

IN THE
SUPREME COURT OF CALIFORNIA

No. S147999
Judicial Counsel Coordination Proceeding No. 4365

**Coordination Proceeding, Special Title (Rule 1550(b))
In re MARRIAGE CASES**

First Appellate District No. A110449
(Consolidated on Appeal with Case Nos. A110450, A110451, A110463,
A110651, A110652)

San Francisco Superior Court Case No. CGC-04-429539
(Consolidated for Trial with Case Nos. CGC-04-504038, CGC 04-429548,
CPF-04-503943, CGC-04-428794)

Los Angeles Superior Court Case No. BS 088506

**AMICUS CURIAE BRIEF
OF PROFESSOR WILLIAM N. ESKRIDGE, JR. IN SUPPORT OF
PARTIES CHALLENGING THE MARRIAGE EXCLUSION**

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INTRODUCTION

The issue on appeal is whether the State's reservation of civil marriage for different-sex couples violates the equal protection guarantee of the California Constitution. California offers committed lesbian and gay couples an institutional form, domestic partnership, that is unequal in a number of ways from marriage, which the State offers different-sex couples:

- domestic partners, but not married spouses, are required to have an intimate relationship (Fam. Code, § 297, subd. (a)) *and* a common residence (*id.* § 297, subd. (b)(1)) before they can apply for state recognition;
- marriage, but not domestic partnership, is required to have a ceremonial element (*id.* § 300, subd. (a));
- domestic partners do not have the right to certain long-term care benefits that married spouses have (*id.* § 297.5, subd. (g));
- some domestic partnerships can be dissolved merely by filing a form with the Secretary of State (*id.* § 299, subd. (a)), in contrast to marriage, which can only be dissolved by divorce (*id.* §§ 2400-2403);
- for domestic partnerships that can be dissolved by filling out a form, there are few if any protections for partners who are economically dependent (*id.* § 299, subd. (a)(8)); and
- “domestic partnership” does not carry with it the cultural signals and social significance of civil “marriage.”

These and other distinctions reveal the State's treatment of lesbian and gay partnerships as less serious than straight marriages. In particular,

the State's requirement that same-sex couples demonstrate an intimate relationship before it will recognize their partnerships and, then, its allowance of easy exit for many partnerships recall the State's own traditional depiction of lesbian, gay, bisexual, and transgendered (LGBT) people as sexually unreliable and anti-family. Unless there is some material difference between same-sex and different-sex unions – a position the State abjures – the discriminatory treatment of lesbian and gay couples would seem to violate state constitutional guarantees of equality.

The State and the Court of Appeal resist this conclusion in large part for reasons of institutional prudence. “[S]uch a social change [as same-sex marriage] should appropriately come from the people rather than the judiciary so long as constitutional rights are protected.” (Answer Brief of the State of California, page 3.) “[T]he court’s role is not to define social policy; it is only to decide legal issues based on precedent and the appellate record.” (*In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 685 (hereafter *Marriage Cases*)). This language suggests a false dichotomy. Protection of constitutional equality rights is *itself* a kind of “social policy” and contributes to “social change.” When this Court struck down California’s law against different-race marriages in *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court “define[d] social policy” and contributed to revolutionary “social change.” Indeed, this Court “define[d] social policy” entailed in civil marriage and contributed to “social change” in family relations when it

abrogated the long-standing defense of recrimination in divorces (*DeBurgh v. DeBurgh* (1952) 39 Cal.2d 858); doctrine of inter-spousal tort immunity (*Self v. Self* (1962) 58 Cal.2d 683); preference for maternal custody in divorce proceedings (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 736-737); and rule that the child bears the father's surname (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 646-47).

The lower court relied on the institutional discussion in William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (2002) (hereafter *Equality Practice*). (*Marriage Cases, supra*, 49 Cal.Rptr.3d at pp. 720-722.) “Equality practice,” as explained in this book, means that constitutional equality-driven socio-political reform must proceed over a period of time, so that society can assimilate and respond to the improved status of a traditionally despised minority. The Legislature is the most important institution in this process, but not the only important one. As *Perez* reflects, California’s judiciary has traditionally played a key role, *reversing the burden of inertia* when the political process is unable (for reasons of gridlock or lingering prejudice) to deliver full equality to a traditionally disadvantaged minority that has earned its rightful place in civil society.

This brief *amicus curiae* will place this institutional argument in the context of the history of this State’s treatment of sexual and gender minorities; in the experience of other jurisdictions where courts have

enjoyed judicial review authority; and in the doctrinal structure this Court has developed in *Perez and Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1. This Court cannot now escape the important constitutional equality issue by deferring to the Legislature, which already has spoken inconsistently on the same-sex marriage issue and cannot easily be expected to support *any* discrimination against same-sex couples *or* their exclusion from marriage.¹ Whatever the Court does in these appeals will affect social policy, for it will determine who enjoys the burden of inertia as regards same-sex marriage. As a matter of constitutional doctrine, the burden should no longer rest upon lesbian and gay couples, whom state policy demonized for most of the twentieth century, then denigrated, and now denies full marriage rights.

¹ Thus, the Legislature in 1977 enacted a statute requiring that civil marriage be one man, one woman (Stats. 1977, ch. 339, §§ 1-2). In 2003, the Legislature recognized that its expanded domestic partnership statute helps “California move *closer* to fulfilling the promises of inalienable rights, liberty, and equality” assured by the Constitution (Stats. 2003, ch. 421, § 1, subd. (a).) In 2005, the Legislature voted for A.B. 849, which would have recognized same-sex marriages as the only way for the State to treat lesbian and gay couples as completely equal citizens. The Governor vetoed the bill, saying that it would add “confusion” to the constitutional issues in *this* litigation. (Governor’s Veto Message, A.B. 849 (Sept. 29, 2005) Assembly Journal (2005-2006 Reg. Sess.); *Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 697.)

I. LEGAL HISTORY: THIS COURT HAS TRADITIONALLY ADVANCED THE EQUAL TREATMENT OF SEXUAL AND GENDER MINORITIES, IN OPINIONS WHOSE LEGITIMACY IS WELL-ESTABLISHED

The relationship among sexual minorities, social attitudes, and California law is one of evolution in three historical stages: In Stage 1, any kind of sexual variation (especially homosexuality) was considered *malignant*, and state law considered “degenerates,” “sex perverts,” and “homosexuals” as outlaws. In Stage 2, homosexuality was considered a *tolerable* sexual variation, intrinsically inferior and degraded but not an outlaw status. In Stage 3, this State’s public culture considers homosexuality a *benign* variation, sexual minorities are not considered a danger to society. Both the Court of Appeal and the State accept that California has progressed from Stage 1 to Stage 3. LGBT people are an important and positive segment of California society, and state policy should not discriminate against them. Yet the State and the lower court argue that the judiciary is powerless to remove these final discriminations against LGBT people.

This part demonstrates that, at *every* stage of California’s evolving policy toward sexual minorities, this Court has played an active and critical role, repeatedly ameliorating or trumping antigay legislation supported by popular prejudice and stereotyping and pressing state policy toward more equal treatment. These “countermajoritarian” judicial actions have neither

undermined the legitimacy of the Court nor nullified the central role of the Legislature and the People, which always have the final word.

A. Stage 1: “Degenerates,” “Sex Perverts,” and “Homosexuals” as Outlaws

Although California’s first Legislature outlawed “the infamous crime against nature” (Stats. 1850, ch. 99), the crime did not include oral sex (*People v. Boyle* (1897) 116 Cal. 658). Hence, sex between women was legal, as were most homosexual male activities. Before 1900, most persons convicted of the crime were men accused of anal rape, sex with a minor, or public sex.² In the early twentieth century, California witnessed heightened social anxieties toward publicly visible urban communities of sexual minorities. Some citizens objected to *sodomites* who violated natural law and biblical admonitions against non-procreative sexuality; others expressed disgust with people that medical experts termed *inverts* or *degenerates* who reverted to a more primitive evolutionary condition. “Degenerates” were considered threats to the fabric of society, corrupting the young. Racist medics linked “degenerate races” (people of color) with gender and sexual inversion.³

² Eskridge, *Hardwick and Historiography* (1999) U. Ill. L. Rev. 631, 643-649, 666-671.

³ Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (1999) pages 21-23 (hereafter *Gaylaw*).

Reflecting new social attitudes, the law began to target “inverts” and “degenerates.” In 1914, for instance, the Long Beach police arrested thirty-one men for being part of a consensual oral sex ring. Because of this Court’s ruling in *Boyle* that the crime against nature did not include oral sex, most of the defendants went free.⁴ Responding to public outrage, the Legislature added to the penal code’s list of serious felonies “fellatio” and “cunnilingus” (Stats. 1915, ch. 586), later recharacterized as “oral copulation” (Stats. 1921, ch. 848). Authorities created an array of other crimes to suppress same-sex intimacy and gender nonconformity. Thus, San Francisco made it a crime for anyone to appear in public “in a dress not belonging to his or her sex” in 1866, followed by Oakland in 1879 and Los Angeles in 1889. By 1930, most large California cities had laws criminalizing gender disguise or cross-gender attire.⁵ In 1903, the Legislature made it a crime to be an “idle, lewd, or dissolute person” (also known as the “vag lewd” law). (Stats. 1903, ch. 87.) Local authorities used this “vag lewd” statute to harass and arrest cross-dressing women,

⁴ Faderman and Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) pages 30-37 (hereafter *Gay L.A.*).

⁵ Eskridge, *Gaylaw*, *supra*, pages 27-29, 38 (list of California jurisdictions making public cross-dressing a crime). For an example of shifting police attitudes, see Sullivan, *From Female to Male: The Life of Jack Bee Garland* (1990).

female impersonators, and effeminate male “inverts” looking for partners.⁶ In 1921, the Legislature made it a misdemeanor to engage in “any act * * * which openly outrages public decency” (Stats. 1921, ch. 69).

Under these open-ended laws, almost any kind of activity deviating from standard sexual intercourse or gender presentation could be a crime in California. These crimes were enforced with increasing vigor after World War I.⁷ The pattern of arrests also took a turn, away from the focus on rape and abuse of minors, and toward greater enforcement against consenting adults of the same sex, “homosexuals.”⁸ For the next several generations, “homosexuals” were universal scapegoats in this State. They would be blamed for waves of child molestation, for the corruption of youth by the sexualization of public culture, and for the decline of the family.

To enforce the law against consenting “homosexual” persons, police engaged in undercover stake-outs, posing as decoys in public restrooms and parks, and spying on people in their own homes.⁹ The consequences of being apprehended were potentially severe. In 1921, a man convicted of

⁶ Sherry, *Vagrants, Rogues, and Vagabonds – Old Concepts in Need of Revision* (1960) 48 Calif. L. Rev. 557.

⁷ Eskridge, *Gaylaw*, *supra*, page 374 (app. C1).

⁸ *Id.* at page 375 (app. C2).

⁹ E.g., *People v. Parisi* (1927) 87 Cal.App. 208; *People v. Smink* (1930) 105 Cal.App. 784; *People v. Jordan* (1937) 24 Cal.App.2d 39; Faderman and Timmons, *Gay L.A.*, *supra*, pages 71-104 (pervasive police harassment after World War II).

sodomy in California could go to jail for 10 years, and a man or woman convicted of oral copulation could be imprisoned for 15 years. Inspired by degeneracy theorists, the Legislature provided for the sterilization of any person convicted of two or more sexual offenses if he showed evidence he was a “moral or sexual pervert” (Stats. 1909, ch. 720). In the next 20 years, the State sterilized almost 7000 “homosexuals” and “perverts”; the numbers went up after the Legislature expanded the law (Stats. 1937, ch. 369, § 6624) to apply also to anyone committed to a state hospital and afflicted with “perversion.” (Calif. State Dep’t Mental Hygiene, *Sterilization Operations in California State Hospitals for the Mentally Ill, 1909-1960.*) In 1941, the Legislature established procedures for *asexualization* (castration) of “moral or sexual degenerate or pervert” prisoners who were repeat offenders (Stats. 1941, ch. 106). The United States Supreme Court discouraged this mania of sterilization and castration when it struck down a particularly discriminatory law in *Skinner v. Oklahoma* (1942) 316 U.S. 535.

Meanwhile, the Legislature developed a new approach: remove “perverts” from civil society and cure them. California’s sexual psychopath law provided a process for civil commitment of defendants predisposed “to the commission of sexual offenses against children” (Stats. 1939, ch. 447, § 5500). In 1945, the Legislature removed the requirement that the sex crime be against children (Stats. 1945, ch. 138), freeing the

State to send “inverts” convicted of consensual homosexual activities to mental hospitals for indefinite periods of time. Subsequently, the Legislature made failure to register as a sex offender one of the grounds for initiating a psychopathic offender proceeding (Stats. 1951, ch. 1759) and provided that a “sexual psychopath” found not amenable to “treatment” could still be held indefinitely by the state (Stats. 1955, ch. 757). After 1954, “sexual psychopaths” were committed to Atascadero Hospital, known in gay circles as the “Dachau for Queers.” There, inmates were subjected to horrific “therapies” (lobotomies, electrical and pharmacological shocks, experimental drugs) to “cure” them of “perversion.”¹⁰

The notion of homosexual persons as predatory psychopaths who threatened children, the family, and social order motivated a statewide anti-homosexual terror after World War II.¹¹ In 1945, the Legislature added consensual sodomy to the list of crimes for which a second offense meant an automatic life prison sentence (Stats. 1945, ch. 934). California in 1947 required convicted sex offenders (including people convicted of consensual oral or anal sex) to register with the police in their home jurisdictions (Stats. 1947, ch. 1124). In 1950, the Legislature adopted statutes increasing

¹⁰ LaStala, *Atascadero: Dachau for Queers?* (Apr. 26, 1972) *The Advocate*, pages 11, 13.

¹¹ Corber, *Homosexuality in Cold War America: Resistance to the Crisis of Masculinity* (1997); Eskridge, *Gaylaw, supra*, pages 57-97.

the penalties for sodomy (Stats. 1949, 1st Extr. Sess., ch. 15 (Jan. 1950)); creating a new crime for loitering around a public toilet (*id.* ch. 14); and requiring registration of toilet loiterers and “lewd vagrants” (*id.* ch. 34). In 1952, the Legislature eliminated the maximum sentence for consensual sodomy, thereby making it a potential life sentence (Stats. 1952, 1st Extr. Sess., ch. 23 (April 1952)).

Engaging in either one-time homosexual liaisons or long-term homosexual relationships was not just a serious crime in California, but excluded the known homosexual person from a variety of public rights and benefits. People who engaged in “immoral conduct,” including sodomy and oral copulation, stood to lose teaching positions (Educ. Code, §§ 13202, 13209 (West 1960)) and state civil service jobs (Govt. Code, § 19572, subd. (1) (West 1954)). The Legislature in 1952 expanded the bases for revoking teaching certificates to include any conviction for “lewd vagrancy” and loitering at a public toilet, misdemeanor sex crimes enforced almost entirely against homosexuals (Stats. 1952, chs. 389-390). “Gross immorality” was a statutory basis for disciplinary action against a host of other licensed professionals, including lawyers, doctors, dentists, pharmacists, and embalmers and funeral directors. (Boggan et al., *The Rights of Gay People: The Basic ACLU Guide to a Gay Person’s Rights* (1975) pp. 211-235.) Many homosexual persons lost or left their teaching and other professional jobs because of these policies.

Under the Twenty-First Amendment, the State regulates the sale of liquor. California barred alcohol sales at “disorderly” establishments (Stats. 1935, ch. 1135), which regulators interpreted to mean lesbian and gay bars. If undercover investigators found homosexual dancing, kissing, hand-holding as well as solicitation for sexual activities outside the bars, the State would close down the bar by taking away its liquor license.¹² In 1955, the Legislature enacted a law allowing regulators to close down bars that had become a “resort for sex perverts” (Stats. 1955, ch. 1217).

During this terror period, the State presented homosexual persons as outlaws and enemies of the family. Virtually no one believed that these anti-homosexual state policies constituted “discrimination,” any more than laws prohibiting burglary “discriminated” against burglars. Even Californians who viewed racism as a “prejudice” and apartheid as “discrimination” were incapable of applying the same concepts to homosexual persons they considered predatory and consumed by animal desires. This helps us understand that the concept of “discrimination” is itself a social as much as a legal concept. In a society that considers all sexual variation (from the heterosexual norm) to be malignant, treatment of sexual minorities will not be considered discrimination.

¹² E.g., *Kershaw v. Dep't of ABC* (1957) 155 Cal.App.2d 544; Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (2003) pages 121-147.

The only significant push-back from the terror came from the judiciary. In *Stoumen v. Reilly* (1951) 37 Cal.2d 713, this Court ruled that the State could not close down the famous Black Cat bar in San Francisco simply because it was a place where “persons of known homosexual tendencies” congregated. The Legislature’s 1955 statutory response was declared unconstitutional in *Vallerga v. Department of ABC* (1959) 53 Cal.2d 313. In *Bielicki v. Superior Court* (1962) 57 Cal.2d 602, this Court invalidated a police practice of spying on men’s private activities within enclosed toilet stalls. The U.S. Supreme Court held in *One, Inc. v. Olesen* (1958) 355 U.S. 371 (per curiam), that the Post Office could not ban Los Angeles-based homophile literature from the mail. None of these decisions explicitly invoked equal protection concepts, but this Court prohibited governmental abuses that discriminated against sexual or gender minorities without any substantiated public justification. Although the most prejudiced citizens grumbled about this Court’s decisions, every one of them announced principles that have held up well over time.

B. Stage 2: Toleration of the Homosexual Minority

One consequence of the anti-homosexual terror was that some homosexuals came to see their group as a “minority” whose persecution was unjustified. The “homophile” movement, originating in California around 1950, maintained that homosexuality was a “tolerable” variation

from the norm (heterosexuality) and was no threat to society.¹³ Hence, organizations such as the Mattachine Society and the Daughters of Bilitis urged the State to decriminalize homosexual intimacy and allow homosexuals to form organizations, socialize in gay bars, and publish gay-friendly tracts and literature.¹⁴ In the 1960s, as more lesbians and gay men lived openly in San Francisco and Los Angeles in particular, the original homophile organizations were joined by larger grass-roots associations, and their message of tolerance began to have wider currency.¹⁵

Local political processes were sometimes responsive to these concerns, even though most Californians still harbored intense anti-homosexual prejudice. For example, a police raid on a New Year's celebration sponsored by San Francisco's Committee on Religion and Homosexuality exposed prominent (straight) citizens to the reality that decent sexual and gender minorities were brutalized by state-sanctioned bigots and bullies.¹⁶ The media attention forced police to curb their abuses,

¹³ D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983); Boyd, *Wide-Open Town*, *supra*, pages 200-236 (San Francisco); Faderman and Timmons, *Gay L.A.*, *supra* (early Mattachine activists in Los Angeles).

¹⁴ E.g., *Daughters of Bilitis – Purpose* (Oct. 1956) *The Ladder*, 1, 4; *A Report from the Legal Director, Mattachine Society* (Dec. 1955) San Francisco Mattachine Newsletter.

¹⁵ See Boyd, *Wide Open Town*, *supra*, at pages 209-212; Faderman and Timmons, *Gay L.A.*, *supra*, pages 141-158.

¹⁶ Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990* (1992) pages 135-136.

while gay and lesbian groups established mechanisms to report and object to future conduct. When police stepped up their harassment again in 1970-1971, gay groups not only protested to an increasingly receptive media, but also went to the ballot box to elect a pro-gay sheriff. After 1971, anti-gay municipal harassment fell off.¹⁷ Los Angeles, the home of the original Mattachine Society, saw a similar pattern of brutality-protest-repose-more brutality-ballot success in the late 1960s and early 1970s.¹⁸

Notwithstanding local political successes, reform at the state level proved impossible in the 1960s, even for an issue as to which experts were largely in agreement, namely, sodomy reform. In 1955, the American Law Institute (“ALI”) voted to exclude consensual sodomy from the Model Penal Code, because criminalizing such conduct served no public interest and engendered police corruption.¹⁹ Between 1964 and 1967, the California Legislature’s Penal Code Revision Project drafted new sex crime provisions. Following the ALI’s reasoning, Project Director Arthur Sherry

¹⁷ Clendinen and Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (1999) pages 148-163; Gregory-Lewis, *Building a Gay Politic: The San Francisco Model* (Oct. 8, 1975) *The Advocate*, 27, 32.

¹⁸ Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981* (1997) 25 *Hofstra L. Rev.* 817, 840-842.

¹⁹ Eskridge, *Hardwick and Historiography*, *supra*, at 661-663.

proposed to deregulate consensual sodomy and oral copulation.²⁰ Police officers later told the Legislature that these laws did not contribute to the public good.²¹

Legislators did nothing, fearing that sodomy reform would be understood as “promoting homosexuality.” The Legislature was also unwilling to re-examine the State’s vague laws against public indecency, lewd vagrancy, and the immoral practices disqualification for teaching certificates. The extraordinary discretion these laws vested in the police impelled California judges to respond. In 1966, the Court of Appeal declared the public indecency law void for vagueness. (*In re Davis* (1966) 242 Cal.App.2d 645.) In the early 1970s, several trial court judges declared the consensual oral copulation law unconstitutional.²²

In 1975, the Legislature responded to this judicial prodding by repealing the consensual sodomy and oral copulation laws (Stats. 1975, ch. 71, § 7). The Legislature’s action was important, for it removed the legal basis for considering homosexuals as per se outlaws, and did so in a

²⁰ Joint Legislative Committee for Revision of the Penal Code (1967) Penal Code Revision Project, Tentative Draft No. 1 – Division 11: Crimes Against Sexual Morality, Public Decency, and the Family.

²¹ *Police Opinion Questionnaire Completed – Here Are the Results* (July 1973) Law Enforcement Journal (copy available in the Assembly’s Republican Caucus File for A.B. 489 [1973 Session]).

²² *Ruling Hits California Oral Sex Law* (Oct. 11, 1972) The Advocate, at page 1; *San Diego Judge Strikes Felony Oral Copulation Law* (Apr. 11, 1973) The Advocate.

democratically accountable way. Several other features of the Legislature's deliberation are notable. First, sodomy reform was only possible because of the sweeping gains made by forward-looking legislators in the 1974 election, the sponsorship of the bill by brilliant strategists (Assemblyman Willie Brown and Senator George Moscone), and support of the Governor. Even when all the stars were aligned, the bill barely squeaked through in the Senate, whose 20-20 deadlock was broken by Lieutenant Governor Mervyn Dymally. Second, the sponsors realized that their key argument was to show how the consensual oral copulation law threatened *heterosexual* couples, not despised homosexuals. Knowledge that heterosexual oral sex was a crime made it much easier for legislators to vote for reform, especially when their wives or girlfriends were sitting in the galleries on the day of the vote.²³

Third, the public arguments against the bill included stunning displays of anti-homosexual stereotyping and animus. Constituents blasted legislators in communications laced with anti-Semitic and racist, as well as gay-bashing, language. Senate opponents of the bill argued that sex crime reform would be state promotion of homosexuality, which one opponent proclaimed on the floor of the Senate "an abomination, a perversion" that God punishes by death (Leviticus 20:13). Additionally, opponents claimed

²³ Interview by William N. Eskridge, Jr., with former Assemblyman Willie Brown, San Francisco (Embarcadero), January 10, 2005.

that homosexuals spread venereal disease and therefore were a public health menace; courts would extend the bill's protections to "the beaches, the bushes, and the restrooms"; and impressionable children would receive the message that "homosexuality is okay."²⁴

Ironically, the repeal of the consensual oral copulation and sodomy laws did *not* remove the primary basis for police harassment of gay men and lesbians in this State, namely, the "vag lewd" law prohibiting sexual solicitation, Penal Code, § 647, subdivision (a) (hereafter Section 647(a)).²⁵ Because of law-and-order support for that law, Assemblyman Brown was required to disclaim any such effect in order to protect his sex crimes bill.²⁶ Legislators concerned about the legality of their own intimate activities felt that the vag lewd law applied only to homosexuals, and they could defend their votes to repeal consensual sodomy by pointing to the anti-homosexual provisions left in the Code. Moreover, the vag lewd law was aimed at

²⁴ Neuman, *Battle Over Consenting Sex Rages, Ends in Draw* (May 2, 1975) Los Angeles Journal, at pages 1, 20; *Sex Bill Passes in Historic Senate Tie-Breaker* (May 21, 1975) The Advocate, at page 4.

²⁵ See Copilow and Coleman, *Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department* (Feb. 14, 1973) The Advocate, at pages 2-3, 24; Toy, Update: Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department (1974).

²⁶ See California Peace Officers' Ass'n et al., letter to Assemblyman Willie Brown, Jr., February 28, 1975 (objecting to Brown's original bill, because it would allow homosexuals to solicit). This letter comes from the Senate Committee files for the 1975 sex crimes law.

“public” rather than “private” activities, always a more popular and better-justified situs for legal regulation.

This Court considered the application of Section 647(a) in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238. Although the State argued that the vag lewd law was a longstanding measure needed to maintain public order, this Court ruled that its vagueness invited enforcement against invitations to consensual activities that posed no legitimate threat to public order. This Court found that the law was applied in a discriminatory manner, against “male homosexuals.” (*Id.* at p. 252.) Rather than striking down the law, the majority interpreted Section 647(a) narrowly, to be applicable only to solicitation of sexual conduct that would occur in a public place *and* to sexual touching the actor has good reason to believe would be offensive to the other person. A rebuke to arbitrary enforcement of the vag lewd law, *Pryor*’s accommodation of public decency and private intimacy has been a lasting resolution.

The Legislature also did not dare tolerate homosexuality in the workforce, and so this issue, too, was left to other branches of government. This Court ruled in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, that the State could not discharge a teacher for once engaging in private homosexual conduct. There had to be a nexus between a disqualifying factor and the person’s ability to do his or her job. This Court extended *Morrison* to protect a teacher who had been arrested (pre-*Pryor*)

for soliciting an undercover policeman and charged with violating the vag
lewd law. (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691.) The
notion of allowing homosexuals to teach in the public schools was alarming
to many California parents, and the voters had an opportunity to override
Morrison and *Jack M.* The Briggs Initiative of 1978 would have required
the discharge of any teacher who advocated or encouraged “private or
public homosexual activity” if such advocacy was likely to come to the
attention of schoolchildren.²⁷ The voters rejected the Briggs Initiative. A
year later, Governor (Jerry) Brown issued an executive order barring sexual
orientation discrimination against state employees. (Governor’s Exec.
Order No. B-54-79 (April 4, 1979).)

These are milestones in the transition of California from a state
where homosexual persons were outlaws hunted like dogs, to a state where
gay people were tolerated. For the first time, Californians could understand
how state persecution of gay people could be “discrimination,” analogous
to the State’s persecution of people having Japanese, Chinese, or Mexican
ancestries. That the notion of “discrimination” was now conceivable did
not mean that most Californians believed that anything should be done to
protect people they had been taught to view with disgust and moral
disapproval. Based upon contemporary accounts as well as current

²⁷ California Proposition 6, section 3, subdivision (b)(2) (operative
language, paraphrased in text); see Hunter, *Identity, Speech, and Equality*
(1993) 79 Va. L. Rev. 1695, 1702-1706.

recollections of surviving legislators, it appears that the California Legislature would not have enacted laws accomplishing what this Court and Governor Brown did in that period. By protecting sexual minorities, this Court and the Governor *reversed the burden of inertia*: Did the Legislature or the People really believe gay people were such immediate threats that majorities in both chambers were willing to override the Court? Reversing the burden of inertia also created *conditions for disproving stereotypes*. Popular fears, long fanned by the State, that homosexuals prey on schoolchildren proved unfounded in the wake of *Morrison* and *Jack M.*; myths that homosexuals disrupted workplaces, accepted by the federal as well as state governments, also failed to materialize after Governor Brown's order. By creating a tolerant space for gay people within the State itself, this Court and the Governor gave gay people opportunities to contribute to public projects, sometimes as openly gay people. That was educational for all concerned.

The Legislature was still eager to express disapproval of homosexuality. The State's domestic relations law was made substantially gender-neutral in 1971 (Stats. 1971, ch. 1748), and after the sodomy repeal some gay activists maintained that the law permitted "homosexual marriages." An alarmed County Clerks Association went to the Legislature to squelch this interpretation, and legislators acted with a swiftness not seen since the anti-homosexual terror. During the legislative debates, opponents

argued that same-sex marriage would promote homosexuality and destroy marriage and the family.²⁸ The power of tradition was doubly powerful in the short debate: gay people were considered unworthy of marriage because their so-called “relationships” were sterile (no children), unfaithful (promiscuity), and unstable (homosexuality was a choice that could be reversed when one of the partners came to his or her senses). By huge margins, the Legislature defined civil marriage as one man, one woman (Stats. 1977, ch. 339, §§ 1-2).

C. Stage 3: Equal Citizenship for LGBT Persons

As early as the 1950s, there were open homosexuals who maintained that homosexuality was not just a tolerable variation from the norm, but was a benign variation and there was no single norm. José Sarria, the famous waiter at the Black Cat (a gay bar the State spent millions of dollars trying to close), ran for a seat on San Francisco’s Board of Supervisors in 1961. His platform: “Gay is Good” – Gay people should not think of themselves as degraded and abnormal, but as worthy and normal.²⁹ The 5613 votes cast for Sarria reflected this point of view. During the 1960s, modest but increasing numbers of gay men and lesbians rejected the

²⁸ *Senate Approves Measure Banning Gay Marriages* (Aug. 12, 1977) L.A. Times, page 33; *California Assembly Approves Bill Banning Gay Marriages* (Aug. 14, 1977) L.A. Times, page 33.

²⁹ Boyd, *Wide Open Town*, *supra*, page 212; Strait, *The Nightengale* (Dec. 23, 1963) San Francisco News, page 4.

Mattachine strategy of acquiescing in the inferiority of homosexuality and asserted that there was nothing wrong with being homosexual. Experts such as Dr. Evelyn Hooker emerged as important allies in this effort. The report she wrote for the National Institute for Mental Health concluded that none of the common stereotypes about homosexual persons had any scientific foundation and that the overriding “social problem” needing state response was homophobia.³⁰

Young gays were fed up with “this degrading of our personalities by the state. Merely to live, we must assert ourselves as homosexual [persons],” and “accept it or not, we will force our way into open society; you will have to acknowledge us.”³¹ The Gay is Good philosophy required lesbians and gay men to “come out” of their “closets,”³² not only for their own emotional well-being, but also to demonstrate to an ignorant society that homosexual persons were human beings with productive lives, serious relationships, and job capabilities. Moreover, the goal of the Gay is Good strategists was legal *equality*, not just tolerance and freedom from police

³⁰ U.S. National Institute of Mental Health, Task Force on Homosexuality, Final Report (Oct. 10, 1969).

³¹ Krim, *Revolt of the Homosexual* (May 1959) Mattachine Review, pages 4-5, 9.

³² On “coming out” of a “closet,” see Eskridge, *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961* (1997) 24 Fla. St. U.L. Rev. 703, 705.

terror.³³ Early thinkers like Harry Hay (the founder of Mattachine) adopted the civil rights movement's idea that homosexuals were a "minority group" subject to "discrimination" because of emotional prejudice and mental stereotypes.³⁴

As more LGBT people came out of the closet, many migrated to San Francisco, Los Angeles, and other cities with sizeable gay populations. In the wake of the June 1969 Stonewall protests, thousands of out-of-the-closet gays demanded not only equal treatment by government, but also state protection against private discrimination that was partially a product of state policy. Following the civil rights model, East Lansing and Ann Arbor, Michigan in 1972 adopted ordinances protecting against discrimination based on sexual orientation in both municipal and private employment. California municipalities were slow to follow, apparently because council members were reluctant to extend something more than tolerance to a minority they still held in disgust or at arm's length. Politicians feared powerful backlash if voters thought they were promoting homosexuality. When Dade County, Florida adopted an anti-discrimination

³³ Constitution of the Mattachine Society of Washington, art. II, § 1, subdivisions (a)-(c) (1962); see Eskridge, *January 27, 1961: The Birth of Gaylegal Equality Arguments* (2001) 58 NYU Ann. Survey Am. Law 39.

³⁴ Hay, *Preliminary Concepts: International Bachelors' Fraternal Order for Peace and Social Dignity* (1950), reprinted in Will Roscoe, editor, *Radically Gay: Gay Liberation in the Words of Its Founder* (1996) pages 63-76.

measure in January 1977, Anita Bryant led a famous “Save the Children” campaign to overturn it. Her argument was that homosexuals prey on children; such human “garbage” were entitled to no “special rights.” Fearful voters agreed, by a two-to-one margin.³⁵

Under these circumstances, the California Legislature was unprepared to extend equality protections to gay people. Again, this Court led the way, in *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458 (*PT&T*). Employees sued PT&T for discriminating against gay people in hiring, firing, and promotion. One ground of complaint was California’s Labor Code bar to employer interference with or coercion because of employee “political activities.” PT&T argued that anti-gay discrimination had nothing to do with political activities, but this Court disagreed:

[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. * * * A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to “come out of the closet,” acknowledge their sexual preferences, and to associate with others in working for equal rights. (*Id.* at p. 488.)

³⁵ Sears, Rebels, Rubyfruit, and Rhinestones: Queering Space in the Stonewall South (2001) pages 226-245.

This Court's reasoning, and the anti-discrimination holding of the case, went well beyond the uneasy tolerance that the Legislature was comfortable with.

The Court majority in *PT&T* was bitterly criticized in some quarters, but its equality idea was one whose time had come. New ordinances barring private job discrimination based on sexual orientation were enacted by the city councils of Berkeley (1978), San Francisco (1978), Los Angeles (1979), Oakland (1984), Santa Monica (1984), West Hollywood (1984), Sacramento (1986), Long Beach (1987), and San Diego (1990).³⁶ Each of these cities also prohibited discrimination in municipal employment, a policy adopted for state employees in 1979 by Governor Brown. In 1992, the Legislature amended the Labor Code to add an explicit protection for employment discrimination based on sexual orientation (Stats. 1992, ch. 915, § 2). The same pattern was followed in regard to public accommodations discrimination. Lower courts construed the Unruh Act (Civ. Code, § 51) to bar sexual orientation discrimination by public accommodations (e.g., *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289), another principle later codified by the Legislature (Stats. 2005, ch. 420, § 3).

Between 1975 and 1992, California moved from a policy where homosexuals were an outlaw class, persecuted by the government, to one

³⁶ Eskridge, Gaylaw, *supra*, page 356 (App. B2).

where government not only decriminalized homosexual intimacy, but opened up civil service and teaching jobs to openly gay people and prohibited anti-gay discrimination in private workplaces and public accommodations. This State's movement was step-by-step and deliberate, with judges, administrators, and legislators all contributing to the instantiation of a non-discrimination norm protecting LGBT people. To be sure, these measures had their limits. Police still harassed gay men especially; anti-discrimination laws were under-enforced, especially at the municipal level; openly gay people were subject to hate crimes, anti-gay violence, and harassment. Most important, gay people were forming relationships and families in unprecedented numbers – and faced a family law regime whose protections were highly uncertain. Committed couples wanted state recognition of their relationships, and couples raising children wanted both partners to have rights as legal parents. In the course of a generation, California has constructed a regime of near-equality, with both this Court and the Legislature playing critical roles.

Given the Legislature's 1977 rebuff to same-sex marriage, gay activists in San Francisco devised an alternate institution, "domestic partnership," that would provide both recognition and some benefits for same-sex couples. They originally propounded this idea at the municipal level, whose councils were increasingly gay-friendly. In 1985, Berkeley adopted the first operative municipal domestic partnership ordinance,

which ultimately allowed city employees to obtain health benefits for their same-sex partners. Similar laws were adopted in West Hollywood (1985), Santa Cruz (1986), Los Angeles (1988), San Francisco (1989 [revoked by referendum], 1990), Sacramento (1992), San Diego (1994), Oakland (1996), and Long Beach (1997).³⁷ In 1999, the Legislature passed a modest statewide domestic partnership law (Stats. 1999, ch. 588). In 2003, the Legislature extended the benefits of statewide domestic partnership to include almost all the legal benefits and in some cases the legal obligations accorded civil marriage (Stats. 2003, ch. 421). The proposed California Marriage License Nondiscrimination Act of 2005, passed by the Legislature but vetoed by the Governor, recognized that the State's constitutional obligation to treat lesbian and gay couples equal to straight couples was not met by the domestic partnership law, which "den[ie]d them the unique public recognition and affirmation that marriage confers on heterosexual couples." (Assem. Bill No. 849, 2005-2006 Reg. Sess.)

While legislators have taken the lead in recognizing lesbian and gay partnerships, the courts have taken the lead in recognizing lesbian and gay families. A generation ago, openly lesbian and gay parents often lost custody and even visitation rights to their biological children because of anti-gay sentiments. For the last twenty-five years, gay and (especially)

³⁷ O'Brien, *Domestic Partnership: Recognition and Responsibility* (1995) 32 San Diego L. Rev. 163.

lesbian couples have been conceiving or adopting children within their committed relationships. Couples rearing children have sought to create parental rights for *both* parents through “second-parent adoption,” whereby the second parent adopts the child of the first parent. Lower court judges in California have confirmed between 10,000 and 20,000 such adoptions.³⁸ This Court ratified this practice in *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417. Justice Werdegar’s majority opinion rejected arguments that state recognition of lesbian and gay families was inconsistent with marriage and traditional family values. (Compare *id.* at pp. 438-440, with *id.* at pp. 463-465 (Brown, J., concurring and dissenting.) Instead, this Court recognized that lesbian and gay families served the fundamental purpose of adoption law: the best interests of children. (Also, *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, interpreting the Uniform Parentage Act to allow for two mothers.) Following the consensus of California judges, Family Code, section 9000, subdivisions (b) and (g) now recognizes registered domestic partners as full co-parents, just as state law has long recognized different-sex married step-parents.

³⁸ Pizer, *What About the Children?* (Nov. 9, 2001) *The Advocate*, 1.

II. COMPARATIVE LAW: JUDGES IN JURISDICTIONS SIMILAR TO CALIFORNIA HAVE ENFORCED CONSTITUTIONAL MARRIAGE EQUALITY WITHOUT THREAT TO SOCIAL ORDER AND THE LEGISLATURE'S PRIMACY IN FAMILY LAW

The historical model suggested in the previous part is largely descriptive. It helps us understand why marriage equality claims have failed in other American states and foreign countries. In the American South and most non-industrialized countries, homosexuality is socially and often legally deemed to be a malignant variation. Like California in the 1930s, these jurisdictions cannot understand homosexuals as dignified citizens or anti-homosexual policies as "discrimination." Hence, neither judges nor legislators can appreciate pro-gay equality claims, and if they did recognize such claims there would be a tremendous socio-political backlash that would override their judgment and place lesbian and gay families in greater peril.

In most Midwestern, Great Plains, and Rocky Mountain states, as well as some European countries, homosexuality is considered a tolerable but inferior variation from the heterosexual norm. Like California in the 1970s, these jurisdictions can accept gay people as participants in parts of public culture, but not as completely equal citizens. Hence, judges and legislators in those jurisdictions have been skeptical of consensual sodomy laws, anti-gay censorship, and some discriminations but reserve some treasured institutions for straights-only; military service and marriage are

the examples. Such uneasy tolerance characterized Hawaii and Alaska of the 1990s, when judicial decisions triggered state constitutional amendments allowing the legislature discretion to provide something short of full marriage equality.³⁹

States in the American Northeast and West Coast, as well as Canada, Northern Europe, and South Africa, have moved toward the next stage, a substantial consensus that homosexuality is a benign variation and LGBT people are good, normal citizens. In these jurisdictions, governments have adopted laws barring sexual orientation discrimination in the private as well as public sector and are recognizing lesbian and gay unions and families. As a descriptive matter, all of the jurisdictions in this group are moving toward recognition of same-sex marriages; as a matter of prescription, these polities *ought* to recognize same-sex marriages. There are different paths by which this is occurring.

The European path is a parliamentary one. (Most European countries have a parliament with one decisive chamber; courts have traditionally not had judicial review authority.) The Netherlands was the first country to recognize same-sex marriages (2001), *after* its Parliament had adopted laws barring anti-gay discrimination and hate crimes and after recognizing same-sex registered partnerships. This is paradigmatic *equality practice*: incremental legal reforms allowed gay people increasing

³⁹ Eskridge, *Equality Practice*, *supra*, pages 16-42.

visibility in neighborhood and public culture; as straight persons worked with their gay relatives and neighbors, they grew increasingly willing to consider them as completely equal citizens. Thus, the Dutch people have accepted the new institution without much dissent. Belgium (2002) and Spain (2005) have followed the Dutch approach. Sweden, which recognized registered partnerships in 1994 legislation, has been studying same-sex marriage and will probably recognize such marriages by 2009.⁴⁰

The North American path involves both courts and legislatures. The United States and Canada are federal systems where much marriage policy is set at the state/provincial level and state/provincial judges enforce constitutionally grounded equality guarantees. In this country, it is much harder to enact statutes than it is in Europe and Canada, because new legislation must pass through two different legislative chambers and then be acceptable to a chief executive with no connection to the legislature. Legislation granting new rights to sexual and gender minorities is triply hard to enact: it must not only pass through the foregoing veto gates, but it *also* faces unusually determined opposition from legislators who accept traditional (state-supported) stereotypes or prejudices *and* doubts from moderates because of the uncertainties associated with adopting new policies. Judicial enforcement of constitutional equality guarantees

⁴⁰ Interview by William N. Eskridge, Jr., with Hans Ytterberg, Swedish Ombudsman, September 8, 2007.

reverses the burden of inertia in ways that advance the jurisdiction's political ability to recognize lesbian and gay marriages, unions, and families.

An early example was the Vermont Supreme Court's decision in *Baker v. State* (1999) 744 A.2d 864. The court declared the state's exclusion of lesbian and gay couples from the rights and duties of civil marriage to be unconstitutional but left the remedy to its legislature, which responded with the civil unions law in 2000.⁴¹ But for the court's constitutional action, even gay-tolerant Vermont would not have moved toward equality for lesbian and gay families. Notwithstanding strong partisan criticisms, the civil unions law has survived in that state, because it has had none of the effects predicted by its opponents (destruction of traditional marriage) and has instead promoted committed families that contribute positively to the state. Vermont's legislature is now studying the possibility of same-sex marriage. (See also *Lewis v. Harris* (2005) 908 A.2d 189, where a divided New Jersey Supreme Court debated civil unions versus marriage as the remedy for the constitutional violation.)

Particularly relevant is *Goodridge v. Department of Public Health* (2003) 798 N.E.2d 941. Like California, Massachusetts revoked its consensual sodomy law, enacted legislation barring anti-gay discrimination,

⁴¹ Eskridge, Equality Practice, *supra*, pages 43-82 (*Baker* and the civil unions law).

and gave benefits to the same-sex domestic partners of state employees. But the triple burden of inertia (veto gates, prejudice, uncertainty about change) prevented any legislative action on marriage. The Massachusetts Supreme Judicial Court reversed the burden of inertia in *Goodridge*, which struck down the exclusion of lesbian and gay couples from the marriage law and gave the legislature a six-month period to respond to the advent of same-sex marriage, and *Opinion of the Justices to the Senate* (2004) 802 N.E.2d 565, which advised the legislature that civil unions would not satisfy the court's mandate. Beginning in May 2004, Massachusetts issued marriage licenses to qualified same-sex couples. Critics assailed this action as the court's creation of important social policy contrary to democratic premises. (E.g., *Goodridge, supra*, 798 N.E.2d at 979-982 (Sosman, J., dissenting).)

Yet the court's constitutional decision never meant that the legislature and the voters had lost control of an important issue, because the Massachusetts Constitution allows for popular override by constitutional amendment, after consideration by two successive sessions of the legislature. In 2004, the legislature narrowly voted for an amendment recognizing civil unions but preserving the marriage exclusion for same-sex couples. The 2004 election for state legislators was a triumph for supporters of same-sex marriage, "a sign that same-sex marriage has

changed the political landscape in Massachusetts.”⁴² In 2005 the legislature voted *against* the constitutional amendment, 157-39; in May 2007 another proposed constitutional amendment lost by a similarly lopsided margin in the legislature. Public opinion has also decisively become much friendlier to civil unions and even marriage now than it was before *Goodridge*. The key reason is that the court’s reversal of the burden of inertia created a situation where LGBT people could actually disprove wild predictions about the social effects of same-sex marriage.

Opponents of same-sex marriage rest their case on claims that are persuasive to moderates as well as homophobes, because they are alarming and hard to refute in the abstract: same-sex marriage will undermine traditional marriage, will be bad for children, and will create social turmoil. Yet European experience with registered partnerships has been *exactly the opposite*: traditional marriage actually bounced back after twenty years of decline, nonmarital birth rates stabilized after twenty years of geometric increases, and everyone has happily adjusted to the new institution.⁴³ *Goodridge* suggests that this evidence is not limited to Europe and, more important, has enabled lesbian and gay couples to demonstrate through

⁴² Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage* (Dec. 15, 2004) N.Y. Times, page A14.

⁴³ Eskridge and Spedale, *Gay Marriage: For Better or For Worse? What We’ve Learned from the Evidence* (2006), invoked by *Marriage Cases*, *supra*, 49 Cal.Rptr.3d at page 727 n.1 (Parrilli, J., concurring).

their shared lives and their commitment to family that sexual minorities are not narcissistic sexual fanatics who have no regard for lasting responsibilities. LGBT people share the values of their parents and their neighbors and are eager to take on these responsibilities.

Nonetheless, most American courts have declined to follow *Goodridge*. (E.g., *Hernandez v. Robles* (2006) 7 N.Y.3d 338 [855 N.E.2d 1].) Those decisions have come in states where equal citizenship for LGBT citizens is not as advanced as it is for Massachusetts and California (see Table 1, below). If this Court seeks a closer analogue, it should look across the national border.⁴⁴ Like California's Legislature, Canada's Parliament repealed that country's consensual sodomy law a generation ago (1969) and subsequently has prohibited sexual orientation discrimination by private employers and public accommodations (S.C. 1996, ch. 14). In both jurisdictions, judicial enforcement of constitutional equality guarantees has moved family law toward full equal citizenship for LGBT persons and families.⁴⁵

⁴⁴ “[N]ow that constitutional law is solidly grounded in so many foreign countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.” William H. Rehnquist, *Constitutional Courts – Comparative Remarks, in Germany and Its Basic Law: Past, Present, and Future – A German-American Symposium*, pages 411 and 412 (Kirchhof and Kommers eds., 1993).

⁴⁵ Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits* (2004) 49 McGill L.J. 1143-1180.

Section-15, subdivision (1) (hereafter Section 15(1)) of the Canadian Charter of Rights and Freedoms assures “equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” This equality guarantee is similar to that in California’s Constitution, as interpreted in *Perez* (race is a suspect classification) and *Sail’er Inn* (sex is a suspect classification). In *Egan v. Canada* (1995) 2 S.C.R. 513, the Supreme Court of Canada ruled that sexual orientation was “analogous” to those classifications enumerated in Section 15(1) as presumptively suspicious grounds for state lawmaking. The Court majority, however, upheld a social security benefit that did not apply to same-sex couples. They reasoned that the state had special leeway to encourage and regulate different-sex marriage.

In *Vriend v. Alberta* (1998) 1 S.C.R. 493, the Supreme Court explained why discriminations against gay people are presumptively invidious: one’s sexual orientation has no correlation with one’s ability to be a productive citizen, yet the state had long discriminated against gay people and had fueled private anti-gay prejudices. The Court extended this reasoning to same-sex couples in *M. v. H.* (1999) 2 S.C.R. 3. M. and H. were lesbian partners whose economic lives were completely intertwined. When M. left their common home in 1992, she sought an order of support as a “spouse” under Ontario’s Family Law Act (“FLA”), which provided

for such support upon the break-up of married couples or cohabiting different-sex couples. The Canadian Supreme Court ruled that the FLA violated Section 15(1). Justice Cory's lead opinion concluded that "[t]he human dignity of individuals in same-sex relationships is violated by the impugned legislation," for it denied a traditionally disadvantaged group access to a fundamental social institution. (*Id.* ¶74.) Responding to *M. v. H.*, Canada's Parliament passed the Modernization of Benefits and Obligations Act (S.C. 2000, ch. 12). The law amended 68 federal statutes to extend benefits and obligations to same-sex couples on the same basis as common-law opposite-sex couples.

Since then, the highest courts in nine Canadian provinces have considered the question of whether the continued exclusion of lesbian and gay couples from marriage is unconstitutional. On May 1, 2003, the British Columbia Court of Appeal ruled in *EGALE Canada Inc. v. Canada (Attorney General)* (2001) 11 W.W.R. 685 [95 B.C.L.R. 3d 122, 225 D.L.R.(4th) 422], that equal access to civil marriage for same-sex couples is the only remedy consistent with the equality principle of Section 15(1). The court rejected the government's argument that the province's almost-all-the-rights-and-duties-of-marriage registered partnership law would satisfy Section 15(1):

[R]egistration schemes should not be viewed as a policy alternative to same-sex marriage since to do so would maintain the stigma of same-sex couples as second-class citizens. * * * If governments are

to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion. (*Id.* ¶154.)

The British Columbia Court ruled that the provincial common law bar against same-sex marriage violated Section 15(1), but suspended its remedy until July 2004, to give Parliament time to consider remedial legislation. (*Id.* ¶161.) On June 10, 2003, the Ontario Court of Appeal ruled in *Halpern v. Canada (Attorney General)* (2003) 60 O.R. (3d) 321 [215 D.L.R.(4th) 223] that neither Ontario's nor Parliament's partnership legislation satisfied the Charter's equality requirement:

[M]arriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships. (*Id.* ¶107.)

The Attorney General contended that the 2000 Act gave same-sex couples virtually all of the federal benefits that flow from marriage. The Court rejected this contention, in part because the law did not provide all the legal benefits and duties of marriage, and in part because it still left same-sex couples "completely excluded from a fundamental societal institution." (*Id.*, ¶139.) Nothing short of full marriage equality would be sufficient; "[t]he societal significance surrounding the institution of marriage cannot be overemphasized." (*Id.*, ¶137.) As a remedy, the Ontario Court required marriage licenses to issue forthwith. The first license was issued, and the couple married, on June 10, 2003.

Parliament had a range of options after *EGALE* and *Halpern*. First, it could have appealed these Charter interpretations to the Canadian Supreme Court. Second, it could have nullified those decisions for a period of time under the Charter's "Notwithstanding Clause." (Section 33 permits a Canadian legislature to exempt legislation from much of the Charter for five years at a time, after which the exemption expires but may be renewed.) On June 17, 2003, the Prime Minister announced that the Government would press for a third option: legislative recognition of same-sex marriages. In 2004, the highest courts of Quebec, Manitoba, Nova Scotia, Saskatchewan, Newfoundland, and the Yukon Territory followed *EGALE* and *Halpern* to rule that the constitutional equality principle required recognition of same-sex marriages.⁴⁶

Meanwhile, same-sex marriage was a prominent issue in the 2004 parliamentary elections, with the Conservative Party suggesting that it would invoke the Notwithstanding Clause to avoid promoting homosexual marriages. That Party lost the election, and polls showed that 57 percent of the population believed that lesbian and gay couples ought to have access to civil marriage.⁴⁷ After the election, the Supreme Court advised the Government that the legislation was consistent with the Charter (*Reference*

⁴⁶ Canadians for Equal Marriage, *Equal Marriage Backgrounder*, available at <www.equal-marriage.ca/resource.php?id=500> (as of Sept. 18, 2007).

⁴⁷ Wintemute, *Sexual Orientation and the Charter*, *supra*, at page 1172.

re Same-Sex Marriage (Dec. 9, 2004) 3 S.C.R. 698). Parliament then debated and enacted the Civil Marriage Act (S.C. 2005, ch. 33), signed into law on July 20, 2005. An effort, by a subsequently elected Conservative Government, to re-examine the marriage issue was defeated in Parliament, 175-123. Most Canadians now support the law.⁴⁸

It is remarkable that full marriage equality came so quickly to Canada and has received such widespread acceptance. Before *M. v. H.*, LGBT people faced an uphill battle for space on the policy agenda, in the face of legislator fears that voters would discipline them for considering proposals cutting against the deepest source of anti-gay prejudice and stereotyping: the government-supported notion that “homosexuality” is inconsistent with marriage and family. Once judges enforcing constitutional rights required the government to justify unequal treatment of lesbian and gay families, both legislators and voters came to accept same-sex marriage. Indeed, the former Attorney General of Canada (2003-06) has praised the “transformative” effect that the *EGALE-Halpern* constitutional litigation had on marriage law.⁴⁹

⁴⁸ *Canadians Support Same-Sex Marriage Bill*, Angus Reid Global Monitor: Polls and Research, July 20, 2005, available at <www.angus-reid.com/polls/view/8147> (as of Sept. 18, 2007).

⁴⁹ Hon. Irwin Cotler, *Marriage in Canada: Evolution or Revolution?* (2006) 44 Fam. Ct. Rev. 60.

How could this have happened? Equality Practice, *supra*, at pages 115-120, provides a framework. “Step-by-step change permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments” (*id.* at p. 115). Assuming a society, like Canada and California, that has a substantial population of open LGBT citizens, equality practice counsels that modest legal changes can create conditions under which the larger population can give sexual and gender minorities fair opportunities to show that they share mainstream values and are productive participants in society. If opponents make doomsday predictions that are repeatedly falsified, moderates become skeptical after so many cries of “wolf,” and full equality becomes possible. This is what happened in Canada, where there would be no same-sex marriage today were it not for judges reversing the burden of legislative inertia.

Table 1 below demonstrates the similarity among California, Massachusetts, and Canada from the equality-practice perspective.⁵⁰ All three jurisdictions have taken the incremental steps that ease the way to same-sex marriage. The notion that seemed radical in the mid-1990s has now become normalized for most citizens of jurisdictions that have decriminalized homosexual intimacy, prohibited anti-gay discrimination

⁵⁰ See also Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in The Netherlands*, in *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Wintemute and Andenaes eds. 2001).

and hate crimes, and formally recognized lesbian and gay relationships and families. (Even gay-tolerant New York, whose Court of Appeals rejected same-sex marriage is not as far along as California et al. in these respects, as illustrated in Table 1.)

Table 1. Equality Practice in Canada, Massachusetts, California, and New York

| Rights for Gay People | Canada | Massachusetts | California | New York |
|--|--|------------------------------|--|----------------------|
| <i>Sodomy Repeal</i> | 1969 | 1974 (court) 2002 (court) | 1975 | 1980 (court) 2000 |
| <i>Anti-Discrimination Law</i> | 1992 (lower court) 1996 1998 (court) | 1989 | 1979 (court) 1992 | 2002 |
| <i>Hate Crime Law</i> | 1985 | 1996 | 1991 | None |
| <i>Domestic Partnership/Civil Unions</i> | 1999 (court) 2000 | 1992 (governor) | 1999 2003 | None |
| <i>Second-Parent Adoption</i> | 1991-2001 (lower courts) | 1993 (court) | 1980s (trial courts) 2001 2003 (court) | 1996 (court) |
| <i>Same-Sex Marriage</i> | 2003 (lower courts) 2005 | 2004 (court) | Pending | None |

Barring external shocks, the equality practice model will continue to work its way through the industrial world, delivering domestic partnerships and civil unions in some jurisdictions, but same-sex marriage in jurisdictions fully committed to the equality principle. So long as the process is incremental, courts' involvement is no plausible threat to democracy, judicial legitimacy, or social peace. Following a similar process (sodomy reform, anti-discrimination measures, domestic partnership, and second-parent adoptions), the Constitutional Court of South Africa ruled in *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) [2005 SACLX LEXIS 34], that the exclusion of lesbian and gay couples from marriage violates that nation's constitutional assurance of equality.⁵¹ Justice Sachs's opinion for the Court reasoned:

[The marriage exclusion] represents a harsh if oblique statement by the law that same-sex couples are outsiders, that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. (Id. ¶71.)

South Africa implemented the Court's judgment in 2006 and now counts itself as one of the growing number of jurisdictions recognizing same-sex marriages.

⁵¹ Section 9 South Africa's Constitution not only guarantees equality, but specifically disapproves state *sexual orientation* discrimination.

III. DOCTRINE: THIS COURT SHOULD EXTEND *PEREZ* TO OVERTURN THE EXCLUSION OF SAME-SEX COUPLES FROM CIVIL MARRIAGE

In deciding whether marriage equality is required by the California Constitution, there is no binding precedent on point. As a matter of California jurisprudence, the most analogous precedent is *Perez v. Sharp* (1948) 32 Cal.2d 711 (plurality opinion of Traynor, J.).⁵² *Perez* was one of the boldest decisions of the twentieth century: this Court struck down an anti-miscegenation statute that had been part of California's family law since statehood and that had recently been expanded to override a lower court decision exempting a Caucasian-Filipino marriage (Stats. 1933, ch. 561); no American appellate court had invalidated an anti-miscegenation law before *Perez*, and no appellate court would do so again until *Loving v. Virginia* (1967) 388 U.S. 1.

The State's defense in this case looks a lot like the State's defense in *Perez*. In both appeals, the State claimed that this Court should defer to the Legislature on a matter of social policy that had long been settled (*Perez, supra*, 32 Cal.2d at pp. 742, 746-747, 753-754 [Shenk, J., dissenting and espousing the State's arguments]), that this Court should respect the "integrity" of marriage as it has traditionally been understood by the community (*id.* at p. 745), and that the proper remedy for an issue of social

⁵² There is no majority opinion, but Justice Traynor's plurality opinion is so cogently reasoned and widely embraced that it will be treated as an authoritative statement of law.

policy was with the Legislature, not this Court (*id.* at p. 760). Given the comparative law explained in Part II, upholding the constitutional claim in this case entails a lot less institutional risk than this Court took on (to its eternal credit) in *Perez*.

The State argues that *Perez* is materially different because it involved a race-based classification triggering strict scrutiny (Answer Brief, 20-21). Yet if the exclusion of different-*race* couples from marriage is a *race* discrimination, why isn't the exclusion of same-*sex* couples a *sex* discrimination (subject to strict scrutiny under *Sail'er Inn*)? If not a sex discrimination, why shouldn't the exclusion be subjected to strict scrutiny because sexual orientation exclusions are a "suspect" classification in light of this State's record of persecution? Even under the intermediate scrutiny suggested as a possibility by the State (Answer Brief, 39-54), why shouldn't the Court reverse the burden of inertia as it has done in earlier gay rights cases and as Massachusetts and Canadian courts have done in recent marriage cases? Contrary to the State's assumptions, a constitutional decision by this Court to require marriage equality would not take the issue away from the voters – but could have the salutary effect of reversing the burden of inertia, allowing lesbian and gay families to refute irresponsible claims, and creating conditions where voters could make better-informed decisions in the constitutional initiative that would inevitably be put to the voters.

A. The Exclusion of Same-Sex Couples Is Sex Discrimination Subject to Strict Scrutiny under Sail'er Inn

In *Perez*, the State argued that different-race marriage bars were not *race* discriminations, because they treated people of color and whites the same. This Court rejected that analysis: equal protection means the rights of “individuals,” and an individual has a presumptive right not to be judged based upon the “irrelevant” criterion of her race or the race of her partner (*Perez, supra*, 32 Cal.2d at p. 716). If the State refuses to allow Joe, an African American, to marry Jane, a Caucasian American, it is race discrimination because the regulatory variable (the criterion that changes to produce the legal discrimination) is Joe’s race; if Joe were Caucasian, the marriage would be permitted. By analogy, if the State refuses to allow Joe to marry Carlos, it is sex discrimination, because the regulatory variable is Joe’s sex; if Joe were a woman, the marriage would be permitted. In *Sail'er Inn (supra*, 5 Cal.3d at pp. 17-19), this Court held that sex-based classifications are subject to the same strict scrutiny as race-based classifications. Under this logic, *Perez* looks almost exactly like this case: the State is denying access to civil marriage based upon a suspect classification and justifies the discrimination on grounds of tradition, social attitudes, and other reasons this Court rejected in *Perez*.⁵³

⁵³ Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination* (1994) 69 NYU L. Rev. 197.

The State first responds that courts in most other jurisdictions have rejected this argument (Answer Brief, 19). This does nothing to distinguish *Perez*, where this Court declined to follow the unanimous consensus of appellate court decisions. Second, the State maintains that it is “sex discrimination” only when “one gender is favored over another” (*id.* at 18). Again, this does not distinguish *Perez*, which rejected the State’s argument that there was no “discrimination” when neither race is favored (*Perez, supra*, 32 Cal.2d at p. 716). Moreover, the State’s exemption for classifications that treat the sexes the same ought *not* be imposed as a general rule in sex discrimination cases. In 1972, California’s unemployment compensation program provided a financial safety net for employees laid off because of illness and other disabilities, but excluded pregnancy, which we would consider a sex-based classification today (42 U.S.C. § 2000e, subd. (k)). California defended its sex-based classification on the ground that the program did not favor “one gender over another”: the average female employee received as much from the program as the average male employee. Although the United States Supreme Court allowed the discrimination (*Geduldig v. Aiello* (1974) 417 U.S. 484), surely this Court would not under its *Sail’er Inn* jurisprudence.

The State’s third response is that strict scrutiny should apply only when the suspect classification matches up symmetrically with an objectionable ideology. Specifically, the State maintains that anti-

miscegenation laws were inspired by a “White Supremacy” philosophy seeking to maintain (white) racial purity (*Loving, supra*, 388 U.S. at 11), while California’s same-sex marriage bar does not “attempt to entrench gender roles” (Answer Brief, 21). The latter point is inconsistent with the Bill Digest for the 1977 statutory amendment, which justified the exclusion for same-sex couples from marriage: the “special benefits” of marriage “were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children” (Assembly Committee on Judiciary, Bill Digest, A.B. 607, 1977-1978 Reg. Sess.). “Why extend the same windfall to homosexual couples except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children?” (*Id.*)

The Bill Digest shows how the 1977 same-sex marriage bar “attempt[ed] to entrench gender roles.” To begin with, the Legislature intended to reinforce the idea of family as necessarily involving role specialization where the female bears and raises children and the male works outside the home. This is a clear an example of “outmoded” gender-role stereotyping (*Arp v. Workers’ Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 405-406). The State presumably believes the Legislature today would disavow these sexist assumptions – but there is better evidence that

the Legislature today believes same-sex marriage is *necessary* to end unconstitutional discrimination against same-sex couples. (Assem. Bill No. 849, 2005-2006 Reg. Sess.; Assem. Bill No. 43, 2007-2008 Reg. Sess.)

The 1977 Bill Digest also suggests a deeper way in which the Legislature was trying to entrench rigid gender roles. Disallowing same-sex marriage confirms the notion that a woman's only possibility of a meaningful romance and lifetime commitment is through marriage to a man, and vice-versa. This notion is our culture's meta-narrative for gender stereotyping, generally. Its foundational idea is *complementarity*: woman is the "opposite sex" from man (always the measure); man and woman are yin and yang, different in ways that generate and define romantic, committed love that can result in both marriage and, inevitably, children. That a woman can fall in love with, form a lifetime commitment to, and raise children with another woman, and not her "complement" (a man), is a deep challenge to this gender stereotype – and indeed to *all* gender stereotypes. "“As long as organized legal systems * * * continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.”” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34-35, quoting Kanowitz, *Women and the Law* (1969) p. 4.)

If *Perez* required strict scrutiny because the State denied (important) marriage rights through a (suspect) race-based classification seeking to entrench a (disapproved) racist ideology, then these appeals require strict scrutiny because the State denies (important) marriage rights through a (suspect) sex-based classification seeking to entrench a (disapproved) sexist ideology of rigid gender roles. Table 2 demonstrates the formal similarities between *Perez* and these appeals.

Table 2. Classification, Class, and Ideology in Marriage Discriminations

| Case | Classification | Underlying Ideology | Class Specifically Harmed by the Classification | Class Generally Harmed by the Ideology |
|--------------------------------|-----------------------|----------------------------|--|---|
| <i>Perez</i> | Race | White Supremacy (Racism) | Miscegenosexual Persons (Attracted to Persons of a Different Race) | People of Color |
| <i>Same-Sex Marriage Cases</i> | Sex | Patriarchy (Sexism) | Homosexual Persons (Attracted to Persons of the Same Sex) | Women |

The larger point suggested by Table 2 is that homophobia and state discriminations against LGBT people are instruments of sexism. There is a

substantial feminist literature making this point,⁵⁴ and the 1977 Bill Digest illustrates it by linking support for traditional gender roles (Mom stays at home) with the State's long-held ideology that homosexuality is the antithesis of family. The point is also intuitive. A central mechanism for articulating and policing our culture's traditional differentiation of the "two sexes" and rigid gender roles (man=male, woman=female) is gay-bashing. Nurturing men are derided as "fags," male rivals are put down as "girlie men," and outspoken feminists as "lesbians" or "man-haters," even in modern California. Sexism and homophobia are not the same prejudice, but they are intertwined.⁵⁵

B. The Exclusion of Lesbian and Gay Couples from Marriage Is a Sexual Orientation Discrimination This Court Should Subject to Strict Scrutiny

Although the sex discrimination argument for same-sex marriage is analytically powerful, some courts have been reluctant to adopt this argument for social and historical reasons. Same-sex couples wanting to get married are almost always lesbian, gay, or bisexual in orientation, and everybody knows (and the 1977 Bill Digest states) that the same-sex

⁵⁴ E.g., Pharr, *Homophobia: A Weapon of Sexism* (1988); Sedgwick, *Between Men: English Literature and Male Homosexual Desire* (1985) page 20; Card, *Why Homophobia?* (1990) 5 *Hypatia* 110; Koppelman, *Sex Discrimination, supra*, pages 234-257.

⁵⁵ A key reason the ERA went down to defeat was the charge that it would promote homosexuality. E.g., Schlafly, *The Power of the Positive Woman* (1977) page 90.

marriage bar operates primarily to deny those persons full equality. Because relationship non-recognition is the most deeply held anti-gay governmental discrimination, and the last to fall in gay-friendly jurisdictions, it cannot plausibly be challenged in jurisdictions that consider homosexuality a malignant or even a tolerable variation. In jurisdictions, such as Massachusetts and Canada, where a tentative public consensus has formed that homosexuality is a benign variation, same-sex marriage is a logical policy for the government to adopt – but the primary argument for change is that the status quo is an unacceptable *sexual orientation* discrimination. To say it is “just” a sex discrimination seems to miss the point of why same-sex marriage bars persist.

The same-sex marriage bar is *both* a sex *and* a sexual orientation discrimination.⁵⁶ This reflects the ideological linkage between sexism and homophobia: insistence on rigid gender roles in sexual relations as well as relationships is important to both prejudices. Conversely, relaxation of rigid gender roles reflects the decline of, and simultaneously undermines,

⁵⁶ The State says that the marriage law does not discriminate on the basis of sexual orientation (Answer Brief, 22-24). *Yick Wo v. Hopkins* (1886) 118 U.S. 356, held that a San Francisco ordinance regulating laundry safety but applied more than 90% of the time to Chinese laundries was a race/ethnicity discrimination. Because “the impact” of the same-sex marriage exclusion “falls virtually exclusively on gay men and lesbians” (Answer Brief, 23), this case is not materially different from *Yick Wo*. In any event, the Court of Appeals was right to conclude that both the 1977 amendment and the 2000 Knight Initiative were motivated by a legislative and voter alarm that “homosexuals” were trying to marry. (The State quarrels with that assertion but presents no evidence to the contrary.)

both prejudices. Thus, a society where most women work outside the home and find joy in careers, where gay and straight men embrace caregiving roles, and where lesbians raise children in coupled unions is a society where both patriarchy and homophobia are waning. The Court can easily extend its *Sail'er Inn* sex discrimination jurisprudence to cover the same-sex marriage exclusion, but this Court (unlike the Court of Appeal) has the authority to recognize sexual orientation as a suspect classification. In so doing, the Court would complete the historical line between *Perez* and these appeals.

In *Sail'er Inn*, this Court held that sex is a suspect classification by analogy to race, both of which (1) are “immutable” traits (2) that have “no relation to ability to perform or contribute to society” and (3) have traditionally been bases for policies that reflect “inferiority and second-class citizenship” of stigmatized groups (*Sail'er Inn, supra*, 5 Cal.3d at pps. 17-19). The State does not contest that homosexuality (1) is immutable, (2) has no relation to ability to perform or contribute to society, and (3) has traditionally been the basis for policies reflecting stigma and second-class citizenship for LGBT people (Answer Brief, 24-25). When judges make these findings, they have concluded that sexual orientation is a suspect classification. (E.g., *M. v. H., supra*, ¶¶ 63-74 (Cory, J.); *Tanner v. Oregon Health Sciences Univ.* (1998) 157 Or. App. 502 [971 P.2d 435].)

The State claims that this Court's and the U.S. Supreme Court's decisions "demonstrate" that "a 'suspect' classification is appropriately recognized only for minorities who are unable to use the political process to address their ends" (Answer Brief, 25). This is wrong. *Sail'er Inn* extended strict scrutiny to sex discriminations which on the whole disadvantage women – a group that was not only a *majority* of the electorate but was using the political process in California with some success. The plurality opinion in *Frontiero v. Richardson* (1974) 411 U.S. 677, argued that sex was a suspect classification *because* Congress had repeatedly legislated to remove sex-based discriminations. Even race did not clearly become a suspect classification under federal law until *McLaughlin v. Florida* (1964) 379 U.S. 184, 192, which was decided in the eve of the Civil Rights Act of 1964, landmark legislation benefiting African Americans.⁵⁷

Contrary to the State, constitutional equality has (and ought to have) its sharpest teeth when statutory classifications are *irrational*, namely, they have been shown through experience to be unrelated to legitimate governmental goals and often related to prejudice and stereotyping.⁵⁸ As

⁵⁷ Klarman, *An Interpretive History of Equal Protection* (1991) 90 Mich L. Rev. 213, 254-257.

⁵⁸ Thus, the State's list of classifications such as age, employment, disability that have not been found to be suspect (Answer Brief, 31-33) are *all* classifications that are sometimes rationally related to legitimate governmental goals.

Part I.A demonstrates, sexual orientation classifications have been deployed by *this* State in ways that were cruel to their victims, wastes of state funds, and empowering to private as well as official homophobes. Their thoroughly unproductive history damns them as irrational. Their history reveals these classifications to have a theme relevant to these appeals: homosexuals are anti-family, not only sterile and incapable of producing children and committed relationships, but also a threat to the idea of family. This prejudice has a continuing power that makes it triply hard for LGBT people, like people of color before them, to achieve complete equality, as they must overcome visceral and intense opposition, as well as the burden of inertia and a dearth of evidence that could be used to falsify stereotype-based claims.

When American judges have held race and sex to be suspect classifications, they have done so, *not* when the affected class was politically powerless, but instead when the affected class had mobilized politically and was proving itself to be a robust participant in our pluralist democracy. By the time the U.S. Supreme Court decided *McLaughlin* and *Loving*, public culture had accepted the norm that racial variation is benign; only at that point could the different-race marriage bar have fallen, nationally at least. Suspectness has served a clearing-up-the-law function, reversing the burden of proof for statutes resting upon the suspect classification, most of which actually did reflect prejudice or stereotyping.

Just as *Perez* and *Loving* cleared out the different-race marriage bar in a public culture that had normatively accepted the notion of benign racial variation, so this Court can now clear out the same-sex marriage bar in a public culture that has normatively accepted the notion of benign sexual variation.⁵⁹

C. Intermediate Scrutiny Ought to Be Fatal to the State's Same-Sex Marriage Bar

As the State suggests (Answer Brief, 39-43), the *application* of equal protection doctrine has not followed the strict scrutiny/rational basis dichotomy and has, instead, followed the approach outlined by Justice Marshall in *Dandridge v. Williams* (1970) 397 U.S. 471, 521 (dissenting opinion), and applied by Justice Mosk in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584 (concurring opinion).⁶⁰ Under this sliding scale approach, this Court would examine “the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state

⁵⁹ There is substantial academic consensus that sexual orientation ought to be a suspect classification for the reasons developed in text. E.g., Tribe, *American Constitutional Law* (2d ed. 1998) § 15-21; Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meaning of Sex and Gender* (2003) 38 Wake Forest L. Rev. 513, 538-52; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification* (1985) 98 Harv. L. Rev. 1285.

⁶⁰ E.g., Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century* (2002) 100 Mich. L. Rev. 2062, 2250-2279; Goldberg, *Equality Without Tiers* (2004) 77 So. Cal. L. Rev. 481.

interests in support of the classification” (id. at p. 601, quoting Justice Marshall’s dissent in *Dandridge*). If the Court applies *Dandridge/Hawkins* intermediate scrutiny, it ought to start with a presumption against constitutionality, because the classification is sex-based on its face and sexual orientation-based in application and both classifications have track records of irrationality and brutal application.

That presumption is confirmed rather than overcome by the other two factors. Because lesbian and gay couples can enter into domestic partnerships, their harm from the marriage exclusion is largely stigmatic and symbolic. Without invoking the loaded rhetoric of “separate but equal” (*Equality Practice, supra* at pps. 139-145), it is important to focus on the ways that California’s domestic partnership alternative reinforces the notion that lesbian and gay relationships are not as serious as straight ones: the lack of a ceremonial element, the requirement that lesbian and gay couples already have a common home before the State will recognize their relationships, and the ease of exit for couples without children (see the Introduction). The stigmatic injury is deepened by the fact that for several generations the State did all that it could to demonize LGBT people as anti-family and to break up their relationships and families. Decades of demonization produce real stigma and unreasoned hatred that do not disappear after the old policies are discredited or even reversed.

Abjuring any belief that lesbian and gay families are inferior, the State's primary asserted interest in maintaining the man-woman sex line in marriage is the governmental interest in "careful, measured organic change" and avoiding "backlash" (Answer Brief, 44).⁶¹ This is justification by nothing more than rhetoric. As Part I.B-C of this *amicus* brief demonstrates, "measured organic change" for gay people in this State has *always* involved this Court as well as the Legislature, and there has never been a successful backlash. The primary example of "backlash" was the 1978 Briggs Initiative responding to this Court's *Morrison/Jack M.* jurisprudence, and the voters supported this Court. The experience of judges in Massachusetts and Canada (provided in Part II) suggests that the fears of marriage backlash are overstated – for the same reason that opposition to same-sex marriage is overstated.

The fact is that California has already taken a measured, small steps approach to LGBT equality. The Legislature has already tried to take the next step (2005), and the intervening election (2006) saw no backlash. Even the Governor who has vetoed same-sex marriage legislation suggests that this Court should decide the constitutional equality issue without the

⁶¹ The State's other interest is "deferring to the will of Californians as expressed in the legislative process" (Answer Brief, 48) and encouraging a "democratic conversation" (*id.* at 50-51). This is all well and good, but ought not satisfy an intermediate standard of scrutiny, and maybe not even represent a rational basis. My analysis in Parts I and II provides a response to this argument as well.

“confusion” of a new statute (note 1, above). Even if this Court requires marriage equality, the People will retain the final word. But this Court decides whether the California Constitution’s equality guarantees assure lesbian and gay families an opportunity to refute opponents’ predictions, as they have in Massachusetts and Canada, before the People decide the issue if it is put to a popular vote. There has been a productive “democratic conversation” on the marriage issue in California (Answer Brief, 50-51). The Legislature and Governor are at an impasse. This Court cannot avoid the responsibility for determining whether same-sex marriage gets a fair chance.

CONCLUSION

At some point, *equality practice* matures into *equality*. For California, that point is now.

Dated: September 26, 2007

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520, subd. (c)(1), and in reliance upon the word count feature included in Microsoft Word, I certify that the attached brief, entitled "Amicus Brief of William N. Eskridge, Jr. in Support of Parties Challenging the Marriage Exclusion," contains 13,822 words, including footnotes, and excluding parts not required to be counted under Rule 8.520, subd. (c)(3).

Dated: September 26, 2007

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PROOF OF SERVICE

I, Sonia L. Mejia, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 1000 Wilshire Boulevard, Suite 600, Los Angeles, California 90017-2463. On September 27, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

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SONIA L. MEJIA

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City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
Court of Appeal Case No. A110451

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

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Clinton, et al. v. California, et al.
San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco

**San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651**

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Campaign for California Families v. Newsom, et al.
 San Francisco Superior Court Case No. CGC 04-428794
 Court of Appeal Case No. A110652

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