LANGAN V. ST. VINCENT HOSPITAL: A FEARFUL COURT OR A PROPERLY MEASURED RESPONSE?

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INTRODUCTION

In December 1999, when faced with deciding *Baker v. State of Vermont,* the Supreme Court of Vermont did not rule that same-sex couples were entitled to marriage licenses. Instead, it offered "all of the individual bundle of rights" without actually calling it marriage.[1] The Court felt that its constitutional obligation was to make sure that same-sex couples have the common benefits and protections that flow from marriage, but that it was for the legislature to decide whether these rights would take the form of marriage.[2] Hence, *Baker* was essentially transformed from a dispute over marriage licenses to one over benefits.[3] The Legislature was given the task of finding a way to provide equality of benefits, but if it failed to do so, the court was ready to determine a remedy itself.[4] Faced with the choice of reversing *Baker* through a constitutional amendment, leaving the court to impose same-sex marriage, including same-sex couples within the existing definition of marriage, or adopting a parallel system of recognition,[5] the Legislature passed the Civil Unions Bill with a 76-69 vote by the Vermont House and with a 19-11 vote by the Senate.[6] The civil union law is framed as extending all statutory, regulatory, common-law, equitable and policy features of civil marriage to parties to a civil union. Parties to civil unions are included in the definition or use of terms such as *spouse, family* or similar terms within the law of Vermont.[7]

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1 DAVID MOATS. CIVIL WARS: A BATTLE FOR GAY MARRIAGE 133 (2004).

2 *Id.*

3 Hernandez v. Robles, 805 N.Y.S.2d 354, 370 n.3 (App. Div. 2005) *aff'd,* 855 N.E.2d 1 (N.Y. 2006) (noting that "The Vermont Supreme Court's decision requiring the State to recognize either marriage or its legal equivalent (civil unions) between members of the same sex was based upon a provision in the Vermont Constitution (the "Common Benefits Clause," VT. CONST. Ch. I, art. 7 (2003)) for which there is no analog in the New York Constitution.").

4 MOATS, *supra* note 1, at 142.

5 Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 571, 605 (2004).

6 *Id.* at 606 n.214.

7 KATHLEEN A. LAHEY & KEVIN ALDERSON, SAME-SEX MARRIAGE: THE PERSONAL AND THE POLITICAL 58 (Richard Almonte ed., Insomniac Press 2004).

Not surprisingly, homosexual couples from outside Vermont made the trip in order to enter into civil unions. Within the first year of their availability, couples from all fifty states had made the journey for that purpose.[8] In November of 2000, John Langan and Conrad Spicehandler were two New Yorkers among this hopeful crowd.[9] They traveled to Vermont along with forty relatives and friends to solemnize their fourteen-year relationship.[10] Their relationship was already legally protected in many ways. Spicehandler was an attorney and aware of the vulnerability of their union because it was not privy to the protections of marriage. As such, Langan and Spicehandler were sole beneficiaries of each other's wills and life insurances policies, they had health care proxies so they could make decisions for one another in emergency situations, and they were joint owners of their property.[11] In addition, Langan and Spicehandler held themselves out to friends, family, and colleagues as spouses.[12] Spicehandler also undertook to become licensed as a sub-agent to participate in Langan's insurance business. It was in all respects a family business.[13]

On February 12, 2002, Spicehandler suffered a broken leg in a hit-and-run accident and was taken to St. Vincent's Hospital of New York. Though Spicehandler was expected to recover from his surgeries, he died on February 15, 2002.[14] His partner Langan commenced an action as executor of Spicehandler's estate for, among other things, medical malpractice and lack of informed consent.[15] On his own behalf, as a spouse and person who depended on Spicehandler financially, he sought damages for wrongful death.[16] New York's wrongful death statute, Section 5-4.1 of the Estates Powers and Trusts Law (EPTL)[17] states in part that,

> [t]he personal representative... of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.[18]

The wrongful death statute is intended to "promote the public welfare" and its goals "are to compensate the victim's dependents, to punish and deter

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[8] Baker, *supra* note 5, at 608.

[9] Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003), *rev'd*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

[10] *Id.*

[11] *Id.*

[12] *Id.*; Memorandum of Law of Plaintiff at 3, Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411 (Sup. Ct. 2003) (No. 11618/2002).

[13] Langan v. St. Vincent's Memo, at 7.

[14] Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

[15] *Id.*

[16] *Id.* at 481.

[17] N.Y. Estates, Powers, and Trusts Law §5-4.1 (2005).

[18] *Id.*

tortfeasors and to reduce welfare dependency by providing for the families of those who have lost their means of support."[19] In other words, family members who would have been financially supported in some way or another by the deceased have a right to recovery. The wrongful death statute is not intended to compensate the survivor for the loss of companionship or consortium, or for the pain and anguish that accompanies the wrongful and unexpected loss of a loved one, neither of which was claimed by Langan. The statute is designed solely to "make a culpable tortfeasor liable for fair and just compensation to those who, by reason of their relationship to the decedent, suffer economic injury" as a result of their loved one's death.[20]

St. Vincent's Hospital moved to dismiss on the ground that Langan and Spicehandler were not spouses because same-sex couples are incapable of being married.[21] It argued that Langan had no standing to bring the action. In 2003, the Supreme Court of New York denied the hospital's motion, stating, *inter alia*, that New York recognizes common-law marriages—requiring no formalities—so long as they are valid in the state where they were contracted. Therefore, it is discriminatory not to recognize those joined in a civil union under the Vermont statute on the grounds that it is not a marriage when it requires all the same formalities of a marriage contracted in New York.[22] An immediate appeal ensued, and in October 2005 the Appellate Division reversed.[23] The Appellate Division assumed that in order to grant Langan a remedy it had to rule that he was a spouse for all purposes. Reluctant to legitimize same-sex marriage in a round-about way, the court stepped back and left the issue up to the political process. In a seemingly unfair conclusion, the court noted that this was a multifaceted issue best suited for the Legislature.[24] Langan's appeal was dismissed by the Court of Appeals.[25]

This Note examines *Langan v. St. Vincent Hospital of New York* by way of New York's public policy, relevant case law, and statutory rights for same-sex couples. Part I contemplates long-standing New York cases in the treatment of evasive marriages and public policy. Part II argues that New York's public policy and case law allows the court to adopt Vermont's approach to handling disputes involving civil unions. Part III examines the majority's avoidance of an in-depth discussion of equal protection as well as its reliance on *Baker v. Nelson*. Lastly, Part IV focuses on the dilemma a court faces when it must choose between being the agent of great change or granting measured steps over time.

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[19] Langan v St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 419 (N.Y. Sup. Ct. 2003) (citing Raum v. Restaurant Associates, 252 A.D. 369 (1998)).

[20] Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476, 486 (N.Y. App. Div. 2005). *See also* New York Estates, Powers, and Trusts Law 5-4.3[a].

[21] *Langan*, 765 N.Y.S.2d at 421-22.

[22] *Id.*

[23] *Langan*, 802 N.Y.S.2d.

[24] *Id.*

[25] Langan v. St. Vincent's Hosp. of N.Y., 817 N.Y.S.2d 625 (N.Y. App. Div 2005).

I. PUBLIC POLICY IN THE CONTEXT OF EVASIVE AND COMMON LAW MARRIAGES

A. The Evasive Marriage and New York's Legal Position

When John Langan and his partner Neil Conrad Spicehandler went to Vermont for the specific purpose of entering into a civil union, they made their intentions as clear as the law at the time allowed them. A heterosexual couple who celebrated their nuptials out-of-state because they were legally unable to do so in their own domicile would constitute an evasive marriage.[26] Generally, such marriages are invalid if they violate the strong public policy of the couple's home state.[27] However, even though the public policy exception is a reasonable one, it is rarely used and states find ways to uphold most marriages.[28] Langan and Spicehandler fall under this evasive marriage category. What complicates the *Langan* case, however, is that New York is one of the few states that has not adopted a state version of the Defense of Marriage Act,[29] so there is no express statute—positive law—that establishes what the public policy is, much less how strong the public policy is, in cases of evasive Vermont civil unions. Given these circumstances, the outcome of Langan's claim was dependent on the details of the local law.[30]

A review of the local law underscores the unacceptable outcome in this case in the appellate courts. The fact that New York offers legal status to registered domestic partnerships [31] indicates that the public policy for recognizing the rights

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[26] Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2145 (stating that an evasive marriage "includes cases in which parties have traveled out of their home state for the express purpose of evading that state's prohibition of their marriage and returned home immediately after being married.").

[27] *Id.*; *See also* L. Lynn Hogue, *Examining a Strand of the Public Policy Exception with Constitutional Underpinnings: How the "Foreign Marriage Recognition Exception" Affects the Interjurisdictional Recognition of Same-Sex "Marriage"*, 38 CREIGHTON L. REV. 449, 451 (2005) ("Many states follow a choice of law rule, known as the public policy doctrine, that allows court's [sic] to ignore or deny recognition to marriages that violate moral standards of the forum state . . . .[S]tate constitutional and statutory prohibitions on same-sex marriage, the DOMA, and the public policy doctrine, form the principal defenses a state has to recognizing an out-of-state marriage that it considers repugnant.").

[28] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969-1970 (1997).

[29] Danielle Epstein & Lena Mukherjee, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J.LEGAL COMMENT. 782, 792 (1997).

> The [Defense of Marriage] Act allows an individual state to utilize its own public policy to determine whether or not to extend full faith and credit to same-sex marriages. A state is therefore permitted to circumvent the principles espoused by the Full Faith and Credit Clause and deny recognition of same-sex marriages occurring outside its borders.

[30] Koppelman, *supra* note 26.

[31] Domestic Partnerships are even acknowledged in section 4 of the N.Y. Workman's Compensation Law, which defines a domestic partner as a

> person at least eighteen years of age who (a) is dependent upon the employee for support as shown by either unilateral dependence or mutual interdependence, as evidenced by a nexus of factors including, but not limited to, common ownership of real

of gay couples exists. Furthermore, even if we agree that New York's domestic partnership laws express the legislature's intention to regulate the conduct of same-sex couples by *not* allowing them to marry, it still leaves in question whether New York has a significant or even legitimate interest in denying effect to an out-of-state civil union in a wrongful death case. As explained below, the civil union should be treated as a marriage in as far as a common law marriage is recognized as a marriage despite the couple's inability to enter such a union in New York.[32] Furthermore, the invocation of the civil union for purposes of a wrongful death suit does not interfere with local conduct restrictions in as much as the couple is no longer together.[33] Generally the state would have no good reason for departing from principles of comity that call for the recognition of marriages that were valid where celebrated.[34] It should follow that civil unions receive parallel consideration.

The role of public policy is considerably diminished when the only matter left in question is distribution of money or property.[35] This principle was clearly established by *In re May's Estate*, where the New York Court of Appeals recognized an evasive marriage of more than thirty years between an uncle and a niece in probate proceedings despite the fact that the marriage was prohibited in New York.[36] The primary reason for the approach was that the court found nothing in the positive law of New York that declared such out of-state marriages so void as to require exclusion from the jurisdiction for *all purposes*.[37] In other words, once a spouse has passed, the state loses all interest in regulating that relationship because there no longer exists a violation of the state's public policy.[38] Like many states, New York distinguishes between the validity of a marriage and the ability to enjoy its incidents.[39] In matters of probate or benefit disputes, the marriage/union is

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> or personal property, common householding . . . , signs of intent to marry, shared budgeting, and the length of the personal relationship with the employee or, if the employee is deceased, was so dependent upon the employee immediately prior to the employee's death; or (b) has registered as the domestic partner of the employee with any registry of domestic partnerships maintained by the employer of either party, the state, or any county, city, town, or village, or, if the employee is deceased, did so register prior to the employee's death . . . . (d) For the purposes of this section, the term "domestic partner" shall include the term "surviving domestic partner". Provided however, "domestic partner" shall not include any person who is related by blood to the employee in a manner that would bar marriage to the employee in New York state.

N.Y. WORKERS' COMP. §4 (McKinney 2005).

32 *See infra* Part II.B.

33 *See* Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2221(2005).

34 *Id.*, at 2222.

35 *Id.*, at 2223.

36 *Id.*, at 2224; *See also In re* May's Estate, 305 N.Y. 486, 493 (1953).

37 *In re* May's Estate, 305 N.Y. 486, 493 (1953).

38 Koppelman, *supra* note 26, at 2163 (stating that extraterritorial marriages "were routinely upheld on the reasoning that, the purpose of the law being the prevention of interracial cohabitation within the forum, no harm would be done by recognizing the marriage after its dissolution by death for purposes of allowing the survivor to inherit the decedent's property in the state, or allowing the children to inherit as legitimate offspring.").

39 Kramer *supra* note 28, at 1971 (stating that over time, judges have loosened the treatment of

merely incidental to the actual claim, so the surviving partner obtains a "legitimate enough" status for the purpose of resolving a private family matter without the state's—now—pointless interference.

The courts are not unequipped to handle the inter-jurisdictional marriage disputes that are bound to emerge from same-sex marriages and civil unions. Decisions like *May* and *Langan* at the trial level show that courts can and will look to the totality of the circumstances and conclude that a couple's evasion of its home state's laws does not mean the home state must refuse benefits to which married persons are entitled under its laws.[40] Generally, the state will uphold the validity of a marriage if it was valid where celebrated.[41] If the marriage is abhorrent, if it violates the home state's "fundamental principle of justice" and "deep-rooted tradition of the common weal,"[42] then it will be deemed as violating public policy. It is a high standard to meet, which explains why it is rarely invoked where there is no statute outlining the policy on an issue.[43] In the absence of a state Defense of Marriage Act, and in light of domestic partnership rights, New York's public policy has to favor recognizing Langan's civil union for the purpose of recovery. Furthermore, awarding Langan some compensation for the wrongful death of his partner would not have been a violation of any fundamental principle of justice. To the contrary, if Langan and Spicehandler were not prevented from contracting protections for one another in New York—such as life insurance and health proxies—then they are functioning within the scope of the state's public policy and it is reasonable for the incidents to be respected.[44] Actions for wrongful death can be brought by the decedent's estate or designated family members who can recover.[45] The viability of a suit can depend on whether the decedent's marriage to a person of the same sex is recognized by the forum,[46] which New York should have done given that there is no apparent repugnant violation of public policy or justice. If there is any injustice, it is leaving Langan with no recourse.

In the past three decades homosexual couples have achieved greater social and legal recognition for their relationships. Hundreds of private-sector employers have elected—voluntarily or through collective bargaining—to recognize same-sex partners for purposes of various employment policies such as bereavement leave,

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marriage. It is no longer valid for all purposes or invalid for all purposes. Judges now draw finer lines, applying the place of celebration rule to the question of validity while saving the public policy exception for particular "incidents of being married.").

[40] Linda Silberman, *Current Debates in the Conflict of Laws Recognition and Enforcement of Same-Sex Marriage*, 153 U. PA. L. REV. 2195, 2203 (2005).

[41] Kramer *supra* note 28, at 1966.

[42] *Id.*, at 1970 (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202. (1918)); *See also id.* at 1972 (stating that public policy is a content-based principle, so "the law of another state need not be recognized if it too deeply offends forum standards.").

[43] Koppelman *supra* note 26, at 17.

[44] Silberman *supra* note 40, at 2211

[45] Koppelman *supra* note 26, at 32.

[46] *Id.*

health insurance, and survivors' benefits.[47] In the public sector, municipal and state governments are also formally adopting such recognition policies for employee benefits by ordinance or state executive order.[48] As seen in *Braschi*,[49] which recognized the claim that same-sex partners should be considered at least family members, if not spouses, for purposes of rent control housing, New York is one of the states at the forefront of recognition policies. Outside of the courtroom, New York has taken other significant steps as well.

New York State has enacted several laws aimed at protecting homosexuals. Keeping in mind that the law is usually slower to adopt social realties, this is no small feat. In 1996, Governor Pataki revived a task force to address individuals' rights to the benefits and opportunities of government services, regardless of sexual orientation. Through amending Executive Order No.28 by way of Executive Order No. 33,[50] Pataki imposed more structure and accountability than was required in 1983. Both orders called for a task force including the Commissioners of the Departments of Correctional Services, Health, Mental Health, Labor, Social Services and the Division of Human Rights, the President of the Civil Service Commission, the Directors of the Women's Division, the Office of Employee Relations, and several designated private citizens. [51] However, Order No. 33 also requires annual meetings and reports to the Office of the Secretary of the Governor and the Office of the Counsel to the Governor,[52] whereas Order No. 28 asked only for reports and recommendations as the task force saw fit. The amended order allows for less opportunity for an idle task force. Also noteworthy in Order No. 33 is the commitment for the Governor's Office of Community Affairs to provide such staff support and assistance as the task force may require to carry out its responsibilities.[53]

Perhaps in response to the task force findings, on December 18, 2002, New York became the thirteenth state to prohibit sexual orientation discrimination with Governor Pataki signing into law the Sexual Orientation Non-Discrimination Act (SONDA). SONDA is a comprehensive act that amends New York's Human Rights Law, barring discrimination on the basis of sexual orientation in employment, education, housing, commercial occupancy, public accommodations, as well as other areas.[54] The Act defines "sexual orientation" as "heterosexuality,

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[47] Arthur Leonard, *On Legal Recognition for Same Sex Partners: Marriage and Same-Sex Unions, in* MARRIAGE AND SAME-SEX UNIONS 65 (Praeger Publishers 2003).

[48] *Id.*

[49] Braschi v. Stahl, 543 N.E.2d 49 (N.Y. 1989). *See infra* Part II.B.

[50] New York Executive Order No. 33, http://www.goer.state.ny.us/MC/handbook/appdxh.html (last visited Jan. 13, 2007).

[51] *Id.*

[52] *Id.* at ¶ 4 § e.

[53] *Id.* at ¶ 4 § f.

[54] 2002 N.Y. Sess. Laws c. 2, § 1 (Consol. 2005); *See also* Carey P. Dedyn et al., *Legal Alert: New York Sexual Orientation Non-Discrimination Act*, Jan. 13, 2003, http://www.sablaw.com/files/tbl_s10News%5CFileUpload44%5C11264%5C842473_2.pdf (last visited

homosexuality, bisexuality or asexuality, whether actual or perceived."[55] This affirms that as a matter of public policy, New York supports the protection of the gay community and the eradication of the "general climate of hostility and distrust."[56] The purpose of SONDA is to "ensure that individuals who live in our free society have the capacity to make their own choice, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law."[57] The legislature specifies that SONDA does not convey the right to marry.[58]

New York recognized same-sex relationships in its response to the September 11th attacks. The September 11th Victims and Families Relief Act specifies in its legislative intent that domestic partners should be eligible for September 11th Federal Fund awards.[59] Also, the state's workers' compensation law was amended to provide same-sex domestic partners of September 11th victims the same death benefits provided to heterosexual spouses.[60] Lastly, same-sex domestic partners and children of September 11th victims are also eligible for the States World Trade Center memorial scholarship program.[61] The *Langan* trial court noted that if New York was accommodating domestic partners within the September 11th context, that it was reasonable to extend wrongful death benefits to a partner in a civil union.[62] In denying Langan recovery, the Appellate Division is drawing a line between the loss of a partner in a terrorist attack and the loss of that same person in car accident, rather than recognizing the same devastating effect on the surviving partner. Among the changes listed above, the trial court also highlights that New York City has amended its Domestic Partner Registry to include persons who have entered civil unions or marriages not explicitly recognized by New York state in other jurisdictions.[63] Therefore, a New York couple does not have to go through the redundancy of applying for a domestic partnership if they have entered a civil union. However, the language indicates that a civil union will not have a different or more privileged status than a registered domestic partner.[64] Just the same, the amendment to the Registry demonstrates the city government's awareness of the expanding landscape of same-sex relationships. The Amendment follows in the tradition of recognizing relationships, if for a limited purpose, to serve justice and render fair results.

Jan. 13, 2007).

[55] N.Y. EXEC. LAW § 292(27) (Consol. 2005).

[56] 2002 N.Y. Sess. Laws c. 2 § 1 (Consol. 2005).

[57] *Id.*

[58] *Id.*

[59] Hernandez v. Robles, 794 N.Y.S.2d 579, 607 (N.Y. Sup. Ct. 2005), *rev'd,* 805 N.Y.S. 2d 354 (N.Y. App. Div. 2005) (citing 2002 Session Law News of NY, ch 73).

[60] *Id.* (citing 2002 Session Law News of NY, ch 467, S7685).

[61] *Id. (*citing 2002 Session Law News of NY, ch 176, S7792).

[62] Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 416 (N.Y. Sup. Ct. 2003),

[63] *Id.* (citing Local Law No. 24 [2002] of City of New York).

[64] .New York City Administrative Code §3-245

Given this trend of securing fairness for same-sex couples and homosexuals as individuals, the Appellate Division's holding against Langan and its blindness to these realities is that much more confusing. The standard policy is inclusion, protection and accommodation. There is abundant evidence to signal to the Appellate Court that it can legitimately grant recovery for the narrow purpose of the wrongful death statute and for the narrow group of same-sex partners in Vermont civil unions. The hesitation, to put it kindly, may be a matter of institutional competence, but leaves a gaping hole where reasoning is warranted.

B. Common-Law Marriage

New York also has a history of upholding common-law marriages, which cannot be contracted in the state,[65] if they were valid where contracted.[66] This is an extension of the place of celebration rule.[67] A common-law marriage is a non-ceremonial relationship that "takes legal effect when a couple lives together as husband and wife, intend to be married, and hold themselves out to others as a married couple."[68] Currently, at least three-quarters of the states no longer recognize common-law marriages. The remaining states recognize common-law marriages contracted within their borders, but with significant restrictions.[69] For example, New Hampshire has a limited form of common-law marriage effective only at death.[70] Generally, the states that allow contracting for common-law marriages, like Pennsylvania, require mutual consent, cohabitation and holding out to society as spouses.[71] Mere cohabitation can never constitute marriage; the couple has to take other steps to show to the world that they are indeed married. Having the same last name and filing taxes jointly are such examples.

New York common law marriages were outlawed in 1933.[72] However, any common law marriages contracted prior would continue to be recognized in court. In the event that one of the spouses died and the surviving spouse alleged the rights of a surviving spouse, the surviving spouse had to provide evidence of the union. The 1949 case of *In re Mandel's Estate*[73] is useful to the *Langan* analysis in that it outlines what a surviving spouse of a common-law marriage must prove to

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65 *See* N.Y. DOM. REL. LAW § 11 (McKinney 2006).

66 Marino v. Anheuser-Busch, 583 N.Y.S.2d 68 (4th Dept. 1992).

67 Kramer *supra* note 28, at 1970 (stating that the place of celebration rule is for marriages deemed contrary to the forum's strong public policy). The law of celebration rule allows a state to recognize a relationship that the parties would not have been able to enter in that state so long as it was legitimately entered in the state where the union was celebrated.

68 Black's Law Dictionary 986 (7th ed. 1999).

69 See *Common Law Marriages, http://family.findlaw.com/marriage/living-together/common-law-marriage.html.*

70 *See* Common Law Marriage, http://www.ct-divorce.com/Commlaw.htm.

71 Black's Law Dictionary 986 (7th ed. 1999). A marriage that takes legal effect, without license or ceremony when a couple lives together as husband and wife, intend to be married, and hold themselves out to others as married couple.

72 N.Y. DOM. REL. LAW, § 11, case note 16.

73 108 N.Y.S.2d 922 (1949).

establish the marital status. Even though the eighteen-year relationship was hidden from some, particularly the disapproving Jewish mother of the husband, he did hold out his Catholic partner as his wife to everybody else.[74] The court stated that

> [t]he law does not require that the agreement be in writing, nor are witnesses necessary; indeed, the essence of the relationship is not dependent upon a mere formal contract. Such a marriage may be proved by showing actual cohabitation as husband and wife, the acknowledgment of the relationship, declarations, conduct, repute, reception among neighbors, and the like.[75]

The court relied heavily on witness testimony, long-time friends who considered them spouses and had seen the couple introduce themselves to others as spouses at church social functions.[76] Consequently, the court recognized the common law marriage to allow the widow to take elective spousal statutory share.[77]

More recently, in 1994, the New York Appellate Division gave parties to a common law marriage spousal recognition. In *Carpenter v. Carpenter* [78] the husband of a twenty-five year relationship did not want the marriage legally acknowledged because he hoped to avoid losing the matrimonial home and paying alimony.[79] As in *Langan*, the facts of the relationship are undisputed. The couple lived together for twenty-five uninterrupted years, shared the same last name, raised two children, held themselves out to society as a married couple, and even went to Pennsylvania on two different occasions—twenty years apart—as a married couple.[80] The court held that because Pennsylvania law did not require that the couple reside within the state for any specific period of time before the marital status would be recognized, a common-law marriage valid under the laws of Pennsylvania came into existence.[81] However,

> courts in New York have declared that behavior in New York before and after a New York's couple's visit to a jurisdiction that recognizes common-law marriage, like Pennsylvania, may be considered in determining whether the pair entered in a valid common-law marriage while cohabitating, even briefly, in the other jurisdiction.[82]

Since their lifestyle prior to their visit to Pennsylvania was, but for the absence of a license, a "marriage," the court found it fitting to yield to a common-law marriage.

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[74] *Id.*
[75] *Id.* at 926.
[76] *Id.* at 928-930.
[77] *Id.* at 939.
[78] 208 A.D.2d 882 (2nd Dept. 1994).
[79] *Id.*
[80] *Id.* at 883
[81] *Id.* at 882.
[82] *Id.* at 882

On the other hand, the court did not recognize a common law marriage in *Marino v. Anheuser-Busch*,[83] where a woman tried to take advantage of Pennsylvania's lack of residential requirement by claiming that she and her decedent boyfriend entered into a common-law marriage while on a weekend excursion to Pittsburgh.[84] While there, the two were introduced as husband and wife.[85] The court goes on to note, however, that there was no evidence that the couple intended to establish the legal relationship of spouses.[86] To the contrary, the woman was not divorced from her previous husband at the inception of the relationship in question, which the court presumes is not a marital relationship unless "the consent of both the parties to enter into a valid marriage is established by clear and convincing evidence."[87] There must be an exchange of words uttered for the specific purpose of creating the legal relationship of marriage.[88] In the absence of any such evidence, a common-law marriage will not take shape in the eyes of the court.

Taken together, a valid argument in Langan's defense emerges from *Mandel, Carpenter,* and *Marino*. As common-law marriages, neither of the couples took formal or legal steps toward marriage, even though they could have exercised the option. Having made the choice to occupy the hybrid status of marriage-like life without marriage, they would have less in common with a traditional marriage than would couples who enter a civil union, where the partners formally accept the legal and personal responsibilities of a marriage. As for Langan and Spicehandler, it is evident that they meet and exceed the established standards of a common-law marriage. Unlike *Mandel*, everyone knew Spicehandler and Langan built a life together.[89] There were no efforts to hide the relationship from any disapproving members of the family or people at work. Unlike *Mandel*, Spicehandler and Langan shared the same residence.[90] Spicehandler and Langan actually had more in their favor; they satisfied all the legal requirements to become spouses under Vermont law. They were two consenting adults unrelated by blood who legally entered into the civil union at the place of celebration.[91] They had better grounds for defending the legality of their relationship than any of the common law marriages discussed. For example, even though not required by *Mandel*, Spicehandler and Langan did have their agreement in writing.[92] *Carpenter* is extraordinary in that a a couple was deemed to have contracted a legally recognized

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[83] 182 A.D2d 1073 (4th Dept. 1992).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 1074.

[87] *Id.*

[88] *Id.*

[89] *See supra* note 11 and accompanying text.

[90] Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 412 (N.Y. Sup. Ct. 2003).

[91] *See supra* notes 7-9 and accompanying text.

[92] *See supra* note 10 and accompanying text.

marriage almost inadvertently merely by going to another jurisdiction and behaving in the same manner as they did in New York. It follows then, that a couple traveling to another jurisdiction for the purpose of legalizing their union, would be given at least the same considerations as the inadvertent Pennsylvania tourists. Spicehandler and Langan meet the burden of evidence mentioned in *Marino*.[93] There is no question as to Spicehandler's and Langan's intentions; no absence of consent, no entanglement in other relationships. Most importantly, at the civil union ceremony, they exchanged vows for the purpose of legalizing their bond.[94] Yet the *Langan* appellate court was not moved to recognize the necessary spousal status to recover under the wrongful death statute.[95] The difference in treatment of same-sex couples and heterosexual couples is stark. While it is obvious that courts will go out of their way to find a marriage for a fair result where opposite sex couples are concerned, *Langan* counters public policy and precedent in not allowing Langan recovery given a narrow set of circumstances.

II. NEW YORK CASE LAW AND THE INTERPRETATION OF STATUTE

A. Considering In Petition of Successor

Further evidence that New York's public policy favors Langan is most present in the state's history of interpreting statutes and contracts broadly so as to allow fairness to prevail.[96] New York courts have, as recently as 2005, acknowledged contractual family relationships that would not otherwise emerge in New York. In *In the Matter of Doe*[97] trusts that specifically excluded adopted children were at the center of controversy.[98] The trusts, however, made no mention of surrogate parenting.[99] A claim was brought for children born out of a California surrogate contract, which New York would normally find void and unenforceable.[100] Still, the court found that surrogacy is not the functional equivalent of adoption[101] and allowed for the children to inherit.[102] In this case, the court took a contractual approach to a family matter and limited itself to the

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[93] *See supra* notes 84-87 and accompanying text.

[94] *See supra* note 9 and accompanying text.

[95] *See supra* note 22-24 and accompanying text.

[96] *See, e.g.*, Braschi v. Stahl, 543 N.E.2d 49, 52 (N.Y. 1989) (stating that "where doubt exists as to the meaning of a term, and a choice between two constructions is afforded, the consequences that may result from the different interpretations should be considered. In addition, since rent-control laws are remedial in nature and designed to promote the public good, their provisions should be interpreted broadly to effectuate their purposes . . .") (citation omitted).

[97] In the Matter of Doe, 793 N.Y.S.2d 878 (N. Y. Sur. Ct. 2005).

[98] *Id.*

[99] *Id.*

[100] *Id.* at 881.

[101] *Id.*

[102] *Id.* at 882 (noting that New York will also entertain surrogacy contracts for petitions of maternity, which do not require parents to go through the adoption proceedings in cases of in vitro fertilization and gestational surrogacy arrangements.)

decedent's statements excluding adoption but not other non-blood relatives. The controlling document also failed to express the anticipation of future changes in reproductive technology. The court did not take it upon itself to create limitations where none were provided. Instead, it validated all the precautions the parents had taken in complying with the California requirements. The court relied on the test applied in California, which looks at the intention of the parties and treats adoption and surrogacy under different sets of rules. Hence, the children were not considered adopted and were able to benefit.

Like *Doe*, where adoption and surrogacy were differentiated, the *Langan* court should have noted that marriage and civil unions are different in Vermont. Taking a contractual approach, the intention of the parties becomes more significant. Just as the decedent in *Doe* did not anticipate technological changes in reproductive options, neither did the New York Legislature anticipate entertaining civil unions between same-sex couples when it wrote New York's wrongful death statute. Yet, only the express limitations were enforced in *Doe* and such considerations could have been given more weight in *Langan*. By using the framework of the state that allowed for the differentiating of related but clearly different kinds of contract, The *Doe* court saw fit to acknowledge an agreement it would not otherwise uphold. In *Langan*, the Appellate Division would have handed down a more consistent decision had it looked to how Vermont treats married couples and those in civil unions, just as it looked to California for its surrogacy rules. Hence, the Appellate Division would have had to confront the fact that Vermont does not differentiate between the two unions except in name. Like the *Doe* parents, Langan and Spicehandler made their intentions as clear as they could by jumping through the procedural hoops available to them. It would not be a far stretch to accommodate their civil union where other family contracts have been enforced and where domestic partnerships already exist. Keeping in mind that New York has a well-established history of acknowledging the nuances of the relationships involved,[103] the *Langan* decision is a poor fit.

B. Braschi v. Stahl

Most significant in recognizing the variety of family structures is *Braschi v. Stahl,*[104] which parallels *Langan*[105] in many respects, notably that both involve

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[103] The court certainly acknowledged such nuances in *Doe* as well as *In re May's Estate* 305 N.Y. 486, 493 (1953).

[104] 74 N.Y.2d 201 (1989).

[105] The dissent of the appellate court does not pay much attention to *Braschi* except to say that,

> [u]nlike the non-eviction right at issue in *Braschi*, . . . the right to assert a wrongful death claim is a vested property right that does not exist at common law or in equity. As a creature of statute, it must be founded on statutory authority. Hence, if the plaintiff does not qualify as a "distributee" under the EPTL, he cannot otherwise assert a wrongful death claim under general principles of equity.

Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476, 483 (N.Y. App. Div. 2005), (citations omitted)..

established same-sex relationships and the weight of the meaning of a term. *Braschi* adopted a functional approach, looking to the totality of the relationship and holding that the surviving partner classified as family for housing purposes. In *Braschi*, a gay man whose name did not appear on a rent-control lease was being evicted upon the death of his partner of ten years.[106] The phrase in contention was in subsection (d) of the §2204.6 of the New York City Rent and Eviction Regulations: "non-eviction protection to those occupants who are either the 'surviving spouse of the deceased tenant or *some other member of the deceased tenant's family* who has been living with the tenant [of record].'"[107] Rather than look strictly to blood relation, the court looked to "the reality of family life."[108] It found that in the context of eviction, a realistic and valid "view of family includes two adult lifetime partners [whose] long term relationship [is] characterized by an emotional and financial commitment and interdependence."[109]

The *Langan* trial judge wanted to take a similar approach.[110] Like Langan and Spicehandler, who had been together for sixteen years, Braschi and his partner lived together as permanent life partners for more than ten years and held themselves out to society as spouses.[111] The *Langan* trial court noted that evaluating the totality of the relationship should include, but not be limited to, "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society and , the reliance placed upon one another for daily family services," and dedication and self-sacrifice of the parties.[112] Because the lives and assets of Braschi and his partner were commingled,[113] as Langan's and Spicehandler's were,[114] the Court of Appeals considered Braschi "family" even though that term was not defined in the rent-control code.[115] Were it not for the fierce protection of the institution of marriage, Langan's argument that he fits the definition of a "spouse" is as logical and valid as Braschi's inclusion under the meaning of family. Yet the different nature of the statutes—equitable principles could be evoked in *Braschi* but not in *Langan*

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106 *Braschi*, 74 N.Y.2d at 206.

107 *Id.* at 209.

108 *Id.* at 210.

109 *Id.*

110 Langan v. St. Vincents Hosp. of N.Y., 765 N.Y.S.2d 411, 415 (N.Y. Sup. Ct. 2003) (stating that "the court will not determine whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute, much as the Court of Appeals has held that a same-sex domestic partner is a "family" member for the limited purposes of New York City's rent control laws.").

111 *Braschi*, 74 N.Y.2d at 213.

112 *Id.* at 212-213.

113 *Id.* at 213 (stating that the two men shared all financial obligations including a household budget, checking account, power of attorney in Braschi's favor for decision-making during his partner's illness, life insurance policy, primary legatee and co-executor of estate).

114 *See* Introduction.

115 *Braschi*, 74 N.Y.2d at 208.

simultaneously with a wrongful death claim[116]—yields to the expansion of a term for Braschi while holding fast to tradition for Langan. This difference, however, is not for lack of support from public policy so much as the finer points of the claim itself.

C. Matter of Jacob

While *Braschi* has significant factual similarities to *Langan*, the trial court relied on the analytical framework of *Matter of Jacob* in regards to statutory interpretation.[117] Essentially, the *Jacob* court consented to second-parent adoption by one unmarried heterosexual couple and one gay couple.[118] In the absence of statutory preclusions the court read the statutes so as to grant the right of second parent adoption in these nontraditional households because it fosters the state's interest of creating stronger and more secure families for the best interest of the child.

> First and foremost, since adoption in this State is "solely the creature of... statute" the adoption statute must be strictly construed. What is to be construed strictly and applied rigorously in this sensitive area of the law, however, is legislative purpose as well as legislative language. Thus, the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child.[119]

The *Langan* trial court adopted *Jacob*'s statutory construction in the 'sensitive' area of family matters by looking to the legislative purpose and language of the EPTL's protection of a spouse to determine whether the plaintiff, Langan, is a person entitled to such protection.[120] The trial court emphasized that the purpose of the wrongful death statute is to promote public welfare with the goal of compensating the victim's dependents.[121] The trial court evaluated the statutory language and saw unnecessary obstacles in a literal and narrow construction:

> From the language set forth, the statute addresses whether a "surviving spouse is disqualified from sharing in intestacy... electing against the will... taking 'set off' property... and sharing in a wrongful death recovery" based upon whether the marriage is intact and functioning, and appears less concerned with whether a spouse is a man or woman – i.e., a husband or wife. The terms husband and wife appear descriptive

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116 *See supra* note 105.

117 In re Matter of Jacob, 86 N.Y.2d 651, 717-718 (1995).

118 *Id.* at 656 (explaining that in the case of the heterosexual couple, the boyfriend was allowed to adopt his girlfriend's child with the consent of the biological father while the other adoption allowed one woman in a lesbian partnership to adopt her partner's child).

119 *Id.* at 657-658.

120 Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 419 (N.Y. Sup. Ct. 2003).

121 *Id.*

> rather than exclusionary, based upon the section's focus upon disqualification.[122]

Despite the trial court's efforts in using *Jacob* to explore language and purpose to come to a just outcome in a family matter, *Jacob* all but disappears in the *Langan* appellate decision. The decision is cited only generally when the dissenting opinion states that "there is nothing to suggest that a civil union of same-sex individuals is abhorrent to the public policy of New York."[123] *Jacob* is certainly on point in that respect for it granted the right for the biological or adoptive parent to retain his or her parental rights while consenting to his or her same-sex partner's adoption of the child.[124] Allowing for second-parent adoption shows that New York has an interest in fortifying its nontraditional families.[125] When those who function as a family are given the rights associated with this label, the members can look out for one another in a more practical and efficient manner that promotes better health and quality of life.[126] *Jacob* highlights that families take different forms, that gays have significant roles in these relationships, and that these relationships deserve protection.

Legitimizing the child's relationship to the parents serves more than a symbolic function. The bundle of protections attached to adoption spares the parents the burden of having to take legal measures on their own, incurring the expense of lawyers and procedures as well as the risk of missing something significant. As evidenced by Langan and Spicehandler, even the most informed, sophisticated individuals can be found unprepared for unforeseen circumstances. Granting some rights relieves some of the burden of securing the rights for oneself, but the withholding of other rights promotes the idea that some families are more worthy than others.[127] Second-parent adoption allows the child to have a legal relationship with each of the parents even though the parents do not have a recognized relationship with each other.[128] Therefore, while *Jacob* offers rights not

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[122] *Id.*, 765 N.Y.S.2d at 420.

[123] Langan v. St. Vincent's Hosp. of N.Y. 802 N.Y.S.2d 476, 484 (N.Y. App. Div. 2005).

[124] *See* SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS 55 (Lexington Books 2004).

[125] Currently there are over 46,000 same-sex households in New York and an estimated six to ten million children of homosexual or bisexual parents in the United States. Women's Educational Media, http://www.womedia.org/taf_statistics.htm (last visited Feb. 6, 2007).

[126] Without this legal protection, a child can be left without access to basic benefits, including health insurance and inheritance rights.

[127] In its discussion of family, Goodridge v. Dept. of Pub. Health 798 N.E.2d 941, 956 (Mass. 2003) emphasized that children of gay couples are direct and indirect recipients of special legal and economic protections obtained through marriage. The Massachusetts Supreme Judicial Court notes that "marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children."

[128] Marcia B. Smith, *State Constitutional Commentar: High Court Study: New York's Court of Appea;s: Judith S. Kaye: Proggressive Decidisionmaking Rooted int eh Common Law,* 59 ALB. L. REV 1763, 1769 (noting that in second parent adoption "the biological parent retains his or her rights and raises the child with the adopting parent.").

previously available, the half-way recognition of same-sex couples as parents, but not spouses, denies all parties full access to family privileges and leaves the children vulnerable due to the unavailability of the legal rights and remedies granted to married couples.[129] *Jacob* bridges the gap for the interest of the child and stands as an important public policy precedent. Hence, the *Langan* trial court was clearly justified in its reliance on *Jacob,* as the case signals a public policy that favors the granting of more family oriented protections to non-traditional families, which would include the right of a life parter to be recognized for recovery purposes. This is a logical step in an evolving public policy.

III. BAKER V. NELSON

A. Misinterpretation of the Case

In the *Langan* context, *Romer v. Evans*[130] is the most significant Supreme Court case in the realm of equal protection. This case invalidated an amendment to the Colorado Constitution that would have allowed local government to discriminate against homosexuals by way of denying the group opportunity for "special" protection in activities such as "housing, employment, education, public accommodations, and health and welfare services."[131] If passed, the amendment would have required an amendment to the state constitution before enacting any future protective statutes, regulations, or policies.[132] The *Romer* court found that the Colorado amendment lacked a rational relation to a legitimate state interest because it imposed "a broad and undifferentiated disability on a single named group, an... invalid form of legislation [and was] inexplicable by anything but animus toward the class that it affects...."[133] However, it does not follow that *Romer* established rational review as the standard for sexual orientation discrimination questions. The *Romer* court found that the questionable amendment could not meet even the lowest level of scrutiny, and needed to go no further.[134]

The majority in *Langan* eschewed the *Romer* question of whether the interpretation of the wrongful death statute is based on animus towards homosexuals as a class, a shocking omission considering it is the most relevant Supreme Court precedent. Instead, the majority used *Romer* to support its statement that "any equal protection analysis must recognize that virtually all legislation entails classifications for one purpose or another which results in the

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[129] Epstein & Mukherjee *supra* note 29, at 811.

[130] Romer v. Evans, 517 U.S. 620 (1996).

[131] *Id.* at 624.

[132] *Id.* at 627

[133] *Id.* at 632.

[134] *Id.* at 632-633. *See also* Hernandez v. Robles, 805 N.Y.S.2d 354, 389 (App. Div. 2005) (Saxe, J., dissenting).

advantage or disadvantage to the affected groups."[135] While this is generally true, the Appellate Division does not go on to explain how any other group is helped by subordinating same-sex couples' access to marriage or marital benefits, nor does it show how any group would be adversely affected by same-sex marriage.[136]

Setting *Romer* aside, the Appellate Division focused on *Baker v. Nelson*,[137] (hereinafter *Nelson*) a Minnesota state Supreme Court case which established that "confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the Equal Protection clause of either the Federal or State constitutions." [138] Despite criticism of the thirty-three year old case and Supreme Court decisions that have grappled with issues affecting gay citizens, the majority merely notes *Lawrence*[139] as a source of indirect Supreme Court authority, pointing to it as an opportunity to indicate that the holding in *Nelson* is suspect.[140] The appellate court glazes over the questionable authority that *Nelson* provides.[141] Of persuasive value is the state level decision in *Nelson*, which rejected two men's argument that the absence of an express statutory prohibition against same-sex marriages was equivalent to a legislative intent to authorize such marriages.[142] The men also argued that denial of their fundamental right to marriage was tantamount to sex discrimination.[143] Relying on "a sensible reading," the state court held that Minnesota legislators had used "marriage" in the common sense of the term, meaning a bond between a man and woman.[144] The case came to the U.S. Supreme Court on appeal from the

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[135] Langan v. St. Vincent's Hosp. of N.Y. 802 N.Y.S.2d 476, 478 (N.Y. App. Div. 2005).

[136] Underlying the court's reasoning is the impulse to protect traditional marriage, which it is entitled to do under rational review. However, as recently noted by a Washington court, whatever threats the institution of traditional marriage currently faces are not without but within, such as domestic violence and child abuse needs cite (*See* Hernandez v. Robles, 794 N.Y.S.2d 579, 598 (N.Y. Sup. Ct. 2005) (citing Andersen v. Kings County, 2004 WL 1738447, *8, *12 (Wash Superior Court)). There simply is no apparent causal relationship between legitimizing same-sex union and the unraveling of heterosexual relationships. A joint tax return filed by two men will not in any way change how a heterosexual married couple files. A lesbian can extend her health insurance benefits to her spouse and the baby the spouse has given birth to without infringing on a heterosexual husband's right or ability to do the same. If one of the primary concerns for denying the right to marry to homosexuals is providing an optimal environment for children, granting them the right to civil marriage would actually be meeting that objective for all of the children currently living with same-sex parents. Currently, children of same-sex couples are not eligible for the same legal, financial, and health benefits that children of traditional married couples can receive. The *Langan* appellate court, however, does not address any of this in any detail. Thus it is impossible to see how the detriment of one group translates into the benefit of another.

[137] 191 N.W.2d 185 (Minn. 1971) (holding that the denial of marital status to same-sex couples did not violate the Fourteenth Amendment), *appeal dismissed*, 409 U.S. 810 (1972).

[138] Langan v. St. Vincent's Hospital, 802 N.Y.S.2d 476, 478 (N.Y. App. Div. 2005).

[139] Lawrence v. Texas, 539 U.S. 558 (2003).

[140] *Langan*, 802 N.Y.S.2d at 478.

[141] The Langan and St. Vincent briefs are of little help, as neither included *Nelson*.

[142] *Nelson*, 191 N.W.2d at 185.

[143] *Id.* at 186.

[144] Amy L. Brandzel, *Queering Citizenship?: Same-Sex Marriage and the State*, 11 GLQ 171, 181-82 (2005).

Minnesota Supreme Court in 1972.[145] At the time, the U.S. Supreme Court had mandatory appellate jurisdiction of state supreme court cases that raised federal questions.[146] In other words, when confronted with *Nelson* in 1972, the Court was obligated to hear appeals from state courts whenever an upheld state statute was being challenged on federal law basis.[147] The U.S. Supreme Court dismissed the case for lack of a substantial federal question.[148]

For several reasons, this dismissal does not have the binding authority a U.S. Supreme Court decision would normally have; such authority would make it worthy of the *Langan* majority's reliance. As described in a separate but related 2005 case[149] involving the same same-sex couple in *Nelson*, the U.S. Supreme Court's dismissal of the appeal "for want of substantial federal question was an adjudication on the merits binding on the lower [federal and state] courts, establishing a precedent that prohibition of same-sex marriage does not violat[e] the U.S. Constitution."[150] The dismissal is simply evidence that the Supreme Court did not have jurisdiction to take the case. It is certainly not an official endorsement of the reasoning or the opinion of the lower court whose judgment is appealed.[151] In New York, as in any other state, fuller consideration of the validity of a same-sex union is still an option when the issue has merely received "cursory consideration" in the absence of briefing and oral arguments.[152] As such, a U.S. Supreme Court dismissal lacks the precedential value of an actual decision.[153] Approximately two months after *Langan* was decided by the Second Department of the Appellate Division, the First Department decided *Hernandez v. Robles*. *Hernandez* addresses the universal dissatisfaction with the *Langan* reasoning that pertains to *Baker* by providing a fuller analysis of *Baker* when refusing marriage licenses to gay couples. The First Department relied on "well established precedent" in noting that the *Baker* dismissal "constitutes a *holding* that the challenge was considered by the Court and was rejected as insubstantial."[154] The well established precedent that Hernandez refers to, however, is the 1975 case, *Hicks v. Mirnada*.[155] It fails to take into account that from 1988 forward, the Supreme Court may grant writs of certiorari upon the affirmative vote of four of the nine justices.[156] Therefore, a case

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145 Baker v. Nelson, 409 U.S. 810 (1972).

146 *See* Smelt v. Orange County, 374 F. Supp. 2d 861, 872 n.17 (2005) (noting that until 1988, the Supreme Court had mandatory appellate jurisdiction under 28 U.S.C. §1257(2) (repealed 1988)).

147 ARTHUR LEONARD & PATRICIA CAIN, SEXUALITY LAW 216 (Carolina Academic Press, 2005).

148 *Baker*, 409 U.S. 810.

149 McConnell v. United States, 2005 U.S. Dist. LEXIS 1313 (involving a suit in federal court pursuing claims for federal benefits based on the same-sex marriage that was at issue in *Baker v. Nelson*)

150 McConnell v. United States, 2005 U.S. Dist. LEXIS 1313, at *6.

151 *Smelt*, 374 F. Supp. 2d at 872; *see also* 1 Op. (Inf.) Att'y Gen. 25 (2004).

152 Hernandez v. Robles, 794 N.Y.S.2d 579, 591 (N.Y. Sup. Ct. 2005).

153 *Id.*

154 Hernandez v. Robles, 805 N.Y.S. 2d 354, 369 (N.Y. App. Div. 2005).

155 422 U.S. 332 (1975). The majority cites pages 343-345.

156 LEONARD & CAIN *supra* note 147 at 216.

that was dismissed in 1975 still has a chance with the Supreme Court if enough justices wish to hear it. In the past, the Court often dealt with the lack of discretion by finding, as in *Baker*, that the case did not raise a substantial issue under federal law and would "dismiss" the appeal "for want of a substantial federal question."[157] Such a dismissal does not give rise to a Supreme Court holding that creates precedent; rather, it seeks to avoid the substantive issue altogether..[158] The Court of Appeals, though affirming the Appellate Division's denial of same-sex marriage, rejected the *Baker*-based argument that appellants' Equal Protection claims were barred from consideration.[159]

Furthermore, the scope of the dismissal is extremely narrow, pertaining only to the precise issues adjudicated. *Baker* presented the question of whether the county clerk's refusal to issue a marriage license violated the couple's First, Eighth, Ninth, and Fourteenth Amendment rights.[160] The law being challenged governed who could and could not obtain a marriage license.[161] *Langan*, on the other hand, consisted of bestowing an incident of marriage and evaluating the status of a civil union in the face of a state statute.[162] The wrongful death statute determines the allocation of certain benefits.[163] Clearly, the issues are related only in that they are brought in the context of same-sex unions, but they diverge from there. The allocation of benefits is different from the acknowledgement of a same-sex couple in a civil marriage.[164] The court's reliance on *Baker*, therefore, is at best a stretch. And, its cryptic treatment of the case leaves many unanswered questions.

In 1971, when the Minnesota Supreme Court decided *Baker*, "gay rights" may have been an oxymoron signaling a social shift that was not ripe for consideration. Therefore, it is not surprising that *Baker* was not heard. U.S. Supreme Court cases decided since *Baker*, notably *Romer* and *Lawrence*, illustrate that the Supreme Court recognizes violation of gay people's rights as a substantial constitutional challenge on Equal Protection or Due Process grounds.[165] Today, the Supreme Court would likely not bypass the rational basis *Romer* analysis by relying on the binding effect of *Baker*.[166] The *Langan* majority is correct that both *Romer* and *Lawrence* were opportunities to speak against *Baker* and that such steps were not taken. Equally, if not more significant, is the fact that neither case cites *Baker* favorably. In fact, neither case mentions *Baker* at all. Not even Scalia's

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157 *Id.*

158 *But see* Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (using the term "holding" when referring to the *Nelson* decision).

159 Hernandez v. Robles, 7 N.Y.3d 338, 367 (N.Y. 2006).

160 Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1972).

161 *Id.* at 185-186.

162 Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005).

163 Id.

164 Smelt v. Orange County, 374 F. Supp. 2d 861, 873 (2005).

165 *Id.*

166 *Id.*

scathing dissent in *Lawrence* makes use of such a valuable tool. The Supreme Court in *Lawrence* actually treated the issue of whether a state could restrict the rights of gay couples to marry without violating the Fourteenth Amendment as an unsettled question.[167] *Baker*, therefore, settles nothing on which the *Langan* court could have reasonably relied. Summary dismissals are invalidated when subsequent doctrinal developments, such as *Romer* and *Lawrence*, indicate otherwise.[168] In 1972,

> a gender classification could comport with the Equal Protection Clause simply by bearing "a rational relationship to a state objective" sought to be advanced. However, contemporary equal protection doctrine, which emerged several years after *Baker v. Nelson* demands that the government demonstrate that a gender-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[169]

In its superficial treatment of *Baker*, the Court in *Langan* makes a huge oversight. It made no effort to qualify the substantial relationship between denying John Langan recovery under the wrongful death statute and an important governmental objective. Certainly the Court is aware that moral disapproval of homosexuals as a class by itself is an inadequate ground for discrimination.[170] There is an interpretive leap one must take to go from the disapproval of a class to the *Langan* result. That gap is bridged by the erroneous application of *Baker*. The Appellate Division acted with the understanding that *Baker* still stands for the denial of same-sex marriage as not being offensive to the Equal Protection Clause of either the Federal or State Constitutions. However, *Baker* is not valid precedent for the Federal Equal Protection Clause,[171] and it is not binding in New York state cases because it is not about New York's Constitution. Therefore, the Court's sweeping use of *Baker* is inappropriate and misguided.[172]

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167 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). *See also* Office of the Attorney General, N.Y. Op. (Inf.) Att'y Gen. 1, 30 (2004).

168 Hernandez v. Robles, 805 N.Y.S. 2d 354, 384 (N.Y. App. Div. 2005) (Saxe, J. dissenting).

169 Office of the Attorney General, N.Y. Op. (Inf.) Att'y Gen. 1, 26 (2004).

170 *Lawrence*, 539 U.S. at 558, 582 (O'Connor concurring).

171 Office of the Attorney General, N.Y. Op. (Inf.) Att'y Gen. 1, 26 (2004) (concluding that *Baker v. Nelson* no longer carries any precedential value with respect to the Federal Equal Protection Clause).

172 *But see* Morrison v. Sadler, 821 N.E.2d 15, 19-20 (2005) (explaining the process of how the *Loving* argument was rejected by the Minnesota Supreme Court, the court summarizes Baker's role: "The couple appealed to the United States Supreme Court, which dismissed the appeal without opinion "for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810 (1972). Under procedural rules in effect at the time, the Plaintiffs do not contest that, unlike a denial of certiorari, such a dismissal represented a decision by the Supreme Court *on the merits* that the constitutional challenge presented was insubstantial, and which decision is binding on lower courts. *See* Hicks v. Miranda, 422 U.S. 332, 344 (1975). Thus, the Supreme Court, five years after it decided *Loving*, determined that that case did not support an argument by same-sex couples that precluding them from marrying

The dissenting opinion of the Second Department in *Langan* did not hone in on *Baker v. Nelson*, but it was not dismissive of the *Romer* decision's significance in the weighing of Equal Protection.[173] It addressed the standard of review while focusing on the different treatment of similarly situated people. In this case, the similarly situated groups were traditional spouses and partners in a Vermont Civil Union.[174] Citing *Romer,* the dissent summarized Langan's argument:

> The plaintiff argues that, with respect to that objective, the wrongful death statute classifies similarly-situated persons on the basis of their sexual orientation. Sexual orientation is a constitutionally cognizable characteristic, and therefore when legislation is challenged on the ground that it classifies and treats persons differently on the basis of sexual orientation, courts will "insist on knowing the relation between the classification adopted and the object to be attained."[175]

The *Langan* majority escaped providing clarification of the relation between civil unions and the purpose of the wrongful death statute. It did not confront the Fourteenth Amendment challenge inherent in *Langan*. The dissent did, and concluded that it could find no rational relationship between any governmental purpose promoted by the statute and a classification of wrongful death plaintiffs according to their legitimacy.[176] However, sexual orientation as a legal category is not a suspect classification for strict judicial scrutiny.[177] So the majority was burdened only with the responsibility of rational—minimal—basis scrutiny. If a statute can be shown to have a reasonably rational relation to a legitimate state interest, in spite of the harm it may cause to some people, it will be upheld.[178] The court is therefore free to consider the statute's rationality in its broadest possible meaning. Because of the minimal standard of review, so long as the wrongful death statute serves some—any—state interest, the court does not have to look to the deeper implications. Under those conditions, preservation of traditional marriage is valid. In practice, however, if the governmental purpose is to preserve traditional marriage, it does not follow that granting the right to recover to a civil union partner interferes with that purpose. Heterosexuals can continue to marry, procreate, and live traditional lives without the enjoyment of these rights being encumbered by homosexual couples' being supported and protected in a simlar way. Because Civil Unions are open exclusively to same-sex couples, benefits flowing to them are not actually benefits taken from heterosexual couples. Traditional marriage is not weakened by any means.

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violated the Fourteenth Amendment.")

173 *See* Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

174 *Langan*, 802 N.Y.S.2d. at 488 (2005) (Fisher, J., dissenting).

175 *Id.* at 486.

176 *Id.* at 490.

177 Patrick Paul Garlinger, *"In All But Name": Marriage and the Meaning of Homosexuality*, 26.3 DISCOURSE 41-72 (2004).

178 *Id.* at 56.

Failure to acknowledge that Vermont Civil Unions do not interfere with New York marriages leads to situating unmarried same sex couples as unmarried heterosexuals. This familiar argument renders unsatisfactory results.[179] In light of the evolving landscape, under heightened scrutiny St. Vincent Hospital, the *Langan* defendant/appellant, would have the burden of proving that excluding a partner to a Vermont Civil Union from the definition of a distributee advances an important state interest. It is difficult to conceive a persuasive explanation not rooted in the broad assumption that heterosexual marriages are somehow better for society and hindered by homosexual "competition" in the institution. Such a position can also be interpreted as animus-based.

Holding two groups, each with unique circumstances, to the same standard illustrates that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[180] Inevitably, this approach will lead to de facto discrimination. These are not two similarly situated classes because unmarried same-sex couples cannot change their marital status—by marrying each other—while unmarried heterosexual couples can.[181] Therefore, if a same-sex couple has taken all steps they can outside the marriage privilege because they are forbidden to enter into a marriage, then that couple should not be "punished" the way heterosexual couples would be for not taking advantage of their option to marry.[182] When unmarried opposite sex couples and same-sex couples are tossed together as similarly situated groups, such punishment policies inevitably have a disproportionate effect on homosexual couples.[183]

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[179] *See* Levin v. Yeshiva University, 96 N.Y. 2d 484 (2001) (where plaintiffs unsuccessfully challenged a university for upholding its housing policy as having the same impact on non-married heterosexual medical students as it had on non-married homosexual medical students).

[180] Jenness v. Fortson, 403 U.S. 431, 442 (1970).

[181] *See* Karen M Loewy, *The Unconstitutionality of Excluding Same-Sex Couples from Marriage,* 38 NEW ENG. L REV. 555, 560. ("The state asserts that there is no sexual orientation discrimination going on here because gay people can get married; they just have to marry someone of the different sex. It really just ignores the nature of the class being discriminated against."). *See also* Levin v. Yeshiva Univ., 96 N.Y. 2d 484 (2001)

[182] Memorandum of Law of Plaintiff, Langan , 765 N.Y.S.2d 411, at 45.

[183] For example, the students in *Levin v. Yeshiva Univ.* 96 N.Y. 2d 484 (2001) challenged a university policy giving priority to married couples applying for student apartments and studios maintained by the university. To qualify for the housing priority the couple was required to provide Yeshiva's housing office with a marriage certificate or other acceptable proof of a marriage. Two lesbian students with partners who were not students brought the suit. One of them requested housing for herself and partner of five years. Unable to provide proof of marriage, she and her partner eventually moved in together in an off-campus apartment. As members of a protected class, plaintiff students alleged a violation of the New York City Human Rights Law, which created a cause of action for "unlawful discriminatory practice based upon disparate impact." The Court noted that this was not really about discriminating on marital status but creating restrictions for those who do not have a legally recognized family relationship with a student (spouse, child, other dependent). However, "Section 8-107 (5) (a) (1) of the Administrative Code of the City of New York makes it an unlawful discriminatory practice to refuse housing accommodations to any person because of that person's . . . sexual orientation or marital status. . ." Hence, the New York Court of Appeals remanded the case to the trial court for a factual determination of whether Yeshiva's policy of allowing married spouses of students to live in university housing but prohibiting non-married partners of students to do the same had a disparate impact that falls along the "impermissible lines of sexual orientation." Furthermore,

The Appellate Division's strict interpretation of "spouse" in *Langan* reduces Langan to an unmarried partner as if an option existed for him, when in fact the inability to marry in New York is what drove Langan and Spicehandler to enter a civil union in Vermont. Once in litigation, the unsettled legal status of the union and the absence of a marriage license prevented Langan from recovery for Spicehandler's wrongful death. If unmarried same-sex and opposite sex couples were similarly situated, the trip to Vermont would have been unnecessary. If there were no disparate impact, Langan would have been able to recover the same as a New York husband who married in Vermont, or anywhere, for that matter. For the two groups to become similarly situated and treated equally without opening civil marriage to same-sex couples, civil unions must be accepted as separate from marriage and allowed the benefits for which that union was designed. Alternatively, the functional family model adopted in *Braschi*, or a comparable approach, is necessary to bridge a significant portion of the gap that currently prevents committed same-sex couples from enjoying the incidents and benefits of a state-sanctioned union.

IV. THE LEGISLATURE'S ROLE IN THE *LANGAN* DECISION

As the previous sections indicate, New York is ready, from the public policy perspective, to add either marriage or spousal status, or both, to partners of a civil union for the purpose of wrongful death claims. Yet public policy considerations are all but absent from the *Langan* decision in the Appellate Division. Rather than undertake policy analysis, the appellate court opted to hand over the problem to the legislature, though it is not clear that the hand-off indeed took place. A legitimate concern the *Langan* court probably entertained is that if it recognized John Langan as a spouse, even if for the limited purpose of the wrongful death statute, the decision would inevitably become useful in supporting an expansion of more general spousal rights, which in the end would bring the courts face to face with what it is trying to avoid: same-sex marriage. Such a disposition would explain why the *Langan* majority speaks as if the case is about same-sex marriage and not the granting of an incident of marriage after a partner's death.

Just as *Braschi* and other cases are used to analogize the granting of a benefit, a decision that puts same-sex partners on the same footing as spouses would become a primary tool in New York's future battles over same-sex marriage. Thus the issue would come before the courts with more teeth, and it would make it easier for judges to take a definitive step of accepting civil unions as equivalent to marriage. With that in place, two things would happen: (1) Same-sex couples would go to Vermont in even greater numbers knowing that their civil union would in fact convey the benefits and protections of marriage and (2) lawsuits

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the Court of Appeals rejected Yeshiva's argument—accepted by the Appellate Division, First Department—that unmarried same-sex couples and heterosexual couples were similarly situated and impacted equally.

would be tailored to have the courts rule for same-sex marriage. As such, the New York Court of Appeals will face the same dilemma as the *Baker* court: choosing between forcing social changes through the judiciary or asking the legislature to get involved. As it stands, *Langan* left the door open for the legislature to take up the cause if it considers it appropriate. The Court of Appeals also made this explicit in *Hernandez,* holding that "the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature."[184]

One argument in favor of the *Langan* outcome is that the court did not unreasonably withhold comity and ignore the validity of the *Baker* judgment. It is possible that the court was actually following the Vermont precedent more closely than immediately apparent. As with *Baker*, the Court is not concerned with reaching finality of the issue on its own, but with the participation of other government branches.[185] Though marriage is a fundamental right,[186] the resistance to same-sex marriage causes policy to eclipse constitutional arguments, which puts the legislature at the helm because it is better suited to enact policy than the judiciary. After all, the legislature has already created existing parameters on marriage in New York,[187] a role it historically played.[188] The legislature has more than the record provided by the parties. It is the appropriate body to engage research and debate that leads to social policy.[189] One of the *Baker* judges was concerned that it is not the Court's responsibility to write the marriage statute because the effect of the ruling would reach far beyond the parties.[190] Hence, the legislature should be the one to modify the statutes while complying with the court's mandate.[191] If the judiciary takes a legislative role to make controversial policy decisions, it may prolong divisiveness rather than settle the issue.[192] Had the *Baker* court proceeded differently, it might have inadvertently tapped the fear of Vermonters and trigger political backlash that would push for the enactment of statutes designed to limit judicial power to promote advancement for same-sex couples. This was the result in Hawaii,[193] and that lesson was not lost on the Vermont judges.[194] At least by forcing the political system as a whole to confront

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

185 MOATS *supra* note 1, at 141.

186 *See* Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 US 374 (1978).

187 *See e.g.* N.Y. DOM. REL. LAW §§5,6,7 (McKinney 2006).

188 Samuels v. New York State Dept. of Health, 811 N.Y.S.2d 136, 136 (N.Y. App. Div. 2006).

189 *Hernandez*, 805 N.Y.S.2d at 359.

190 MOATS *supra* note 1, at 140.

191 *Id.*

192 *Hernandez*, 805 N.Y.S.2d at 359.

193 Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

194 LAHEY & ALDERSON *supra* note 7, at 48. (commenting that, "As soon as politicians began to grasp the implications of the 1993 rulings in the *Baehr* cases in Hawaii, intense political backlash resulted in the swift enactment of state statutes and even constitutional amendments designed to deprive the courts of the power to actually order the issue of marriage license. The Hawaii government used all those strategies to prohibit same-sex marriage shortly after the Hawaii courts

same-sex marriage, allowing for full debate in public and behind closed doors, even those who disliked the result could not claim that they had been excluded from the process.[195] Undoubtedly, the New York Appellate Division had both *Baehr* and *Baker* in mind as it weighed its options.

In framing the issue as one of benefits and not marriage, Justice Amestoy, heading the *Baker* decision, blocked the direct attacks against same-sex marriage,[196] and positioned the three branches of government to craft a solution for same-sex couples that would be received with greater legitimacy.[197] Had the court taken the decision on itself—without the legislative process—, it would likely have been viewed as a premature advancement of same-sex marriage and fan the flames of the current turmoil.[198] Such considerations are more strategically rooted than legally driven. Regardless of how convinced one is that marriage is a fundamental right denied to a group, that there are clear parallels to the struggle of interracial marriages, that society will benefit from equal treatment of all—it may be better, though not faster, to gradually transition into legal recognition of same-sex couples. The advantage of this approach is that it may "normalize" such relationships, reducing the social tensions inherent when different groups see each other as "abnormal" or "outsiders."[199]

However, opting for the incremental approach leaves a group vulnerable to remaining only partially recognized permanently. Had the recognition of interracial marriages or desegregated schools been left until most of America was ready to embrace the ideas, these developments might never have occurred. The gradual introduction of rights for a particular group is nothing more than sanctioning continued discrimination of that group. Furthermore, it is paternalistic in spirit, for it suggests that society cannot adjust to the group's rightful place in it and that rather than take the chance on sparking violence, the deprivation of privilege is for that group's protection.[200] The counterargument, however, is that easing into the full recognition of a disfavored group allows the political system to test the waters of that group's general acceptability. It allows for imperfect decisions, [201] mistakes and tactical broadening of rights while limiting social outrage. The logic of the incremental approach in respect to social policy becomes inadequate when what is

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ruled that queers could not be constitutionally prohibited from marrying.").

195 MOATS *supra* note 1, at 145.

196 These attacks were somewhat silenced in the sense that the court was no longer officially dealing with same-sex marriage. People are more likely to be willing to extend benefits than rights. Hence, Justice Almestoy opted for a winnable strategy signifying an advance in gay rights rather than risk going the way of other same-sex marriage cases.

197 MOATS *supra* note 1, at 143.

198 John Witte, Jr., *Reply to Professor Strasser* , *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 44(Lynn D. Wardleet al. eds., 2003).

199 Leonard, *supra* note 47 *at* 70. *But see* McClesky v. Kemp, 481 U.S. 279, 343 (1987) ("It is the particular role of the courts to hear [disfavored] voices , for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.").

200 Hernandez v. Robles, 794 N.Y.S.2d 579, 600 n.30 (N.Y. Sup. Ct. 2005).

201 Hernandez v. Robles, 805 N.Y.S. 2d 354, 361 (N.Y. App. Div. 2005).

at issue is a fundamental right. "Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.... [I]t is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role...."[202] If the legislature counters established precepts of the Constitution, court intervention is appropriate even if the issue is unpopular.[203] Unfortunately, a New York court has yet to be convinced that same-sex marriage is a fundamental right, or that same-sex couples are entitled to the fundamental right of marriage.

[202] *Id.* at 383 (Saxe, J., dissenting) (quoting *West Virginia Bd. of Educ. v Barnette*, 319 U.S. 624, 638, (1943)).

[203] Samuels v. New York State Dept. of Health, 811 N.Y.S.2d 136, 138 (N.Y. App. Div. 2006).