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THE WEDDING BELLS HEARD AROUND THE WORLD: YEARS FROM NOW, WILL WE WONDER WHY WE WORRIED ABOUT SAME- SEX MARRIAGE?

MARK E. WOJCIK*

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If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation . . . want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the awful roar of its many waters Power concedes nothing without a demand. It never did and it never will.¹

I. INTRODUCTION

Few people can deny the social and legal importance of civil marriage as an institution. “Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”² Those words, found in a recent court decision from the Supreme Judicial Court of Massachusetts, reflect the sentiment that supports extending the protections, benefits, and duties of civil marriage to “same-sex couples”³ that have traditionally been

1. Susan Arnold, *Countdown to Gay Marriage: Massachusetts Embraces Same-Sex Civil Marriages*, PINK PAGES 27 (Winter 2004) (interview with Hillary Goodridge, lead plaintiff in the Massachusetts same-sex marriage case, who quoted these words from Frederick Douglass).

2. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003).

3. This article will generally use the terms “same-sex couples” or “same-sex marriage” rather than “gay marriage” or “homosexual marriage” to describe two men or two women who wish to marry. The term “same-sex marriage” recognizes that a marriage may be between two persons who are gay or lesbian, or between two persons who are each bisexual, or between a gay person and a person who is bisexual. *See, e.g., Goodridge*, 798 N.E.2d at 953 n.11; *Baehr v. Lewin*, 852 P.2d 44, 55 n.11 (Haw. 1993). The term also recognizes some – but not all – of the legal issues that may arise with the marriages of transgendered persons, both before and after sex change surgery. Discussions of transsexual marriage provide valuable insights on ideas and presumptions surrounding gender roles, gender equality, and the fundamental values of love and personal commitment for a happy and successful marriage. *See generally, e.g., Helen G. Berrigan, Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 TUL. J.L. & SEXUALITY 87 (2003). *See also Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001). Legal and political issues surrounding transgender marriage continue to develop in the United

denied the right to marry.⁴ The court ordered that same-sex couples in Massachusetts should have the right to marry as of May 17, 2004,⁵ the date that marks the fiftieth anniversary of the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*.⁶

The same-sex marriage debate in the United States and other countries has been characterized by a good deal of misinformation, misunderstanding, and false fears. Same-sex marriage has also been one of the most passionately debated subjects in our law, religion, politics, and culture.⁷ The debate is not only in legislatures and courtrooms, but also on the streets and in society at large.⁸ For their part, same-sex couples wonder about the hypocrisy of those who claim a need to preserve the "sanctity" of opposite-sex marriage,⁹ particularly in light of "Marriage Reality Shows"

States and other countries. See, e.g., In re Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio. App. 2003) (denying transsexual the right to marry); Rex Wockner, *Chinese Trans Gets Married*, WINDY CITY TIMES, Jan. 28, 2004, at 9. Issues arise not only in the right to marry, but also in all aspects of daily life. See, e.g., *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

4. A similar sentiment can be found in part of a court decision from Ontario:

Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.

Halpern v. Toronto (City), 172 O.A.C. 276, ¶ 5 (2003).

5. See, e.g., Frank Langfitt, *Court Says Gays Entitled to Marriage—Massachusetts Sets Stage for 1st Same-Sex Wedding*, CHI. TRIB., Feb. 5, 2004, § 1, at 1; Jennifer Peter, *Court Demands Gay Marriage – Massachusetts Opinion Says Civil Unions Won't Cut It*, CHI. SUN-TIMES, Feb. 5, 2004, at 3.

6. 347 U.S. 483 (1954). See also, e.g., Dennis W. Archer, *The Blessings of Brown*, A.B.A. J., Apr. 2004, at 8.

7. See, e.g., Karen Breslau, *A 'Wildfire' Burns On*, NEWSWEEK, Mar. 15, 2004, at 10; Michael Slackman, *Party Lines Blur as Gay Activists Take the Same-Sex Marriage Issue Front and Center*, N.Y. TIMES, Mar. 7, 2004, at 21; Stevenson Swanson, *Same-Sex Marriage Leaping Into Election*, CHI. TRIB., Feb. 15, 2004, § 1, at 1, 17; Nikki Usher, *Gays Rally for Marriage*, CHI. TRIB., Feb. 15, 2004, § 4, at 3.

8. See, e.g., Andrew Jacobs, *Gay Legislator at the Center of a Storm in Georgia*, N.Y. TIMES, Mar. 9, 2004, at A18; Lisa Neff, *U.S. House Holds Marriage Hearing*, CHI. FREE PRESS, Apr. 7, 2004, at 7; Gina Kim, *Gay Protesters Take to Street*, CHI. TRIB., Mar. 5, 2004, § 2, at 1.

9. See, e.g., Andrew Sullivan, *The Sacred and the Pop Star*, THE ADVOC., Feb. 17, 2004, at 72 ("Newt Gingrich was defending civilization against gay marriages while

on U.S. television and well-publicized marital fiascos such as the midnight spur-of-the-moment marriage of singer Britney Spears to Jason Allen Alexander (and annulment of that marriage about fifty-five hours later).¹⁰

Before there was intense national news coverage on the issue of same-sex marriage, many people wrongly believed that lawful same-sex marriage had already been available in the United States and other countries for many years.¹¹ This confusion was, perhaps, understandable, given the variety of misleading press reports about registered partnerships and same-sex marriages in other countries, reports about the legal effect of “domestic partnership registries” in various local jurisdictions in the United States, and descriptions of Vermont Civil Unions as being the functional equivalent of marriage all except in name. The confusion was perhaps also attributable to popular television shows featuring gay and lesbian characters; such shows only rarely focus on the legal difficulties regularly faced by gay and lesbian persons, such as employment discrimination, housing discrimination, or violent hate crime.¹² Finally, the public confusion may have arisen because an increasing number of same-sex couples were “getting married” in private religious ceremonies that had no legal effect, although they might be recognized by private employers and others. Despite the popular belief that same-sex marriage was already legal in the United States, the first state court decision to allow same-sex marriages was issued only in November 2003, and even that decision was stayed for 180 days until May 17, 2004.¹³

When, then, did same-sex civil marriages become legal? In 2001, the Netherlands became the first country in the world to give same-sex couples the full equivalent of rights of civil marriage available to opposite-sex couples.¹⁴ Earlier legislation came close to providing most of the important

carrying on an adulterous affair.”).

10. See, e.g., William Hageman, *Wedding Fling Leaves Nothing But Regret*, CHI. TRIB., Jan. 11, 2004, § 13, at 1; Jack B. Harrison, *Britney's Fling: Taking Marriage Seriously*, NAT'L L.J., Jan. 26, 2004, at 26.

11. See, e.g., YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 3 (U. Chicago Press 2002).

12. See, e.g., Christopher Healy, *Marriage's Bloody Backlash—Legal Victories and the Movement to Legalize Gay Marriage Have Meant an Increase in Gay Bashing*, THE ADVOC., Apr. 27, 2004, at 38, 38-40. See also *FBI Investigating Hate Mail Targeting Denver-Area Gays*, CHI. FREE PRESS, Apr. 7, 2004, at 3.

13. See *Goodridge*, 798 N.E.2d at 955.

14. See MERIN, *supra* note 11, at 56, 111. See also Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenæs, eds., 2001).

benefits and protections of civil marriage, but that earlier legislation fell short. It was, accordingly, only in 2001 that same-sex civil marriage—without any restrictions—became legal anywhere in the world, and that was then only in the Netherlands.¹⁵ Belgium followed the Netherlands in allowing same-sex civil marriage, but gay and lesbian couples married in Belgium are still prohibited from adopting children.¹⁶ Some individuals would say that Belgium has allowed same-sex marriage; others would say that Belgium has “almost” allowed same-sex marriage.

Canada was the next country to legalize same-sex marriage. In the summer of 2003, courts in British Columbia and Ontario found that the denial of marriage licenses to same-sex couples violated the Canadian Charter of Rights and Freedoms.¹⁷ (In 2004, the Quebec Court of Appeal also affirmed a lower court ruling that recognized the rights of same-sex couples to marry.¹⁸) Same-sex couples in Canada took immediate advantage of this right to marry, as did hundreds of same-sex couples from the United States and other countries that have not yet recognized same-sex marriage.¹⁹

But even where same-sex civil marriages were not recognized, progress was being made toward recognizing that same-sex couples should enjoy the rights and privileges of civil marriage. Other European nations not yet ready for full marriage had enacted Registered Domestic Partnerships that conferred most—but not all—of the important benefits and security of marriage.²⁰ Hawai’i,²¹ Vermont,²² California,²³ and, most

15. See Waaldijk, *supra* note 14.

16. *Id.*

17. See *infra* Part II G and accompanying text for a discussion of same-sex marriage decisions from Canada.

18. See, e.g., Colin Campbell, *Canada: Quebec Court Upholds Gay Marriage*, N.Y. TIMES, Mar. 20, 2004, at A5; Mike King, *Canada: Marriage Comes to Quebec, Oregon*, THE ADVOC., Apr. 27, 2004, at 20.

19. See, e.g., Alan Bayless, *Chicago Gay Couple Ties the Knot in Canada*, CHI. SUN-TIMES, Jan. 14, 2004, at 4; Justice Harvey Brownstone, *Marrying Man*, OUT, Jan. 2004, at 10 (letter from the first openly gay judge in Canada reporting personally on dozens of marriages of same-sex couples, “approximately half of whom have been Americans”).

20. See *infra* Part II B and accompanying text for a discussion of the domestic partnerships in Europe.

21. See *infra* Part II C and accompanying text.

22. See *infra* Part II F and accompanying text.

23. California enacted legislation that allows same-sex couples to register with the Secretary of State as domestic partners, and almost 20,000 couples reportedly registered in the past three years. Lisa Neff, *Partner Bill Passes [California] Senate*, CHI. FREE PRESS, Sept. 3, 2003, at 1, 8. Many same-sex couples in California did not register, however; the 2000 census figures showed that there were 92,138 same-sex couples in California. *Id.* The United States Census also showed that California had the highest number of same-sex

recently, New Jersey²⁴ offer versions of Civil Unions or Domestic Partnership that portend to confer the benefits of marriage but also fall short in their delivery of legal rights and protections. Elsewhere in the United States, local Domestic Partnership Registries in places such as Cook County, Illinois, offer a mechanism for societal and private recognition of same-sex relationships,²⁵ but the registries confer no real enforceable legal

couples in the United States. *Id.* Most recently, California further expanded the rights available to allow domestic partners to make funeral arrangements for a partner; to make a partner responsible for sharing the other's debts; to recognize a partner's community property rights if the partners break up; to allow a partner to seek child custody and support payments if the partners separate; and to allow a partner to refuse to testify against the other in court. *Id.* The domestic partner benefits now offered in California still fall short of marriage, but they provide legal rights in an influential American jurisdiction. A lawsuit to challenge the new California legislation failed to win a preliminary injunction that would have blocked implementation of the domestic partner law, an indication that the litigation may also be unsuccessful in challenging the new state law. *California Partner Bill Faces Suit*, CHI. FREE PRESS, Jan. 7, 2004, at 7. Legislation was also introduced in California to allow same-sex couples to obtain marriage licenses. See Lisa Neff, *California Marriage License Bill Drafted*, CHI. FREE PRESS, Jan. 21, 2004, at 10. The introduction of that bill, however, was quickly followed by the marriages of thousands of same-sex couples in San Francisco. See *infra* note 27 and accompanying text.

24. See *infra* Part III and accompanying text.

25. On October 1, 2003, Cook County, Illinois, began to allow same-sex couples to register as domestic partners. See, e.g., Bonnie Miller Rubin, *Gays, Lesbians View Registry as Progress—Cook County's Enrollment of Same-Sex Couples 'A Step Forward, Not Completion of the Journey'*, CHI. TRIB., Oct. 1, 2003, § 1, at 1; COOK COUNTY, ILL. ORDINANCES, Domestic Partnership Registry Ordinance, available at <http://www.thirdcoastmarketing.com/CookDomesticPartners.doc> (visited April 12, 2004). The county ordinance, introduced by Cook County Commissioner Michael Quigley, requires that at least one of the partners live or work in Cook County. COOK COUNTY, ILL. ORDINANCES, Domestic Partnership Registry Ordinance, available at <http://www.thirdcoastmarketing.com/CookDomesticPartners.doc> (visited April 12, 2004). Couples register with the Bureau of Vital Records located in the Cook County Building in Chicago. *Id.* The couples must present valid identification and pay a thirty-dollar fee. *Id.* The registry provides no formal legal benefits or protections for couples that register, but private employers and other non-governmental organizations can voluntarily recognize the partnership for various purposes. See *id.* For example, a private employer may accept the certificate of domestic partnership as a way of establishing eligibility for health insurance coverage or other benefits for a same-sex partner. The Cook County Ordinance does not allow opposite-sex partners to register; opposite-sex partners can marry, however, and receive many more benefits than those available to same-sex couples that utilize a domestic partnership registry. There was a question as to whether providing a registry only for same-sex couples would be discriminatory against opposite-sex couples. The legality of limiting the registry to same-sex couples has support in a federal court decision that upheld a City of Chicago ordinance that provided benefits for the qualified same-sex domestic partner of a city employee. See CHI. MUNICIPAL CODE § 2-152-072. The United States Court of Appeals for the Seventh Circuit found that the city ordinance was not discriminatory against heterosexuals, because opposite-sex partners had the option to marry and obtain the same benefits. *Irizarry v.*

benefits on the couple, particularly when the couples who register travel outside of the area where the registry is located.

But as important as the new domestic partnership registries may be as a local government's recognition of a same-sex union, their potential significance was soon dwarfed by the acts of local governments that began to issue marriage licenses to same-sex couples, even though there were significant questions about the legal validity of those acts.²⁶ In a short burst of activity that started in February 2004, thousands of same-sex couples were married in a frenzy of wedding ceremonies in California,²⁷ New

Board of Educ. of the City of Chicago, 251 F.3d 604, 606 (7th Cir. 2001).

Although Illinois has made some progress on the local level toward protecting the rights of gay, lesbian, bisexual, and transgendered persons, it is similar to other states that do not yet provide statewide protections against based on sexual orientation and gender identity. See, e.g., Gary Barlow, *Capital Clout--GLBT Rights Advocates Lobby in Springfield*, CHI. FREE PRESS, Apr. 9, 2003, at 1; Gary Barlow, *Illinois Senate Fails to Act on Rights Bill*, CHI. FREE PRESS, Nov. 26, 2003, at 1. Illinois has come close to passing nondiscrimination legislation, however, even as recently as November 2003. See, e.g., Tracy Baim, *[Governor] Puts Gay-Rights Law on Frontburner*, WINDY CITY TIMES, Nov. 12, 2003, at 1; Gary Barlow, *[Governor] Pushes SB101*, CHI. FREE PRESS, Nov. 12, 2003, at 1. In the week that the nondiscrimination legislation should have come to a vote in the Illinois Senate, however, a vote on the legislation was postponed because of an announcement of a court decision from Massachusetts allowing same-sex marriage. See, e.g., Ray Long & John Chase, *Gay-Rights Proposal Shelved in Legislature—Democrats Cite Marriage Backlash*, CHI. TRIB., Nov. 20, 2003, § 1, at 1; *Statewide LGBT Human Rights Bill Stalls in Illinois Senate*, ILL. GENDER ADVOC. [NEWSL.], Dec. 2003, at 1.

26. See, e.g., Lisa Leff, *87 Gay Couples Wed in San Francisco—Mayor Defies State Law Defining Marriage as Union of Man, Woman*, CHI. SUN-TIMES, Feb. 13, 2004, at 30 (reporting that San Francisco Mayor Gavin Newsom and other city officials had begun performing marriage ceremonies for same-sex couples despite an earlier California ballot initiative that defined marriage as the union between a man and a woman); Bob Roehr, *1000s Marry in San Francisco*, WINDY CITY TIMES, Feb. 18, 2004, at 1.

27. See, e.g., Lisa Leff, *87 Gay Couples Wed in San Francisco—Mayor Defies State Law Defining Marriage as Union of Man, Woman*, CHI. SUN-TIMES, Feb. 13, 2004, at 30 (reporting that San Francisco Mayor Gavin Newsom and other city officials had begun performing marriage ceremonies for same-sex couples despite an earlier California ballot initiative that defined marriage as the union between a man and a woman). See also Carolyn Marshall, *More than 50 Gay Couples Are Married in San Francisco*, N.Y. TIMES, Feb. 13, 2004, at A19; Jane Meredith Adams, *Marriage Mania in Calif.*, CHI. TRIB., Feb. 14, 2004, § 1, at 11; Dean E. Murphy, *Bid to Stop San Francisco From Letting Gays Marry*, N.Y. TIMES, Feb. 14, 2004, at A8; *Gay Couples Tie Knot By Dozens*, CHI. TRIB., Feb. 16, 2004, § 1, at 8; Bob Roehr, *1000s Marry in San Francisco*, WINDY CITY TIMES, Feb. 18, 2004, at 1; Dean E. Murphy, *San Francisco Sues State Over Same-Sex Weddings*, N.Y. TIMES, Feb. 20, 2004, at A12; Mike McKee, *California – State Justices May Wait and See on Gay Marriage*, NAT'L L.J., Mar. 1, 2004, at 7. The marriages were halted in March. See Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1; Jane Meredith Adams, *California Supreme Court Halts Same-Sex Marriages*, CHI. TRIB., Mar. 12, 2004, § 1, at 13; Scott Morrison, *California Same-Sex Marriages – Court Order*

York,²⁸ and Oregon,²⁹ and even a small number in New Mexico.³⁰ There were protests in other jurisdictions that refused to follow suit by also issuing marriage licenses.³¹ Although the gay and lesbian community celebrated and hailed the officials who did issue the marriage licenses to same-sex couples,³² some others thought that the actions were counter-productive and harmful to the goal of eventual recognition of full rights of same-sex marriage.³³ And although the legal status of those marriages may later be questioned in court and used as evidence of a need for a federal amendment to ban same-sex marriage,³⁴ there were places where the

Leaves Gay Couples in Legal Limbo, FIN. TIMES, Mar. 13-14, 2004, at 2.

28. See, e.g., Sumathi Reddy, *Gay Marriage Debate Moves to N.Y. – Green Party Mayor Unites 20 Couples*, CHI. TRIB., Feb. 28, 2004, § 1, at 11; *Mayor: Same-Sex Weddings to Go On*, CHI. TRIB., Feb. 29, 2004, § 1, at 11; Thomas Crampton, *Gay Weddings Bring Division to an Upstate Village*, N.Y. TIMES, Mar. 1, 2004, at A21; *Gay Marriages Bring Charges – Mayor of Village in New York Faces 19 Criminal Counts*, CHI. TRIB., Mar. 3, 2004, § 1, at 9; Robert D. McFadden, *With Polite Refusals, Same-Sex Marriage Hits New York*, N.Y. TIMES, Mar. 5, 2004, at A19; Michael Hill, *Judge Calls Halt to Gay Marriages in N.Y. Village*, CHI. TRIB., Mar. 6, 2004, § 1, at 9. Although New York may not yet perform same-sex marriages, lawful same-sex marriages from other jurisdictions may be recognized there. See Marc Santora, *New York's Laws Said to Support Some Gay Unions*, N.Y. TIMES, Mar. 4, 2004, at A1.

29. More than 2,500 same-sex couples married in Multnomah County, Oregon, which began issuing marriage licenses on March 3, 2004. See, e.g., Thomas Alex Tizon & Josh Getlin, *Gay Marriages Spread to Northwest*, CHI. TRIB., Mar. 4, 2004, § 1, at 12; Matthew Preusch, *Oregon County, With Portland, Offers Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2004, at A22; Terry Bean, *Only in Oregon*, THE ADVOC., Apr. 27, 2004, at 10; John Caldwell, *Portland's Lifetime Commitment, Oregon*, THE ADVOC., Apr. 27, 2004, at 32; Bob Roehr, *Wedding Bells Ring in Portland*, WINDY CITY TIMES, Mar. 10, 2004, at 1, 6. See also Oregon: *Suit on Same-Sex Marriages*, N.Y. TIMES, Mar. 6, 2004, at A9.

30. See, e.g., *New Mexico Attorney General Asks Court to Intervene in Marriage Fight*, CHI. FREE PRESS, Apr. 7, 2004, at 7 (reporting that marriage licenses were issued to 66 same-sex couples on February 20, 2004).

31. See, e.g., Mickey Ciokajlo & Gina Kim, *Orr Won't License Gay Marriages*, CHI. TRIB., Mar. 3, 2004, § 2, at 3 (reporting that Cook County would not follow the lead of San Francisco and issue marriage licenses to same-sex couples). See also Steve Patterson, *Gays Rip Denial of Marriage Licenses*, CHI. SUN-TIMES, Mar. 5, 2004, at 8. Chicago Mayor Richard Daley spoke in favor of same-sex marriage. See Gary Washburn & Dan Mihalopoulos, *Daley Supports Gay Marriages*, CHI. TRIB., Feb. 19, 2004, § 2, at 1.

32. See, e.g., Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES, Feb. 19, 2004, at A14.

33. See, e.g., Steve Chapman, *Wrong Way to Achieve Gay Marriage*, CHI. TRIB., Mar. 7, 2004, § 2, at 9 (comparing gay rights supporters who take the law into their own hands to the discredited former Chief Justice of Alabama, Roy Moore, who took it upon himself to install in the courthouse a replica of the 10 commandments, in disregard of the U.S. Constitution). See also Steve Chapman, *Compromise is in Order on Gay Marriage*, CHI. TRIB., Feb. 8, 2004, § 2, at 9.

34. See, e.g., Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*,

marriages would be recognized.³⁵ One county in Oregon was so confused by the legality of what they could or couldn't do under current state law regarding same-sex marriage that they suspended the issuance of marriage licenses altogether to any couple, same-sex or opposite-sex, until there was greater legal certainty on the issue.³⁶

Opponents of same-sex marriage have sounded a national alarm, claiming that the marriages of same-sex partners will destroy traditional marriage and many other values that society holds sacred. Many opponents base their arguments primarily on grounds of religion and tradition.³⁷ They argue that marriage must be recognized only between a man and a woman because marriage has always been between only a man and a woman.³⁸ They argue that the state should not recognize same-sex marriages because homosexuality is sinful and perverse.³⁹ They see the main social and biological purpose of marriage as the procreation of children,⁴⁰ and argue that opposite-sex couples are more likely to have children, or more children, than same-sex couples.⁴¹ They also see the "optimal" situation

N.Y. TIMES, Feb. 25, 2004, at A1; Bob Kemper, *Bush: Protect Marriage – Calls for Constitutional Amendment to Bar Gay Couples From Marrying*, CHI. TRIB., Feb. 25, 2004, § 1, at 1. See also Carl Hulse, *Senate Hears Testimony on Gay Marriage Amendment*, N.Y. TIMES, Mar. 4, 2004, at A22.

35. See [Seattle, Washington] *City Workers' Same-Sex Spouses to Get Benefits*, CHI. TRIB., Mar. 8, 2004, § 1, at 16; *San Jose [California] Recognizes Gay Marriages*, CHI. TRIB., Mar. 10, 2004, § 1, at 16.

36. See Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8.

37. See, e.g., Dahleen Glanton, *In South, Issue of Gay Marriage Exposes Hate and Fear*, CHI. TRIB., Apr. 8, 2004, § 1, at 1, 18 ("While many Christians are calling for tolerance, some evangelicals see homosexuality and same-sex marriage as an assault on the most sacred values of their religion."); Elisabeth Bumiller, *Why America Has Gay Marriage Jitters*, N.Y. TIMES, Aug. 10, 2003, § 4, at 1 ("[M]ost Americans consider marriage essentially a religious institution intended explicitly for a man and a woman"); Dean E. Murphy, *Gay Marriage Licenses Create a Quandary for the Clergy*, N.Y. TIMES, Mar. 6, 2004, at A7 (describing a same-sex couple who had been married in San Francisco, who attended a service at the Santa Cruz Bible Church and later received messages on their answering machine such as "We will stone you" and "Jesus will stone you.").

38. See, e.g., Charles Krauthammer, *Courts Should Stay Out of the Gay Marriage Arena*, CHI. TRIB., Mar. 1, 2004, § 1, at 17 ("Marriage has been around for, oh, 5,000 years. In every society, in every place, in every time it has been defined as an opposite-sex-union).

39. See, e.g., MERIN, *supra* note 11, at 64.

40. See, e.g., Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 232 (2004) ("Marriage arises in every known society out of the need to manage the biological reality that sex between men and women produces children, the twin social realities that societies need babies in order to survive, and babies need mothers and fathers.").

41. See Goodridge, 798 N.E.2d at 951.

for children as having a “traditional family” with a mother and father, and that the purpose of civil marriage is to provide a framework for this optimal situation.⁴² Opponents of same-sex marriage argue that state recognition of same-sex unions would undermine the “sanctity of marriage” and “demoralize[] society.”⁴³ They see same-sex marriage as being harmful to children, and as something that will lead to crime, illegal drugs, and disease.⁴⁴

There are also many opponents of same-sex marriage who oppose any sort of legal protections whatsoever for gay, lesbian, bisexual, and transgendered individuals.⁴⁵ They believe that the GLBT community is not “a deserving minority” that needs or is even worthy of “special civil rights protections.”⁴⁶ Because some portions of the Bible, the Book of Mormon, and other religious texts have been interpreted as condemning homosexuality, these opponents believe that law – as a reflection of morality expressed in religious texts – should deny recognition to any form of homosexual relationships.⁴⁷

Although many opponents of same-sex marriage reject any recognition of same-sex unions in any form,⁴⁸ some of the opponents of

42. See, e.g., *Ex parte J.M.F.*, 730 So.2d 1190, 1196 (Ala. 1998).

43. William B. Rubenstein & R. Bradley Sears, *Toward More Perfect Unions*, N.Y. TIMES, Nov. 20, 2003, at A31. See also William B. Rubenstein, *Hiding Behind the Constitution*, N.Y. TIMES, Mar. 20, 2004, at A27.

44. See, e.g., William B. Rubenstein & R. Bradley Sears, *Toward More Perfect Unions*, N.Y. TIMES, Nov. 20, 2003, at A31; MERIN, *supra* note 11, at 65.

45. See, e.g., Nancy J. Knauer, *Science, Identity, and the Construction of Narrative*, 12 TUL. J.L. & SEXUALITY 1, 47 (2003).

46. *Id.* at 47 (citing arguments of anti-gay organizations). Professor Knauer also notes that “[b]y drawing often crude analogies to African-Americans, pro-family organizations attempt to establish that gay men and lesbians are undeserving of civil rights protections based on sexual orientation, and they are actually demanding special rights, not equal rights.” *Id.*

47. ROBERT A.J. GAGNON, *THE BIBLE AND HOMOSEXUAL PRACTICE: TEXTS AND HERMENEUTICS* (2002). See *Leviticus* 18:22 (King James) (“Thou shalt not lie with mankind as with womankind: it is abomination.”); *The LDS Church & Homosexuality: Past and Present* at http://www.religioustolerance.org/hom_lds.htm (visited April 12, 2004); *Islam and Homosexuality* at http://www.religioustolerance.org/hom_isla.htm (visited April 12, 2004); but cf. Matthew Preusch & Laurie Goodstein, *Jury of Methodists Clears Gay Minister Over Relationship*, N.Y. TIMES, Mar. 21, 2004, § 1, at 1, 14 (describing “several eminent Methodist legal scholars and experts in Scripture, who argued that the Book of Discipline and the Bible contain unclear and contradictory passages about homosexual relationships.”).

48. The “slippery slope” argument against even the most benign recognition of a same-sex relationship – or even any form of non-discrimination legislation – argues that any positive step for homosexuals will lead to a situation where churches and other religious institutions are forced to perform same-sex marriage ceremonies, where all landlords must

same-sex marriage may favor “domestic partnerships,” “civil union” registries, or other forms of legal protection as an acceptable compromise or substitute for marriage.⁴⁹ They recognize that granting some recognition to same-sex couples is either the right thing to do or the politically expedient thing to do to avoid a court decision or legislation that might extend traditional marriage to same-sex couples.⁵⁰ These individuals favoring some sort of social compromise are, ostensibly, not opposed to state recognition of a same-sex union in principle, but they oppose calling such a union or partnership a “marriage” because they believe that doing so will weaken or trivialize the institution of traditional opposite-sex marriage.⁵¹

Proponents of same-sex marriage argue that same-sex couples should be entitled to the same benefits (and burdens) of marriage as opposite-sex couples, and that it is a denial of due process, equal protection, and fundamental fairness to deny marriage licenses to same-sex couples. Under the present law, even the existence of an “acceptable” substitute for marriage, such as a civil union or registered partnership, is inadequate. The “separate but equal” arrangements that are allegedly equivalent to civil marriage still deny the full rights of marriage. As the *Goodridge* court recognized, “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”⁵² Arrangements that do not provide the full benefits of marriage necessarily fall short of full equality and equal protection.

rent to gay and lesbian couples, where companies must have “affirmative action programs” to hire gay and lesbian employees, and other similar fears. The slippery slope argument against same-sex marriage also sometimes warns that the next changes to marriage will be to recognize polygamous marriages, incestuous marriages, and marriages between people and their pets. The arguments are seldom serious, but are raised in hopes of convincing people that there is a danger to granting any form of recognition to same-sex couples or to individuals who are gay, lesbian, bisexual, or transgender.

49. See, e.g., Don Browning & Elizabeth Marquardt, *A Marriage Made in History?*, N.Y. TIMES, Mar. 9, 2004, at A27 (“Rather than expanding the status and privileges of marriage to same-sex couples and then gradually to other kinds of caring relationships, as logic would soon require, society should find alternative ways of meeting the needs not only of same-sex couples but also interdependent friends, and dependent but unmarried kin. Tax benefits, legal adoption, welfare transfers, and more refined and accessible legal contracts should all be used to meet these needs – but not the institution of marriage itself.”).

50. See, e.g., Pam Belluck, *How Massachusetts Left Gay Marriage at the Altar*, N.Y. TIMES, Feb. 14, 2004, at A8.

51. See, e.g., Jonathan Goldberg-Hiller, “*Making a Mockery of Marriage*” – *Domestic Partnership and Equal Rights in Hawai’i*, in *SEXUALITY IN THE LEGAL ARENA* 113, 115 (Carl Stychin & Didi Herman, eds., Anthlone Press 2000).

52. *Goodridge*, 798 N.E.2d at 955. See *infra* Part II I and accompanying text for a discussion of particular benefits identified in the *Goodridge* decision.

Some courts have now begun to reject arguments against same-sex marriage and to accept the arguments that same-sex couples should have the same right to marry as opposite-sex couples.

Courts that have considered the argument that the main purpose of marriage is procreation recognize that many opposite-sex married couples do not have children and never even intend to have children,⁵³ while at the same time many same-sex couples do have children from previous marriages, artificial insemination, and adoption. If married couples are not required to have children, the purpose of marriage cannot only be to have children. "Persons do not marry solely for the purpose of raising children."⁵⁴

Courts also distinguish civil marriage from religious marriage.⁵⁵ In a country that separates church from state,⁵⁶ the grant or denial of a marriage license for a civil marriage ceremony cannot force any religious group to perform a religious ceremony for the holders of that license.⁵⁷ It should also be noted that recent religious developments – such as the appointment of openly gay clergy – have changed the minds of many people about

53. *E.g.*, *Adams v. Howerton*, 486 F. Supp 1119, 1124-25 (C.D. Cal., 1980) (recognizing that opposite-sex couples are not required to prove or declare willingness to procreate in order to marry); *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (noting that "[I]t is equally undisputed that many *opposite-sex* couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children.").

54. *Halpern v. Toronto (City)*, 172 O.A.C. 276, at ¶ 99 (2003).

55. *See, e.g.*, *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

56. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

57. *See, e.g.*, *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) ("the State may not interfere . . . with the decision of any religion to refuse to perform religious marriages of same-sex couples"); *Baker v. State*, 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) ("This case concerns the secular licensing of marriage."). *See also* *EGALE Canada, Inc. v. Canada (Attorney General)*, 13 B.C.L.R. (4th) 1, para. 181 (2003) ("the issue before us concerns civil marriage only and the conclusion [to allow same-sex marriage] does not displace the rights of religious groups to refuse to solemnize same-sex marriages that do not accord with their religious beliefs."); *Halpern v. Toronto (City)*, 172 O.A.C. 276, at para. 53 (2003) ("In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage."). The issue of whether a church might be ordered to perform a same-sex wedding might perhaps arise in a country with a state-sponsored church, but any requirements to perform a same-sex marriage would be under national laws of the particular country.

issues of religion and homosexuality.⁵⁸ Some religious groups welcome and embrace gay and lesbian persons; they also perform same-sex commitment ceremonies.⁵⁹

Courts also reject the argument that governments should not recognize same-sex marriages because society traditionally has not accepted same-sex marriage.⁶⁰ Three reasons support this rejection of an argument that society must deny recognition to same-sex marriage because it previously rejected same-sex marriage. First, to give weight to an argument based only on “tradition” would mean that we should never have allowed interracial or interfaith marriages.⁶¹ It would also mean that we should still allow slavery, that we should deny women the right to vote, and that we should repeal a range of other social advances that have been hard-won over the years. Second, “to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law.”⁶² A law enacted on the basis of hate and animus will not withstand constitutional scrutiny. Third, recent anti-discrimination legislative advances on the state and local level,⁶³ state hate crime legislation,⁶⁴ and other statutes or court decisions allowing adoption by same-sex couples⁶⁵ (except in Florida⁶⁶ and

58. See, e.g., *Episcopalians Urged to Be Tolerant on Homosexuality*, CHI. TRIB., Jan. 30, 2004, § 2, at 10.

59. See, e.g., Dean E. Murphy, *Gay Marriage Licenses Create a Quandary for the Clergy*, N.Y. TIMES, Mar. 6, 2004, at A7 (noting that some religious institutions have been performing same-sex blessings “for many years”).

60. E.g., *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003).

61. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948); *Goodridge*, 798 N.E.2d at 958. See also David E. Rosenbaum, *Race, Sex and Forbidden Unions*, N.Y. TIMES, Dec. 14, 2003, § 4, at 4 (“As a political, legal and social issue, same-sex marriage seems to be now where interracial marriage was about 50 years ago.”).

62. *Baker*, 744 A.2d at 885.

63. E.g., N.M. STAT. ANN. § 28-1-7 (Michie 1978), amended by 2003 N.M. Adv. Legis. Serv. 3513. Federal legislation known as the Employment Non-Discrimination Act (ENDA) is unlikely to pass in the current Congress or to be signed by the current U.S. president.

64. E.g., 720 ILL. COMP. STAT. 5/12-7.1 (2002). A federal hate crimes bill is stalled in the U.S. Senate. See Lisa Neff, *Senate Feud Stalls Hate Crimes Bill*, CHI. FREE PRESS, Apr. 7, 2004, at 3.

65. E.g., *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

66. Florida prohibits gay and lesbian couples – and individuals – from adopting. The Florida statute provides that “No person eligible to adopt under this statute may adopt if that person is a homosexual.” See *Lofton v. Dep’t of Children and Family Serv.*, 358 F.3d 804 (11th Cir. 2004) (affirming constitutionality of 1977 Fla. Laws, ch. 77-140, § 1, FLA. STAT. ANN. § 63.042(3) (West 1997)). See also Lisa Neff, *Florida Adoption Ban Upheld*,

Mississippi),⁶⁷ showed that there was a shift from the historical discrimination against gay and lesbian persons.⁶⁸ Similar shifts toward acceptance are also evident in how private companies treat gay and lesbian employees and customers.⁶⁹

The recognition of lawful same-sex marriage in the United States raises many social, legal, and political issues, particularly in a country with a federal government structure that rejects any recognition whatsoever of same-sex civil marriage.⁷⁰ The debate is, not surprisingly, complicated and contentious, involving the highest levels of government,⁷¹ in society at large, and even within the lesbian and gay community itself.⁷² Some of the legal issues that will soon arise include: whether the denial of same-sex marriage is a denial of due process or equal protection of the laws within a

CHI. FREE PRESS, Feb. 4, 2004, at 1; *Gays Trying to Adopt Lose Case in Florida – State Claimed Right to Require Marriage*, CHI. TRIB., Jan. 29, 2004, § 1, at 8.

67. Mississippi statutes prohibit same-sex couples from adopting. MISS. CODE ANN. § 93-17-3(2) (Supp. 2003) (“Adoption by couples of the same gender is prohibited.”); *S.B. v. L.W.*, 793 So.2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring).

68. See *Baker*, 744 A.2d at 885.

69. Associated Press, *Survey: Most U.S. Companies Protect Gay Rights*, NEWSDAY, Aug. 14, 2002, at A47; Rebecca Carroll, *Working Conditions for Gays and Lesbians Called Better; An Advocacy Group Said It Found Improvements from Last Year at One-Third of the Firms Surveyed*, THE PHILADELPHIA INQUIRER, Aug. 26, 2003, at C02. See also Human Rights Campaign Foundation, *21 Companies Score 100 Percent on Second Annual HRC Corporate Equality Index* (Aug. 5, 2003) at http://www.hrc.org/Template.cfm?Section=Corporate_Equality_Index&CONTENTID=10124&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

70. Many of the benefits and protections of marriage are available only at the federal level. Even where a state recognizes same-sex marriage, the married couple will be unable to file a joint federal tax return or to apply for federal social security and other federal benefits that are routinely available to opposite-sex married couples, such as favorable immigration status for a non-citizen spouse. See, e.g., *Gay & Lesbian Advocates & Defenders, Protections, Benefits and Obligations of Marriage Under Massachusetts and Federal Law: Some Key Provisions of a Work-In-Progress* (June 21, 2001), at <http://www.glad.org/publications/civilrightproject/pbosofmarriage.pdf>; Denis Symington, *Kicked Out of America*, THE ADVOC., Feb. 3, 2004, at 9; Elisabeth Bumiller, *Why America Has Gay Marriage Jitters*, N.Y. TIMES, Aug. 10, 2003, § 4, at 1, 4. In earlier years, homosexuality was also a ground of exclusion under the Immigration and Nationality Act. See generally Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. CIV. RTS-CIV. LIB. L. REV. 439 (1994).

71. See Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

72. See, e.g., SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan, ed., 1997); Michael Simon & Jean Albright, *Same-Sex Marriage Hot Topic at Town Hall Event*, WINDY CITY TIMES, Jan. 21, 2004, at 26; Sara B. Miller, *Gays Want the Right, But Not Necessarily the Marriage*, CHRISTIAN SCIENCE MONITOR, Feb. 12, 2004, at 1.

particular state⁷³; whether one state's refusal to recognize another state's lawful same-sex marriage violates principles of comity or constitutional privileges and immunities; how employers can provide domestic partnership benefits to married same-sex couples without jeopardizing that are married; and whether employers should now be able to require gay and lesbian persons to marry (or to register as domestic partners in jurisdictions where that is available) as a condition of eligibility to extend employee benefits to same-sex partners in the same way as benefits might be extended to an opposite-sex spouse.⁷⁴

II. A SURVEY OF IMPORTANT DEVELOPMENTS: HOW DID WE GET WHERE WE ARE, AND WHERE IS IT THAT WE ARE GOING?

Although the struggle for same-sex marriage has been waged for 30 years or more, the stories of major successes in that struggle are only relatively recent. This section surveys the traditional prohibition on same-sex civil marriage, the development of registered partnerships and same-sex civil marriage in Europe, attempts in the United States to win same-sex marriage, and decisions that now recognize same-sex marriage in Canada and the United States.

A. TRADITIONAL PROHIBITION

The rights (and rites) of marriage have traditionally been denied to same-sex couples. In a series of cases litigated in the early 1970s, courts established a framework for rationalizing the denial of equal rights to gay and lesbian couples. For example, the Minnesota Supreme Court found that there was no denial of due process or equal protection by limiting "the

73. See, e.g., Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 187 (1997); Jason W. Hayes, *Amendment One: The Nebraska Equal Protection Clause*, 32 CREIGHTON L. REV. 611, 626-27 (1998); Leigh Jones, *Lawsuit Highlights Conflicts in Rights for Same-Sex Partners*, LEGAL INTELLIGENCER, Feb. 20, 2003, at 4, available at WL 2/20/2003 TLI 4.

74. See, e.g., Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption* 76 TULANE L. REV. 373, 383 (2001); *O Curse of Civil Unions!*, 10 GAY & LESBIAN REV. WORLDWIDE 8 (Nov.-Dec. 2003) (describing a same-sex couple from Illinois who moved to Vermont and were "forced to get married" by registering as Domestic Partners under Vermont law in order to be eligible for domestic partnership benefits from a state government employer).

state's classification of persons authorized to marry" in a way that excluded same-sex couples.⁷⁵ The Kentucky Supreme Court found that marriage had "always been considered as the union of a man and a woman and we have been presented with no authority to the contrary."⁷⁶ A court in Washington State found there was "a rational basis for the state to limit the definition of marriage to exclude same-sex relationships."⁷⁷ The court found that same-sex couples were not being denied the right to marry because of their sex, but were denied marriage because of "the recognized definition" of marriage as being a relationship that "may be entered into only by two persons who are members of the opposite sex."⁷⁸ The court concluded that the state's refusal to grant a marriage license to a same-sex couple was not because they were males, "but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."⁷⁹ These cases have been cited as persuasive authority, even in recent court decisions. Other courts, citing various dictionaries almost as if they were binding rather than merely persuasive sources of authority, also concluded that there is no right to same-marriage because of these traditional dictionary definitions.⁸⁰

In addition to the "definitional" objections raised to same-sex marriage, some courts noted that historical and religious traditions "could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures . . . of all homosexual relationships."⁸¹ Despite the secular nature of marriage, religious traditions made civil same-sex marriages "unthinkable and, by definition, impossible."⁸²

The court decisions denying same-sex marriage are not just historical anomalies of times long past. For example, the Court of Appeals of Arizona recently held that "the fundamental right to marry protected by our

75. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).

76. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973). "It appears that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined." *Id.*

77. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. Ct. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

78. *Id.* at 1192.

79. *Id.* at 1195.

80. *See, e.g., Dean v. District of Columbia*, 653 A.2d 307, 315 (D.C. App. 1995).

81. *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

82. *Id.*

federal and state constitutions does not encompass the right to marry a same-sex partner.”⁸³

In addition to the traditional prohibition against same-sex marriage, federal and state law reflected a traditional animus toward gay and lesbian people generally, even when laws or policies purport to protect the rights of gays and lesbians.⁸⁴ Gay and lesbian individuals were prohibited, for example, from serving in the armed forces of the United States.⁸⁵ They are subject to discharge from the military if they enter into a same-sex marriage or attempt to do so.⁸⁶ Gay and lesbian people have been denied a variety of rights, and have been treated as criminals. In *Bowers v. Hardwick*,⁸⁷ for example, the U.S. Supreme Court ruled against a due process challenge to the Georgia sodomy statute, finding that gay and lesbian persons do not have “a fundamental right to engage in homosexual sodomy.”⁸⁸ The majority there said that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand ha[d] been demonstrated”⁸⁹ Claiming that proscriptions against sodomy had “ancient roots” that were carried on in the history of criminal penalties in various states, the majority asserted that “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”⁹⁰ Although *Bowers* itself dealt only with the constitutionality of

83. *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003). The court stated that “although many traditional views of homosexuality have been recast over time in [Arizona] and [the United States], the choice to marry a same-sex partner has not taken sufficient root to receive constitutional protection as a fundamental right.” *Id.* The case was decided by Arizona’s intermediate appellate court on October 8, 2003, before the Supreme Judicial Court of Massachusetts reached its decision recognizing a right to same-sex marriage.

84. See Stephen Barr, *White House Clarifies Stance on Gay Rights – Move Seeks to End Flap Over Federal Staff Policy*, WASH. POST, Apr. 3, 2004, at A7; Lisa Neff, *White House: Policy Protects Federal Gay Workers*, CHI. FREE PRESS, Apr. 7, 2004, at 3.

85. See e.g., Barry Goldwater, *The Gay Ban: Just Plain Un-American*, in *HOMOSEXUALITY: DEBATING THE ISSUES* 183 (Robert M. Baird & M. Katherine Baird, eds., Prometheus Books 1995); Randy Shilts, *Homosexuality in the United States Armed Forces*, in *HOMOSEXUALITY: DEBATING THE ISSUES* 151 (Robert M. Baird & M. Katherine Baird, eds., Prometheus Books 1995). See also *GAYS IN UNIFORM: THE PENTAGON’S SECRET REPORTS* (Kate Dyer, ed., Alyson Publications 1990); *GAYS AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES* (Marc Wolinsky & Kenneth Sherill, eds., Princeton Univ. Press 1993).

86. 10 U.S.C. § 654(b)(3) (2000).

87. 478 U.S. 186 (1986).

88. *Id.* at 191.

89. *Id.*

90. *Id.* at 192-93.

sodomy statutes, the decision was often cited to justify other acts of discrimination against gay and lesbian persons.⁹¹ This was particularly true in jurisdictions that still had sodomy statutes. In those jurisdictions, the *Bowers* decision might be cited as support for denying child custody,⁹² or for denying employment to a gay or lesbian person.⁹³ A common argument was that if homosexual conduct could be criminalized, then those who are identified by their participation in that criminal conduct could not constitute a “suspect class” for equal protection or due process challenges.⁹⁴ In other countries as well, such as Canada (which legalized same-sex marriages in 2003), same-sex sexual relations were illegal until 1969.⁹⁵

But it is not only laws on the books that did violence to gay and lesbian persons; there are well-documented physical acts of violence and discrimination against gay, lesbian, bisexual, and transgendered persons.⁹⁶

The traditional prohibitions against same-sex marriage, and traditional animus and discrimination against gay and lesbian people generally, produced a situation where gay and lesbian persons were denied their rights as individuals, and where same-sex couples were denied the rights that opposite-sex couples could enjoy. Because gay and lesbian people challenged traditional assumptions about gender, gender roles, and gender hierarchy, they were “viewed as unworthy of being accorded respect for their basic human right to intimate life”⁹⁷ Although there has been progress in non-discrimination legislation designed to protect a few basic rights, there is still a long way to go in many jurisdictions and on a number

91. See, e.g., Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001); Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 201-03 (2000).

92. See, e.g., *S.B. v. L.W.*, 793 So.2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (mother denied custody because of her lesbian relationship; concurring judge cited *Bowers* to support a declaration that “the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality.”).

93. See *id.*; *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

94. See, e.g., *Baker*, 744 A.2d at 890 (Dooley, J., concurring). The Court’s subsequent decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), call into question all of the interim decisions that previously relied on *Bowers v. Hardwick*.

95. See *EGALE Canada Inc. v. Canada (Attorney General)*, 13 B.C.L.R. (4th) 1, para. 40 (2003).

96. See, e.g., CONSTANCE DENNEY ISRAEL, *HATE CRIMES AGAINST GAYS/LESBIANS* (Monument Press 1992); Lisa Neff, *Study: Anti-GLBT Harassment Widespread*, CHI. FREE PRESS, Jan. 21, 2004, at 10; Lisa Neff, *FBI Reports Rise in GLBT Hate Crimes*, CHI. FREE PRESS, Nov. 5, 2003, at 11.

97. MERIN, *supra* note 11, at 45.

of legal issues affecting gay and lesbian families in the United States.⁹⁸ The debate in the United States has been inspired and informed by many international and foreign developments toward recognizing same-sex unions and other fundamental rights.

B. INTERNATIONAL DEVELOPMENTS

The debate about same-sex marriages has not been one exclusive to the United States, of course. Nor has the struggle for equal rights and fair treatment of same-sex couples been a struggle fought only in this country. There have been a number of important advances around the world, particularly in Europe. These advances, though often overlooked in the United States, helped to frame the same-sex marriage debate as a human rights issue of equal access to legal rights.

In the late 1980s, a few European countries began to provide certain legal protections to same-sex couples. Some countries adopted legislation to provide for registered partnerships. Registered partnership statutes refer to marriage statutes, but exempt out some provisions, effectively granting some but not all of the benefits and protections of marriage.⁹⁹ They provide, however, more legal benefits than “domestic partner” registries that may be available in parts of the United States.¹⁰⁰

Denmark was the first country to adopt registered partnerships, and it did so in 1989 after twenty years of debate on the issue.¹⁰¹ The legislation was passed on June 1, 1989 and entered into effect on October 1, 1989.¹⁰² The law required that at least one of the partners be a Danish citizen.¹⁰³ Seven years later, the Danish legislation was extended to Greenland, a self-governing external territory of Denmark.¹⁰⁴ Ten years after the legislation was passed, it was amended to allow for second-parent adoption,

98. For a recent development that supported an employer's efforts to include gay and lesbian persons as part of its diversity program, see *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

99. See MERIN, *supra* note 11, at 56.

100. Some domestic partner registries in the United States provide no benefits whatsoever, but private individuals may use them or organizations for certain circumstances. See generally *id.* at 57-59.

101. See *id.* at 56, 61-67; Bent Hansen & Henning Jørgensen, *The Danish Partnership Law: Political Decision Making in Denmark and the National Danish Organization for Gays and Lesbians*, in *THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 86, 86-99 (Aart Hendriks et al. eds., 1993).

102. See MERIN, *supra* note 11, at 67.

103. Hansen & Jørgensen, *supra* note 101, at 95.

104. See MERIN, *supra* note 11, at 67 & n.28.

something that had been denied in the original legislation.¹⁰⁵ When the legislation was first passed in 1989 without the right to adopt children, gay and lesbian activists appeared to accept the temporary unequal status because they could return to the legislature later after society became more accustomed to the idea of lawful same-sex union.¹⁰⁶ It is interesting to compare the situation in the United States, which has generally allowed second-parent adoption by same-sex couples but denied those couples the right to marry.¹⁰⁷ Denmark had granted same-sex couples the right to marry but denied same-sex couples the right to adopt.

The 1989 legislation had also required that at least one person in the partnership be a permanent resident of Denmark and a Danish citizen.¹⁰⁸ The 1999 amendments now require only that those intending to register be permanent residents of Denmark for the preceding two years.¹⁰⁹ It is expected that the Danish law will be further amended in the future to provide for the full rights of marriage that are available to opposite-sex couples.¹¹⁰

Norway was the second country to enact registered partner legislation, which became effective for same-sex couples in that country in August 1993.¹¹¹ The legislation refers to the Norwegian marriage statutes, but as with the Danish legislation, the Norwegian legislation did not allow

105. See *id.* at 67-68, 73-75, 344-45.

106. There has always been debate as to whether it is preferable to change the law first and have society become accustomed to the new situation, or whether it is preferable to change societal values first and then enact a law that recognizes a more tolerant societal norm. See, e.g., Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

107. The term "second parent adoption" recognizes a particular problem when same-sex couples adopt. For example, a parent who places a child up for adoption will normally lose his or her own parental rights when the child is adopted. In same-sex couples, however, a birth mother will not want to give up her own parental rights; she will want to add a second mother because that will be in the best interests of the child. The most recent recognition of the importance of allowing second parent adoption was in a case from Indiana. See *In re* adoption of K.S.P., No. 56A03-0309-CV-375, 2004 WL 557345 (Ind. Ct. App. Mar. 23, 2004) ("We conclude that where . . . the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result.").

108. See MERIN, *supra* note 11, at 70.

109. See *id.* at 70, 77-78.

110. See *id.* at 79-80. See also Ingrid Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 417 (Robert Wintemute & Mads Andenæs eds., 2001).

111. See MERIN, *supra* note 11, at 80, 86, 89.

registered partners to adopt children.¹¹² But approximately 800 other rules from 120 laws applicable to married couples now also apply to same-sex registered partners.¹¹³ It is significant that the legislation passed even though there was no evidence of popular majority support for its passage. However, as one Member of Parliament noted, “the rights for minorities, which this is all about, probably is the kind of case where we can trust least in public opinion and opinion polls, and this is an area where we, as politicians, have a responsibility to take the lead and establish the norms of society.”¹¹⁴

Sweden had given some recognition to same-sex couples as early as 1987, when it amended its family law to provide unmarried cohabitants some limited rights in property acquired by either party while they were living together – such as rights to a home and its furnishings – if the parties were living in a “marriage-like” relationship.¹¹⁵ In 1988, another law in Sweden called the Homosexual Cohabitants Act extended to same-sex couples the provisions of other laws, including laws relating to housing, inheritance, and taxes.¹¹⁶ In 1994, the Swedish parliament passed the Registered Partnership Act, which entered into effect on January 1, 1995.¹¹⁷ As with its neighbors Denmark and Norway, the Swedish legislation granted all the rights of marriage except for certain laws relating to adoption, joint custody, and church weddings.¹¹⁸

Iceland passed a Registered Partnership Act that became effective in June 1996.¹¹⁹ Iceland’s law contains similar protections and exceptions as the laws of its Scandinavian neighbors.¹²⁰ There is an important difference, however, in that Iceland will allow registered partners to have joint guardianship and custody of biological children, but only if the biological parent had sole custody at the time of registration.¹²¹ It is again interesting

112. See *id.* 89, 92-93. See also *id.* at 345 (English translation of the legislation).

113. See MERIN, *supra* note 11, at 90.

114. See *id.* at 91.

115. See *id.* at 94-96.

116. *Id.* at 96-97.

117. *Id.* at 98-99. See also *id.* at 346-48 (English translation of the legislation).

118. See MERIN, *supra* note 11, at 99. See also Hans Ytterberg, *From Society's Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life: A Swedish Story of Love and Legislation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 427 (Robert Wintemute & Mads Andenæs eds., 2001).

119. See MERIN, *supra* note 11, at 103-04. See also *id.* at 348-49 (English translation of legislation); Rex Wockner, *Half of EU Recognizes Gay and Lesbian Couples*, WINDY CITY TIMES, Mar. 26, 2003, at 13.

120. See MERIN, *supra* note 11, at 105-07.

121. *Id.* at 107.

to compare the situation to that in the United States, which generally allows same-sex couples to adopt children,¹²² but does not afford those same-sex rights comparable to those available under a registered partnership law.

The Netherlands adopted registered partnership legislation that became effective on January 1, 1998.¹²³ The Dutch law allowed both same-sex couples and opposite-sex couples to register.¹²⁴ In 2001, the Netherlands became the first country in the world to recognize civil same-sex marriage.¹²⁵

Finland adopted a registered partnership law in 2002.¹²⁶ Benefiting from the earlier experiences of its Nordic neighbors, Finland's lawmakers were able to provide some additional benefits and protections to same-sex couples. For example, artificial insemination services are available to lesbian couples.¹²⁷ The law also left unaffected an earlier interpretation of the Child Custody law that allowed same-sex couples to gain joint custody of children.¹²⁸ There is, however, no right to adopt children.¹²⁹ Registration is available to those who resided in Finland for the previous two years; the residency requirement is waived if one of the parties is a citizen of Finland.¹³⁰ The law also recognizes foreign partnerships that are valid under the laws of the country where they were contracted.¹³¹

Other countries have also enacted various provisions to recognize same-sex partnerships at the national level.

122. Florida is the only state that prohibits any individual gay or lesbian person from adopting children. FLA. STAT. § 63.042(3) (2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). The constitutionality of that Florida statute was recently affirmed in a widely-criticized decision. See *Lofton v. Gilmore*, No. 01-16723 (11th Cir. Jan. 28, 2004). See also Lisa Neff, *Florida Adoption Ban Upheld*, CHI. FREE PRESS, Feb. 4, 2004, at 1; *Gays Trying to Adopt Lose Case in Florida*, CHI. TRIB., Jan. 29, 2004, § 1, at 8. Mississippi statutes prohibit same-sex couples from adopting. MISS. CODE ANN. § 93-17-3(2) (Supp. 2000) ("Adoption by couples of the same gender is prohibited."); *S.B. v. L.W.*, 793 So.2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (denying custody to a lesbian mother).

123. See MERIN, *supra* note 11, at 111.

124. See *id.* at 56.

125. See, e.g., Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenæs eds., 2001).

126. See MERIN, *supra* note 11, at 56. See also *id.* at 349-50.

127. MERIN, *supra* note 11, at 109.

128. *Id.* at 109-10.

129. *Id.* at 110.

130. *Id.*

131. *Id.*

In Hungary, the Common Law Marriage Act of 1996 extended the definition of “common law marriage” to same-sex couples.¹³² These couples now have the same rights (and duties) as common law opposite-sex couples.¹³³ This legislation followed a decision in March 1995 from the Hungarian Constitutional Court, which had ruled that it was “arbitrary and contrary to human dignity . . . that the law (on common law marriages) withholds recognition from couples living in an economic and emotional union simply because they are [of the] same-sex.”¹³⁴ The court ordered the parliament to make appropriate legislative changes, which it did in the Common Law Marriage Act enacted on May 21, 1996.¹³⁵ The new common law marriage in Hungary gives most of the rights of civil marriage, including inheritance rights, pension and social security rights, other common property rights, and the immunity from spousal testimony.¹³⁶ The Hungarian court’s ruling came as somewhat of a surprise in light of the well-documented discrimination and intolerance frequently faced by gay and lesbian persons in Hungary.¹³⁷ Yuval Merin explains that the Hungarian development was partially based on a belief that “it would be politically and economically advantageous to appear socially tolerant” to the European Union.¹³⁸ Although Hungary’s road to common law same-sex marriage is somewhat of an anomaly,¹³⁹ the Hungarian example is nonetheless one that should not be forgotten because it is the current law in Hungary to recognize common law same-sex marriages.

In Belgium, legislation passed in 1998 allowed for “statutory cohabitation” starting in January 2000.¹⁴⁰ The law regulates any two adults who live together, including same-sex and opposite-sex couples.¹⁴¹ Because the law applies to any two cohabitating adults, adult siblings who

132. MERIN, *supra* note 11, at 131.

133. *See id.* at 60.

134. *See id.* at 131; Lilla Farkas, *Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 563, 567 (Robert Wintemute & Mads Andenæs eds., 2001).

135. MERIN, *supra* note 11, at 131.

136. *See id.* at 131; Farkas, *supra* note 134, at 569-71.

137. *See, e.g.*, MERIN, *supra* note 11, at 132.

138. *Id.*

139. *Id.* at 134.

140. *See id.* 60, 147. *See also* Olivier De Schutter & Anne Weyembergh, *Statutory Cohabitation Under Belgian Law: A Step Toward Same-Sex Marriage?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 465 (Robert Wintemute & Mads Andenæs eds., 2001).

141. *See* MERIN, *supra* note 11, at 60.

live together may also use the law.¹⁴² There has never been a requirement that those living together have sexual relations; if the nature of the relationship is merely one of mutual support and dependence, it seems right to include all adults living together in such a situation.

In France, the *Pacte Civil de Soliarité* provides fewer legal rights than the registered partnership model of other countries, but more rights than the American domestic partnership registries.¹⁴³ It was enacted in 1999.¹⁴⁴ In addition to creating a new institution for France, it defined “co-habitation” as “a de-facto stable and continuous relationship between two persons of the opposite or same sex, who live together as a couple.”¹⁴⁵

Germany adopted legislation that recognized only a limited number of rights for same-sex couples.¹⁴⁶ The Law on Ending Discrimination Against Same-Sex Communities: Life Partnerships became law on February 16, 2001 and entered into force on August 1, 2001.¹⁴⁷ It created a new legal institution called *Lebenspartnerschaft* (life partnership),¹⁴⁸ but it provides only limited rights.¹⁴⁹ Other legislation that would have granted certain economic benefits to same-sex couples was unsuccessful.¹⁵⁰ Gay and lesbian persons in Germany have not previously received any federal recognition of their rights, and the legal situation of gay and lesbian persons in Germany is still described as lagging behind other countries that recognize same-sex partnerships.¹⁵¹

142. See *id.* at 148.

143. See *id.* at 59-60.

144. *Id.* at 59, 141. Although the legislation does not allow same-sex couples to have the full rights of marriage, the popular (mis)understanding among many living in France is that their country allows “gay marriage.”

145. *Id.* at 141. See also Daniel Borillo, *The “Pacte Civil de Solidarité” in France: Midway Between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 475 (Robert Wintemute & Mads Andenæs eds., 2001).

146. See MERIN, *supra* note 11, at 60; Roland Schimmel & Stefanie Heun, *The Legal Situation of Same-Sex Partnerships in Germany: An Overview*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 575, 589 (Robert Wintemute & Mads Andenæs eds., 2001).

147. Schimmel & Heun, *supra* note 146, at 589.

148. *Id.*

149. See, e.g., Rex Wockner, *No Tax Break for German Gays*, WINDY CITY TIMES, Jan. 28, 2004, at 9 (noting that same-sex couples united under Germany’s civil union law cannot pay taxes as if they were married).

150. See MERIN, *supra* note 11, at 60. See also Schimmel & Heun, *supra* note 146, at 590.

151. See MERIN, *supra* note 11, at 142-43. See also Schimmel & Heun, *supra* note 146, at 575.

In Portugal, legislation enacted in March 2001 to authorize partnerships applies to both opposite-sex and same-sex couples.¹⁵² The Portuguese legislation does not provide as many rights as the legislation in Belgium, France, Germany, or Hungary.¹⁵³ Portugal had earlier provided some indirect rights for same-sex couples, such as in the housing law, which gave surviving partners a preferential right to continue a lease.¹⁵⁴ The new legislation in Portugal offers some additional protections in housing, employment benefits, and some property rights.¹⁵⁵

The first country to extend civil marriage to same-sex couples was the Netherlands, which did so in legislation that became effective on April 1, 2001.¹⁵⁶ The Dutch law states simply that “[a] marriage can be contracted by two persons of different sex or of the same sex.”¹⁵⁷

The Dutch same-sex marriage legislation did not repeal the earlier registered partnership legislation; both are allowed for the present time.¹⁵⁸ It is possible to convert a registered partnership into a marriage, and it is possible to convert a marriage into a registered partnership.¹⁵⁹ There is even anecdotal evidence that many opposite-sex married couples are converting their marriages to registered partnerships not to take advantage of any legal benefits that are unavailable to married couples, but to be able to dissolve the registered partnership more easily than by obtaining a divorce. The Netherlands also amended its laws to permit adoptions by same-sex couples, a right that remains largely unavailable in nations with registered partnerships.¹⁶⁰

Following the example of its neighbor, Belgium amended its law on January 30, 2003 to provide the full rights of marriage to same-sex couples.¹⁶¹ Unfortunately, the adoption law in Belgium was not also

152. See MERIN, *supra* note 11, at 60, 134. See also Rex Wockner, *Half of EU Recognizes Gay and Lesbian Couples*, WINDY CITY TIMES, Mar. 26, 2003, at 13.

153. See MERIN, *supra* note 11, at 60. See also S. Predrag, *LGBT News and Views from Around the World: Belgium*, LESBIAN NEWS, Jan. 2004, at 18.

154. See MERIN, *supra* note 11, at 134.

155. See *id.* at 135-36.

156. *Id.* at 56. See also Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenæs eds., 2001).

157. MERIN, *supra* note 11, at 352 (English translation of legislation).

158. See *id.* at 56, 115.

159. See *id.* at 56.

160. See *id.* at 119-23.

161. See, e.g., Rex Wockner, *Belgian Wedding Numbers Released*, WINDY CITY TIMES, Nov. 12, 2003, at 12.

amended, so that same-sex couples can marry but cannot be co-parents.¹⁶² In all other areas of the law, same-sex couples in Belgium have enjoyed the full rights of marriage since the law entered into effect on June 16, 2003.¹⁶³ In addition, after February 6, 2004, Belgium began to recognize marriages between non-Belgian same-sex couples, as long as at least one partner lives in or visits the country regularly.¹⁶⁴

In addition to the foreign legislative developments identified, other nations to afford some-recognition to same-sex couples include Australia,¹⁶⁵ New Zealand,¹⁶⁶ South Africa,¹⁶⁷ Israel,¹⁶⁸ and Brazil.¹⁶⁹ Other jurisdictions are also making national or local progress toward providing

162. See S. Predrag, *LGBT News and Views from Around the World: Belgium*, LESBIAN NEWS, Jan. 2004, at 18.

163. See, e.g., <http://www.samesexmarriage.ca/equality/world.html#belgium> (visited April 12, 2004). See also Rex Wockner, *Belgian Wedding Numbers Released*, WINDY CITY TIMES, Nov. 12, 2003, at 12.

164. See, e.g., <http://www.samesexmarriage.ca/equality/world.html#belgium> (visited April 12, 2004).

165. See Justice Michael Kirby, *Same-Sex Relationships: An Australian Perspective on a Global Issue*, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 7, 11-21 (Robert Wintemute & Mads Andenæs, eds., 2001); MERIN, *supra* note 11, at 59, 170-73. See also John Hart, *Gay and Lesbian Couple Immigration to Australia: Pressure Group Compromises and Achievements*, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 100 (Aart Hendriks et al. eds., 1993).

166. See MERIN, *supra* note 11, at 59, 173-76; Rex Wockner, *New Zealand Plans Civil Unions*, WINDY CITY TIMES, Feb. 18, 2004, at 5. See also Nigel Christie, *The New Zealand Same-Sex Marriage Case: From Aotearoa to the United Nations*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 317, 334-35 (Robert Wintemute & Mads Andenæs, eds., 2001). "Aotearoa" is the Maori name for the islands we know as New Zealand.

167. See MERIN, *supra* note 11, at 357; Craig Lind, *Politics, Partnership Rights and the Constitution in South Africa . . . (and the Problem of Sexual Identity)*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 279, 289-90 (Robert Wintemute & Mads Andenæs, eds., 2001). See also Pierre de Vos, *The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity*, in SEXUALITY IN THE LEGAL ARENA 194 (Carl Stychin & Didi Herman, eds., 2000).

168. See MERIN, *supra* note 11, at 356-57; Aeyal M. Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 391 (Robert Wintemute & Mads Andenæs, eds., 2001).

169. See MERIN, *supra* note 11, at 357-58; Marcelo Dealtry Turra, *Brazil's Proposed "Civil Unions Between Persons of the Same Sex": Legislative Inaction and Judicial Reactions*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 337 (Robert Wintemute & Mads Andenæs, eds., 2001).

some form of recognition for same-sex relationships.¹⁷⁰ Other countries seeing progress include the United Kingdom,¹⁷¹ Spain,¹⁷² Switzerland,¹⁷³ and the Czech Republic.¹⁷⁴ For whatever advances there are, however, there are always other countries – such as Austria,¹⁷⁵ Ireland,¹⁷⁶ Italy,¹⁷⁷ and other countries¹⁷⁸ – where legal progress for gay, lesbian, bisexual, and transgendered persons seems difficult to achieve in any real measure.¹⁷⁹

170. There are even reports of quite unexpected jurisdictions making progress toward same-sex marriage. See, e.g., Rex Wockner, *Taiwan Plans to Legalize [Same-Sex] Marriage*, WINDY CITY TIMES, Nov. 12, 2003, at 12. Where national progress is not being made, there is sometimes progress at the local level.

171. See S. Predrag, *LGBT News and Views from Around the World: England*, LESBIAN NEWS, Jan. 2004, at 18; *U.K. Partner Bill Introduced*, CHI. FREE PRESS, Apr. 7, 2004, at 1. See also Rebecca Bailey-Harris, *Same-Sex Partnerships in English Family Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 605 (Robert Wintemute & Mads Andenæs, eds., 2001).

172. See Rex Wockner, *Spanish Marriage Challenge Begins*, WINDY CITY TIMES, Nov. 12, 2003, at 12; MERIN, *supra* note 11, at 151-59. See also Nicolás Pérez Cánovas, *Spain: The Heterosexual State Refuses to Disappear*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenæs, eds., 2001); Francesc Jaurena i Salas, *The Law on Stable Unions of Couples in the Catalonia Autonomous Community of Spain*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenæs, eds., 2001).

173. See MERIN, *supra* note 11, at 156-58; François E. Baur, *At the End of the Fairy Tale, Will Heidi Stay Single? Same-Sex Partnerships in Switzerland*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 531 (Robert Wintemute & Mads Andenæs, eds., 2001); S. Predrag, *LGBT News and Views from Around the World: Switzerland*, LESBIAN NEWS, Jan. 2004, at 18.

174. See MERIN, *supra* note 11, at 158-59.

175. See, e.g., Helmut Gaupner, *The First Will Be the Last: Legal Recognition of Same-Sex Partnerships in Austria*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 549, 561 (Robert Wintemute & Mads Andenæs, eds., 2001) (lamenting that Austria has made little progress toward same-sex marriage).

176. See, e.g., Leo Flynn, *From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 591 (Robert Wintemute & Mads Andenæs, eds., 2001).

177. See MERIN, *supra* note 11, at 155-56; Gioia Scappucci, *Italy Walking a Tightrope Between Stockholm and the Vatican: Will Legal Recognition of Same-Sex Partnerships Ever Occur?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 519 (Robert Wintemute & Mads Andenæs, eds., 2001).

178. See, e.g., *Macedonia: Tolerance OK, But Not for Gays*, THE ADVOC., Feb. 17, 2004, at 15.

179. Indeed, in some countries progress is nowhere to be seen. See, e.g., Gary Barlow, *Egyptian Court Orders Jail for 21 Gay Men in Retrial*, CHI. FREE PRESS, Mar. 19,

C. SUCCESS FOR SAME-SEX MARRIAGE IN THE UNITED STATES, STOLEN BY AMENDMENTS TO THE STATE CONSTITUTIONS OF HAWAI'I AND ALASKA

Advocates of same-sex marriage realized that a political consensus on same-sex marriage was not realistic, even if the denial of the right to marry was a violation of fundamental fairness. There were, instead, attempts to have the courts recognize same-sex marriage. The first case to achieve some measure of success was litigated in Hawai'i,¹⁸⁰ but a subsequent amendment to the state constitution rendered that victory a hollow one.¹⁸¹ Although the court ruling was mooted by the amendment, *Baehr v. Lewin*¹⁸² remains significant as a spark that ignited widespread awareness that same-sex couples wanted – and deserved – recognition of their relationships.¹⁸³

The case began in 1991, when several couples in Hawai'i sued for a declaratory judgment that the denial of marriage licenses to same-sex couples violated the privacy and equal protection provisions of the Hawai'i State Constitution.¹⁸⁴ The Hawai'i Constitution provides that “[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.”¹⁸⁵ The couples argued that the state’s denial of marriage licenses to same-sex couples violated their right to privacy, equal protection, and due process.¹⁸⁶

The Hawai'i Supreme Court, citing the U.S. Supreme Court’s antimiscegenation decision in *Loving v. Virginia*,¹⁸⁷ stated that marriage was a vital personal right essential to the pursuit of happiness.¹⁸⁸ The court also found that the plain language of the Hawai'i Constitution prohibited “state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.”¹⁸⁹ The court found that the denial of a marriage license to an individual because of the sex of the person they

2003, at 4; Rex Wockner, *Egyptian Arrests Continue*, WINDY CITY TIMES, Mar. 10, 2004, at 11.

180. *Baehr v. Lewin*, 852 P.2d 44, 53 (Haw. 1993).

181. HAW. CONST. art. 1 § 23.

182. 852 P.2d 44 (Haw. 1993).

183. The national and international dialogue on recognizing same-sex relationships is, of course, a dialogue that will continue for many years.

184. *Baehr*, 852 P.2d at 53.

185. HAW. CONST. art. I, § 5.

186. *Baehr*, 852 P.2d at 52.

187. 388 U.S. 1 (1967).

188. *Baehr*, 852 P.2d at 53.

189. *Id.* at 60.

wanted to marry was discrimination based on sex.¹⁹⁰ Consequently, under the heightened scrutiny standard, the State of Hawai'i had the burden of justifying the state's refusal to allow same-sex couples to marry.

Judge James S. Burns, a judge of the Hawai'i Intermediate Court of Appeals who was sitting by designation on the Supreme Court, wondered in a concurring opinion whether heterosexuality, homosexuality, bisexuality, and asexuality were "biologically fated."¹⁹¹ Judge Burns wrote that if people had no control over their sexual orientation, he would find that the Hawai'i Constitution "probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawai'i Civil Law Marriages and not permitting same-sex Hawai'i Civil Law Marriages."¹⁹² If sexual orientation was not biological, in Judge Burns' view the state could lawfully prohibit same-sex marriages without violating the state constitution.¹⁹³

In a dissenting opinion, Judge Waller M. Heen, another judge of the Hawai'i Intermediate Court of Appeals who was sitting by designation on the Supreme Court, wrote that the Hawai'i marriage statutes treated all persons alike in that they "applied equally to both sexes."¹⁹⁴ Judge Heen found no effects of invidious discrimination based on sex because a man could not marry another man, and a woman could not marry another woman. He stated: "Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit the other has."¹⁹⁵ In his dissenting view, Judge Heen found that the statutory classification was "designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage"¹⁹⁶

Although the Hawai'i Supreme Court could have declared immediately that the marriage statutes violated the state constitution, the court instead remanded the case to allow the state government to demonstrate a compelling state interest in limiting marriage to opposite-sex couples.¹⁹⁷ The state collected its reasons amid a flurry of local, national, and international public debate on the merits of same-sex marriage.

190. *Id.* at 51.

191. *Id.* at 69 (Burns, J., concurring).

192. *Id.* at 91.

193. *Id.* at 70.

194. *Id.* at 71 (Heen, J., dissenting). This line of analysis is similar to stating that a ban on interracial marriage treated all races equally, because every individual could still marry a person of their own race (just as they can still marry a person of the opposite sex).

195. *Id.* (Heen, J., dissenting).

196. *Id.* at 74 (Heen, J., dissenting).

197. *Id.* at 74.

On remand, the state asserted that the sex-based classification of marriage furthered “compelling state interests” such as promoting the well-being of children and families and that the limitation of marriage to opposite-sex couples was “narrowly drawn to avoid unnecessary abridgements of constitutional rights.”¹⁹⁸ The Hawai’i Circuit Court rejected the state’s arguments as insufficient to justify a violation of rights under the state constitution.¹⁹⁹ The court found that the state had “failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children[,] will be adversely affected by same-sex marriage.”²⁰⁰ The decision was appealed to the Hawai’i Supreme Court.²⁰¹

Fearing that the state would be unable to provide a compelling reason for its line drawing, opponents of same-sex marriage moved to amend the Hawai’i State Constitution to prohibit same-sex marriage. The Hawai’i voters approved a proposed amendment on November 3, 1998. The new section to the Hawai’i State Constitution provided: “The legislature shall have the power to reserve marriage to opposite-sex couples.”²⁰²

The constitutional amendment deprived the plaintiffs of the constitutional argument and mooted the case that was pending on appeal. However, increased awareness of the issues led the state of Hawai’i to create a “reciprocal beneficiary” compromise to provide a limited number of important benefits, including hospital visitation, certain tax benefits under state law, the ability to sue for certain torts, and certain inheritance rights under state law.²⁰³

Meanwhile, in another part of the Pacific Ocean, the state of Alaska took center stage in the same-sex marriage spotlight. In February 1998, Alaska Superior Court Judge Peter Michalski ruled that two men – Jay Brause and Gene Dugan – had a fundamental right to choose their life partner, and that the State of Alaska had to show a compelling state interest

198. *Id.*

199. Baehr v. Miiike, No. Civ. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

200. *Id.* For a description of the trial testimony, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER & THE LAW* 1074-76 (2d ed., Foundation Press 2004).

201. The appeal was filed in early 1997, but the Hawai’i Supreme Court did not rule on the case until December 1999.

202. HAW. CONST. art. 1, § 23.

203. HAW. REV. STAT. § 572C-1 (Supp. 2003). See also Jonathan Goldberg-Hiller, “*Making a Mockery of Marriage*” – *Domestic Partnership and Equal Rights in Hawai’i*, in *SEXUALITY IN THE LEGAL ARENA* 113, 115 (Carl Stychin & Didi Herman, eds., Anthlone Press 2000).

for banning same-sex marriage.²⁰⁴ The potential recognition of same-sex marriage in more than one state fueled fears that all states would eventually have to recognize same-sex marriage. Rather than waiting for the state to prove a compelling state interest to justify its disparate treatment of same-sex couples, opponents of same-sex marriage replicated the strategy they had used in Hawai'i and successfully organized an effort to amend the Alaska State Constitution.²⁰⁵ The new provision stated, "a marriage may exist only between one man and one woman."²⁰⁶ The state constitutional amendment effectively ended the ability to win same-sex marriage in Alaska through the judicial system.

The success that anti-gay groups found in amending the state constitutions of Hawai'i and Alaska underlie current attempts to amend other state constitutions²⁰⁷ and, indeed, the federal constitution.²⁰⁸

D. THE DEFENSE OF MARRIAGE ACT

Alarmed by the prospect that Alaska, Hawai'i, or some other state might actually legalize same-sex marriage or find unconstitutional the continued prohibition against same-sex marriage, political forces at the national and state level moved to "score points in an election year" by enacting laws that purported to "defend" traditional marriage.²⁰⁹ These forces succeeded at the national level, even though there was not then any

204. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). See also Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 22-24 (2000) (describing personal difficulties that the plaintiffs suffered after filing their successful challenge to the restriction against same-sex marriage).

205. ALASKA CONST. art. 1, § 25.

206. *Id.*

207. See, e.g., *Gays and Marriage*, STATE LEGISLATURES, Jan. 2004, at 6; Pam Belluck, *The Gay-Marriage Debate Resumes in Massachusetts – Legislators Battle Again Over Amendment*, N.Y. TIMES, Mar. 12, 2004, at A14; *Gay Marriage Ban Advances in Wisconsin*, CHI. TRIB., Mar. 13, 2004, § 1, at 10.

208. See, e.g., Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1; David D. Kirkpatrick, *Bush Assures Evangelicals of His Commitment to Amendment on Marriage*, N.Y. TIMES, Mar. 12, 2004, at A14; *Cheney Backs Gay Nuptial Ban*, CHI. TRIB., Mar. 3, 2004, § 1, at 9.

209. See, e.g., Noel C. Paul & Amanda Paulson, *Gay Marriage Divide Roils States*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2004, at 1; Donald P. Haider-Markel, *The Marrying Kind? Defense, Morality, Civil Rights, and Family: The Evolution of Lesbian and Gay Issues in the U.S. Congress*, in QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 358, 358 (Mary Bernstein & Renate Reimann, eds., Columbia Univ. Press 2001).

jurisdiction that recognized civil same-sex marriage. The federal Defense of Marriage Act (DOMA) provided that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.²¹⁰

In addition to prohibiting any recognition of same-sex marriage for federal purposes (such as federal income tax, social security, immigration, or any number of other rights or benefits recognized under federal law), DOMA also purported to allow states the right to ignore a valid same-sex marriage from another state.²¹¹

In addition to the federal DOMA statute, the forces opposing same-sex marriage were also largely successful in a number of states that enacted "baby-DOMA" statutes in an attempt to ensure that same-sex marriages would not be recognized within their borders.²¹² For example, Arizona amended its statutes to provide: "Marriage between persons of the same sex is void and prohibited."²¹³ Mississippi amended its statutes to provide: "Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi."²¹⁴ The Illinois statutes were amended to declare that "[a] marriage between [two] individuals of the same sex is contrary to the public policy of [Illinois]."²¹⁵ The Ohio legislature passed a DOMA statute that not only banned same-sex couples from marrying, but also prohibited state agencies from extending benefits to the same-sex

210. Pub. L. 104-199, 110 Stat. 2419 (creating 1 U.S.C. § 7).

211. Pub. L. 104-199, 110 Stat. 2419 (creating 28 U.S.C. § 1738C). *See also, e.g.*, Elisabeth Bumiller, *Why America Has Gay Marriage Jitters*, N.Y. TIMES, Aug. 10, 2003, § 4, at 1, 4. DOMA has been criticized as "codified ignorance, prejudice, and fear." Deborah A. Batts, *Repeal DOMA*, 30 HUM. RTS. 2 (Summer 2003).

212. *See, e.g.*, David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 946 (2001).

213. ARIZ. REV. STAT. ANN. § 25-101(C) (West 2000).

214. MISS. CODE ANN. § 93-1-1(2) (1994 & Supp. 2003).

215. 750 ILL. COMP. STAT. 5/212(a)(5), 5/213.1 (2002).

partners of state employees.²¹⁶ It was described as “one of the most sweeping bans on same-sex unions in the country.”²¹⁷

The advent of same-sex civil marriage brings with it the promise of legal challenges to the federal and state legislation that purports to limit the recognition of civil same-sex marriages that are lawfully performed.²¹⁸ Until now there has not been a live “case or controversy” with which to challenge the constitutionality of the federal DOMA and the “baby-DOMA” state statutes, although there have been some challenges to particular aspects of state anti-gay legislation.²¹⁹ Fearing that a federal or state court will declare these discriminatory federal and state statutes to be unconstitutional,²²⁰ opponents of same-sex marriage began calling for a “Federal Marriage Amendment”²²¹ to the U.S. Constitution.²²² Even though the effort to amend the federal constitution is unlikely to prevail because of the extraordinary measures required to amend it,²²³ these efforts to

216. James Dao, *Ohio Legislature Votes to Ban Same-Sex Unions*, N.Y. TIMES, Feb. 4, 2004, at A12; *Ohio Legislators OK Gay-Union Ban – Measure Also Bars State Benefits for Domestic Partners*, CHI. TRIB., Feb. 4, 2004, § 1, at 14; Stevenson Swanson, *Same-Sex Marriage Leaping Into Election*, CHI. TRIB., Feb. 15, 2004, § 1, at 1. See also H.B. 234 § 1, 124th Gen. Assembly (Ohio 2001) (proposing addition to Ohio Rev. Code Ann. § 3101.01); Katrina C. Rose, *Three Names in Ohio: In re Bicknell, In re Maloney, and Hope for Recognition That the Gay-Transgender Twain Has Met*, 25 T. JEFFERSON L. REV. 89, 91 (2002).

217. James Dao, *Ohio Legislature Votes to Ban Same-Sex Unions*, N.Y. TIMES, Feb. 4, 2004, at A12.

218. See generally, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Bonnie Miller Rubin, *Same-Sex Couples See Some Light, But Conservatives Call State Ruling Slippery Slope*, CHI. TRIB., Nov. 19, 2003, § 1, at 30.

219. See Lisa Neff, *Judge OKs [Nebraska] Marriage Suit*, CHI. FREE PRESS, Nov. 19, 2003, at 10.

220. See, e.g., Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment’s Due Process Clause*, 44 B.C. L. REV. 177 (2002).

221. Bob Roehr, *Tinkering With the Marriage Amendment*, WINDY CITY TIMES, Nov. 19, 2003, at 5.

222. See, e.g., Jan Crawford Greenburg, *Gay Marriage Ban Rejected: Massachusetts Court Throws Out State Law It Says Is Rooted In Prejudice*, CHI. TRIB., Nov. 19, 2003, § 1, at 1, 30; Bonnie Miller Rubin, *Same-Sex Couples See Some Light, But Conservatives Call State Ruling Slippery Slope*, CHI. TRIB., Nov. 19, 2003, § 1, at 30; Bob Roehr, *Bush’s ‘Union’ Nixes Gays*, WINDY CITY TIMES, Jan. 28, 2004, at 1; Lisa Neff, *Bush: No to Gay Marriage – Same-sex Unions Opposed in State of the Union*, CHI. FREE PRESS, Jan. 28, 2004, at 1. See also Bob Roehr, *Bush Urges \$1.5 Billion for Hetero Marriage*, WINDY CITY TIMES, Jan. 21, 2004, at 1.

223. See U.S. CONST. art. V.

incorporate discrimination into the constitution must still be fought and condemned.²²⁴

Efforts to amend state constitutions will also continue, reflecting an animus and fear of extending the same rights of marriage to same-sex couples.²²⁵ In some states, those efforts will fail. In other states, those efforts may succeed. Where a state constitution is amended to prohibit same-sex marriage, that amendment should be challenged using the authority of *Romer v. Evans*,²²⁶ where the U.S. Supreme Court found an amendment to the Colorado State Constitution violated the Equal Protection Clause of the United States Constitution.

E. *ROMER V. EVANS*

Long before the issue of same-sex marriage was in the minds of many persons, there were successful efforts to add sexual orientation and gender identity to the categories of non-discrimination in employment, housing, and public accommodation. There were many unsuccessful efforts as well, of course, but gay, lesbian, bisexual, and transgendered persons did win many legislative battles on the state and local levels. But that “success” was sometimes met with a backlash. In Colorado, for example, opposition arose to gay and lesbian people after a number of municipalities had enacted ordinances prohibiting discrimination based on sexual orientation.²²⁷ A ballot amendment to the Colorado State Constitution removed the protections that local cities had enacted to prohibit discrimination based on sexual orientation.²²⁸

224. See, e.g., *Preserving the Constitution*, Chi. Trib., Mar. 7, 2004, § 2, at 8 (editorial) (“The Constitution was designed so that it would be changed only for important purposes enjoying broad, lasting popular support. It’s by no means clear that public opposition to gay marriage is sufficient to overcome the hurdles of the amendment process.”).

225. See, e.g., Tracy Baim, *Marriage Battle in Illinois*, WINDY CITY TIMES, Jan. 21, 2004, at 1; Gary Barlow, *State [Representatives] Propose Anti-Gay Amendments*, CHI. FREE PRESS, Jan. 21, 2004, at 1; *Illinois Marriage Legislative Fight*, WINDY CITY TIMES, Jan. 28, 2004, at 4. But see also Gary Barlow, *State Officers Oppose Anti-Gay Amendment*, CHI. FREE PRESS, Jan. 28, 2004, at 1 (noting opposition of state constitutional officers to a proposed anti-gay amendment to the Illinois State Constitution). See also *Utah to Face Anti-Gay Marriage Bill*, CHI. FREE PRESS, Nov. 19, 2003, at 10.

226. *Romer v. Evans*, 517 U.S. 620 (1996).

227. See, e.g., STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2* (1994) (anti-gay account of political developments in Colorado).

228. See *id.*

Ten years after its decision in *Bowers v. Hardwick*, the U.S. Supreme Court found that the constitutional amendment to the Colorado State Constitution violated the equal protection provisions of the federal constitution.²²⁹ In *Romer v. Evans*,²³⁰ the U.S. Supreme Court ruled that laws singling out gay and lesbian persons for special discriminatory treatment “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”²³¹

Justice Kennedy’s opinion for the majority in *Romer* began by citing Justice Harlan’s dissenting opinion from *Plessy v. Ferguson*, where Justice Harlan announced that the U.S. Constitution “neither knows nor tolerates classes among citizens.”²³² Justice Kennedy wrote that although Justice Harlan’s words were not heeded when they were written, those words “are now understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”²³³ The rights at stake in *Romer* were the rights of gay and lesbian persons.

The majority found that Amendment 2 to the Colorado Constitution did more than repeal or rescind the rights that gay and lesbian persons had won in various parts of the state.²³⁴ The amendment had the effect of prohibiting “all legislative, executive or judicial action at any level or state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.”²³⁵ The court found that the amendment “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies” by enacting new local ordinances.²³⁶ This put gay and lesbian persons in “a solitary class” where only they could not use the political process to win protections from discrimination against them.²³⁷ The amendment deprives gay and lesbian persons from any remedy for discrimination they may suffer in access to public accommodation, housing, insurance, health services, education, and employment.²³⁸ Indeed, the majority found it would be “a fair, if not

229. *Romer v. Evans*, 517 U.S. 620 (1996).

230. *Id.*

231. *Id.* at 634.

232. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The “separate but equal” doctrine in *Plessy* was overruled in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494-95 (1954).

233. *Romer*, 517 U.S. at 623.

234. *Id.* at 629.

235. *Id.* at 624.

236. *Id.* at 627.

237. *Id.*

238. *See id.* at 629.

necessary, inference from the broad language of the amendment that it [would have deprived] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”²³⁹

The majority rejected the argument that the amendment only denied “special rights” to homosexuals.²⁴⁰ Indeed, the court found “nothing special” about the protections that the amendment removed from gay and lesbian people.²⁴¹ As Justice Kennedy wrote: “These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”²⁴²

The court found that the amendment had no rational relationship to a legitimate government end, and as such, that the amendment violated the Equal Protection Clause of the Fourteenth Amendment.²⁴³ The court gave two initial reasons why the amendment failed the “rational basis” test.

First, the court found that the amendment had imposed an exceptional and invalid form of legislation on a single group.²⁴⁴ The court noted that a law would ordinarily be sustained if it could be said to advance a legitimate government interest, “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”²⁴⁵ Using a test that ensures that there is a relationship between the legislative classification and an “independent and legitimate legislative end,” the court can “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”²⁴⁶ The amendment before the court, however, “confound[ed] this normal process of judicial review.”²⁴⁷ The amendment identified individuals by a single trait, and then denied those persons any protection under state or local law, including the right later to seek legal protection from acts of discrimination.²⁴⁸ The court stated that it was “not within our constitutional tradition to enact laws” that denied persons equal protection of the law.²⁴⁹

239. *Id.* at 630.

240. *Id.* at 631. “To the contrary, the amendment imposes a special disability upon those persons alone.” *Id.*

241. *Romer*, 517 U.S. at 631.

242. *Id.*

243. *Id.* at 635.

244. *Id.* at 632.

245. *Id.*

246. *Id.* at 633.

247. *Romer*, 517 U.S. at 633.

248. *Id.* “The resulting disqualification of a class of persons from the right to seek

Second, the court found that the “sheer breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.”²⁵⁰ Although other legislative amendments often refer to “legitimate public policies” that purport to justify disadvantages those laws may inflict,²⁵¹ the only explanation for the law here was hatred of gay and lesbian persons, and of the rights of others not to associate with them. “The primary rationale the State offers for Amendment 2,” the court noted “is respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”²⁵² The state also cited “its interest in conserving resources to fight discrimination against other groups.”²⁵³ However, the court credited neither argument. “The breadth of the Amendment” said the court “is so far removed from these particular justifications that we find it impossible to credit them.”²⁵⁴ Because the court could not identify any “legitimate purpose or discrete objective” to support the amendment, the court determined that the amendment was impermissible under the Fourteenth Amendment.²⁵⁵ There was no rational basis to support legislation that removed existing protections for gay and lesbian persons and that further removed the ability of gay and lesbian persons to petition the state or local government for the redress of grievances.

Justice Scalia, in “vigorous” and histrionic dissent, said that the Supreme Court had “mistaken a *Kulturkampf* for a fit of spite.”²⁵⁶ Justice Scalia argued that the legislation properly reflected the “modest attempt of seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through

specific protection from the law is unprecedented in our jurisprudence.” *Id.*

249. *Id.* “Respect for this principle [of Equal Protection] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Id.*

250. *Id.* at 632.

251. *Id.* at 635.

252. *Id.*

253. *Romer*, 517 U.S. at 635.

254. *Id.*

255. *Id.* “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.” *Id.* at 636.

256. *Id.* at 636 (Scalia, J., dissenting) (emphasis added).

use of the laws.”²⁵⁷ He said that the amendment did nothing more than prohibit “special treatment of homosexuals,” and that the court’s “unassailable” holding in *Bowers v. Hardwick* provided a rational basis for the legislation.²⁵⁸ Justice Scalia accused the court of “[taking] sides in the culture wars,” and stated that the voters of Colorado “adopted an entirely reasonable provision” that merely denies preferential treatment to homosexuals.²⁵⁹

The decision in *Romer* found that homophobic legislation that denied equal protection of the law could not withstand a rational basis challenge. *Romer* would later be one of the decisions cited by the Massachusetts Supreme Judicial Court as support for allowing same-sex couples the equal protections of marriage. The Massachusetts court noted that like “Amendment 2” to the Colorado Constitution, the prohibition against same-sex marriage “impermissibly ‘identifies persons by a single trait and then denies them protection across the board.’”²⁶⁰

In finding that an anti-gay amendment was an unconstitutional violation of equal protection, the *Romer* decision set the stage for subsequent courts to question and strike down laws that discriminated against gay and lesbian persons. The *Romer* decision was not always interpreted expansively, however.²⁶¹

257. *Id.* (Scalia, J., dissenting).

258. *Id.* at 638, 641 (Scalia, J., dissenting). The proposition that the holding was “unassailable” was proven wrong in the state court opinions that refused to follow it, the law review articles that criticized it, and the U.S. Supreme Court’s own decision that overruled it. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (*Bowers* “was not correct when it was decided, and it is not correct today.”).

259. *Romer*, 517 U.S. at 652-53 (Scalia, J., dissenting).

260. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 962 (Mass. 2003) (quoting *Romer*, 517 U.S. at 633).

261. In *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998), for example, the U.S. Court of Appeals for the Sixth Circuit upheld a similar anti-gay amendment to the city charter of Cincinnati. *Id.* The Sixth Circuit found that the amendment to the city charter did not adversely affect gay and lesbian persons as much as the Colorado Amendment, in part because the city charter affected only those people living in the city of Cincinnati rather than the entire state of Ohio. See *id.* at 301. See also *Bailey v. City of Austin*, 972 S.W.2d 180, 190 (Tex. App. 1998). The court’s efforts to distinguish *Romer* are unconvincing, however. Discrimination is discrimination; animus is animus; and a violation of Equal Protection is a violation of Equal Protection. The Sixth Circuit erred in not applying *Romer* to the referendum before it, and the U.S. Supreme Court erred in not accepting the case for review and reversal under *Romer*.

F. “COMMON BENEFITS” UNDER THE VERMONT STATE CONSTITUTION – VERMONT CIVIL UNIONS

In 1999, the Vermont Supreme Court ruled that the Common Benefits Clause of the Vermont Constitution required the state “to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”²⁶² The case arose when a gay couple and two lesbian couples sued Vermont after town clerks refused to issue marriage licenses because of the state marriage laws.²⁶³ The couples had claimed that the denial of marriage licenses violated the “Common Benefits Clause” of the Vermont Constitution, which provides in relevant part that:

government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons who are a part only of that community²⁶⁴

The couples argued that denying access to a civil marriage license denied them “a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.”²⁶⁵

The Vermont Supreme Court stressed that it was deciding the case under the Common Benefits Clause of the Vermont Constitution, and not its federal counterpart, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.²⁶⁶ The court noted that this provision

262. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

263. *Id.*; David L. Chambers, *The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and Speculation*, 25 VT. L. REV. 5, 5 (2000).

264. *Baker*, 744 A.2d at 867 (quoting VT. CONST. ch. 1, art. 7).

265. *Id.* at 870.

266. *Id.* The Court took considerable pride in relying on the state constitution instead of the federal constitution: “Vermont’s constitutional commitment to equal rights was the product of the successful effort to create an independent republic and a fundamental charter of government, the Constitution of 1777, both of which preceded the adoption of the Fourteenth Amendment by nearly a century.” *Id.* A state constitution may often provide stronger protection than the federal constitution. See *Arizona v. Evans*, 514 U.S. 1, 8 (1995); MARK E. WOJCIK, ILLINOIS LEGAL RESEARCH 17 (Carolina Academic Press 2003). State constitutions may also identify rights that are not identified expressly in the federal constitution. *Id.* See also *Goodridge*, 798 N.E.2d at 959 (“The Massachusetts Constitution

of the state constitution “differs markedly” from its federal counterpart “in its language, historical origins, purpose, and development.”²⁶⁷ Although the Common Benefits Clause of the Vermont Constitution might have a similar purpose to that of the federal Equal Protection Clause, the Vermont Supreme Court stated that its decisions reflect “a very different approach from current federal jurisprudence.”²⁶⁸

In construing the particular language of the state constitution, the Vermont Supreme Court said that its challenge was to remain faithful to the historical motivating ideals of the framers of the Constitution, “while addressing contemporary issues that [they] undoubtedly could never have imagined.”²⁶⁹ In this context, the court first opined that the Vermont Constitution provided an “affirmative and unequivocal mandate” that the state government was “established for the common benefit of the people and community as a whole.”²⁷⁰ The court also found that the Common Benefits Clause did not prohibit the denial of rights to those without rights, but instead prohibited “the conferral of advantages or emoluments upon the privileged.”²⁷¹ Recognizing that “the principle of inclusion” was one of the standards to use when determining the constitutionality of a particular

protects matters of personal liberty against government incursions as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”).

267. *Baker*, 744 A.2d at 870. The court also noted that although the federal constitution “may . . . supplement the protections afforded by the Common Benefits Clause,” the federal constitution did not “supplant” the Vermont State Constitution “as the first and primary safeguard of the rights and liberties of all Vermonters.” *Id.* (citing *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982), and *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985)).

268. *Id.* at 871. The court described its approach as being “broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective.” *Id.* (emphasis original).

269. *Id.* at 874.

270. *Id.* Unlike the federal Equal Protection Clause, which provides that no state may “deny” the equal protection of the laws, the Vermont Constitution provides that all Vermonters should enjoy the common benefits of the government. The Vermont Supreme Court stated that: “Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority (no state shall “deny” the equal protection of the laws), the Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth century group of men aggressively laying claim to the same rights as their peers in Great Britain, or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley.” *Id.*

271. *Baker*, 744 A.2d at 874. “The same assumption that all the people should be afforded all the benefits and protections bestowed by government is also reflected in the second section [of the Common Benefits Clause], which prohibits not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged.” *Id.*

statute, the Vermont Supreme Court stated that the essence of the Common Benefits Clause was “a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage.”²⁷²

Thus guided by an approach that reflected a principle of inclusion, the Vermont Supreme Court expressed difficulty with “the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment” and federal court labels such as “suspect,” “quasi-suspect,” and “non-suspect” when determining what level of judicial scrutiny to give to a challenged statute.^{273 274}

Against this framework, the court looked at the state government’s purpose “in drawing a classification that includes some members of the community within the challenged law but excludes others.”²⁷⁵ The court asked whether the limitation of civil marriage to opposite-sex couples was “reasonably necessary to accomplish the State’s claimed objectives.”²⁷⁶ In making this determination, the court stated that it would consider:

- (1) The significance of the benefits and protections of the challenged law;
- (2) Whether the omission of members of the community from the benefits and protections of the challenged law promoted the government’s stated goals; and

272. *Id.* at 875. After further review of the historical context behind the Vermont State Constitution, the Vermont Supreme Court concluded that the framers were principally concerned not with the extension of civil rights, “but with equal access to public benefits and protections for the community as a whole. The concept at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that the social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege.” *Id.* at 876-77.

273. *Id.* at 878. The Vermont Supreme Court stated that in harmony with the “guiding principle of affording the protection and benefit of the law to all members of the Vermont community,” it would “examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State’s claimed objectives.” *Id.*

274. *Baker*, 744 A.2d at 878.

275. *Id.*

276. *Id.*

(3) Whether the government's classification was "significantly underinclusive or overinclusive."²⁷⁷

The Vermont Supreme Court acknowledged that the answers to these questions would not necessarily serve as a substitute for the exercise of "reasoned judgment" by the court, stating that balancing the interests of individual liberty with those of society "does not lend itself to the precision of a scale."²⁷⁸

The principle purpose asserted to justify excluding same-sex couples was the governmental interest in "furthering the link between procreation and child rearing."²⁷⁹ The State of Vermont argued that it had "a strong interest . . . in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support."²⁸⁰ The State argued that the Vermont Legislature was justified "in using the marriage statutes to send a public message that procreation and child rearing are intertwined."²⁸¹

The Vermont Supreme Court agreed that the State did have "a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children," and said that there was little doubt that most births today resulted from natural conception between one man and one woman.²⁸² But the court found that it was "equally undisputed that many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children."²⁸³ Because marriage is available to opposite-sex couples who never intend to have children, the court found that the Vermont marriage statute "extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal."²⁸⁴

277. *Id.* at 879.

278. *Id.*

279. *Id.* at 881.

280. *Id.* The State argued further that the Vermont Legislature "could reasonably believe that sanctioning same-sex unions 'would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surpluse to the functions of procreation and child rearing.'" *Id.*

281. *Id.*

282. *Baker*, 744 A.2d at 881.

283. *Id.* (emphasis original). The court stated that "if the purpose of the statutory exclusion of same-sex couples is to 'further[] the link between procreation and child rearing,' it is significantly underinclusive." *Id.*

284. *Id.*

In addition to finding that the marriage laws offered benefits to many heterosexual couples who had no intention to raise children, the court found that “a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by [same-sex] parents through a variety of assisted-reproductive techniques.”²⁸⁵ The court noted that the Vermont Legislature recognized the growing number of gay and lesbian parents, and that it had “acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts.”²⁸⁶

The Vermont Supreme Court found that if the State’s purpose in limiting marriage to opposite-sex couples was really to legitimize children and provide for the security of those children, then the Vermont marriage statutes excluded many same-sex couples that have children that deserve those same protections.²⁸⁷ The court found that excluding same-sex couples from the legal protections incident to marriage “exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against.”²⁸⁸ The court also found that the State offered “no persuasive reasoning” to support “the bare assertion” that allowing same-sex couples to marry would render mothers and fathers a “mere surplusage to the functions of procreation and child rearing.”²⁸⁹

Finding little support in the state’s arguments to continue denying the benefits of marriage to same-sex couples, the Vermont Supreme Court turned to the interests of the same-sex couples who were denied the benefits and protections of marriage. As in the Hawai’i Supreme Court decision that would have recognized same-sex marriage, the Vermont Supreme Court looked for guidance in *Loving v. Virginia*, the U.S. Supreme Court decision that struck down Virginia’s anti-miscegenation law. In that decision, the U.S. Supreme Court stated that “[t]he freedom to

285. *Id.*

286. *Id.* at 882. (citing VT. STAT. ANN. tit. 15A, § 1-102(b) (2002), a statute that allows the partner of a biological parent to adopt if it is in the child’s best interest; VT. STAT. ANN. tit. 15A, § 1-112 (2002), a statute vesting the family court with jurisdiction over parental rights and responsibilities when unmarried persons who adopt a minor child end their domestic relationship).

287. *Id.*

288. *Baker*, 744 A.2d at 882 (emphasis original). The court continued: “In short, the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*.” *Id.* (emphasis original).

289. *Id.* Noting that many opposite-sex couples rely on non-traditional methods of conception, the court found that “there is no reasonable basis to conclude that a same-sex couple’s use of the same technologies would undermine the bonds of parenthood, or society’s perception of parenthood.” *Id.*

marry has long been recognized as one of the vital personal rights.”²⁹⁰ The Vermont Supreme Court found that this language (as well as the holding itself in *Loving v. Virginia*) showed that “access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society.”²⁹¹ The court also found that the state marriage laws provided “significant public benefits and protections,”²⁹² including:

- The right to receive a portion of the estate of a spouse who dies intestate;
- Protection against disinheritance through elective share provisions;
- Preference in being appointed as the personal representative of a spouse who dies intestate;
- The ability to sue for the wrongful death of a spouse;
- The ability to sue for loss of consortium;
- The right to workers’ compensation benefits;
- The right to spousal benefits guaranteed by statute to public employees, including health, life, disability, and accident insurance;
- The opportunity to be covered as a spouse under group life insurance policies;
- The opportunity to obtain health insurance as the insured’s spouse under an individual health insurance policy;
- The right to claim an evidentiary privilege for marital communications;
- Homestead rights and protections;
- The presumption of joint ownership of property, and the right of survivorship;
- Hospital visitation and other rights that arise during the medical treatment of a family member; and

290. *Id.* at 883 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

291. *Id.*

292. *Id.*

- The right to receive (and the obligation to provide) spousal support, maintenance, and the division of property if there is a separation or divorce.²⁹³

The court recognized that even this extensive listing was only a partial list of the benefits that are unavailable to same-sex couples who are denied the right to marry, and ruled that the state would have to show a public concern of sufficient weight to justify the denial of these significant benefits and protections.²⁹⁴

The state did not succeed in showing that the denial of benefits was justified. The court found that the rationale of protecting children and “furthering the link between procreation and child rearing” did not justify the denial of benefits to same-sex couples, because many opposite-sex couples had no children and many same-sex couples did.²⁹⁵ The court considered other arguments that the state raised concerning the raising of children by opposite-sex couples, but the court rejected these arguments because Vermont allowed the adoption of children by same-sex couples.²⁹⁶ This policy choice, according to the court, rendered meritless the argument that Vermont favored opposite-sex over same-sex parents, or that the State disfavored the use of artificial reproduction technologies.²⁹⁷ The court also rejected arguments that recognizing same-sex marriage “might foster marriages of convenience or otherwise affect the institution in ‘unpredictable’ ways,” because even if true those arguments could not provide a “reasonable and just basis for the statutory exclusion.”²⁹⁸

293. *Id.* at 883-84.

294. *Baker*, 744 A.2d at 884. “The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.” *Id.*

295. *Id.* The court stated: “The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to *this goal* than their opposite sex counterparts. Promoting a link between procreation and childrearing similarly fails to support the exclusion.” *Id.* (emphasis original).

296. *Id.* at 884-85 (citing VT. STAT. ANN. tit. 15A, § 1-102 (2002)). The court noted that “[a]t the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their ‘domestic relationship.’” *Id.* at 885 (citing VT. STAT. ANN. tit. 15A, § 1-112 (2002)).

297. *Id.* at 885.

298. *Id.* The court stated: “It would, for example, serve no useful purpose to remand this matter for hearings on whether marriages of convenience . . . would result from

The Vermont Supreme Court held that the language the framers used and the broad underlying principle of inclusion in the benefits of government supported a change to the civil marriage law of Vermont. “[I]n the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.”²⁹⁹ The court held that same-sex couples were entitled to have access to the “same benefits and protections” that Vermont law afforded to married, opposite-sex couples.³⁰⁰ The court saw its ruling not only as “the fulfillment of constitutional responsibility”³⁰¹ but also as “a recognition of our common humanity.”³⁰²

Although some have mistakenly assumed that the effect of the Vermont decision was to legalize same-sex marriage, the Vermont Supreme Court stopped short of requiring the state to issue marriage licenses to same-sex couples. Neither did the court rule that a denial of a marriage license to a same-sex couple would violate equal protection or other constitutionally protected rights.³⁰³ The constitutional violation came not in the particular form of union for same-sex couples, but in the denial of common benefits that were available to opposite-sex couples. The Vermont Supreme Court required the state legislature to provide some means of extending the constitutionally required common benefits and protections of marriage to same-sex couples, in whatever way it found to fulfill that mandate.³⁰⁴ As guidance for the legislature, the court identified statutory schemes in Hawai’i, Denmark, and Norway as starting points for a revised legislative solution, but the court noted that even these suggested alternatives omitted certain significant benefits that would be constitutionally required under the Common Benefits Clause of the

providing same-sex couples with the statutory benefits and protections accorded opposite-sex couples under marriage laws. For the reasons we have stated in this opinion, it is not a failure of proof that is fatal to the State’s arguments, it is a failure of logic.” *Id.* n.14.

299. *Id.* at 886.

300. *Baker*, 744 A.2d at 886.

301. *Id.* at 888.

302. *Id.* at 889.

303. *Id.* at 867, 886.

304. *Id.* at 867. The Vermont Supreme Court stated: “Whether this [extension of the benefits and protections of marriage] ultimately takes the form of inclusion within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests with the [Vermont State] Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford to all Vermonters the common benefit, protection, and security of the law.” *Id.*

Vermont State Constitution.³⁰⁵ The court allowed the marriage statutes to remain in place while the legislature considered an appropriate alternative. The court also retained jurisdiction over the case as a way of ensuring legislative action. The court warned that if the legislature did not act to grant the common benefits and protections of marriage, the plaintiffs could petition the Vermont Supreme Court to order the issuance of marriage licenses.³⁰⁶

In a separate decision that concurred with the result but dissented from the failure to grant an immediate remedy to the same-sex couples who were the plaintiffs in the case, Justice Johnson would have granted the relief requested and enjoined the defendants from denying marriage licenses to same-sex couples.³⁰⁷ Justice Johnson wrote that “allowing plaintiffs to obtain a license would further the overall goals of marriage, as defined by the majority – to provide stability to individuals, their families, and the broader community by clarifying and protecting the rights of married persons.”³⁰⁸ Justice Johnson also wrote separately to describe the challenge to the denial of marriage licenses to same-sex couples as “a straightforward case of sex discrimination.”³⁰⁹

Based upon the mandate of the Vermont Supreme Court, the Vermont legislature voted to allow civil unions between same-sex couples.³¹⁰

305. *Id.* at 886-87.

306. *Baker*, 744 A.2d at 887, 889.

307. *Id.* at 898 (Johnson, J., concurring in part, dissenting in part).

308. *Id.* at 902 (Johnson, J., concurring in part, dissenting in part).

309. *Id.* at 904-05 (Johnson, J., concurring in part, dissenting in part). As Justice Johnson explained:

A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.

Id. at 905 (Johnson, J., concurring in part, dissenting in part). Under this standard, Justice Johnson found that the State had failed to show that its classification was narrowly tailored to further important interests; not only did the rationalizations offered by the State fail to satisfy any heightened form of judicial scrutiny, but Justice Johnson found that the rationalizations also “fail[ed] to satisfy the rational-basis test as articulated under the [Vermont] Common Benefits Clause.” *Id.* (Johnson, J., concurring in part, dissenting in part).

310. See An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201-07 (2003)).

Howard Dean, the then-governor of Vermont, said that when he signed the legislation in April 2000, it was “in the long run the right thing for Vermont and for the United States of America.”³¹¹ He stated a belief that “this bill enriches all of us, as we look with new eyes at a group of people who have been outcasts for many, many generations.”³¹²

The Vermont Civil Union law entered into effect on July 1, 2000. The law allowed Vermont citizens who entered into civil unions – and who remained in the state – “virtually all the state-created rights and responsibilities given to married couples.”³¹³

G. CANADIAN COURTS RECOGNIZE A RIGHT FOR SAME-SEX COUPLES TO MARRY

The debate on same-sex marriage was, of course, not a debate limited to any one country. Other countries were also dealing with the demands of same-sex couples to have the same rights, benefits, and protections of civil marriage. While the United States continued to debate the propriety of same-sex marriage, provincial appellate courts in Canada ruled that the bar against same-sex marriage violated the Canadian Charter of Rights and Freedoms.³¹⁴

The first appellate court to so rule was the British Columbia Court of Appeal, which ruled on May 1, 2003 in the case of *EGALE Canada, Inc. v. Canada (Attorney General)*.³¹⁵ EGALE, a Canadian advocacy group,³¹⁶ along with several same-sex couples, sued in British Columbia for a declaration that the issuer of marriage licenses³¹⁷ could issue licenses to same-sex couples, and that there was no enforceable legal bar to the

311. Lisa Neff, *Dean: Faith Guided on Civil Unions Act*, CHI. FREE PRESS, Jan. 14, 2004, at 1.

312. *Id.* He stated later that he was also guided by his Christian faith, which helped him decide to sign the legislation. He stated: “The hallmark of Christianity is to reach out to people who have been left behind. So there was a religious aspect to my support of civil unions.” *Id.* at 13.

313. Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113, 116 (2000).

314. *EGALE Canada, Inc. v. Canada (Attorney General)*, [2003] 13 B.C.L.R.4th 1 (B.C. C.A.); *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276.

315. *EGALE Canada, Inc. v. Canada (Attorney General)*, [2003] 13 B.C.L.R.4th 1 (B.C. C.A.).

316. *Id.* “EGALE” is the acronym for “Equality for Gays and Lesbians Everywhere.” It is a national organization “committed to the advancement of equality for lesbians, gays, bisexuals and transgendered people in Canada. *Id.* at para. 16.

317. *Id.* The issuer of marriage licenses was the British Columbia Director of Vital Statistics. *Id.* at para. 24.

marriage of same-sex couples.³¹⁸ The couples had been denied marriage licenses on the basis that there was a “common law bar to same-sex marriages,” and they were told that only the federal government could remove that common-law prohibition against same-sex marriage “by enacting legislation to redefine marriage or to change the rules concerning capacity to marry.”³¹⁹

The Canadian same-sex couples affirmed that they wanted to marry for the same reasons common to those who enter opposite-sex marriages: love, family support, social recognition, legal protection, financial and emotional security, religious and spiritual fulfillment, providing a supportive atmosphere for children, and to strengthen their commitment to their relationship.³²⁰ The trial court dismissed their petition,³²¹ and the parties appealed to the British Columbia Court of Appeal.³²²

Madam Justice Prowse noted that the trial court had considered affidavits from the same-sex couples and from a variety of experts in the fields of comparative religion, history, anthropology, ethics, law, sociology, gender studies, linguistics, lesbian and gay studies, theology, education, economics, and philosophy.³²³ She noted that the trial court was also aware of recent legal developments in Canada that extended rights previously available only to married couples, including expanded access to support, guardianship, adoption, pension entitlement, and medical decision-making.³²⁴ She found that the trial court correctly determined that although there was no explicit statutory prohibition against same-sex marriage, there was a common law bar to same-sex marriage “by virtue of the common law definition of marriage as ‘the voluntary union for life of one man and one woman, to the exclusion of all others.’”³²⁵ This “common law bar” operated

318. *Id.* at paras. 8, 14.

319. *Id.* at para. 24. The Attorney General for British Columbia had filed a petition with the British Columbia Supreme Court in July 2000 seeking a declaration that same-sex marriage was allowed, but the petition was withdrawn in July 2001 after a change in government. *Id.* at para. 25.

320. *Id.* at para. 15.

321. *See* EGALE Canada, Inc. v. Canada (Attorney General) [2001] 95 B.C.L.R.3d 122 (B.C. S.C.). The trial court found, in part, that “[u]nder Canadian law, marriage is a legal relationship between two persons of [the] opposite sex” and that this legal relationship of marriage “[did] not extend to same-sex couples.” *Id.* at para. 8.

322. EGALE Canada, Inc., 13 B.C.L.R.4th 1, para. 23. Additional parties were granted leave to intervene in the case, on condition that they not seek costs, and that they would carry any additional costs of their intervention. *Id.*

323. *Id.* at paras. 34-35. Many of the experts were also experts in the concurrent litigation in Ontario. *See id.* para. 36.

324. *Id.* at para. 37.

325. *Id.* at para. 56.

as a “legal disqualification” for same-sex couples to marry.³²⁶ This determination was not the end of the analysis, however; it was only the beginning.

The Canadian Charter of Rights and Freedoms provides in section 15(1) that: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”³²⁷ It is true that “sexual orientation” is not specifically listed as an example of illegal discrimination, but the language of the Charter does not protect only those categories listed.³²⁸ Under the Charter “every individual is equal,” including gay and lesbian persons.³²⁹ “Sexual orientation” is an “analogous ground” of non-discrimination under the Charter.³³⁰

Madam Justice Prowse found that the denial of marriage licenses to same-sex couples violated the same-sex couples’ right to equality under section 15 of the Canadian Charter.³³¹ Her finding that the denial of marriage licenses to same-sex couples violated the Charter was also what the trial court had found, but the trial court had determined that the violation was reasonably justified under section 1 of the Charter.³³² The trial court judge had concluded that “the salutary effects of retaining the common law definition of marriage far outweighed the deleterious effects of changing that definition,” particularly because other legal developments prohibiting discrimination based on sexual orientation had “narrowed or minimized the differences between same-sex and opposite-sex relationships.”³³³

Madam Justice Prowse did not agree with the trial court that the denial of marriage licenses to same-sex couples could be justified, however. She noted that the government had to prove that its interest was “pressing and

326. *Id.* at para. 57-58.

327. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 15(1).

328. *See generally*, EGALE Canada, Inc., 13 B.C.L.R.4th 1.

329. *Id.*

330. *See* EGALE Canada, Inc. 13 B.C.L.R.4th 1, para. 82. *See also* Egan v. Canada, [1995] 2 S.C.R. 513, para. 13 ; M. v. H., [1999] 2 S.C.R. 3, para 64 .

331. *See* EGALE Canada Inc., 13 B.C.L.R.4th 1, para. 95.

332. *Id.* at para. 102. Section 1 of the Charter provides that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1.

333. EGALE Canada Inc., 13 B.C.L.R.4th 1, para. 105.

substantial.”³³⁴ To prove this, in turn, the government needed to satisfy a three-part proportionality test, proving that:

- (1) The means are rationally connected to the objective;
- (2) The impugned provision impairs the constitutionally protected right no more than necessary; and
- (3) The deleterious effects of the impugned provision are proportional both to the salutary effects and to the importance of the governmental objective that was identified as pressing and substantial.³³⁵

Justice Prowse stated that although there was a body of authority supporting the proposition that the purpose of marriage was procreation, she found that there was evidence “that the emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage and its role in society”³³⁶ She found that “procreation (including the rearing of children) resulting from sexual intercourse between a husband and wife[] [could] no longer be regarded as a sufficiently pressing and substantial objective” that would satisfy the analysis required under Section 1 of the Canadian Charter of Rights and Freedoms.³³⁷ She was “not satisfied,” in other words, “that denying same-sex couples the right to marry because of their inability to procreate ‘as between themselves’” would satisfy the first stage of analysis required under section 1 of the Charter.³³⁸ Accordingly, Madam Justice Prowse found that the common law bar to same-sex marriage could not be justified under section 1 of the Charter.³³⁹

As to a remedy for that unjustifiable violation, Madam Justice Prowse wrote that she would grant a declaration “that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by [section] 15 of the Charter and does not constitute a reasonable and demonstrably justified limit on those rights and freedoms within the meaning of [section] 1 of the Charter.”³⁴⁰ She would also “reformulate the common law definition of marriage” as “the lawful union

334. *Id.* at para. 116.

335. *Id.*

336. *Id.* at para. 124.

337. *Id.*

338. *Id.*

339. *EGALE Canada Inc.*, 13 B.C.L.R.4th 1, para. 135.

340. *Id.* at para. 158.

of two persons to the exclusion of all others.”³⁴¹ However, she wrote that she would suspend both of those remedies (to grant the declaration and to reformulate the common law definition of marriage) until July 12, 2004, “solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision.”³⁴² Justices Mackenzie and Low agreed with Madam Justice Prowse to allow the appeals and the appropriate remedy.³⁴³

The following month, on June 10, 2003, the Court of Appeals for Ontario issued its own decision in *Halpern v. Toronto*, also finding that the denial of marriage licenses to same-sex couples was a violation of section 15 of the Canadian Charter of Rights and Freedoms, and that the violation was unjustifiable under section 1 of the Charter.³⁴⁴ However, unlike the court in British Columbia, the Ontario court found no reason to delay its decision.³⁴⁵

In the *Halpern* case, several same-sex couples applied for marriage licenses from the Clerk for the City of Toronto.³⁴⁶ The clerk did not deny the marriage licenses, but held the applications in abeyance while she applied to the court for directions on whether to issue the marriage licenses.³⁴⁷ Around the same time, the Metropolitan Community Church of Toronto (“MCCT”) started using “the ancient Christian tradition of publishing the banns of marriage” as an alternative under to a municipal marriage license.³⁴⁸ The pastor at the MCCT published the banns for two same-sex couples, registered the marriages in the Church Register, and issued marriage certificates to the two couples.³⁴⁹ The MCCT submitted the required documentation to the Office of the Registrar General of Ontario, which refused to accept the documents because of “an alleged federal prohibition against same-sex marriages.”³⁵⁰ The MCCT filed a court challenge to that act, and its case was consolidated with the other case of the same-sex couples who were waiting for their marriage licenses.³⁵¹

A panel at the Divisional Court first hearing the cases held unanimously on July 12, 2002 that the common law definition of marriage

341. *Id.* at para. 159.

342. *Id.* at para. 161.

343. *Id.* at paras. 164, 182.

344. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 142.

345. *See id.* at para. 154.

346. *Id.* at para. 10.

347. *Id.*

348. *Id.* at para. 11.

349. *Id.* at paras. 12-13.

350. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 14.

351. *Id.* at paras. 14-15.

as the “lawful and voluntary union of one man and one woman to the exclusion of all others” was a violation of section 15(1) of the Canadian Charter of Rights and Freedoms, and that the violation was not justified under section 1 of the Charter.³⁵² However, the panel was not unanimous as to the remedy. The compromise position of the lower court was to allow the Parliament two years to amend the common law rule in a way that would permit same-sex marriage.³⁵³ A similar remedy had been ordered in a Québec case that had also found that the prohibition against same-sex marriage violated section 15(1) of the Charter and that the violation was unjustifiable under section 1 of the Charter, but that stayed the declaration of invalidity for two years.³⁵⁴

The Ontario appellate court agreed with the lower court that there was a common law rule against recognizing same-sex marriages.³⁵⁵ The court disagreed, however, that the definition of marriage was unchangeable. Using the doctrine of progressive interpretation, the court recalled a familiar analogy that described the fundamental law as something that could grow like a living tree, rather than something that was static or frozen at the time it was first written.³⁵⁶ The word “marriage,” therefore, did not have a “constitutionally fixed meaning.”³⁵⁷

The Ontario appellate court found that the national and provincial governments of Canada “chose to give legal recognition to marriage,” and in so doing, “built a myriad of rights and obligations around the institution of marriage.”³⁵⁸ Having done so, however, the governments created a situation that denied those rights (and obligations) to same-sex couples.³⁵⁹ The court recognized that “a distinction had been made” between same-sex couples and opposite-sex couples.³⁶⁰ The court rejected as circular reasoning the argument that marriage is heterosexual because it “just is.”³⁶¹ Continuing its own analysis, the court found that “the common law requirement that marriage be between persons of the opposite sex does not

352. *Id.* at para. 16.

353. *Id.* at para. 17.

354. *Id.* at para. 32; *Hendricks c. Québec (Procureur général)*, [2002] R.J.Q. 2506. The Québec Court of Appeal in March 2004 affirmed that the traditional definition of marriage was discriminatory against same-sex couples. Colin Campbell, *Canada: Quebec Court Upholds Gay Marriage*, N.Y. TIMES, Mar. 20, 2004, at A5.

355. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, at para. 37.

356. *Id.* at paras. 42-44.

357. *Id.* at para. 46.

358. *Id.* at para. 69.

359. *Id.*

360. *Id.* at para. 70.

361. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 71.

accord with the needs, capacities and circumstances of same-sex couples.”³⁶² The court found that the prohibition against obtaining marriage licenses violated “the dignity of persons in same-sex relationships”³⁶³

Having found a violation under section 15(1), the Ontario court considered next whether the violation could be justified under section 1 of the Charter.³⁶⁴ The test that the court used required “the party seeking to uphold the impugned law” to prove “on a balance of probabilities” that: (1) the objective of the law is pressing and substantial; and (2) the means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society.³⁶⁵ The second part of the test requires that: (a) the violation of rights is rationally connected to the stated objective of the law; (b) the impugned law only minimally impact the Charter guarantee; and (c) proportionality between the effect of the law and its objective, so that attaining the objective will not be outweighed by the abridgement of the right.³⁶⁶

In considering the arguments to preserve the opposite-sex definition of marriage, the court found that there was no valid objective to maintaining marriage as “an exclusively heterosexual institution.”³⁶⁷ As the court noted, “Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a *Charter* guarantee.”³⁶⁸ Marriage could continue to be heterosexual, but this presented no reason why marriages could not also be homosexual as well.

Opponents argued that traditional marriage served three basic purposes: (1) uniting the opposite sexes; (2) encouraging the birth and raising of children; and (3) companionship.³⁶⁹ The court rejected each of these arguments.

362. *Id.* at para. 95.

363. *Id.* at para. 108. The court concluded that “the common-law definition of marriage as ‘the voluntary union for life of one man and one woman to the exclusion of all others’ violates [section] 15(1) of the Charter.” *Id.*

364. *Id.* Section 1 of the Charter, for ease of reference, provides: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by the law as can be demonstrably justified in a free and democratic society.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1.

365. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, at para. 113.

366. *Id.*

367. *Id.* at para. 117.

368. *Id.* (emphasis original).

369. *Id.* at para. 118.

First, the court found that the purpose of “uniting members of the opposite sex” suggested that the uniting of persons of the same sex was of lesser importance.³⁷⁰ The court rejected this argument instantly because “a purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial.”³⁷¹

Second, the court found that the purpose of encouraging the birth and raising of children is “a laudable goal” properly regarded as pressing and substantial, but the court failed to see how keeping marriage as an exclusively heterosexual institution furthered this goal.³⁷² “Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry,” noted the court, while at the same time “an increasing percentage of children are being born to and raised by same-sex couples.”³⁷³ The court rejected the suggestion that the law should favor only “natural” procreation, as that was “not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples.”³⁷⁴

Third, the court found that the goal of promoting “companionship” was not a pressing and substantial objective for the failure of the marriage laws to cover same-sex marriages.³⁷⁵ “Encouraging companionship between only persons of the opposite sex,” said the court, “perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships.”³⁷⁶

Reviewing these three benefits of marriage, the court considered whether there was a “rational connection” for excluding same-sex couples from the benefits of marriage.³⁷⁷ The court rejected assertions that the rational connection was “self-evident” in the effectiveness of marriage “in bringing the two sexes together, in sheltering children, and in providing a stable institution for society.”³⁷⁸ The court said that its difficulty with this

370. *Id.* at para. 119.

371. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 119.

372. *Id.* at paras. 120-21.

373. *Id.* at para. 121.

374. *Id.* at para. 122. “A law that aims to encourage only ‘natural’ procreation ignores the fact that same-sex couples are capable of having children.” *Id.*

375. *Id.* at para. 124.

376. *Id.*

377. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 127. “Under the rational connection component of the proportionality analysis, the party seeking to uphold the impugned law must demonstrate that the rights violation is rationally connected to the objective, in the sense that the exclusion of same-sex couples from marriage is required to encourage procreation, childrearing, and companionship.” *Id.*

378. *Id.* at para. 128.

argument was that the same-sex couples were not seeking to abolish marriage, but were seeking access to these rights and benefits as well.³⁷⁹ The benefits of marriage, self-evident as they may be, were not self-evidently available only to opposite-sex couples.³⁸⁰ Gay men and lesbians who entered into same-sex relationships could also have children by adoption or artificial means, and gay men and lesbians “are as capable of providing companionship to their same-sex partners as persons in opposite-sex relationships.”³⁸¹

Finally turning to the remedy for the violation of Charter rights, the court found that the remedy that would “best” correct the situation was to “declare invalid the existing definition of marriage to the extent that it refers to ‘one man and one woman,’ and to reformulate the definition of marriage as ‘the voluntary union for life of two persons to the exclusion of all of others.’”³⁸²

The court rejected the suggestion that the legislature be given time to reformulate the common law definition of marriage; the court stated that deference to the legislature was unnecessary in this instance because it was the courts who first came up with the common law definition of marriage, and this new definition did not conflict with the Charter of Rights and Freedoms.³⁸³ The court also rejected the suggestion that it should allow some time before implementing this new definition.³⁸⁴ Although the court identified several instances where it would be proper to delay a declaration of invalidity if that declaration would unintentionally injure others, but here the court found no evidence that giving immediate effect to its order would “pose any harm to the public, threaten the rule of law, or deny anyone of the benefit of legal recognition of their marriage.”³⁸⁵ The court accordingly declared a new definition of marriage, ordered the Clerk of the City of Toronto to issue marriage licenses to the same-sex couples, and ordered the Registrar General of the Province of Ontario to accept the marriage certificates tendered by the MCCT.³⁸⁶ Same-sex marriage thus became legal in Ontario on June 10, 2003.

379. *Id.* at para. 129.

380. *Id.* at paras. 129-32.

381. *Id.* at para. 131. The court rejected some remaining arguments on similar grounds, finding that reasons for heterosexual marriage did not support limiting marriage to heterosexuals. *See id.* at paras. 133-42.

382. *Id.* at para. 148.

383. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, para. 149.

384. *Id.* at para. 152.

385. *Id.* at para. 153.

386. *Id.* at para. 156.

Seeing that the Ontario appellate court had ordered the immediate granting of marriage licenses to same-sex couples, the plaintiffs in British Columbia moved to have the court there enter its order right away, finding again that the denial of marriage licenses to same-sex couples violated the Canadian Charter of Rights and Freedoms.³⁸⁷ The court agreed that there was no further reason to suspend its order, noting that it was “common ground that the federal government ha[d] instructed its counsel not to appeal either the Ontario Court of Appeal decision in *Halpern* or the decision of [the British Columbia Court of Appeal].”³⁸⁸ On July 8, 2003, British Columbia became the second Canadian province to legalize same-sex marriage. On March 19, 2004, the Quebec Court of Appeal also affirmed a lower court ruling that had found that the traditional definition of marriage was discriminatory against same-sex couples.³⁸⁹

The Canadian court rulings allowed gay couples – including couples from the United States – to obtain marriage licenses and be legally married in two provinces of Canada.³⁹⁰ Same-sex couples in the United States traveled to Canada to marry,³⁹¹ and local newspapers across the United States carried announcements of same-sex couples who married in Canada.³⁹² Those marriage announcements of course did not describe the legal difficulties couples might have when they returned to the United States, or information on how those couples could enjoy any tangible benefits of a lawful foreign marriage that their home states refused to recognize.

387. *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 15 B.C.L.R.4th 226 (judgment of July 8, 2003).

388. *Id.* at para. 4.

389. Colin Campbell, *Canada: Quebec Court Upholds Gay Marriage*, N.Y. TIMES, Mar. 20, 2004, at A5; Mike King, *Canada: Marriage Comes to Quebec*, OREGON, THE ADVOC., Apr. 27, 2004, at 20.

390. Lisa Neff, *Canadian Prime Minister Stands by Gay Marriage Bill*, CHI. FREE PRESS, Sept. 3, 2003, at 6 (also praising former Canadian Prime Minister Jean Chretien’s plan to introduce federal legislation in Canada, because “the courts have been telling us that the notion of separate but equal has no place in Canada.”).

391. See, e.g., Alan Bayless, *Chicago Gay Couple Tie the Knot in Canada*, CHI. SUN-TIMES, Jan. 14, 2004; Harvey Brownstone, *Marrying Man*, OUT, Jan. 2004, at 10 (letter from the first openly gay judge in Canada reporting personally on dozens of marriages of same-sex couples, “approximately half of whom have been Americans”).

392. See, e.g., *Dean Hamer, Joseph Wilson*, N.Y. TIMES, Apr. 11, 2004, § 9, at 11 (reporting marriage in Vancouver of two men from the United States); *Zvi-Dann, Fisher Marry in Toronto*, CHI. FREE PRESS, Sept. 3, 2003, at 18. The publication by national and local newspapers of announcements of same-sex weddings and civil union ceremonies is a relatively recent and welcome development. Other couples were married in private ceremonies that were not announced in American newspapers.

There are still some open legal issues surrounding same-sex marriage in Canada.³⁹³ Nevertheless, same-sex couples who married in Ontario or British Columbia were recognized in other Canadian provinces as being lawfully married.³⁹⁴ However, same-sex couples who were married in Canada were unable to challenge their home state's failure to recognize their lawful Canadian marriages as a violation of the "full faith and credit clause" of the United States Constitution. That clause, by its terms, applies only to other states of the United States:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.³⁹⁵

Although the word "State" may be understood in public international law to mean another country or nation, the context of word "State" as used in the Full Faith and Credit Clause of the U.S. Constitution is limited to other states of the United States.³⁹⁶

Even though the Full Faith and Credit Clause did not apply to Canadian judgments, the Canadian same-sex marriages should have been granted legal recognition as a matter of comity. "Comity" is a legal principle of accommodation that invokes "neighborliness" and "mutual respect" of one country for the other.³⁹⁷ Because Canada did not restrict its marriage law to Canadian citizens, the need for international comity might arguably have been even greater than the need to recognize marriages from the Netherlands or Belgium, which initially restricted marriage only to

393. See, e.g., *Canadian Court Asked to Consider Marriage Questions*, CHI. FREE PRESS, Feb. 4, 2004, at 11.

394. Canadian provinces that did not themselves allow same-sex marriage appeared nonetheless willing to accept the legality of same-sex marriages performed elsewhere in Canada. See, e.g., Rex Wockner, *Nunavut Protects Gays, Backs Marriage*, WINDY CITY TIMES, Nov. 19, 2003, at 11 (also reporting that the newest Canadian province of Nunavut had voted to extend antidiscrimination legislation to claims based on sexual orientation).

395. U.S. CONST. art. IV § 1. The couples could, however, still argue that the states should recognize their Canadian marriages under principles of comity.

396. *Id.*

397. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 28 (6th ed. 2003). Professor Brownlie, a member of the International Law Commission, notes that the term "comity" is also used in international law: "(1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law." *Id.*

citizens and permanent residents. However, even those marriages, being lawful marriages in the nations where they were performed, were also entitled to respect and recognition by the government and by the private sector.³⁹⁸

When the same-sex couples who married in Canada returned to the United States, they found that there was social recognition, but little if any formal legal recognition of their union. There is anecdotal evidence, however, that many private employers, companies, private organizations, and even some local municipal governments did recognize the validity of the Canadian marriages for certain purposes. For example, individuals who had married a same-sex partner in Canada were able to claim health insurance and other employee benefits similar to those afforded to colleagues who had married a member of the opposite sex.³⁹⁹ Others may have used copies of their Canadian marriage certificates to obtain family rates at health clubs, access to other special programs, or access to a hospital or emergency room to visit a sick or injured partner. These couples used their new marriage certificates to try to obtain some of the benefits of marriage that opposite-sex couples take for granted or do not even recognize as benefits.

H. *LAWRENCE V. TEXAS* AND THE DEATH OF *BOWERS V. HARDWICK* –THE VICTORY OF DUE PROCESS

In a landmark decision issued in June 2003, the U.S. Supreme Court found that a conviction under a Texas criminal statute for sodomy between two consenting adults was an unconstitutional violation of the Due Process Clause.⁴⁰⁰ In finding the Texas statute to be unconstitutional, the majority preferred to find a violation of the Due Process Clause rather than a violation of Equal Protection, even though the Court's earlier decision in

398. Imagine, for example, that a same-sex couple married in Canada, Belgium, or the Netherlands was involved in an automobile accident in the United States. Would it really make sense to keep one partner out of the emergency room or to otherwise deny hospital visitation privileges to a same-sex spouse?

399. Employers offer a broad range of benefits and policies that are fairly characterized under the umbrella of "employee benefits." Employee benefits that are not traditionally recognized as such may include, for example, bereavement leave policies that would allow an employee to take time off to attend the funeral of a parent of a same-sex partner. Some companies in the past have allowed only married employees to take such leave, or have required gay and lesbian employees to use personal vacation time as their bereavement leave (while not making a similar requirement of unmarried heterosexual employees).

400. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

Romer v. Evans made the Equal Protection challenge “a tenable argument.”⁴⁰¹ In basing its ruling on the Due Process Clause, the U.S. Supreme Court avoided a situation where the sodomy statute applicable only to homosexual sodomy would simply be redrafted to apply to both heterosexual and homosexual acts of sodomy.⁴⁰² The Court also wanted to take the opportunity to erase one of its most embarrassing mistakes, its decision in *Bowers v. Hardwick*.⁴⁰³

The *Lawrence* decision was the culmination of a legal battle that arose when police officers in Texas were sent to a private home in response to a reported weapons disturbance.⁴⁰⁴ The police entered the home of John Geddes Lawrence; they found him engaged in a sexual act with Tyron Garner.⁴⁰⁵ They arrested both men, held them overnight in custody, and charged them with a violating the Texas statute that prohibited “deviate sexual intercourse.”⁴⁰⁶ The men challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment, and a similar clause in the Texas Constitution.⁴⁰⁷ After the trial court rejected their constitutional challenges, the men entered pleas of *nolo contendere* and were each fined \$200 and assessed court costs of \$141.25.⁴⁰⁸

The Texas Court of Appeals considered the constitutionality of the Texas sodomy statute under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the state constitution, rejecting the challenges in a divided *en banc* opinion.⁴⁰⁹ The majority opinion concluded that under the principles of *stare decisis*, the U.S. Supreme Court’s decision in *Bowers v. Hardwick* required rejection of the men’s Due Process arguments.⁴¹⁰ The *Bowers* decision was one of the most heavily criticized decisions ever issued by the U.S. Supreme Court.⁴¹¹

401. *Id.* at 2482. Justice O’Connor, however, based her concurring opinion on an equal protection challenge to the Texas sodomy statute. *See id.* at 2484-88 (O’Connor, J., concurring in the judgment).

402. *Lawrence*, 123 S. Ct. at 2482.

403. 476 U.S. 186 (1986).

404. *Lawrence*, 123 S. Ct. at 2475.

405. *Id.* at 2475-76.

406. *Id.* at 2476.

407. *Id.*

408. *Id.*

409. *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001).

410. As the U.S. Supreme Court later noted, “*Bowers* then being authoritative, this was proper.” *Lawrence*, 123 S. Ct. at 2476.

411. For example, one author wrote that “if *Bowers* were our only example, it would be difficult to defend the ability of the judiciary to engage in a process of reasoned decisionmaking.” Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987). William Eskridge and Nan Hunter observed that the case “quickly became

Justice Kennedy's opinion for the majority in *Lawrence* found that the rationale of *Bowers* could not "withstand careful analysis."⁴¹² He dissected the majority opinion in *Bowers* and the concurring opinion by Chief Justice Burger with a number of specific criticisms:

1. By saying that the issue before it was whether the U.S. Constitution conferred a "fundamental right upon homosexuals to engage in sodomy," the *Bowers* Court disclosed its "own failure to appreciate the extent of the liberty at stake."⁴¹³ The issue put forth by the *Bowers* Court "demean[ed] the claim" put forward by the two men, "just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."⁴¹⁴

2. The *Bowers* court had earlier asserted: "Proscriptions against [consensual sodomy] have ancient roots."⁴¹⁵ The *Lawrence* majority noted that academic writings and many of the amicus briefs set forth "fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*."⁴¹⁶ While not resolving the historical debate, the *Lawrence* court refused to adopt the same "definitive conclusions upon which *Bowers* placed such reliance."⁴¹⁷ After reviewing several sources, the *Lawrence* court found that earlier prosecutions for sodomy were not directed toward consensual acts between adults, but "typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals."⁴¹⁸ The *Lawrence* court noted that it was "not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."⁴¹⁹ The *Lawrence* court thus found that "the historical

one of the most criticized opinions in the history of the Court, with virtually no defenders in the academy or established bar." WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 61 (Foundation Press, 2d ed. 2004). They also observe that "the contemptuous tone of its language seems, ironically, to have been its own undoing as a legitimate attempt at interpretation." *Id.* See also, e.g., Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355, 368-70 (1998); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081-97 (1988).

412. *Lawrence*, 123 S. Ct. at 2483.

413. *Id.* at 2478.

414. *Id.*

415. *Bowers*, 478 U.S. at 192.

416. *Lawrence*, 123 S. Ct. at 2478.

417. *Id.*

418. *Id.* at 2479.

419. *Id.*

grounds relied upon in *Bowers* are more complex than the majority opinion and concurring opinion by Chief Justice Burger indicate.⁴²⁰

3. Although powerful voices have condemned homosexual conduct as being immoral, the *Lawrence* Court found that the issue was not whether these voices of condemnation were sincere, but whether the majority could use the criminal law to enforce its views on the whole of society.⁴²¹ This point considered the power of the majority to impose its will on the entire society through coercive use of the criminal laws.

4. Although Chief Justice Burger cited “Judeo-Christian moral and ethical standards” in his concurring opinion, the *Lawrence* Court found that the laws and traditions of the last half-century were relevant to its analysis.⁴²² These more recent references showed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁴²³ Justice Kennedy’s majority opinion commented that “[t]his emerging recognition should have been apparent when *Bowers* was decided.”⁴²⁴

5. *Bowers* claimed that before 1961, all 50 states had outlawed sodomy and, at the time of the Court’s decision, there were still sodomy laws in 24 states and the District of Columbia.⁴²⁵ The *Lawrence* court noted that state legislatures and state supreme courts had repealed and invalidated same-sex marriage laws since *Bowers* was decided; of the 25 States that then had sodomy laws, only 13 jurisdictions remain.⁴²⁶ Furthermore, of these 13 remaining sodomy jurisdictions, only four enforce their laws only against homosexual conduct.⁴²⁷ There was also a history of non-enforcement of these laws; the State of Texas had earlier admitted in 1994 that it had not prosecuted any consenting adults acting in private.⁴²⁸ The admitted failure to prosecute any consensual violations of the sodomy statute suggested that the law was being kept on the books for its coercive effects rather than for legitimate law enforcement purposes.

6. *Lawrence* criticized the failure of the *Bowers* Court to consider relevant foreign precedent available at the time of the *Bowers* decision.

420. *Id.* at 2480.

421. *Id.*

422. *Id.* (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”)).

423. *Lawrence*, 123 S. Ct. at 2480.

424. *Id.*

425. *Id.* at 2481.

426. *Id.*

427. *Id.*

428. *Id.*

First, the *Bowers* Court had ignored the *Wolfenden Report* from the United Kingdom,⁴²⁹ which had advised the British Parliament in 1957 to repeal the sodomy laws.⁴³⁰ Second, the *Bowers* Court had ignored a highly relevant Court decision from the European Court of Human Rights, *Dudgeon v. United Kingdom*.⁴³¹ Although the European case was only persuasive, the *Lawrence* Court said that it undermined the “premise” that “the claim put forward [in *Bowers*] was insubstantial in our Western civilization.”⁴³²

7. *Lawrence* noted that after *Bowers* was decided, the European Court of Human Rights did not follow *Bowers*, but its own decision in *Dudgeon*.⁴³³ The *Lawrence* Court also noted that other nations also took action to affirm and protect the “right of homosexual adults to engage in intimate, consensual conduct.”⁴³⁴ As the *Lawrence* Court noted, other countries accepted this right “as an integral part of human freedom,” while the United States made no showing that “the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”⁴³⁵

8. The *Lawrence* Court noted that two principal cases decided after *Bowers* placed into doubt its continued viability. First, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴³⁶ the United States Supreme Court “reaffirmed the substantive force of the liberty protected by the Due Process Clause” and “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”⁴³⁷ Applying that case, the *Lawrence* Court stated that “[p]ersons in a homosexual relationship may seek autonomy for these

429. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Stein & Day, Inc. 1963).

430. *Lawrence*, 123 S. Ct. at 2481.

431. *Id.* (citing *Dudgeon v. United Kingdom*, Eur. Ct. H.R. (1981)).

432. *Id.* The use of foreign and international legal precedent by the United States Supreme Court in resolving legal disputes is a welcome development, because it allows the United States to examine and learn from the experience of other nations that have considered issues similar to those before the Court.

433. *Id.* (citing three decisions of the European Court of Human Rights—*P.G. & J.H. v. United Kingdom*, no. 44787/98, Eur. Ct. H.R., § 56 (2001); *Modinos v. Cyprus*; 259 Eur. Ct. H.R. (1993); and *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988)).

434. *Id.*

435. *Id.* The foreign authorities cited by the Court did not control the outcome in the case, but the Justices’ willingness to look at the collective force of a contrary view to *Bowers* helped convince them that *Bowers* was incorrectly decided. Those who doubt the potential persuasive influence of foreign and international authorities should consider whether the Court might have reached a different result if other nations of the world had followed *Bowers*.

436. 505 U.S. 833 (1992).

437. *Lawrence*, 123 S. Ct. at 2481.

[personal] purposes, just as heterosexual persons do.”⁴³⁸ Second, the United States Supreme Court’s invalidation of an anti-gay amendment to the Colorado State Constitution in *Romer*⁴³⁹ also raised doubts as to the continued viability of *Bowers*. *Romer* found that “class-based legislation” directed against gay and lesbian persons violated the Equal Protection Clause, and that the anti-gay amendment had “no rational relation to a legitimate governmental purpose.”⁴⁴⁰ The decisions in *Romer* and *Planned Parenthood* eroded the foundations of *Bowers*.⁴⁴¹

9. The *Lawrence* Court recognized that criticism of *Bowers* in the United States “has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions.”⁴⁴² While criticism alone would not be enough to reverse a Supreme Court decision, the majority found the sustained and substantial criticism to be “of greater significance” given that subsequent United States Supreme Court decisions eroded the foundations of *Bowers*.⁴⁴³

10. The *Lawrence* Court also recognized that state courts had refused to follow the decision when interpreting state constitutional provisions that paralleled the Due Process Clause of the Fourteenth Amendment.⁴⁴⁴ The courts of Arkansas,⁴⁴⁵ Montana,⁴⁴⁶ Tennessee,⁴⁴⁷ Kentucky,⁴⁴⁸ and even Georgia⁴⁴⁹ – where the *Bowers* case first arose – had rejected the United States Supreme Court’s decision in *Bowers*.

With ten reasons to overturn *Bowers*, the Court reminded itself that the principle of *stare decisis* was not “an inexorable command.”⁴⁵⁰ The Court also took into consideration the reality that the holding in *Bowers* “had not induced detrimental reliance comparable to some instances where recognized individual rights are involved.”⁴⁵¹ The majority in *Lawrence*

438. *Id.*

439. 517 U.S. 620 (1996).

440. *Id.* at 634.

441. *Lawrence*, 123 S. Ct. at 2482.

442. *Id.* at 2482-83.

443. *Id.* at 2483.

444. *Id.*

445. *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

446. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

447. *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996).

448. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

449. *Powell v. State*, 510 S.E.2d 18 (1998).

450. *Lawrence*, 123 S. Ct. at 2483.

451. *Id.* Furthermore, there was “no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there were compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after it contradict its central holding.” *Id.*

emphasized that the case before it involved consenting adults, acting in the privacy of their home.⁴⁵² The case involved neither public conduct nor commercial sex.⁴⁵³ Nor did the case involve “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁴⁵⁴ As Justice Kennedy wrote for the majority, the case involved:

two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” [Citation omitted.] The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.⁴⁵⁵

Finding that the Texas statute was an unconstitutional violation of the Due Process Clause, the Court also overruled *Bowers*, stating that it “was not correct when it was decided, and it is not correct today.”⁴⁵⁶

Justice O’Connor, in her concurring opinion, agreed that the Texas statute was unconstitutional but she did not join the Court in overruling *Bowers*, a decision in which she had voted with the majority. Instead of accepting the Substantive Due Process claims put forth, Justice O’Connor found that the statute violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁵⁷ Because the Texas “deviate sexual intercourse statute”⁴⁵⁸ prohibited consensual conduct only when done by two individuals of the same gender, Justice O’Connor found an Equal Protection Clause violation in that the Texas statute prohibited sodomy between same-sex partners but not opposite-sex partners.

452. *Id.* at 2484.

453. *Id.*

454. *Id.*

455. *Lawrence*, 123 S. Ct. at 2484.

456. *Id.*

457. *Id.* (O’Connor, J., concurring).

458. TEX. PENAL CODE § 21.06(a) (2003).

Justice O'Connor noted that the Texas statute made gay and lesbian persons "unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction."⁴⁵⁹ She also noted that even though the criminal sanctions themselves might be relatively insignificant, the consequences of a sodomy conviction would require individuals to register as sex offenders and would disqualify them from practicing a variety of professions, "including medicine, athletic training, and interior design."⁴⁶⁰

Justice O'Connor noted that the State of Texas had attempted to justify the statute and its negative effects by arguing that it satisfied "rational basis review because it furthers the legitimate governmental interest of the promotion of morality."⁴⁶¹ However, Justice O'Connor had difficulty in accepting that a statute targeted only at homosexuals showed "[m]oral disapproval of this group," and that this governmental disapproval, "like a bare desire to harm this group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."⁴⁶²

Justice O'Connor also rejected the State's argument that the statute did not discriminate against homosexual persons, but rather only homosexual conduct.⁴⁶³ She noted that being called a homosexual in Texas provided a cause of action for defamation *per se* because it "impute[s] the commission of a crime."⁴⁶⁴ She also noted that the State of Texas "admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal."⁴⁶⁵ Although a state could "assign certain consequences to a violation of its criminal law," Justice O'Connor found

459. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

460. *Id.* at 2485-86.

461. *Id.* at 2485.

462. *Id.* ("Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). *Id.*

463. *Id.* at 2486.

464. *Lawrence*, 123 S. Ct. at 2487 (citing *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310 (5th Cir. 1997), and *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980)). The *Restatement (Second) of Torts* provides that a person:

who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.

RESTATEMENT (SECOND) OF THE LAW OF TORTS § 571 (1965).

465. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring).

that the State could not “single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.”⁴⁶⁶ She wrote “so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”⁴⁶⁷

Justice Thomas, dissenting from the finding that the Texas statute was an unconstitutional violation of Substantive Due Process, wrote that the Texas statute was “uncommonly silly” and that “[p]unishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.”⁴⁶⁸ Justice Thomas would have urged the Texas legislature to repeal the law, but he dissented from the declaration of unconstitutionality because he could find no general right of privacy within the Constitution.⁴⁶⁹

Justice Scalia, in a dissenting opinion joined by Justice Thomas and Chief Justice Rehnquist, criticized the overruling of *Bowers* and said that the majority’s decision now called into question all state laws “against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”⁴⁷⁰ He called this “a massive disruption of the current social order” that was somehow greater than if the Court had overruled *Roe v. Wade*.⁴⁷¹

After levying further criticisms of the majority opinion and Justice O’Connor’s concurring opinion, Justice Scalia announced his view that the *Lawrence* decision was “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”⁴⁷² As support for this, he

466. *Id.*

467. *Id.*

468. *Id.* at 2498 (Thomas, J., dissenting).

469. *Id.* In the same-sex marriage debate, others would later seize upon this theme to argue that same-sex marriage was a matter for legislators to decide rather than “unelected judges.”

470. *Id.* at 2490 (Scalia, J., dissenting).

471. *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting) (“What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State.”). *Id.*

472. *Id.* at 2496.

recalled his earlier observation that the Association of American Law Schools will deny membership to any law school that allows potential employers to discriminate on the basis of sexual orientation.⁴⁷³

Justice Scalia asserted that the United States Supreme Court had “taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”⁴⁷⁴ Justice Scalia claimed that he had no objection to gays and lesbians using the political process to achieve legislative victories, but he objected to the Court’s declaration that gay and lesbian people have protectable rights.⁴⁷⁵ He warned that the *Lawrence* decision might lead to the recognition of same-sex marriage: “[t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”⁴⁷⁶

Newspaper reports of the decision gave more space to Scalia’s dissenting views than to the majority decision; this is not surprising given the harsh rhetoric of his dissent and its dire warnings of impending societal doom. However, the majority decision fundamentally changed the legal landscape of the law regarding sexual orientation by reasserting that gay and lesbian persons also could enjoy substantive due process rights. The

473. *Id.* Justice Scalia of course failed to note the continuing debate over the Solomon Amendment, which has had the effect of reinserting military recruiters on campus despite the military’s exclusion of gay and lesbian persons.

474. *Id.* at 2497. According to Justice Scalia:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination under Title VII have repeatedly been rejected by Congress [citations omitted]; that in some cases such “discrimination” is mandated by federal statute, see 10 U.S.C. § 654(b)(1) [(2000)] (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such “discrimination” is a constitutional right, see *Boy Scouts of America v. Dale*, (530 U.S. 640 (2000)).

Id.

475. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

476. *Id.*

United States Supreme Court not only reversed *Bowers*, but also called into question the validity of any case that had ever cited *Bowers* to support discriminatory acts against gay and lesbian persons. The *Lawrence* decision also set the stage for the Massachusetts Supreme Judicial Court, which delayed its decision on same-sex marriage in order to study the *Lawrence* decision.

J. SAME-SEX MARRIAGE FINALLY COMES TO THE UNITED STATES:
GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH

The Supreme Judicial Court of Massachusetts ruled on November 18, 2003, that the Commonwealth of Massachusetts could no longer deny marriage licenses to same-sex couples seeking to marry.⁴⁷⁷ The court found that the exclusion of marriage for same-sex couples failed to pass the rational basis test for both Due Process and Equal Protection.⁴⁷⁸ The decision was hailed as the wedding bell that might be heard around the world.⁴⁷⁹

The court recognized that there were two competing views on the question before it. In one view, the court recognized that many persons hold strong religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman.⁴⁸⁰ In the other view, the court recognized that many believe that gay and lesbian persons should be treated no differently than their neighbors.⁴⁸¹ Neither view resolved the legal dispute before the court, a question of first impression left unresolved by the United States Supreme Court's decision in *Lawrence*.⁴⁸²

The *Goodridge* case involved seven same-sex couples from five Massachusetts counties; the couples had been in committed relationships for four, eleven, thirteen, twenty, thirty, and thirty-five years, respectively.⁴⁸³ Each of the couples had homes where they lived as

477. *Goodridge*, 798 N.E.2d 941; Jan Crawford Greenburg, *Gay Marriage Ban Rejected: Massachusetts Court Throws Out State Law It Says Is Rooted In Prejudice*, CHI. TRIB., Nov. 19, 2003, § 1, at 1.

478. *Goodridge*, 798 N.E.2d at 960.

479. Tracy Baim, *Massachusetts Marriage Victory*, WINDY CITY TIMES, Nov. 19, 2003, at 1. See also, e.g., Lisa Neff, *Court Rules for Marital Rights—Court Sets Deadline for Action on Gay Marriage Ruling*, CHI. FREE PRESS, Nov. 26, 2003, at 1.

480. *Goodridge*, 798 N.E.2d at 948.

481. *Id.*

482. *Id.*

483. *Id.* Each couple had been in a relationship that far outlasted the well-publicized 55-hour marriage of Britney Spears to Jason Allen Alexander. See William Hageman, *Wedding Fling Leaves Nothing But Regret*, CHI. TRIB., Jan. 11, 2004, § 13, at 1.

couples, or as families with children.⁴⁸⁴ They were well-established members of the community. They worked as business executives, lawyers, educators, and therapists.⁴⁸⁵ They were active in local church, school, and community groups.⁴⁸⁶ Additionally, they wanted to marry.⁴⁸⁷

City clerks in five different counties refused to issue marriage licenses to the seven same-sex couples, on the ground that Massachusetts did not permit same-sex marriage.⁴⁸⁸ The couples then sued the Department of Public Health and the Commissioner, alleging that the refusal to issue the necessary licenses was a violation of several provisions of the Massachusetts State Constitution.⁴⁸⁹

The trial court granted summary judgment to the Department and Commissioner, holding that the plain language of the marriage statutes did not permit same-sex couples to marry, and rejecting constitutional arguments that the refusal to issue marriage licenses offended the Liberty, Freedom, Equality, and Due Process provisions of the Massachusetts Constitution.⁴⁹⁰ The trial court also found that the Massachusetts Declaration of Rights did not guarantee a fundamental right to marry a person of the same sex, and that the prohibition against same-sex marriage “rationally further[ed] the Legislature’s legitimate interest in safeguarding the ‘primary purpose’ of marriage, ‘procreation.’”⁴⁹¹ After the trial court

484. *Goodridge*, 798 N.E.2d at 949.

485. *Id.*

486. *Id.*

487. As Hillary Goodridge, the lead plaintiff in the case, explained:

Julie and I thought we were married, until a number of events [happened] when we realized we were not . . . and there’s a big difference. Sadly, it’s during moments of crisis--death, disability, economic hard times – that we see what a difference it is to not have marriage. In our case, I had to cry and lie my way into the neonatal intensive care unit to see our newborn Annie when she had some serious complications, as I had no legal relationship to her. I had to do the same thing to get in to see Julie. Finally, it was our daughter asking why we were not married that spurred us to go down to City Hall and apply for a marriage license.

Arnold, *supra* note 1.

488. *Goodridge*, 798 N.E.2d at 950.

489. *Id.*

490. *Id.*

491. *Id.* The trial court stated that the Legislature could “rationally limit marriage to opposite-sex couples” because those couples are “theoretically . . . capable of procreation,” do not necessarily rely on “inherently more cumbersome” noncoital means of reproduction, and are “more likely than same-sex couples to have children, or more children.” *Id.*

granted summary judgment for the Department, the parties sought and obtained direct appellate review.⁴⁹²

The arguments presented to the Supreme Judicial Court of Massachusetts were similar to those presented at trial. In its opinion, the court recognized that the state marriage licensing statutes restricted the right to marry by forbidding the marriage of individuals within certain degrees of consanguinity, polygamous marriages, and marriages where one of the parties has communicable syphilis.⁴⁹³ Massachusetts law also restricts the circumstances for persons under the age of eighteen to marry.⁴⁹⁴ However, the court described these restrictions on marriage as being minimal “gatekeeping” provisions.⁴⁹⁵ Other provisions of the licensing statutes provide that marriage applicants can file standard information forms and medical certificates in any city or town clerk’s office, pay a fee, and have a copy of their subsequent marriage certificate sent to the registrar as a public record.⁴⁹⁶ As the Supreme Judicial Court noted, “for all the joy and solemnity that normally attends a marriage,” the law governing the ability of parties to marry was basically “a licensing law.”⁴⁹⁷

There was no issue of infringing upon religious freedom. Massachusetts, like other states, never required a religious ceremony in order to validate a marriage.⁴⁹⁸ The court noted that it was not necessary to marry in a church or other religious building; couples could always marry get married in the town hall or before a judge.⁴⁹⁹

The court found that civil marriage, being regulated by the state, was also an institution that “anchor[ed] an ordered society by encouraging stable relationships over transient ones.”⁵⁰⁰ Civil marriage also confers “enormous private and social advantages” upon those who marry.⁵⁰¹ For example, some of the statutory benefits of marriage include a variety of

492. *Goodridge*, 798 N.E.2d at 950.

493. *Id.* at 951-52.

494. *Id.* at 952.

495. *Id.* at 951.

496. *Id.* at 952.

497. *Id.*

498. *Goodridge*, 798 N.E.2d at 954.

499. *Id.* Marriage was not strictly a religious institution, the Massachusetts Supreme Judicial Court noted, but a civil institution “created and regulated through the exercise of the police power,” which is the “old-fashioned term for the Commonwealth’s lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government.” *Id.*

500. *Id.*

501. *Id.*

rights relating to property.⁵⁰² Other rights, equally as important, related to other benefits available only through marriage.⁵⁰³ Finally, there were

502. Some of these property rights include:

- the ability to file a joint state income tax return, which may result in a lower tax burden where one spouse earns less;
- tenancy by the entirety (a form of property ownership that provides spouses with certain protections against creditors, and allows for the automatic transfer of property to a surviving spouse without the need for probate);
- homestead protection, which allows spouses and children to secure, under Massachusetts law, up to \$300,000 equity from creditors;
- rights of intestate succession, the automatic rights to inherit the property of a spouse who dies without a will;
- rights of elective share and dower, which may be exercised after the death of a spouse who made a will that does not adequately provide for the surviving spouse;
- the ability of a spouse to collect wages owed to a deceased employee;
- the ability to continue certain businesses of a deceased spouse;
- the ability to claim health insurance benefits under a spouse's medical insurance policy;
- the ability to continue, for a limited time, health coverage for the spouse of a person who is laid off or dies;
- preferential options under the state pension system;
- preferential benefits under the state medical program;
- the ability to prevent placing a lien on the former home of a long-term care patient if the patient's spouse still lives in that home;
- access to veteran's spousal benefits and preferences;
- financial protections for the spouses of certain state government employees, including firefighters, police officers, and prosecutors, if those employees are killed in the line of duty;
- the equitable division of property upon divorce;
- temporary and permanent rights to receive alimony;
- the right to receive support if the married couple separates, even when that separation does not result in a divorce; and
- the right to bring claims for wrongful death and loss of consortium, and for funeral expenses, burial expenses, and punitive damages resulting from tort actions. *Id.* at 955-56 (citations omitted).

503. These additional rights include:

- presumptions of legitimacy and parentage of children born to a married couple;
- evidentiary rights in civil and criminal cases, including the prohibition against spouses testifying against one another about what was said to each other in private conversations;
- bereavement and medical leave to allow an employee to care for individuals related by blood or marriage;

significant benefits available only to those children whose parents were married.⁵⁰⁴ The court recognized that despite the strong public policy to abolish distinctions between marital and nonmarital children, there was “a measure of family stability and economic security” not enjoyed by children whose parents are not married.⁵⁰⁵

The court’s extensive list of benefits available only through marriage was, by the court’s own admission, incomplete.⁵⁰⁶ Furthermore, even this list of public benefits largely cannot fully take into account the benefits and support available to married couples and families through private companies, schools, community groups, and other non-governmental institutions. These private sector benefits and support mechanisms are regularly denied to those who cannot marry.

Having surveyed some of the benefits available only to those who can marry, the Massachusetts Supreme Judicial Court noted that the state constitution protected “matters of personal liberty as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”⁵⁰⁷ This higher level of protection

- an automatic “family member” preference to make medical decisions for an incompetent or disabled spouse who did not execute a health care power of attorney;
 - access to “predictable rules” when married parents divorce, including rules for child custody, visitation, support, and removal of children to another state;
 - priority rights to administer the estate of a spouse who dies intestate, and the requirement to consent to the appointment of any other person who might be appointed as the administrator;
 - the right to dispose of the body of a deceased spouse; and
 - the right to be buried in a lot or tomb owned by a deceased spouse.
- Goodridge*, 798 N.E.2d at 956.

For additional discussion of the rights of surviving partners in same-sex relationships, and of the difficulties that arise when the wishes of a “traditional family” conflict with the “non-traditional spouse,” see generally Mark E. Wojcik, *Discrimination After Death*, 53 OKLA. L. REV. 389 (2000).

504. “Where a married couple has children, their children are also directly or indirectly . . . the recipients of the special legal and economic protections obtained by civil marriage.” *Goodridge*, 798 N.E.2d at 956.

505. The court noted: “Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.” *Id.* at 956-57. It might even be argued that children of divorced parents have potentially greater benefits than those available to children of parents who cannot marry.

506. *See id.* at 955.

507. *Id.* at 959. *See also* MARK E. WOJCIK, ILLINOIS LEGAL RESEARCH 17 (Carolina Academic Press 2003).

under the state constitution, said the court, was “not surprising,” given the nature of our federal system of government.⁵⁰⁸

Recognizing that the state constitution provided a stronger framework for analysis of the claims asserted in the case before it, the court noted that the case involved the “two freedoms” found in the individual Liberty and Equality protections in the Massachusetts Constitution. These two freedoms were the “‘freedom from’ unwarranted government intrusion into protected spheres of life and [the] ‘freedom to’ partake in benefits created by the State for the common good.”⁵⁰⁹ The court found that both of these freedoms were involved in the same-sex marriage challenge. First, an individual’s Liberty and Due Process rights include among the most basic rights the freedom to decide whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family.⁵¹⁰ Second, the court stated that “central to personal freedom and security” was “the assurance that the laws will apply equally to persons in similar situations.”⁵¹¹

Finding that both of these constitutional freedoms applied to the claims before the court, the court stated that the state constitution “requires, at a minimum, that the exercise of the State’s regulatory authority not be ‘arbitrary or capricious.’”⁵¹² The court stated that under both guarantees of liberty and equality, the state’s regulatory authority must “at very least, serve ‘a legitimate purpose in a rational way’ a statute must ‘bear a reasonable relation to a permissible legislative objective.’”⁵¹³

Because the same-sex couples challenged the marriage statute under both equal protection and due process grounds, the court had first to determine the appropriate standard of review.⁵¹⁴ Where the statute

508. *Goodridge*, 798 N.E.2d at 959. “Fundamental to the vigor of our Federal system of government is that ‘state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.’” *Id.* (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)).

509. *Goodridge*, 798 N.E.2d at 959.

510. *Id.* It is interesting to see what cases the Massachusetts court cited in support of this proposition. Those cases are *Lawrence*, 123 S. Ct. at 2481; *Planned Parenthood*, 505 U.S. at 851; *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and *Loving*, 388 U.S. 1.

511. *Goodridge*, 798 N.E.2d at 959. The court stated that “[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.” *Id.*

512. *Id.* at 959.

513. *Id.* at 960 (citations omitted). Where a law could not “satisfy the basic standards of rationality,” that law was void. *Id.*

514. *Id.* at 960.

concerned a “fundamental right” or a “suspect classification,” the court said that it would invoke “strict judicial scrutiny.”⁵¹⁵ However, for statutes that do not involve a fundamental right or suspect class, the court said it would use the “rational basis test” to determine whether the statute was constitutional.⁵¹⁶

The Massachusetts Supreme Judicial Court here used the “rational basis” standard.⁵¹⁷ For alleged due process violations, the “rational basis” standard requires that statutes have “a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.”⁵¹⁸ For alleged violations of the Equal Protection Clause, the “rational basis” standard requires the state to prove that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”⁵¹⁹

The state advanced three reasons to justify its refusal to issue marriage licenses to the same-sex couples. The Supreme Judicial Court of Massachusetts rejected each of the three reasons.

First, the state argued that the trial court judge had ruled correctly when it stated that the primary governmental interest in denying marriage to same-sex couples was “the traditional notion that marriage’s primary purpose is procreation.”⁵²⁰ The Supreme Judicial Court found that the marriage laws “do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and

515. *Goodridge*, 798 N.E.2d at 960. It is generally assumed (although not always correctly so) that statutes subject to “strict judicial scrutiny” will be found unconstitutional, because the special nature of the rights or class of persons affected provides a high standard that is difficult for legislative actions to infringe upon.

516. *Id.* It is often assumed that statutes challenged as being only “rational” have a good chance of surviving a constitutional challenge. It does not matter that the court would have picked a different solution to a particular social problem, or even that a better system might be available. The rational basis standard generally requires only that the legislative solution not be irrational.

517. *Id.* The court used the rational basis test even though the right to marry might be fairly characterized as a fundamental right that should implicate a higher standard of review. Because the court found that the statute did not meet even the rational basis test, the court did not reach the question of whether gay and lesbian persons were a suspect class, or whether the right to marry a persons of the same gender was a fundamental right. *Id.* at 961.

518. *Id.* at 960. Commentators opposed to same-sex marriage will be likely to argue that the ban does indeed implicate “morals.” *See id.* Having a particular sexual orientation does not make one moral or immoral, however.

519. *Goodridge*, 798 N.E.2d at 960.

520. *Id.* at 961.

every other means of creating a family.”⁵²¹ As the court stated: “[f]ertility is not a condition of marriage, nor is it grounds for divorce.”⁵²² The court could have also said that marriage licenses do not expire if the married couple does not have children. Instead of a focus on fertility that was urged by the state, the court found that the essence of marriage was the mutual commitment of the partners:

People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.⁵²³

The court recognized that it was “hardly surprising” that civil marriage had “developed historically as a means to regulate heterosexual conduct and to promote child rearing.”⁵²⁴ Furthermore, denying rights to illegitimate children, and the stigma attached traditionally to homosexuality, also helped to “cement the common and legal understanding of marriage as an unquestionably heterosexual institution.”⁵²⁵ But because same-sex couples now also have children by adoption, from previous marriages, or by artificial insemination, the historical development of marriage as a heterosexual institution was, by itself, an insufficient reason for continuing today to limit marriage to opposite-sex couples. The court described it as “circular reasoning, not

521. *Id.*

522. *Id.* Furthermore, “[p]eople who have never consummated their marriage, and never plan to, may be and stay married.” *Id.*

523. *Id.* (internal citations and footnotes omitted)

524. *Goodridge*, 798 N.E.2d at 961 n.23:

It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed.

525. *Id.*

analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."⁵²⁶

Giving further consideration to the state's first argument that the primary purpose of marriage was to raise children, the court found that the state "affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual."⁵²⁷ The court noted that gay and lesbian persons in Massachusetts can adopt children, and that medical insurance coverage for assisted reproductive technology was not limited to married couples, but was also available to single individuals, unmarried couples, and same-sex couples.⁵²⁸

The court then turned to the state's second stated reason for denying marriage to same-sex couples, which was that that limiting marriage to opposite-sex couples "ensures that children are raised in the 'optimal' setting."⁵²⁹ The court agreed that "[p]rotecting the welfare of children is a paramount State policy," but the court found that denying marriage to same-sex couples did nothing to further this stated policy.⁵³⁰ Citing statutes and cases that allowed for grandparent visitation, "de facto" parents, and coparent adoption, the court noted that the state had "moved vigorously to strengthen the modern family in its many variations."⁵³¹ The court also noted that it had repudiated the common-law power of the state to provide different levels of protection to children based on the conditions of their

526. *Id.*

527. *Id.* at 962. The court reasoned:

If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," [citing the dissenting opinion of Justice Cordy], overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

Id.

528. *Id.* at 962, n.24.

529. *Goodridge*, 798 N.E.2d at 962.

530. *Id.* ("Restricting marriage to opposite-sex couples . . . cannot plausibly further this policy.")

531. *Id.* at 963.

birth.⁵³² Simply put, the “best interests of the child” no longer depend upon a parent’s sexual orientation or marital status.⁵³³

Continuing its analysis of the state’s second reason to limit marriage to opposite-sex couples, the court found that the state had not shown that denying marriage to same-sex couples would increase the number of persons seeking to enter opposite-sex marriages to have children.⁵³⁴ The state had also conceded that gay and lesbian persons can be “excellent” parents.⁵³⁵ The court found that there was “no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the ‘optimal’ child rearing unit.”⁵³⁶

Beyond the state’s proffered interest in providing an “optimal” environment for raising children, the court found that the state’s refusal to allow same-sex couples to marry made it “infinitely harder” for gay and lesbian parents to raise their children.⁵³⁷ The court also found that the “enhanced income provided by marital benefits” was “an important source of security and stability for married couples and their children,” but that the state denied those benefits to same-sex couples with children.⁵³⁸ Because of the “wide range of public benefits” and protections available only to married couples, the court rejected the state’s argument that the denial of marriage to same-sex couples was merely a matter of “inconvenience.”⁵³⁹ The court recognized that there was a “sizeable class of parents raising children” and that these parents had “absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license.”⁵⁴⁰ Rejecting the state’s second argument, the court stated that it was neither rational nor permissible “to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”⁵⁴¹

The third reason put forward by the state to justify its failure to recognize same-sex marriage was the purported desire to conserve “scarce State and private financial resources.”⁵⁴² The state argued that the marriage

532. *Id.*

533. *Id.*

534. *Goodridge*, 798 N.E.2d at 963.

535. *Id.* Four of the plaintiff couples were parents. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

539. *Goodridge*, 798 N.E.2d at 964.

540. *Id.* at 963-64.

541. *Id.*

542. *Id.* In other settings, some wondered whether there was a paper shortage in Massachusetts, such that the state was trying to conserve the sheet of paper it would

restriction was rational because the legislature⁵⁴³ could logically . . . assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.⁵⁴⁴

The court rejected this third argument as well, stating that the “absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy.”⁵⁴⁵ The court rejected the state’s stereotype that same-sex couples are all financially successful and financially independent, stating that the state’s argument ignored couples supporting children and other dependents, such as aging parents.⁵⁴⁶ The state could not argue that those dependents were “less needy or deserving than the dependents of married couples.”⁵⁴⁷ The court noted that the state marriage laws did not require any showing of financial dependence; instead, “the benefits [of civil marriage] are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.”⁵⁴⁸ Civil marriage also created “legal dependency” between the spouses, something that is simply unavailable to those who are prohibited from marrying.⁵⁴⁹

Other arguments, not as strong as the first three, were also considered and rejected by the court. The court considered and rejected an argument that allowing same-sex couples to marry would “trivialize or destroy the institution of marriage as it has historically been fashioned.”⁵⁵⁰ The court did not deny that it was changing the institution of marriage, but it denied that its decision would disturb the “fundamental value of marriage in our society.”⁵⁵¹ Instead of destroying the institution of marriage, the court was making it available to more people. The court’s words are instructive on this point:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary

otherwise have used to issue the marriage license.

543. The Massachusetts legislature is called the “General Court.”

544. *Id.*

545. *Id.*

546. *Goodridge*, 798 N.E.2d at 963-64.

547. *Id.* at 964.

548. *Id.*

549. *Id.* at 964 n.27.

550. *Id.* at 964-65.

551. *Id.* at 965.

nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.⁵⁵²

The court thus rejected the argument that the plaintiffs were seeking to destroy marriage because marriage was precisely the remedy they were seeking. The plaintiffs did not want the court to strike down the marriage laws.⁵⁵³ They wanted access to the same rights of civil marriage available to others.

The court also considered and rejected the argument that the decision to extend or deny marriage rights to same-sex couples was purely a legislative decision. "To label the court's role as usurping that of the legislature," wrote the court, was to "misunderstand the nature and purpose of judicial review."⁵⁵⁴ Although the court acknowledged that it should defer to the legislature to act on particular social and policy issues, the question of whether a statute was unconstitutional was a question that was within "the traditional and settled role of courts."⁵⁵⁵

The court also considered and rejected the argument that recognizing same-sex marriage would "lead to interstate conflict."⁵⁵⁶ The court did not predict whether other states would recognize same-sex marriages from Massachusetts, but stated that "[t]he genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each

552. *Goodridge*, 798 N.E.2d at 965 (citations omitted).

553. *Id.* at 969.

554. *Id.* at 965.

555. *Id.*

556. *Id.* at 967.

State is free to address difficult issues of individual liberty in the manner its own Constitution demands.”⁵⁵⁷

Finally, the court considered and rejected the argument raised by several amici that the same-sex marriage ban reflected “community consensus that homosexual conduct is immoral.”⁵⁵⁸ In rejecting this argument, the court noted the state’s “strong affirmative policy of preventing discrimination on the basis of sexual orientation.”⁵⁵⁹ The existence of laws and policies that condemn acts of discrimination based on sexual orientation and gender identity show that there is no “community consensus” on the immorality of homosexuality; indeed, the court might have further noted that there are even now some religious groups with openly gay and lesbian clergy.⁵⁶⁰ But the court made a more important point by not mentioning the presence of openly gay and lesbian clergy; by its silence on this point, the court emphasized that “morality” is not the standard by which to measure equal rights.

The court concluded that the state had failed “to articulate a constitutionally adequate justification” that would support its continued refusal to issue marriage licenses to same-sex couples.⁵⁶¹ The court found that the refusal to issue marriage licenses worked “a deep and scarring hardship on a very real segment of the community for no rational reason.”⁵⁶² The justifications offered for the ban on same-sex marriage suggested to the court that the same-sex marriage ban was “rooted in persistent prejudice” against gay and lesbian persons, and that the law should not give effect to those private biases.⁵⁶³

557. *Id.*

558. *Goodridge*, 798 N.E.2d at 967.

559. *Id.* In addition to citing the state non-discrimination legislation as support for this proposition, the court cited the statutory provisions that punished hate crimes against gay and lesbian persons and the court decision that decriminalized private consensual sex between adults of the same sex. *See id.*

560. *See, e.g.,* Laurie Goodstein, *Methodists Put Pastor on Trial for Declaring Herself a Lesbian*, N.Y. TIMES, Mar. 18, 2004, at A1; Matthew Preusch & Laurie Goodstein, *Jury of Methodists Clears Gay Minister Over Relationship*, N.Y. TIMES, Mar. 21, 2004, § 1, at 1; Shannon Dininny, *Views Mixed on Pastor’s Acquittal – Methodists Likely to Debate in April on Homosexuality*, CHI. TRIB., Mar. 22, 2004, § 1, at 11; *In Ceremony, Gay Bishop Takes Over New Hampshire Diocese*, N.Y. TIMES, Mar. 8, 2004, at A13; *Gay Bishop is Welcomed*, CHI. TRIB., Mar. 8, 2004, § 1, at 10; Tracy Baim, *Gay Bishop Takes Charge*, WINDY CITY TIMES, Nov. 5, 2003, at 1; *Episcopal Church Consecrates Gay Bishop*, CHI. FREE PRESS, Nov. 5, 2003, at 13; Bruce C. Steele & John Caldwell, *Person of the Year: Bishop V. Gene Robinson*, THE ADVOC., Dec. 23, 2003, at 34. *See also* Archbishop Bruce Simpson, *Rescuing Christ from the “Christians,”* THE ADVOC., Dec. 23, 2003, at 44.

561. *Goodridge*, 798 N.E.2d at 968.

562. *Id.*

563. *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Turning to the appropriate relief for this constitutional violation, the court looked to the Ontario court decision that found that the ban on same-sex marriage there violated the Canadian Charter of Rights and Freedoms.⁵⁶⁴ The court there refined the common-law meaning of marriage, a remedy that allowed same-sex couples to then marry in Ontario. Finding that remedy to be appropriate for Massachusetts as well, the court revised the common-law definition of marriage: “We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”⁵⁶⁵

The revised definition, according to the court, provided the appropriate redress for the plaintiffs’ constitutional injury while furthering the aim of marriage “to promote stable, exclusive relationships.”⁵⁶⁶ The court stated that the new definition advanced the legitimate interests advanced by the state by providing a stable setting to raise children and for conserving state resources.⁵⁶⁷ With this new definition, the court declared that the denial of marriage licenses to same-sex couples violated the Massachusetts Constitution. The court made no declaration that the denial violated the United States Constitution; such a declaration may have allowed the state to seek further review before the United States Supreme Court. Because the case was limited to finding a violation of the state constitution, there would be no further federal review.⁵⁶⁸

The court vacated the summary judgment that had been previously entered for the state, and remanded the case to the trial court for entry of judgment consistent with its opinion. But in a surprising side note that gave some legislators hope of working out a compromise for civil unions instead of marriage, the court stayed entry of its judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”⁵⁶⁹ As the court later clarified, the purpose of the stay was to give the legislature time not to create an alternative system of civil union similar to that in Vermont, but to amend the existing state statutes to allow same-sex marriages.⁵⁷⁰ The 180-day period ran until May 17, 2004,⁵⁷¹ the date that marks the 50th anniversary of the United States

564. *Id.* at 969 (citing *Halpern*, 172 O.A.C. 276).

565. *Goodridge*, 798 N.E.2d at 969.

566. *Id.*

567. *Id.*

568. This point of federalism and constitutional law had been lost on commentators who urged that the matter go before the United States Supreme Court.

569. *Id.* at 969-70 (citing *Michaud v. Sheriff of Essex County*, 458 N.E.2d 702 (Mass. 1983)).

570. See *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

571. See, e.g., John Leland, *In Gay-Marriage Ruling, Boom for Provincetown*, N.Y.

Supreme Court's historic decision in *Brown v. Board of Education*.⁵⁷² And just as "separate" was not "equal" in *Brown*, a proposed alternative system of civil union or domestic partnership is not equal to the full rights of marriage.⁵⁷³

Justice Greaney concurred in the result and remedy ordered by the court, but wrote separately to state that the case should be resolved using traditional equal protection analysis. He wrote that "[t]he right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference."⁵⁷⁴ He found that the marriage statute discriminated because of sex, in violation of the Declaration of Rights, as the Massachusetts Equal Rights Amendment amended it. Because the marriage statutes provide that marriage was a union of only one man and one woman, Justice Greaney found that the statutes create a classification based on the sex of the persons who want to marry.⁵⁷⁵ "As a factual matter," he wrote, "an individual's choice of marital partner is constrained because of his or her own sex."⁵⁷⁶ He found the argument "disingenuous, at best, to suggest that . . . an individual's right to marry has not been burdened at all, because he or she remains free to choose another partner . . . of the opposite sex."⁵⁷⁷

Having found a fundamental right of marriage and a sex-based classification, Justice Greaney stated that the enforcement of the marriage statutes "as they are currently understood is forbidden by our [State] Constitution unless the State can present a compelling purpose . . . that can be accomplished in no other reasonable matter."⁵⁷⁸ Applying this strict scrutiny to the justifications advanced by the state to justify the ban on same-sex marriage, Justice Greaney found that those justifications were

TIMES, Jan. 21, 2004, at A1 ("The 180-day period ends May 17, a date that has become etched in the minds of Provincetown's couples, business owners and town officials.").

572. 347 U.S. 483 (1954).

573. As but one example, an opposite-sex couple that is married can travel from state to state (or outside the country) and have their marriages recognized without the need to get married again each time they cross over a state line (or go to another country). The legal status of domestic partnerships and civil unions for same-sex couples is still as yet uncertain, as the rights for those forms of union may be held to be limited to the jurisdictions that granted them. But even where state, local, or foreign governments may refuse to recognize a same-sex civil union or domestic partnership, those relationships may still be recognized by private entities. For example, a private employer in Illinois may choose to recognize a Vermont Civil Union for purposes of a partner's eligibility for certain employee benefits.

574. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring).

575. *Id.* at 971

576. *Id.*

577. *Id.*

578. *Id.* at 972

insufficient. Additionally, he described the treatment of children with same-sex parents as creating a “caste-like system” in which the children of same-sex couples could not “partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex.”⁵⁷⁹

As important as the legal analysis is in Justice Greaney’s opinion, however, it will be long remembered for its plea to the “thoughtful citizens” of Massachusetts, asking them to accept the court’s decision.⁵⁸⁰ He wrote:

The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.⁵⁸¹

Justice Greaney’s words are admittedly *dicta*, but they express a positive hope that thoughtful individuals would see that the court was fulfilling its constitutional mandate and that society, as a whole, would extend to each citizen the equal protection and equal courtesy of the law.

There were three dissenting opinions. First, Justice Spina wrote that there was no denial of equal protection or due process. He believed that the prohibition on same-sex marriage did not deny anyone equal protection of the law based on gender, because men and women could each select marriage partners of the opposite sex.⁵⁸² He likewise found that the prohibition on same-sex marriage did not deny due process of law, because each person “is free to marry a person of the opposite sex.”⁵⁸³ He also

579. *Id.*

580. *Goodridge*, 798 N.E. 2d at 973 (Greaney, J., concurring).

581. *Id.*

582. *Goodridge*, 798 N.E.2d at 973 (Spina, J., dissenting).

583. *Id.*

wrote (as would Justice Cordy, who also dissented⁵⁸⁴) that the issue of same-sex civil marriage was an issue for the legislature rather than the courts.⁵⁸⁵

Second, in his dissenting opinion, Justice Sosman found that the state's arguments were rational, and that the state did not have to afford "the full benefits of marriage on every household raising children."⁵⁸⁶ While acknowledging that there are same-sex couples with children, Justice Sosman wrote that under the rational basis test, the legislature had to have only "some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure"⁵⁸⁷ He believed it was "rational" for the state legislature to wait until there was more conclusive proof that the redefinition of marriage would not bring with it "unintended and undesirable social consequences."⁵⁸⁸ Justice Sosman would have found that the denial of marriage licenses to same-sex couples would have passed the rational basis test.

Third, in his dissenting opinion, Justice Cordy wrote that the marriage statutes carried a presumption of constitutional validity to which the court should defer.⁵⁸⁹ He agreed with the other dissenting justices that the statute was constitutional. He stated that although there was a deep history and tradition of marriage, there was no such history or tradition of same-sex marriage.⁵⁹⁰ He did not believe that laws should be found to have a rational basis simply because they are "of ancient origin," but the fact that a large number of states have followed the same tradition – and have followed it for some time – should at least play some part in determining whether the legislation had a rational basis.⁵⁹¹ Justice Cordy argued that marriage provides "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other."⁵⁹² He also believed that the "marital family" was "the foremost setting for the education and socialization of children."⁵⁹³ Justice Cordy argued that if there was to be a change to the marriage statutes, it should be

584. *Infra*, notes 593-98, and accompanying text.

585. *Goodridge*, 798 N.E.2d at 974 (Spina, J., dissenting).

586. *Goodridge*, 798 N.E.2d at 978-79 (Sosman, J., dissenting).

587. *Id.* at 979.

588. *Id.* at 982.

589. *Goodridge*, 798 N.E.2d at 983 (Cordy, J., dissenting).

590. *Id.* at 987.

591. *Id.* at 990.

592. *Id.* at 995.

593. *Id.* at 996.

a change effected by the legislature. "So long as the question is at all debatable," he wrote, "it must be the Legislature that decides."⁵⁹⁴

There have been calls to amend the Massachusetts Constitution to prohibit same-sex marriage before the court's ruling goes into effect.⁵⁹⁵ However, the state constitution cannot be so easily amended. Because a proposed constitutional amendment must be approved during two legislative sessions before it goes before the voters, the Massachusetts Constitution could not be amended before November 2006, at the earliest.⁵⁹⁶

Lawmakers searched for ways to avoid complying with the *Goodridge* decision.⁵⁹⁷ Using the 180-day window that the Massachusetts Supreme Judicial Court afforded to the legislature,⁵⁹⁸ lawmakers introduced legislation to create civil unions in an attempt to avoid the mandate of the *Goodridge* decision.⁵⁹⁹ The proposed legislation would have prohibited "marriage" but would allow same-sex couples to form "civil unions with all 'benefits, protections, rights and responsibilities' of marriage."⁶⁰⁰

Although civil unions are undoubtedly meaningful to those who enter them for the purpose of celebrating their domestic partnerships, gay and lesbian activists in Massachusetts (as well as activists from other states) would not be satisfied with anything less than the full marriage rights (and rites) that were ordered in the *Goodridge* decision. The Massachusetts Supreme Judicial Court, answering a question submitted to them by the Senate,⁶⁰¹ told the Senate that only "marriage" would satisfy the constitutional requirements outlined in the courts' earlier decision in *Goodridge*.⁶⁰²

The legislation proposed by the Massachusetts Senate stated that its purpose was to preserve "the traditional, historic nature of and meaning of

594. *Id.* at 1004.

595. *See, e.g., Rallying Against Marriage in the Bay State*, THE ADVOC., Feb. 17, 2004, at 17.

596. *See, e.g., Mubarak Dahir, Waiting at the Altar*, THE ADVOC., Dec. 23, 2003, at 30, 31.

597. *See, e.g., Pam Belluck, Gays' Victory Leaves Massachusetts Lawmakers Hesitant*, N.Y. TIMES, Nov. 20, 2003, at A25.

598. *See Goodridge*, 798 N.E.2d at 969-70.

599. *See, e.g., Legislation: Can [Massachusetts] Dodge Marriage?*, THE ADVOC., Feb. 3, 2004, at 14.

600. *Opinion of the Justices*, 802 N.E.2d at 566 (quoting Mass. S.B. 2175).

601. *See MASS. CONST. Part II, c. 3, art. 2* (as amended by art. 85) ("Each branch of the legislature, as well as the governor or the council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.")

602. *Opinion of the Justices*, 802 N.E.2d at 569.

the institution of civil marriage.”⁶⁰³ The Massachusetts Supreme Judicial Court found “constitutional difficulty” with the bill’s stated purpose, because the bill did nothing to “preserve” the civil marriage law.⁶⁰⁴ To the contrary, the proposed legislation preserved on the “constitutional infirmity” identified in the court’s earlier opinion.⁶⁰⁵ The legislation did nothing to cure constitutional defects in the state’s prohibition against same-sex marriage, and instead “exaggerated” the “same defects of rationality” in limiting marriage to opposite-sex couples.⁶⁰⁶ There was nothing rational in creating a separate system to “advance” or “preserve” the state’s “legitimate interests in procreation, child rearing, and the conservation of resources.”⁶⁰⁷ It did not matter if the rights to be conferred by the proposed legislation were the same as marriage in all but name,⁶⁰⁸ because the bill “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”⁶⁰⁹ The state constitution “does not permit such invidious discrimination,” said the court, “no matter how well intentioned.”⁶¹⁰

The court recognized that there may be “personal residual prejudice against same-sex couples,” but stated that the existence of such prejudice would not be a reason to “insist on less than the Constitution requires.”⁶¹¹ The court could not have missed the political storm that its decision created,⁶¹² but such public pressure was not a reason for the court to shirk its constitutional responsibility to interpret the state constitution. Neither

603. *Id.*

604. *Id.*

605. *Id.* The court stated that the issue was “not a matter of social policy but of constitutional interpretation. As the court concluded in *Goodridge*, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage.” *Id.*

606. *Opinion of the Justices*, 802 N.E.2d at 569.

607. *Id.*

608. As the court stated: “The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic. The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.” *Id.* at 570.

609. *Id.*

610. *Id.*

611. *Id.* at 571.

612. *See, e.g.*, Noel C. Paul & Amanda Paulson, *Gay Marriage Divide Roils States—A New Ruling by Massachusetts’ Top Court and a Constitutional Convention Here Next Week are Escalating a National Debate*, CHRISTIAN SCI. MONITOR, Feb. 6, 2004, at 1.

was the likelihood of legal complications that will arise on the federal level, or that may arise in other jurisdictions when same-sex couples that marry in Massachusetts travel to other states.⁶¹³ The court was concerned only with the issue before it, and it found that even if the Senate's proposed civil union legislation ameliorated the discrimination suffered by same-sex couples, it did not eliminate the unconstitutional denial of marriage licenses.⁶¹⁴ In the *Goodridge* decision, the court found that even using "the more lenient rational basis test," the state had presented nothing to justify the prohibition against same-sex marriage.⁶¹⁵ In the proposed legislation, there was likewise no rational reason that supported "the different nomenclature."⁶¹⁶ Nothing less than marriage will suffice.⁶¹⁷

Justice Martha B. Sosman, in a dissenting opinion joined by Justice Francis X. Spina, argued that because the proposed legislation provided all of the benefits of marriage without using the word "marriage," the issue had turned into "a squabble over the name to be used."⁶¹⁸ Justice Sosman described this as "a pitched battle over who gets to use the 'm' word."⁶¹⁹ This, she found, was not a quarrel "of any constitutional dimension whatsoever."⁶²⁰ She and Justice Spina would have found that the proposed legislation did not violate the equal protection or due process provisions of the state constitution and the Massachusetts Declaration of Rights.⁶²¹

Justice Robert J. Cordy, writing separately, also argued that the court should withhold its judgment in order to give the legislature more time to deliberate about the benefits that should be extended to same-sex couples in Massachusetts.⁶²² He did not believe that the state had to prove even a rational basis for coming up with a new name to describe the unions of same-sex couples differently from the marriages allowed to opposite sex couples.⁶²³

As expected, the advisory ruling from Massachusetts fueled further debate about the issue of same-sex marriage. As after the initial *Goodridge*

613. *Opinion of the Justices*, 802 N.E.2d at 571.

614. *See id.*

615. *See id.* at 569 n.3.

616. *Id.*

617. *See* Jennifer Peter, *Court Demands Gay Marriage--Massachusetts Opinion Says Civil Unions Won't Cut It*, CHI. SUN-TIMES, Feb. 5, 2004, at 3.

618. *Opinion of the Justices*, 802 N.E.2d at 572 (Sosman, J., dissenting).

619. *Id.* A popular cable television show called "The 'L' Word" depicting the lives of lesbians began to air a few weeks before the court's decision.

620. *Id.*

621. *Id.* at 579-80.

622. *Id.* at 581 (Spina, J., dissenting).

623. *Id.*

decision, calls were made again to amend the Massachusetts Constitution and to enact a federal constitutional amendment to prohibit same-sex marriage.⁶²⁴ The issue of same-sex marriage is poised to become a divisive issue in the upcoming national election.⁶²⁵

The court's *Goodridge* decision stated that there was no rational basis for denying marriage to same-sex couples. The court's advisory opinion to the Massachusetts Senate said that the court meant what it said in *Goodridge*, and that the state had to prepare for issuing marriage licenses to same-sex couples.

Even though the issue appears to be settled, there are still many questions that will need to be resolved in Massachusetts, such as the legal status of couples who come from other states to marry in Massachusetts.⁶²⁶

III. ADDITIONAL OBSERVATIONS AND CONCLUSIONS

A New Jersey trial court upheld the state's ban on same-sex marriage in a decision issued on November 5, 2003.⁶²⁷ The court ruled that the New Jersey Constitution contained no protections for same-sex marriage.⁶²⁸ Nevertheless, within three months of that decision, the governor of New Jersey signed domestic partnership legislation that affords legal recognition to same-sex couples.⁶²⁹ The legislation could be seen as an effort to thwart a successful appeal of the trial court's decision against same-sex marriage. The legislation provides same-sex couples with hospital visitation rights, an inheritance tax exemption, state income tax benefits, and domestic partnership benefits for state employees.⁶³⁰

New Jersey, unlike Massachusetts, was not under an order to amend its marriage laws. The Massachusetts legislature may have averted the

624. See, e.g., Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A1; Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A25.

625. See, e.g., Terence Hunt, *Bush, Kerry Each Take Issue With Judges*, CHI. SUN-TIMES, Feb. 5, 2004, at 3.

626. See *Massachusetts May Not Wed Gay Couples From 38 States*, CHI. FREE PRESS, Apr. 7, 2004, at 7. See also Marc Santora, *New York's Laws Said to Support Some Gay Unions*, N.Y. TIMES, Mar. 4, 2004, at A1.

627. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 2319114 (N.J. Sup. Ct. Nov. 5, 2003).

628. *Id.*

629. Lisa Neff, *New Jersey Governor Signs Partners Bill*, CHI. FREE PRESS, Jan. 14, 2004, at 1; S. 2820, 210th Leg., Reg. Sess. (N.J. 2003).

630. Lisa Neff, *New Jersey Assembly Approves Partnership Bill*, CHI. FREE PRESS, Jan. 7, 2004, at 7; S. 2820, 210th Leg., Reg. Sess. (N.J. 2003).

same-sex marriage decision had it enacted a civil union law before the *Goodridge* decision. Having waited too long to act, however, the Massachusetts legislature could not avoid the judicial decision that ordered same-sex marriage in that state. The New Jersey legislature, by acting before a court in that state ruled in favor of same-sex marriage, hoped to avert a result similar to that in Massachusetts.

That small debate in New Jersey frames one point of the same-sex marriage – who should have the right to decide? Is it the legislature, or the courts? While legislatures can indeed act to protect the rights of individuals and couples, the legislative record in many states has more often been one that reflects enactments of discrimination rather than protection.

Same-sex couples have long been denied the benefits and protections of civil marriage. For years many couples have tried to work around this denial, doing what they could to create for themselves as many legal protections as might be possible with wills, contracts, powers of attorney for property, durable powers of attorney for health care, joint checking and investment accounts, joint ownership of property, and other forms of domestic partnership agreements.⁶³¹ Some individuals have also changed their names to take the name of their partner or to take a new, joint name. Nevertheless, even the most extensive use of these legal measures pales in comparison to the wide array of benefits and protections available through civil marriage. On the federal level alone, marital status affects more than 1,000 federal laws.⁶³²

As the Massachusetts Supreme Judicial Court noted in its advisory opinion to the Massachusetts Senate, even legislation that purports to provide every benefit and protection – except for the word “marriage” itself – still fails the rational basis test for due process and equal protection under that state’s constitution.⁶³³

There has been, and will be, opposition to same-sex marriage. Whatever form this opposition takes, it essentially boils down to the same fundamental point – some people want the right to exclude others from

631. See, e.g., Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U.L. REV. 75, 84 (2003); Afshin A. Asher, *Estate Planning for Same-Sex Couples*, LESBIAN NEWS, Jan. 2004, at 31.

632. See, e.g., Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL’Y & L. 163, 170 (2001) (citing a 1997 report from the General Accounting Office that identified 1,049 federal laws where marital status was a factor).

633. *Opinion of the Justices*, 802 N.E.2d at 569-72.

marrying. They attempt to claim injury from any limitation of what they see as their own fundamental right to discriminate against others.

Some states will amend their state constitutions to prohibit same-sex marriage. Amending the state constitution successfully derailed the prospect of celebrating same-sex marriages in Hawai'i and in Alaska. A number of states enacted state legislation to deny same-sex marriage; these statutes will now be challenged when same-sex couples marry in Massachusetts and travel to other states. Because opponents of same-sex marriage know that these challenges are coming, they are working to pass multiple layers of other discriminatory legislation. They recognize that a state or federal court may declare unconstitutional a law that refuses to recognize a same-sex marriage. Other jurisdictions are passing (or proposing) statutory alternatives to marriage (such as the Vermont Civil Union Law, or the Hawai'i Reciprocal Benefits Law, or the recent New Jersey Domestic Partnership Law) in the hope that such legislation will appease same-sex couples who would otherwise pursue constitutional challenges.⁶³⁴ While such an alternative solution may have been acceptable even a year or two ago, same-sex couples have suddenly and irreversibly realized that they too are entitled to exactly the same benefits and protections of marriage as opposite sex couples.

Same-sex couples have already married in the Netherlands, Belgium, and Canada. Now they will marry in the United States as well. Same-sex married couples will travel to other states; they will demand that their marriages be recognized. Many private employers and businesses will likely recognize these marriages. Some employers may even begin to *require* gay and lesbian employees to marry as a condition of obtaining employee benefits for a same-sex partner.⁶³⁵ Families will attend same-sex weddings. Same-sex couples will share wedding photos. Individuals in same-sex marriages will love and care for their partners. They will raise children with love and support, just as they do now, but with the legal protections of marriage that provide protection and security for those children.

The legal landscape for the coming constitutional challenges has changed dramatically. We know that gay and lesbian persons have the same rights to equal protection of the law, because that essentially was the lesson underlying *Romer*.⁶³⁶ We know that gay and lesbian persons have

634. See, e.g., S. 2820, 210th Leg., Reg. Sess. (N.J. 2003).

635. See, e.g., *O Curse of Civil Unions!*, 10 GAY & LESBIAN REV. WORLDWIDE 8 (Nov.-Dec. 2003).

636. 517 U.S. 620 (declaring amendment to Colorado State Constitution to violate Equal Protection Clause).

the same rights to due process of the law, because that was essentially the lesson of *Lawrence*.⁶³⁷ Both *Romer* and *Lawrence* found that homophobic legislation could not pass the rational basis test to withstand the constitutional challenges in those cases. Justice Scalia had, of course, warned in his dissenting opinion in *Lawrence* that the ruling would likely lead to a court finding a right to same-sex marriage,⁶³⁸ just as the Supreme Judicial Court of Massachusetts did just a few months later.

There are, not unexpectedly, calls for constitutional amendments to prohibit same-sex marriage, even in Massachusetts.⁶³⁹ Those calling to amend state constitutions to prohibit same-sex marriage seem to have largely forgotten that the United States Supreme Court ruled in *Romer* that an amendment to a state constitution can violate equal protection when the law is motivated by nothing more than animus.⁶⁴⁰ That is the situation we have here, where calls to “preserve” marriage by amending state constitutions or enacting further layers of discriminatory legislation are merely attempts to perpetuate violations of equal protection, due process, privacy, and liberty.⁶⁴¹ Such measures, when obviously motivated by pure homophobic hate and fear, cannot withstand constitutional scrutiny.

At some point opposite-sex couples will realize that the sanctity of their marriages are not threatened by the marriage of same-sex couples who are not seeking to destroy the institution of marriage, but to share in its benefits and protections. Many fears about same-sex marriage will simply be found to be irrational. For some time already, we have had among us same-sex couples who married in the Netherlands, Belgium, and Canada. The presence of those married couples in the United States has not destroyed our country or the institution of civil marriage. It is time now to recognize that same-sex couples deserve the same recognition and protection of the law afforded to opposite-sex couples.

Opinions do change. It was only in 1967 that the United States Supreme Court ruled in *Loving* that the prohibition on interracial marriage violated the due process and equal protection clauses of the Fourteenth Amendment.⁶⁴² California had reached that same result in 1948,⁶⁴³

637. 123 S. Ct. 2472 (finding Texas sodomy statute to violate Due Process Clause and overruling *Bowers v. Hardwick*).

638. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

639. See Pam Belluck, *Setback is Dealt to Gay Marriage – Massachusetts Takes Step for a Constitutional Ban*, N.Y. TIMES, Mar. 30, 2004, at A1. The proposed amendment will not by itself prevent gay marriages, because it must be passed again in the 2005-06 legislative session, and then by popular referendum of the Massachusetts voters. *Id.*

640. *Romer*, 517 U.S. 620.

641. See *Opinion of the Justices*, 802 N.E.2d at 569.

642. *Loving*, 388 U.S. 1.

showing that states can sometimes reach the right result faster than the federal government. Nonetheless, it took many years for the California decision to be accepted nationally.

The issues of interracial marriage parallel those of same-sex marriage, although many persons distinguish the two situations.⁶⁴⁴ But the track of acceptance may well prove to be the same. The Supreme Judicial Court of Massachusetts has now twice decreed that same-sex couples must have the right to marry in that jurisdiction. The court did not decree that persons must enter into same-sex relationships,⁶⁴⁵ nor did the court order religious groups to perform same-sex marriages. The court's order requires only that the state grant marriage licenses to those same-sex couples who want to marry.

Other states will follow that decision, finding that equal protection, due process, privacy, and other rights particular to state constitutions are indeed valuable concepts worth preserving and defending. They will reject arguments that there is a fundamental right to discriminate against the rights of others to marry, and they will question more seriously the argument as to how one couple's marriage threatens other couples. Once people actually have the chance to meet married same-sex couples, they will get quite used to the idea. The gay and lesbian community "will achieve the right to a marriage license because the legal and moral conclusion can be none other than that it is right."⁶⁴⁶ The same-sex marriage debate now, magnified during an election year, will subside. Judges, legislators, and other policymakers will behave differently when they are standing face to face with a lawfully married same-sex couple that is demanding no special right, but only the right to be treated the same as other married couples.⁶⁴⁷ The laws being passed now will fall from the books, just as we no longer have laws prohibiting interracial marriage. Years from now, we will wonder why we worried about same-sex marriage.

643. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

644. See generally David Ehrenstein, *The Black Divide – African-Americans Who Refuse to Support Equal Marriage Rights for Gays and Lesbians are Shoving Their Own History Back Into the Closet*, THE ADVOC., Apr. 27, 2004, at 34.

645. The Onion, a satirical newspaper, joked in one issue that the Supreme Judicial Court of Massachusetts had ordered all citizens of that state to enter into gay marriages. *Massachusetts Supreme Court Orders All Citizens to Gay Marry*, THE ONION, Feb. 26-Mar. 3, 2004, at 1.

646. Terry Bean, *Only in Oregon*, THE ADVOC., Apr. 27, 2004, at 10.

647. See, e.g., Amanda Paulson, *Wedding Shots Deepen Gay-Marriage Divide*, CHRISTIAN SCIENCE MONITOR, Feb. 27, 2004, at 3.

