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**The American Constitution Society of Chapman  
University**

*and*

**The Federalist Society for Law  
and Public Policy**

*presents*

**SAME-SEX MARRIAGE**

**2007-2008 Chapman Dialogues**

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**PANELISTS:**

**Professor William N. Eskridge**, John A. Garver Professor of  
Jurisprudence, Yale Law School

**Professor Lawrence Rosenthal**, Associate Professor, Chapman University  
School of Law

**Professor Matthew J. Parlow**, Assistant Professor, Chapman University  
School of Law (moderator)

**PROFESSOR PARLOW:** [Professor Parlow began the Dialogue by  
introducing Professor Eskridge to the audience.]

**PROFESSOR ESKRIDGE:** What I would like to talk about is in connection with the California same-sex marriage cases. I've filed a brief in those cases, in addition to some of the other cases highlighted by the moderator. But, on the other hand, I have spent my entire career trying to understand the underlying cultural and legal dynamics of the marriage litigation. So I'm very interested in exploring all the kinds of arguments that we have here. What I want to do today is think about the California same-sex marriage cases in a historical perspective in terms of the legal arguments, and then in terms of the deeper cultural and legal arguments that I think underlie these cases.

So, let me start, if I could, with a brief history. And I hope that many of you are from California. You are certainly being educated in California, and you might want to practice law in California, which, believe me, has it over every other state in the country in terms of weather and spirit and robustness of opportunity. So maybe some history of California would be very useful. This was one of the main points of my amicus brief,<sup>1</sup> to sort of give the court a legal and cultural history of gender and sexual minorities in California, and where the marriage litigation fits into in terms of the state's relationship to those minorities. I basically divide my history into three periods. The first goes from 1914 to 1975, before most of you all were born. The second is your lifetime, and that is 1975 to 2003. And then a third period is probably going to be the period, beginning in 2003 that the marriage cases will fit into in some form or another.

Now, the first period, which is the period of my life and is the most important period of the twentieth century, is between 1914 when California made consensual fellatio and cunnilingus a serious crime in this state,<sup>2</sup> to 1975 when California's legislature repealed its consensual sodomy law—not just oral sex, but also anal sex as well.<sup>3</sup> This is a period I call the terror period. It's a period in which gender and sexual minorities—by gender minorities, I mean cross-dressers, transsexuals, et cetera; by sexual minorities, I mean gay men, lesbians, bisexuals, perhaps inter-sexuals—were literally outlaws. The conduct which was characteristic of these minorities was a crime everywhere in California; and these crimes were actually seriously enforced by the state, not just through the criminal law, but through a whole bevy of civil sanctions that literally created a class of

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<sup>1</sup> Amicus Curiae Brief of Professor William N. Eskridge, Jr. In Support of Parties Challenging the Marriage Exclusion, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 3307727.

<sup>2</sup> Act of Aug. 8, 1915, ch. 586, 1915 Cal. Stat. 1022 (Cal. 1915).

<sup>3</sup> William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 943 (1997) [hereinafter Eskridge, *Lesbian and Gay Intimacy*]; see also American Civil Liberties Union, *History of Sodomy Laws and the Strategy that Led Up to Today's Decision* (June 16, 2003), <http://www.aclu.org/lgbt/discrim/11895res20030616.html> (last visited May 28, 2008) (describing the circumstances surrounding the repeal of California's sodomy law in 1975) [hereinafter ACLU].

outlaws. This was a class of outlaws that was usually able to closet their status by, like, not dressing in the attire of the opposite sex or not wearing a badge saying they were gay and lesbian or bisexual. But they were outlaws nonetheless.

In addition to its sodomy laws—which were felonies for consensual behavior in California—in addition to those laws, California had a law they called the “vag. lewd law” or lewd vagrancy law.<sup>4</sup> This law was usually used for solicitation—not solicitation for commercial sex which, as Eliot Spitzer<sup>5</sup> is now learning back East, is usually for consensual sex activities in private places—but for solicitation occurring somewhere in public. In this area, Orange County and Los Angeles, literally thousands of people each year were arrested for this kind of crime. It was a misdemeanor, but it could subject you to enormous civil sanctions. And, indeed, in California, in a terrible innovation of the Warren era<sup>6</sup>, if you were arrested for either lewd vagrancy, or sodomy, or consensual copulation at the discretion of the judge, you could be sentenced as a sexual psychopath.

If you were sentenced as a sexual psychopath—which was aimed at what they call “moral degenerates” in the forties and fifties—then you could be sent to Atascadero State Hospital.<sup>7</sup> I don’t think it still exists as a state hospital. It was known as the “Dachau for Queers,” and the reason it was known as that was that, at Atascadero, experimental therapies and medical technologies were used on human beings, many of whom had been put there for consensual activity. They included lobotomies. They included electric shock therapy. They included giving people a drug which stimulated suffocation and drowning—in other words, a pharmacological version of water boarding. These were routine therapies at Atascadero. And you could be sent there for violating these very statutes.

You could lose your license as a teacher. You would be fired as a state employee. You could lose your bar license. You could lose your medical license. So, this was obviously a much smaller group. You might be surprised to know that, if you’re in Orange County and in Los Angeles, cross-dressing was a crime. In other words, if you were a woman wearing overalls, you were literally violating municipal codes all over California, and these codes were enforced. People were arrested. Women particularly were arrested for wearing the attire of the opposite sex, which was a crime throughout California in this period.<sup>8</sup>

Well, I think I’ve given you enough of the law to give you an idea of

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4 CAL. PENAL CODE § 647(5) (West 1955).

5 Eliot Spitzer, former governor New York, resigned from office following the discovery of his involvement with prostitutes. David Kocieniewski & Danny Hakim, *Spitzer Resigns in Sex Scandal and Turns His Attention to Healing His Family*, N.Y. TIMES, Mar. 13, 2008, at A1.

6 Earl Warren’s era as Governor between 1943–45.

7 William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 716 (1997).

8 *Id.* at 723.

what the legal terrain looked like. Ideologically, what this legal terrain looked like, the coherence that it had, was that sexual and gender minorities were demonized by the state as immoral. These were all crimes against the Bible. *Leviticus* makes sodomy “an abomination” to the Lord.<sup>9</sup> *Deuteronomy*, you might be interested in knowing, makes cross-dressing also “an abomination” to the Lord.<sup>10</sup> These people were demonized as predatory, as threats to children, and were demonized as anti-family. I’ll return to that in just a second. Now, that’s the period that I call the terror period.

The second period is a period of greater toleration. After the Stonewall riots in 1969, unprecedented numbers of lesbians, gay men, bisexuals, and transgendered people came out of the closet and actually started resisting the very statutes that I’m describing in this earlier period.<sup>11</sup> Most of the statutes were either repealed or, in even more cases, invalidated by the California Supreme Court. The sodomy law was the first to go in 1975.<sup>12</sup> And, later, the California Supreme Court in ‘79, in the *PT&T* case, actually extended to lesbian and gay employees the protections of state law against discrimination, at least in the employment relationship,<sup>13</sup> a view that the legislature codified its statute in 1992.<sup>14</sup> So, in this period from 1975 to 2003—the period in which most of you all grew up—the state repealed most of the criminal prohibitions. LGBT people were no longer literally outlaws. They were tolerated by the state.

But the idea of tolerance is an idea where there’s still a norm. So, gays and lesbians were no longer predatory threats, but they were not considered normal, either. The norm was still heterosexuality. Gay and lesbian Californians were kind of “icky”—kind of second class. And this was also reflected in California law. Shortly before the sodomy law repeal California had made its marriage law gender-neutral as part of the feminist revolution of the 1970s.<sup>15</sup> The county clerks became hysterical.<sup>16</sup> And what they said was: “Well, this now makes it possible for gays and lesbians to get married, which would be the end of civilization.” The legislature completely agreed with them. Before you could say, “I now pronounce you man and husband,” the legislature in 1977 re-gendered the state marriage law, passing a law saying that marriage does not pertain to same-sex couples.

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<sup>9</sup> *Leviticus* 20:13 (King James).

<sup>10</sup> *Deuteronomy* 22:5 (King James).

<sup>11</sup> The Stonewall riots, involving young drag queens challenging law enforcement, are “universally recognized as the ignition point for the modern lesbian and gay civil rights movement.” Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1033 (1994).

<sup>12</sup> ACLU, *supra* note 3.

<sup>13</sup> *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 611–13 (Cal. 1979).

<sup>14</sup> CAL. GOV’T CODE § 12920 (West 2005).

<sup>15</sup> Eskridge, *Lesbian and Gay Intimacy*, *supra* note 3, at 943.

<sup>16</sup> Professor Eskridge later clarified that in 1955, the combination of the legislature’s sodomy reform with the gender neutrality of the marriage law suggested the possibility of gay marriage.

The reasoning of the legislature was quite interesting. The legislature's reasoning—this is embodied in the committee reports that the California Supreme Court is now considering<sup>17</sup>—was that marriage is to protect the wife who is staying at home and raising the children. That's why we need all this marriage law—to protect the wife and the dependent children. Well, gays and lesbians don't need that, because they don't have children. Then, there was a little parenthetical: except, maybe, for some of those lesbians. So, the California Legislature was a little bit clued in, even in 1977.

In 2000, the Knight Initiative<sup>18</sup> encoded also the idea that, not only same-sex marriage is not going to be recognized in California, but even out-of-state same-sex marriages—of which there were none in 2000—would also not be recognized in the State of California. The Knight Initiative passed by a very significant majority in California's referendum process. On the other hand, at the same time you all were doing the Knight Initiative, you were creating—in 1999, and then greatly expanded in 2003—a statewide domestic partnership law.<sup>19</sup> California's domestic partnership law—created by the legislature, signed by the governor—created a new institution for same-sex couples called. If you enter into a domestic partnership, you get *almost* all of the same rights, benefits, obligations, and duties as a different-sex marriage couple would get under California law—not under federal law, but under California law.

Now while you all were doing that, back East we were creating an institution called “civil unions,” a very similar idea. Different name, only same-sex couples. Virtually all—or in some states all—of the same rights, duties, obligations, et cetera, that state law can confer on married couples. You see this in Vermont in 2000; Connecticut in 2005, where I live; New Jersey in 2006; New Hampshire in 2007.<sup>20</sup> Oregon, in 2007, adopted a similar law,<sup>21</sup> but they called it “domestic partnership,” and, now, as I understand it, it's on hold. Other states like Hawaii, Washington and Maine have created domestic partnership laws that conferred many of the rights and benefits of marriage to same-sex couples.<sup>22</sup>

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<sup>17</sup> The California Supreme Court subsequently decided this case. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). See generally Amanda Alquist, *The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court*, 12 CHAP. L. REV. 23 (2008).

<sup>18</sup> In 2000, Proposition 22, also known as the “Knight Initiative,” declared “[only] marriage between a man and a woman is valid or recognized in California.” Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 781 (2001).

<sup>19</sup> CAL. FAM. CODE §§ 297–299.6 (West 2004).

<sup>20</sup> VT. STAT. ANN. Tit. 15, §§ 1201–1207 (2002); CONN. GEN. STAT. ANN. §§ 46b-38aa to -39 (West 2008); N.J. STAT. ANN. §§ 37:1-28 to -36 (West Supp. 2008); N.H. REV. STAT. ANN. §§ 457-A:1–8 (LexisNexis Supp. 2007).

<sup>21</sup> H.B. 607, 74th Leg. (Or. 2007).

<sup>22</sup> HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2005) (entitled “reciprocal beneficiaries”); WASH. REV. CODE ANN. §§ 26.60.010–070 (West Supp. 2008); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2007).

By 2003, LGBT Californians had been tolerated for about a generation and had flourished in California. They've risen to the peaks of state government. They have long been well represented in the legislature. These folks have flourished in the State of California like they flourished nowhere else possibly in the world. And in 2003, and afterwards, the LGBT agenda has been that California now should move from this tolerable-toleration idea to the idea of full equality for LGBT citizens in the State of California.

And that did generate new legislation. In 2006 and 2007, the legislature passed same-sex marriage bills.<sup>23</sup> The Governor<sup>24</sup> in both years vetoed them. And, it's very interesting. He didn't veto them because [imitating Governor Schwarzenegger's voice] "these are girly men trying to do this to us." No, no. No, that was not the reason the Governor vetoed them. Instead, the Governor, in his Governor wisdom, said [imitating Governor Schwarzenegger's voice]: "This legislation, if I signed it, it would confuse—would confuse the litigation," because this litigation was pending. That was the only reason I saw he gave—it would confuse the litigation if he adopted same-sex marriage.

So twice the legislature has voted for same-sex marriage, and twice it's been successfully vetoed, so these cases have gone forward. And it's a whole rainbow coalition of people who are bringing these cases and are lawyering for them. And there are, literally, I think, dozens of amicus briefs, of which one of them is mine. And you might ask, "Well, why aren't they happy enough with domestic partnership?" Indeed, the domestic partnership law, I think, is an enormous step forward. And I think California is fabulous and great, and so on, and so forth. But it should be noted that the domestic partnership law does treat same-sex couples differently in significant ways from the way that married couples are treated. Here are three examples, though it does not exhaust the number of differences.

The difference is that, for domestic partnership in California, there's no ceremonial requirement.<sup>25</sup> There's a statutory requirement for marriage that there be a ceremony.<sup>26</sup> It doesn't have to be religious, but there has to be a ceremony. Moreover, if you want to be in a domestic partnership, you have to show the registrar that you're in an intimate relationship and that

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<sup>23</sup> Complete Bill History, A.B. 849, 2005–06 Leg., Reg. Sess. (Cal. 2005) (vetoed Sept. 29, 2005), available at [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0801-0850/ab\\_849\\_bill\\_20060223\\_history.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_bill_20060223_history.html) (last visited Sept. 4, 2008); Complete Bill History, A.B. 43, 2007–08 Leg., Reg. Sess. (Cal. 2007) (vetoed Oct. 12, 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_43\\_bill\\_20080114\\_history.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20080114_history.html) (last visited Sept. 4, 2008).

<sup>24</sup> After starring in the films *THE TERMINATOR* (Orion Pictures Corp. 1984), *TERMINATOR 2: JUDGMENT DAY* (TriStar Pictures 1991), and *TERMINATOR 3: RISE OF THE MACHINES* (Warner Bros. Pictures 2003), Arnold Schwarzenegger was elected governor of California in 2003. See generally <http://www.schwarzenegger.com>.

<sup>25</sup> CAL. FAM. CODE §§ 298–298.6 (West 2008).

<sup>26</sup> *Id.* §§ 300(a), 421.

you share a common residence.<sup>27</sup> Now, I will tell you, you don't have to do that for marriage. You just show up. "We're not related. It's consensual. Give us the license." But if you're a gay and lesbian couple you have to prove that you're serious—whereas you don't if you're straight.

Second difference—and maybe this is not so big—is that domestic partnerships are excluded from some long-term care benefits, even today. Some of the gaps have been remedied, but this one has not yet. The third I think is the most significant one—is that, if there are no children in the relationship, if it's a domestic partnership, it can be terminated by filling out a form.<sup>28</sup> In contrast, if you're married, you cannot terminate your marriage—no matter how bad or few children—by filling out a form.<sup>29</sup> You've got to go through a divorce process, which could be quite expensive.

I myself disagree with calling this "separate but equal." I don't like to use the term "separate but equal" partly because the "separate but equal" term invokes the memory of racial apartheid, which was much worse. I think providing not all the benefits and obligations are not comparable in any way with racial apartheid. So, I reject that. Moreover, I think calling it "separate but equal" is also inaccurate. It's not equal. It's separate. It's separate but separate. I would also quickly add that the equality is mostly symbolic. There's a ceremonial requirement, the intimacy requirement. These are symbolic. But they're symbolic in an important way.

This is the role that the history plays in my brief—is that, for all of my lifetime, California expended an enormous amount of energy, not just harassing, arresting, and even torturing LGBT people, but also demonizing gays and lesbians as anti-family, as threats to the family, as incapable of human relationships and raising children. And, given that state history of demonization as anti-family, to then perpetuate this in the statute, it seems to me, is open to criticism.

The California marriage cases are asking California to join Massachusetts and Canada, both of which had court decisions requiring, under equal protection principles that the state recognize same-sex marriages.<sup>30</sup> I think most of the briefs acknowledge—the State's brief certainly does, and my brief says so as well—there's no precedent directly on point. So the court has a fair amount of leeway here, it seems to me. What most of the plaintiffs have asked for—and, I'm with them—is that the California Supreme Court should apply its *Perez*<sup>31</sup> precedent. That was its 1948 decision striking down the State's bar to different-race marriage. That is race discrimination, the court said, and it struck down that

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<sup>27</sup> *Id.* § 297.

<sup>28</sup> *Id.* § 299.

<sup>29</sup> *See id.* § 2330.

<sup>30</sup> *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961–65 (Mass. 2003); *Egan v. Canada*, [1995] 2 S.C.R. 513, 528–29, 536 (Can.); *Civil Marriage Act*, 2005 S.C., ch. 33 (Can.).

<sup>31</sup> *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

discrimination—which was unprecedented, both before or since, until the U.S. Supreme Court addressed this issue in *Loving vs. Virginia*<sup>32</sup> twenty years after the *Perez* decision.

What I argue is that the court ought, by analogy, to extend the *Perez* precedent to these cases. I make three arguments. Well, here are three that I do make. One is that, under the *Sail'er Inn* precedent,<sup>33</sup> sex discrimination is now a suspect classification subject to strict scrutiny under the California Constitution. Now, if barring licenses to different-race couples is race discrimination, then, I argue that barring licenses to same-sex couples is sex discrimination. In each case, the regulatory variable, the item that changes, is the race or sex of one of the partners. So, if Carlos wants to marry Diane, and one is European and one is African in descent, then the State's refusal to do that is based upon Carlos' race. If he were African, they would give a license. Because he's not, they won't. But if Carlos wants to marry Joe today, the State won't give him a license, though it will give him a domestic partnership certificate. And the regulatory variable is that Carlos would get the license if he were Caroline—or, even if he cross-dressed as Caroline be able to persuade the near-sighted registrar that he actually was a woman, right? So, the regulatory variable—the item that changes to produce the discrimination—is sex. And if sex discrimination is a suspect classification—as it unquestionably is—then, why should this not get strict scrutiny, which the State says it would not pass?

The State has conceded that. Now the objection is legitimately made: Marriage. Well, this is very different—the whole point of interracial bars was white supremacy, a philosophy of racism; whereas, what California is engaged in is, at most, homophobia and not sexism. I think that's just simply wrong. What California is engaged in, maybe, is a kind of homophobia, but it also is a kind of sexism. It is a kind of patriarchy. Indeed, the Committee Report for the 1977 statute proves it. It's telling you what the legislature was doing. It thought it was preserving traditional gender roles. Marriage is useful because the wife stays at home, takes care of the children. What's more traditional than that?

Indeed, I would go so far as to say this. I think same-sex marriage challenges the deepest gender role—and the one that mainstream Americans are most reluctant to give up. I think the deepest gender role is the way that we, as a society, have constructed romance around the idea of male/female complementarity—that woman is the complement of the man. Man is always the measure. Woman is the complement of the man, and a woman can only achieve personal satisfaction and children through her coupling with a man.

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<sup>32</sup> 388 U.S. 1 (1967).

<sup>33</sup> *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 539 (Cal. 1971).



This is not one of the worst prejudice or stereotype that people have. But this is a deeply felt view about gender roles that, indeed, maybe mainstream Californians are not willing to interrogate because there's a difference. So, that's one argument that I make, and that's the deep cultural resistance to that argument.

The second argument that I make: Even if you don't think it's a sex discrimination it's at least a sexual orientation discrimination argument, right? If you don't allow same-sex couples to marry, that has its effect overwhelmingly on gay and lesbian couples, you would think. So, what about sexual orientation—is sexual orientation a suspect classification? Now, the court below said that's never been held in California and it hasn't.<sup>34</sup> The courts below probably don't have the power to do that. The California Supreme Court does have that power.

*Sail'er Inn*, the leading precedent on sex discrimination, said: We consider it suspect classification if the trait is immutable, if it has been the object of the history of discrimination, and if it's an irrational trait to be used for ordinary state policy.<sup>35</sup> I will tell you, the State has conceded each of these three points. They say, yes, it's immutable—though, I think that's a complicated issue. I don't think it's a matter of choice, like going to Walgreen's and choosing a variety of aspirin. But I think that's a complicated discussion. The State concedes it; so, I have nothing to add to what they're saying. There's certainly been a history of discrimination; and I certainly think it's an irrational characteristic.

And here's the State's response, which I think is quite amusing. The State says: We only recognize, as suspect classifications, traits that affect groups that have no access to the political process. But gay people have lots of access to the political process. They've got an anti-discrimination law in '92.<sup>36</sup> They got marriage in 2006 and 2007.<sup>37</sup> They've already got marriage from the legislature. They're not marginalized. And, the Governor loves them too. You know, so, everybody loves the homosexuals, et cetera.

So they're right about that; gay people do have access to the political process. I think that's quite true. But, of course, the same is true of women. When *Sail'er Inn* recognized sex as a suspect classification, women were—and, I'll give you a hint, still are—a majority of the voting electorate. Women, politically marginalized? When *Sail'er Inn* was

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<sup>34</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 702 n.17 (Ct. App. 2006) (finding that while “gender and race are both recognized as constitutionally suspect classifications[,] . . . classifications based on sexual orientation have not been accorded the same degree of searching constitutional scrutiny.”) (internal citations omitted).

<sup>35</sup> 485 P.2d at 539.

<sup>36</sup> CAL. LAB. CODE § 1102.1 (West 1992) (repealed 1999; current version at CAL. GOV'T CODE §§ 12920–22 (West 2007)).

<sup>37</sup> See *supra* note 23.

decided, women had been added to Title VII.<sup>38</sup> In 1972, there were dozens and dozens of federal statutes that outlawed sex discrimination in various federal programs, and so on, and so forth. The same was going on in California. So, I don't know where the State's brief is coming from. It's just simply wrong.

I could make the same kind of argument for race. At the very point when race became a suspect classification, racial minorities started to be heard seriously in the political process in states like California and the U.S. Congress. In short, I would argue that sexual orientation should also be a suspect classification. Instead, the State proposes an intermediate standard. I won't go into it because of time, but we can talk about it in the Q&A if you want. It's kind of a balancing test. You look at the importance of the rights denied, the rationality of the trait, and the state interest. I will say this: The State's interests are tradition—which is probably the most powerful argument, to which they devote maybe two sentences to—and avoiding backlash. Well, the problem with the backlash argument is that, in 2006, the legislature voted for same-sex marriage, and none of them was defeated in the next election. There wasn't a referendum. There was no backlash that I could detect. And other instances where the California Supreme Court or the legislature has adopted gay rights, the sodomy repeal in '75, there's not really been a backlash.

We can talk about tradition in the Q&A. Tradition, of course, was ultimately the only argument in favor of different-race marriage bans. And, indeed, tradition was an argument in favor of slavery in the South, where I grew up. So, tradition is not an all-purpose argument, particularly, in an equal protection case. So, it seems to me, on issues of race and sex and sexual orientation, tradition should be talked about, and should be deeply understood. But it's not a definitive answer, at least in precedents, or any guide.

The final thing I told the court—and, I don't say you need to tell them this; it's quite obvious—is that, whatever the California Supreme Court does will not be taking the issue away from the people of California. If they were to require same-sex marriage, faster than you could say Knight Initiative's stepchild, there would be an initiative on the ballot for the people to have a say. And I think that would be fine. What I urged the court was that, what it can do, and the opportunity that it had from the marriage cases, is to reverse the burden of inertia and to create conditions for falsification of stereotypes. This is what Massachusetts has done, for Massachusetts recognized same-sex marriage.<sup>39</sup>

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<sup>38</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to -17).

<sup>39</sup> Professor Eskridge later clarified that the Massachusetts legislature immediately debated, and defeated an amendment to its state constitution.

2008]

*Same-Sex Marriage*

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Opponents could make any kind of wild argument, and they did. You know, that there would be rapes; there would be child molestation; that marriage would decline. And I will tell you, I just published a book on Denmark's laws regarding same-sex marriage,<sup>40</sup> which recognized lesbian and gay relationships in 1989 and where Robert Bork, and all the other opponents of marriage said, "Oh, Scandinavia is now [inaudible]; marriage collapsed in Scandinavia after they recognized registered partnerships." And, that's just simply false. In Denmark, the marriage rate had been plummeting for two decades before '89; where the non-marital child rate had gone up four-fold in two decades, trends that reversed themselves after domestic partnerships were recognized in 1989. Since 1989, the Danish marriage rate has actually gone up, and the non-marital children rate has stabilized for the first time in a century in Denmark. The consequences of gay marriage are usually very minor on both sides of the issue. But you don't know that for sure until the California Supreme Court says: Let's have marriage licenses and let's see what happens. And then you would actually debate about something concrete. Do you want this lesbian couple to be able to ceremonialize their relationship as a marriage? Do you want their children to be able to say that my mommies are legally married to one another and, indeed, did they decide to get married because they're invested in me, et cetera?—which is a very common scenario in the gay and lesbian community.

Now, here are three deeper issues, and then I'll stop. One thing [the moderator] didn't tell you—he told you about all my books and what not—he didn't tell you that when you get law professors started, very often they don't stop until fifty minutes have expired. But I will finish this up in two. There are several deeper things. One, that I've already mentioned, is that I do think that same-sex marriage is a difficult issue for people who are not prejudiced—just normal good people. One reason it's a difficult issue is the deepest challenge to our deeply held gender roles that we have in our society, and where people all over the lot on how attached they are to this complementarity thing. I'm not attached to it, but you might be. And, that's fine.

Second—the LGBT agenda. I think it's widely accepted when within the LGBT community that the LGBT agenda should be family supportive. About a quarter of gay and lesbian couples are raising children. They're raising them in a very serious way. My sister and her partner are raising two wonderful children in Sacramento. They are a credit to their sexual orientation. They're doing a great job. Okay? In my opinion, heterosexuals have a lot to learn from lesbians raising children, as well as vice-versa. But, the question that arises within the lesbian and gay community is, should the community be seeking marriage—an arguably

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<sup>40</sup> See WILLIAM N. ESKRIDGE & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* (Oxford Univ. Press 2006).

patriarchal institution—or, should the lesbian and gay community be seeking universal domestic partnerships, universal civil unions? Maybe the goals should be, rather than everybody getting marriage, maybe everybody should get domestic partnerships. It's something that is not as explicitly tied to the religious traditions.

My third point is that the debate over gay marriage ignores the big story of redoing family law. The big story is the regulation of romantic relationships in the West. And, here's where you all are now, is the menu approach. When I was growing up it was marriage or nothing. You either had no recognition, no rights, et cetera, or you were married with all this bundle of stuff that you get.

In California, you have marriage only for different-sex couples at this point. Maybe that will change. Then you have state-wide domestic partnership. Additionally, ever since the *Marvin* case,<sup>41</sup> you've had cohabitation, which has been extended to same-sex couples. And, this action does extend to both different and same-sex couples, where, if you co-habit particularly with an Oscar-winning movie star like Lee Marvin, and dumps you, then you might have contractual and other causes of action for promises that were made. Well, this is a kind of regulation of a relationship. Cohabitation is legal in California, and, you can have legal rights as a cohabiting person, even if you're not a domestic partner or a spouse.

And then, you have also municipal domestic partnership rights, which is that most of your cities do give domestic partnership benefits—mainly healthcare and insurance benefits—to the partners of your city employees. And, in most of the places, it's different sexes or same-sex; but that also cuts across the board. And this is what's going on the reconfiguration as well as expansion of state regulation of romantic relationships. If you're concerned about protecting marriage, this is where the action is. The more competitors that are created to marriage, that probably does contribute to the decline of marriage. But it's not a gay thing. It's a straight thing. Or, it's a straight and gay thing. Moreover, if you're pro-choice, well, you can get more choices. And so, you might like that feature of it. But that's where a lot of the debate ought to be. I'll stop with that.

**PROFESSOR PARLOW:** [Professor Parlow briefly introduced the discussant of this Dialogue, Professor Larry Rosenthal.]

**PROFESSOR ROSENTHAL:** Let me start by betraying my ideological bias. Personally, I see no objection, as a matter of policy, to same-sex marriage. To elaborate just a bit, after I was a prosecutor, and

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<sup>41</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

before I came to Chapman, I was Deputy Corporation Counsel for the City of Chicago, and my client was Richard M. Daley, Mayor of Chicago, a nice Irish boy. Yet, much to my surprise, it turned out that Mayor Daley supports same-sex marriage. Mayor Daley comes from a very traditional, south-side Chicago Irish family—but one in which there have been some ugly divorces in recent years, and he took the position that inasmuch as heterosexuals are doing their best to destroy the institution of marriage, if somebody wanted to strengthen the institution of marriage, he was all for it.<sup>42</sup> My own view, as a matter of policy, is that any legal regime that encourages stable and monogamous relationships is a good thing. And, there is, in my view, an avalanche of social science data to support that proposition.

But of course, Professor Eskridge asked us to consider achieving same-sex marriage not by means of a hard slog through the political process. He asked us to achieve same-sex marriage by means of judicial decisions interpreting the Constitution. On that issue, the thought I want to share with you and Professor Eskridge is: Be careful what you ask for.

The doctrinal theories Professor Eskridge advanced—I think at least some of them are perfectly plausible, if not better than plausible. Personally, however, I'm not sure that I share his enthusiasm for the notion that a denial of marriage to same-sex couples is a form of sex discrimination. I think it's a clever argument and yet, we all know, at some level, that society's attitudes toward homosexual and lesbian relationships are quite different than its attitude toward women who want to transcend traditional gender roles. Justice Brennan once described sex discrimination as "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>43</sup> Something very different is going on when it comes to discrimination on the basis of sexual orientation.

Professor Eskridge, I think, acknowledges that the opposition to same-sex marriage involves a deeply-rooted cultural norm about how people should find fulfillment in relationships—sexual fulfillment in particular—that is very different than the kind of romantic paternalism that underlay traditional attitudes about the proper roles of women. It involves something specific to homosexual relationships—indeed, a kind of animus toward those relationships that bears some similarity to the traditional animus toward interracial sexual relationships.

After *Brown v. Board of Education*<sup>44</sup> was decided in 1954, the law reviews were full of commentary about that decision. And much of it, in

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<sup>42</sup> "Marriage as been undermined by divorce, so don't tell me about marriage. You're not going to lecture me about marriage. People should look at their own life and look in their own mirror. Marriage has been undermined for a number of years if you look at the facts and figures on it. Don't blame the gay and lesbian, transgender and transsexual community." CHI. SUN-TIMES, Feb. 19, 2004, at 9.

<sup>43</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

<sup>44</sup> 347 U.S. 483 (1954).

the early years, was critical of *Brown*. In particular, an important article appeared in the *Harvard Law Review*, written by Herbert Wechsler, one of the leading constitutional professors of the day, saying, as a matter of principle, he couldn't see why "separate but equal" violated the equality principle in the Equal Protection Clause.<sup>45</sup> And then, Charles Black, a member of the Yale Law School faculty, wrote one of the greatest law review articles of all time. As I recall, it was about nine pages. I wish those of us writing law review articles today could learn from that example. Let me read you just a brief excerpt:

I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on a level with the fiction of "finding" in the action of trover. I think few candid southerners deny this. Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.<sup>46</sup>

After Professor Black's article appeared, the fighting in the law reviews about the soundness of *Brown* ended. Everyone understood that Black was speaking truth as a matter of social reality, which was more important than any type of abstract legal reasoning. And, as a matter of social reality, as Professor Eskridge acknowledges, we all know what underlies the reluctance to legalize same-sex marriage. It is a deeply rooted cultural disapproval of same-sex relationships. Now, you can say that that's constitutionally legitimate for the government to express its moral disapproval; or, you can say it's constitutionally illegitimate. I think that is the ground on which this legal debate should turn—but I don't think we have any doubt about what's going on. This debate is not about separate but equal; it is not about romantic paternalism; it is about society's view that homosexual relationships should not be condoned.

Should the Constitution then be read to regard this interest—this interest in enforcing cultural norms—as illegitimate? As I said, legally, Professor Eskridge makes a plausible case in support of his view. Just so, my principal reaction to his argument remains: Be careful what you ask for. Let me remind you of an opinion of the great pragmatist, Justice Holmes, that is little remembered today—a case called *Giles vs. Harris*, decided in 1903.<sup>47</sup> In *Giles vs. Harris*, the plaintiff alleged that, although Alabama law permitted African Americans to register to vote, in fact, there was a

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<sup>45</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

<sup>46</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

<sup>47</sup> 189 U.S. 475 (1903).

massive conspiracy underway to disenfranchise them. Registrars, for example, imposed all kinds of onerous literacy tests that were not imposed on non-minorities. As a result, the plaintiff, and all other African Americans, was not permitted to register to vote. The allegation was, in Montgomery, Alabama, not a single African American had been permitted to register. The complaint was dismissed and so, as the case went to the Supreme Court, all the allegations were taken as true. And of course, we know they were true. This is what Justice Holmes wrote:

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. . . . [R]elief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.<sup>48</sup>

Now today, if we even remember *Giles* at all, we probably would say it was not one of Justice Holmes' better performances. And yet, I wonder. What if the Supreme Court had announced in 1903 that all forms of racial subjugation were unconstitutional—"separate but equal" and all the rest—and that the great mass of Southern (and many Northern) laws and practices would have to be reformed? What would have happened? I suspect there would not have been a constitutional amendment to repeal the Fourteenth Amendment. But I suspect there would have been a campaign of massive resistance, as there was later, to which the North would not have been prepared to respond with legislation like the Voting Rights Act<sup>49</sup> and the Civil Rights Act.<sup>50</sup> I suspect a decision for the plaintiff in *Giles* would have gone unenforced. And I suspect our tradition of reverence for the judiciary—the tradition that judicial judgments are to be respected—might have turned out very differently. A different decision in *Giles* might have been the greatest constitutional disaster in the history of this country. The plaintiff in *Giles* was right, but that did not really matter when the political groundwork for a legal regime involving profound social transformation in much of the country had not yet been laid.

While the Massachusetts case that recognized the constitutional right to same-sex marriage has been a great victory for gays and lesbians in Massachusetts,<sup>51</sup> we've seen in dozens of other states constitutional amendments added that prohibit same-sex marriage,<sup>52</sup> and which will be

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<sup>48</sup> *Id.* at 488.

<sup>49</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445.

<sup>50</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>51</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>52</sup> Christi Goodman, *State of the Unions: The Debate to Define is Raging Around the Country in*

very difficult to repeal. Gays and lesbians in those states have already paid a high price for the Massachusetts decision. If the California Supreme Court were to rule in favor of the plaintiff in the pending case,<sup>53</sup> perhaps it would be impossible for the opponents of same-sex marriage to amend the California Constitution.<sup>54</sup> But what will happen in other states, or in the United States Congress? In the Congress, there have been substantial majorities in favor of a constitutional amendment to outlaw same-sex marriage as a matter of federal constitutional law.<sup>55</sup> Judicial decisions in favor of same-sex marriage have been a principal impetus of the movement to add to the United States Constitution a prohibition on same-sex marriage.<sup>56</sup> If the risk that same-sex marriage will be imposed on an unwilling public becomes more realistic as a result of judicial decisions, what will happen to the United States Constitution? And how difficult will it be to undo a Federal Marriage Amendment?

I agree with Professor Eskridge that very deeply rooted cultural norms are at stake here. But I wonder where that takes us. Can the Constitution, that functions as our organic law, that is meant to reflect a consensus about the norms governing society—can it really be used to attack deeply rooted cultural norms without causing an enormous backlash? Would judicial recognition of a constitutional right to same-sex marriage prior to the time that the necessary political groundwork has been laid become yet another more example of the law of unintended consequences, which operates with truly ferocious power when you are dealing with deeply rooted social institutions? I think about those well-meaning lawyers in Boston forty years ago who thought that busing was the appropriate remedy to racial segregation in the public schools. And yet, we know today that the law of unintended consequences operated with ferocity in Boston. Not only did busing lead to a re-segregation of schools as white students fled to private schools, but it de-legitimated the whole enterprise of integration, and eventually lost support even in the African-American community.<sup>57</sup> So, I say: Be careful what you ask for.

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*the Wake of Massachusetts' Court Decision*, STATE LEGISLATURES, Apr. 2004, at 26.

<sup>53</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The California Supreme Court has since decided the issue and found for the plaintiff, holding that the “retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples,” and to the extent that such distinctions are drawn, they are unconstitutional. *Id.* at 452.

<sup>54</sup> As it happens, in the November 2008 election, voters in California, as well as Arizona and Florida, approved amendments to their state constitutions that prohibited same-sex marriage. See Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

<sup>55</sup> Only the House of Representatives voted on the merits of the proposed Federal Marriage Amendment, but on both occasions on which votes were held, the proposal secured substantial majorities, although short of the requisite two-thirds. See Thomas Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 563, 571 (2008).

<sup>56</sup> See *id.* at 540-46.

<sup>57</sup> For perhaps the leading account of the problems engendered by the desegregation litigation in Boston and elsewhere, see Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).



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*Same-Sex Marriage*

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I'm willing to accept the great bulk of Professor Eskridge's case. But where does it lead? Professor Eskridge understands that efforts will be made to secure constitutional amendments banning same-sex marriage; he tells us that he wants to reverse the burden of inertia. Yet, it may be that you reverse the burden of inertia only to have the deeply rooted cultural norms come back and impose some much greater burden on the advocates of same-sex marriage. So when it comes to a judicial attack on this kind of deeply-rooted cultural norm, I say: Be careful what you ask for.

Thank you.

**PROFESSOR PARLOW:** I think we'll have a quick response from Professor Eskridge and then we'll open it up to some questions.

**PROFESSOR ESKRIDGE:** Yeah, I think that was really great, actually. If we had the Alabama Supreme Court doing what I'm suggesting, for exactly these arguments, it would be a constitutional train wreck. If we had the California Supreme Court doing it in 1975—constitutional train wreck. But I think the big difference is that California has already moved step-by-step to the very threshold of gay marriage. This is the only thing that remains in terms of formal equality. So the prerequisite, I think, for a court to do this is that there already has been a change in public opinion—not so that sixty percent of the people favor same-sex marriage, but a significant minority probably favors same-sex marriage in California today. Probably even in this room another significant minority are opposed. And, probably, there's a significant minority that is still making up its mind. And that's the prerequisite. So, actually, I don't think there will be a train wreck at all.

Moreover, the Defense of Marriage Act<sup>58</sup> puts the weight of the federal Congress and the federal President behind the idea that, if California had same-sex marriage, Alabama doesn't have to recognize it. To be sure, you didn't need DOMA to do that. The Full Faith and Credit Clause<sup>59</sup> allow Alabama to do that. But give those Alabamans two reasons to think that they won't have to recognize California gay marriages—and I think they've actually internalized that. They know that a lot of things that go on here in California stay in California and are not going to necessarily infect Alabama. So, I'm very much attuned—I've written a whole book on this equality practice thing—I'm very much attuned to what you're saying. And, I do think, the time is now in California. I also do think—if the court rules the other way—I think you'll still get same-sex marriage in California through the legislative process and through some new change in heart on the part of the Governor, or whoever might succeed the Governor. If he

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<sup>58</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>59</sup> U.S. CONST. art. IV, § 1.

decides not to run for the Senate, then maybe he will sign it the next time around. So, I think it will come through one of these processes in the next ten years. And, this is the prize. California is the big prize.

**PROFESSOR PARLOW:** All right, maybe we can get some questions. We'll start with our dean—"dean's prerogative."

**DEAN JOHN EASTMAN:** Wonderful, both of you. Professor Eskridge, I've got two points—questions. You've made a very strong argument in support of strict scrutiny, which, seems to me, the fundamental flaw in the Massachusetts ruling,<sup>60</sup> that it doesn't go there. It, instead, adopts what's rather an incoherent position—that gay marriage is required even under rational basis review; that we can conceive of no rational ground for distinguishing between heterosexual and homosexual couples, even with respect to procreation and the rearing of children—which seems pretty preposterous on a rational review standard.

So, my first question is: Why do you think Massachusetts Supreme Court Justice Marshall took that tack rather than going to strict scrutiny as you urged? And, then, the second question—it seems to me that in your remarks you also rebut what is a common position: If we get married, what is it to you—how will it hurt your marriage? You've made a rather compelling case that, in fact, gay marriage, like the loosening of heterosexual marriage that has occurred post-*Marvin* and others, actually does alter the nature of the marriage relationship. And, to the extent the state has an interest in fostering that for society, you've made yourself, I think, an argument that there may be a compelling state interest there, if I've read you correctly.

**PROFESSOR ESKRIDGE:** Okay, let me start with Mayor Daley. I think that Daley thing is absolutely priceless. Here's what has happened in the last century. Marriage has been completely redefined in the last century, exclusively by heterosexuals. It's been redefined in very important ways. Number one, marriage has lost its monopoly in the last century. Gay people were not asking for that. It was straight people who wanted that—Lee Marvin and Michelle Marvin, Oscar-winning actor and his partner. Second is no-fault divorce. You all were also the leaders in that. The California Family Act of 1969,<sup>61</sup> which pioneered the no-fault divorce revolution—that was not gay people. No homosexual agenda there. It was straight people wanting easier exits from the relationship. So, these have been the big changes in marriage. And they have moved

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<sup>60</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>61</sup> Family Law Act, 1969 Cal. Stat. 3341 (current version at CAL. FAM. CODE § 2310 (West 2007)).

marriage away from the unitive idea of the nineteenth century to a consumerist idea. You call it pro-choice, if you like it. You can call it consumerist if you're mildly critical. I'm mildly critical.

State recognition of same-sex marriage is not consumerist and pro-choice in the same way—it's an expansion of *committed* relationships, not an easy way to avoid and escape commitment, as no-fault divorce is.

What gay marriage gives you is not more consumerism—as no-fault divorce has done; as co-habitation has done; even domestic partnership. Instead, what it says is that this couple that's going to be together now has the option of actually entering into serious legal commitments. And, even in California, which does have no-fault divorce, it's not that easy to get divorced—particularly if there are children, particularly if there's acrimony. So, it might not be just expensive, but it's a very difficult process and that can be criticized. So, the way I would say it is, that the move towards same-sex marriage, I'm completely with Mayor Daly. That's the idea.

Now, your other question—I think it's actually a great question, because—if I can gas on for just a few minutes about what I think the Massachusetts Supreme Court Justice Marshall opinion is all about in Massachusetts. Have you all had Con Law? Well, a lot of you have. In Con Law, you'll learn, there's this big difference between rational basis and strict scrutiny—it's very difficult to pass strict scrutiny. You pretty much surrender, usually. But if its rational basis, it's pretty hard to lose that. Even the most incompetent state Attorney General can win on rational basis, because the Justices will give you rational basis. Justice Scalia will say, "Oh, come on now, what about this, is that not a rational basis?"—and you win the case. But, here's what's happening. And, here who's the genius behind it. It's not Daly. It's Thurgood Marshall—Thurgood Marshall, who deserves our undying praise for the work he did in the *Brown* litigation—actually, in my opinion, who is the most brilliant reconceptualizer of the Equal Protection Clause. He said this thirty-five years ago in the *Dandridge* case<sup>62</sup> and then in the *Rodriguez* case,<sup>63</sup> both in dissent. Thurgood Marshall says, here's what we're actually doing in our equal protection cases, and here's what we should be doing. We're not doing strict scrutiny/rational basis—it always fails if it's strict, it always passes if it's rational basis. Thurgood Marshall says, what we're really doing is, we're doing a sliding scale approach when we do Equal Protection cases. We're thinking about how important the right that is being denied to a subgroup is. You know, is this something that is just economic, just a matter of allocation? Or, is this something more fundamental, like voting or marriage? The Supreme Court struck down a poll tax by saying that

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<sup>62</sup> *Dandridge v. Williams*, 397 U.S. 471, 508–30 (1970) (Marshall, J., dissenting).

<sup>63</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70–137 (1973) (Marshall, J., dissenting).

voting is a fundamental interest.<sup>64</sup> If you're a deadbeat dad and you don't pay your child support, Wisconsin said you can't get remarried.<sup>65</sup> The U.S. Supreme Court, with Thurgood Marshall writing, struck that down as a violation of the right to marry<sup>66</sup>—even though, I think that's a pretty good state interest. So, Thurgood Marshall says, the first thing we always look at is how important, how fundamental is the right, or the cluster of rights, that are being denied to a minority?

Second thing to look at is the classification that's being used: How fishy is it? If it's one of the fishiest, like race or sex, that's going to be automatically fatal. If it's just purely economic, that's almost automatically okay. But if it's something intermediate, like maybe sexual orientation—I think that's a pretty fishy classification. I think California has proven that sexual orientation discriminations and classifications are destructive. They not only destroy the lives of sexual minorities, but their real victim is the majority. Because, if you think that you're protecting children from their stepfathers raping them by going after homosexual schoolteachers, you're not only deluding yourself and being very unfair to the lesbian and gay schoolteachers—you are victimizing children, and you're victimizing other people who are victims of rape and sexual assault, while the gendarmerie is engaged in a witch hunt against gays and lesbians. When the state uses its resources for delusional and unproductive reasons, that means it does not have state resources to go after the major problems, and they are overwhelming us. So, it's not like we have an abundance of resources to deal with our problems.

[Thurgood] Marshall's third point is the state interest—how weighty is the state interest? Does the state really have an interest in excluding *this* group? So, it's not a state interest generally in marriage. What is the real state interest in excluding these particular people from the relationship—from the state terms and the benefits and obligations and all that goes with that? Indeed, I think that's what Massachusetts Supreme Court Justice Margaret Marshall said,<sup>67</sup> and I think that's what's going on at the state level. I agree with you. I personally don't see in my casebooks how there's not a rational basis under the traditional approaches. But I don't think that's what she's doing. I don't think that's what the Vermont Court did in the Vermont case, and what the New Jersey Court did in the New Jersey case.<sup>68</sup> And the Attorney General's brief, I think, is onto that.<sup>69</sup>

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<sup>64</sup> Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

<sup>65</sup> Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

<sup>66</sup> *Id.* at 388.

<sup>67</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (Marshall, C.J.).

<sup>68</sup> Baker v. State, 744 A.2d 864, 886 (Vt. 1999); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2005) (both requiring equal rights and benefits for same-sex couples as compared to heterosexual married couples, but not requiring this to be accomplished through the traditional institution of "marriage").

<sup>69</sup> Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 43–48, 60 n.32, *In re Marriage Cases*, 149 P.3d 737 (Cal. 2006) (No. S147999), 2007 WL 2905413 (discussing the state interest in maintaining the traditional definition of marriage while providing same-sex couples with the same rights and benefits, citing *Baker*, 744 A.2d at 868–69, and *Lewis*, 908 A.2d at

Justice Mosk here in the California Supreme Court made exactly the same point, citing Thurgood Marshall.<sup>70</sup> He says, “here is what’s really going on in these cases.” And the Attorney General’s reviving that—and, I’m with him. I think this makes a lot of sense.

And, I think what’s going on in the same-sex marriage cases is, they were doing this kind of balancing that avoids the tiers, you know, strict—because we’ve now got rational basis. We’ve got strict scrutiny. Well, sex at the U.S. level, not in California, is intermediate scrutiny. Why? Well, we don’t even know, because the Supreme Court keeps applying different standards. And then we have *Evans* and *Romer*,<sup>71</sup> and we have some disability cases where it’s called rational basis with “bite.”<sup>72</sup> Okay, we’ve already got the sliding scale, even if you look at it formalistically. And, what Thurgood Marshall said—Marshall, again, I repeat, said it thirty-five years ago. It was genius.

*Bowers v. Hardwick*<sup>73</sup>—this was the decision that declined to strike down the Georgia sodomy law on privacy grounds. And you can talk for hours on that—and you and I probably could. A lot of arguments to be made both ways; you know, the privacy line, et cetera. But I’ve read the Blackmun papers. Powell has—I’ve seen Powell’s notes, Blackmun’s notes, Brennan’s notes, et cetera. And here’s the way the conference went. The conference had two moments that are just absolutely amazing moments.

Chief Justice Burger—who was a dedicated homophobe—started off the conference by saying we’ve got to reverse. You know, this is just really unimaginable, protecting homosexuals. They’re demons. These are really awful people, and we can’t let this go on. Justice Brennan and Marshall, you know, made shorter statements: We should defer; right to privacy; *Roe v. Wade*, that sort of stuff. Blackmun, *Roe v. Wade*. And so, it got to Powell. And Powell made, I think, the most bizarre argument I’ve ever seen in conference notes, and Powell was voting to affirm. He was voting to recognize the rights, though he later changed his mind. But, here was his argument to affirm. Powell says [imitating voice of Justice Powell], “Well you know, we’ve recognized, in our cases, this *Robinson vs. California*<sup>74</sup> (that’s this state). Well, we said it would violate the Eighth Amendment for you to imprison someone for being a drug addict or an alcoholic.” And Powell countered: “Well you know this fellow, Hardwick,

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222, while distinguishing *Goodridge*, 798 N.E.2d at 969).

<sup>70</sup> The Attorney General’s brief quotes Justice Mosk’s concurring opinion (concurring in his own majority) in *Hawkins v. Superior Court*, 586 P.2d 916, 927 (Cal. 1978) (Mosk, J., concurring) (quoting *Dandridge v. Williams*, 397 U.S. 471, 521 (1970)). *Id.* at 42–43.

<sup>71</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>72</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); see also MARK STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS 7–8 (2002).

<sup>73</sup> 478 U.S. 186 (1986).

<sup>74</sup> 370 U.S. 660 (1962).

I believe he's addicted to homosexuality. And so, I would say, it would violate the Eighth Amendment to put him in jail,<sup>75</sup> because he's addicted to homosexuality, and so I think I'll vote to affirm."

**PROFESSOR ROSENTHAL:** I can vouch; by the way, that's a really pretty good imitation.

**PROFESSOR ESKRIDGE:** Well anyway, when Powell was saying that, their eyes were rolling. Justice Blackmun's notes say: "Can this possibly hold?" Justice Blackmun thinks we're going to win, but on this? This is just really bizarre. So then Justice Stevens said something nice about the Powell rationale, because I think he could sense that Justice Powell felt that he was hanging out there. And Stevens countered: "You know, I think we have to admit—I think I have to make an admission here, that I harbor prejudice." Stevens said this. He says, "I'm prejudiced and I think we have to deal with this"—you know, the American Psychological Association says this is unproductive. The disease is homophobia, says Justice Stevens. The State says the statute is only about homosexual sodomy. That's wrong. The statute regulates all kinds of sodomy, and the homosexual acts are just a tiny percentage of what goes on. And Stevens says, "we just simply can't uphold the statute that's being defended on the basis of prejudice that I share"—that Justice Stevens shared. This was thirty years ago. He probably didn't know a lot of gays and lesbians in 1975. He maybe had never known that that he knew a gay or a lesbian person. But that's one reason he's a judge, to be self-reflective about the role of judges which is to interrogate things like this. And the California Supreme Court, I think, has a historic opportunity.

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<sup>75</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (Powell, J., concurring) (finding it would violate the Eighth Amendment to imprison a person for "20 years for a single private, consensual act of sodomy.").