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Commentary Introduction Commentary

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Commentary Introduction

On October 10, 2008, in a 4-3 decision, the Connecticut Supreme Court held that it was a violation of the Constitution of the State of Connecticut to prohibit same-sex couples from entering into a marriage. The decision in *Kerrigan v. Department of Public Health* established Connecticut as the third state, following Massachusetts and California (which later reversed its position on same-sex marriage), to recognize the right of same-sex couples to marry. The *Kerrigan* decision is unique since the state previously passed legislation allowing civil unions, which granted all of the rights of marriage to same-sex couples but did so under a different nomenclature.

In *Kerrigan*, the plaintiffs argued that the state's civil union law was unconstitutional and discriminatory because it established a separate and unequal institution for a minority class. The Connecticut Supreme Court agreed, holding that sexual orientation is a quasi-suspect classification demanding a heightened level of review. The Court found that the state had "failed to establish adequate reason to justify the ban" and concluded that excluding same-sex marriage violated equal protection principles within the state constitution.

Following the decision, the national debate regarding same-sex marriage has only intensified. Since the ruling, two states, Iowa and Vermont, have legalized same-sex marriage. Iowa legalized the matrimony through a state Supreme Court ruling and Vermont did the same through legislation. On the other end of the spectrum, Arizona, California, and Florida all passed state constitutional amendments defining marriage as between only a man and a woman. As states continue to ponder the issue of same-sex marriage, the *Kerrigan* decision and its analysis will provide a powerful tool for proponents of marriage as a legal right to all individuals, regardless of the gender of the potential spouse.

In this Commentary Issue, the *Connecticut Law Review* has chosen to use the *Kerrigan* decision as our focal point, with each commentator analyzing an aspect of the decision. We are fortunate to have five

distinguished individuals share their thoughts and opinions on the decision and its potential impact on future same-sex marriage jurisprudence. In *Changing the Immutable*, Professor Susan Schmeiser of our University of Connecticut School of Law challenges the focus on immutability that courts often utilize when analyzing equal protection challenges to discriminatory legislation. Schmeiser applauds the approach to the immutability question used by the Connecticut Supreme Court and offers a broader discussion of the development of the legal discourse towards homosexuality to support her contention

In *Marriage as Monopoly: On the Flaws of History, Tradition, and Incrementalism Rationales for the Marriage/Civil Union Distinction*, Professor Suzanne B. Goldberg of Columbia Law School argues that the oft used history, tradition, and incremental rationales used to support the exclusion of same-sex marriage are flawed and without merit. Goldberg questions why states continue to advance these rationales and why some judges accept them. Finally, Goldberg points out the flaws inherent in these rationales and advances arguments for why they should not be accepted.

In *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, Bennett Klein, Senior Attorney and Aids Law Project Director at Gay and Lesbian Advocates & Defenders and co-counsel in *Kerrigan v. Commissioner of Public Health*, along with Daniel Redman, an associate at Cooley Godward Kronish LLP, discuss the historical background of same-sex litigation. They also offer insight into the challenges of litigating *Kerrigan* given the fact that Connecticut already had a civil union bill in place that bestowed “all the same benefits, protections and responsibilities under law . . . in a marriage” to same-sex couples.

In *Sexual Politics and Social Change: Does the Recent Democratic Electoral Sweep Portend Progress on GLBT Rights?*, Darren Hutchinson, Professor of Law at American University, Washington College of Law, asks whether the recent election of President Barack Obama and the “Democratic sweep” of Congress, state legislatures, and gubernatorial elections presents an opportunity for social movements to change the legal status for gay, lesbian, bisexual, and transgender (“GLBT”) individuals. Hutchinson discusses the many political and social factors that may lead to change for GLBT rights and asks whether the current economic conditions may facilitate change.

Finally, in *Name Calling: Identifying Stigma in the “Civil Union” / “Marriage” Distinction*, Marc R. Poirier, Professor of Law at Seton Hall Law School, focuses on the distinct injury caused by applying the term “civil unions” to same-sex couples and “marriage” to opposite-sex couples. In doing so, Poirier examines the facts that led the *Kerrigan* majority to find a cognizable injury capable of redress when only civil unions are

allowed for same-sex couples. In addition, Poirier expands on the harm and social stigma that is caused when distinct names are legally recognized for the same act by analyzing the impact language has on our society at large.

On behalf of the *Connecticut Law Review*, I want to thank all of our commentators for their timely and insightful pieces. We are honored to publish their worthwhile articles in this Commentary Issue.

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