthering the law or policy.[87] Applying the correct standard to the correctly defined right, it is clear that the Domestic Relations Law does not further a compelling government purpose.

The *Hernandez* majority defines the interest involved as protecting the "welfare of children."[88] Under a strict scrutiny test, the interest in protecting the welfare of children must be compellingly furthered by the Domestic Relations Law. As shown above, the *Hernandez* majority's conclusion that the law is a rationally related legislative decision is seriously flawed. The rationally related legislative decision test is a lower threshold than the compelling government interest test; therefore, it is clear that there is not a compelling government interest in limiting marriage to only opposite-sex couples.

Further, even if there were a compelling government interest, there are less restrictive alternatives to protecting the interest asserted. When determining whether there is a less restrict alternative, the government has the heavy burden of showing that the law is narrowly tailored

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[84] *Clark*, 468 U.S. at 461.

[85] Regents of California v. Bakee, 438 U.S. 265, 357 (1977) (Brennan, J., dissenting) (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972)).

[86] OTIS H. STEPHENS AND JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW VOLUME II: CIVIL RIGHTS AND LIBERTIES 28 (4th Ed. Thompson Wadsworth 2008) (2003).

[87] *Id.*

[88] *Hernandez*, 855 N.E.2d at 7.

to achieve the compelling government interest.[89] Common sense shows that there are several "less restrictive" alternatives to advance the interests that the government asserts. There are numerous ways to protect the welfare of children without limiting marriage to opposite-sex couples. For example, to obtain the majority's goal of benefiting the welfare of children through stable relationships, the state could implement mentor or educational programs that teach child-raising skills. For these reasons the Domestic Relations Law cannot be justified under a strict scrutiny test.

ii. Due Process Under a Rational Basis Test

More importantly, even if the *Hernandez* majority correctly defined the right involved and correctly deemed the right to be non-fundamental, the reasoning would still be flawed. This is because had the *Hernandez* majority been correct in defining the right involved as "the right to marry someone of the same sex" and had the *Hernandez* majority been correct in defining the right as non-fundamental, the law would still have to pass the rational basis test.[90] However, as explained above, the *Hernandez* majority's argument that the Domestic Relations Law can be defended as a rational legislative decision is flawed. This means that even if the *Hernandez* majority was correct in defining the right involved as "the right to marry someone of the same sex" and even if the right is not a fundamental right because there is no rationally related government interest for limiting the right, the *Hernandez* majority still should have found the Domestic Relations Law violative of New York's constitution.

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[89] STEPHENS & SCHEB, *supra* note 86.
[90] *Id.*

2. Equal Protection

The same determination of whether to use a rational basis or strict scrutiny test under the Due Process Clause applies to the Equal Protection Clause. The *Hernandez* majority again proceeded under a rational basis test when it should have proceeded under a strict scrutiny test.

The *Hernandez* majority believed that the Domestic Relations Law does not discriminate based on sex.[91] It explained:

> By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Men and women are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.[92]

Finding no sex-based discrimination, the majority proceeded under a rational basis test. This reasoning is unsound. The Domestic Relations Law does discriminate based on sex. It does not allow a woman to marry a woman or a man to marry a man. Because of her sex, a woman is not allowed to marry another woman, and because of his sex, a man is not allowed to marry another man. In other words, the sex of the individual seeking marriage determines whether an individual will or will not be allowed to marry his or her partner. This sex based discrimination means that a suspect classification is involved.

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[91] *Hernandez*, 855 N.E.2d at 10.
[92] *Id.* at 10-11.

i. Equal Protection Under a Strict Scrutiny Test

When a fundamental right or suspect classification is involved, a strict scrutiny test is applicable.[93] As mentioned above, the right involved, properly defined, is the "right to marry"—a fundamental right. Additionally, as explained above, the classification involved is suspect. According to two constitutional experts:

> Operationally speaking, strict judicial scrutiny means that the ordinary presumption of constitutionality is reversed; the government carries the burden of proof that its challenged policy is constitutional. To carry the burden, government must show that its policy is "narrowly tailored" to further that interest.[94]

As mentioned above, the policy involved is neither narrowly tailored nor does it further the expressed government interest in promoting the welfare of children. For these reasons, the Domestic Relations Law is unconstitutional under New York's Equal Protection Clause.

ii. Equal Protection Under a Rational Basis Test

More importantly, even if there was no sex-based discrimination, the classification must still pass the rational basis test. In order to pass the rational basis test, the Domestic Relations Law must be rationally related to a legitimate state interest. The *Hernandez* majority argued that the legitimate state interest is to benefit the welfare of

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[93] *See e.g.*, Loving v. Virginia, 518 U.S. 515 (1996).
[94] STEPHENS & SCHEB, *supra* note 86, at 455.

children. However, as explained above, this argument is unreasonable.

A classification does not meet constitutional muster under a rational basis test, if (1) the purpose of the challenged discrimination is an illegitimate state objective, and (2) the means employed by the state are not rationally related to achievement of the objectives.[95] In other words, "where individuals in the group affected by the law have distinguishing characteristics relevant to the interest the State has the authority to implement," the law passes muster under the rational basis test;[96] otherwise, it does not. As mentioned above, there is no rational basis for such a law; therefore, there is no rational basis for the classification, and the law does not even pass the rational basis test.[97]

C. Alternative Standard of Review: Intermediate Scrutiny

Alternatively, plaintiffs argued that even if a strict scrutiny test were not applied, an intermediate scrutiny analysis would also be appropriate.[98] Intermediate scrutiny "generally has been applied to discriminatory classifications based on sex or illegitimacy."[99] The Supreme Court has held that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[100]

The majority recognized that "[t]hose who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike, since only opposite-sex relationships may

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[95] *Id.* at 454.
[96] *Hernandez*, 855 N.E.2d at 11 (citations omitted).
[97] Graham v. Richardson, 403 U.S. 365, 371 (1971) (citations omitted).
[98] *Id.* at 10.
[99] *Clark*, 486 U.S. at 461.
[100] *Id.*

gain the status and benefits associated with marriage."[101] Despite this recognition, the majority argued that there was no gender-based discrimination in restricting same-sex couples from marrying because the Domestic Relations Law "does not put men and women in different classes, and give one class a benefit not given to the other."[102] According to the majority's rationale, "[w]omen and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex."[103]

However, the majority misconstrued intermediate scrutiny. The purpose of applying intermediate scrutiny to gender-based classifications is to bar the government from discriminating against an individual based on his or her gender. By barring same-sex couples from marrying, the state of New York is clearly barring individuals from marrying based on their gender. The state is saying, for example, that because an individual is a woman, she cannot marry another woman, and because an individual is a man, he cannot marry another man. This is discrimination based on gender classification.

When discrimination is based on gender classification, the intermediate scrutiny test applies, and the "proffered justification [must be] exceedingly persuasive."[104] As noted above, the majority's proffered justification for restricting marriage to opposite-sex couples is unreasonable. An unreasonable justification cannot be "exceedingly persuasive;" therefore, the Domestic Relations Law does not pass intermediate scrutiny either.

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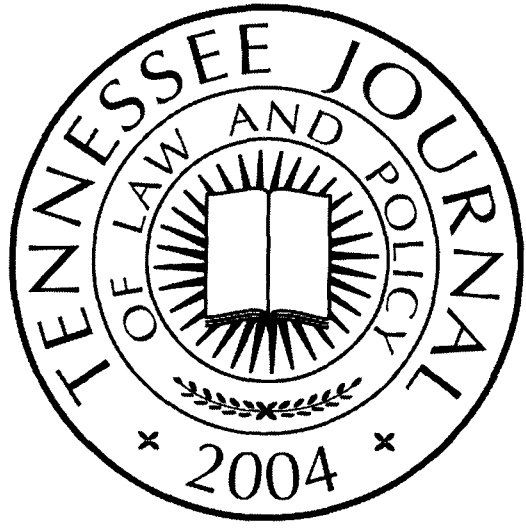
[101] *Hernandez*, 855 N.E.2d at 11.
[102] *Id.* at 10.
[103] *Id.* at 10-11.
[104] United States v. Virginia, 518 U.S. 515, 532-33 (1995).

IV. Conclusion

The reasoning of the *Hernandez* majority is flawed, and the repercussions of this flawed reasoning are grave. Many benefits of marriage remain unavailable to same-sex couples because their right to marry has not been recognized. Same-sex couples are left with few options with respect to gaining benefits that are automatically afforded to married couples. Same-sex can wait for the Court of Appeals of New York to overrule its own decision or wait for the Supreme Court of the United States to take a case and declare laws barring same-sex marriage to be in violation of the United States Constitution, options which are not likely in the foreseeable future. Alternatively, they can convince the New York legislature to overturn the Domestic Relations Law and grant same-sex couples the right to marry under a new law. At this point, however, it seems that their best bet is to petition the courts for individual benefits, as has already been done in several cases. Additionally, same-sex couples can lobby for executive orders and other acts to protect their rights. Such efforts, however, will never give same-sex couples the array of rights that are automatically afforded to opposite-sex couples when they enter into marriages. More importantly, many rights are unattainable without the legal ability to marry. Therefore, without a favorable decision by the courts, it is unlikely that same-sex couples will receive the benefits of marriage they deserve.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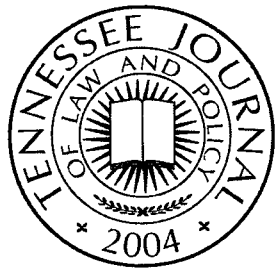

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