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RE: Summary of the New Jersey Marriage Decision – *Lewis v. Harris*, A-68-05

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I. Short Summary and Analysis

The two questions before the New Jersey Supreme Court in *Lewis v. Harris* were whether, under the New Jersey Constitution, “persons of the same sex have a fundamental right to marry that is encompassed within the concept of liberty,” and whether the Constitution’s protection of equality requires that same-sex couples have the same benefits and privileges as married couples, including the right to the title of “marriage.” *Lewis v. Harris*, A-68-05 (N.J. 2006), slip. op. at 5-6. The Court held by a 4-3 vote that there is no fundamental, due process right to same-sex marriage under the New Jersey Constitution. *Id.* at 6. The Court also held, however, that the “unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated.” *Id.* The Court concluded that New Jersey law must be modified so that it offers equal benefits to same-sex couples. *Id.* at 6-7. The Court left it up to the Legislature to determine whether to issue same-sex “marriage” licenses (like Massachusetts) or to create civil union status (like Vermont). *See id.* at 7. Three Justices joined a separate opinion that concurred

with the Court's equal protection analysis while arguing that the plaintiffs had a due process right to same-sex "marriage."

While the Court's determination that same-sex couples are analogous to married couples for the purposes of state benefits is very disappointing, the *Lewis* decision was largely a defeat for those advocating same-sex marriage. As one recent news article explained, "[c]onservatives watching the cases [in New Jersey and elsewhere] believe[d] the best chance for gay marriage to be allowed would be in New Jersey, where the state Supreme Court has a history of extending civil rights protections." Geoff Mulvihill, *NJ Court to Rule on Gay Marriage in Closely Watched Case*, ASSOCIATED PRESS (Oct. 25, 2006). Unlike the earlier Massachusetts case that recognized a right to same-sex marriage, a New Jersey decision mandating the issuance of same-sex marriage licenses would have had a monumental impact across the country because of a key difference between Massachusetts and New Jersey law:

From a practical standpoint, the Massachusetts court decision made little impact nationally because the state has a law barring out-of-state couples from wedding there if their marriages would not be recognized in their home states. *New Jersey has no such law*. People on both sides of the issue expect[ed that] a victory for same-sex unions would make New Jersey a destination for gay couples from around the country who want to get married. Some of these couples could return home and sue to have their marriages recognized.

Id. (emphasis added). By a 4-3 vote, the New Jersey Supreme Court held that the New Jersey Constitution does not guarantee a right to same-sex "marriage" and requires those seeking to alter the traditional definition of marriage to go to the Legislature. This ruling is very important because the advocates of same-sex marriage have focused primarily on litigation rather than legislative action precisely because the legislatures (and citizens) of even the most liberal states have declined to redefine marriage every time the issue has been presented to them.

II. Background and Procedural History

The plaintiffs in *Lewis v. Harris* were seven same-sex couples who have been in committed relationships for more than ten years. *Lewis*, slip. op. at 7. After being denied marriage licenses, the couples filed a complaint in New Jersey Superior Court challenging the constitutionality of the statutes limiting marriage to a relationship between one man and one woman. *Id.* Each of the plaintiff couples complained of hardships and embarrassment because they were not permitted to marry and therefore did not have access to the same rights and status afforded to married couples. *Id.* at 11. While New Jersey law afforded same-sex couples some domestic partner benefits and prohibited “sexual orientation discrimination,” many of the benefits of marriage were not extended to same-sex couples. *Id.* at 52. The plaintiffs sought “a declaration that the laws denying same-sex marriage violated the liberty and equal protection” clauses of the New Jersey Constitution and also asked the court to compel the State to issue same-sex marriage licenses. *Id.* at 12.

After both parties moved for summary judgment, the Superior Court ruled in favor of the State and denied the plaintiffs’ claims. *Id.* at 13. The court held in an unpublished opinion that “marriage” was limited to one man and one woman and added that the State’s refusal to issue same-sex marriage licenses infringed upon no fundamental right and did not violate New Jersey’s equal protection provision. *Id.* at 13-14. A divided Appellate Division affirmed the decision of the Superior Court. *Id.* at 14. The author of the majority opinion concluded that there was no fundamental right to same-sex marriage and, as such, there could not be a violation of equal protection rights because a requisite “affected right” was lacking. *Id.* at 15. The opinion also declared that the Legislature was the only body able to authorize same-sex marriage in the “absence of a constitutional mandate.” *Id.* at 16. The dissenting opinion at the Appellate Division

argued that, because times have changed—particularly in the institution of marriage and in the ability of same-sex couples to raise children—the plaintiffs were deprived of equal protection and due process rights. *Id.* at 18. The Supreme Court of New Jersey heard the case as of right because of the dissent in the Appellate Division. *Id.*

III. Due Process Analysis

The plaintiffs asserted that “same-sex couples have a fundamental right to marry that is protected by the liberty guarantee of Article I, Paragraph 1 of the State Constitution.” *Id.* at 19. The Supreme Court explained that, in identifying fundamental rights, it applies the same two-step substantive due process analysis applied by the Supreme Court of the United States: “First, the asserted fundamental liberty interest must be clearly identified. Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State.” *Id.* at 23-24 (citations omitted). Applying the first prong of the test, the Court stated that the “liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry.” *Id.* at 25.

Under the second prong of the analysis, the Court examined its own marriage laws and other states’ laws which, except for Massachusetts, define “marriage to mean the union of a man and a woman.” *Id.* at 26-27. The Court held that the framers of the New Jersey constitution “could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex.” *Id.* at 27-28. After reviewing New Jersey statutes aimed at eliminating discrimination based on sexual orientation as well as Supreme Court cases involving same-sex issues (*Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003)), the Court concluded that they “fell far short of

establishing” that same-sex marriage was a fundamental right. *Id.* at 28-30.

Importantly, the Court rejected the plaintiffs’ claim that *Loving v. Virginia*, 388 U.S. 1 (1967), a case involving a prohibition on interracial marriages, supported the recognition of a right to same-sex marriage. Opponents of traditional marriage often cite the *Loving* decision to characterize support for traditional marriage as similar to support for racial discrimination and bigotry. The Court noted that *Loving* dealt with “intolerable racial distinctions that patently violated the Fourteenth Amendment” and added that *Loving* and other cases cited by the plaintiffs dealt with heterosexual marriage. *Id.* at 31-32. The Court explained:

In searching for the meaning of “liberty” under Article I, Paragraph 1, we must resist the temptation of seeing in the majesty of that word only a mirror image of our own strongly felt opinions and beliefs. Under the guise of newly found rights, we must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State.

Id. at 33. The Court ultimately concluded that there is no fundamental right to same-sex marriage.

IV. Equal Protection Analysis

While the New Jersey Constitution does not actually have an equal protection clause, the New Jersey courts have consistently interpreted Article I, Paragraph 1 of the New Jersey Constitution as guaranteeing equal protection of the laws. *Id.* at 34 (citations omitted). In this case, the plaintiffs argued that “[d]epriving same-sex partners access to civil marriage and its benefits . . . violates Article I, Paragraph 1’s equal protection guarantee.” *Id.* at 35. The Court explained that “[New Jersey] equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose.” *Id.* (citations omitted). In determining whether a substantial relationship

exists, New Jersey courts consider three factors: “the nature of the right at stake, the extent to which the challenged statutory scheme restricts the right, and the public need for the statutory restriction.” *Id.* (citations omitted). The Court noted this test is more “flexible” than the federal equal protection test because it only measures the importance of the right against the necessity of the restriction imposed by the government. *Id.* at 36 n.13 (discussing the analysis of a statute under the Equal Protection Clause of the United States Constitution’s Fourteenth Amendment). Thus, “the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right.” *Id.* at 36 (citations omitted).

The Court characterized two equal protection issues for its consideration: (1) whether the same “statutory benefits and privileges” that are granted to heterosexual married couples should be given to same-sex couples as a matter of right, and (2) whether the definition of marriage should be changed to include same-sex couples. *Id.* at 37. First, the Court explored the development of protections for homosexual individuals from discrimination on the basis of sexual orientation in New Jersey through statutes and court decisions. *See id.* at 37-43. Through this analysis, the Court concluded that same-sex couples do have a “strong interest in equality of treatment relative to comparable heterosexual couples.” *Id.* at 43. The Court examined in detail how the current laws of New Jersey prevent same-sex couples from receiving the “full benefits and privileges available through marriage.” *See id.* at 43-46 (noting that statutes afford homosexual couples fewer workplace protections, family law protections, and other rights and benefits which are given to heterosexual married couples).

Next, the Court proceeded to “assess the public need for denying the full benefits and privileges that flow from marriage to committed same-sex partners.” *Id.* at 48. The Court framed the issue as whether there was “any legitimate public need for depriving same-sex couples of [a]

host of benefits and privileges” available to married heterosexual couples and argued that “the traditional definition of marriage . . . is not implicated in this discussion.” *Id.* at 48-49. The Court stated “we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples.” *Id.* at 48. The Court determined that there is no rational basis for New Jersey to prohibit the unequal treatment of same-sex persons as individuals while simultaneously failing to afford same-sex couples all of the benefits that are given to married heterosexual couples. *Id.* at 49. The Court emphasized that the failure to extend all of the benefits of marriage to same-sex couples “directly disadvantages their children.” *Id.* at 50. The Court concluded that, in light of New Jersey’s history of progressive public policy, “we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.” *Id.* at 51.

A key to the Court’s equal protection analysis was the fact that New Jersey differs from many other states because it prohibits “sexual orientation discrimination,” places foster children in same-sex households, and does not have a Defense of Marriage Act. *Id.* at 52. The Court noted that only Connecticut, Vermont, and Massachusetts extend to same-sex couples all of the benefits offered to married heterosexual couples, while New Jersey and a few other states offer some level of domestic partner benefits. *Id.* at 52. The Court reviewed the high-profile cases that led to civil unions in Vermont and same-sex marriage in Massachusetts and noted, “Vermont, Massachusetts, and Connecticut represent a distinct minority view. Nevertheless, our current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states.” *Id.* at 53-54. The Court also explained that the New Jersey Constitution has been interpreted broadly to afford wider protection for civil and political rights

than the United States Constitution. *Id.* at 55-56. The Court concluded, “denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose.” *Id.* at 56-57.

V. Remedy

The Court determined that its equal protection analysis “leaves the Legislature with two apparent options. The Legislature could simply amend the marriage statutes to include same-sex couples, or it could create a separate statutory structure, such as a civil union, as Connecticut and Vermont have done.” *Id.* at 57. This holding is quite significant because the plaintiffs had argued that “the title of marriage is an intangible right, without which they are consigned to second-class citizenship.” *Id.* at 57-58. The State had argued, on the other hand, that, “if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process.” *Id.* at 58. Noting that it could not predict what the Legislature would do in response to its decision, the Court stated that it “will not speculate that identical schemes called by different names” would be unconstitutional, and added “[w]e will not presume that a difference in name alone is of constitutional magnitude.” *Id.* at 59.

The Court attempted to counter any suggestions that it had acted with a political motive by stating “it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.” *Id.* at 60. The majority then criticized the dissenters for holding that same-sex “marriage” was

constitutionally required and added, “[h]owever the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship.” *Id.* at 62. The Court stated that, if the State creates a civil unions scheme, “it cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage.” *Id.* at 65. The Court concluded by holding that “the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.” *Id.* at 65-66.

VI. The Separate Opinion

Although all seven Justices agreed with the majority’s equal protection analysis, three joined a separate opinion arguing that the plaintiffs had a due process right to same-sex marriage. These Justices stated that they could “find no principled basis . . . on which to distinguish those rights and benefits [of marriage] from the right and title of marriage.” *Id.* at 2 (Poritz, Ch. J., dissenting). The opinion cited portions of “individual and personal statements” submitted by the plaintiffs that express their “deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word.” *Id.* at 6. The dissent then criticized the majority for “demean[ing the] plaintiffs’ claim” by holding that the Legislature cannot deny the benefits of marriage to same-sex couples, while suggesting “a separate statutory scheme, which uses a title other than marriage.” *Id.*

The opinion discussed New Jersey’s analytical framework for evaluating equal protection and due process claims under *Robinson v. Cahill*, 62 N.J. 473 (1973). The first inquiry is “whether the affected right is so basic to the liberty interests found in Article I, Paragraph I, that it is ‘fundamental.’” *Id.* at 9-10. The opinion argued that the majority framed the liberty interest

at issue too narrowly for it to be considered fundamental. The majority framed the issue as “whether there is a fundamental right to same-sex marriage,” and then concluded that such a right cannot be fundamental because it has historically been denied to same-sex couples. *Id.* at 10. The separate opinion called this argument circular: “plaintiffs cannot marry because by definition they cannot marry.” *Id.* at 11. The opinion also argued that *Loving v. Virginia*, *Lawrence v. Texas*, and *Brown v. Board of Education* are each examples where the Supreme Court was willing to step in to overturn wrong legal precedent regarding our nation’s history and traditions. *Id.* at 11-14. In the opinion’s view, while “the political branches [may] right the wrong presented in this case by amending the marriage statutes to recognize fully the fundamental right to marry,” such a possibility “does not relieve this Court of its responsibility to decide constitutional questions, no matter how difficult.” *Id.* at 17.

In conclusion, the opinion quotes Professor Ronald Dworkin’s essay, *Three Questions for America*, which addresses the possibility of recognizing “civil unions” as a status that provides many of the benefits of marriage without the title “marriage.” *Id.* at 18. The essay states that the civil union alternative to granting same-sex couples access to civil marriage may reduce discrimination against gay and lesbian couples, but does not eliminate it. *Id.* at 19. For this reason, the separate opinion argued that the Court should have interpreted the New Jersey Constitution “to require that same-sex couples have access to the ‘status’ of marriage and all that the status of marriage entails.” *Id.* at 19-20.