

Tulsa Law Review

Volume 40
Number 3 *The Legislative Backlash to
Advances in Rights for Same-Sex Couples*

Volume 40 | Number 3

Spring 2005

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Recommended Citation

Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage*, 40 Tulsa L. Rev. 381 (2013).

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SAME-SEX UNIONS: THE NEW CIVIL RIGHTS STRUGGLE OR AN ASSAULT ON TRADITIONAL MARRIAGE?

Phyllis G. Bossin*

I. INTRODUCTION

In November 2003, in the landmark case of *Goodridge v. Department of Public Health*,¹ the Massachusetts Supreme Court held that denying gay and lesbian couples the right to marry violated the Massachusetts Constitution. Since that time, and in direct response to that decision, there has been a flurry of activity at both the state and national level, mostly in the form of state constitutional amendments, directed at preventing other like decisions.²

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1. 798 N.E.2d 941.

2. See ABA Sec. Fam. L. Working Group on Same-Sex Marriages and Non-Marital Unions, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* 30-33, 56 nn. 207-08 (2004) (available at <http://www.abanet.org/family/whitepaper/fullreport.pdf>) [hereinafter *White Paper*]. The *White Paper* discusses the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), and the two proposed federal constitutional amendments, Sen. Jt. Res. 26, 108th Cong. (Nov. 25, 2003) and H.R. Jt. Res. 56, 108th Cong. (May 21, 2003), that seek to limit marriage to opposite-sex couples. It also indicates that the following states have enacted statutes, constitutional amendments, or executive orders restricting marriage to opposite-sex couples: Alabama (Ala. Code § 30-1-19 (1998)); Alaska (Alaska Const. art. I, § 25; Alaska Stat. § 25.05.013 (2004)); Arizona (Ariz. Rev. Stat. Ann. § 25-101 (West 2000)); Arkansas (Ark. Code Ann. § 9-11-109 (2002)); California (Cal. Fam. Code Ann. § 308.5 (West 2004)); Colorado (Colo. Rev. Stat. § 14-2-104 (2003)); Delaware (Del. Code Ann. tit. 13, § 101 (1999)); Florida (Fl. Stat. Ann. § 741.212 (West Supp. 2005)); Georgia (Ga. Code Ann. § 19-3-3.1 (2004)); Hawaii (Haw. Const. art. I, § 23; Haw. Rev. Stat. Ann. § 572-1 (LEXIS 1999)); Idaho (Idaho Code § 32-209 (1996)); Illinois (750 Ill. Comp. Stat. Ann. 5/212 (West 1999)); Indiana (Ind. Code Ann. § 31-11-1-1 (LEXIS 2003)); Iowa (Iowa Code Ann. § 595.2 (West 2001)); Kansas (Kan. Stat. Ann. § 23-101 (1995)); Kentucky (Ky. Rev. Stat. Ann. § 402.020 (LEXIS 1999)); Louisiana (La. Civ. Code Ann. arts. 89, 3520 (West 1999)); Maine (19-A Me. Rev. Stat. Ann. § 701 (1998)); Michigan (Mich. Comp. Laws Ann. § 551.1 (West 2005)); Minnesota (Minn. Stat. Ann. § 517.01 (West 1990)); Mississippi (Miss. Code Ann. § 93-1-1 (2004)); Missouri (Mo. Rev. Stat. Ann. § 451.022 (West 2003)); Montana (Mont. Code Ann. § 40-1-401 (2003)); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Gen. Stat. § 51-1.2 (2003)); North Dakota (N.D. Cent. Code § 14-03-01 (2004)); Ohio (Ohio Rev. Code Ann. §§ 3101.01, 3105.12 (West Supp. 2005)); Oklahoma (Okla. Stat. Ann. tit. 43, § 3.1 (West 2001)); Pennsylvania (23 Pa. Consol. Stat. Ann. § 1704 (West 2001)); South Carolina (S.C. Code Ann. § 20-1-15 (Supp. 2004)); South Dakota (S.D. Codified Laws § 25-1-1 (2004)); Tennessee (Tenn. Code Ann. § 36-3-113 (1996)); Utah (Utah

The debate concerning the rights of same-sex couples began long before the *Goodridge* case was decided. This debate has taken place in Congress and in state legislatures, in state and federal courts, and in corporate America. A cursory review of the literature on this subject reveals that at least twenty books and hundreds of law review articles have been written on this subject in the past twenty-five years.³ Same-sex couples have been fighting for equal rights and equal protections for at least three decades, with little success. Although this activity has long been ongoing, the issue of equal rights for gay and lesbian couples has not been in the mainstream consciousness of most Americans. While people in general were aware of the “gay rights movement,” the public, for the most part, was not cognizant of the various forums in which these issues were being addressed.

The *Goodridge* decision, however, seized the public’s collective attention and brought the discussion to a head, causing it to become a significant issue in the recent presidential election.⁴ The issue pitted those who believe that the judiciary should be free to interpret the laws and the Constitution against those who decry judicial activism.⁵ On one end of the spectrum are those who believe that the gay

Code Ann. § 30-1-2 (1998)); Virginia (Va. Code Ann. § 20-45.2 (2004)); Washington (Wash. Rev. Code § 26.04.010 (West Supp. 2005)); West Virginia (W. Va. Code § 48-2-104 (2004)).

3. See Paul Axel-Lute, *Same-Sex Marriage: A Selective Bibliography of the Legal Literature*, <http://law-library.rutgers.edu/SSM.html> (last updated Feb. 9, 2005) (providing a substantial bibliography of legal annotations, web based resources, articles, and laws concerning same-sex marriage); Paul Axel-Lute, *Same-Sex Marriage*, <http://www-rci.rutgers.edu/~axellute/ssm.htm> (last updated Sept. 19, 2002) (providing a bibliography of legislation, caselaw, monographs, law review articles, periodicals, and websites addressing same-sex marriage current up to October 1996).

4. See e.g. BBC News, *Bush Calls for Gay Marriage Ban: President George W. Bush Has Endorsed a Constitutional Amendment that Would Ban Marriages of Same-Sex Couples*, <http://news.bbc.co.uk/1/hi/world/americas/3518117.stm> (last updated Feb. 24, 2004); Michael C. Dorf, *The Likely Impact of the Presidential Election on the Supreme Court*, <http://www.cnn.com/2004/LAW/07/07/dorf.scotus.elections/> (July 7, 2004); Howard Fineman & T. Trent Gegax, “My Mommies Can Marry”: A Ruling Green-Lighting Gay Marriage Echoes Loudly through the Country—and in the 2004 Campaign, *Newsweek* 34 (Dec. 1, 2003); Mitch Frank, *Where Do They Stand on Gay Marriage?* *Time* 30 (Mar. 8, 2004); David D. Kirkpatrick, *Bush’s Push for Marriage Falls Short for Conservatives*, 153 *N.Y. Times* A18 (Jan. 15, 2004); Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage: Officials Try to Address Conservatives’ Concerns*, 153 *N.Y. Times* A1 (Jan. 14, 2004); Debra Rosenberg & Karen Breslau, *Winning the “Values” Vote: It Was on 11 Ballots, and Won on All of Them. How the Anti-Gay-Marriage Initiatives Shaped the Presidential Contest*, *Newsweek* 23 (Nov. 15, 2004); wbur.org, *The Gay Marriage Wedge in Election 2004*, http://www.here-now.org/shows/2004/02/20040210_3.asp (Feb. 10, 2004).

5. See e.g. Sen. Jud. Comm., *A Proposed Constitutional Amendment to Preserve Traditional Marriage*, 108th Cong. 1-5 (Mar. 23, 2004) [hereinafter *Amendment to Preserve Traditional Marriage*] (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:98156.wais) (statement of Sen. John Cornyn (R-Tex.)) (criticizing judicial activism, stating that “the only reason we are here today is that activist judges have inserted their personal political agenda into our nation’s most important legal document, our U.S. Constitution” and insisting that such judges are “accusing ordinary Americans of prejudice, while abolishing American traditions by judicial fiat,” with the resulting necessity of a constitutional amendment “to save laws deemed ‘unconstitutional’ by activist judges”); CNN.com, *Massachusetts Court Rules Ban on Gay Marriage Unconstitutional*, <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/index.html> (Feb. 4, 2004); Mary Mostert, *Did Judge Marshall Collude with Lesbian Buddies on Same-Sex Marriage Decision?* <http://www.conservativetruth.org/article.php?id=2014> (Nov. 24, 2003).

rights movement is the next civil rights struggle.⁶ On the other end are those who believe that homosexuality violates moral and religious values and that same-sex couples should, therefore, have limited, or no, legal rights.⁷ The latter group contends that this movement is nothing short of an all-out assault on the institution of marriage itself and that giving same-sex couples rights to marry or even rights that are the equivalent of marriage will destroy the institution.⁸ Those favoring equal rights for same-sex couples assert that these couples are seeking to benefit from, rather than destroy, marriage. The battle lines are drawn. This issue, more than any other, has energized and galvanized conservative Americans, whose mission now is a federal marriage amendment that will forever preclude the possibility of legalizing same-sex marriage.

Part II of this article will present a historical perspective, tracing how we arrived at the present and discussing the history of legal recognition of same-sex relationships, including early court cases, federal and state defense of marriage acts, the Vermont Supreme Court decision, and the subsequent civil union law and its interstate enforcement.

Part III of this article will discuss the revolutionary year of 2003, including the legalization of same-sex marriage in Canada, the United States Supreme Court decision in *Lawrence v. Texas*,⁹ and the Massachusetts Supreme Court decision in *Goodridge*. It will then trace the response to these decisions, including the proposed federal marriage amendment and the various state constitutional amendments.

Part IV will turn to the areas of law affected by issues related to same-sex couples, including family law in particular.

6. See e.g. *Amendment to Preserve Traditional Marriage*, supra n. 5, at 15-17 (testimony of Rep. John Lewis (D-Ga.)) (stating that the proposed Constitutional amendment "seeks to write discrimination into the constitution," that it would "restrict[] the civil rights of some of our citizens," and that "[t]he right to liberty and happiness belongs to each of us, and on the same terms, without regard to . . . sexual orientation"); Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 Human Rights Mag. 3 (Summer 2003); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 Rutgers L. Rev. 999 (2002); Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 Loy. U. Chi. L.J. 597 (2002); Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. Chi. L. Sch. Roundtable 61 (2000); Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. Political Phil. 225 (1999); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567 (1994).

7. See e.g. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999); William C. Duncan, *Whither Marriage in the Law?* 15 Regent U. L. Rev. 119 (2002); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 Am. J. Juris. 97 (1997); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 Am. J. Juris. 135 (1997); Dale M. Schowengerdt, Student Author, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage,"* 14 Regent U. L. Rev. 487 (2002).

8. See also *Amendment to Preserve Traditional Marriage*, supra n. 5, 123-27 (testimony of Rep. Marilyn Musgrave (R-Colo.)) (asserting, in defense of the proposed constitutional amendment, that "the traditional definition of marriage is likely doomed unless we amend the Constitution," and contending that "traditional marriage—as well as our democratic system of government—is now under attack" and that "[w]ithout traditional marriage, it is hard to see how our community will be able to thrive").

9. 539 U.S. 558.

Part V of the article will address the statutory protections afforded to same-sex couples in the tiny minority of states that provide such protections, including California, Vermont, and New Jersey.

Part VI will conclude that at some point in the future, if history repeats itself, whether it be within years or decades, progressive constitutional interpretation may very well allow for the expansion of rights for same-sex couples, much as rights for other individuals and groups were expanded during the civil rights decade.

II. THE HISTORICAL PERSPECTIVE

The regulation of marriage has always been within the province of the states.¹⁰ States have historically determined who may marry, at what age they may marry, and other conditions related to eligibility for marriage. Divorce laws have also always been within the exclusive province of the states. At one time in this country, the majority of states made it a crime for a white person to enter an interracial marriage.¹¹ It was not until 1967 that the United States Supreme Court intervened, holding that laws prohibiting interracial marriage were a denial of both due process and equal protection under the Fourteenth Amendment to the United States Constitution.¹² In *Loving v. Virginia*,¹³ the Court stated that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁴ The Court reinforced the right to marry in *Zablocki v. Redhail*,¹⁵ in which it emphasized that “the right to marry is of fundamental importance”¹⁶ to all individuals, is one of the “basic civil rights of man,”¹⁷ and is included within “the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”¹⁸

The Court’s decision in *Loving* is a classic example of the judiciary progressively, rather than strictly, interpreting the Constitution. Only by utilizing such an affirmative approach was the Court able to declare unconstitutional state laws prohibiting interracial marriage. In *Loving*, and in the state court cases overturning anti-miscegenation laws, the states maintained that it was within the province of the state legislature to regulate marriage, and thus, that judicial

10. *Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (“[D]omestic relations law is primarily an area of state concern”); *Mansell v. Mansell*, 490 U.S. 581, 597 (1989) (“Family law is an area traditionally of state concern.” (O’Connor, J., dissenting) (citation omitted)); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“[M]arriage is a social relation subject to the State’s police power.”). See also H.R. Rpt. 104-664 at 3 (July 9, 1996) (“The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and H.R. 3396 [the federal Defense of Marriage Act] in no way changes that fact.”).

11. *White Paper*, *supra* n. 2, at 11; see generally *Loving*, 388 U.S. 1 (overturning Virginia’s anti-miscegenation statute for violating the Fourteenth Amendment).

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

13. 388 U.S. 1 (1967).

14. *Id.* at 12.

15. 434 U.S. 374 (1978).

16. *Id.* at 383.

17. *Id.* (quoting *Loving*, 388 U.S. at 12).

18. *Id.* at 384 (citing *Griswold v. Conn.*, 381 U.S. 479, 486 (1965)).

intrusion was inappropriate.¹⁹ The fundamental principal remains, however, that Article III of the Constitution,²⁰ as well as most state constitutions,²¹ established courts for the purpose of interpreting the law, including statutory law.

Only a few years after *Loving*, the first challenges were brought against state statutes that denied homosexual couples the right to marry. The first such reported case is that of *Baker v. Nelson*,²² a 1971 case in which the Minnesota Supreme Court held that a state statute denying a same-sex couple the right to marry did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the Constitution. The U.S. Supreme Court initially granted certiorari but later dismissed the appeal for want of a substantial federal question.²³ Over the course of the next twenty years, several other state court decisions followed suit, all of them denying gay and lesbian couples the right to marry.²⁴

It was not until 1993 that a state court opened the door to the possibility that a prohibition against gay marriage might be unconstitutional. In *Baehr v. Lewin*,²⁵ the Hawaii Supreme Court held that, although same-sex marriage was not a fundamental right,²⁶ the state's prohibition against same-sex marriage appeared to be both sex discrimination and a denial of equal protection under the state's constitution.²⁷ The court remanded the case, instructing the lower court to hold the statute unconstitutional unless the state could demonstrate that the prohibition met the "strict scrutiny" test.²⁸ Before further proceedings could take place in the lower court,²⁹ however, the state passed a constitutional amendment defining marriage as between one man and one woman.³⁰ The fallout from the *Baehr* case was tremendous and immediate. It was the proverbial shot across the bow. The most immediate and direct result outside of Hawaii was the enactment of the federal Defense of Marriage Act.³¹

19. 388 U.S. at 7-8.

20. U.S. Const. art. III, § 2(1).

21. See generally e.g. Ala. Const. art. VI; Alaska Const. art. IV; Ariz. Const. art. VI; Colo. Const. art. VI; Del. Const. art. VI; Fla. Const. art. V; Haw. Const. art. VI; Ill. Const. art. VI; Kan. Const. art. III; Ky. Const. pt. I, §§ 109-139; Me. Const. art. VI; N.Y. Const. art. VI; Ohio Const. art. IV; Pa. Const. art. V; R.I. Const. art. X; S.C. Const. art. V; Tenn. Const. art. VI; Va. Const. art. VI; Wyo. Const. art. V.

22. 191 N.W.2d 185 (Minn. 1971).

23. 409 U.S. 810 (1972).

24. E.g. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973); *DeSanto v. Barnsley*, 476 A.2d 952, 955-56 (Pa. Super. 1984); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. Div. 1 1974). *Contra Hernandez v. Robles*, 2005 WL 363778 (N.Y. Sup. Ct. Feb. 4, 2005) (holding that denying same-sex couples the right to marry violates the New York Constitution).

25. 852 P.2d 44 (Haw. 1993).

26. *Id.* at 57.

27. *Id.* at 58-67.

28. *Id.* at 68.

29. *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

30. Haw. Const. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

31. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

A. *The Federal Defense of Marriage Act*

Congress inserted itself into the regulation of marriage, traditionally a field within the sole province of the states, with the enactment of the Defense of Marriage Act (“DOMA”),³² which consists of two parts. The first part states as follows:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.³³

The second part creates the definition of marriage:

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.³⁴

Thus, Congress accomplished two purposes with this Act. It defined marriage as between one man and one woman for purposes of federal law and it determined that no state would be required to give full faith and credit to a same-sex marriage performed in another state. As reflected in the legislative history of the Act, Congress was not satisfied to leave the issue of same-sex marriage solely up to the states and was concerned that federal rights, obligations, and benefits would or could be affected.³⁵

A review of the legislative history of DOMA demonstrates that Congress wanted to preclude the possibility that there would be any federal consequences, or consequences to other states, as a result of the actions of the Hawaii court.³⁶ Congress’s visceral reaction to the Hawaii decision is evident in the beginning of its committee report, which stated that “permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.”³⁷ The strong language used by the committee at the beginning and throughout the report illustrates that Congress was clearly threatened by the movement toward legalizing same-sex marriage. Specifically, the committee stated that “it is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.”³⁸ It is only against

32. *Id.*

33. *Id.* (codified at 28 U.S.C. § 1738C (2000)).

34. *Id.* (codified at 1 U.S.C. § 7 (2000)).

35. *See generally* H.R. Rpt. 104-664 (July 9, 1996).

36. *Id.*

37. *Id.* at 2.

38. *Id.* at 2-3.

this backdrop, the committee explained, that the motivation for DOMA can be understood.³⁹

The committee report traced the attempts by the gay rights movement to legalize same-sex marriage and also discussed the division within the gay rights community over whether same-sex marriage should be a main objective of the movement.⁴⁰ Congress clearly expressed its deep concern over “judicial activism” and the fact that the possibility of same-sex marriage in Hawaii came about as a result of judicial ruling rather than legislative action, stating “the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers.”⁴¹

Congress declared that it was not concerned with the effects of the *Baehr* decision within Hawaii; rather, the impetus for DOMA was the potential impact for other states and for the federal government itself.⁴² A great deal of discussion in the committee report is dedicated to the issue of full faith and credit.⁴³ The committee indicated within its report that:

Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex “marriage.” And the primary mechanism for nationalizing their break-through in Hawaii will be the Full Faith and Credit Clause of the U.S. Constitution.⁴⁴

Congress also expressed concern that “[u]pholding traditional morality, encouraging procreation in the context of families, [and] encouraging heterosexuality . . . would be undermined by forcing another State to recognize same-sex unions.”⁴⁵

Congress recognized that there is a public policy exception to the Full Faith and Credit Clause that allows states to refuse to honor marriages from other states that violate their own public policy.⁴⁶ Congress was not, however, willing to take the chance that an “activist judge” might agree with those advocating that a same-sex marriage from another state should be given full faith and credit.⁴⁷ While the committee agreed with the conclusion of law professors who testified that states would not be required by the Full Faith and Credit Clause to recognize an out-of-state same-sex marriage,⁴⁸ it also believed that this conclusion was far from

39. *Id.*

40. H.R. Rpt. 104-664 at 3-4.

41. *Id.* at 5.

42. *Id.* at 6-7.

43. *Id.* at 7-10.

44. *Id.* at 7.

45. H.R. Rpt. 104-664 at 7 n. 21.

46. *Id.* at 8 (citing *Restatement (Second) of Conflicts of Law* § 283(2) (1971)). See also *id.* at 9 n. 27 (citing, among other cases, *Nev. v. Hall*, 440 U.S. 410, 422 (1979)).

47. See *id.* at 9.

48. *Id.* at 9 n. 28 (citing testimony of Lynn Wardle, L. Prof., BYU).

certain, and cited a growing body of legal scholarship that would suggest just the opposite.⁴⁹

Congress also found it noteworthy that, by the time of its hearings, fourteen states had already passed their own defense of marriage laws in direct response to the Hawaii decision.⁵⁰ The report commented:

The fact that these States are sufficiently concerned about their ability to defend their marriage laws against the threat posed by the Hawaii situation is enough to persuade the Committee that federal legislation is warranted. The States, after all, are best-positioned to assess the legal situation within their own State; that so many of them are not content to rely on the amorphous "public policy" exception reveals that congressional clarification and assistance is both necessary and appropriate.⁵¹

Congress was not, however, motivated solely by its concerns over the possible interpretations of the Full Faith and Credit Clause; it was also concerned about the potential impact of the *Baehr* ruling on federal law.⁵² Congress has traditionally relied on the definition of marriage as set forth by the states in determining eligibility for federal benefits.⁵³ Thus, if one state defined marriage to include same-sex couples, then the possibility would exist that individuals within that state could make claims for federal benefits.⁵⁴ By enacting DOMA, Congress sought to ensure that this possibility would be eliminated.⁵⁵

The committee also deemed it necessary to comment on the decision rendered by the Court in *Romer v. Evans*.⁵⁶ In that case, the Court struck down an amendment to the Colorado state constitution on the basis that it violated the Equal Protection Clause of the United States Constitution.⁵⁷ This constitutional amendment provided:

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁵⁸

The Court held that this amendment classified homosexuals not for any rational purpose but to make them unequal to everyone else.⁵⁹ Congress expressed its consternation over this decision and gave it short shrift, finding that "[i]t is

49. H.R. Rpt. 104-664 at 9 n. 29.

50. See *id.* at 9-10, 10 n. 31 (indicating that Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah had "enacted new laws designed to protect against an impending assault on their marriage laws").

51. *Id.* at 10.

52. *Id.* at 10-11.

53. *Id.* at 10.

54. H.R. Rpt. 104-664 at 10.

55. *Id.* at 11.

56. 517 U.S. 620 (1996); H.R. Rpt. 104-664 at 31.

57. 517 U.S. at 635-36.

58. *Id.* at 624.

59. *Id.* at 631-36.

difficult to fathom how . . . the Court majority concluded that Amendment 2 is unconstitutional.”⁶⁰ Congress apparently found it abhorrent that “Colorado citizens who have moral, religious, or other objections to homosexuality could be forced to employ, rent an apartment to, or otherwise associate with homosexuals.”⁶¹ In fact, the committee did not understand how the Court could fail to distinguish this case from, or even discuss, its earlier holding in *Bowers v. Hardwick*,⁶² where it upheld a sodomy statute on the basis that the law expressed the presumed majority opinion of the citizens of Georgia that “homosexual sodomy is immoral and unacceptable.”⁶³ Congress then undertook an analysis of whether the proposed DOMA was constitutional, as applied against the standard set forth in *Romer*.⁶⁴ Ultimately, Congress concluded that the act passed constitutional muster, as it advances the following legitimate government interests: “defending the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self-governance; and preserving government resources.”⁶⁵

1. Constitutional Challenges to the Federal DOMA

The federal DOMA has been challenged constitutionally, but none of the challenges has ever been successful. In August 2004, in the first published ruling on the constitutionality of the federal DOMA, a bankruptcy judge in the state of Washington held that it is constitutional and that the right to marry someone of the same sex is not a fundamental right.⁶⁶ The petitioners had standing because they were legally married in Canada and sought to have that status recognized in their bankruptcy filing.⁶⁷ They alleged that DOMA violated the Tenth Amendment, the principles of comity, and the Fourth and Fifth Amendments to the Constitution.⁶⁸

The Tenth Amendment challenge alleged that DOMA is an attempt by the federal government to regulate domestic relations matters and is therefore unenforceable, as marriage is not a power specifically granted to Congress pursuant to Article I and is therefore reserved to the states.⁶⁹ The court found this argument unconvincing, pointing out that DOMA applies exclusively to federal law, not to the states, and that therefore, the Tenth Amendment does not come into play.⁷⁰ The court also pointed out that there is no conflict between state and

60. H.R. Rpt. 104-664 at 32.

61. *Id.*

62. 478 U.S. 186 (1986); H.R. Rpt. 104-664 at 32-33.

63. 478 U.S. at 196.

64. H.R. Rpt. 104-664 at 33.

65. *Id.*

66. *In re Kandu*, 315 B.R. 123, 139-40, 148 (Bankr. W.D. Wash 2004).

67. *Id.* at 130.

68. *Id.* at 131.

69. *Id.*

70. *Id.* at 133.

federal law on this issue, because the state and federal DOMAs are identical, and thus Congress has not preempted state family law.⁷¹

The court also dismissed the debtors' assertion that comity requires that the marriage entered into in Canada be recognized in the United States, pointing out that there is no preference for comity when the law of a foreign nation conflicts with a nation's own laws.⁷² Likewise, the court was dismissive of the debtors' assertion that the denial of recognition of their marriage was a taking of property in violation of the Fourth Amendment.⁷³

The court undertook an interesting analysis as to whether it was bound by the United States Supreme Court's summary disposition of *Baker v. Nelson*,⁷⁴ ultimately finding that it was not bound by the decision.⁷⁵ Citing authority for the proposition that summary dispositions have limited precedential effect, the court found that the facts before it were not on all fours with the facts in *Baker* and further that there had been a substantial shift in the Supreme Court's thinking, as evidenced by *Lawrence*.⁷⁶ Thus, the court undertook its own analysis of whether the right to marry someone of the same sex is a fundamental right protected by the Due Process Clause of the Fifth Amendment.⁷⁷ The court concluded that the right to marry someone of the same sex is not a fundamental right.⁷⁸ The court also rejected the argument that the classification involved required the strict scrutiny standard to be applied to the equal protection analysis.⁷⁹ The court then undertook a rational basis review, discussing at length the underlying basis for marriage laws and the state's interest in promoting stable families, and ultimately finding that the ban on same-sex marriage was rationally related to the state's interests in these regards.⁸⁰

In the first reported decision from a federal district court ruling on a challenge to DOMA, a Florida district court dismissed a challenge to both the federal DOMA and the Florida DOMA.⁸¹ The plaintiffs, a lesbian couple married in Massachusetts, sued to declare the state of Florida DOMA⁸² and the federal

71. *Kandu*, 315 B.R. at 133.

72. *Id.*

73. *Id.* at 135.

74. 409 U.S. 810; *see supra* nn. 22-23 and accompanying text.

75. *Kandu*, 315 B.R. at 135-37.

76. *Id.* at 136-37.

77. *Id.* at 138-41.

78. *Id.* at 140.

79. *Id.* at 144.

80. *Kandu*, 315 B.R. at 144-48.

81. *Wilson v. Ake*, 2005 WL 281272 (M.D. Fla. Jan. 19, 2005).

82. Fla. Stat. Ann. § 741.212 (West Supp. 2005) provides:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States or any other jurisdiction, either domestic or foreign, or any other place or locations, are not recognized for any purpose in this state.

DOMA unconstitutional as violative of the Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses of the Constitution.⁸³

The court rejected the plaintiffs' argument that DOMA exceeds Congress's power under the Full Faith and Credit Clause, finding that "Congress' actions are an appropriate exercise of its power to regulate conflicts between the laws of two different States, in this case, conflicts over the validity of same-sex marriages."⁸⁴ Further, the court found that it was bound by the decision in *Baker*, where the Supreme Court determined that the right to marry without regard to sex was not a fundamental right protected by the Constitution.⁸⁵

The court decided that the Supreme Court's recent decision in *Lawrence* did not alter this result, stating: "The Supreme Court has not explicitly or implicitly overturned its holding in *Baker* or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today."⁸⁶ The court concluded that although marriage is a fundamental right, the right to marry someone of the same sex is not, thereby negating the necessity of applying the strict scrutiny test to determine whether the statute denies due process.⁸⁷

The court also determined that homosexuality is not a suspect class; thus, only a rational relation threshold was required to analyze equal protection claims based upon sexual orientation.⁸⁸ The court found that the prohibition against same-sex marriage was rationally related to the legitimate government interests of promoting procreation and stable child rearing.⁸⁹ The court concluded that it is not its role to declare same-sex marriage to be a fundamental right in advance of the legislature so declaring or the Supreme Court so holding.⁹⁰

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

83. *Wilson*, 2005 WL 281272 at *1.

84. *Id.* at *2.

85. *Id.* at **3-4. The *Wilson* court found that "[a] dismissal for lack of a substantial federal question constitutes an adjudication on the merits that is binding on lower federal courts." *Id.* at *3 (citing *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)).

86. *Id.* at *4.

87. *Wilson*, 2005 WL 281272 at **4-6 (citing *Lofton v. Sec. of Dept. of Children & Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004), *rehearing en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005) (noting the proposition that *Lawrence* did not create a new fundamental right and the fact that the court remained bound by the precedent of its circuit court of appeals)).

88. *Id.* at *6.

89. *Id.* at **7-8.

90. *Id.* at *8.

B. State Defense of Marriage Acts

The states were equally alarmed by the *Baehr* decision and concerned that they would be forced to recognize same-sex marriages from other states. As a result, many states enacted their own DOMAs. The purpose of the state DOMAs was similar to that of the federal one. Each defined marriage as between one man and one woman and also provided that the state would not recognize a same-sex marriage from another state. Over the course of the next several years, many states passed DOMAs, so that by the spring of 2004, thirty-eight states had passed such acts.⁹¹ Four of these acts took the form of constitutional amendments.⁹² With the exception of a few statutes, these laws were in place by the late 1990s.⁹³ Some of the acts simply defined marriage as between one man and one woman, leaving open the door for some type of domestic partnership or civil union, while other states banned civil unions and domestic partnerships as well.⁹⁴

At least two state appellate courts have upheld their DOMAs in the face of constitutional challenges. In *Standhardt v. Superior Court*,⁹⁵ an Arizona appellate court found that the state's interest in encouraging procreation within heterosexual marriage is a legitimate state interest and a viable reason for the state to distinguish between opposite-sex and same-sex couples.⁹⁶ The court explained that:

Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.⁹⁷

In *Morrison v. Sadler*,⁹⁸ an Indiana appellate court found that the state's DOMA did not violate the Indiana Constitution.⁹⁹ In this case, the plaintiffs were members of same-sex couples who had entered into civil unions in Vermont and were seeking to enforce those unions in Indiana.¹⁰⁰ The court undertook a lengthy analysis, and as with the federal bankruptcy case decided in Florida, one day earlier,¹⁰¹ also relied upon *Baker v. Nelson* for the proposition that the right to

91. See *supra* n. 2.

92. See *supra* n. 2 (Alaska, Hawaii, Nebraska & Nevada).

93. *White Paper, supra* n. 2, at 30-33.

94. *Id.*

95. 77 P.3d 451 (Ariz. App. Div. 1 2003).

96. *Id.* at 461-64.

97. *Id.* at 462-63.

98. 821 N.E.2d 15 (Ind. App. 2005).

99. *Id.* at 35.

100. *Id.* at 19.

101. *Wilson*, 2005 WL 281272. See *supra* nn. 81-90 and accompanying text.

same-sex marriage is not a fundamental right.¹⁰² Accordingly, the court, in discussing the standard for constitutional review, found that the contested “statutes will survive Article I, § 23 scrutiny if they pass the most basic rational relationship test.”¹⁰³ The court proceeded to hold that the marital procreation justification for the distinction between same-sex and opposite-sex couples is not unreasonable or arbitrary.¹⁰⁴

The court stated that the issue before it was:

[W]hether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under Article I, § 23 of the Indiana Constitution.¹⁰⁵

The court spent a considerable amount of time assessing the differences between “natural” and other means of procreation and found that the “legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by ‘natural’ means.”¹⁰⁶ The court declined to follow the analysis of either the Vermont Supreme Court in *Baker v. State*¹⁰⁷ or the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*.¹⁰⁸ The court also found that the denial of the right to same-sex marriage does not violate the provisions of the Indiana Constitution that protect core values.¹⁰⁹ Ultimately, then, the court’s decision that the Indiana DOMA does not violate the Indiana Constitution relies heavily on the natural procreation distinction.

C. Vermont Opens the Door

Even as many state legislatures were quickly passing DOMAs, some courts were taking contrary positions. In 1998, an Alaska trial court held that denying same-sex couples the right to marry violated both the state constitutional right to privacy and the state constitutional right to be free from discrimination.¹¹⁰ Before the case could work its way to the highest state court, however, voters passed a

102. *Morrison*, 821 N.E.2d at 19-20.

103. *Id.* at 22. The court discussed the different standards for review under the Indiana and United States Constitutions, noting that: “Unlike federal equal protection analysis, there is no varying or heightened level of scrutiny based on the nature of the classification or the nature of the right affected by the legislation,” and finding that prior cases require “only that the disparate treatment accorded by legislation, not the purposes of the legislation, be reasonably related to the inherent characteristics that distinguish the unequally treated classes, although legislative purposes may be a factor considered in making the reasonable relationship determination.” *Id.* at 21-22 (citing *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)) (emphasis omitted).

104. *Id.* at 23.

105. *Id.*

106. *Morrison*, 821 N.E.2d at 25.

107. 744 A.2d 864 (Vt. 1999).

108. 821 N.E.2d at 27-29.

109. *Id.* at 31-34.

110. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

constitutional amendment defining marriage as between one man and one woman, thereby effectively ending the lawsuit.¹¹¹

It was therefore not until 1999 that another state supreme court upheld the rights of same-sex couples to partake of the benefits of marriage. On December 20, 1999, the Vermont Supreme Court held that it violated the Common Benefits Clause of the Vermont Constitution to deny to same-sex couples the same benefits and privileges granted to married couples.¹¹² The court ordered that the legislature remedy this constitutional infirmity, stating:

[U]nder the Common Benefits Clause of the Vermont Constitution, . . . plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this 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 Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.¹¹³

In response, the Vermont legislature created “civil unions,” making it the first state in the country to offer the same state benefits and protections to same-sex couples as those extended to married couples.¹¹⁴ The state legislature chose not to grant to same-sex couples the right to “marry.”¹¹⁵ Although there was outrage and indignation in Vermont from various segments of society and a backlash against the legislators who supported the civil union bill,¹¹⁶ the civil union law has not changed since its enactment.¹¹⁷

111. Alaska Const. art. I, § 25. See also *Brause v. State*, 21 P.3d 357 (Alaska 2001) (holding that plaintiffs’ constitutional challenge to the state’s refusal to grant them marriage licenses was made moot by adoption of article I, § 25).

112. *Baker*, 744 A.2d at 867.

113. *Id.*

114. Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002).

115. See Vt. Stat. Ann. tit. 15, § 8 (“Marriage is the legally recognized union of one man and one woman.”).

116. See e.g. Fred Bayles, *Vermont’s Gay Civil Unions Mostly Affairs of the Heart*, USA Today A1 (Jan. 7, 2004); Carolyn Lochhead, *Gay Rights Law Starts Civil War in Vermont: A State Divided Expects Political Leaders to Feel the Heat at Ballot Box on Election Day*, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/10/30/MN43018.DTL> (Oct. 30, 2000); Patti Reid, *Activists Warn Civil Union Equity Law Vulnerable*, <http://www.womensenews.org/article.cfm/dyn/aid/728> (Nov. 20, 2001); Debra Rosenberg, *State of the “Union”: A Law Allowing Gays to All but Marry Has Divided the Pastoral State of Vermont. “It’s Like North and South,” Says One Woman*, Newsweek 56 (Oct. 23, 2000); Ross Sneyd, *Backlash Over Vt. Civil Unions Law*, <http://www.freerepublic.com/forum/a39b6ad3d6352.htm> (Sept. 6, 2000).

117. The specific provisions of Vermont’s civil union law will be discussed in more detail in Part V of this article.

D. *Interstate Recognition of Vermont Civil Unions*

There is no requirement in the Vermont civil union law that the parties to the civil union be residents of the state of Vermont.¹¹⁸ As a result, the vast majority of parties entering into civil unions in Vermont has been out-of-state residents.¹¹⁹ After traveling to Vermont to enter into a civil union, the parties return to their states of residence, where such unions do not exist and are generally not recognized.¹²⁰ Under the federal DOMA, each individual state's DOMA, and the public policy exception to the Full Faith and Credit Clause, the states are not required to grant rights, including the right to terminate the union, to parties in civil unions.

Parties to civil unions cannot simply return to Vermont to dissolve their civil unions. Though they do not have to reside there to enter into a civil union, Vermont does require residency to dissolve one.¹²¹ This requirement is identical to the one for divorce; that is, the person filing to dissolve the union must be a resident of Vermont for six months prior to filing.¹²² Thus, at least one of the parties to the civil union would have to move and establish residency in Vermont for a period of six months before being able to dissolve the union there. As a result, the number of dissolutions of civil unions in Vermont is very low.¹²³

There have been lawsuits in several states seeking recognition of civil unions, but, generally speaking, there has not been widespread success. For example, a Connecticut appellate court held that a civil union entered into in Vermont did not constitute a marriage under Connecticut law and therefore the civil union could not be dissolved in Connecticut.¹²⁴ The court opined that since the legislature could have elected to enact legislation permitting either same-sex marriage or civil unions but had failed to do so, a public policy opposing such unions had been articulated.¹²⁵

118. See Vt. Stat. Ann. tit. 15, §§ 1201-1207.

119. Vt. Civ. Union Rev. Commn., *Report* § V, Finding 3, <http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm> (Jan. 2002). As of January 4, 2002, over 4,371 civil unions had been entered into in Vermont, the majority by non-residents. In 2002, approximately 89% of civil unions were between non-residents. *Id.*

120. See *supra* n. 2 and accompanying text.

121. Vt. Stat. Ann. tit. 15, § 1206 (2002) provides:

The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements.

122. Vt. Stat. Ann. tit. 15, § 592 (2002) (“A complaint for divorce or annulment of marriage may be brought if either party to the marriage has resided within the state for a period of six months or more . . .”).

123. [gaydemographics.org](http://www.gaydemographics.org), *Vermont Civil Unions, Comparison to Marriage and to Divorces in Vermont*, http://www.gaydemographics.org/USA/states/vermont/2000Census_state_vt_civilunions.htm (accessed Mar. 20, 2005).

124. *Rosengarten v. Downs*, 802 A.2d 170 (Conn. App. 2002), *cert. granted*, 806 A.2d 1066 (Conn. 2002) (limiting the issue on appeal to the question of whether the lower court properly concluded that the trial court lacked subject matter jurisdiction to dissolve a civil union entered into in Vermont).

125. *Id.* at 179.

This issue was also recently presented to a Texas trial court that initially granted a dissolution to a same-sex couple.¹²⁶ After the dissolution was granted, the attorney general intervened.¹²⁷ The petitioning spouse then withdrew his petition, as he was not financially able to fight the attorney general.¹²⁸ Because the petition for dissolution was withdrawn,¹²⁹ there was no opportunity for the decision to be appealed and thus there is no higher court ruling on the ability of partners in civil unions to have those unions dissolved in Texas.¹³⁰

In *Burns v. Burns*,¹³¹ the Georgia Court of Appeals ruled against the validity of a Vermont civil union. The court held that the civil union did not make one party legally related to the other and that the civil union could not substitute for legal marriage.¹³² At issue in this case was the interpretation of a consent decree under which Susan Burns and her ex-husband were both prohibited from having an unrelated adult spend the night when their children were present.¹³³ Burns's ex-husband filed a contempt action on the basis that Burns was cohabitating with her female partner.¹³⁴ The trial court agreed and Burns appealed, arguing that the civil union satisfied the terms of the consent order.¹³⁵ The appellate court found that the parties were not "related" by virtue of their civil union.¹³⁶

It is difficult, if not impossible, to know how many trial courts have quietly and without much ado terminated civil unions. Those decisions have not been appealed. The reported decisions generally involve cases in which the lower courts refused to recognize the civil union. There are, however, a few known instances in which a Vermont civil union has been recognized elsewhere. One such instance occurred in West Virginia, where a trial court ordered a civil union dissolved.¹³⁷

Additionally, an Iowa trial court granted a divorce to a lesbian couple who had entered into a Vermont civil union.¹³⁸ A group of plaintiffs petitioned for certiorari, arguing that as members of the public, taxpayers, state and federal legislators, a minister, and a church, they had standing, and that the district court

126. Fred A. Bernstein, *Lesbian/Gay Law Notes, The First Lesbian Divorce?* <http://www.qrd.org/qrd/www/legal/lgn/05.2003.html> (May 2003).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. 560 S.E.2d 47 (2002).

132. *Id.* at 49.

133. *Id.* at 48.

134. *Id.*

135. *Id.*

136. *Burns*, 560 S.E.2d at 49.

137. Bernstein, *supra* n. 127 (indicating that said dissolution was obtained in the case of *In Re The Marriage of Gorman*, case number 02-D-292, in the Family Court of Marion County, West Virginia on December 19, 2002).

138. See CNN.com, L. Ctr., *Iowa Court to Review Case of Two Women's Divorce Pact: Congressman, State Lawmakers Try to Block Judge's Ruling*, <http://www.cnn.com/2004/LAW/02/04/lesbian.divorce.ap/> (Feb. 4, 2004).

exceeded its authority in dissolving the civil union.¹³⁹ Certiorari was granted on February 3, 2004.¹⁴⁰ A decision has not yet been rendered.

In a significant decision involving civil unions, a New York appellate court recently recognized the right of a partner in a civil union to sue under the state's wrongful death statute, holding that he was a "spouse" for purposes of the statute.¹⁴¹ The court found that the plaintiff had standing to bring suit and that, in fact, to find otherwise would be a denial of equal protection.¹⁴² The court analyzed the existing law in New York with regard to same-sex couples, citing, for example, the fact that New York had not passed a DOMA, and concluding that recognizing the Vermont civil union did not violate the public policy of the state.¹⁴³

A classic example of the problems that are going to increasingly arise in enforcing rights arising out of civil unions is being played out in a case involving a Virginia trial court's refusal to enforce a Vermont order dissolving a civil union and granting parenting rights.¹⁴⁴ This case is significant because it has resulted in conflicting orders from two states, a situation for which there is no resolution.¹⁴⁵

In this case, the parties (Janet and Lisa) lived in Virginia and traveled to Vermont for the purpose of entering into a civil union.¹⁴⁶ They returned to Virginia and conceived a child through artificial insemination, choosing Lisa to bear the child. Subsequently, they moved to Vermont and established legal residence there. The parties later ended their relationship and Lisa and the child returned to Virginia while Janet remained in Vermont. A couple of months after leaving, Lisa returned to Vermont to seek a dissolution of the civil union. She sought an order for custody and child support. The court entered an order granting Janet visitation rights in both Vermont and Virginia. Unhappy with this order, Lisa filed an action in Virginia, asking the Virginia court to re-decide the case, giving her sole parenting rights and denying Janet even the right of visitation with the child.¹⁴⁷ Significantly, she filed this action the day after Virginia's Affirmation of Marriage Act,¹⁴⁸ which prohibits Virginia from recognizing out-of-state civil unions, went into effect.¹⁴⁹

Subsequently, the Vermont court entered an order giving Janet equal parental rights, finding that Janet had all of the legal rights that a parent in a marriage would have, and found Lisa in contempt for her refusal to comply with

139. Iowa Jud. Branch, *Case Statement, Alons v. Iowa District Court for Woodbury County* <http://www.judicial.state.ia.us/supreme/oralarg/03-1982.asp> (accessed Mar. 20, 2005).

140. *Id.*

141. *Langan v. St. Vincent's Hospital of N.Y.*, 765 N.Y.S.2d 411, 420-21 (Sup. Ct. 2003).

142. *Id.*

143. *Id.* at 415-16. For an excellent analysis of the case, see Emily Stein, Student Author, *Case Note: Langan v. St. Vincent's Hospital*, 48 N.Y.U. L. Rev. 871 (2004).

144. Equality Virginia, *FAQ: Miller-Jenkins v. Miller-Jenkins*, <http://www.equalityvirginia.org/site/pp.asp?c=dfiITMIG&b=262607> (accessed Mar. 20, 2005).

145. *Id.* at "What is the legal controversy?"

146. *Id.* at "Who are the parties to the case?"

147. *Id.*

148. Va. Code Ann. § 20-45.3 (2004).

149. Equality Virginia, *supra* n. 144, at "Why is it significant that Lisa filed her Virginia proceeding on July 1, 2004?"

Vermont's orders.¹⁵⁰ Janet has also filed an action in Virginia challenging Virginia's exercise of any jurisdiction in the case.¹⁵¹ Pursuant to both the federal Parental Kidnaping Prevention Act ("PKPA")¹⁵² and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),¹⁵³ a state may not exercise child custody jurisdiction if another state is already properly exercising jurisdiction and must enforce the orders of the state exercising jurisdiction so long as the exercise of jurisdiction is proper.¹⁵⁴ Therefore, under normal circumstances, Virginia would be prohibited from exercising jurisdiction in such a matter.

However, the trial court judge in Frederick County, Virginia found that the Virginia Affirmation of Marriage Act trumped the PKPA and both Virginia's UCCJEA and Vermont's Uniform Child Custody Jurisdiction Act,¹⁵⁵ and ruled that the court did not have to uphold the Vermont court orders.¹⁵⁶ The case is currently on appeal in Virginia.¹⁵⁷ The issue is whether the Affirmation of Marriage Act overrides federal and state law designed to prevent the exact type of forum shopping that occurred in this case.¹⁵⁸ This fact pattern is on all fours with many similar cases involving removing children from a court's jurisdiction for the purpose of obtaining a different result elsewhere.¹⁵⁹ Courts will now have to determine whether state DOMAs or similar acts will supercede these laws. If they find that they do, instances of child removal and conflicting court orders could become a serious interstate problem.

III. THE YEAR OF SEISMIC CHANGE AND ITS AFTERMATH: 2003 AND 2004

Three separate legal events occurred in 2003 that represented an earth-shaking shift in the landscape, from which the fallout is still being felt. Within two weeks of each other, an appellate court in Ontario held that denying same-sex couples the right to marry violated the Canadian Constitution,¹⁶⁰ and the United States Supreme Court declared unconstitutional a Texas sodomy statute, expressly overruling *Bowers v. Hardwick*.¹⁶¹ A few months later, the Massachusetts Supreme Court dropped a bombshell when it declared that denying same-sex couples the right to marry violated the Massachusetts Constitution.¹⁶² While the actions of a Canadian court have no legal bearing in the United States, the fact that our nearest neighbor to the north was going to legalize gay marriage caused an uproar that resulted in a new call-to-arms by opponents of equal rights for

150. *Id.* at "What is the legal controversy?"

151. *Id.*

152. 28 U.S.C. § 1738A (2000).

153. Va. Code Ann. §§ 20-146.1 to 20-146.38 (LEXIS 2004).

154. 28 U.S.C. § 1738A(a); Va. Code Ann. § 20-146.24.

155. Vt. Stat. Ann. tit. 15, §§ 1031-1051 (LEXIS 2002).

156. Equality Virginia, *supra* n. 144, at "What happened in the Virginia Court?"

157. *Id.*

158. *Id.* at "What is at stake in the appeal?"

159. *Id.*

160. *Halpern v. Toronto (City)*, (2003) 225 D.L.R. 529 (Ont. Ct. App.).

161. *Lawrence v. Texas*, 539 U.S. 558 (2003).

162. *Goodridge v. Dept. of Pub. Health*, 798 N.E. 941 (2003).

same-sex couples. Although many European countries had already recognized the rights of same-sex partners in various forms (including, in two countries, marriage),¹⁶³ the impact of this recognition was not felt here in the United States until our closest neighbor paved the way for same-sex marriage. These three legal decisions signaled recognition of the rights of same-sex couples in a previously unheard of manner. Each of these decisions bears detailed examination.

The reaction to these events reflected a renewed determination to ban same-sex marriage. In light of the Canadian decisions and in anticipation of similar decisions in the United States, a resolution was introduced in the House of Representatives on May 10, 2003, calling for a constitutional ban on same-sex marriage.¹⁶⁴ On November 25, 2003, immediately after the *Goodridge* decision, Senate Joint Resolution 26, calling for a federal marriage amendment, was introduced in the Senate. Furthermore, many states began moving forward with plans to amend their own constitutions.¹⁶⁵

A. Canada Legalizes Gay Marriage

In sweeping terms, the Ontario Appellate Court stated that the case before it was “ultimately about the recognition and protection of human dignity and equality in the context of social structures available to conjugal couples in Canada.”¹⁶⁶ Recognizing that throughout Canada’s history, marriage has been defined as between one man and one woman,¹⁶⁷ the court summarized the central

163. See *White Paper*, *supra* n. 2, at 36-38 (indicating that the Netherlands and Belgium both permit same-sex marriage, and that many other European countries grant legal recognition to same-sex relationships and/or grant legal rights to same-sex partners, including Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, New Zealand, Norway, and Sweden).

164. H.R. Jt. Res. 56, 108th Cong. (May 21, 2003).

165. *Infra* pt. IV(E).

166. *Halpern*, 225 D.L.R. 529 at ¶ 2. The court began its decision with a discussion of the meaning of human dignity, quoting *Law v. Canada (Minister of Employment and Immigration)*, (1999) 1 S.C.R. 497 at 530, which stated:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

Halpern, 225 D.L.R. 529 at ¶ 3. The court also cited the Ontario Human Rights Code, Preamble, R.S.O. ch. H. 19 (1990) (Can.) at *Halpern*, 225 D.L.R. 529 at ¶ 4, which states:

[I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

167. *Halpern*, 225 D.L.R. at ¶ 1. The court stated:

The definition of marriage in Canada, for all of the nation’s 136 years, has been based on the classic formulation of Lord Penzance in *Hyde v. Hyde* (1886), L.R. 1 P.D. 130 (Eng. P.D.A.), at 133: “I conceive that marriage, as understood in Christendom, may for this

question in the appeal as whether the exclusion of same-sex couples from the definition of marriage violates Canadian law, specifically, the Canadian Charter of Rights and Freedoms §§ 2(a) and 15(1).¹⁶⁸

Sexual orientation had previously been found to be a protected classification in Canada.¹⁶⁹ The court noted that previous same-sex equality litigation had focused on such areas as bereavement leave, health care and pension benefits, and spousal support, but that this appeal went to the heart of the issue of human dignity itself and whether denying the right of marriage to same-sex couples denies human dignity.¹⁷⁰ It is important that Canada had previously passed legislation extending federal benefits and obligations to all unmarried couples that have cohabitated in a conjugal relationship for at least one year, regardless of sexual orientation.¹⁷¹ The court was also influenced by the fact that two other provincial courts had already declared a ban on same-sex marriage to be unlawful.¹⁷² It is significant that the court was not concerned with the historical definition of marriage as between one man and one woman, as this evidenced its willingness to embrace judicial progressivism.¹⁷³

The court undertook an in-depth analysis of whether the common law definition of marriage as between one man and one woman violates Section 15(1)

purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

Id.

168. *Id.*

169. *Id.* at ¶ 7 (citing *M. v. H.*, (1999) 2 S.C.R. 3 and *Egan v. Canada*, (1995) 2 S.C.R. 513). After citing *Egan* and *M. v. H.* to support sexual orientation as a protected classification, the court quoted from the former:

In *Egan*, . . . this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1). Sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, “whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”

Id. (citations omitted).

170. *Halpern*, 225 D.L.R. 529 at ¶ 8.

171. *Id.* at ¶ 28.

172. *Id.* at ¶¶ 31-33 and *EGALE Canada, Inc. v. Canada (Attorney General)*, (2003) B.C.J. No. 994 (B.C. C.A.).

173. *Id.* at ¶ 42. The court explained: “[T]o freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country’s jurisprudence of progressive constitutional interpretation.” *Id.* The court further stated:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is enacted and as easily repealed. A constitution, by contrast, is drafted with an eye toward the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

Halpern, 225 D.L.R. 529 at ¶ 42.

of the Canadian Charter.¹⁷⁴ As a starting point for its analysis, the court pointed out the express purpose of that Section:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁷⁵

In the first instance, the court evaluated whether “the common law definition of marriage draws a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation.”¹⁷⁶ The court determined that there is a distinction, and then turned to an analysis of the impact of the differential treatment of same-sex couples within the context of the Charter.¹⁷⁷ The court noted that, while it must examine both the purpose and the effect of the law in question, it need not find both a discriminatory purpose and a discriminatory effect, as either will suffice.¹⁷⁸

As part of its analysis, the court discussed the historic disadvantage and vulnerability of homosexuals as a class.¹⁷⁹ In determining whether the law was discriminatory, the court further analyzed the correlation between the grounds on which the claim is based and the actual needs, capacities, or circumstances of the

174. *Id.* at ¶ 59 (“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.” quoting *Canadian Charter of Rights and Freedoms*, § 15(1)).

175. *Id.* at ¶ 60 (quoting *Law*, 1 S.C.R. at 529).

176. *Id.* at ¶ 65.

177. *Halpern*, 225 D.L.R. 529 at ¶ 67. The court’s approach requires it to:

[D]etermine whether the differential treatment, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

Id. at ¶ 61 (quoting *Law*, 1 S.C.R. at 548-49).

178. *Id.* at ¶ 80. The court stated:

[A]ny demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society . . . will suffice to establish an infringement of s. 15(1).

Id. (quoting *Law*, 1 S.C.R. at 535) (emphasis in original).

179. *Id.* at ¶¶ 82-84. The court found that:

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, community and in private life.

Halpern, 225 D.L.R. 529 at ¶ 83.

claimant or others possessing similar traits.¹⁸⁰ The court found that “the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same-sex couples” and concluded that “this factor weighs in favour of a finding of discrimination.”¹⁸¹ The court was dismissive of the Ontario Attorney General’s argument that only opposite-sex couples can procreate, noting that, while only opposite-sex couples can “procreate” within the traditional meaning of the word, “[a]n increasing percentage of children are being conceived and raised by same-sex couples.”¹⁸²

The court was clear that legislation granting to same-sex couples the benefits afforded married couples would not cure the discrimination; indeed, it found that denial of access to the institution of marriage itself is discriminatory and violative of the Charter.¹⁸³ Once it had determined that the common law requirement that marriage be between one man and one woman was discriminatory, the court turned to an analysis of whether the violation of the Charter was justified, specifically, whether there was a valid objective to justify maintaining marriage as a solely heterosexual institution.¹⁸⁴ The court was very pointed in its rejection of upholding such a distinction just because it historically has been the case.¹⁸⁵ It further rejected the government’s argument that uniting opposite-sex couples, procreation, and the raising of children justified restricting marriage to opposite-sex couples. The court found that the government failed to demonstrate “any

180. *Id.* at ¶ 88.

181. *Id.* at ¶ 95. The court disagreed with the argument of the attorney general that “marriage relates to the capacities, needs and circumstances of opposite-sex couples” and that the concept of marriage, across all societies, legal cultures and time is “that of an institution to facilitate, shelter and nurture the unique union of a man and a woman who, together, have the possibility to bear children from their relationship and shelter them from within it.” *Id.* at ¶ 89. The court clarified that “the purpose and effects of the impugned law must at all times be viewed from the perspective of the claimant,” rather than any other individual or group. *Id.* at ¶ 91. The court, therefore, found that the “question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples.” *Halpern*, 225 D.L.R. 529 at ¶ 91.

182. *Id.* at ¶ 93.

183. *Id.* at ¶¶ 107-08. The court called attention to the fact that:

[S]ame-sex couples are excluded from a fundamental societal institution—marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetrates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

Id. at ¶ 107.

184. *Id.* at ¶ 108.

185. *Halpern*, 225 D.L.R. 529 at ¶ 117. The court stated:

No one is disputing that marriage is a fundamental societal institution. Similarly, it is accepted that, with limited exceptions, marriage has been understood to be a monogamous opposite-sex union. What needs to be determined, however, is whether there is a valid objective to maintaining marriage as an exclusively heterosexual institution. 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.

Id.

pressing and substantial objective for excluding same-sex couples from the institution of marriage.”¹⁸⁶ It therefore concluded that restricting marriage to heterosexual couples violated same-sex couples’ rights under § 15(1) of the Charter.¹⁸⁷

The court, therefore, undertook to redefine marriage itself, finding that a constitutional amendment was unnecessary and that courts have jurisdiction to alter the common law definition of marriage.¹⁸⁸ The court held that the common law definition of marriage shall be “the voluntary union for life of two persons to the exclusion of all others.”¹⁸⁹ The court ordered that the change be effective immediately and that marriage licenses be issued to same-sex couples.¹⁹⁰

Within a year of the issuance of *Halpern*, ten Canadian provinces and one of three territories legalized same-sex marriage.¹⁹¹ Members of the Canadian Parliament drafted legislation that would legalize same-sex marriage throughout Canada, but rather than passing it immediately, elected to submit it to the Canada Supreme Court for an advisory opinion on its constitutionality.¹⁹² On December 9, 2004, the Canadian Supreme Court ruled that legislation legalizing same-sex marriage was constitutional.¹⁹³ This decision further fueled the determination of those opposing same-sex marriage in the United States to seek passage of the federal marriage amendment.¹⁹⁴

B. *The United States Supreme Court Overturns Sodomy Statute*

On June 26, 2003, a mere two weeks after the Canadian decision was announced, the United States Supreme Court issued its decision in *Lawrence v. Texas*.¹⁹⁵ In this case, the Court held that the Texas statute that made it a crime for people of the same sex to engage in certain sexual conduct violated the Due Process Clause of the Constitution, finding that the liberty protected by the Constitution allows homosexual adults to “choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”¹⁹⁶ The questions before the Court were whether the Texas sodomy statute violated the Equal Protection Clause of the Constitution, whether it violated the Due Process Clause of the Constitution, and whether

186. *Id.* at ¶ 125.

187. *Id.*

188. *Id.* at ¶¶ 149-153.

189. *Halpern*, 225 D.L.R. 529 at ¶ 154.

190. *Id.*

191. Rona Marech, *Top Court in Canada Ok's Gay Marriage: Lawmakers Sought Ruling Before Introducing Bill*, <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/12/10/MNG20A9TUS1.DTL> (Dec. 10, 2004).

192. *In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26*, 2004 S.C.R. 79 (at this time publication pages are not available for this document).

193. *Id.*

194. *See infra* pt. IV(E).

195. 539 U.S. 558.

196. *Id.* at 567.

*Bowers v. Hardwick*¹⁹⁷ should be overruled.¹⁹⁸ The decision is significant in many respects, including the language the Court chose to utilize in its analysis, its express overturning of the *Bowers* decision, its reliance on the Due Process Clause rather than the Equal Protection Clause, and the fact that it is not a unanimous opinion. Justice Scalia's shrill dissent has garnered almost as much attention as the decision itself.

As the Texas statute only proscribed certain sexual acts between members of the same sex (as opposed to the Georgia statute upheld in *Bowers*, which proscribed certain sexual activity between heterosexual couples as well), the Court could have elected to decide this case on equal protection grounds, as did Justice O'Connor in her concurring opinion.¹⁹⁹ However, the Court concluded that:

[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry, we deem it necessary to reconsider the Court's holding in *Bowers*.²⁰⁰

The Court began its analysis of *Bowers* with a tracing of the "substantive reach of liberty under the Due Process Clause in earlier cases,"²⁰¹ beginning with *Griswold v. Connecticut*.²⁰² It was in *Griswold* that the Court held that a right of privacy existed.²⁰³ *Griswold* was followed within the decade by *Eisenstadt v. Baird*,²⁰⁴ which extended the right of privacy to non-married individuals.²⁰⁵ The Court continued its analysis with a discussion of its decision in *Roe v. Wade*.²⁰⁶ Lastly, the Court mentioned its decision in *Carey v. Population Services International*,²⁰⁷ wherein it invalidated a New York law that forbade the sale of contraceptives to persons under sixteen.²⁰⁸

197. 478 U.S. 186 (1986).

198. *Lawrence*, 539 U.S. at 564.

199. *Id.* at 565, 579-85.

200. *Id.* at 564.

201. *Id.*

202. 381 U.S. 479, 485 (1965) (overturning a state law prohibiting the use of drugs or devices that interfered with conception, as well as the counseling, aiding or abetting of someone using drugs or devices of contraception).

203. *Id.* at 483-85.

204. 405 U.S. 438 (1972).

205. In *Eisenstadt*, the Court invalidated a law that prohibited the distribution of contraceptives to unmarried people. Although the case was decided under the Equal Protection Clause instead of the Due Process Clause, the *Eisenstadt* Court found the law to be in conflict with basic individual rights, stating:

It is true that in *Griswold* the right to privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453.

206. *Lawrence*, 539 U.S. at 565 (citing *Rowe v. Wade*, 410 U.S. 113 (1973) (holding that a woman's right to an abortion, while not absolute, did have protection as an exercise of her liberty under the Due Process Clause)).

207. 431 U.S. 678 (1977).

208. *Lawrence*, 539 U.S. at 566.

The Court concluded that the state of the law at the time that *Bowers* was decided was that the right of privacy was not limited to married people.²⁰⁹ The Court pointed out that the inherent flaw in the *Bowers* Court's framing of the issue presented was that it did not appreciate the liberty interest at stake.²¹⁰ The Court pointed out that the statutes in question, both in *Bowers* and in *Lawrence*, "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."²¹¹ The Court undertook a lengthy historical analysis of laws affecting homosexuality, finding that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."²¹² The Court went on to criticize Justice Berger's sweeping summary of history as it relates to homosexual behavior, finding it to be overstated and inaccurate.²¹³ The Court scolded the *Bowers* Court for failing to rely upon the law as it had developed over the more recent past, citing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,"²¹⁴ and that this "emerging recognition should have been apparent when *Bowers* was decided."²¹⁵ The Court also chastised the *Bowers* Court for ignoring historical developments that conflicted with its decision as well as recent developments elsewhere of significance.²¹⁶ In addition to its criticism of the reasoning in *Bowers* itself, the Court found that two opinions issued after *Bowers* (*Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁷ and *Romer v. Evans*²¹⁸) made the decision even more suspect.²¹⁹

209. *Id.*

210. *Id.* at 566-67. In *Bowers*, the Court stated that the issue before it was whether the Constitution confers a fundamental right of privacy to engage in homosexual conduct, specifically, sodomy, rather than whether the Constitution confers a right of privacy generally. 478 U.S. at 190.

211. *Lawrence*, 539 U.S. at 567.

212. *Id.* at 568. The Court pointed out that laws prohibiting sodomy historically have not been enforced against consenting adults but rather were enacted to prosecute predatory sexual acts against non-consenting individuals. *Id.* at 569. The Court further found that laws directed at homosexuality did not, in fact, have "ancient roots" as claimed by the Court in *Bowers*, noting that laws targeting same-sex couples did not come about until the last third of the twentieth century and that the first state law criminalizing same-sex relations was not enacted until the late 1970s. *Id.* at 569-70.

213. *Id.* at 568-71. The court noted that: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." *Id.* at 571 (quoting *Bowers*, 478 U.S. at 196).

214. *Lawrence*, 539 U.S. at 572.

215. *Id.* The Court pointed out that in 1955 the American Law Institute promulgated the Model Penal Code, which made clear that private sexual conduct should not be criminalized. *Id.*

216. *Id.* at 572-73. The Court indicated that a law similar to the Georgia statute was struck down by the European Court of Human Rights five years before the *Bowers* decision. *Id.* at 573. That decision, which colors the *Bowers* Court's finding that the claim pursued by the plaintiff was insubstantial in Western civilizations, was authoritative in all member nations at that time (of which there were 21). *Lawrence*, 539 U.S. at 573.

217. 505 U.S. 833 (1992). In *Casey*, the Court reaffirmed the right of liberty protected by the Due Process Clause, stating:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

The Court expressly rejected deciding this case on equal protection grounds, leaving open the question of whether the statute in question could survive scrutiny if it applied equally to homosexual and heterosexual couples.²²⁰ Rather, the Court concentrated on the continued validity of the *Bowers* decision, stating that “its continuance as precedent demeans the lives of homosexual persons.”²²¹ Recognizing that the “criticism of *Bowers* has been substantial and continuing”²²² and further acknowledging that stare decisis is not absolute,²²³ the Court held that “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”²²⁴

Despite the strong historical legal precedent for the right of privacy and for the right of individuals to live their personal lives in a free manner and with dignity, three justices dissented from this decision, and two asserted that such a right should not exist for homosexuals.²²⁵ Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a scathing dissent about both the decision itself and its underlying reasoning, opining that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”²²⁶ are all called into question by this decision. The dissent disagreed that a right of liberty actually exists under the Due Process Clause, pointing out that the Fourteenth Amendment expressly permits states to proscribe liberty so long as due process is provided.²²⁷ The dissent scathingly criticized the overruling of *Bowers*, asserting that the decision therein was correct and further suggesting that the majority in the present case was attempting to make homosexuality a fundamental right, though “the Court does not have the boldness”²²⁸ to say so. The dissenting opinion skewered the majority’s holding that there was no rational basis for the sodomy statute, stating that: “This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society that we know—that it requires little discussion.”²²⁹

In biting language, the dissenting opinion criticized the majority opinion as judicial activism by a “Court . . . that has largely signed on to the so-called

Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

Id. at 851.

218. 517 U.S. 620 (1996).

219. *Lawrence*, 539 U.S. at 573.

220. *Id.* at 574-75.

221. *Id.* at 575.

222. *Id.* at 576.

223. *Id.* at 577.

224. *Lawrence*, 539 U.S. at 578.

225. *Id.* at 586-606 (Scalia, J., Rehnquist, C.J., & Thomas, J.).

226. *Id.* at 590.

227. *Id.* at 592 (citing the Fourteenth Amendment: “No state shall . . . deprive any person of life, liberty, or property, without the due process of law.” (emphasis omitted)).

228. *Id.* at 594.

229. *Lawrence*, 539 U.S. at 599 (emphasis in original).

homosexual agenda.”²³⁰ In the strongest possible terms, Justice Scalia warned that this decision was the harbinger of things to come, namely, that the next logical progression in this reasoning would be the legalization of same-sex marriage.²³¹ The dissenters worried that the majority has in effect made homosexuality a fundamental right, even though the majority was clear that it is the right to liberty and privacy that is fundamental.²³² The dissenting opinion’s criticism of judicial activism and promotion of social change through means other than the courts flies in the face of some of the greatest decisions in the Court’s history. To argue that the law should not change until societal views catch up would negate such decisions as *Loving v. Virginia*²³³ and *Brown v. Board of Education*.²³⁴ It is evident that the majority of society at the time those cases were decided did not favor integrated schools or interracial marriage. However, such societal attitudes did not prevent the Court from remedying these terrible wrongs. For the dissenting justices to argue that the Court should not take positions that deviate from the mainstream disregards historic jurisprudence. Even though they pay lip service to the history of the Court in engaging in exactly such activity, their condemnation of the practice in this case is disingenuous. Thus, at the end of the day, one-third of the justices on the Supreme Court determined that the Texas statute criminalizing certain sexual conduct between homosexuals should be allowed to stand as constitutional.

230. *Id.* at 602. Justice Scalia decried this shift in roles from “neutral observer” to “taking sides in the culture war,” pointing out: “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.” *Id.*

231. *Id.* at 604. Justice Scalia stated:

At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Today’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. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing such conduct; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution” This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

Id. at 604-05 (citations omitted).

232. *Lawrence*, 539 U.S. at 604-05.

233. 388 U.S. 1 (1967).

234. 347 U.S. 483 (1954).

C. *Massachusetts Declares Ban on Same-Sex Marriage Unconstitutional*

The most dramatic legal development in the United States in 2003 was the Massachusetts Supreme Court's decision in *Goodridge v. Department of Public Health*. It was without question the shot heard around the world, or at least around the United States. The decision became a call to arms for conservatives to press for a federal constitutional amendment. Although the decision was based upon the Massachusetts, not the United States, Constitution, concern about the spread of legalized same-sex marriage was profound.²³⁵ Numerous amicus briefs were filed by groups presenting legal, religious, and mental health perspectives.²³⁶ The court had amassed before it a wealth of information related to all possible aspects of this highly controversial issue.²³⁷ It is clear from a reading of the opinion that the court weighed all of the information before it, and also considered much of the dicta of *Lawrence*, in rendering its opinion.²³⁸ The court distinguished the Massachusetts Constitution from the federal Constitution, noting that: "The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected sphere of private life."²³⁹

The court divided the question before it—whether the marriage restriction violated the Massachusetts Constitution—into two queries: whether the restriction was a denial of equal protection and whether the restriction violated due process of law. It pointed out, however, that in matters of marriage and children, the two concepts overlap.²⁴⁰ The court recognized the substantial benefits enjoyed by those in marriages and pointed out that: "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."²⁴¹ The court then discussed some of the benefits attached to marriage that are not available to unmarried persons,²⁴² concluding that: "It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'"²⁴³

Significantly, the court analogized the prohibition on same-sex marriage to the earlier prohibition on interracial marriage, stating:

As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate

235. See *supra* n. 4 and accompanying text.

236. *Goodridge*, 798 N.E.2d at 946-47.

237. *Id.*

238. *Id.* at 948.

239. *Id.* at 948-49.

240. *Id.* at 953.

241. *Goodridge*, 798 N.E.2d at 955.

242. *Id.* at 955-57.

243. *Id.* at 957 (citing *Loving*, 388 U.S. at 12).

government restrictions in the interests of public health, safety and welfare. In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.²⁴⁴

After analyzing the safeguards of the Massachusetts Constitution to protect liberty and equality, the court found that: “The 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.”²⁴⁵ The court went on to find that the marriage ban could not meet the rational basis test under either due process or equal protection analysis.²⁴⁶

The court made short shrift of the argument propounded by the State that the primary purpose of marriage is procreation, finding that: “Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.”²⁴⁷ The court, in strong language, found that this argument relative to procreation “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”²⁴⁸

The second argument put forth by the state in favor of maintaining the ban on same-sex marriage was that limiting marriage to heterosexual couples ensures that children are raised in an “optimal” environment.²⁴⁹ The Court shredded this assertion, pointing out its flawed reasoning and finding no rational relation between the ban on same-sex marriage and the goal of rearing children in an optimal environment.²⁵⁰ Instead, the court found that:

Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of “a stable family structure in which children will be reared, educated, and socialized.”²⁵¹

In fact, the court found that the ban on same-sex marriage penalized the children of same-sex relationships by depriving them of state benefits and that this penalty

244. *Id.* at 958 (citations omitted).

245. *Id.* at 959.

246. *Goodridge*, 798 N.E.2d at 960-61. The court further concluded that since the statute could not meet the rational basis test, it was unnecessary to determine whether the statute required strict scrutiny, thus skirting the issue of whether the statute concerned a fundamental right. *Id.*

247. *Id.* at 961. Rather, the court pointed out that it is the exclusive and permanent commitment of the partners to each other that forms the underpinning of marriage, not having children. *Id.*

248. *Id.* at 962.

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

250. *Id.* at 963-64. The court discussed the many benefits, both tangible and intangible, not available to children whose parents are not married, pointed to the difficult process that same-sex couples must often undertake to establish their joint parentage, and expressed concern for the repercussions for children when a same-sex relationship ends. *Id.*

251. *Id.* at 964 (citation omitted).

was not rational.²⁵² The court likewise disposed of the state's third claim, which was that the statutory prohibition against same-sex marriage preserved economic resources,²⁵³ holding that a "statutory ban on same-sex marriage bears no rational relationship to the goal of economy."²⁵⁴

Finally, the court took on the argument propounded most often by opponents of same-sex marriage: that legalizing same-sex marriage will undermine, if not destroy, the very institution of marriage.²⁵⁵ In the strongest possible terms, the court concluded:

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 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.²⁵⁶

The court, in dismissing the argument propounded by the dissent that this decision usurped the role of the legislature, pointed out that it has always been the role of courts to interpret constitutions.²⁵⁷ Citing the principle that the history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded,"²⁵⁸ the court found that this is as true in the arena of civil marriage law as in other civil rights arenas.²⁵⁹ Ultimately, the court found the prohibition against same-sex marriage to be nothing more than blatant discrimination against homosexuals.²⁶⁰

252. *Id.*

253. *Goodridge*, 798 N.E.2d at 964. The state claimed that same-sex couples are more financially independent than heterosexual couples and therefore less in need of the financial benefits associated with marriage. *Id.*

254. *Id.* The court pointed out that many same-sex couples have children in their care and also that married people receive economic benefits from the fact of the marriage itself, regardless of any demonstration of need. *Id.*

255. *Id.* at 965.

256. *Goodridge*, 798 N.E.2d at 965.

257. *Id.* at 966 ("To label the court's role as usurping that of the Legislature is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.")

258. *Id.* at 966 (quoting *U.S. v. Va.*, 518 U.S. 515, 557 (1996) (involving the exclusion of women from a public military institute)).

259. *Id.*

260. *Id.* at 968. The court found that:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other hand, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who

The court stayed its order for 180 days to permit the legislature to enact legislation consistent with its decision.²⁶¹ Subsequently, the legislature requested an advisory opinion from the court as to whether the enactment of a civil union law would comply with the court's order. The court unequivocally found that it would not.²⁶² The court found that the proposed legislation suffered from an inherent defect, specifically, that it continued to define "marriage" as between one man and one woman and attempted to create an institution that is parallel but not the same as marriage.²⁶³ The court stated emphatically that "the history of our nation has demonstrated that separate is seldom, if ever, equal."²⁶⁴ Therefore, the court ordered that only full marriage rights for same-sex couples would pass constitutional muster.²⁶⁵

Although the *Goodridge* decision made abundantly clear that the Massachusetts Constitution affords greater protections than does the United States Constitution and further acknowledged that its decision can and should go no further than the state's own borders, the national reaction to the decision was nothing short of mass hysteria. Afraid that homosexual marriage would be imposed throughout the land, Congress and many states urged the passage of constitutional amendments forever banning same-sex marriage.

D. Proposed Federal Constitutional Amendment

The first proposed constitutional amendment banning same-sex marriage was introduced in the House of Representatives prior to the issuance of any of the three decisions discussed above. It is safe to surmise, however, that the rumblings of change had been heard and the results were being anticipated with dread. On May 21, 2003, House Joint Resolution 56 was introduced by Representative Marilyn Musgrave. The proposed amendment stated:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution or any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.²⁶⁶

are (or who are believed to be) homosexual. . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

Goodridge, 798 N.E.2d at 968 (citations omitted).

261. *Id.* at 970.

262. *See Op. of the JJ. to the Sen.*, 802 N.E.2d 565, 572 (Mass. 2004) ("The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples, and the bill's remaining provisions are too entwined with this purpose to stand independently.").

263. *Id.* at 568-72.

264. *Id.* at 569.

265. *Id.* at 571-72.

266. H.R. Jt. Res. 56, 108th Cong. (May 21, 2003) (subsequently referred to the Committee on the Judiciary).

It was not until immediately after the *Goodridge* decision that the Senate companion bill was introduced.²⁶⁷

On the eve of the first hearing on House Joint Resolution 56 before the Senate Committee on the Judiciary, a substitute amendment was submitted.²⁶⁸ The wording in the substitute amendment differed from the original proposed amendment and provided:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.²⁶⁹

The proposed constitutional amendment, both in its original form and its substitute form, was in direct response to the *Goodridge* decision, and its sole unambiguous purpose was to prevent the judiciary from interpreting either the federal constitution or any state constitution to require the recognition of same-sex marriage. The proponents of this court-stripping amendment did not want a court anywhere in the fifty states to be legally permitted to interpret either the federal Constitution or its own state constitution in a manner that would legalize same-sex marriage or even legalize civil unions (“the legal incidents thereof”). The other purpose of this proposed amendment was to protect against the possibility that a federal judge would find the federal DOMA to be unconstitutional.²⁷⁰ Simply put, the proponents seek to make a ban on same-sex marriage bulletproof.

It is not clear why the language was changed to remove the words “nor state or federal law” from the substitute proposed amendment, nor is an interpretation of this language easily accomplished. At first blush it appears to imply that although a constitution cannot be interpreted to require that states recognize same-sex marriage or civil unions, a state law could be so interpreted. In other words, if a state legislature, on its own and not under court order, wished to pass a civil union law, such a law might be permissible, although not required under the state or federal Constitution. However, the language also states that marriage in the United States would be defined as between one man and one woman, which is no different than the current language of the federal DOMA but is in the form of a constitutional amendment. It is therefore open to interpretation as to whether the language defining marriage only as between one man and one woman would be for the purposes of federal law only, in other words, for the purpose of denying federal rights and benefits to same-sex couples.²⁷¹ These interpretation issues,

267. Sen. Jt. Res. 26, 108th Cong. (Nov. 25, 2003) (Nov. 25, 2003) (introduced by Sen. Wayne Allard (R-Colo.)).

268. Sen. Jt. Res. 30, 108th Cong. (Mar. 22, 2004) (also introduced by Sen. Allard).

269. *Id.*

270. *Id.*

271. *Id.*

among others, have caused legal experts to disagree on the probable interpretation of the proposed amendment.²⁷²

Some insight into the interpretation of that language can be garnered from the House of Representatives hearing on House Joint Resolution 106, which is the substitute amendment identical to the Senate substitute proposed amendment.²⁷³ According to Representative Steve Chabot, Chair of the House Subcommittee on the Judiciary, “[t]he first sentence of the amendment ensures that a common definition of marriage, that between a man and a woman, exists for the entire Nation. This will preclude attempts by the judiciary or State legislatures to determine otherwise.”²⁷⁴ In urging the passage of this resolution, Chabot stated, contrary to well-established constitutional law, that “marriage is an institution, not a right.”²⁷⁵ Under his explanation of the proposed resolution, state legislatures would be free to define the terms and conditions of civil unions or domestic partnerships as they see fit, although under no circumstances would they be permitted to legalize same-sex marriage.²⁷⁶

Senate Joint Resolution 30 did not get voted out of committee; therefore, proponents of a federal marriage amendment decided to go directly to the full Senate. On July 7, 2004, Senate Joint Resolution 40,²⁷⁷ identical to Senate Joint Resolution 30, was introduced in the Senate and scheduled for a vote.²⁷⁸ A motion to proceed was made on July 9, 2004,²⁷⁹ but the Republicans were unable to invoke cloture and the motion to proceed was withdrawn on July 15, 2004.²⁸⁰ The House version was debated but a vote never occurred. At this time, resolutions are still pending in both houses of Congress.

Proponents of a federal marriage amendment have long been concerned, as expressed in the hearings on the amendment in both the Senate and the House, that the federal DOMA did not provide sufficient protection against judges

272. See *Amendment to Preserve Traditional Marriage*, *supra* n. 5, at 5-9. Senator Diane Feinstein asked if states would be able to permit same-sex marriage or civil unions through either referendum or statute but not through constitutional amendment. The legal experts, including this author, did not view the proposed language as clear and unambiguous as to whether states, through non-court mandated legislation, could legalize same-sex marriage and civil union so long as it was not through a constitutional amendment. *Id.* See also *White Paper*, *supra* n. 2, at 33.

273. H.R. Jt. Res. 106, 108th Cong. (Sept. 23, 2004):

Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

274. 121 Cong. Rec. H7899 (daily ed. Sept. 30, 2004).

275. *Id.*

276. See *id.*

277. Sen. Jt. Res. 40, 108th Cong. (July 7, 2004) states:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

278. 150 Cong. Rec. S7755 (daily ed. July 7, 2004).

279. 150 Cong. Rec. S7901 (daily ed. July 9, 2004).

280. 150 Cong. Rec. S8150 (daily ed. July 15, 2004).

interpreting the constitution to require same-sex marriage and could be declared unconstitutional. There have been no successful challenges to the federal DOMA; as previously revealed in Section II of this article, a bankruptcy court in Washington²⁸¹ and a federal district court in Florida have now upheld the Act.²⁸²

E. State Constitutional Amendments

Up until 2004, most states were satisfied that their marriage laws were adequately protected by DOMAs. Prior to 2004, only four states had amended their constitutions to define marriage as between one man and one woman.²⁸³ However, with the rendering of the *Goodridge* decision, many states became concerned that their DOMAs could be declared unconstitutional by “activist judges” such as those in Massachusetts. Since same-sex couples were first permitted to marry in Massachusetts in May 2004, fourteen states have passed constitutional amendments defining marriage as between one man and one woman.²⁸⁴ Eleven of these amendments were passed in the November 2004 general election. The majority of these constitutional amendments ban domestic partnerships and civil unions as well.²⁸⁵ Additionally, three states have passed laws that will amend their constitutions but only if re-approved by their legislature and then approved by the voters by ballot measure.²⁸⁶ Of these three, the Massachusetts amendment would ban same-sex marriage but expressly create civil unions.²⁸⁷ The Wisconsin proposed amendment would ban civil unions and domestic partnerships.²⁸⁸

At the present time, therefore, the vast majority of states have either passed constitutional amendments banning same-sex marriage or enacted DOMAs (which accomplish the same objective), or both. A few states, however, have affirmatively elected to provide rights and benefits to same-sex couples.²⁸⁹

281. *Kandu*, 315 B.R. 123.

282. *Wilson*, 2005 WL 281272.

283. Alaska (Alaska Const. art. I, § 25); Hawaii (Haw. Const. art. I, § 23); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21).

284. Arkansas (Ark. Const. art. I, § 25); Georgia (Ga. Const. art. I, § IV); Kansas (Kan. Sen. Con. Res. 1601, 2005-2006 Leg. (Jan. 13, 2005) (amending Kan. Const. art. XV)); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. § 263-A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. II, § 35); Oregon (Or. Const. art. XV, § 5a); Utah (Utah Const. art. I, § 29).

285. These states include Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah.

286. The states of Massachusetts (Mass. H. 3190, 183rd Leg., Jt. Sess. 1482 (Mar. 29, 2004)), Tennessee (Tenn. H. Jt. Res. 990, 104th Gen. Assembly (May 6, 2004); Tenn. Sen. Jt. Res. 31, 104th Gen. Assembly (Mar. 17, 2005)), and Wisconsin (Wis. Assembly Jt. Res. 66, 2003-2004 Leg. (Mar. 5, 2004); Wis. Sen. Jt. Res. 63, 2003-2004 Leg. (Mar. 11, 2004)), all must seek re-approval from their state legislatures.

287. Mass. H. 3190, 183rd Leg., Jt. Sess. 1482.

288. Wis. Assembly Jt. Res. 66; Wis. Sen. Jt. Res. 63.

289. See *infra* pt. V.

IV. AREAS OF LAW AFFECTED BY ISSUES RELATED TO SAME-SEX COUPLES

The areas of law that are affected by the issues facing same-sex couples are wide-ranging, in terms of both federal and state benefits. In a study updated in 2004, the Government Accountability Office identified 1,138 rights, responsibilities, and privileges that attach to marital status.²⁹⁰ Those benefits are not available to same-sex couples in the United States, even if they have been legally married in Massachusetts or elsewhere.²⁹¹ Additionally, there are many benefits offered at the state level that accrue to married couples, as well as benefits offered through the private sector, mainly employers, which are generally available only to married couples.²⁹²

The area of law that most readily comes to mind relating to same-sex unions is family law. In the vast majority of states, when a same-sex union terminates, the members of that union cannot seek assistance through the family courts. While married people seeking to terminate their marriages can request a division of property, custody rights, spousal support, and other rights arising out of the divorce statutes, same-sex couples, who face the very same issues, often have no legal remedy. While some of these issues, such as how property will be distributed, can be addressed in written cohabitation agreements, many others cannot. Many states do not recognize any claim whatsoever for support in same-sex relationships, nor in most states can a non-biological parent seek custody of minor children.

The lack of parental status has resulted in children being removed from their de facto parent in the event of the death of the biological parent.²⁹³ In those instances, the child suffers the loss of both parents simultaneously and is often removed geographically and emotionally from the non-biological parent. Likewise, in the event of the termination of the relationship, the non-biological parent has generally been unable to obtain the status of a parent for purposes of custody proceedings.²⁹⁴ Many courts have found de facto parent status but only for the purpose of awarding visitation.²⁹⁵

290. GAO, *Rpt. No. 04-353R: Defense of Marriage Act: Update to Prior Report 1*, <http://www.gao.gov/new.items/d04353r.pdf> (Jan. 23, 2004).

291. *See id.*

292. *See White Paper, supra* n. 2, at 22-29.

293. *See e.g. McGuffin v. Overton*, 542 N.W.2d 288 (Mich. App. 1995) (holding that a lesbian co-parent was not entitled to custody after the death of the biological mother, despite the existence of a power of attorney and a will designating the co-parent as the child's legal guardian). *See also* ABA, *Section of Individual Rights and Responsibilities, Section of Family Law, Steering Committee on the Unmet Legal Needs of Children, National Lesbian and Gay Law Association, Report to the House of Delegates, Recommendation*, <http://www.abanet.org/irr/annual2003/finalsecondparent.doc> (Aug. 12, 2003) [hereinafter *Recommendation*] ("Resolved, That the American Bar Association supports state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child.").

294. *See e.g. Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 841 (1991) (holding that even if the non-biological parent could establish that she was a de facto parent, she could not seek custody or visitation over the objections of the biological mother and could be granted custody only upon a showing that a granting of custody to the biological mother would be detrimental to the child); *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 1600 (1990) (holding that the non-biological parent lacked standing to establish a

Some recent decisions have recognized the rights of non-biological parents as parents for custody purposes. The Maine Supreme Court was the first to recognize a non-biological parent's right to seek custody in *C.E.W. v. D.E.W.*²⁹⁶ In this case, a lesbian couple had decided to conceive a child through artificial insemination.²⁹⁷ Both women changed their last names and entered into a written parenting agreement to the effect that they would co-parent the child equally.²⁹⁸ The parties subsequently separated and signed another parenting agreement setting forth their post-separation rights and responsibilities with regard to the child.²⁹⁹ The parties acknowledged the court's ultimate authority to determine legal residence and other issues.³⁰⁰ Subsequently, the non-biological parent filed an action for the court to declare her parental rights and responsibilities and the biological parent asserted that only she was the "parent" of the child.³⁰¹ The trial court entered summary judgment in favor of the non-biological parent after the parties stipulated that she had functioned as the child's de facto parent throughout his life.³⁰² The Maine Supreme Court affirmed the trial court's decision, holding that as the child's de facto parent, she had standing to seek parental custody rights.³⁰³

Likewise, a Washington state appellate court ruled that although a non-biological mother did not have standing pursuant to any statutory authority to seek shared parenting or visitation, she did have a common law right to do so as a de facto parent.³⁰⁴ That case is currently on appeal to the Washington Supreme Court.³⁰⁵ Additionally, an Indiana appellate court recently held, as a matter of law, that "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child."³⁰⁶

The issue of children and adoption has been widely addressed in many state courts.³⁰⁷ A second-parent adoption is one where a partner legally adopts the

parent-child relationship); *Kazmierczak v. Query*, 736 So. 2d 106, 110 (Fla. 4th Dist. App. 1999) (holding that a psychological parent is not entitled to the same status as the biological parent).

295. See e.g. *S.F. v. M.D.*, 751 A.2d 9 (Md. Spec. App. 2000) (holding that a non-biological mother had standing to seek visitation as a de facto parent but that the trial court could deny visitation using the best interests standard); *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), cert. denied sub nom. *Knott v. Holtzman*, 516 U.S. 975 (1995) (holding that court had equitable jurisdiction to allow a non-biological parent to seek visitation, where the non-biological parent could prove that the legal parent had consented to and fostered the parent-child relationship, because she had performed parental functions and a parent-child bond was formed).

296. 845 A.2d 1146 (Me. 2004).

297. *Id.* at 1147.

298. *Id.*

299. *Id.*

300. *Id.*

301. *C.E.W.*, 845 A.2d at 1147-48.

302. *Id.* at 1148.

303. *Id.* at 1152.

304. *In re Parentage of L.B.*, 89 P.3d 271, 284 (Wash. App. Div. 1 2004).

305. *In re Parentage of L.B.*, 101 P.3d 107 (Wash. 2004).

306. *In re Parentage of A.B.*, 818 N.E.2d 126, 132 (Ind. App. 2004).

307. See *White Paper*, supra n. 2, at 13-14.

other partner's biological child.³⁰⁸ A joint adoption is where both partners in a same-sex couple adopt a child not biologically related to either of them.³⁰⁹ It is not difficult to understand the myriad of problems that may arise when only one parent has a legal relationship to a child, including access to health care, the ability to make health care decisions, lack of Social Security benefits, lack of inheritance rights and the like. In the absence of a second-parent adoption, the child of a same-sex relationship cannot benefit from Social Security and other inheritance rights in the event of the death of the second parent.³¹⁰ While the number of states allowing second-parent adoptions is growing, it has not been universally accepted.³¹¹ The American Bar Association, however, adopted a recommendation favoring second-parent and joint adoptions in 2003.³¹²

Adoption by even one homosexual parent is not permitted by law in Florida, the only state to have such a prohibition.³¹³ In *Lofton v. Secretary of Department of Children and Family Services*,³¹⁴ the Eleventh Circuit refused to strike down the Florida law banning adoption by homosexuals.³¹⁵ Disappointingly, the United States Supreme Court denied certiorari without opinion.³¹⁶

Many other areas of the law affect same-sex couples.³¹⁷ There are many rights related to health care that flow only to married couples.³¹⁸ For example, couples not in marital relationships do not have a right of visitation in the hospital, or the right to consent to medical treatment. Unmarried couples do not have the right to take advantage of tax laws, cannot claim exemptions, and cannot file joint tax returns. Unmarried couples cannot sue for loss of consortium or wrongful death. They certainly cannot claim military benefits of any kind, or Social Security benefits. They are also not entitled to be named as dependents for health insurance or family leave purposes.³¹⁹

Many private employers have sought to provide benefits, particularly health care benefits, to same-sex couples.³²⁰ In 2004, there were 6,811 private sector employers providing such health care benefits.³²¹ Additionally, many municipalities, universities, and some states are offering benefits to domestic partners.³²² For example, New York has offered health benefits to domestic partners, whether same-sex or heterosexual, since 1995.³²³ The state of Oregon

308. *Id.* at 14.

309. *Id.*

310. *Id.*

311. *Id.*

312. *See Recommendation, supra* n. 293.

313. Fla. Stat. § 63.042(3) (2002).

314. 358 F.3d 804 (11th Cir. 2004).

315. *Id.* at 827.

316. 125 S. Ct. 869 (2005).

317. *White Paper, supra* n. 2, at 16-17.

318. *Id.* at 16.

319. *Id.*

320. *Id.* at 34.

321. *Id.*

322. *White Paper, supra* n. 2, at 34.

323. *Id.* at 27.

has provided health insurance, life insurance, and long-term care benefits to same-sex and opposite sex domestic partners since 1998.³²⁴ At the present time, in the vast majority of jurisdictions, the benefits offered to same-sex partners is a hodgepodge, some statewide, some in select municipalities, and none providing benefits across the board.³²⁵ It is only in the jurisdictions that recognize domestic partners on a statewide basis that any significant protection is afforded.³²⁶

V. STATUTORY PROTECTIONS FOR SAME-SEX COUPLES

A small minority of states have circumvented the trend of restricting or eliminating rights of same-sex couples through legislation. As discussed above, the first state to enact a civil union law was Vermont.³²⁷ The Act was all-encompassing in nature and offered comprehensive rights and benefits to same-sex couples.³²⁸ Vermont law states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other sources of civil law, as are granted to spouses in a marriage."³²⁹ Civil unions are only available to couples of the same sex.³³⁰ Just a few of these rights and responsibilities are:

- the ability to utilize the law of domestic relations in full, including annulment, separation, divorce, child support, child custody, division of property, and maintenance;³³¹
- the ability to take advantage of the laws relating to title, ownership, inheritance, descent, and distribution with respect to the ownership of real estate;³³²
- the ability to utilize prohibitions against discrimination based upon marital status;³³³
- the ability to access causes of action dependent on spousal status, such as loss of consortium, emotional distress, and wrongful death;³³⁴
- the availability of group insurance for state employees;³³⁵
- the availability of family leave benefits;³³⁶

324. *Id.*

325. *Id.* at 22-29.

326. *See id.*

327. *Supra* pt. II(C).

328. Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002).

329. *Id.* at § 1204(a).

330. *Id.* at § 1202.

331. *Id.* at § 1204(d).

332. *Id.* at § 1204(e)(1).

333. Vt. Stat. Ann. tit. 15, § 1204(e)(7).

334. *Id.* at § 1204(e)(2).

335. *Id.* at § 1204(e)(5).

- the ability to adopt;³³⁷ and
- the availability of marital immunity and privilege.³³⁸

The law also explicitly puts both parties to a civil union on equal footing with regard to parenting issues, stating that:

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.³³⁹

As of January 1, 2005, the California Domestic Partner Registration Act,³⁴⁰ which was originally enacted in 1999, became almost the equivalent of Vermont's civil union laws in terms of the rights and benefits bestowed upon partners of civil unions.³⁴¹ Similar to the Vermont law, it states that:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.³⁴²

On April 6, 2005, the Connecticut Senate passed Substitute Bill 963 creating civil unions. Similar to Vermont's civil union law and California's Domestic Partner Registration Act, Section 14 of the Bill states that:

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage.³⁴³

The Connecticut House also passed the Bill on April 13, 2005, but added an amendment that defines "marriage as the union of a man and a woman."³⁴⁴ The Connecticut Senate passed the bill as amended and the bill was signed into law by the Governor on April 20, 2005, making it the second state to create civil unions.³⁴⁵

336. *Id.* at § 1204(e)(12).

337. *Id.* at § 1204(e)(4).

338. Vt. Stat. Ann. tit. 15, § 1204(e)(15).

339. *Id.* at § 1204(f).

340. Cal. Fam. Code Ann. §§ 297-299.6 (2004).

341. One significant difference between the two laws is that the Vermont statute permits parties to a civil union to be treated as married for purposes of state and municipal taxes. Vt. Stat. Ann. tit. 15, § 1204(e)(14). In contrast, the California statute requires domestic partners to file their state tax returns using the same filing status as they use for federal income tax purposes. Cal. Fam. Code Ann. § 297.5(g).

342. Cal. Fam. Code Ann. § 297.5(a).

343. Conn. Sen. 963, 2005 Reg. Sess. (Apr. 6, 2005).

344. William Yardley, *Connecticut House Backs Gay Civil Unions*, <http://www.nytimes.com/2005/04/14/nyregion/14hartford.html> (April 14, 2005).

345. NewsMax.com, *Connecticut OKs Same-Sex Civil Unions*, <http://www.newsmax.com/archives/articles/2005/4/20/180352.shtml> (Apr. 21, 2005).

On January 12, 2004, a Domestic Partners Act³⁴⁶ was signed into law in New Jersey. While it grants many rights to domestic partners that are available to married couples, it is not as sweeping or all-encompassing as the laws in Vermont and California and does not purport to make domestic partners the equivalent of spouses.³⁴⁷

Several other states have enacted legislation offering certain specific benefits to same-sex partners, such as health insurance for state employees, but these laws are extremely limited in scope.³⁴⁸ Many municipalities also offer limited benefits, such as health insurance for their employees.³⁴⁹

VI. CONCLUSION

It is safe to say that the issue of the rights of same-sex couples will continue to be controversial and very much in the foreground of law and politics for the indefinite future. Will we look back at this period in our history much as we now look back at the institutional injustices remedied in the civil rights movement? At that time, the Supreme Court rulings with regard to civil rights were not consistent with the general will of the people or the legislatures. As a country, we now look back through the lens of history at that period with shame and regret while at the same time we applaud the Court's forward thinking on these issues and its willingness to broadly interpret the Constitution.

It is likely that someday all of the newly passed state constitutional amendments will be repealed and replaced with laws protecting same-sex couples. Eventually it is likely that the United States will legalize same-sex marriage as Canada has already done. As of the writing of this article, the country is in a conservative mode, with the same people opposing same-sex marriage and civil unions as are promoting the conservative marriage movement, which seeks to make divorce more difficult. Polls indicate that the public is close to evenly split on the issue of rights for same-sex couples in the form of civil unions, and that although it is generally opposed to same-sex marriage, it does not want the United States Constitution amended.³⁵⁰ There are now millions of children being raised by same-sex couples. It is likely that as time goes on, more and more people will become comfortable with the idea of rights for same-sex couples and will recognize the impact of disparate treatment. At the same time, courts will in all likelihood become more receptive to expanding rights of same-sex couples. If history repeats itself, over time cultural mores will change in a manner that will be inclusive of same-sex couples. Whether such a shift in public opinion and the law will take years or decades remains to be seen.

346. N.J. Stat. Ann. §§ 26:8A-1 to 26:8A-12 (Supp. 2004).

347. *See id.*

348. *See White Paper, supra* n. 2, at 34.

349. *Id.*

350. PollingReport.com, *Law and Civil Rights*, <http://www.pollingreport.com/civil.htm> (accessed Mar. 20, 2005) (Quinnipiac Univ. Poll).