Braschi v. Stahl Associates Co.: Much Ado about Nothing

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Notes

BRASCHI v. STAHL ASSOCIATES CO.: MUCH ADO ABOUT NOTHING?

I. INTRODUCTION

In July 1989 the New York Court of Appeals ruled that, as a matter of law, Miguel Braschi could be considered a family member of Braschi's long-term homosexual lover Leslie Blanchard.¹ The Court of Appeals, in Braschi v. Stahl Associates Co., concluded that, in addition to the traditional view of family as those related by blood, marriage or adoption, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."² Legal experts predict that the Braschi decision will have far-reaching effects.³ Braschi is significant in that it is the first opinion by a highest state court conferring legal recognition on gay and lesbian relationships in the form of family member status.⁴ Whether the decision will have the far-reaching effects and implications predicted by legal commentators remains to be seen.

This Note will explore the current legal status of same-sex relationships⁵ and examine the impact of that status on the rights of same-sex couples.⁶ This Note will then analyze the protection traditionally afforded nuclear families under the United States Constitution and dis-

1. Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 214, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989). Braschi sought protection from eviction from Blanchard's rent-controlled apartment under 9 New York City Rent and Eviction Regulations § 2204.6(d), N.Y. UNCONSOL. LAW (McKinney 1987). This regulation provides that a landlord may not dispossess a "family member" of a deceased tenant who has been living with the tenant in a rent-controlled apartment. For the full text of § 2204.6(d), see infra note 54.

2. Braschi, 74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89.

3. See, e.g., Anderson, New Nuclear Family, A.B.A. J., Oct. 1989, at 20. The chairman of the American Bar Association's Committee on the Rights of Gay People asserts that the decision "signals the onset of a new direction in family law." Id. William Rubenstein, the American Civil Liberties Union attorney who argued the case on behalf of Braschi, considers the case "a groundbreaking victory for lesbian[s] and gay men . . . the most important single step forward in American law toward legal recognition of lesbian and gay relationships." Chi. Daily L. Bull., July 6, 1989, at 1, col. 5, 14, col. 3.

4. Anderson, supra note 3, at 20. The opinion will also apply to unmarried, heterosexual couples involved in long-term interdependent relationships. Id.

5. Throughout this Note, the term "same-sex relationship" will be used to denote both gay and lesbian relationships. For a discussion of the current legal status of same-sex relationships, see infra notes 10-23 and accompanying text.

6. See infra notes 24-33 and accompanying text.

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cuss the impact of this constitutional protection on state regulation of domestic relations.\(^7\) Next, this Note will trace the evolution of an expanded notion of family in the context of protection from eviction in the New York state courts culminating in the *Braschi* decision.\(^8\) Finally, this Note will discuss the reasons why the *Braschi* opinion, although a significant victory for same-sex couples, will have limited precedential effect outside of the context of protection from eviction under New York City's Rent and Eviction Regulations.\(^9\)

II. BACKGROUND

A. The Legal Limbo of Same-Sex Relationships

In most jurisdictions same-sex couples exist in a legal limbo, involved in a relationship that has no legal classification and, therefore, no concomitant legal rights or obligations.\(^10\) For example, courts have consistently refused to recognize a right to enter into a same-sex marriage.\(^11\) Challenges to this marital prohibition have failed when based

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7. See infra notes 35-48 and accompanying text.
8. See infra notes 51-124 and accompanying text.
9. See infra notes 125-39 and accompanying text.
10. See generally Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part II*, 11 U. DAYTON L. REV. 275, 309 (1986) (discussing legal system's "failure to accommodate reality" in area of gay rights). An exception to this lack of legal recognition is the so-called "domestic partnership" type of ordinance adopted by some cities. Certain cities, acting in their capacities as employers, have extended to unmarried, cohabiting heterosexual and homosexual couples the same employee benefits accorded to married couples. Berkeley, California was the first city to adopt such a policy in March 1985. See id. at 372 n.631; see also H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 63 (4th ed. 1986).

Berkeley's policy stipulates that any insurance company chosen by the city to provide coverage to city employees *should* extend coverage to any employee's "domestic partner." Id. A city worker seeking coverage for his or her domestic partner must file an affidavit attesting that the partners are not married, that they share the common necessities of life and that each is responsible for the common welfare of both partners. Rivera, supra, at 372 n.631.

Unfortunately, the Berkeley policy seems to have had little practical impact on the rights of city employees. H. CURRY & D. CLIFFORD, supra, at 63. With the exception of insurers providing dental insurance coverage to city employees, no health insurance carrier for the city of Berkeley has been willing to extend coverage to domestic partners. Id.


11. See, e.g., Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980) (marriage of two males to achieve immigration status invalid under state law and Immigration and Nationality Act), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982). Although many state statutes concerning marriage do not define the term "marriage" or specify the sex of the participants, courts have uniformly held that the term, as used in such statutes, refers to the union of a man and a woman. See id. at 1122 (“[T]he term ‘marriage’ as used throughout
on either the fundamental right to marry assured by the United States Constitution\textsuperscript{12} or on an equal rights amendment to a state constitution.\textsuperscript{13} Additionally, in many states, the recognition of a right to same-sex marriage would conflict with state laws that criminalize consensual sodomy.\textsuperscript{14}

Same-sex couples seeking to establish a family relationship have occasionally resorted to adoption as a means of defining their respective

Colorado law refers to a contract and ceremony involving . . . 'a man and a woman.'\textsuperscript{15}; see also Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (two women prevented from marrying under state statutes because proposed relationship not marriage as term is commonly defined); Baker v. Nelson, 291 Minn. 310, 311, 191 N.W.2d 185, 186 (1971) (state statute governing marriage contemplates state of union between persons of opposite sex, thus prohibiting marriage of two men), appeal dismissed, 409 U.S. 810 (1972); Anonymous v. Anonymous, 67 Misc. 2d 982, 984, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (marriage between man and transvestite invalid because marriage must be contract between "man and woman").

12. The United States Supreme Court has found that heterosexual marriage is a fundamental right entitled to protection from unwarranted state interference under the due process and equal protection clauses of the 14th amendment. See Zablocki v. Redhail, 434 U.S. 374, 383-88 (1978) (striking down statute requiring residents with child support obligations to obtain court permission to marry); Loving v. Virginia, 388 U.S. 1, 12 (1967) (ban on interracial marriages violates 14th amendment); see also Jones, 501 S.W.2d at 590 (no constitutional protection of right of marriage between persons of same sex); Baker, 291 Minn. at 315, 191 N.W.2d at 187 (prohibition of same-sex marriage does not offend 1st, 8th, 9th or 14th amendments to U.S. Constitution).


In jurisdictions that allow it, adoption of one member of a same-sex couple by the other can be a convenient means of establishing a pseudo-marital relationship. Adoption can serve a second purpose for same-sex couples as a public acknowledgment of their emotional bond.

Another method available to same-sex couples for defining the legal aspects of their relationship is the cohabitation contract. The validity of such a contract between cohabiting, heterosexual couples was established.

Courts that have disallowed adult adoptions on discretionary grounds have pointed out that the primary legislative intent behind adoption statutes is to create a parent-child relationship to which sexual intimacy is repugnant. See, e.g., Robert Paul P., 63 N.Y.2d at 236, 471 N.E.2d at 425, 481 N.Y.S.2d at 653; see also Comment, supra note 15, at 668-69 & n.10. Other courts, however, have recognized that adult adoption is functionally dissimilar to the adoption of children and requires different criteria and considerations. See id. (citing In re Adoption of Miller, 227 So. 2d 73, 75 (Fla. Dist. Ct. App. 1969) ("A minor receives the special attention and solicitude of the court.... Child custody, welfare, environment and support are important matters which the court must decide for the child.... However, adults are cut loose to make such decisions for themselves.... to exercise a wide discretion as to their legal status.")).

The legal relationship created by adoption is that of parent and child. See Sexual Orientation, supra note 15, § 1.05[1]. Such a relationship, however, carries with it many of the same rights and benefits established by marriage. Such rights include the right of inheritance under intestacy laws, legal status as next of kin with the power to make decisions on behalf of the other partner in emergency situations, rights to insurance and employment benefits and the right to live together in housing accommodations restricted to related individuals. See id. § 1.05[2][a]-[g]; Comment, supra note 15, at 679-88.


For a discussion and examples of same-sex cohabitation contracts, see Sexual Orientation, supra note 15, §§ 2.04-.05[3][m][iii] & apps. A cohabitation contract formalizes the cohabiting partners' respective obligations within the relationship. It must contain the standard elements of a contract, such as a meeting of the minds and valid consideration. Id. § 2.04[1].
lished in the infamous case of Marvin v. Marvin. The Marvin court based its reasoning on the principle that adults who voluntarily live together and engage in sexual relations are fully competent to make contractual arrangements regarding their respective earnings and property rights. This reasoning has been applied to similar cases involving same-sex couples. A written cohabitation agreement between a same-

20. 18 Cal. 3d 660, 684-85, 557 P.2d 106, 122-23, 134 Cal. Rptr. 815, 831-32 (1976). In Marvin the female partner of a cohabiting heterosexual couple brought suit to enforce an alleged oral contract entitling her to certain property and support payments upon dissolution of the relationship. Id. at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819. The California Supreme Court held that she had stated a valid cause of action for support on the possible theories of express contract, implied contract, quantum meruit, implied partnership or constructive trust. Id. at 864, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. For a general discussion of the Marvin case, see Note, Property Rights of Same-Sex Couples: Toward a New Definition of Family, 26 J. Fam. L. 357, 364-67 (1987-88).

21. Marvin, 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. The court also noted the prevalence and social acceptance of nonmarital relationships in modern society. Id. at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. Courts generally will enforce provisions in cohabitation agreements concerning financial matters such as support. See Sexual Orientation, supra note 15, § 2.04[2]. A legal handbook designed for lesbians and gay men, however, cautions that it is prudent to omit any reference to sexual relations in cohabitation contracts. Id. § 2.04[1]. A court may refuse to enforce the entire contract where sexual relations form all or part of the consideration. Id.; see also Marvin, 18 Cal. 3d at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823 ("[A] contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid . . . if sexual acts form an inseparable part of the consideration for the agreement."). This is a particularly relevant risk for same-sex couples in those states which criminalize homosexual activity. Sexual Orientation, supra note 15, § 2.04[1].

Some courts will, if possible, sever those portions of a cohabitation contract resting upon sexual consideration and enforce any remaining provisions supported by independent, non-sexual consideration. See Marvin, 18 Cal. 3d at 672, 557 P.2d at 114, 134 Cal. Rptr. at 893 ("[A]ny severable portion of the contract supported by independent consideration will still be enforced."); Whorton v. Dillingham, 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405, 407 (1988) (citing Marvin). As not all courts are willing to sever such provisions, same-sex couples should be careful to set out adequate, non-sexual consideration to ensure that the entire contract will be enforceable by a court. Sexual Orientation, supra note 15, § 2.04[1]. Provisions dealing with personal matters such as housekeeping, companionship and fidelity generally are not judicially enforceable. Id. § 2.04[2]. Such provisions may muddy the contractual waters, providing a court with an excuse not to enforce an entire contract on the ground of lack of valid consideration. Id.

22. See, e.g., Whorton, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (reversing trial court's dismissal of claim for support and property rights based on oral cohabitation agreement between two homosexual men); Friedlander v. Solari (N.Y. App. Term.), N.Y.L.J., Jan. 14, 1988, at 14, col. 4 (denying motion for summary judgment in action to enforce oral cohabitation agreement between two women where present financial support was provided in return for claim on partner's future trust fund). At least one commentator is of the opinion that the Marvin decision was made possible in part by California's Brown Act which decriminalized adulterous cohabitation and sodomy and oral copulation between consenting adults. See Note, supra note 20, at 365. Although homosexual
sex couple may serve as proof of the existence and duration of the relationship in much the same way as a marriage license would for a heterosexual couple. Neither an oral nor written cohabitation contract, however, can confer upon the partners of a same-sex couple all of the automatic rights and privileges accorded a heterosexual couple upon the event of their marriage. 

B. The Impact of the Lack of Legal Recognition on the Rights of Same-Sex Couples

Because no legally recognized spousal or family relationship exists between same-sex partners, individuals involved in such a relationship generally have not been extended the rights and privileges traditionally accorded to members of nuclear families. The statutory right to protection from eviction from a rent-controlled apartment at issue in Braschi is only one of a host of benefits extended to spouses and other family members by custom, by statute and under common law. Rights typically extended by law solely to family members include, among others, financial support upon dissolution of a relationship, the opportunity for privacy protection, and the right to inherit property. See supra note 14, one commentator has stated that an express, written same-sex cohabitation agreement concerning property rights should be given effect by the courts of all states provided it is properly drafted and based on valid, adequate consideration. See supra note 15, § 2.04[1].

23. Like a cohabitation agreement, heterosexual marriage is itself a contract. See 52 Am. Jur. 2d Marriage § 4 (1970) ("Marriage is contractual in nature, and a valid marriage is a binding contract."); 55 C.J.S. Marriage § 1(b) (1948) (marriage generally considered civil contract). Marriage, however, is also a legal status leading to the grant of certain rights and privileges by the state and third parties. See L. Weitzman, The Marriage Contract at xv-xix (1981). For a discussion of some of the rights and privileges automatically ascribed to spouses upon the advent of marriage, see infra notes 25-32 and accompanying text. Rights extended to family members by third parties such as a landlord, an employer or the state by their very nature cannot be provided for in a private cohabitation agreement. Because such third parties are not parties to the cohabitation contract, they are not bound by it to provide benefits to same-sex or heterosexual partners.

24. A nuclear family is generally recognized as consisting of a married, heterosexual couple and their unmarried, dependent children. See, e.g., Webster's Third New International Dictionary 1547 (1986) (defining "nuclear family" as "a family group consisting of father, mother, and children"). For a discussion of rights normally restricted to spouses and family members, see infra notes 25-32 and accompanying text.

25. For a discussion of the statutory right at issue in Braschi, see infra notes 51-56 and accompanying text.

to inherit through intestacy laws, status as next-of-kin with the power to make emergency medical decisions and funeral arrangements, benefits under entitlement programs such as welfare, Social Security and Aid to Families with Dependent Children, and the right to recover damages for loss of consortium and infliction of emotional distress upon the death or injury of the partner or other family member.

Additional benefits extended by custom solely to family members include hospital visitation rights, benefits received through the employment of a family member such as health insurance and survivorship benefits under pensions, as well as benefits from various other types of organizations such as museums, health clubs and vacation resorts which often offer low cost family rates. Thus, by leading to the denial of these and other rights, the lack of legal recognition of same-sex relationships has a severe detrimental impact on the lives of participants in such relationships.

cohabitation agreement). For a discussion of cohabitation contracts, see supra notes 19-23 and accompanying text.


28. Recent Development, supra note 14, at 224. For a discussion of methods by which participants in a same-sex relationship can ensure such rights for their partners, see id. at 229-35 (discussing durable powers of attorney, living wills, wills and written instructions regarding desired funeral arrangements). In heterosexual couples, such rights are gained automatically upon the advent of marriage. See id. at 223-24.

29. Cox, supra note 10, at 2-3. For a discussion of the legal ability of heterosexual cohabitants to obtain these benefits, see Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. REV. 1125, 1137-59 (1981).


32. See Cox, supra note 10, at 2-3.
C. The Parameters of "Family"

1. The U.S. Supreme Court

Any consideration of the limitation of rights to spouses and other family members necessarily raises the question of who is to be considered "family." Unlike the designation "spouse," which has a precise legal meaning, "family" is a general term susceptible to many meanings or interpretations depending upon the context in which it is used. Unfortunately, the United States Supreme Court has consistently avoided defining family in any conclusive or comprehensive manner.

The existence and nature of the Court's definition of family is of critical importance to those involved in same-sex relationships. Although domestic relations have traditionally been considered a state concern, the states' power to regulate domestic relations has always been subject to constitutional limitations. The Supreme Court is the ultimate arbiter of the constitutional validity of state regulation of domestic relations.

The Supreme Court has extended broad constitutional protection from undue governmental interference to family relationships under the circumstances:

33. See BLACK'S LAW DICTIONARY 1258 (5th ed. 1979) (defining "spouse" as "one's wife or husband"); see also Menchaca v. Farmers Ins. Exch., 59 Cal. App. 3d 117, 127-28, 130 Cal. Rptr. 607, 613-14 (1976) (unmarried female cohabitant of insured male not covered under policy covering "spouse" of insured, as "spouse" is lawful wife or husband according to legal as well as ordinary meaning of term).

34. See, e.g., Nationwide Mut. Fire Ins. Co. v. Turner, 29 Ohio App. 3d 73, 74, 503 N.E.2d 212, 215 (1986) (meaning of word "family" depends on field of law in which word used, purpose to be accomplished by use and facts and circumstances of case).

35. See Developments in the Law: The Constitution and the Family, 93 HARV. L. REV. 1156, 1271 (1980) [hereinafter Developments]. One commentator, however, is of the opinion that the Court, in its approximately 50 decisions discussing family interests, has effectively defined family as those related by blood, marriage or adoption. See Hafen, supra note 12, at 491-92.

36. Developments, supra note 35, at 1159 (citing Loving v. Virginia, 388 U.S. 1, 7-8 (1967) (state statutes prohibiting mixed-race marriages unconstitutional under 14th amendment to United States Constitution); Atherton v. Atherton, 181 U.S. 155 (1901) (full faith and credit clause required New York court to give effect to divorce decree previously granted by Kentucky court)).

The doctrine of substantive due process stems from the fifth and fourteenth amendments to the United States Constitution, which provide that no federal or state governments, respectively, shall deprive any person of "life, liberty, or property, without due process of law." U.S. Const. Amendments. V & XIV, § 1. The due process clauses are recognized as authorizing judicial scrutiny of the adequacy of legal procedure under federal and state law. See Developments, supra note 35, at 1166. Substantive due process, on the other hand, is concerned with limiting governmental deprivations of certain fundamental rights regardless of the adequacy of the procedures employed. Id. Substantive due process protection is afforded by applying a heightened standard of judicial review to federal or state laws that limit the exercise of certain fundamental rights. J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 351 (3d ed. 1986) [hereinafter NOWACK]. The usual standard of review used by the Court when scrutinizing the substance of state or federal law is the rational basis or rational relationship test. Under this standard, the government must establish that the legislation in question is rationally related to a legitimate governmental interest. Id. at 357. When state or federal legislation or regulations impinge on fundamental personal rights protected by the Constitution, however, strict scrutiny is applied. Id. at 351. The legislation or regulation will be upheld only if it is narrowly tailored to protect a substantial or compelling state interest. Id. This heightened standard of review clearly extends to rights expressly granted by the Constitution. See, e.g., West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[F]reedoms of speech and of press . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."). A heightened standard of review has also been applied to legislation restricting conduct in the areas of marriage and family which are not expressly protected in the text of the Constitution. See Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (applying heightened scrutiny to marital relationship); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (applying heightened scrutiny to state legislation of family living arrangements).

38. The doctrine of substantive due process stems from the fifth and fourteenth amendments to the United States Constitution, which provide that no federal or state governments, respectively, shall deprive any person of "life, liberty, or property, without due process of law." U.S. Const. Amendments. V & XIV, § 1. The due process clauses are recognized as authorizing judicial scrutiny of the adequacy of legal procedure under federal and state law. See Developments, supra note 35, at 1166. Substantive due process, on the other hand, is concerned with limiting governmental deprivations of certain fundamental rights regardless of the adequacy of the procedures employed. Id. Substantive due process protection is afforded by applying a heightened standard of judicial review to federal or state laws that limit the exercise of certain fundamental rights. J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 351 (3d ed. 1986) [hereinafter NOWACK]. The usual standard of review used by the Court when scrutinizing the substance of state or federal law is the rational basis or rational relationship test. Under this standard, the government must establish that the legislation in question is rationally related to a legitimate governmental interest. Id. at 357. When state or federal legislation or regulations impinge on fundamental personal rights protected by the Constitution, however, strict scrutiny is applied. Id. at 351. The legislation or regulation will be upheld only if it is narrowly tailored to protect a substantial or compelling state interest. Id. This heightened standard of review clearly extends to rights expressly granted by the Constitution. See, e.g., West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[F]reedoms of speech and of press . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."). A heightened standard of review has also been applied to legislation restricting conduct in the areas of marriage and family which are not expressly protected in the text of the Constitution. See Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (applying heightened scrutiny to marital relationship); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (applying heightened scrutiny to state legislation of family living arrangements).


40. Id. at 506. The ordinance defined family as the husband, wife, unmarried children with no children of their own living with them, father or mother of the nominal head of the household. Id. at 496 & n.2. The appellant, who lived in her home together with her son and two grandsons (who were cousins rather than brothers), was convicted of a criminal violation of the ordinance. Id.

41. Id. at 503-06. Justice Powell expressed the plurality's view as follows: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." Id. at 502 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

42. Id. at 499. By "usual judicial deference" the Court appears to be referring to the rational basis standard of review. For a discussion of this standard, see supra note 38.
In extending constitutional protection to nuclear and extended family relationships, the Moore Court relied upon the historical importance of those relationships in this country. Because same-sex relationships, although having attributes and functions similar to the traditional forms of family, lack this historical importance, it is impossible to predict whether such relationships will be accorded similar constitutional protection. To date, the Court has not clearly extended constitutional protection to any non-traditional "family" relationship.
It has been suggested, however, that the Court has shown a willingness to do so should the proper case arise.48

2. One State’s Emerging Definition of Family: New York’s Rent-Controlled Tenancy Succession Cases

a. Lower Court Cases

Any state has traditionally been free to decide, within constitutional limits, which relationships it wishes to exclude from the benefits traditionally accorded to nuclear families.49 The Supreme Court has clearly extended constitutional protection only to families related by blood, marriage or adoption.50 Thus, the states appear to have wide latitude in excluding alternative families, such as same-sex couples, from the protection of legislation intended to benefit families.

One example of such protective legislation is the New York City rent control regulation at issue in Braschi. Section 2204.6(d) of the New York City Rent and Eviction Regulations51 was promulgated under the authority of the New York state rent control statute.52 Section 2204.6(d) provides that upon the death of the named tenant53 of a rent-controlled apartment, the landlord may not dispossess the tenant’s surviving spouse or any member of the tenant’s “family” who had been living with the tenant.54 Those qualifying for protection under this section receive a new rent-controlled tenancy.55 Not surprisingly, given the fact that the term “family” is defined in neither the regulations nor the rent control statute, there has been much litigation over exactly what

48. See id. at 1271. This conclusion is based on an analysis of Supreme Court decisions concerning foster families and the relationship of unwed parents to their illegitimate children. See id. at 1272-77.

49. For a discussion of state regulation of domestic relations, see supra note 36 and accompanying text. For a discussion of the benefits traditionally accorded to nuclear families, see supra notes 25-32 and accompanying text.

50. See supra note 47 and accompanying text.

51. 9 New York City Rent and Eviction Regulations § 2204.6(d), N.Y. UNCONSOL. LAW (McKinney 1987) (formerly § 56(d) (renumbered without change in text)).

52. N.Y. UNCONSOL. LAW § 8605 (McKinney 1987). Rent control was enacted to address an acute shortage in dwellings that resulted in “speculative” and “abnormal” rent increases. Braschi, 74 N.Y.2d at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787 (quoting N.Y. UNCONSOL. LAW § 8581 (McKinney 1987)). Section 2204.6(d) was enacted pursuant to legislative recognition that evictions would also have to be controlled. Id. at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787.

53. The term “named tenant” is used throughout this Note to refer to the tenant whose name appears on the lease.

54. “No occupant of housing accommodations shall be evicted . . . where the occupant is 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.” 9 New York City Rent and Eviction Regulations § 2204.6(d), N.Y. UNCONSOL. LAW (McKinney 1987).

55. Braschi, 74 N.Y.2d at 217, 543 N.E.2d at 57, 544 N.Y.S.2d at 792.
type of relationship with the deceased tenant brings the surviving occupant of a rent-controlled apartment within the scope of the regulation's protection.\footnote{56}

Prior to 1980 New York courts adhered to a traditional view of family in deciding disputes concerning occupancy rights to rent-controlled or rent-stabilized apartments.\footnote{57} In line with the notion that family consists of those related by blood, marriage or adoption, various lower courts have held that co-occupants of a named tenant such as a godson\footnote{58} and a fiancee\footnote{59} were not members of tenants' immediate families. In at least two cases, however, tenants' sisters, as blood relatives, qualified as immediate family.\footnote{60}


57. New York State's rent stabilization law, N.Y. Unconsol. Law §§ 8621-8634 (McKinney 1987 & Supp. 1990), and the New York City regulations promulgated pursuant to that statute are similar to, but less restrictive of landlords' rights, than the rent control statute and regulations. One similarity is that both guarantee rights of occupancy of controlled or stabilized apartments to certain specified parties upon the death or voluntary vacation from the apartment of a named tenant. See 9 New York City Rent and Eviction Regulations § 2204.6(d), N.Y. Unconsol. Law (McKinney 1987) (rent control regulation); 9 New York City Rent and Eviction Regulations §§ 2523.5, 2520.6(o), N.Y. Unconsol. Law (McKinney 1987) (rent stabilization regulations) (tenant's "family member" has right to renewal or vacancy lease where tenant died or vacated apartment; "family member" defined as "husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law" of tenant).

Under the rent control system, upon the death or voluntary vacation of the tenant of record of a rent-controlled apartment, the apartment becomes decontrolled and is subject to the less restrictive, and for the landlord, more profitable, system of rent stabilization. Braschi, 74 N.Y.2d at 216-17, 543 N.E.2d at 57, 544 N.Y.S.2d at 792 (Simons, J., dissenting). An exception to decontrol is made if there is a surviving member of the named tenant's family entitled to protection from eviction and a new statutory rent-controlled tenancy under § 2204.6(d). Id. at 217, 543 N.E.2d at 57, 544 N.Y.S.2d at 792 (Simons, J., dissenting).

58. See Mideast Holding Corp. v. Tow, 60 Misc. 2d 422, 302 N.Y.S.2d 706 (Civ. Ct. 1969) (landlord entitled to final judgment of possession where tenant's adult godson occupied apartment in violation of lease provision limiting occupancy to members of tenant's "immediate family").

59. See Fraydun Enters. v. Ettinger, 91 Misc. 2d 119, 397 N.Y.S.2d 301 (App. Term. 1977) (tenant's fiancee not member of tenant's family for purposes of lease provision limiting occupancy to members of tenant's "immediate family").

60. See Herzog v. Joy, 74 A.D.2d 372, 428 N.Y.S.2d 1 (1980) (sister of named tenant entitled to possession of rent-controlled apartment by virtue of relationship to, and contemporaneous occupancy of apartment with, named ten-
The decision of the New York Civil Court in Zimmerman v. Burton\textsuperscript{61} in 1980 was the first indication of a shift away from strict judicial interpretation of the definition of family. The court awarded possession of a rent-controlled apartment to the surviving male partner of a cohabiting, heterosexual couple,\textsuperscript{62} placing the relationship under the protection of section 2204.6(d) of the Rent and Eviction Regulations.\textsuperscript{63} The court analogized the relationship to a traditional marriage, rather than attempting to characterize the surviving partner as family.\textsuperscript{64} Thus, the surviving heterosexual partner was apparently accorded protection under the statute as the surviving spouse.

The Zimmerman opinion is, nevertheless, noteworthy in three respects. First, the court relied on equitable considerations in awarding occupancy to the surviving partner, rather than on strict judicial construction of the language of the statute.\textsuperscript{65} Second, the court invoked the concept of discrimination in discussing the emerging legal recognition of the rights of unmarried partners.\textsuperscript{66} Third, the court recognized a necessity for a case-by-case scrutiny of the non-traditional family and attempted to set out a standard for determining whether such a

\footnotesize\textsuperscript{61} 107 Misc. 2d 401, 434 N.Y.S.2d 127 (Civ. Ct. 1980).
\footnotesize\textsuperscript{62} Id. at 404, 434 N.Y.S.2d at 129.
\footnotesize\textsuperscript{63} For the text of § 2204.6(d), see supra note 54.
\footnotesize\textsuperscript{64} Zimmerman, 107 Misc. 2d at 402, 434 N.Y.S.2d at 128. The court stated that "[t]he issue presented is whether [§ 2204.6(d)] also protects those who cohabited with the deceased tenant for a significant period of time in a partnership closely akin to marriage." Id. The court went on to note that "[t]he rationale for [§ 2204.6(d)] does not permit a distinction to be made between a bereaved respondent and a widower with a marriage certificate." Id. at 403, 434 N.Y.S.2d at 129 (quoting Rutar Co. v. Gensuke Yoshito, No. 53042/79 (N.Y. Civ. Ct. 1979)).
\footnotesize\textsuperscript{65} Id. at 404, 434 N.Y.S.2d at 129. The court stated that "[t]he quality of [the surviving partner's] relationship with [the deceased tenant], and the quantity of time they spent together in a close and loving relationship is such that it would be unfair and discriminatory to evict him because he lacks a marriage license." Id. (emphasis added). The court also noted that upon moving into the rent-controlled apartment, the surviving partner assumed financial responsibility for the deceased tenant, and upon her death paid for her funeral services and burial. Id. at 402, 434 N.Y.S.2d at 128.
\footnotesize\textsuperscript{66} Id. at 404, 434 N.Y.S.2d at 129. The court opined that "[t]he law must keep abreast of changing moral standards. . . . 'A prohibition against discrimination based on marital status is consistent with both evolving notions of morality and the realities of contemporary urban society, where couples openly live in heterosexual and homosexual units without sanction of State or clergy.'" Id. at 403, 434 N.Y.S.2d at 128 (quoting Hudson View Props. v. Weiss, 106 Misc. 2d 251, 256-57, 431 N.Y.S.2d 632, 637 (Civ. Ct. 1980), rev'd, 59 N.Y.2d 733, 450 N.E.2d 234, 463 N.Y.S.2d 428 (1983) (reversed on ground that tenant had not been discriminated against on basis of marital status)).
relationship qualifies for protection under section 2204.6(d).67 Interestingly, the court suggested that an appropriate standard would be similar to that used by states which recognize common-law marriages.68 Such a standard would include two factors: (1) the presence of mutual consent to act as husband and wife in an exclusive and permanent arrangement, and (2) constant cohabitation for a significant period of time.69

In 420 East 80th Co. v. Chin70 the New York Supreme Court, Appellate Term, adopted an equitable approach similar to that used in Zimmerman. The court rejected a landlord’s petition to evict a named tenant and his live-in male lover for breach of their lease’s occupancy clause.71 The court decided that a lease clause limiting occupancy to “immediate family” would not be enforced absent a showing of demonstrable prejudice to the landlord, violation of legal occupancy laws or waste to property.72 The court reasoned that “[i]n the housing field, these are not ordinary times and ‘strict adherence to technical concepts of landlord and tenant law’ which might have justified eviction in the past is now to be avoided.”73 The court declined to “conjur[e] up artificial distinctions among various types of sexual, fraternal, and economic relationships.”74

Two Associates v. Brown,75 a 1986 case, gave the Supreme Court of New York County an opportunity to address the issue of discrimination based on marital status raised in Zimmerman. The defendant, the surviv-

67. Id. at 404, 434 N.Y.S.2d at 129.

68. Id.

69. Id. The application of such a standard, however, has been criticized in view of the fact that New York has not recognized the formation of common-law marriages within the state since 1933. See N.Y. Dom. Rel. Law § 11 (McKinney 1988 & Supp. 1989) (marriage must be solemnized by clergyman, public official or judge); see also Lepow v. Gress (N.Y. Sup. Ct.), N.Y.L.J., July 2, 1984, at 14, col. 1 (“To confer property rights upon [a cohabiting, heterosexual partner] as a ‘surviving spouse’ . . . would be contrary to the Legislature’s abolition of common-law marriage in 1933.”).


71. Id. at 197, 455 N.Y.S.2d at 44.

72. Id.

73. Id. at 196-97, 455 N.Y.S.2d at 44 (citation omitted). The court supported its reasoning with the recent judicial decision in In re Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982) (upholding adoption of 43-year-old man by his 32-year-old gay life partner). The Adult Anonymous II court stated that [t]he “nuclear family” arrangement is no longer the only model of family life in America. The realities of present day urban life allow for many different types of non-traditional families. . . . In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person.

74. 420 East 80th Co., 115 Misc. 2d at 197, 455 N.Y.S.2d at 44.

ing gay life partner of the named tenant of a rent-stabilized apartment, sought renewal of his partner's lease. He argued that their relationship was equivalent to a marriage and as the surviving spouse, he qualified for a lease renewal as an "immediate family member." He further argued that failure to recognize him as the equivalent of a surviving spouse would deny him equal protection of the law as guaranteed under the United States and New York State Constitutions. While the court rejected the defendant's claim to the classification of surviving spouse,

76. Id. at 987, 502 N.Y.S.2d at 605.

77. Id. at 988, 502 N.Y.S.2d at 606. The controlling law in this case was Emergency Operational Bulletin No. 85-1, issued by the State Division of Housing and Community Renewal in response to a decision handed down by the New York State Court of Appeals in Sullivan v. Brevard Associates, 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96 (1985). The court in Sullivan held that due to the absence of a definition of "tenant" in the Rent Stabilization Law and Code of the Rent Stabilization Association of New York City, a landlord was required to offer a renewal lease of a rent-stabilized apartment only to the tenant named in the original lease. Sullivan, 66 N.Y.2d at 491, 488 N.E.2d at 1208, 498 N.Y.S.2d at 96.

The Emergency Operational Bulletin defined "tenant" and also attempted to modify the harsh effect of the Sullivan decision by requiring that landlords of rent-stabilized apartments offer renewal leases to a named tenant's "immediate family" (defined as a spouse, child or parent) upon his or her death or vacancy of the apartment. Two Assocs., 131 Misc. 2d at 987, 502 N.Y.S.2d at 605. "Non-immediate" family members (defined as a brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law) were entitled to vacancy leases (the right to first refusal of a new lease). Id. at 987-88, 502 N.Y.S.2d at 605. The trial court's decision in favor of the surviving partner of the named tenant in Two Associates was appealed on the ground that the Operational Bulletin was invalidly promulgated. Two Assocs. v. Brown, 127 A.D.2d 173, 180, 513 N.Y.S.2d 966, 970 (1987). The Appellate Division agreed and reversed the trial court's decision on that basis. Id. at 185, 513 N.Y.S.2d at 973.

Thus, once again, the holding in Sullivan was controlling, restricting a landlord's obligation of offering a renewal lease to the named tenant.

78. U.S. CONST. amend. XIV, § 1 ("[No state shall deprive] any person within its jurisdiction the equal protection of the laws."); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state."). Both clauses guarantee that similar individuals will be treated in a similar manner by the government where there is no basis for separate classification. See Nowack, supra note 38, at 525; see also Two Assocs., 131 Misc. 2d at 990, 502 N.Y.S.2d at 607.

When applying equal protection analysis, courts use the same standards of review as employed in substantive due process analysis. See Nowack, supra note 38, at 351, 524. For a discussion of substantive due process analysis and judicial standards of review, see supra note 38. Equal protection and substantive due process analyses are similar in that both require a court to review the substance of a law. See Nowack, supra note 38, at 351. Substantive due process analysis focuses upon the adequacy of governmental justification for a law which restricts the freedom of all persons in society. Id. at 350. In equal protection analysis, however, the court is required to review the basis upon which the government determined that certain classifications would receive the benefit of a law, while others would not. Id.

79. Two Assocs., 131 Misc. 2d at 989, 502 N.Y.S.2d at 606. The court indicated that two factors prevented the defendant from prevailing on this argu-
it accepted his claim of equal protection. The court reasoned that

to interpret the [applicable regulation] so as not to include
the defendant as a family member would render it unconstitu-
tional in that there is no rational reason to exclude persons in
[the defendant's] situation from being classified as a family
member, when in fact, the relationship was much closer than
that of most family members.

The court found that the defendant was a family member for the pur-
pose of entitlement to a vacancy lease. The court based its reasoning
on the arbitrariness of defining family solely by a list of eligible lineal
relationships without regard to any emotional or economic relationship
or dependency.

In 2-4 Realty Associates v. Pittman the New York Civil Court also
extended non-eviction rights to persons outside the “immediate family”
of the deceased tenant. The court applied a substantive due process

80. Two Assoc's., 131 Misc. 2d at 989-90, 502 N.Y.S.2d at 606-07.
81. Id. at 990, 502 N.Y.S.2d at 607.
82. Id. Despite its conclusion that the defendant's relationship to the
named tenant was closer than that of most family members, the court awarded
him only a vacancy lease. Under the Emergency Operational Bulletin, vacancy
leases, which involve a potential rent increase, rather than the more valuable
renewal leases are awarded to non-immediate family members. Id. For a discus-
sion of the Emergency Operational Bulletin, see supra note 77.
83. Two Assoc's., 131 Misc. 2d at 990, 502 N.Y.S.2d at 607. The court rea-
soned that

[i]n the operational Bulletin at issue a host of relatives who are living in
the household are deemed to be family members and are given vacancy
lease rights whether or not there is a loving relationship among them or
whether indeed there exists any economic relationship or dependency.
To deem such collateral relatives, some of whom have no blood relation-
ship to each other, family members and to deprive the instant de-
fendant, who has provided care and love through both a serious illness
and death, of family member status would indeed be an arbitrary way to
define family.

Id.
85. Id. at 908, 523 N.Y.S.2d at 12. This case involved a claim of protection
from eviction under § 2204.6(d) of a woman and her son, who lived with and
cared for the named tenant for 25 years in a “family unit.” Id. at 899-902, 523
N.Y.S.2d at 7-9. The court refused to restrict the statutory protection against
eviction to family members related solely by blood or marriage. Id. at 907-08,
analysis to section 2204.6(d). The court’s analysis relied heavily on the recent case of *McMinn v. Town of Oyster Bay*, which had struck down, as violating the due process protection of the New York State Constitution, a zoning ordinance restricting occupancy in single-family homes to those related by blood, marriage or adoption. The *McMinn* court applied a two-pronged rational relationship test to determine the validity of the zoning ordinance under the due process clause. While the zoning ordinance was found to serve valid governmental purposes, limitation of occupancy of homes to those related by blood, marriage or adoption was held not to be a rational means of serving those purposes.

The *Pittman* court found the reasoning of the *McMinn* court applicable to the case before it because the zoning ordinance construed in *McMinn* and the rent control regulation (section 2204.6(d)) before the court in *Pittman* served the same legitimate governmental purpose of preserving the quality of communities or neighborhoods. Additionally, section 2204.6(d) serves the legitimate governmental purpose of preservation of family units.

The court found that achievement of the government’s purposes depended “not upon the biological or legal relations between the occupants of a house but generally upon the size of the dwelling and the lot and the number of its occupants.” The court found that such an interpretation of § 2204.6(d) “would be irrational and violative of the respondent’s due process rights.”

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86. Id. at 905-07, 523 N.Y.S.2d at 11-13. For a detailed discussion of the doctrine of substantive due process, see *supra* note 38.


88. Id. at 551-52, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132. The suit was brought by the McMinns, owners of a single-family home which they rented out to four unrelated men, after criminal proceedings were brought against them based on violations of the zoning ordinance. Id. at 548, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130.

89. Id. at 549-50, 488 N.E.2d at 1242-43, 498 N.Y.S.2d at 130-31. The two prongs were: (1) the zoning ordinance must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a reasonable relation between the end sought to be achieved by the ordinance and the means used to achieve that end. Id. at 549, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130-31.

90. Id. at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131. The court cited preservation of the character of traditional single-family neighborhoods, reduction of parking and traffic problems, prevention of noise and disturbance and control of population density as some of the legitimate governmental purposes served by the ordinance. Id.

91. Id. The court found that achievement of the government’s purposes depended “not upon the biological or legal relations between the occupants of a house but generally upon the size of the dwelling and the lot and the number of its occupants.” Id.


93. Id. at 907, 523 N.Y.S.2d at 12.

94. Id. The court found that such an interpretation of § 2204.6(d) “would be irrational and violative of the respondent’s due process rights.” Id. at 907, 523 N.Y.S.2d at 12-13. The plaintiff’s relationship with the deceased tenant, although not a marital or blood relationship, was “precisely what the State and
b. Braschi v. Stahl: The Court of Appeals Endorses an Expanded Notion of Family

In Braschi v. Stahl Associates Co., the New York Court of Appeals was faced with a fact pattern similar to that of Two Associates v. Brown. Braschi arose when Stahl Associates Company threatened to evict Miguel Braschi from the rent-controlled apartment, owned by Stahl, in which Braschi was living. Braschi had shared the apartment with Leslie Blanchard, the sole tenant of record, from 1975 until Blanchard's death from AIDS in 1986. The two men regarded each other, and were regarded by family and friends, as spouses. Soon after Blanchard's death, Stahl Associates served a notice to terminate on Braschi, informing him that if the apartment was not vacated within one month, Stahl Associates would commence summary eviction proceedings.

Braschi initiated an action seeking protection from eviction under section 2204.6(d) of the New York City Rent and Eviction Regulations as a member of Blanchard's family. Braschi then moved for a preliminary injunction enjoining Stahl Associates from evicting him until a final decision was rendered on the merits of his claim. The trial court granted Braschi's motion for a preliminary injunction.

The Appellate Division reversed, concluding that protection from eviction under section 2204.6(d) should be afforded only to "family members within traditional, legally recognized familial relationships." City in enacting this regulation[] meant to define, value and encourage." Id. at 907, 523 N.Y.S.2d at 13.

97. Braschi, 74 N.Y.2d at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.
98. Id. at 206, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785-86.
99. Id. at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
100. Id. at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786. Blanchard died in September 1986. In November, Stahl Associates served a notice to cure on Braschi, contending that as Blanchard was the sole tenant of record, Braschi was a mere licensee with no further right to occupy the apartment. Id. at 206, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785-86. Braschi remained in the apartment and in December was served with the notice to terminate. Id. at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.
101. Id. Braschi sought a permanent injunction and a declaration of entitlement to occupy the apartment. Id.
102. Id.
103. Id. The Supreme Court found that the relationship between Braschi and Blanchard "fulfilled[] any definitional criteria of the term 'family,'" and thus Braschi was protected from eviction under § 2204.6(d) until a final decision could be reached on the merits of his claim. Id.
104. Braschi v. Stahl Assocs. Co., 143 A.D.2d 44, 45, 531 N.Y.S.2d 562, 563 (1988), rev'd, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). The Appellate Division granted Braschi leave to appeal its denial of preliminary injunctive relief to the Court of Appeals, certifying the following question of law: "Was the order of this court, which reversed the order of the Supreme Court,
On appeal the Court of Appeals reversed in a plurality decision, concluding that as a matter of law, protection from eviction under section 2204.6(d) must be extended to relationships "having all of the normal familial characteristics." Braschi had presented sufficient evidence of a family-like relationship to demonstrate a likelihood of success on the merits of his claim to protection from eviction and was therefore entitled to preliminary injunctive relief.

The plurality based its holding on the narrow ground of statutory construction. After noting that the term "family" is not defined in the rent control code, and that there is no specific mention of section 2204.6(d) in the legislative history of the code, the plurality turned its attention to the legislative history underlying the rent control system as a whole.

The plurality determined that underlying the rent control system were two seemingly competing purposes: (1) the protection of individuals from sudden eviction from their homes upon the death or vacation of the tenant of record, and (2) the gradual transition of rent-controlled apartments to the less rigorous rent stabilization system. The plurality reasoned that extending protection from eviction to members of non-traditional families would serve both purposes. Such an extension would protect family members who have regarded the rent-controlled apartment as their home, regardless of any legal relationship to the tenant of record. It would also foster the transition of housing from rent control to rent stabilization by limiting protection from eviction to those who have a genuine family relationship with the tenant of record as distinguished from mere roommates or distant relatives.

The plurality determined that an objective examination of the relationship properly made?" Braschi, 74 N.Y.2d at 207, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

105. Braschi, 74 N.Y.2d at 211, 214, 543 N.E.2d at 54, 55, 544 N.Y.S.2d at 789, 790.

106. Id. Braschi had presented evidence of his social and financial interdependency with Blanchard. The two men lived together in the apartment at issue for 10 years. Id. at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. They considered each other, and held themselves out to family and friends, as spouses. Id. They shared financial obligations including a household budget, and maintained joint checking and savings accounts, joint credit cards and shared safe-deposit boxes. Id. During his final illness, Blanchard executed a power of attorney in Braschi's favor so that Braschi could make all necessary financial, medical and personal decisions for Blanchard. Id. In addition, Blanchard named Braschi as the beneficiary of Blanchard's life insurance policy and as primary legatee and co-executor of Blanchard's estate. Id.

107. Id. at 208-09, 543 N.E.2d at 52-53, 544 N.Y.S.2d at 787-88.

108. Id. at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789. For a discussion of the transition of rent-controlled apartments to the rent stabilization system, see supra note 57.


110. Id.

111. Id.
tionship of the parties should be made when judging whether a particular individual is entitled to noneviction protection. The court pointed to a number of factors previously utilized by lower courts in making this assessment: the exclusivity and longevity of the relationship; the extent of emotional and financial interdependency; the manner in which the couple conducted their daily lives and held themselves out to society; and the reliance placed by each partner on the other for daily family services.

Judge Simons, writing in dissent for himself and Judge Hancock, disagreed with the expansion of the definition of family beyond the traditional legal relationships established by blood, marriage or adoption. Judge Simons agreed with the plurality regarding the purposes underlying the rent control code. The dissent, however, urged the application of a balancing test, which required the weighing of the interests of the individuals residing with the named tenant in protection from eviction and those of the landlord of the rent-controlled apartment in regaining possession of the apartment and re-renting it under the less restrictive rent stabilization laws. Judge Simons asserted that these interests are properly balanced if protection from eviction is restricted to those individuals having objectively verifiable relationships based on the traditional, legally recognized bonds of blood, marriage or adoption.

Judge Simons pointed out that his interpretation of the meaning of family as used in the regulation promotes certainty and consistency in the law and avoids the problems of a case-by-case determination of family member status. He also suggested that the fact that Braschi was

112. Id. at 212, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
113. Id. at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. The plurality stated further that although these factors were helpful, "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." Id. at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
114. Id. at 217, 543 N.E.2d at 57-58, 544 N.Y.S.2d at 792-93 (Simons, J., dissenting).
115. Id. at 218, 543 N.E.2d at 58, 544 N.Y.S.2d at 793 (Simons, J., dissenting).
116. Id. (Simons, J., dissenting).
117. Id. (Simons, J., dissenting). Judge Simons argued that such a distinction is just because members of families, as defined by blood, marriage or adoption, assume legal obligations to one another and to third parties, which are not imposed on unrelated individuals, and that this legal interdependency should be considered when determining the scope of protection from eviction under § 2204.6(d). Id. (Simons, J., dissenting). Judge Simons also noted that this definition of family is used by the state in estate succession laws, family court acts and similar legislation. Id. (Simons, J., dissenting).
118. Id. (Simons, J., dissenting).
unable to avail himself of the institutions of marriage or adoption as a means to establish a relationship eligible for protection under section 2204.6(d) points out the need for a legislative, rather than a judicial, solution.

Judge Bellacosa, in a concurring opinion, approved of the result reached by the plurality, but disagreed with the scope of both the plurality and dissenting opinions. In Judge Bellacosa's view, the court needed only to apply section 2204.6(d) to the facts of the instant case. Any sweeping definition of the term "family" was both unnecessary and beyond the power of the court.

III. Analysis

Although Braschi has been hailed as a significant legal victory for same-sex couples, this Note suggests that the case is likely to have limited and unpredictable precedential effect, both in New York courts and nationally. The Braschi plurality was careful to establish a narrow context in which same-sex couples can be considered "family," emphasizing that its definition of that term was fashioned to further the legislative purposes underlying section 2204.6(d). A decision based on such narrow grounds is clearly limited in precedential value for cases outside the context of eviction protection.

119. For a discussion of the restriction of the rights of same-sex couples to marry, see supra notes 11-14 and accompanying text.

120. For a discussion of the use of adoption by same-sex couples as a means of establishing a legally recognized family relationship, see supra notes 15-18 and accompanying text.

121. Braschi, 74 N.Y.2d at 219, 543 N.E.2d at 58, 544 N.Y.S.2d at 793 (Simons, J., dissenting).

122. Id. at 214, 543 N.E.2d at 55, 544 N.Y.S.2d at 790 (Bellacosa, J., concurring).

123. Id. (Bellacosa, J., concurring).

124. Id. (Bellacosa, J., concurring). Judge Bellacosa opined that the court was not "empowered or expected to expand or to constrict the meaning of the legislatively chosen word 'family,' which could have been and still can be qualified or defined by the duly constituted enacting body in satisfying its separate branch responsibility and prerogative." Id. (Bellacosa, J., concurring).

125. See supra note 3 and accompanying text.

126. The plurality explicitly limited its analysis of a family relationship to the context of eviction. "In the context of eviction, a more realistic, and certainly equally valid, view of family includes ...." Braschi, 74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89 (emphasis added). The court defined family to include "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." Id. at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789. The court reasoned that "[t]his definition of 'family' is consistent with both of the competing purposes of the rent-control laws." Id. at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789. For the court's articulation of the purposes underlying § 2204.6(d), see supra note 108 and accompanying text.

127. Braschi's likely precedential effect is further limited by its status as a plurality, rather than a majority, opinion. Braschi was a four to two decision with
The *Braschi* decision provides little support where a participant in a same-sex relationship seeks the extension of a statutory right that is expressly limited to specifically defined categories of relationships.128 According to the *Braschi* court's reasoning, a legislature makes its intent clear as to the scope of such a statute's protection by expressly designating the relationships covered.129 Where the designated relationships are unambiguously defined, judicial construction of such terms would be outside of a court's authority.130

Additionally, the outcome of even a factually similar case arising under section 2204.6(d) is uncertain after *Braschi* due to the plurality's lack of guidance as to how its analysis is to be applied.131 Although the one judge concurring in result only. Chief Judge Wachtler took no part in the decision. *Braschi*, 74 N.Y.2d at 223, 543 N.E.2d at 61, 544 N.Y.S.2d at 796.

128. An example of such a statutorily created right is a cause of action for wrongful death. Some state wrongful death statutes designate the relationships qualifying for the statute's protection using terms such as "spouse" or "child" which, unlike family, have unambiguous legal meanings. See, e.g., Mo. ANN. STAT. § 537.080 (Vernon 1988) (only deceased's spouse, children, father or mother, or if no eligible person in those categories, brother or sister of deceased or their descendants may recover under state's wrongful death statute); 42 PA. CONS. STAT. ANN. § 8301(b) (Purdon 1982) (only spouse, children or parents of deceased person permitted to recover under state's wrongful death statute).

129. *Braschi*, 74 N.Y.2d at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. The court stated that "where a problem as to the meaning of a given term arises, a court's role is not to delve into the minds of legislators, but rather to effectuate the statute by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature." Id. (emphasis added) (citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-40 (1947)). The *Braschi* plurality decided that in construing § 2204.6(d) it was "reasonable to conclude that, in using the term 'family,' the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics." Id. at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

130. The doctrine of separation of powers limits the power of a court when construing statutory language. As Supreme Court Justice Frankfurter pointed out, "judges are expected to refrain from legislating in construing statutes," because "[i]n a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 555, 545 (1947).

131. There are other indications that future cases involving the status of same-sex couples under § 2204.6(d) may be decided differently than *Braschi*. The first indication is found in the stance of Judge Bellacosa's concurring opinion, which was expressly limited to the result reached under the facts of the instant case. Judge Bellacosa explained the basis of his concurring opinion as follows:

> My vote to reverse and remit rests on a narrower view of what must be decided in this case than the plurality and dissenting opinions deem necessary.

> The issue is solely whether petitioner qualifies as a member of a "family".... The particular anti-eviction public policy enactment is fulfilled by affording the remedial protection to this petitioner on the facts advanced on this record.... *Braschi*, 74 N.Y.2d at 214, 543 N.E.2d at 55-56, 544 N.Y.S.2d at 790-91 (Bellacosa, J., concurring) (emphasis added). For a discussion of Judge Bellacosa's...
plurality concluded that a case-by-case approach to the determination of family-member status is necessary, it failed to provide sufficient guidelines as to the future application of its analysis. Where, as here, a court construes the definition of a statutory term, clear guidelines are needed to promote consistency and certainty in the definition's application. The plurality attempted to provide such guidelines by listing several factors to be considered when analyzing a relationship for the determination of family status. The court, however, provided little guidance as to how the factors should be applied in factual situations other than those present the instant case. The plurality concluded that it is the "totality of the relationship" which should control and that the presence or absence of one or more of the listed factors should not be dispositive. Thus, Braschi failed to establish minimum standards which must be met before a relationship qualifies as "family" under section 2204.6(d).

Had the plurality based its decision on constitutional grounds, the decision would have had far greater impact. A ruling based on the equal protection clause of either the United States Constitution or the New York state constitution would have shifted the focus of the analysis away from the specific language of the statute. Under equal protection analysis, the statutory language becomes irrelevant if the plaintiff proves that a same-sex relationship is equivalent to a statutorily protected relationship and that there is no rational basis for denying the statute's protection to same-sex relationships. If the plaintiff suc-

concurring opinion, see supra notes 122-24 and accompanying text. The concurring opinion, however, gave no indication of which facts Judge Bellacosa considered controlling, other than the length of Braschi's cohabitation with Blanchard. Braschi, 74 N.Y.2d at 215, 543 N.E.2d at 56, 544 N.Y.S.2d at 791 (Bellacosa, J., concurring). The second indication is the abstention of Chief Judge Wachtler from the Braschi decision. Id. at 223, 543 N.E.2d at 61, 544 N.Y.S.2d at 796. Chief Judge Wachtler and Judge Bellacosa may well be the deciding votes in future decisions.

132. For a discussion of the factors outlined by the court, see supra note 113 and accompanying text.

133. The only guidance provided by the court was contained in its statement that "a court examining [the facts in Braschi] could reasonably conclude that these men were much more than mere roommates." Braschi, 74 N.Y.2d at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

134. Id.


136. For the text of both clauses and a discussion of equal protection analysis, see supra note 78.

ceeds in proving both points, a court may extend the statutory protection to same-sex relationships regardless of specific statutory language to the contrary. If the court declines to extend the statutory protection under the present wording of the statute, it must declare the statute constitutionally invalid. Any statute subsequently enacted to extend the same benefit would have to be worded broadly enough to encompass same-sex relationships.

In Braschi the statutorily protected relationship was "family." Braschi proved a family relationship with the deceased tenant. Additionally, the plurality implicitly discounted the need for objective certainty as to the scope of the regulation's protection and so could have concluded that there was no rational basis for denying such protection to Braschi. Thus, a decision based upon equal protection grounds was possible and would have provided precedent for future use by courts in determining that there is no rational basis for denying other statutory rights to same-sex couples. Therefore, a decision based upon equal protection analysis, rather than statutory construction, would have provided greater support for future plaintiffs seeking statutory protection for same-sex relationships in the judicial system. Such a decision may have had a further impact—on the legislative process itself. Faced with the prospect of invalidation of future legislation on equal protection grounds, legislatures might have been inclined to consider extending the benefit of such legislation to same-sex couples.

It is likely that the Braschi decision will lead to further litigation as landlords of rent-controlled apartments and parties seeking protection from eviction under section 2204.6(d) force the courts to determine the minimum standards necessary to qualify as "family" under the Braschi definition. Due to the lack of guidance in the Braschi opinion it will be

138. See, e.g., Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring) ("Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare [the statute] a nullity . . . or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."). In such a case, the court is engaging in a "saving construction" of the statute. See L. Tribe, American Constitutional Law 1036-37 (2d ed. 1988). Courts will generally construe a statute in such a way as to avoid invalidating it on constitutional grounds. See id. at 72 n.21 (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., dissenting)).

139. Such litigation appears likely in view of the economic incentives to litigate. Landlords have a strong economic incentive for wanting to regain possession of a rent-controlled apartment. Upon the termination of a rent-controlled tenancy, if there is no qualified successor to the tenancy under § 2204.6(d), the rent control ends and the apartment becomes subject to rent stabilization. Braschi, 74 N.Y.2d at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. Under rent stabilization, a landlord has greater control over the regulated premises, including the amount of rent to be charged. Id. at 216, 543 N.E.2d at 57, 544 N.Y.S.2d at 792. Residents of rent-controlled apartments have strong economic incentive to litigate as well. The rent control system imposes strict limits on the amount of rent to be charged for a controlled apartment. Id. at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. Additionally, affordable, available apartments are virtually
difficult for either party to accurately assess his chances of success.

IV. RECOMMENDATION AND CONCLUSION

The difficulties encountered by the Braschi court in formulating a workable analysis of a “family” relationship are not surprising due to the subjective, intangible and unquantifiable qualities of such a relationship. It is submitted that a consistent standard for case-by-case analysis of relationships to determine family status under section 2204.6(d) is not possible due to the nature of the family relationship. Even if a case-by-case analysis capable of being consistently applied could be developed, such an approach would lack the objective certainty that is the main advantage of the traditional formulation of family (those related by blood, marriage or adoption). As pointed out by Judge Simons’ dissent, such certainty is desirable to protect both the interest of the landlord in regaining possession of a rent-controlled apartment and the apartment dweller’s interest in protection from eviction. Certainty is also needed to prevent an undue burden on the courts from the excessive litigation likely to result from Braschi.

The formation of a definition of family for the purposes of protection from eviction is best left to the Division of Housing and Community Renewal (“DHCR”), the New York City agency charged by the state legislature with implementing New York City’s rent control system. DHCR promulgates the rent control regulations, including section 2204.6(d).

One possible approach available to DHCR is the establishment of a “domestic partnership” registration system. Under such a system, nonexistent in New York City at this time. See Note, All in the Family: Succession Rights and Rent-Stabilized Apartments, 53 BROOKLYN L. REV. 213, 213 (1987) (unofficial vacancy rate for N.Y.C. apartments estimated to be minus one percent). These difficulties are furthered by the Supreme Court’s inability or unwillingness to fashion a conclusive and comprehensive definition of “family.” See supra note 35 and accompanying text.

It is further suggested that it is inherently unfair to force members of same-sex couples to reveal intimate details of their private lives in court to prove the close family relationship which is presumed to exist between married couples.

Braschi, 74 N.Y.2d at 218, 543 N.E.2d at 58, 544 N.Y.S.2d at 793 (Simons, J., dissenting).

See supra note 139 and accompanying text.

Braschi, 74 N.Y.2d at 219, 543 N.E.2d at 59, 544 N.Y.S.2d at 794. The powers of the DHCR are set forth at N.Y. UNCONSOL. LAW § 8584 (McKinney 1987).

See 9 New York City Rent and Eviction Regulations § 2100.1, N.Y. UNCONSOL. LAW (McKinney 1987).

A similar domestic partnership registration system was implemented by the City of Berkeley, California, although for a different purpose. For a discussion of Berkeley’s domestic partnership ordinance, see supra note 10. Although Berkeley’s system has not met with much success, there is a crucial difference involved in a registration system for rent control purposes. The City
named tenants of rent-controlled apartments and their cohabiting partners would be required to file an affidavit with the agency in order to qualify the cohabiting partner for protection from eviction under section 2204.6(d). The affidavit would set forth the cohabiting couple's statement that they satisfy the requirements of emotional and financial interdependency as set forth in Braschi. The cohabiting partner would then automatically come under the protection of section 2204.6(d) with no need for a judicial determination of the status of the relationship. The landlord would necessarily be able to challenge the nature of the relationship as set forth in the affidavit. Such a challenge would preferably begin with an administrative hearing held by the DHCR, rather than in a judicial setting. The outlined registration system would thus minimize both the cost and delay involved in a judicial proceeding and free the court from an undue burden of cases.

The proposed approach to determination of family member status under section 2204.6(d) would retain the flexibility of the case-by-case approach utilized by the plurality in Braschi. Additionally, it would introduce an element of certainty into the process without having to restrict family member status to those related through blood, marriage or adoption.

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of Berkeley was unable to force the city's insurance carriers to comply with the city policy of providing benefits to domestic partners. In contrast, landlords of rent-controlled apartments are subject to the regulation of DHCR, which may force compliance with a registration system. See N.Y. UNCONSOL. LAW § 8584.5(a) (McKinney 1987).

147. For a discussion of these requirements, see supra note 113 and accompanying text. Such an affidavit could be kept confidential, thus preventing the problem of disclosure of intimate details of couples' private lives necessary in a court determination of family status.

148. Without such a procedure for challenge by the landlord, a registration system such as the one described would enable tenants to create succession rights to a tenancy virtually at will.

149. In apparent response to the decision in Braschi, the DHCR promulgated the Emergency/Proposed Permanent Amendments to the New York State Rent Regulations on Succession Rights of Family Members Residing With Rent Stabilized and Rent Controlled Tenants, N.Y. St. Reg., Nov. 29, 1989, at 23-29. The proposed amendment to § 2204.6(d) defines "family member" as a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant; or any other person residing with the tenant ... who can prove emotional and financial commitment, and interdependence between such person and the tenant.

Id. at 26 (emphasis added).

The proposed amendment lists factors to be considered in determining whether the required emotional and financial commitment and interdependence existed between the tenant and the claimant. Id. The listed factors are similar to those outlined in Braschi and include the longevity of the relationship, sharing of expenses and intermingling of finances, engaging in family-type activities and
performing family functions, formalizing legal obligations and intentions toward each other through documents such as wills or personal relationship contracts and holding themselves out as family members to family, friends and society. *Id.* The proposed amendment provides somewhat greater guidance for the determination of family member status than did *Braschi* by virtue of a longer and more detailed list of factors to be considered. Like *Braschi*, however, it fails to set forth the minimum standards which must be met before achieving family member status. The proposed amendment does provide for an optional notice from the tenant to the landlord that a family member is eligible for § 2204.6(d)’s protection. The landlord, however, is provided with no administrative avenue to challenge the claimed eligibility. Thus, due to the lack of minimum standards for family member status and the absence of an administrative channel for challenges to such status, the proposed amended regulation leads to the same problems as the *Braschi* decision: a need for objective certainty as to the protected parties and the likelihood of increased litigation. The registration system proposed in this Note would, as noted above, alleviate these problems. For a discussion of the proposed registration system, see *supra* notes 146-49 and accompanying text.