



NEW YORK STATE BAR ASSOCIATION

SPECIAL COMMITTEE ON LGBT PEOPLE AND THE LAW

REPORT AND RECOMMENDATION ON MARRIAGE RIGHTS FOR SAME-SEX COUPLES

MAY 4, 2009



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NYSBA SPECIAL COMMITTEE ON LGBT PEOPLE AND THE LAW
Report and Recommendation on Marriage Rights and Same-Sex Couples

Executive Summary

The mission of the New York State Bar Association includes the commitment “to promote reform in the law [and] to facilitate the administration of justice.”¹ The Special Committee on LGBT People and the Law presents the attached Report and Recommendation to the Association and asks it to fulfill its purposes as set forth in its Bylaws by endorsing civil marriage as the only means of providing full equality to same-sex couples.

In 2005, the Association took an appropriate – and some would say courageous – stand. Having reviewed the extensive Report of the Committee on Legal Issues Affecting Same-sex Couples (the “2004 Report”), the Association concluded that there was a need for systemic reform of New York state law to ensure that same-sex couples were provided with rights equal to those enjoyed by their opposite-sex counterparts. That reform, said the Association, could come in the form of marriage, civil union, or domestic partnership.²

In 2008, the Association created the Special Committee on LGBT People and the Law, codifying a place to address LGBT issues within the structure of the Association. The excitement generated by the creation of the Committee – both within and outside the Association – was significant and we were eager to fulfill our mandate to

promote equality in the law for LGBT people; eliminate
discrimination against LGBT attorneys and litigants; promote
equality of opportunity for, and increase the visibility of,

¹ The Bylaws of the New York State Bar Association, Sec. II (January 30, 2009).

² The House of Delegates of the NYSBA defeated a “marriage only” proposal (recommended by a plurality of the Special Committee) a vote of 86-82. It defeated a proposal that the Association ought not to take a stand on the issue by a vote of 58-114. New York State Bar Association, *State Bar News*, May/June 2005, pp. 6-7.

contributions made by LGBT attorneys; and promote diversity in the bench by inclusion of all minorities, including LGBT people.³

In deciding upon initial projects, the Committee undertook to educate members of the bar about legal hurdles faced by LGBT citizens, litigants and attorneys, presenting a CLE at the January 2009 annual meeting.⁴ As Committee members consulted with members of the Association, our attention was repeatedly drawn to New York State's failure to lead – and, in fact, its lagging behind other states and foreign jurisdictions – in giving legal recognition to same-sex couples and their families. These conversations led the Committee to commence research on developments affecting the legal rights of same-sex couples since the issuance of the 2004 Report.

Findings on Marriage and Civil Unions. When we began the process of drafting this Report, we expected to provide the Association with a rather short document. We found, however, that a great deal has changed in the landscape of marriage rights. The Committee has painstakingly analyzed what has occurred over the last four-and-a-half years around the country, globally, and most especially at home in New York.

Same-sex couples now can marry in Vermont, Iowa and Connecticut – in addition to Massachusetts. Marriage equality legislation is advancing in New Hampshire and Maine. And, the issue is currently before the California Supreme Court, as it decides whether Proposition 8, banning same-sex couples from marriage, is constitutional.

³ See Mission Statement for Special Committee on LGBT and the Law.

⁴ The CLE was entitled, "Meeting the LGBT Client: Issue Assessment and Intake Strategies." The Committee also has plans to create "Know Your Rights" publications, to reach out to courts to conduct sensitivity training, and numerous other projects.

Civil union laws have not kept pace. For this and other reasons, we specifically were curious about how such alternatives to marriage had fared. Were lesbian and gay couples who availed themselves of these models of legal union satisfied? Were their rights being recognized? Were they receiving the same acceptance as their opposite-sex, married counterparts? How did heterosexual people view the alternative status? Quite frankly, we were surprised to learn the extent to which citizens and courts have found civil unions and domestic partnerships to be disadvantageous.

We discovered through the extensive studies conducted by legislatively-appointed commissions in both Vermont and New Jersey that examined the impact of civil unions, that citizens of those states – both heterosexual and homosexual – were deeply dissatisfied with these alternative structures. Tangible harms – in medical settings, in the workplace, and elsewhere – were not uncommon. Intangible harms – in suffering indignities and stigma not associated with marriage – were at least as common and as painful.

We also learned that when courts have been asked to review civil unions and domestic partnerships, they uniformly have found them to be unconstitutional. Massachusetts, the first state to recognize that same-sex couples had a state constitutional right to marry, rejected the civil union option following a facial review of the proposed statute. The California Supreme Court, after experience with the domestic partnership model, concluded that anything short of marriage was a violation of the fundamental rights and equality protections provided by the state's constitution. And, although Connecticut had only recently adopted civil union legislation, its high court also concluded that both in theory and in practice, it failed to survive constitutional review.

We further found that New Yorkers who have entered into civil unions and domestic partnerships outside of New York have returned home to find a tangle of inconsistent rulings often falling far short of the legal stability and equality with marriage they had sought. State court rulings have only exacerbated the instability of civil unions and domestic partnerships entered into elsewhere by New Yorkers.

More recently, an increasing number of same-sex couples from New York are traveling to our neighbors — Massachusetts, Connecticut, Canada, and soon, Vermont – to marry while married same-sex couples from these jurisdictions travel to and re-settle in New York. Public officials in New York, starting with the Governor and including the Westchester County Executive and the commissioners of state agencies, have issued orders requiring their governments and agencies to recognize same-sex couples’ marriages contracted elsewhere. The courts reviewing these orders – including the Second, Third and Fourth Departments of the Appellate Division, thus far have upheld them and have legally recognized the marriages same-sex couples have contracted in other jurisdictions. The Court of Appeals has yet to rule on the legal standing of married same-sex couples in New York, but recently has granted leave to appeal in two of these cases.

Absent a definitive ruling from the Court of Appeals or the New York Legislature, state officials and courts have been recognizing the marriages same-sex couples have entered into domestically and in other countries. And, an inherent inequality is resulting: same-sex couples can live as married partners in New York, but they cannot enter into a valid marriage in their

home state. As a result, New Yorkers can *be* married in New York; they just can't *get* married in New York.⁵

When the Committee reviewed the aforementioned commission reports, the judicial rulings on the constitutionality of civil unions, our own state court rulings that decline to recognize such unions, and the reality that same-sex couples married elsewhere are domiciled in New York, we could reach only one conclusion: extending equal marriage rights to same-sex couples is the only legally and pragmatically viable way to vest same-sex couples with the full panoply of rights and responsibilities enjoyed by married opposite-sex couples.

Marriage Equality and the Free Exercise of Religion. Some have raised objections to permitting same-sex couples to marry on religious grounds, arguing that marriage is a sacred, religious institution that should be left to our churches, synagogues and mosques. Others subscribe to different religious values and solemnize, or seek religious blessing for, their same-sex unions or religious marriages. However valid these conflicting positions may be from a religious or spiritual perspective, courts and the law should abstain from favoring one side of a religious debate. We are concerned here only with marriage as a civil legal institution regulated by government and valid only with a state-conferred marriage license.

This does not mean that members of the clergy who object to them would be forced to solemnize marriages of same-sex couples. Freedom of religion is an essential American institution, reflected in both the “establishment” and “free exercise clauses” of our Constitution, that ensures separation of church and state. In recognition of both of these principles, the

⁵ Professor Arthur Leonard of New York Law School, among others, has used this phrase. Arthur Leonard, “Leonard Link,” Mar. 30, 2009, *available at* <http://newyorklawschool.typepad.com/leonardlink/2009/03/getting-married-to-my-samesex-partner.html> (last visited Apr. 23, 2009).

legislation pending in the New York State Legislature that seeks to establish the right of same-sex couples to marry also explicitly provides that “no clergyman ... shall be required to solemnize any marriage when acting in his or her [religious] capacity.” The Special Committee believes that this is an appropriate balance that recognizes the essential nature of marriage equality and protects religious liberty.

Marriage is a Legislative Issue in New York. As the Committee explains in great detail in the Report, although the Court of Appeals ruling in *Hernandez v. Robles* denied that same-sex couples have a right to marry under the New York Constitution, the court did not ban the legislature from creating this right. On the contrary, the *Hernandez* court declared the issue is a matter of public policy and shifted the debate to the State Legislature with an express invitation to all parties to the controversy to take the issue there.⁶

Successive governors of New York have introduced identical legislation to achieve marriage equality. The leaders of both houses of the State Legislature back the legislation, which passed in the Assembly in 2007. All statewide elected officials endorse marriage equality, and it is widely supported by the voters throughout the state according to two recent public opinion polls. Although it is not known whether the Legislature will take up the issue this session, consistent with *Hernandez*, it is an issue the Legislature ultimately must resolve.

⁶ *Hernandez* did not assess the validity, or desirability, of adopting civil unions or domestic partnerships because there was and is no civil union law in New York. It would, however, make no sense for New York to adopt an approach that has been so strongly rejected as “separate and unequal.”

***Recommendation: The New York State Bar Association
Should Endorse Marriage Legislation That Provides Full
Marriage Equality to Same-Sex and Opposite-Sex Couples***

In 2005, the New York State Bar Association concluded that same-sex couples experience significant inequities under existing state law, and that systemic change – in the form of marriage, civil union or domestic partnership – was necessary to rectify this harm. This policy has been a legislative priority of the NYSBA. The events of the last four years, as well as the ongoing debate in our state concerning marriage rights for same-sex couples, make it timely for NYSBA to refine its position to support marriage alone as the only vehicle to provide full equality to same-sex couples.

Where, as a matter of state law and policy, the legal rights, privileges, and duties of marriage are to be enjoyed by all couples, and not reserved exclusively to opposite-sex couples, we conclude that there is no basis for denying same-sex couples the legal name, status, and emoluments of “marriage.” Legal marriage has an exalted status, and a deliberate choice of civil unions or domestic partnership has no rational or legitimate basis where equal rights are intended. Especially in light of the history of discrimination suffered by lesbian and gay persons, such other statuses echo the “otherness” long-experienced by these communities, and would reinforce that couples in same-sex relationships are second-class citizens.

Thus, we recommend that the New York State Bar Association modify its current position to endorse marriage rights for same-sex couples and reject civil union or domestic partnership as viable alternatives. Only this position will adequately remedy the exclusion of tens of thousands of this state’s citizens from the rights, responsibilities, and dignity that attend the right to marry.

The Association should continue to advocate for full equality of legal marriage rights, but abandon its support for civil unions or domestic partnerships, as full equal marriage rights cannot be conveyed by a status different from and inferior to legal marriage. The Domestic Relations Law should be amended to permit same-sex couples to marry.

PART ONE

Marriage, Civil Union, Domestic Partnership Outside New York

I. Marriage

In October 2004, the NYSBA Special Committee on the Legal Rights of Same-Sex Couples published a report of its findings.⁷ At that time, Massachusetts was the only state to recognize the right of same-sex couples to be married legally. Since then, there have been significant developments in the marriage rights of same-sex couples, both in the United States and internationally.

A. Massachusetts

On November 18, 2003, in the landmark case *Goodridge v. Department of Public Health*,⁸ the Massachusetts Supreme Judicial Court (“SJC”) held that the Massachusetts Constitution prohibited the state from denying same-sex couples “the protections, benefits, and obligations conferred by civil marriage”⁹ and gave the state legislature six months to change its marriage statutes to comply with the decision. The legislature considered enacting a “civil union” bill instead of permitting same-sex couples to marry, and sought the opinion of the SJC as to its constitutionality.

In a decision entitled *Opinions of the Justices to the Senate*, the SJC declared that civil union status discriminates against same-sex couples without justification and therefore does not

⁷ See Report and Recommendations of the Special Committee on the Legal Rights of Same-Sex Couples, N.Y.S.B.A. (2004) (hereinafter “2004 Report”), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=13520>.

⁸ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁹ *Id.* at 948.

satisfy the constitutional requirements set out in *Goodridge*.¹⁰ As a result, on May 17, 2004, the first marriage licenses were issued to same-sex couples in Massachusetts. Since then, all efforts by those opposing marriage rights for same-sex couples in Massachusetts have failed.¹¹

Many expected Massachusetts to be a haven for same-sex couples from throughout the country to be married and were surprised when, as the court-ordered deadline for Massachusetts to begin issuing marriage licenses to same-sex couples neared, then-Governor Mitt Romney invoked a little-known law to prevent non-resident same-sex couples from marrying in the state.¹² The statute, adopted in 1913 primarily to prevent non-resident interracial couples from marrying in Massachusetts, prohibited marriages that would be “void” under the laws of a couple’s home state.¹³

¹⁰ *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (“*Opinions of the Justices*”). For a more detailed discussion of the majority holdings and the dissenting opinions in *Goodridge* and *Opinions of the Justices*, see Part II (B)(2)(a-b) of the 2004 Report.

¹¹ In May 2004, shortly before the first licenses were handed out, opponents of the rights of same-sex couples to marry filed a lawsuit against the SJC in federal court, alleging that the SJC’s decision in *Goodridge* usurped the power of the state legislature, and seeking to enjoin the state from issuing marriage licenses to same-sex couples. See *Largess v. Supreme Judicial Court for State of Mass.*, 317 F. Supp. 2d 77 (D. Mass. 2004). This lawsuit was unsuccessful at the District Court and Court of Appeals levels, and in November 2004, the U.S. Supreme Court declined to hear the case. See *Largess v. Supreme Judicial Court for State of Mass.*, 373 F.3d 219 (1st Cir.), cert. denied, 543 U.S. 1002 (2004).

On the legislative front, immediately following the rulings of the SJC, a petition began making its way through the state legislature to amend the state constitution to prohibit same-sex couples from marrying. See David Crary, *Gay-Rights Groups Buoyed by Recent Gains*, ASSOCIATED PRESS, June 19, 2007, available at <http://www.commondreams.org/archive/2007/06/19/1979> (last visited Apr. 17, 2009). On June 14, 2007, a joint session of the Massachusetts legislature voted 151-45 against the proposed constitutional amendment, ensuring that the measure would not make it onto the ballot in the 2008 election. *Id.*

¹² Jay Lindsay, *Mass. High Court Says Nonresident Gays Cannot Marry in State*, ASSOCIATED PRESS, Mar. 30, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/03/30/mass_high_court_says_nonresident_gays_cannot_marry_in_the_state_1143737176 (last visited Apr. 17, 2009). Governor Romney stated that he wanted to prevent Massachusetts from becoming the “Las Vegas of same-sex marriage.” *Id.*

¹³ MASS. GEN. LAWS ANN. ch. 207, § 11, repealed by 2008, 216, § 1; see also Pam Belluck and Katie Zezima, *A 1913 Law Dies to Better Serve Gay Marriage*, N.Y. TIMES, July 16, 2008.

Several non-resident same-sex couples challenged the constitutionality of the law, which the SJC ultimately upheld.¹⁴ In July 2008, however, the Massachusetts legislature voted to repeal the 1913 law, clearing the way for out-of-state couples to marry.¹⁵ The decision was, at least in part, based on expected economic benefits of allowing non-resident, same-sex couples to marry in Massachusetts, and a concern about losing those benefits to California, which had just begun issuing marriage licenses to both resident and non-resident same-sex couples.¹⁶

On November 18, 2008, Massachusetts marked the fifth anniversary of allowing same-sex couples to marry. According to an article in *The Boston Globe* discussing the anniversary, the marriage rate of same-sex couples had leveled off, accounting for 4% of all state marriages performed in 2006 and 2007; likewise, the divorce rate in Massachusetts for all couples has remained steady and is still the lowest in the country.¹⁷ The level of opposition to allowing same-sex couples to marry has declined over time, from 44% in 2004 to 37% in 2008; over the same period of time, approval has increased from 42% in 2004 to 59% in 2008.¹⁸

¹⁴ See *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). In its decision, the court made clear that the law barring out-of-state couples from marrying applied only if the home state had an express prohibition against their marriage. *Id.* at 658.

¹⁵ Belluck and Zezima, *supra* note 13.

¹⁶ See generally Belluck and Zezima, *supra* note 13 (“A just-released study commissioned by the State of Massachusetts concludes that in the next three years about 32,200 couples would travel here to get married, creating 330 permanent jobs and adding \$111 million to the economy, not including spending by wedding guests and tourist activities the weddings might generate.”). By some estimates, in just three years, spending by in-state and out-of-state couples seeking to marry in California could generate over \$683.6 million in direct spending and an additional \$63.8 million in government revenue. See Brad Sears and M.V. Lee Badgett, *The Impact of Extending Marriage to Same-Sex Couples on the California Budget*, THE WILLIAMS INSTITUTE 2 (June 2008), available at <http://www.law.ucla.edu/williamsinstitute/publications/EconImpactCAMarriage.pdf> (last visited Apr. 17, 2009).

¹⁷ David Filipov, *5 Years Later, Views Shift Subtly on Gay Marriage*, THE BOSTON GLOBE, Nov. 17, 2008. The divorce rate in Massachusetts was most recently calculated in 2004 at 2.2 divorces per 1,000 residents. The national average was 3.8.

¹⁸ *Id.*

B. California

When the *2004 Report* of the NYSBA was published, California had established a “domestic partnership” mechanism that was similar in many ways to civil unions, but also had defined “marriage” as being solely between one man and one woman.¹⁹ San Francisco Mayor Gavin Newsom’s issuance of marriage licenses to same-sex couples in 2004, and the subsequent California Supreme Court decision invalidating those marriages,²⁰ brought the question of whether the state constitution prohibited this limiting definition of “marriage” to the state’s highest court.

On May 15, 2008, in *In re Marriage Cases*, the California Supreme Court held that although the state’s domestic partnership law gave same-sex couples most of the “substantive elements embodied in the constitutional right to marry,” the statute “nonetheless must be viewed as potentially impinging on a same-sex couple’s constitutional right to marry under the California Constitution.”²¹

¹⁹ Under the California Domestic Partners Rights and Responsibilities Act, same-sex couples in unions called “Domestic Partnerships” received most of the benefits given to opposite-sex couples who are in marriages. *See generally* The California Domestic Partners Rights and Responsibilities Act, CAL. FAM. CODE § 297.5 (2007).

²⁰ *See Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

²¹ *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008).

1. *The Majority Opinion (by Justice George)*

The court closely examined plaintiffs’ argument that the challenged statutes infringed their fundamental right to marry under the privacy, free speech and due process clauses of the state constitution,²² reviewing its landmark ruling in *Perez v. Sharp*,²³ in which almost 20 years before the U.S. Supreme Court’s decision in *Loving*, the California court held that state statutes prohibiting interracial marriage violated the fundamental right to marry.²⁴ *Perez*, according to the court, did not narrowly define the fundamental right at issue as being “a right to interracial marriage,” but instead characterized it as “the freedom ‘to join in marriage with the person of one’s choice.’”²⁵ Applying *Perez*, the majority concluded that the fundamental right to marry applied to all persons, not just heterosexuals. As stated by the court, “the right to marry represents the right of an individual to establish a legally recognized family with the person of one’s choice, and, as such, is of fundamental significance both to society and to the individual.”²⁶

The court then turned to the question of whether, by reserving the *label* of “marriage” to opposite-sex couples, while designating another name for same-sex unions, the California Family Code infringed this right. The state argued that any distinction between the label of “marriage” given to opposite-sex unions, and that of “domestic partnership” given to same-sex

²² *Id.* at 419. The court began its decision by quickly rejecting plaintiffs’ argument that the provision of the California Family Code providing that “[o]nly marriage between a man and a woman is valid or recognized in California,” was intended to apply only to marriages performed outside the state and should not be construed to limit marriages entered into within the state. *Id.* at 409. Proposition 22, CAL. FAM. Code § 308.5, was enacted as the result of a ballot initiative (“Proposition 22”). The Court noted that nothing in the ballot history indicated an intent to limit the scope of the provision to out-of-state marriages, and accordingly, held that the statute must be read to apply both to marriages performed inside California, as well as to those entered into outside the state. *In re Marriage Cases*, 183 P.3d at 409–11.

²³ *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

²⁴ *In re Marriage Cases*, 183 P.3d at 420-21.

²⁵ *Id.* at 420 (citing *Perez*, 198 P.2d at 17).

²⁶ *Id.* at 423.

unions, was form over substance, and did not infringe on any of the core rights relating to marriage.²⁷ The majority disagreed, holding that

reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples, while offering same-sex couples only the new and unfamiliar designation of domestic partnership — pose[s] a serious risk of denying same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.²⁸

The court also held that the distinction drawn by the state law violated the equal protection principle. Although it rejected plaintiffs’ argument that the statute discriminated on the basis of sex, the court found that the statute did make classifications based on sexual orientation, thus requiring it to determine the appropriate level of scrutiny to apply.²⁹ Under California law, to qualify for heightened or strict scrutiny, the defining characteristic of the “suspect” class must: (1) be based on an immutable trait; (2) bear no relation to a person’s ability to contribute to society; and (3) be associated with a stigma of inferiority, manifested by the group’s legal and social disabilities.³⁰

Noting that gay men and lesbians easily satisfy the latter two requirements, the court assessed whether sexual orientation is “immutable.”³¹ Relying on California precedent establishing that a person’s religion can be a suspect classification for equal protection purposes, it found that immutability of the defining characteristic was not invariably required.³²

²⁷ *Id.* at 434.

²⁸ *Id.* at 434-35.

²⁹ To proceed with its analysis, the court first had to resolve a matter of first impression: whether a classification based on sexual orientation was “suspect,” so as to subject it to strict scrutiny. *Id.* at 436.

³⁰ *Id.* at 442.

³¹ *Id.*

³² *Id.*

Accordingly, the court held that the proper test was whether the defining characteristic was so integral to a person's identity that the state should not require the person to repudiate it. Sexual orientation, concluded the court, meets that test.³³

The court rejected the state's argument that a group also must lack any political power to be treated as a suspect class (that is, one entitled to heightened or strict judicial scrutiny of laws that discriminate against it), stating that although some precedent had discussed political powerlessness as a factor, the decisions did not require that a group currently be politically powerless as a prerequisite to qualifying as a suspect class.³⁴ Rather, the majority noted, the most important factors were whether the group's defining characteristic had historically exposed its members to invidious discrimination, and whether society has since recognized that the defining characteristic bore no relation to the ability of the group's members to be productive citizens.³⁵ Applying these factors, the court found that sexual orientation "is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights," and held that laws discriminating on the basis of sexual orientation were subject to strict scrutiny.³⁶

Under California law, a statute may survive strict scrutiny analysis only if the state establishes a compelling interest in the identified discrimination, and if the classifications imposed by the statute are necessary to accomplish that interest.³⁷ The court rejected the state's argument that it had a compelling interest in restricting the designation of "marriage" to

³³ *Id.* at 443.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 429, 443-44.

³⁷ *Id.* at 436.

opposite-sex unions in order to preserve such unions.³⁸ Rather, the court held that “[e]xtending access to the designation of marriage to same-sex couples [would] not deprive any opposite-sex couple or their children of the rights and benefits conferred by the marriage statutes....”³⁹

The court rejected the state’s argument that because the term “marriage” traditionally had applied only to opposite-sex unions, any modification of the term must be done through the legislative process, to comply with rules regarding the separation of powers.⁴⁰ On the contrary, the separation of powers doctrine imposes an obligation on the court to “enforce the limitations that the California Constitution imposes upon legislative measures....”⁴¹ The court stated that it was not re-defining or modifying the definition of marriage, it merely was determining whether the statute’s exclusion of a group of citizens from access to a fundamental right was permissible under the state constitution.⁴²

Having found that the state failed to present a sufficiently compelling interest for preserving marriage solely for opposite-sex couples, the court held that the sections of the California Family Law Code prohibiting same-sex couples from entering into marriage violate the equal protection provisions of the state constitution.⁴³

³⁸ *Id.* at 451.

³⁹ *Id.*

⁴⁰ *Id.* at 448.

⁴¹ *Id.* at 450.

⁴² *Id.*

⁴³ *Id.* at 453.

2. *Concurring Opinion (by Justice Kennard)*

Justice Kennard wrote separately to emphasize that the court's decision was consistent with its prior holding in *Lockyer v. City and County of San Francisco*, in which it found that the Mayor of San Francisco had unlawfully issued marriage licenses to same-sex couples, and invalidated all the resulting marriages.⁴⁴ She stressed that *Lockyer* did not address the constitutionality of banning same-sex couples from marriage; rather, it addressed only whether the Mayor and other San Francisco officials had the authority to issue the licenses in contravention of the state's marriage laws.⁴⁵

3. *The Baxter Dissent*

Agreeing with the state's argument that the separation of powers doctrine prevented the court from invalidating the ban on same-sex couples from marrying, Justice Baxter accused the majority of circumventing the legislative process and substituting its own social policy by inventing a "new constitutional right, immune from the ordinary process of legislative consideration."⁴⁶ He also disagreed with the majority's holding that the statute infringed upon same-sex couples' fundamental right to marry, stating that there is no deeply-rooted tradition of same-sex couples being allowed to marry in this country.⁴⁷ He further asserted that strict scrutiny was not triggered since the statute was facially neutral with regard to sexual orientation, there was no indication that the statute had a discriminatory purpose, and same-sex couples are not

⁴⁴ *Id.* at 453-455. *See Lockyer*, 95 P.3d 459.

⁴⁵ *See generally In re Marriage Cases*, 183 P.3d. at 453-56 (citing *Lockyer*, 93 P.2d at 464).

⁴⁶ *Id.* at 457-58.

⁴⁷ *Id.* at 459-63.

similarly situated to opposite-sex couples with regard to marriage. Thus, he concluded, a lower level of scrutiny should have been applied.⁴⁸

Having determined that there was no fundamental right at issue, and that sexual orientation did not constitute a suspect class, Justice Baxter applied the rational basis test to the Domestic Partnership statute. He concluded that because the state had a need to distinguish between opposite-sex couples and same-sex couples for the purpose of administering certain federal benefits, preserving the term “marriage” to distinguish between the two groups served a legitimate purpose.⁴⁹ He also asserted that upholding the will of the voters who had voted for the ban was a further legitimate state interest.⁵⁰ For all of these reasons, he concluded, the majority should have upheld the statute limiting a marriage to one man and one woman and let any extension of marriage benefits to same-sex couples happen through the legislative process.⁵¹

4. The Corrigan Dissent

Justice Corrigan dissented from the majority’s central holdings that California’s domestic partnership statute created an unequal institution for same-sex couples, and that preserving the designation of marriage for opposite-sex couples was not a legitimate state interest.⁵² She agreed with the other dissenters that the court should have exercised judicial restraint and allowed the intent of the voters and the legislature to prevail, stating, “[i]f there is to be a new understanding

⁴⁸ *Id.* at 464-66.

⁴⁹ *Id.* at 467.

⁵⁰ *Id.*

⁵¹ *Id.* at 467-68.

⁵² *Id.* at 468-71. Justice Corrigan did concur, however, with the majority’s initial finding that the state’s ban on access to marriage by same-sex couples applied to both resident and non-resident couples. *Id.* at 468 n.1.

of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.”⁵³

5. *Post-ruling Initiative Overturns Access to Marriage for Same-Sex Couples (Proposition 8)*

Shortly after the ruling in *In re Marriage Cases*, California officials began issuing marriage licenses to same-sex couples.⁵⁴ As had happened in Massachusetts after the *Goodridge* decision, advocates opposing access to marriage by same-sex couples took steps to nullify the court’s ruling. Petitions were circulated calling for a state-wide referendum to amend the state constitution to define marriage as a union between one man and one woman.⁵⁵ The petition garnered enough signatures to make it onto the ballot in the November 2008 election, where Proposition 8 passed by a vote of 52%-48%.⁵⁶

Since the November 2008 election, demonstrations protesting Proposition 8 have sprung up throughout the country, and have reached as far as Canada and Scotland.⁵⁷ Civil rights organizations have filed several lawsuits challenging the placement of Proposition 8 on the ballot as procedurally improper.⁵⁸ Plaintiffs argue that the measure constitutes such a change to the

⁵³ *Id.* at 471.

⁵⁴ *Wedding Bells Chime for California Same Sex Couples*, CNN.COM, June 16, 2008, available at <http://www.cnn.com/2008/US/06/16/samesex.marriage/index.html> (last visited Apr. 19, 2009).

⁵⁵ *See id.*

⁵⁶ *See, e.g.*, Editorial, *Our View on Same-Sex Couples: Lessons on Gay Marriage Emerge from Election Day*, USA TODAY, Nov. 11, 2008, at 10A.

⁵⁷ Kamika Dunlap, *Nationwide Anti-Prop. 8 Protests to Include Oakland, Walnut Creek, Alameda Rallies*, OAKLAND TRIBUNE, Nov. 13, 2008.

⁵⁸ The organizations representing plaintiffs include Lambda Legal, the National Center for Lesbian Rights, the NAACP Legal Defense & Education Fund, the Asian Pacific American Legal Center, the American Civil Liberties Union, and the Mexican American Legal Defense & Education Fund. *See* Chris Johnson, *Newsom Criticizes Obama, Schwarzenegger Over Prop 8*, THE WASHINGTON BLADE, Nov. 21, 2008 (“Anurima Bhargava, director of the education practice at the NAACP Legal Defense & Educational Fund,

fundamental rights protected by the California constitution (*i.e.*, the right to marry), that it is a “revision,” not an “amendment” to the state’s constitution.⁵⁹ Any revision first must be approved by two-thirds of both houses of the legislature before being submitted to the public for a vote. Because Proposition 8 did not go through that process, the challengers argue, it is invalid.⁶⁰

On December 19, 2008, Jerry Brown, the California Attorney General, who previously had said he would defend the constitutionality of Proposition 8 on behalf of the state, filed a brief with the California Supreme Court urging it to void the ban.⁶¹ When asked about his unexpected reversal of position, Brown referred to the state Supreme Court’s ruling in *In re Marriage Cases*, saying, “[t]he right of same-sex couples to marry is protected by the liberty interests of the constitution If a fundamental right can be taken away without any particular justification, then what kind of right is it?”⁶²

The passage of Proposition 8 left in limbo the legal status of over 18,000 marriages of same-sex couples that were performed between the state’s high court ruling in June 2008 and the passage of Proposition 8 in November 2008. The California Attorney General has issued

said her organization and others filed the lawsuit because they’re ‘all deeply concerned’ about having ‘a recognized fundamental right be subject to bare majority rule.’”).

⁵⁹ See Amended Petition of *Strauss v. Horton*, Case No. S168047, Cal. Sup. Ct. (Nov. 5, 2008), available at http://www.aclu.org/pdfs/lgbt/ca_prop8_writpetition.pdf (last visited Apr. 19, 2009).

⁶⁰ *Id.*; see also Press Release, ACLU, *Legal Groups File Lawsuit Challenging Proposition 8, Should It Pass* (Nov. 5, 2008), available at <http://www.aclu.org/lgbt/relationships/37706prs20081105.html> (last visited Apr. 19, 2009); Lisa Leff, *Prop. 8 Sponsors Seek to Nullify 18k Gay Marriages*, ASSOCIATED PRESS, Dec. 20, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/12/19/state/n150241S64.DTL&type=Politics> (last visited May 1, 2009).

⁶¹ *Jerry Brown Urges Court to Void Prop. 8*, ASSOCIATED PRESS, Dec. 19, 2008, available at <http://cbs13.com/local/Jerry.Brown.Urges.2.891813.html> (last visited Apr. 19, 2009); see also *Jerry Brown’s About-Face: Void Prop. 8*, ADVOCATE.COM, Dec. 23, 2008, available at http://www.advocate.com/news_detail_ektid69154.asp (last visited Apr. 19, 2009).

⁶² Peter Henderson, *California’s Top Lawyer Opposes Gay Marriage Ban*, REUTERS, Dec. 19, 2008, available at http://www.blnz.com/news/2008/12/19/unavailable_4864.html (last visited Apr. 20, 2009).

statements saying he believes the state Supreme Court will uphold the marriages⁶³ and that Proposition 8 was not written to be applied retroactively.⁶⁴ The “Yes on 8” campaign, which sponsored the measure, however, has asked the California Supreme Court to nullify the marriages, arguing that the amendment mandates that only marriages between opposite-sex couples can be valid or recognized in California.⁶⁵

The California Supreme Court agreed to review the constitutionality of the amendment and the legality of the 18,000 marriages entered into by same-sex couples on an expedited hearing schedule. Oral arguments were held on March 5, 2009, and a decision must be issued within 90 days of the argument.⁶⁶ The court is faced with reconciling the state constitution’s promise of equal protection to all with the power to amend the constitution provided to the state’s voters.⁶⁷ Questions posed during the oral argument showed the court is struggling with invalidating the majority vote for California’s Proposition 8.⁶⁸ Although Associate Justice Ming Chin queried if the court should direct the state to adopt “non-marriage terminology” and provide only civil marriages and domestic partnership to both same-sex and opposite-sex couples,⁶⁹ some

⁶³ See Press Release, ACLU, *California Will Continue to Honor Marriages of Same Sex Couples Who Married Before the Possible Passage of Prop. 8* (Nov. 5, 2008), available at <http://www.aclu.org/lgbt/relationships/37701prs20081105.html> (last visited Apr. 19, 2009). Attorney General Brown stated, “I believe that marriages that have been entered into subsequent to the May 15 Supreme Court opinion will be recognized by the California Supreme Court.” *Id.*

⁶⁴ See *Jerry Brown’s About-Face*, *supra* note 61; Press Release, *supra* note 63.

⁶⁵ See Johnson, *supra* note 58.

⁶⁶ Maura Dolan, *Prop. 8 Gay Marriage Ban Goes to Supreme Court*, L.A. TIMES, Nov. 20, 2008, available at <http://articles.latimes.com/2008/nov/20/local/me-prop8-supreme-court20> (last visited Apr. 21, 2009).

⁶⁷ Lisa Leff, *Ruling Could Mean Civil Unions for All in Calif.*, WASH. POST, Mar. 6, 2009.

⁶⁸ John Schwartz and Jesse McKinley, *California Court Weighing Gay Marriage Ban*, N.Y. TIMES, Mar. 6, 2009, at A2 of the N.Y. Edition.

⁶⁹ Leff, *supra* note 67.

foresee the court's upholding both the 18,000 marriages of same-sex couples already solemnized and Proposition 8's definition of marriage, as the more likely outcome.⁷⁰

C. Connecticut

In August 2004, a group of same-sex couples who had applied for, and been denied, marriage licenses by the town of Madison, Connecticut, filed suit against the Commissioner of the Connecticut Department of Public Health and the Madison Town Clerk. In the suit, *Kerrigan v. State of Connecticut*,⁷¹ the couples sought a declaratory judgment stating that any statute or common law rule which prohibited otherwise-qualified same-sex couples from marrying violated the Connecticut state constitution; they also requested an order directing the Town Clerk to issue a marriage license to each couple and requiring the Public Health Department to register the marriages.⁷² In April 2005, while the case was pending in the trial court, the Connecticut legislature passed a bill to create civil unions, a legal status which afforded same-sex couples many of the same rights and privileges available to opposite-sex couples, and at the same time, explicitly defined "marriage" under state law as "the union of one man and one woman."⁷³

With no material facts in dispute, both parties moved for summary judgment. The trial court, citing the principle that the recently created civil union law carried a strong presumption of constitutionality, granted summary judgment to the defendants.⁷⁴ The court held that the plaintiffs had not suffered a cognizable injury because, "[c]ivil union and marriage in

⁷⁰ Because Proposition 8 lacked language indicating that it was to be applied retroactively, it would not necessarily be inconsistent to uphold the same-sex marriages already performed while prohibiting all future same-sex unions. See Leff, *supra* note 67; Schwartz and McKinley, *supra* note 68.

⁷¹ *Kerrigan v. State of Connecticut*, 909 A.2d 89 (Conn. Super. Ct. 2006) ("First *Kerrigan* Decision").

⁷² *Id.* at 90-91.

⁷³ CONN. GEN. STAT. §§ 46b-38aa *et seq.* (2008) ("Civil Union Law"), at §§ 46b-38nn.

⁷⁴ First *Kerrigan* Decision, 909 A.2d at 101-02.

Connecticut now share the same benefits, protections, and responsibilities under law. The Connecticut constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process.”⁷⁵

Plaintiffs appealed the decision, and the Connecticut Supreme Court transferred the case to itself to be heard *en banc*. On October 28, 2008, the Connecticut Supreme Court ruled that the equal protection clause of the state constitution required that same-sex couples be given full access to marriage.⁷⁶

1. The Majority Opinion (by Justice Palmer)

The court began by addressing the same-sex couples’ argument that they had a cognizable harm even though the Civil Union Law allowed same-sex couples to enjoy the same legal rights as opposite-sex couples. Acknowledging that the Civil Union Law likely had been designed to benefit same-sex couples by granting them access to legal rights that were previously unavailable to them, the court held that the law nevertheless subjected same-sex couples to differential treatment because it denied them the freedom to marry.⁷⁷

Noting the long history of invidious discrimination against gay men and lesbians, the court rejected defendants’ assertion that civil union was equal to marriage, agreeing instead with plaintiffs’ argument that the statutory scheme essentially deemed same-sex couples unworthy of the institution of marriage and relegated them to an inferior status.⁷⁸ Accordingly, the court held that the Civil Union Law’s denial of the right to marry a same-sex partner constituted a

⁷⁵ *Id.* at 102.

⁷⁶ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481-82 (Conn. 2008) (“*Kerrigan*”). The court was split 4-3, with each member of the minority writing a separate dissenting opinion. *See id.* at 482-536.

⁷⁷ *Id.* at 416-18.

⁷⁸ *Id.* at 417.

cognizable constitutional injury, stating “[i]f ... the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine.”⁷⁹

Conducting this review, the court noted that the equal protection clause of the Connecticut Constitution, like its federal counterpart, requires uniform treatment of all similarly situated people. The majority rejected defendants’ argument that same-sex couples are not similarly situated to opposite-sex couples because marrying someone of the same sex is “fundamentally different” from marrying someone of the opposite sex.⁸⁰ Relying heavily on the reasoning of the California Supreme Court in *In re Marriage Cases*,⁸¹ the court found that same-sex and opposite-sex couples had a “multitude of characteristics” in common, including the shared interest of wishing to enter into a legally binding, long-term relationship, and the shared interest of raising children in a loving, supporting environment.⁸²

The *Kerrigan* majority rejected the state’s argument that the Civil Union Law should be analyzed using only rational basis, not heightened scrutiny. Although the state’s equal protection clause limited “suspect” status to eight enumerated classes of persons, not including gay men and lesbians, this list was only one factor to be considered when deciding whether a class is entitled

⁷⁹ *Id.* at 418.

⁸⁰ *Id.* at 424.

⁸¹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The California high court held that domestic partnerships were a separate and unequal category from marriage and that California's constitution required that same-sex couples be permitted to marry. *Id.* at 445-46. The case was decided prior to the passage of Proposition 8, which modified the state's constitution to ban such marriages. The procedural constitutionality of that proposition is currently before the Court. See *supra* Part One, Sec. I.B for a discussion of marriage rights in California.

⁸² *Kerrigan*, 957 A.2d at 424.

to have heightened scrutiny of laws that disfavor them. The court further held that even if the equal protection clause contained an exhaustive list of suspect classes, it was not precluded from recognizing gay men and lesbians as a quasi-suspect class entitled to heightened protection.⁸³

Basing its analysis primarily on federal precedent concerning gender-based discrimination, the majority found that sexual orientation is a quasi-suspect status, entitled to heightened scrutiny, because: (1) gay men and lesbians have suffered a long history of invidious discrimination that is still ongoing; (2) sexual orientation, the defining characteristic of the class, bears no logical relationship to one's ability to form familial relations or be productive members of society; (3) even if sexual orientation is not immutable, it is such an essential component of a person's identity that it would be abhorrent for the state to penalize a person for it or to require a person to change it; and (4) gay men and lesbians represent a distinct minority of the population who do not have the political power to prevent discrimination against them.⁸⁴

Having determined that gay men and lesbians constitute a quasi-suspect class, the court applied heightened scrutiny to the Civil Union Law. To prevail, the state had the burden of showing that classifying people on the basis of their sexual orientation served important government interests, and that the means of discrimination were substantially related to achieving those interests.⁸⁵ The state asserted that it had an interest both in promoting uniformity and consistency with the laws of other states and in preserving the traditional definition of marriage as being between one man and one woman.⁸⁶

⁸³ *Id.* at 425.

⁸⁴ *Id.* at 431-61.

⁸⁵ *Id.* at 476.

⁸⁶ *Id.*

The court dismissed the state’s first argument, noting that the state had not offered any precedent or other evidence to support its claim that uniformity and consistency with the laws of other states was an important government interest to which limiting marriage to opposite-sex couples was related. Absent such a showing, said the court, the state’s asserted interest “in defining marriage as most other jurisdictions do is insufficiently compelling to justify the discriminatory effect that that definition has on gay persons.”⁸⁷

The court similarly rejected the state’s argument that the legislature had a compelling interest in limiting marriage to opposite-sex couples because it had done so in the past and it reflected the strong beliefs of many legislators and their constituents. Stating that “a history or tradition of discrimination – no matter how entrenched – does not make the discrimination constitutional,”⁸⁸ the court found the state’s second justification for limiting marriage to opposite-sex couples unpersuasive.

Based on the foregoing analysis, the court concluded that the state had failed to prove that the statutory ban prohibiting same-sex couples from marrying served an important government interest, and therefore the Civil Union Law, insofar as it prohibited same-sex couples from marrying, violated the state’s Equal Protection Clause.⁸⁹ Acknowledging that its decision marked a change in the “traditional” definition of marriage, the court observed that it was its obligation to interpret its state’s constitution “in accordance with firmly established equal

⁸⁷ *Id.* at 477.

⁸⁸ *Id.* at 478 (internal quotations and citations omitted).

⁸⁹ *Id.* at 481. The decision did not affect the validity of the law with regard to the creation of civil unions, which, in addition to marriage, will remain a viable option for same-sex couples wishing to solemnize their relationships in Connecticut unless the legislature acts to repeal the civil union law. See Conn. Dep’t of Pub. Health, *Frequently Asked Questions About Same-Sex Marriages*, available at <http://www.ct.gov/dph/cwp/view.asp?A=3294&Q=427720> (last visited Apr. 19, 2009).

protection principles”⁹⁰ This analysis, said the court, “leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others.”⁹¹

2. *The Borden Dissent*

In his dissent, Justice Borden agreed with the majority that plaintiffs had established a cognizable constitutional claim and that same-sex couples were similarly situated to opposite-sex couples with regard to the right to marry.⁹² He disputed the majority’s conclusion, however, that civil unions relegated same-sex couples to the status of second-class citizens, arguing that civil unions were too new to judge whether society really perceived this institution to be inferior to marriage.⁹³

Despite this disagreement, Justice Borden conceded that the uncertainty as to whether the Civil Union Law created an inferior status was enough to trigger an equal protection analysis of the statute.⁹⁴ He began by rejecting the majority’s conclusion that sexual orientation was a quasi-suspect classification, disagreeing principally on whether gay men and lesbians qualified as a politically powerless minority. Arguing to the contrary, he stated that they constituted an “extraordinarily great and growing political power,” pointing out that the “extraordinary

⁹⁰ *Kerrigan*, 957 A.2d. at 482.

⁹¹ *Id.*

⁹² *Id.* at 483 n. 6.

⁹³ *Id.* at 484.

⁹⁴ *Id.* at 483.

trajectory [of Connecticut legislation] consistently has been in the direction of greater protection and recognition of the rights of gay persons”⁹⁵

Justice Borden also explored whether same-sex couples had a fundamental right to marry, and, more generally, whether individuals had a fundamental right to marry the person of one’s choice.⁹⁶ Citing the deeply-rooted history of marriage as being between opposite-sex couples, Justice Borden argued that defining the right to marry broadly to include same-sex couples would be counter to the state’s history and tradition.⁹⁷

He stated that marriage was a “fundamental right” only because it fosters procreation, invoking certain wording from the U.S. Supreme Court’s statement in *Loving v. Virginia*, that “[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival”⁹⁸ to support his conclusion that the Supreme Court’s “reference to marriage as fundamental to our survival must be taken as a reference to marriage as linked to procreation.”⁹⁹ Accordingly, Justice Borden asserted that the fundamental right protected by the Connecticut state constitution, was the right to marry someone of the opposite sex, not the right to marry the person of one’s choice, since that would necessarily include same-sex couples, who, by definition, cannot procreate without outside assistance.¹⁰⁰

⁹⁵ *Id.* at 493.

⁹⁶ Justice Borden addressed the question of whether marriage constitutes a fundamental right even though the majority had not reached it. *Id.* at 509-10. The majority stated that because it had found the civil union statute deficient under heightened scrutiny, it would not address any of plaintiffs’ claims that would implicate a strict level of scrutiny, including their claim that the marriage ban violated their fundamental right to marry. *Kerrigan*, 957 A.2d at 412 (majority).

⁹⁷ *Id.* at 511 (Borden, J., dissenting).

⁹⁸ *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

⁹⁹ *Id.* at 511-12.

¹⁰⁰ *Id.* at 510-12.

In the absence of a suspect or quasi-suspect classification, and in the absence of any fundamental right, Justice Borden stated that the majority should have applied rational basis review to the Civil Union Law. Under this standard, he concluded, the law would survive because the legislature has consistently expanded its laws to protect the rights of same-sex couples and because it acted in an entirely rational manner when it chose to do so in a step-by-step manner by enacting a Civil Union Law before extending full marriage rights to same-sex couples.¹⁰¹

3. *The Vertefeuille Dissent*

Stating her strong support of Justice Borden’s dissent, Justice Vertefeuille wrote separately to emphasize the point that validly enacted statutes, such as the Civil Union Law, carry a strong presumption of constitutionality. Thus, she asserted, those who challenge a statute’s “constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt.”¹⁰² For these reasons, she would have rejected plaintiffs’ claims.

4. *The Zarella Dissent*

Justice Zarella, in a separate dissent, agreed with the majority that plaintiffs alleged a cognizable constitutional claim, but rejected the claim on its merits. He observed that marriage was a fundamental civil right, and thus could not be abolished, whereas a civil union was a “creature of statute, subject to change or repeal at the pleasure of the legislature.”¹⁰³ Therefore, he concluded, the two institutions are not equal in all respects.

¹⁰¹ *Id.* at 514.

¹⁰² *Id.* at 515 (quoting *State v. McKenzie-Adams*, 915 A.2d 822, 833 (Conn. 2007)).

¹⁰³ *Id.* at 516.

He declared, however, that same-sex couples are not similarly situated to opposite-sex couples. He wrote that the purpose of marriage is to regulate procreative conduct and that only opposite-sex couples can have children that are biologically related to both parents.¹⁰⁴ Limiting marriage to opposite-sex couples would only create a classification based on procreative conduct (a valid purpose in his view), not one based on sexual orientation, as the majority concluded.¹⁰⁵ For that reason, he agreed with Justice Borden’s conclusion that same-sex couples have no fundamental right to marry.¹⁰⁶

In light of the above, Justice Zarella applied the rational basis test to the Civil Union Law. Under this test, he wrote, the law should have been upheld, since the state’s interest in regulating procreative conduct is legitimate, and limiting marriage to opposite-sex couples is rationally related to that purpose.¹⁰⁷

5. *Post-Ruling Developments*

The Kerrigan ruling took effect on October 28, 2008, with the first marriage licenses becoming available to same-sex couples on November 12, 2008. On March 30, 2009, the Connecticut General Assembly adopted legislation to implement the *Kerrigan* ruling, amending the state’s marriage law to permit same-sex couples to be licensed for marriage and defining “marriage” as the “legal union of two persons.”¹⁰⁸ The legislation also contained a new provision

¹⁰⁴ *Id.* at 519-20.

¹⁰⁵ *Id.* at 519.

¹⁰⁶ *Id.* at 525.

¹⁰⁷ *Id.* at 527.

¹⁰⁸ Ct. S.B. 899 (2009), Sec. 3.

exempting clergy and religious groups from any obligation to solemnizing or participating in same-sex marriage ceremonies.¹⁰⁹

In a recent Quinnipiac University poll, 52% of Connecticut voters said they supported the majority's ruling, while 39% said they opposed it.¹¹⁰ In the same poll, 61% of voters said they opposed amending the Connecticut constitution to ban the marriage of same-sex couples, compared with 33% who favored the idea.¹¹¹

D. Iowa

On April 3, 2009, Iowa became the fourth state in the union to permit same-sex couples to marry. The Iowa Supreme Court ruled unanimously, in *Varnum v. Brien*, that the state statute restricting marriage to "one man and one woman" violated the due process and equal protection rights of same-sex couples under the Iowa Constitution.¹¹² The decision addressed all of the central issues in the debate over access to marriage rights for same-sex couples.

The ruling came in a 2005 lawsuit filed by six same-sex couples against the Polk County Recorder for refusing to accept their marriage license applications. The trial court granted summary judgment for plaintiffs, requiring the marriage law to be interpreted in a gender-neutral

¹⁰⁹ *Id.*, Sec. 7, provides:

(a) No member of the clergy authorized to join persons in marriage pursuant to section 46b-22 of the general statutes shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the United States Constitution or section 3 of article first of the Constitution of the state.

(b) No church or qualified church-controlled organization, as defined in 26 USC 3121, shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization.

¹¹⁰ See Associated Press, *Poll: Connecticut Voters Back Gay Marriage*, THE HARTFORD COURANT, Dec. 17, 2008, available at http://www.imfct.org/site2?page=newsarticle&id=7143enews.iv_gr\=1282 (last visited Apr. 30, 2009).

¹¹¹ *Id.*

¹¹² *Varnum v. Brien*, No. 07-1499, --N.W.2d--, 2009 WL 874044 (Iowa Apr. 3, 2009).

manner so as not to prevent same-sex couples from obtaining marriage licenses.¹¹³ The trial court also enjoined the County Recorder from refusing to issue licenses to otherwise-qualified same-sex couples.¹¹⁴ Four hours later, however, the court granted the Polk County Attorney's motion for a stay of the ruling until the Supreme Court could hear an appeal on the matter.¹¹⁵

Separation of Powers. The opinion begins with the doctrine of separation of powers and the role of the courts. Re-affirming bedrock principles from *Marbury v. Madison*, *M'Culloch v. Maryland*, *W. Va. State Bd. of Educ. v. Barnette*, and *Lawrence v. Texas*, among others, the Iowa Supreme Court concluded that after the legislature had banned same-sex couples from marrying, and the Polk Country Recorder had refused to accept the marriage license applications, it then became the duty of the judicial branch to hear the case filed by the plaintiffs, interpret the constitution, say what the law is, and recognize when "laws once thought necessary and proper in fact serve only to oppress."¹¹⁶

Equal Protection. The opinion traced some of Iowa's long history of leading the country in decisions affording equal protection. Its first case as a territorial supreme court held that human beings are not property and slave contracts are unenforceable, seventeen years before the U.S. Supreme Court ruled the *opposite* way in *Dred Scott v. Sandford*.¹¹⁷ In 1868 and 1873, Iowa's highest court outlawed segregation, almost a century before *Brown v. Board of*

¹¹³ *Id.* at *1-3.

¹¹⁴ *Id.*

¹¹⁵ See Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. TIMES, Sept. 1, 2007. In the four hours between the time the ruling took effect, and the time the stay was imposed, one same-sex couple was able to obtain a license and get married.

¹¹⁶ *Varnum*, 2009 WL 874044, at *5, quoting *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (other citations omitted).

¹¹⁷ *In re Ralph*, 1 Morris 1 (Iowa 1839).

Education. Iowa was the first state to admit women to the bar,¹¹⁸ three years before the U.S. Supreme Court affirmed Illinois’ decision to *deny* women’s admission to the bar.¹¹⁹ “In each of those instances,” the *Varnum* court wrote, “our state approached a fork in the road toward fulfillment of our constitution’s ideals and reaffirmed the ‘absolute equality of all’ persons before the law as ‘the very foundation principle of our government.’”¹²⁰

Similarly Situated. The court rejected the state’s argument that same-sex couples are not “similarly situated” to opposite-sex couples and therefore the state may treat them differently in its marriage laws. The argument was circular, the court held: “‘similarly situated’ cannot mean simply ‘similar in the possession of the classifying trait,’” because “[a]ll members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.”¹²¹ The court focused instead on the purpose of the classification. Same-sex couples are similarly situated “with respect to the purposes of the [marriage] law”¹²² because they are

in committed and loving relationships, many raising families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework with which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples.

¹¹⁸ *Admission of Women to the Bar*, 1 CHICAGO LAW TIMES 76 (1887).

¹¹⁹ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1872).

¹²⁰ *Varnum*, 2009 WL 874044, at *6 (citing *Coger v. North West. Union Packet Co.*, 37 Iowa 145 (1873)).

¹²¹ *Id.* at *11 (citation omitted).

¹²² *Id.*

In short, for purposes of Iowa’s marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation.¹²³

Upon reaching the conclusion that same-sex and opposite-sex couples are similarly situated, yet treated differently, the court next assessed whether the marriage law actually classified couples based on sexual orientation. The court determined that although it does not do so explicitly, the opposite-sex-only marriage law discriminated on the basis of sexual orientation. Though gay men and lesbians can marry, they can marry only people of the opposite sex, which is a wholly empty “right”:

Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all.¹²⁴

The court held, therefore, “by purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation,”¹²⁵ and it turned to whether heightened scrutiny was the appropriate standard to review this deprivation of rights.

Heightened Scrutiny. The Iowa court identified four factors widely considered appropriate in deciding when heightened scrutiny is required:

(1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that

¹²³ *Id.* at *12.

¹²⁴ *Id.*

¹²⁵ *Id.* at *13.

distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4) the political power of the subject class."¹²⁶

Reciting examples of discrimination through hate crimes, harassing and bullying behavior, among other examples, the supreme court concluded that lesbian and gay people had suffered a "history of discrimination [that] suggests any legislative burdens placed on lesbian and gay people as a class 'are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.'"¹²⁷ After exploring each factor separately in detail, the *Varnum* court found that all factors weighed in favor of applying heightened scrutiny. The court stated "it would be difficult to improve upon the words of the Supreme Court of Connecticut [in *Kerrigan*]" and quoted that court's conclusion that a state's marriage laws should be subject to heightened scrutiny:

Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society. The characteristic that defines the members of this group – attraction to persons of the same sex – bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens. Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so. Gay persons also represent a distinct minority of the population. It is true, of course, that gay persons recently have made significant advances in obtaining equal treatment under the law. Nonetheless, we conclude that, as a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling them out for disparate treatment are subject to heightened judicial

¹²⁶ *Id.* at *14.

¹²⁷ *Id.* at *15 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.¹²⁸

The *Varnum* court did not elect between levels of heightened scrutiny (intermediate and strict), finding that the marriage law failed to withstand even intermediate scrutiny. That test requires that “a statutory classification must be substantially related to an important governmental objective.”¹²⁹ The court painstakingly analyzed every argument proposed for excluding same-sex couples from marriage, and found none was sufficient.

The first rationale the court considered was “maintaining traditional marriage.” Although it acknowledged a “superficial appeal” to this argument, the court rejected it as circular, noting that because the tradition in this case *is* the classification, it is another example of “empty analysis” that permits a classification against same-sex couples to be maintained “for its own sake.”¹³⁰

Looking rather into the reasons underlying the tradition, the court addressed the state’s next proposed justification for excluding same-sex couples from marriage: the promotion of an optimal environment in which to raise children. Observing that the best interests of children is clearly an important governmental interest, the court found that opinions that children fare better in opposite-sex homes “while thoughtful and sincere ... were largely unsupported by reliable scientific studies.”¹³¹

¹²⁸ *Id.* at *19 (quoting *Kerrigan*, 957 A.2d at 432).

¹²⁹ *Id.* at *20 (internal quotations and citation omitted).

¹³⁰ *Id.* at *21-22 (quoting *Kerrigan*, 957 A.2d at 478, in turn quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). “[T]he equal protection analysis is transformed into the circular question of whether the classification accomplished the governmental objective, which objective is to maintain the classification. In other words, the equal protection clause is converted into a ‘barren form of words’ when discrimination is made an end in itself.” *Id.* at *21 (citations omitted).

¹³¹ *Id.* at *22.

Additionally, the court concluded, the “optimal environment” justification does not justify the same-sex/opposite-sex distinction, because that classification is both under- and over-inclusive. Significant over- and under-inclusiveness tends to demonstrate that the classification is grounded in improper prejudice, because it “puts in perspective just how minimally the same-sex marriage ban actually advances the purported legislative goal.”¹³² The marriage ban is under-inclusive in that it does not prohibit “child abusers, sexual predators, parents neglecting to provide child support, and violent felons – that are undeniably less than optimal parents”¹³³ from marrying. And the ban is significantly over-inclusive, because it bans all same-sex couples from marrying, including many who choose not to raise children at all.¹³⁴

Comparably, the court rejected the argument that the marriage ban is a valid way to promote procreation. Again, the court found the ban to be both significantly over-inclusive because it affects “[g]ay and lesbian persons [who] are capable of procreation,” and under-inclusive because the marriage law does not exclude a variety of groups that “do not procreate for reasons such as age, physical disability or choice.”¹³⁵

The supreme court similarly ruled that the ban had an insufficient connection to the proposed justifications of promoting stability in opposite-sex relationships and conservation of resources to withstand heightened scrutiny.

Religious Concerns. The court addressed *sua sponte* an unexpressed argument: the religious sentiment that “most likely motivates many, if not most, opponents of same-sex civil

¹³² *Id.* at *23.

¹³³ *Id.*

¹³⁴ *Id.* at *24.

¹³⁵ *Id.* at *25.

marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling.”¹³⁶ Acknowledging the legitimacy of concerns for the “sanctity of marriage,” the supreme court nevertheless re-affirmed that religious doctrine is not constitutionally permitted as a basis to deny equal protection of the law:

[I]n pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.¹³⁷

To respect all views on marriage, religious or otherwise, the supreme court held it must respect the constitution, and leave people free to associate with the religion that best supports their views, including those which do celebrate marriages for same-sex couples.¹³⁸

Remedy. Having exhausted all arguments against marriage equality, the supreme court found it could not allow the legislature to attempt to cure the problem through civil union or domestic partnership stating that “a new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”¹³⁹ Officials in Iowa began marrying same-sex couples on April 27, 2009.¹⁴⁰

¹³⁶ *Id.* at *27.

¹³⁷ *Id.* at *28.

¹³⁸ *Id.* at *29.

¹³⁹ *Id.* at *30.

¹⁴⁰ Monica Davey, *A Quiet Day in Iowa as Same-Sex Couples Line Up to Marry*, N.Y. TIMES, Apr. 28, 2009, at A12.

E. Vermont

On April 7, 2009, Vermont adopted an amendment to the state’s marriage laws to allow same-sex couples to marry and abandoned its experiment with civil unions.¹⁴¹ The statute passed the Vermont Senate 26 to 4 on March 23, 2009. The Vermont House passed it 94 to 52 on April 3, 2009. The Republican Governor Jim Douglas vetoed the legislation, but his veto was overridden by a vote of 23 to 5 in the Senate and 100 to 49 in the House (the exact number of House votes necessary to override the veto). The statute takes effect September 1, 2009.

Fully entitled “An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage,” the stated purpose of the statute “is to recognize legal equality in the civil marriage laws and to protect the religious freedom of clergy and religious societies authorized to solemnize civil marriages.”¹⁴² The statute defines marriage as the union of “two people,” replacing the phrase “one man and one woman”¹⁴³ and strikes the prohibition on the marriage of two persons of the same sex.¹⁴⁴ Further, each party to a marriage is permitted to choose the term “bride,” “groom,” or “spouse” on the marriage application form.¹⁴⁵

The statute also extensively addresses religious concerns. Clergy authorized to perform marriages are not required to perform any marriage and are immunized from suit if they refuse to

¹⁴¹ S. 115, 2009-2010 Leg. Sess. (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf> (last viewed May 1, 2009).

¹⁴² *Id.* § 2.

¹⁴³ *Id.* § 5.

¹⁴⁴ *Id.* § 6.

¹⁴⁵ *Id.* § 7.

do so.¹⁴⁶ Religious organizations are not required to admit married same-sex couples if they object to them.¹⁴⁷ Similarly, the public accommodations laws were amended to provide that religious organizations may provide marriage accommodations and services selectively and are free from suit if they do so.¹⁴⁸

Finally, the statute repealed the Vermont Civil Union Act and ended its nearly nine-year experiment with civil unions.¹⁴⁹ As discussed in detail in the Civil Unions Laws section below,¹⁵⁰ Vermont’s Legislature had directed that a special independent commission be created to study, hear testimony on, and issue a report about the state’s experience with civil union. The Commission overwhelmingly concluded that the civil union status was a failed experiment in “separate but equal” statutes that unfairly made same-sex couples “second-class citizens” by fomenting confusion about their status and rights, confusion that caused significant problems in society, families, the workplace, health care settings, child custody situations, and crossing state lines.

¹⁴⁶ *Id.* § 9 (“This section does not require a member of the clergy authorized to solemnize a marriage as set forth in subsection (a) of this section ... to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action.”).

¹⁴⁷ *Id.* § 10 (“The civil marriage laws shall not be construed to affect the ability of a society to determine the admission of its members as provided in section 4464 of this title, or to determine the scope of beneficiaries in accordance with section 4477 of this title, and shall not require a society that has been established and is operating for charitable and educational purposes and which is operated, supervised, or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the society’s free exercise of religion, as guaranteed by the First Amendment to the Constitution of United States or by Chapter I, Article 3 of the Constitution of the State of Vermont.”).

¹⁴⁸ *Id.* § 11.

¹⁴⁹ *Id.* § 12(b). Also, the term “marriage” in Vermont’s laws was replaced with the term “civil marriage.” *Id.* §§ 5, 12a.

¹⁵⁰ *See infra* Part One, Sec. II.A, discussing the findings of the Vermont Commission.

F. Maryland

In July 2004, the ACLU filed a complaint on behalf of nine same-sex couples seeking declaratory and injunctive relief against several Maryland county clerks who had refused to issue marriage licenses to the couples. In *Conaway v. Deane*,¹⁵¹ plaintiffs alleged that the Maryland Family Law had a disparate impact on and unlawfully discriminated against same-sex couples on the basis of sexual orientation, and that it inhibited and unjustifiably burdened same-sex couples' fundamental right to marry, in violation of the Equal Protection and Due Process Clauses of the Maryland Declaration of Rights.¹⁵² The trial court found for plaintiffs, holding that denying same-sex couples the right to marry constituted a sex-based classification and that the state had failed to sufficiently establish that the classification furthered an important government purpose.¹⁵³ The government filed a special appeal directly to the state's highest court, the Maryland Court of Appeals, which, in a 4-3 decision, reversed the lower court's holding and upheld the constitutionality of the law restricting marriage to opposite-sex couples.¹⁵⁴

1. The Majority Opinion (by Judge Harrell)

The Court of Appeals held that the section of the Maryland Family Law defining marriage as a union between a man and a woman did not discriminate based on sex, since men and women were treated equally under the statute.¹⁵⁵ The court also found that opposite-sex

¹⁵¹ *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

¹⁵² Maryland Family Law § 2-201 was enacted in 1973 and was not part of the wave of statutes and constitutional amendments that started after the *Goodridge* decision banning same-sex couples from marriage. See Ann W. Parks, *Same-Sex Marriage: The Big Day Approaches*, MD. DAILY RECORD, Nov. 17, 2006, available at http://www.aclu-md.org/aPress/News%202006/111706_DR.html (last visited Apr. 19, 2009).

¹⁵³ *Conaway*, 932 A.2d at 584.

¹⁵⁴ *Id.* at 571.

¹⁵⁵ *Id.* at 584-98.

marriage is a fundamental right but that there was no fundamental right to marry someone of the same sex.¹⁵⁶ Although the court determined that the statute discriminated on the basis of sexual orientation, it concluded that this classification did not require strict or heightened scrutiny since plaintiffs had not proven that sexual orientation is an immutable characteristic and the gay community was not a politically powerless group, as evidenced by the recent legislative trend toward protecting gay rights.¹⁵⁷

Having found that sexual orientation was not a suspect or quasi-suspect class, and that no fundamental right was at issue, the court evaluated the statute using a rational basis test. The court held that the statute did not violate the Maryland Declaration of Rights because it served the legitimate government interest of promoting marriage in its “traditional” form (*i.e.*, the union of a man and a woman) to foster procreation, and that the prohibition on permitting same-sex couples to marry was rationally related to accomplishing that purpose.¹⁵⁸

2. *The Raker Dissent*

Judge Raker’s dissent distinguished the question of whether same-sex couples were entitled to marry from whether gay and lesbian couples were entitled to the rights accompanying marriage. He concluded that the majority correctly applied rational basis review and he accepted its position that retaining the traditional definition of marriage could justify excluding same-sex couples from marriage.¹⁵⁹ He also concluded, however, that this exclusion failed rationally and

¹⁵⁶ *Id.* at 626-29 (stating that *Lawrence v. Texas* did not establish a fundamental right to marriage for same-sex couples and that the right of same-sex couples to marry is not so “deeply rooted in this State or the country as a whole that it should be regarded at this time as a fundamental right”).

¹⁵⁷ *Id.* at 606-16.

¹⁵⁸ *Id.* at 635.

¹⁵⁹ *Id.* at 651 (Raker, J., dissenting).

consistently to promote a stable procreative and child-rearing environment, interests that the state had raised in defense of the Maryland Family Law.¹⁶⁰

Judge Raker noted the state's actions contradicted its own arguments: by providing some rights pertaining to procreation and child-rearing to same-sex couples, the government undercut its contention that denying full rights and benefits would further child-welfare concerns.¹⁶¹ Judge Raker ultimately favored a scheme that would provide complete rights and protections to same-sex couples; whether that scheme included marriage would depend on the state's legislature.¹⁶²

3. *The Battaglia Dissent*

Judge Battaglia found the majority had inappropriately attributed precedential value to a minority opinion to justify its application of rational basis review.¹⁶³ Finding the marriage statute imposed a classification based on sex, he presented a comprehensive review of case law related to the Maryland's Equal Rights Amendment, demonstrating that the Court of Appeals repeatedly had applied strict scrutiny when examining sex-based classifications.¹⁶⁴ Judge Battaglia rejected the state's arguments that its interests in excluding same-sex couples from marriage were

¹⁶⁰ *Id.* at 649-50.

¹⁶¹ *Id.*

¹⁶² *Id.* at 654. Chief Judge Bell concurred that individuals in committed, same-sex relationships deserved the full rights and benefits of marriage; he disagreed with the majority's analysis that rational state interests justified withholding marriage from same-sex couples. *See, infra*, this section.

¹⁶³ The majority relied on Chief Judge Murphy's minority opinion in *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817 (Md. 1985). In *Burning Tree*, a woman was denied membership at a private country club that limited membership to males. The Court of Appeals affirmed her claim that, by providing preferential tax treatment to the club, the state violated the Equal Rights Amendment, condoning discriminatory treatment based on sex. The minority opinion of Chief Judge Murphy, by contrast, concluded that the statute granting preferential tax treatment did not implicate the Equal Rights Amendment because the tax benefit was available to all single-sex country clubs, not just those excluding women. *Id.* at 826.

¹⁶⁴ *Conaway*, 932 A.2d at 682 (Battaglia, J., dissenting).

“compelling”¹⁶⁵ and favored remanding the case to supplement what he considered to be an incomplete factual record.¹⁶⁶

4. The Bell Dissent

Chief Judge Bell concurred in the opinion of Judge Battaglia and also wrote a short dissent in which he echoed the arguments and conclusions presented by Chief Judge Kaye of the New York Court of Appeals in *Hernandez v. Robles*.¹⁶⁷

G. Pending Marriage Legislation

Legislation to amend marriage laws to provide for equality for same-sex couples is under active consideration in three states at the time of the writing of this report (April 30, 2009).

In New Hampshire, the state’s House passed legislation on March 26, 2009 by a margin of 186-179 allowing same-sex couples to marry,¹⁶⁸ and passed the New Hampshire Senate on April 29, 2009.¹⁶⁹

On April 30, 2009, the Maine Senate voted 15-10 in support of legislation to approve marriage rights for same-sex couples.¹⁷⁰

¹⁶⁵ *Id.* at 690.

¹⁶⁶ *Id.* at 693.

¹⁶⁷ *Id.* at 694 (citing *Hernandez v. Robles*, 7 N.Y.3d 338 (2006)). *See infra* Part Two, Sec. I. for a discussion of the *Hernandez* decision.

¹⁶⁸ *See* Abby Goodnough, *New Hampshire Senate Passes Gay Marriage Bill*, NY TIMES, Apr. 30, 2009, at A16.

¹⁶⁹ Tom Fahey, *NH House Endorses Gay Marriage*, UNIONLEADER.COM, Mar. 27, 2009, available at <http://www.theunionleader.com/article.aspx?headline=NH+House+endorses+gay+marriage&articleId=d2564bb9-7761-401a-9366-f3dccde337a5> (last visited May 1, 2009).

¹⁷⁰ Abby Goodnough, *Maine Senate Backs Same-Sex Marriage*, NY TIMES, Apr. 30, 2009, available at <http://www.nytimes.com/2009/05/01/us/ormaine.html?ref=us> (last visited Apr. 30, 2009).

In New Jersey, legislation¹⁷¹ to enact marriage equality is pending before the state legislature. The bill has the support of the Governor¹⁷² and was recommended by the New Jersey Commission appointed to assess the efficacy and fairness of civil unions.

H. International

In its *2004 Report*, the NYSBA Special Committee described a series of international developments concerning the right of same-sex couples to marry. At that time, a number of countries extended limited legal recognition to same-sex couples by imparting some benefits of marriage; six provinces in Canada, plus the Netherlands and Belgium, permitted same-sex couples to marry.

Just as several states have considered, and granted, marriage recognition to same-sex couples in the four years since the Special Committee's report, this issue has arisen globally as well. Due to the number and variation of levels of recognition of same-sex couples' rights abroad, the following section provides a selective update of countries that have debated granting marriage equality to same-sex couples since the issuance of the Special Committee's report in 2004.

¹⁷¹ The "Civil Marriage and Religious Protection Act," A. 818, 213th Leg. (N.J. 2008) (introduced January 8, 2008), authorizes marriage of same-sex couples and exempts religious objectors: "No minister of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution." The "Freedom of Religion and Equality in Civil Marriage Act," A. 2978, 213th Leg. (N.J. 2008) (introduced June 16, 2008), equally authorizes marriage of same-sex couples.

¹⁷² *Jon Corzine On Gay Marriage*, NJ.com, Mar. 8, 2009, available at http://blog.nj.com/njv_auditor/2009/03/jon_corzine (last visited Apr. 19, 2009) ("I'm a Democrat and I'm straight and I believe in marriage equality If we work together, 2009 will be the year when I will take this pen out of my pocket and we will sign the marriage equality bill."); Wally Edge, *Corzine Says He'd Sign Marriage Equality Law*, POLITICKERNJ.com, Mar. 2, 2009, available at <http://www.politickernj.com/wallye/27801/corzine-says-hed-sign-marriage-equality-law> (last visited Apr. 19, 2009).

1. *Canada*

On July 20, 2005, Canada enacted the Civil Marriage Act that established the uniform right of same-sex couples to marry across the country.¹⁷³ With the passage of this statute, same-sex couples were “able to marry for the first time in Alberta, Prince Edward Island, the Northwest Territories and Nunavut, and the unions of couples who had already married in other jurisdictions would now be recognized everywhere in Canada.”¹⁷⁴ The law permits officials of religious groups to “refuse to perform marriages that are not in accordance with their religious beliefs.”¹⁷⁵ One year after the passage of the Civil Marriage Act, the Canadian legislature easily defeated the efforts of the ruling Conservative Party to revisit the issue.¹⁷⁶

2. *Spain*

In June 2005, the Spanish Parliament gave final approval to a bill that eliminated legal distinctions between unions of opposite-sex and same-sex couples.¹⁷⁷ A week later, Spain became the third country in the world to legalize marriage of same-sex couples, by adding a

¹⁷³ Mary C. Hurley, Library of Parliament, *Bill C-38: The Civil Marriage Act*, at 10, Feb. 2, 2005, available at <http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/summaries/c38-e.pdf> (last visited Apr. 19, 2009) (see preamble to Bill C-38, paragraph 4). Prior to the passage of the Act, Canada had “a patchwork of entitlements” and various civil registration and union schemes in effect across the country. *Id.* at 3. At the time of its enactment, the right of same-sex couples to marry had been recognized in nine of thirteen Canadian jurisdictions. Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT’L J.L. POL’Y & FAM. 249, 250 (2006). On July 20, 2005, Chief Justice Beverley McLachlin, who served as Deputy Governor General and acted on behalf of convalescing Governor General Adrienne Clarkson, proclaimed the Civil Marriage Act, which recognizes civil marriages between individuals of the same-sex, into law, thereby permitting same-sex couples to marry in the four remaining jurisdictions. *Id.* at n.9.

¹⁷⁴ Clifford Krauss, *Gay Marriage Is Extended Nationwide in Canada*, N.Y. TIMES, June 29, 2005.

¹⁷⁵ Civil Marriage Act, 2005 S.C., ch. 33 § 3 (Can.).

¹⁷⁶ *MPs Defeat Bid to Reopen Same-Sex Marriage Debate*, CBCNews.ca, Dec. 7, 2006, available at <http://www.cbc.ca/canada/story/2006/12/07/vote-samesex.html> (noting that the MPs defeated the bill by a vote of 175-123) (last visited Apr. 19, 2009).

¹⁷⁷ Art. 44, Amend. to Código Civil, available at http://noticias.juridicas.com/base_datos/Privado/113-2005.html (last visited Apr. 19, 2009).

single sentence to its previous marriage law: “*El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo,*” meaning “[m]arriage will have the same requirements and results when the two people entering into the contract are of the same sex or of different sexes.”¹⁷⁸ The law imparts the same rights and benefits to heterosexual and same-sex married couples unless otherwise specified.¹⁷⁹ In August 2005, the Boletín Oficial del Estado, the official government registry, “published a ruling by Spain’s justice ministry that the marriage law allows same-sex marriage to a foreigner regardless of whether that person’s homeland recognizes the partnership.”¹⁸⁰

3. South Africa

In November 2006, one year after the country’s highest court held in *Fourie and Another v. Minister of Home Affairs and Others* that existing marriage laws violated the Constitution’s grant of equal rights, South Africa became the first African nation and the fifth nation in the

¹⁷⁸ *Id.*; see also Melissa Durand, *From Political Questions to Human Rights: The Global Debate on Marriage and Its Implications for U.S. Laws*, 5 REGENT J. INT’L L. 269, 274 (2007).

¹⁷⁹ *Id.* at 274 (noting that same-sex couples in Spain are allowed to adopt only Spanish children).

¹⁸⁰ *Id.* The passage of the marriage law received nearly as much opposition as it did support, both from the public as well as the Spanish Congress of Deputies. *Id.* at 275. Vatican officials, the Spanish Bishops Conference, and other conservatives attacked the law; one Roman Catholic group presented the parliament with a petition containing 600,000 signatures opposing the legislation. *Spain Approves Gay Marriage Bill*, BBC NEWS, June 30, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4636133.stm> (last visited Apr. 19, 2009). Conversely, according to a survey in 2005 by the private polling organization Instituto Opina, 62% of the public favored the legislation when the law had passed. Hope Lozano-Bielat and David Masci, *Same-Sex Marriage: Redefining Legal Unions Around the World*, PEW RESEARCH CENTER, July 11, 2007, available at <http://pewresearch.org/pubs/541/gay-marriage> (last visited May 4, 2009) (hereinafter “*Redefining Legal Unions Around the World*”). See also *Same-Sex Marriage Legislation OK in Spain*, ANGUS REID GLOBAL MONITOR, July 2, 2005, available at <http://www.angus-reid.com/polls/view/7887> (last visited Apr. 19, 2009). The same poll showed the sample “about evenly split over whether same-sex couples should be allowed to adopt children.” Demian, *Spain Offers Legal Marriage*, PARTNERS TASK FORCE FOR GAY & LESBIAN COUPLES, Sept. 27, 2006, available at <http://www.buddybuddy.com/mar-spai.html> (last visited Apr. 19, 2009). Nearly a year later, in March 2006, Instituto Opina released a second poll showing 61% of the public in support of legalizing marriages of same-sex couples. *Spaniards Back Government on Same-Sex Marriage*, Angus Reid Global Monitor: Polls & Research, April 20, 2006, available at <http://www.angus-reid.com/polls/view/11617> (last visited Apr. 19, 2009) (noting that the poll was conducted via “[t]elephone interviews with 1,000 Spanish adults . . . on Mar. 30, 2006”).

world to legalize marriage for same-sex couples.¹⁸¹ In *Fourie*, the Constitutional Court, which is South Africa’s highest court, recognized the constitutional right of same-sex couples to marry.¹⁸² The Court gave the government until December 1, 2006 to change the laws or else same-sex couples’ marriages would be legalized by default.¹⁸³ In November 2006, the South African legislature enacted the Civil Union Act and modified the existing marriage statute,¹⁸⁴ which now provide for the “voluntary union of two persons ... by way of either a marriage or a civil partnership.”¹⁸⁵ South Africa remains the only nation in Africa that confers equal marriage rights to same-sex couples.¹⁸⁶

4. Nepal

On November 17, 2008, Nepal became the first country in Asia to recognize marriages between same-sex couples.¹⁸⁷ In August 2006, four months after the fall of King Gyanendra’s

¹⁸¹ *Redefining Legal Unions Around the World*, *supra* note 180; *see Fourie and Another v. Minister of Home Affairs and Others*, 2005 (3) SA 429 (SCA) (S. Afr.). Netherlands and Belgium legalized marriage for same-sex couples in 2004; Spain and Canada began providing marriage equality in 2005.

¹⁸² *Fourie*, 2005 (3) SA 429; *see also* Sharon LaFraniere, *South African Parliament Approves Same-Sex Marriages*, N.Y. TIMES, Nov. 15, 2006. The Constitutional Court held that the “exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.” 2005 (3) S.A. 429 (S.C.A.) at [75].

¹⁸³ *Id.*

¹⁸⁴ Clare Nullis, *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST, Dec. 1, 2006, at A20.

¹⁸⁵ Civil Union Act 17 of 2006 s. 1 (S.Afr.); *see also* *S. Africa Approves Same-Sex Unions*, BBC NEWS, Nov. 14, 2006, available at <http://news.bbc.co.uk/2/hi/africa/6147010.stm> (last visited Apr. 19, 2009). The Act passed by a vote of 230 to 41. *Id.* As with Canada’s marriage law, clergy and civil marriage officers in South Africa may refuse to conduct same-sex marriage ceremonies for reasons of “conscience, religion and belief.” *Id.*

¹⁸⁶ *See Redefining Legal Unions Around the World*, *supra* note 180.

¹⁸⁷ *See, e.g.*, Wong Shu Yun, *Full Citizens: Sexual Minorities Are Moving Towards Recognition*, NEPALI TIMES, June 6, 2008 (recognizing that Nepal is the only South Asian country to legally protect LGBT individuals against discrimination); *Same-Sex Marriage Gets Court Nod in Nepal*, THE STATESMAN (India), Nov. 19, 2008, available at <http://news.in.msn.com/international/article.aspx?cp-documentid=1700057> (last visited Apr. 30, 2009) (hereinafter “*Court Nod in Nepal*”) (Nepal recognizes marriages between same-sex individuals).

regime in Nepal and the advent of Nepal's transition to becoming a federal democratic republic, the Blue Diamond Society, a Nepalese gay rights organization, began to conduct marriage ceremonies for same-sex couples.¹⁸⁸ Between August 2006 to November 2008, half a dozen such marriages took place;¹⁸⁹ however, because Nepalese laws did not then recognize same-sex unions, none of these marriages received official approval at the time they were conducted.¹⁹⁰

In November 2008, the Apex Court — which is the supreme court of Nepal and is constitutionally authorized to review parliamentary enactments and executive actions¹⁹¹ — issued a landmark verdict, consenting to these marriages.¹⁹² The court instructed the Maoist-led government in Nepal to formulate the necessary laws guaranteeing full rights to gay men and lesbians — including the rights to own property, the right to employment and the right to marry — and directed the government to ensure that the next constitution, which is scheduled to be ratified in 2010, does not discriminate against sexual minorities.¹⁹³

¹⁸⁸ *Nepal Becomes a Federal Democratic Republic*, NEPALNEWS.COM, May 28, 2008, available at <http://www.nepalnews.com/archive/2008/may/may28/news18.php> (last visited Apr. 20, 2009); *Nepalese Monarchy to Be Abolished*, BBC NEWS, Dec. 24, 2007, available at http://news.bbc.co.uk/2/hi/world/south_asia/7158670.stm (last visited Apr. 20, 2009); *Court Nod in Nepal*, *supra* note 187.

¹⁸⁹ *Court Nod in Nepal*, *supra* note 187.

¹⁹⁰ *Nepal Sees First Public Same-Sex Marriage*, ADVOCATE.COM, Aug. 29, 2006, available at http://www.advocate.com/news_detail_ektid36049.asp (last visited Apr. 22, 2009).

¹⁹¹ Supreme Court of Nepal, *Judiciary in Nepal: Preliminaries*, available at <http://www.supremecourt.gov.np/main.php?d=general&f=preliminaries> (last visited Apr. 30, 2009).

¹⁹² Press Trust of India, *Nepal SC Approves Same-Sex Marriage*, HINDUSTAN TIMES, Nov. 19, 2008, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?sectionName=&id=7c190914-f498-427c-ad0b-97559a3aae71&&Headline=Nepal+SC+approves+same-sex+marriage> (last visited Apr. 30, 2009).

¹⁹³ *See id.*; *see also Court Nod in Nepal*, *supra* note 187.

5. Norway

In 2008, Norway granted full legal rights to same-sex couples to “marry, adopt, and have access to alternative insemination”¹⁹⁴ replacing a 1993 statute that permitted civil unions but not marriages.¹⁹⁵

* * *

In sum, many countries are grappling with ways to legally recognize the rights and responsibilities of same-sex couples. Increasing numbers have opted to permit same-sex couples to marry. Others, discussed below, have endorsed a “civil union” approach. The next section of this Report describes the experience of various U.S. states and other countries with civil unions and domestic partnerships.

II. Civil Unions and Domestic Partnerships in the United States

For more than a decade, state legislatures and state courts have attempted to recognize the relationships of same-sex couples with mechanisms ranging from marriage, to civil unions and domestic partnerships, to more piecemeal approaches. As addressed above, four states, Massachusetts, Connecticut, Iowa and Vermont currently offer civil marriage to same-sex

¹⁹⁴ Demian, *Norway Offers Legal Marriage*, PARTNERS TASK FORCE FOR GAY & LESBIAN COUPLES, Oct. 16, 2008, available at <http://www.buddybuddy.com/mar-norw.html> (last visited Apr. 30, 2009). On June 11, 2008, the lower house voted 84-41 in favor of granting equal rights legislation between opposite-sex and same-sex couples; five days later, the upper house concurred by a vote of 23-17. *Id.*; see also Associated Press, *Norway: Same-Sex Marriage Permitted*, N.Y. TIMES, June 18, 2008 (hereinafter “*Norway: Same-Sex Marriage*”); David Cronin, *Report: Sweden Among States Most Tolerant of Gays*, INTERPRESS SERVICE, July 14, 2008, available at http://www.accessmylibrary.com/coms2/summary_0286-34802350_ITM (last visited May 2, 2009).

¹⁹⁵ *Norway: Same-Sex Marriage, supra*. Under the former Registered Partnership Act, only married couples or cohabitants of opposite sexes could receive artificial insemination and be considered adoptive parents. John Asland & Kees Waaldijk, *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in Norway*, Documents de Travail n°125, Ined, 170, 172 (2005), available at <http://www.same-sex.ined.fr/pdf/DocTrav125/05Doc125Norway.pdf> (last visited Apr. 30, 2009). According to the new law, churches and clergy members may perform weddings for same-sex couples, but are not legally obligated to do so. *Id.*

couples.¹⁹⁶ Two states currently provide same-sex couples the right to enter civil unions: New Jersey, and New Hampshire (Vermont and Connecticut have repealed civil unions legislation); Vermont repealed its civil union law when it enacted its marriage law in April 2009.¹⁹⁷ California and Oregon have provided a domestic partnership scheme that is analogous to civil unions,¹⁹⁸ while Maine and Washington state have also enacted domestic partnership legislation that aims to provide increased rights for same-sex couples.¹⁹⁹ The section that follows provides a brief overview and update from the *2004 Report* on the types of non-marriage, same-sex partnerships available in several jurisdictions.

A. Vermont

As noted above, on April 7, 2009, the Vermont legislature amended the state’s marriage law to permit same-sex couples to marry, becoming the first U.S. state to do so in the absence of a court order.²⁰⁰ This was not, however, the first time Vermont has led the way in seeking to create equality for same-sex couples. Indeed, Vermont created the concept of the “civil union” in response to its Supreme Court’s decision in *Baker v. State* in 2000.²⁰¹ The *Baker* court held that the Vermont Constitution required the extension of the benefits and protections flowing from marriage to same-sex couples, but it left the means of achieving this parity to legislative determination.²⁰² In response, the Vermont legislature adopted the Vermont Civil Union Act in

¹⁹⁶ See *supra* Part One, Secs. I.A (Massachusetts), I.C (Connecticut), I.D (Iowa) and I.E (Vermont).

¹⁹⁷ See *infra* Part One, Secs. II.B (New Jersey) and II.C (New Hampshire).

¹⁹⁸ See *supra* Part One, Sec. I.B (discussing the complex situation concerning the rights of same-sex couples to marry in California) and *infra* Part One, Sec. II.D (Oregon).

¹⁹⁹ See *infra* Part One, Secs. II.E (Maine) and II.F (Washington).

²⁰⁰ See *supra* Part One, Sec. I.E for further discussion of the Vermont legislature's actions.

²⁰¹ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

²⁰² *Id.* at 867.

April 2000, providing that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law ... as are granted to spouses in marriage.”²⁰³

In 2007, the Vermont legislature created a commission to review and evaluate Vermont’s laws relating to the recognition and protection of same-sex couples.²⁰⁴ The Vermont Commission on Family Recognition and Protection (hereinafter, the “Vermont Commission”) was charged with addressing three primary issues:

(1) [t]he basis for Vermont’s separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples; (2) [t]he social and historical significance of the legal status of being “married” versus “joined in civil union”; [and] (3) [t]he legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples.²⁰⁵

The Vermont Commission heard from over 240 people, at both public hearings and through written submissions, over the course of its five month investigation. In April 2008, the Commission reported back to the legislature. It noted that the single, most common theme in the testimony it received was that civil unions created a separate but unequal status,²⁰⁶ and that, as a result, true equality could not be achieved while two separate legal structures confer state

²⁰³ VT. STAT. ANN. tit. 15, § 1204(a) (2008). Vermont civil unions are exclusive to same-sex couples and may not be entered into by opposite-sex couples. *Id.*

²⁰⁴ Office of Legislative Council, *Report of the Vermont Commission on Family Recognition and Protection* (Apr. 21, 2008), available at https://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf (hereinafter “*Vt. Report*”).

²⁰⁵ *Vt. Report* at 1.

²⁰⁶ *Id.* at 6. A licensed psychologist testified to the impact that the inability of same-sex parents to marry has on their children: “[T]he fact that parents cannot marry and have to have an alternative marriage sends a very bad message. It is no different than water fountains for ‘negroes’ and ‘whites’ 45 years ago. The message is, ‘your family isn’t good enough and therefore your parents are unable to marry.’” *Id.* at 6-7.

benefits to couples based on sexual orientation.²⁰⁷ Notably, of those who testified, supporters of marriage equality in Vermont outnumbered opponents by approximately 20 to one.²⁰⁸ In permitting same-sex couples to marry, the Vermont legislature clearly responded to these voices.

Even though Vermont has now created full marriage equality between same-sex and opposite-sex couples, the NYSBA Special Committee on LGBT People and the Law thought it would be useful to summarize the findings of the Vermont Commission in this Report and the experience of Vermonters with civil unions.

Several individuals testified about the different treatment they received because they could enter only into a civil union and could not marry, relating their experience that civil unions create confusion, second-class citizenship and stigmatization.²⁰⁹ For example, one Vermont couple went to great lengths to ensure that the pregnant partner gave birth in a Vermont hospital, even though similar medical specialists were available much closer in a neighboring state.²¹⁰ The couple's concerns did not end with the birth of the child. After the birth, the non-biological mother legally adopted the child to ensure that she would be recognized as the child's mother when traveling outside of the state. One of the parents testified:

No parent should have to worry that his or her infant could be considered parentless in a foreign state because that state does not recognize the civil union. Navigating medical emergencies is stressful enough for families without having to worry about these

²⁰⁷ *Id.* at 6 Episcopal Bishop Thomas C. Ely of the Diocese of Vermont testified: "In the reality of our having lived with civil unions in Vermont for seven years now, we know that, as was true with school segregation, so too with civil unions and civil marriage: separate is not equal. Discrimination does continue" *Id.* at 7.

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.* at 6-8. Many witnesses testified that delays in medical treatment and decision-making stemming from the confusion created by their non-marriage partnership status resulted in undue stress and frustration in what were already difficult situations. *See id.*

²¹⁰ *Id.* at 8.

kinds of issues! Civil unions have gone a long way toward providing rights and benefits, but it has not made it possible to travel the country freely without being terrified that someone might not let you near in an emergency or might even refuse to recognize you as a parent.²¹¹

A particularly bitter custody dispute arose between two women who had entered into a Vermont civil union. In *Miller-Jenkins v. Miller-Jenkins*,²¹² the birth mother sought sole custody of the child born in the civil union. She filed her original claim in Vermont, but later filed a claim in Virginia, where she had moved; the lower Virginia court held that the non-biological parent/former partner could claim neither parentage nor visitation. On appeal, the Virginia appellate court reversed, applying the Parental Kidnapping Prevention Act (“PKPA”) to prevent the state from exercising jurisdiction over a suit originally filed in Vermont.²¹³ Following this case, at least one other court has applied the PKPA to allow former partners visitation or custody rights,²¹⁴ but the law remains unsettled: when a biological parent moves outside of the state in which the civil union was entered, the ability of a former partner to exercise second-parent status remains tenuous.

Numerous individuals also testified before the Vermont Commission that the continued ambiguity of the term and status of civil unions caused them endless frustration. All too often, they noted, they were “forced to explain their civil union status, what a civil union is, and how a

²¹¹ *Id.*

²¹² *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. 2006).

²¹³ *Id.*

²¹⁴ *See A.K. v. N.B.*, -- So.2d --, 2008 WL 2154098 (Ala. Civ. App. 2008) (holding that, since the former partner in a California domestic partnership had already begun proceedings to establish a parental relationship in California, the PKPA prevented Alabama from later claiming jurisdiction, granting full and temporary custody to one partner in a child custody battle).

civil union by law secures a legal status and consequences equal to marriage.”²¹⁵ Couples encountered this confusion “when using government, business, employer, and health care forms and documents that do not contemplate or appropriately deal with the status of being in a civil union.”²¹⁶

For example, a woman who complained to her self-insured employer about its denial of benefits to her civil union partner reported to the Vermont Commission that her CEO “compared civil union couples to employees who live with their boyfriend or girlfriend, but did not equate them with married couples.”²¹⁷ The woman testified:

We believed that part of the CEO’s failure to take civil unions seriously was his unfamiliarity with them and that the term “civil union” was nebulous enough to allow him to automatically dismiss our relationship. Had full marriage rights been accorded to lesbian and gay couples in Vermont, it is still possible that we would have been excluded from coverage [because the insurer is self-insured], but we still believe that it would have been much harder for the CEO ... to dismiss our relationship as insubstantial and casual.²¹⁸

Individuals also testified that issues of stigma affect couples who have entered into civil unions. For example, one woman who grew up on a dairy farm as the youngest of 12 children, three of whom are gay or lesbian, wrote of how within her family all the siblings are treated the same, yet the community treats them differently:

All of my siblings are either married or engaged to be married with the exception of the three siblings who do not have marriage as the option. This does not seem fair in this great country of opportunity and prosperity. The question of “why” enters my mind frequently. Why is it that nine of my siblings can share in all that marriage has

²¹⁵ *Vt. Report* at 9.

²¹⁶ *Id.* at 9-10.

²¹⁷ *Id.* at 10.

²¹⁸ *Id.*

to offer and yet, we (the gay/lesbian portion of the family) cannot? ... We are all of similar make-up, educational backgrounds, family values, success in careers, and love for our children. The answer can only be that we (my two brothers and I) are not as valued by our fellow citizens as my heterosexual siblings. How can this be? ... This is an astonishing realization.²¹⁹

A licensed psychologist addressed the impact of stigma on children with same-sex parents, noting that the separate structure of marriage and civil union “sends a very bad message” to them.²²⁰ Analogous concerns on behalf of the entire family were expressed by the Bishop of the Episcopal Church’s Diocese of Vermont, who observed that after seven years of experience with civil unions, “we know that ... with civil unions and civil marriage: separate is not equal.”²²¹

Indeed, one man testified that his father refused to attend his civil union ceremony while he “happily attended the marriage of the man’s gay brother in Massachusetts a short time later.”²²² According to the son, in his father’s mind,

a civil union was something for and about gay people. Not gay himself, he felt apart from it, and was unable to conceptualize a role for himself in this gay ceremony... [In attending my brother’s wedding, my] father understood what marriage means, and he understood his social role in welcoming a new son into his family through marriage. A marriage meant something to my father that a civil union could in no way replicate....²²³

Those who testified against marriage equality cited to the importance of preserving “the traditional legal and social union of one man and one woman,” and not disparaging those who

²¹⁹ *Id.* at 6.

²²⁰ *Id.* at 6-7. The psychologist went on to testify that the message children receive is “‘your family isn’t good enough and therefore your parents are unable to marry.’ No child should feel inferior because of the gender combination of their parents.” *Id.* at 7.

²²¹ *Id.*

²²² *Id.* at 9.

²²³ *Id.*

take this view.²²⁴ According to one Vermont Law School professor, it would be impossible to maintain respect for “the old marriage institution” should it be “suppress[ed] or de-institutionaliz[ed]” by the enactment of “genderless marriage”.²²⁵

Based on the totality of the testimony which it received, the Vermont Commission observed that “the very existence of a separate track for same-sex couples is unfair and creates an inferior status for same-sex couples and their families.”²²⁶ Although the Vermont Commission was not charged with taking a position as to whether Vermont should grant same-sex couples access to civil marriage, it found that changing the law to allow same-sex couples to marry would give them access to many of the practical and less tangible incidents of marriage, including its social, cultural and historical significance, and would provide a clearer and more direct statement in support of full equality by the state.²²⁷

In April 2009, the Vermont legislature concurred, overriding the governor’s veto, to ensure marriage equality for all.

B. New Jersey

The New Jersey legislature also created the category of civil unions in response to a ruling from the state’s highest court. Following the state Supreme Court’s holding in *Lewis v. Harris*²²⁸ that same-sex couples are guaranteed equal protection under the state constitution, the legislature established civil unions for same-sex couples, effective February 19, 2007. New

²²⁴ *Id.* at 21.

²²⁵ *Id.* at 21 (quoting testimony of Professor Monte M. Stewart of Vermont Law School).

²²⁶ *Id.* at 6. The Commission further concluded that the difference between “civil union” and “marriage” went well beyond a linguistic distinction. Such terms, said the Commission, are very “powerful” and quite capable of producing “stigmatizing results.” *Id.* at 9.

²²⁷ *Id.* at 27-29.

²²⁸ *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

Jersey's Civil Union Act mirrored the objectives of Vermont's Civil Union Act in its attempt to provide to same-sex couples all of the benefits and responsibilities associated with civil marriage.²²⁹ The legislation also established an independent commission, the New Jersey Civil Union Review Commission (hereinafter, the "New Jersey Commission"), to evaluate the effectiveness of the law and provide semi-annual reports on the status of civil unions in the state.²³⁰

The New Jersey Commission issued its Final Report on December 10, 2008.²³¹ Based on the written and public testimony it had broadly solicited, the Commission found that there are both tangible and more amorphous (though no less painful) harms experienced by same-sex couples who have entered into civil unions.²³²

Employers have hesitated to provide "civil unioned" employees with the same benefits they provide to married couples. For example, in 2007, United Parcel Service ("UPS") received significant media attention when it denied benefits to a New Jersey employee's partner, despite

²²⁹ N.J. STAT ANN. § 37: 1-32 (2009) (providing a non-exclusive list of the legal benefits, protections, and responsibilities of spouses that shall apply in like manner to civil union couples. The list includes such rights as home ownership, rights of a surviving spouse; laws relating to insurance, health, and pension benefits; spousal immunity; and the right to change one's surname without petitioning the court).

²³⁰ N.J. STAT ANN. § 37: 1-36 (2009). Some of the duties of the Commission included: studying the implementation, operation and effectiveness of the act; determining whether additional protections are needed; evaluating the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage; and evaluating the financial impact on the state of same-sex couples being provided civil unions rather than marriage. *Id.*

²³¹ New Jersey Civil Union Review Commission, *Final Report: The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law* (December 10, 2008), available at <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf> (last visited Apr. 30, 2009) (hereinafter "N.J. Final Report"). This Final Report was based on the testimony recorded in its Interim Report (February 2008) and additional testimony received after that report was published. See, New Jersey Civil Union Review Commission, *First Interim Report* (Feb. 19, 2008), available at <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf> (last visited Apr. 30, 2009) (hereinafter "N.J. Interim Report").

²³² *N.J. Final Report* at 5-6.

the partners' having entered into a New Jersey civil union.²³³ The company stated that the partner could not be added to the employee's benefit plan because "New Jersey law does not treat civil unions the same as marriages"²³⁴ This denial was further justified, said UPS, because ERISA preempted state law in the realm of partner healthcare benefits.²³⁵ Notwithstanding this assertion, the company acknowledged that if New Jersey were to provide same-sex couples the right to marry, as had been done in Massachusetts, it would extend benefits to same-sex spouses as it had in Massachusetts.²³⁶ Following intervention by the state's governor, UPS ultimately agreed to provide spousal benefits to the partners of employees who enter into civil unions.²³⁷

The New Jersey Commission identified another common theme in the testimony: civil union status was not understood by the general public. Individuals testified that although marriage is universally recognized by the public, they must repeatedly explain their civil union status to employers, doctors, nurses, insurers, teachers, and emergency room personnel.²³⁸ In addition, an expert from Massachusetts testified that same-sex couples who have been permitted

²³³ Press Release, Lambda Legal, *UPS Denies Spousal Benefits to Employees in New Jersey Civil Unions: Lambda Legal to Represent Couples* (July 9, 2007), available at <http://www.lambdalegal.org/news/pr/ups-denies-nj-spousal-benefits.htm> (last visited Apr. 30, 2009) (hereinafter "July 9, 2007 Press Release"). The Commission did not report on this employee's experience.

²³⁴ Letter from UPS Plan Administrator to Gabrielae Brazier (May 31, 2007), available at <http://data.lambdalegal.org/our-work/in-court/other/ups-denial-letter.html> (last visited May 1, 2009). See also July 9, 2007 Press Release, *supra*.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Press Release, United Parcel Service, *UPS Extends Health Benefits to N.J. Civil Union Partners* (July 30, 2007), available at <http://www.pressroom.ups.com/pressreleases/current/0,1088,4913,00.html> (last visited Apr. 30, 2009).

²³⁸ *N.J. Final Report* at 3, 11-12, 16-17, 20, 26, 40, 68, 72.

to marry in that state have faced fewer problems than couples in New Jersey and Vermont who have entered into civil unions.²³⁹

Witnesses provided specific examples of the categorical shortcomings of the civil union. For example, a New Jersey man testified that when he went to the bank to open a line of credit and was asked about his marital status, the bank employee explained that the computer system did not contemplate civil unions.²⁴⁰ A New Jersey woman testified that when she told the nurse prior to having a medical procedure performed that any decisions made while she was unconscious should be made by her partner, the nurse not only asked if she was her “legal partner,” but also asked her to present documentation to prove her legal status.²⁴¹

Such experiences, the New Jersey Commission found, in effect gave rise to a “second-class status” for couples who had entered into these unions,²⁴² noting that “the separate categorization established by the Civil Union Act invites and encourages unequal treatment of same-sex couples and their children.”²⁴³ The Commission also heard testimony that society attaches significant meaning to the term “marriage” and concluded that extending marriage rights

²³⁹ *Id.* Tom Barbera, who works for the Service Employees International Union and served as Vice President of the Massachusetts AFL-CIO, explained to the Commission how Massachusetts employers had been more willing to grant benefits to same-sex couples because of marriage equality in the state. He stated, “It is not that ERISA-covered employers in Massachusetts don’t understand that federal law allows them to refrain from providing benefits to same-sex married couples. It’s that employers also understand that without the term ‘civil union’ or ‘domestic partner’ to hide behind, if they don’t give equal benefits . . . these employers would have to come forth with the real excuse for discrimination.” *Id.* at 20-21.

²⁴⁰ *N.J. Interim Report* at 14. Another New Jersey resident reported similar frustration when, upon being called for jury duty, a judge asked every potential juror whether they were single or married. This individual testified, “I felt like I was hit with a ton of bricks, because the judge repeatedly asked every person, ‘Are you single, are you married?’ I’m thinking, how do I answer that, because I am not. I’m not single, I’m not married. I’m in a court of law and here is a judge qualifying candidates for the jury, and what I am is not represented in any way.” *Id.* at 14-15.

²⁴¹ *Id.* at 13.

²⁴² *Id.* at 17.

²⁴³ *N.J. Final Report* at 1.

could remedy the existing shortcomings and make a significant impact in providing equality to same-sex couples in New Jersey.²⁴⁴ As a result, the Commission unanimously recommended to the Governor and state legislature that state law should be amended immediately to allow same-sex couples to marry as “any delay in marriage equality will harm all people of New Jersey.”²⁴⁵

C. New Hampshire

Unlike Vermont and New Jersey, the New Hampshire legislature adopted civil unions without a judicial mandate. On April 4, 2007, by a vote of 243 to 129, the New Hampshire House passed a civil union bill conferring the same “rights, responsibilities and obligations” to same-sex couples as are enjoyed by married, opposite-sex couples.²⁴⁶ The bill was then approved by the state senate 14 to 10.²⁴⁷ On May 31, 2007, Governor John Lynch signed the bill into law.²⁴⁸ On January 1, 2008, civil unions began to take place in New Hampshire.²⁴⁹

In March 2009, the New Hampshire House voted to grant marriage rights to same-sex couples.²⁵⁰ The state’s senate passed a similar bill on April 30, 2009. The legislation must be

²⁴⁴ *Id.* at 9.

²⁴⁵ *Id.* at 45.

²⁴⁶ Eric Moskowitz, *N.H. House Passes Civil Unions*, CONCORD MONITOR, April 5, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070405/REPOSITORY/704050342> (last visited Apr. 30, 2009).

²⁴⁷ Beverley Wang, *State Senate Approves Civil Unions for Same-Sex Couples*, CONCORD MONITOR, April 26, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070426/REPOSITORY/70426002/1030> (last visited Apr. 30, 2009).

²⁴⁸ Associated Press, *Lynch Signs Bill Legalizing Civil Unions*, CONCORD MONITOR, May 31, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070531/BREAK/70531001/1030> (last visited Apr. 30, 2009).

²⁴⁹ Carol Robidoux, *Civil Unions Ring in the New Year*, UNION LEADER, Jan. 1, 2008.

²⁵⁰ Katie Zezima, *Gay Marriage, Set Back in One State, Gains in a 2nd*, N.Y. TIMES, Mar. 26, 2009, available at www.nytimes.com/2009/03/27/us/27hampshire.html?fta=y (last visited May 2, 2009).

reconciled before it can be forwarded to the governor, who has indicated a desire to keep the state's civil union structure in place.²⁵¹

D. Oregon

Oregon became the ninth state to recognize same-sex unions in some fashion when the state legislature created the category of “domestic partnerships” and granted same-sex couples access to over 500 rights and responsibilities available through marriage.²⁵² In essence a marriage-like statutory scheme for gays and lesbians, the Oregon Family Fairness Act states:

any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married . . . is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership....²⁵³

The legislation, signed by Governor Ted Kulongoski on May 9, 2007, became effective on February 1, 2008.²⁵⁴ Since then, about one-fifth of the state's same-sex couples - approximately 2,600 couples - have opted to register as domestic partners.²⁵⁵ Many same-sex couples have declined, however, to enter into this legal partnership because they find that it is “too narrow and falls short of their ultimate goal - gay marriage.”²⁵⁶

²⁵¹ *Same-sex Marriage Bill Passes New Hampshire Senate*, CNN.COM, Apr. 30, 2009, available at <http://www.cnn.com/2009/POLITICS/04/03/nh.same.sex.marriage/index.html?iref=newssearch> (last visited May 2, 2009).

²⁵² *Top 25 Rights and Responsibilities*, BASIC RIGHTS OREGON, available at http://www.basicrights.org/?page_id=188 (last visited Apr. 30, 2009).

²⁵³ Oregon Family Fairness Act, H.B. 2007 § 9(1) (Or. 2007).

²⁵⁴ *Ruling Allows Legal Status for Partners of Same Sex*, N.Y. TIMES, Feb. 3, 2008, available at <http://www.nytimes.com/2008/02/03/us/03oregon.html> (last visited Apr. 30, 2009).

²⁵⁵ Bill Graves, *Only One-Fifth of Oregon's Same-Sex Couples Opt for Union*, THE OREGONIAN, Feb. 2, 2009.

²⁵⁶ *Id.*

E. Maine

Demonstrating the vast differences among statutory schemes that aim to provide greater equality in the treatment of same-sex couples, Maine’s domestic partnership legislation, in contrast to the comprehensive rights and responsibilities accorded to same-sex couples in Oregon, provides rights on a far more limited scale. The statute, passed by the state legislature in April 2004 and effective on July 30, 2004, provides rights of inheritance to both same- and opposite-sex couples who choose to register their relationship with the state.²⁵⁷ Registered domestic partners are treated as married regarding probate, guardianship, conservatorship, victim’s compensation, and inheritance issues.²⁵⁸

F. Washington State

Since July 2007, same-sex couples in Washington have enjoyed certain limited rights under the state’s domestic partnership law. Under the original State Registered Domestic Partnership (“SRDP”) Law, registered partners had health care rights, could sue for wrongful death, and were given the right of inheritance.²⁵⁹ The state legislature greatly expanded the scope of the SRDP in changes effective in June 2008. The current law preserves the original rights and provides increased economic benefits and frameworks for protecting communal property, health

²⁵⁷ LD 1579, 2004 Leg., 121st Leg. (Me. 2004).

²⁵⁸ *Domestic Partnerships Information*, EQUALITY MAINE, available at <http://equalitymaine.org/domestic-partnerships/domestic-partnerships-information> (last visited Apr. 30, 2009).

²⁵⁹ *The Legal Rights of Registered Domestic Partners in Washington State*, LAMBDA LEGAL AND QLAW, available at <http://data.lambdalegal.org/pdf/publications/wa-detail-2007-dp-law.pdf> (last visited Apr. 30, 2009).

insurance for partners of state employees, spousal privilege, and numerous other rights and duties of married couples under state law.²⁶⁰

G. International

I. Mexico

Although marriages and civil unions between same-sex couples are not recognized on a federal level in Mexico, civil unions between same-sex couples are legal in Mexico City—the Federal District and capital of Mexico—and in the state of Coahuila.²⁶¹ On November 2006, Mexico City began allowing same-sex couples to enter civil unions.²⁶² On January 11, 2007, Coahuila adopted a similar law permitting civil unions between same-sex couples, but prohibiting child adoptions, including adopting the child of a partner.²⁶³ Both Mexico City and Coahuila allow same-sex couples who have entered civil unions to have “joint health- and life-insurance policies, make medical decisions for each other and inherit pensions and property from the deceased partner.”²⁶⁴

²⁶⁰ See *The Legal Rights of Registered Domestic Partners in Washington State*, LAMBDA LEGAL (May 2008), available at http://data.lambdalegal.org/publications/downloads/gen_legal-rights-registered-domestic-partners-washington.pdf (last visited Apr. 30, 2009) for a comprehensive list of these rights.

²⁶¹ See *Mexicans Flatly Reject Same-Sex Marriage*, ANGUS REID GLOBAL MONITOR, Dec. 27, 2006, available at <http://www.angus-reid.com/polls/view/14225> (last visited Apr. 30, 2009); *Northern Mexican State of Coahuila Approves Law Recognizing Same-Sex Unions*, ADVOCATE.COM, Jan. 13-15, 2007, available at www2.advocate.com/news_detail_ektid41082.asp (last visited Apr. 30, 2009).

²⁶² *Same-Sex Marriage: Redefining Legal Unions Around the World*, *supra* note 180. The Democratic Revolution Party, which holds the majority in Mexico City’s local legislature, voted 43-17 to create civil unions. *Mexico City Approves Same-Sex Civil Unions*, ADVOCATE.COM, Nov. 10, 2006, available at http://www.advocate.com/news_detail_ektid39335.asp (last visited Apr. 30, 2009).

²⁶³ *Pacto Civil de Solidaridad*, Decreta Numero 209, Jan. 11, 2007, available at <http://sgob.sfpcoahuila.gob.mx/admin/uploads/Documentos/modulo3/PactoCivilSolidaridad.pdf> (last visited Apr. 30, 2009).

²⁶⁴ *Same-Sex Unions in Latin America*, MIAMI HERALD, July 27, 2007, at L6; see ANGUS REID GLOBAL MONITOR, *supra* note 261.

2. Colombia

Colombia has led Latin America in providing gay and lesbian citizens with the rights accorded to its heterosexual population. In a 2007 ruling, the Constitutional Court, the nation's highest, provided same-sex couples legal recognition of their relationships when it declared that the law which governs the formation of heterosexual common law marriages was to apply equally to same-sex couples.²⁶⁵ Although the Court stopped short of permitting same-sex couples to marry, couples who form a committed, monogamous relationship for over two years can, through certain procedural measures, receive the legally recognized status of *compañeros permanentes* (“permanent companions”).²⁶⁶ Another ruling later that year held that permanent companions of gay men and lesbians would be recognized as beneficiaries under the extended family coverage provided by the government's mandatory health insurance plan (“social security”).²⁶⁷

Following the 2007 rulings, the Constitutional Court concluded that 25 laws violated the constitutionally mandated right of gay men and lesbians to equal treatment and thus were

²⁶⁵ See *Sentencia C-075-07* (citing Law 54 of 1990).

²⁶⁶ *Id.*

²⁶⁷ See *Sentencia C-811-07*. The Constitutional Court's ruling addressed Law 100 of 1993, Article 163, which defined “family” using the gendered pronouns for the term “permanent companion.” The Court's ruling explicitly stated that same-sex partners were to benefit from the Colombian equivalent of spousal health benefits, so long as they were “permanent companions,” as defined by the Court's February 2007 decision in *Sentencia C-075-07*. *Sentencia C-811-07*. Although a permanent companion's legal right to such benefits is clear, translating a socially volatile ruling into actual benefits can be more challenging. A Colombian human rights organization, Colombia Diversa, details the obstacles faced by a gay man who was forced to resort to the legal system to secure his constitutionally guaranteed spousal social security benefits. See *Parejas Como Las Demás*, COLOMBIA DIVERSA, Feb. 19, 2009, available at http://www.colombiadiversa.org/index.php?option=com_content&task=view&id=638&Itemid=469 (last visited Apr. 30, 2009).

unconstitutional.²⁶⁸ Among the benefits implicated in a ruling that effectively provides Colombia's same-sex couples with most of the rights enjoyed by their opposite-sex counterparts, are increased access to health care and government services for partners of those serving in the armed forces; spousal privilege permitting someone to refuse to testify against his or her permanent companion; the possibility of securing Colombian citizenship for a foreign partner; and eligibility for spousal indemnification in traffic-related deaths.²⁶⁹ The Court expanded both the rights to be shared by same-sex couples as well as the responsibilities. For example, criminal penalties for domestic violence will now apply to gay men and lesbians, and all permanent companions, regardless of sexual orientation, must now comply with communal property laws.²⁷⁰

3. *United Kingdom*

In 2004, the United Kingdom enacted the Civil Partnership Act, which received Royal Assent on November 18, 2004. This Act, which came into full force in December 2005, is available only to same-sex couples and is designed to confer identical rights and responsibilities to civil marriage.²⁷¹ According to the Act, those who enter a civil partnership are entitled to the same property and immigration rights as married heterosexual couples and can receive the same

²⁶⁸ See Sentencia C-336-08; Daniel Bonilla, *La Igualdad y Las Parejas del Mismo Sexo*, SEMANA.COM, Feb. 2, 2009, available at <http://www.semana.com/noticias-justicia/igualdad-parejas-del-mismo-sexo/120354.aspx> (last visited Apr. 30, 2009).

²⁶⁹ See *id.*; 42 Disposiciones Modificó la Corte Constitucional para Amparar Derechos de las Parejas Gay, EL TIEMPO, Jan. 30, 2009, available at http://www.eltiempo.com/colombia/justicia/42-disposiciones-modifico-la-corte-constitucional-para-amparar-derechos-de-las-parejas-gay_4780782-1 (last visited Apr. 30, 2009).

²⁷⁰ See 42 Disposiciones Modificó, *supra*.

²⁷¹ Civil Partnership Act, 2004, Ch. 33 (Eng.), available at http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1 (last visited Apr. 30, 2009); see also *Gay Marriage Around the Globe*, BBC NEWS, Dec. 22, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4081999.stm> (last visited Apr. 30, 2009).

exemption as married couples regarding inheritance tax, social security and pension benefits.²⁷²

The Act also provides “reasonable maintenance for civil partners and children of the family [and the] ability to gain parental responsibility for a partner’s children.”²⁷³

This status, however, is not the same as marriage in the United Kingdom. In 2003, a lesbian couple, Susan Wilkinson and Celia Kitzinger, who were residents of England, married in British Columbia, Canada. Whereas an opposite-sex couple married in Canada would have had their marriage automatically recognized as a valid marriage in the United Kingdom, the marriage between Wilkinson and Kitzinger was converted by the government to a civil partnership pursuant to the enactment of the Civil Partnership Act.²⁷⁴

The couple subsequently sought a “declaration that the marriage was a valid marriage at its inception” from the President of the Family Division of the High Court, claiming that a failure to recognize the validity of the marriage constituted a breach of their rights under the European Convention on Human Rights.²⁷⁵ In July 2006, the High Court rejected the couple’s bid and ruled their legal Canadian marriage invalid in the United Kingdom, finding that to the extent same-sex couples are treated differently from heterosexual couples, “such discrimination has a legitimate aim, is reasonable and proportionate.”²⁷⁶

²⁷² *Same-Sex Partnership Law to Take Effect*, L.A. TIMES, Dec. 05, 2005, at A5.

²⁷³ *At-a-Glance: Civil Partnerships*, BBC NEWS, Mar. 31, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/politics/3585819.stm (last visited Apr. 30, 2009).

²⁷⁴ See Civil Partnership Act, 2004, Ch. 33, at [215] (requiring that same-sex couples who legally marry outside the United Kingdom “are to be treated as having formed a civil partnership”).

²⁷⁵ *Wilkinson v. Kitzinger & Ors*, (2006) EWHC 2022 (Fam.), at [3], available at <http://www.bailii.org/ew/cases/EWHC/Fam/2006/2022.html> (last visited Apr. 30, 2009); see also Equal Marriage Rights Home Page, <http://www.equalmarriagerights.org/> (last visited Apr. 30, 2009).

²⁷⁶ *Wilkinson*, EWHC 2022, at [122].

4. *Other Countries*

a. *Hungary*

In December 2007, the Parliament of Hungary approved a registered partnership statute that made available most of the protections and benefits of marriage to both heterosexual and same-sex couples.²⁷⁷ Shortly before the law was to take effect, however, the Hungarian Constitutional Court struck it down on the grounds that, in allowing opposite-sex couples to register, it contradicted the special status conferred on the institution of marriage by the Constitution.²⁷⁸ The Parliament responded by revising the law to apply only to same-sex couples, and the legislation was approved by the legislature on February 12, 2009.²⁷⁹

b. *Israel*

Although marriage laws in Israel are controlled by the Orthodox rabbinate and Israeli law prohibits secular civil marriage for all couples,²⁸⁰ in November 2006, in a 6-1 ruling, Israel's High Court of Justice began recognizing the civil ceremonies of same-sex couples that are performed abroad by allowing these couples to register their marriages in Israel.²⁸¹ Two years

²⁷⁷ *Hungarian Government Proposes Registered Same-Sex Partnerships*, PINKNEWS.COM, Feb. 12, 2009, available at <http://www.pinknews.co.uk/news/articles/2005-11133.html> (last visited Apr. 30, 2009).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ David Kaufman, *Israel at 60*, THE OUT TRAVELER, Fall 2008, at 40; *Israeli High Court Recognizes Same-Sex Marriages*, CBCNEWS.CA, Nov. 21, 2006, available at <http://www.cbc.ca/world/story/2006/11/21/israel-gaymarriage.html> (last visited Apr. 30, 2009).

²⁸¹ Kaufman, *supra*. Although Israel has provided same-sex partner benefits since 1994, gay and lesbian couples still may not marry “within Israel’s borders.” According to Kaufman’s article, “Israeli law does not provide for secular civil marriages; all Jewish weddings must be officiated by an Orthodox rabbi, Christian weddings by a priest or pastor, and Muslim weddings by a cleric.” *Id.*

later, in 2008, Israel legally permitted same-sex couples to adopt children together and for one partner to adopt the other partner's child.²⁸²

c. Andorra

In March 2005, the Principality of Andorra, one of the smallest principalities in Europe with a population of only 83,888,²⁸³ began recognizing the right of same-sex couples to enter civil unions, or “Stable Union of a Couple,” in which the couples can share most marriage rights, including the right to adopt.²⁸⁴ To be eligible, the members of the couple must prove that they have the right of residency in Andorra, they have cohabitated for at least six months, and they “have a private pact regulating their property and personal relations.”²⁸⁵

III. Rejection of Marriage Rights For Same-Sex Couples

A. The Defense of Marriage Act and the Mini-DOMAs

1. The History and Terms of the DOMAs

In 1996, Congress enacted the Defense of Marriage Act (“DOMA”), which defines marriage as a union of one man and one woman for the purpose of federal recognition, and relieves states of the obligation to recognize same-sex couples’ marriages validly performed in another state.²⁸⁶

²⁸² *Id.*; see also David Regev, *State to Help Same-Sex Couples Adopt*, ISRAEL NEWS, YNETNEWS.COM, July 29, 2007, <http://www.ynetnews.com/articles/0,7340,L-3430923,00.html> (last visited Apr. 30, 2009)

²⁸³ Central Intelligence Agency, *The World Factbook: Andorra* (Apr. 23, 2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/an.html> (last visited Apr. 30, 2009) (information estimated through July 2009).

²⁸⁴ *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA EUROPE, <http://www.ilga-europe.org/europe/issues/Marriage-and-partnership/Marriage-and-partnership-rights-for-same-sex-partners-country-by-country> (last visited Apr. 30, 2009).

²⁸⁵ *Id.*

²⁸⁶ PUB. L. NO. 144-199, 110 STAT. 2419 (1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C. In enacting the federal DOMA, Congress was relying on the theory that it had the authority to decide when the Full

The first substantive provision of DOMA (Section Two) specifically defines marriage as a “legal union between one man and one woman” and limits the availability of federal benefits (and responsibilities) to heterosexual married couples.²⁸⁷ Whether Congress has the authority to so define marriage, or to actively discriminate against a class of individuals, ultimately will be challenged in the courts.²⁸⁸ For now, however, enforcement section two of DOMA means that federal benefits are not available to same-sex couples who marry.

At the time *Goodridge* was decided in 2003 (requiring Massachusetts to permit same-sex couples to marry), more than three-fourths of the states already prohibited same-sex couples from marrying, either by pre-existing statute, or through “mini-DOMAs” (*i.e.*, statutes or state constitutional amendments modeled after the federal DOMA). As of the *2004 Report*, only eleven states had not enacted a mini-DOMA statute or its equivalent.²⁸⁹ The mini-DOMAs vary in scope - some, in addition to prohibiting the recognition of same-sex couples’ marriages, go further and prohibit the recognition of civil unions, domestic partnerships, or any similar legal relationship between same-sex couples.²⁹⁰ Some go so far as to prohibit the recognition of any

Faith and Credit clause is applicable; this issue has been hotly debated. For a discussion of the constitutionality of the federal DOMA, *see* Sec. III(F)(3) of the *2004 Report*.

²⁸⁷ This provision of DOMA states: “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.” 1 U.S.C.A. § 7 (West 2009).

²⁸⁸ *See infra* next section.

²⁸⁹ *See 2004 Report*, n.1533. These states included Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin and Wyoming. *Id.*

²⁹⁰ *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 269 (Winter 2007).

contractual rights arising from any legal union of same-sex couples²⁹¹ or any judgment arising from judicial proceedings involving married same-sex couples.²⁹²

In his January 20, 2004, State of the Union address, President Bush encouraged the country to “take a stand” against marriage between same-sex couples.²⁹³ Making a veiled reference to the *Goodridge* decision in Massachusetts, he criticized the “activist judges” who were “redefining marriage by court order,” and declared that the nation must protect “the sanctity of marriage” against judges who would “insist on forcing their arbitrary will upon the people.”²⁹⁴ Implicitly alluding to the proposed Federal Marriage Amendment, which would constitutionally prohibit marriages of same-sex couples,²⁹⁵ he stated that the only alternative left to the nation was to “defend the sanctity of marriage” through the “constitutional process.”²⁹⁶

Prior to the *Goodridge* decision, and the 2004 State of the Union Address, the only states with constitutional amendments restricting marriage to opposite-sex couples were Alaska,

²⁹¹ *Id.* at 270. The mini-DOMAs in Alaska, Arkansas, Minnesota, and Virginia all contain a prohibition on contractual rights.

²⁹² *Id.* at 275. The mini-DOMAs in Florida, Georgia, Ohio, Texas and West Virginia contain the prohibition of enforcement of judgments relating to married same-sex couples.

²⁹³ Presidential State of the Union Address, Jan. 20, 2004. A full transcript of the Address is available at <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.1/index.html> (last visited Apr. 30, 2009).

²⁹⁴ *Id.* Lambda Legal, an LGBT rights organization, refuted Bush's allegations of liberal bias on the bench, finding that a majority of the judges who had issued significant decisions expanding rights for gay and lesbian people were actually conservatives who were appointed by Republicans. *Lambda Legal Targets "Activist Judge" Distortion with Aggressive Multifaceted National Campaign*, LAMBDA LEGAL, Mar. 2, 2004, available at <http://www.lambdalegal.org/news/pr/activist-judge-constitution-amendment-ban-gay-marriage.html> (last visited Apr. 30, 2009) (noting “Republican governors appointed six of the seven justices on the Massachusetts high court that recently ruled gay couples have the right to marry, and Republican presidents appointed four of the six U.S. Supreme Court justices who voted to strike down Texas's law banning gay couples from having sex”).

²⁹⁵ H.J. RES. 56, introduced in the House in May 2003, and the related resolution, S.J. RES. 26, introduced in the Senate in November 2003, proposed amending the Federal Constitution to define marriage as the union of one man and one woman. The resolution was defeated by Senate vote on July 14, 2004. See Empire State Pride Agenda Press Release, *Federal Marriage Amendment Dies in U.S. Senate* (July 14, 2004), available at <http://www.prideagenda.org/tabid/304/default.aspx?c=223> (last visited Apr. 30, 2009).

²⁹⁶ 2004 State of the Union Address, *supra*.

Nebraska, Nevada and Hawaii,²⁹⁷ which it conferred on the legislature the power to limit marriage to opposite-sex couples.²⁹⁸ The landscape has since changed drastically, as even states with existing statutory prohibitions on marriage between persons of the same sex have sought to amend their constitutions to explicitly limit marriage to opposite-sex couples.²⁹⁹

In 2004, proposed constitutional amendments banning same-sex couples from marrying appeared on the ballot in thirteen states, and all thirteen measures passed.³⁰⁰ By November 2006, twenty states had amended their constitutions to limit marriage to opposite-sex couples.³⁰¹ In the interim elections that year, an additional eight states had constitutional amendments on the ballot

²⁹⁷ See *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN.COM, Nov. 3, 1998, available at <http://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot/> (last visited Apr. 30, 2009). The legislature thereafter passed a law defining marriage as being between one man and one woman. For more information about the evolution of Hawaii law in this area, see *2004 Report* at 229-33.

²⁹⁸ See Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, N.Y. TIMES, Aug. 4, 2004; National Conference of State Legislatures, *Same-Sex Marriage Measures on the 2004 Ballot* (Nov. 17, 2004), available at www.ncsl.org/programs/legismgt/statevote/marriage-mea.htm (last visited Apr. 30, 2009).

²⁹⁹ See, e.g., Kilian Melloy, *Anti-Gay Fla. Initiative Will Appear on Nov. Ballot*, EDGE BOSTON, Feb. 3, 2008, available at <http://www.edgeboston.com/index.php?ch=news&sc=glt&sc2=news&sc3=&id=55748> (last visited Apr. 30, 2009) (“Although Florida already has a law on the books specifically denying gay and lesbian families marriage equality, anti-gay proponents of the amendment fear that a court decision could, at some point in time, overturn that legislation, allowing same-sex couples access to the protections of matrimony.”); Tom Barnes, *Pa. House Passes Gay Marriage Ban*, PITTSBURGH POST-GAZETTE, June 7, 2006 (“‘Activist judges in some states, such as Massachusetts, have legalized same-sex marriages, [Pennsylvania Family Institute President Michael Geer] said, adding it would be much harder for judges to redefine marriage if it were contained in the state constitution.’”).

³⁰⁰ See Associated Press, *Voters Pass All 11 Bans on Gay Marriage*, MSNBC, Nov. 3, 2004, available at <http://www.msnbc.msn.com/id/6383353> (last visited May 1, 2009). The states that adopted these amendments were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. The Louisiana amendment was voted on in a special election in September 2004; the Missouri amendment was voted on during state primaries in August 2004. The remaining amendments were passed during the general elections in November of that year. See *Same-Sex Marriage Measures on the 2004 Ballot*, *supra*.

³⁰¹ See National Conference of State Legislatures, *Same-Sex Marriage Issues on the 2006 Ballot* (Nov. 12, 2006), available at www.ncsl.org/statevote/samesex_06.htm (last visited May 1, 2009). In addition to the seventeen states with anti-marriage constitutional amendments after the 2004 elections (including the four states with pre-2004 amendments), Texas and Kansas passed amendments in 2005, and Alabama passed an amendment during the June 2006 primaries, bringing the total number to twenty states.

defining marriage as being between one man and one woman;³⁰² all but one amendment passed,³⁰³ bringing the total number of states with constitutional bans to twenty-seven.³⁰⁴

In the November 2008 elections, the number of constitutional amendments on the ballot banning marriage between persons of the same sex dwindled to three: Arizona, California, and Florida, and all three passed.³⁰⁵ This was the second time the people of Arizona had voted on the measure. In the 2006 elections, the amendment was defeated 52% to 48%;³⁰⁶ in 2008, the same measure passed by 56% to 44%.³⁰⁷ As discussed above, the constitutionality of the California measure (“Proposition 8”) is being reviewed by the California Supreme Court.³⁰⁸

As of January 2009, thirty states had enacted constitutional amendments banning same-sex couples from civil marriage;³⁰⁹ twenty-six of these amendments had been passed in the last

³⁰² These states were Arizona, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. *Id.*

³⁰³ Of the eight states with anti-marriage constitutional amendments on the ballot, Arizona alone did not pass its amendment to define marriage as a heterosexual union. *See id.*

³⁰⁴ *Id.*

³⁰⁵ National Conference of State Legislatures, *Same-Sex Marriage on the 2008 Ballot* (Nov. 6, 2008), available at http://www.ncsl.org/programs/legismgt/stateVote/same-sex_marriage.htm (last visited May 1, 2009); *Election Center 2008: Ballot Measures*, CNN.COM, available at <http://edition.cnn.com/ELECTION/2008/results/ballot.measures> (last visited at May 1, 2009)

³⁰⁶ *Same-Sex Marriage Issues on the 2006 Ballot, supra.*

³⁰⁷ *Same-Sex Marriage on the 2008 Ballot, supra.*

³⁰⁸ *See supra* Part One, Sec. I.B.5.

³⁰⁹ This number includes the Hawaii amendment, which leaves the definition of marriage up to the state legislature. *See supra* note 297.

four years.³¹⁰ Of the twenty-six amendments, ten of them began as voter initiatives, while the rest were submitted to a popular vote after passage by the state legislature.³¹¹

Not all attempts to pass constitutional amendments have been successful. Efforts to enact such measures were stymied in Illinois,³¹² Pennsylvania,³¹³ and Puerto Rico.³¹⁴ Further, New York does not have a mini-DOMA and has not amended its constitution to ban same-sex couples from marrying.

2. *Legal Challenges to the Federal DOMA*

The federal DOMA neither prohibits same-sex couples from marrying, nor disallows interstate recognition of their marriages. Congress passed this legislation specifically to restrict

³¹⁰ Currently, the states without constitutional bans on the marriage of same-sex couples are: Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia and Wyoming, as well as the District of Columbia.

³¹¹ See Initiative and Referendum Institute, *Same Sex Marriage: Breaking the Firewall in California?*, BALLOTWATCH, at 3, Iss. No. 2 (Oct. 2008), available at [http://www.iandrinstitute.org/BW%202008-2%20\(Marriage\)\[1\].pdf](http://www.iandrinstitute.org/BW%202008-2%20(Marriage)[1].pdf) (last visited May 1, 2009). For a detailed breakdown of states with statutes and/or constitutional amendments, see National Gay and Lesbian Task Force, Issue Map: Anti-Gay Marriage Measures in the U.S. (Apr. 3, 2008), available at http://www.thetaskforce.org/reports_and_research/marriage_map (last visited May 1, 2009).

³¹² A group called Protect Marriage Illinois launched an effort to get a state constitutional amendment banning same-sex couples from marrying on the ballot in November 2008, but the measure failed to gather the required amount of signatures in time for the election. The group has vowed to try again to get the measure on the ballot in the 2010 election. See Rhys Saunders, *Gay Marriage Foes to Try Again in Illinois*, THE STATE JOURNAL-REGISTER, Nov. 17, 2008, available at <http://www.sj-r.com/homepage/x1772950620/Gay-marriage-foes-to-try-again-in-Illinois> (last visited Apr. 30, 2009).

³¹³ A bill that would have amended the state constitution to ban same-sex marriage was withdrawn from consideration in May 2008, after the bill's main sponsor learned it would likely be held up indefinitely by the House State Government Committee. See Tom Barnes, *Same-Sex Marriage Ban Likely Dead in Pa. Senate*, PITTSBURGH POST-GAZETTE, May 7, 2008, available at <http://www.post-gazette.com/pg/08128/879641-178.stm> (last visited May 1, 2009); Associated Press, *Lawmakers Hear Testimony on Same-Sex Proposal*, PENNLIVE.COM, Apr. 11, 2008, available at http://www.pennlive.com/midstate/index.ssf/2008/04/samesex_marriage_amendment_tes.html (last visited Apr. 30, 2009).

³¹⁴ Associated Press, *Constitutional Amendment to Ban Gay Marriage in Puerto Rico Fails*, ADVOCATE.COM June 14, 2008, available at http://www.advocate.com/news_detail_ektid55845.asp (last visited Apr. 30, 2009). The measure died when the House of Representatives failed to submit it to a vote before adjourning for the 2007-2008 legislative term.

marital benefits and federal statutes to heterosexual married couples and to allow states to do the same. The first clause of DOMA allows the states to deny full faith and credit to marriages of same-sex couples contracted in other states.³¹⁵ A majority of states have adopted mini-DOMA's, state constitutional amendments, or statutes specifically defining marriage within the state as between a male and one female and declined to recognize marriages of same-sex couples performed elsewhere.³¹⁶

So far judicial challenges to the first clause of the DOMA have been limited. For example, in *Wilson v. Ake*,³¹⁷ two Florida residents, married in Massachusetts, sought a declaratory judgment in federal court that Florida's marriage statute violated the United States Constitution. The court dismissed the challenge using a rational basis review.³¹⁸ A similar challenge to a mini-DOMA was ultimately rejected in Nebraska.³¹⁹ In *Bishop v. Oklahoma*,³²⁰ plaintiffs are challenging the constitutionality of both the federal Defense of Marriage Act and

³¹⁵ The law is an attempt to define the full faith and credit clause, which allows Congress to "prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." U.S. Const., art. 4, § 1. The first substantive provision of DOMA states that "No State...shall be required to give effect to any public act, record, or judicial proceeding of any other State...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...." Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). See *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Each state, under principles of comity, may still decide to recognize same-sex marriages contracted elsewhere. There is a wealth of commentary on the constitutionality of this statute. See, e.g., Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 Ky. L.J. 1075, 1099 n.131 and the articles cited therein. See also Rubenstein, Ball and Schacter, *Sexual Orientation and the Law*, . 665 (3d ed. 2008).

³¹⁶ See *supra* Part One, Sec. III.A.1 for a more thorough discussion of mini-DOMAs.

³¹⁷ *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

³¹⁸ *Id.* at 1308-09.

³¹⁹ See *infra*, Part One, Sec. III.A.3.d.

³²⁰ *Bishop v. Oklahoma*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006).

Oklahoma’s “mini-DOMA” on both state and federal equal protection and due process grounds.³²¹

In March 2009, same-sex married couples filed a challenge to Section Three of the federal DOMA, which prohibits the federal government from providing legal protections to such spouses.³²²

3. Legal Challenges to Anti-Marriage Constitutional Amendments

The wave of amendments prohibiting same-sex couples from marrying that have passed since 2004 thus far has sparked legal challenges in only a handful of states. This section reviews these challenges.

a. Georgia

Shortly after Georgia amended its constitution to prohibit same-sex couples from getting married, supporters of marriage rights for same-sex couples filed a lawsuit challenging the amendment on procedural grounds.³²³ Plaintiffs argued that the amendment was misleading and impermissibly contained multiple sections, violating the Georgia constitutional requirement that voters be able to vote on each substantive section separately.³²⁴

The amendment provided:

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same

³²¹ Although several portions of the plaintiffs’ complaint did not survive summary judgment, the equal protection and due process challenges to both the federal and state definitions of marriage as “a legal union between one man and one woman” survived the motion and are still pending. *Id.* at 1244.

³²² *Gill v. Office of Personnel Management* was filed in federal court in Massachusetts on March 3, 2009. See <http://www.glad.org/doma/lawsuit> (last visited Apr. 24, 2009).

³²³ *Perdue v. O’Kelley*, 632 S.E.2d 110 (Ga. 2006).

³²⁴ *Id.* at 112-13.

sex shall be recognized by this state as entitled to the benefits of marriage....³²⁵

The trial court determined that the first sentence of paragraph (b) dealt with how the state will treat same-sex relationships, which was a separate subject from that dealt with in paragraph (a), which defined marriage as being between a man and a woman.³²⁶ As a result, it found the amendment unconstitutional, holding that it violated the requirement that voters be able to vote on each individual amendment.³²⁷

On appeal, the state Supreme Court reversed, holding that the proper test of whether an amendment violates the multiple subject rule is whether all subjects are “germane” to accomplishing a single objective.³²⁸ The Court upheld the amendment, finding that both sections were germane to accomplishing the objective of limiting marriage and all its related benefits to unions of opposite-sex couples.³²⁹

b. Oklahoma

In *Bishop v. Oklahoma*,³³⁰ two groups of same-sex couples – those who had entered into civil unions and those who had entered into marriages – filed a lawsuit challenging the constitutionality of the federal DOMA and the state’s mini-DOMA.³³¹ Both groups argued that

³²⁵ GA. CONST. Art I, § IV, Part 1.

³²⁶ *Perdue*, 632 S.E.2d at 112.

³²⁷ *Id.*

³²⁸ *Id.* at 112-113.

³²⁹ *Id.* at 113.

³³⁰ *Bishop v. Oklahoma*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006).

³³¹ *Id.* at 1243-44. The state’s mini-DOMA is incorporated into Article 2, §35 of the Oklahoma Constitution, which provides: a) marriage is defined as the union of one man and one woman and neither the state constitution nor any other state law shall be construed to require “that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”; b) the state will not recognize a marriage between persons of the same gender performed in another state; and c) any person knowingly issuing a marriage license in violation of these provisions will be guilty of a misdemeanor. *Id.*

both laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Full Faith and Credit Clause, and the Privileges and Immunities Clause of the federal Constitution.³³²

The plaintiffs who had entered into civil unions, the court held, lacked standing to challenge Section Two of the federal DOMA, which provides that no state “shall be required to give effect to any public act ... of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State”³³³ The court reasoned that since civil unions were a separate institution from marriage, plaintiffs had not entered into any union “that is treated as a marriage under the laws of [another] state.”³³⁴ For the same reason, the court also found that the civil union plaintiffs lacked standing to challenge Section Three of the federal DOMA, which defines marriage as “a legal union between one man and one woman.”³³⁵

The court also found that the plaintiffs who had been legally married in Canada lacked standing to challenge Section Two of the federal DOMA, because DOMA invokes the Full Faith and Credit Clause which deals only with recognition between states of the United States, not foreign states; according to the court, a foreign marriage does not come within the scope of interests implicated by the federal DOMA.³³⁶

³³² *Id.* at 1244.

³³³ 28 U.S.C. § 1738C.

³³⁴ *Bishop*, 447 F. Supp. 2d at 1247-48

³³⁵ 1 U.S.C. § 7; *Bishop*, 447 F. Supp. 2d at 1249-51.

³³⁶ *Bishop*, 447 F. Supp. 2d at 1248-49.

Although the court found that the married plaintiffs had standing to pursue their claims to invalidate Section Three of the federal DOMA, it rejected those claims on the merits,³³⁷ holding that neither the Full Faith and Credit clause nor the Privileges and Immunities clause is binding on the federal government, only the states.³³⁸ Thus, the court concluded, these provisions did not provide plaintiffs with a valid basis through which to challenge the federal DOMA. The court did, however, permit the married plaintiffs' equal protection and due process claims to go forward, and denied the defendant's motion for summary judgment. These claims are still pending before the court.

The court refused to dismiss plaintiffs' claims to invalidate the state DOMA under the 11th Amendment, holding that it did not bar the type of prospective relief sought by plaintiffs.³³⁹ As with the parallel federal claims to Section Two of the federal DOMA, the court determined that all plaintiffs lacked standing to challenge Part B of the Oklahoma Amendment because none of the plaintiffs had entered into a union that was treated as a "marriage" under the laws of another state.³⁴⁰ However, since all plaintiffs wished to marry legally in Oklahoma but were prohibited by the restriction contained in Part A of the state DOMA, the court determined that plaintiffs had standing to challenge this provision, which mirrored Section Three of the federal DOMA.³⁴¹ As with the remaining claims against the federal DOMA, the court agreed to hear

³³⁷ *Id.* at 1249-53. Section 3 of the Federal DOMA also provides that, for the purpose of interpreting any federal law or "any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States," marriage was to be construed to be the union of an opposite-sex couple only. 1 U.S.C. § 7.

³³⁸ *Bishop*, 447 F. Supp. 2d at 1251-52.

³³⁹ The 11th Amendment does not bar prospective relief against individual state officers in federal court when the action is based on a federal right. *See id.* at 1256.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1257. *See supra* note 331 for the text of Part A of the Oklahoma DOMA.

plaintiffs' claims that Part A of the Oklahoma Amendment violated the Equal Protection and Due Process Clauses of the state constitution. These claims are also still pending.

c. Wisconsin

In July 2007, William McConkey, a sixty-five year old heterosexual political science professor at the University of Wisconsin filed a *pro se* lawsuit in the Dane County Circuit Court against the state of Wisconsin, asking the court to repeal the state's constitutional amendment banning same-sex couples from marrying. The ban had been supported by 59% of voters in the 2006 election.³⁴² McConkey claimed he was motivated to challenge the amendment out of concern for one of his daughters, who is gay.³⁴³ On June 9, 2008, the court upheld the constitutionality of the marriage ban.³⁴⁴ McConkey has appealed the decision, which was certified to the Wisconsin Supreme Court on April 9, 2009.

d. Nebraska

Three public interest groups whose members were gay and lesbian citizens of Nebraska brought an action in federal court challenging the constitutionality of Nebraska's voter-approved mini-DOMA legislation; the Eighth Circuit rejected their challenge, reversing the Nebraska District Court's ruling in their favor.³⁴⁵ The case turned principally on the Equal Protection Clause, but also dealt with arguments under the Bill of Attainder Clause and the First Amendment.

³⁴² See *McConkey v. Van Hollen* (formerly *Doyle*), No. 07-CV-2657 2008 WL 5503993 (Wis. Cir. June 9, 2008) (Trial Order) (Final Order in Action for Declaratory Judgment); Kevin Mueller, *Oshkosh Professor Battles Gay Marriage Ban*, THE MARQUETTE TRIBUNE, Jan. 15, 2008.

³⁴³ *Id.*

³⁴⁴ *McConkey*, 2008 WL 5503993.

³⁴⁵ *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

The Eighth Circuit rejected the District Court’s holding that plaintiffs were entitled to strict scrutiny of the mini-DOMA legislation based upon *Romer v. Evans*³⁴⁶ under the theory that the mini-DOMA raised “an insurmountable political barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship.”³⁴⁷ The Eighth Circuit ruled that sexual orientation is not, like race, a suspect classification for equal protection purposes, and that rational basis review is “highly deferential”³⁴⁸ to the voter-passed referendum. Because marriage historically has not included same-sex couples, the court found tolerable the fact the marriage ban is “at once too broad and too narrow” in its application, and rejected the argument that the ban was as broad as the referendum barring anti-discrimination laws that was at issue in *Romer*.³⁴⁹

B. International Anti-Marriage Actions Since 2004

Through this Special Report, we seek to comprehensively update the material presented in the *2004 Report*. It is impossible, however, to follow all of the marriage-related changes around the world. The section that follows, therefore, provides just a snapshot of global action seeking to limit the access of same-sex couples to marriage.

In early 2005, the First Party of Latvia proposed a constitutional amendment that explicitly defines marriage as a union between a man and a woman “to prevent any possibility

³⁴⁶ *Romer v. Evans*, 517 U.S. 620 (1996).

³⁴⁷ *Citizens for Equal Protection*, 455 F.3d at 865.

³⁴⁸ *Id.* at 867.

³⁴⁹ *Id.* at 868. The Court rejected the Bill of Attainder argument because the referendum may create political disadvantage but it does not punish, and it rejected the First Amendment argument both because it was raised for the first time on appeal and because the referendum did not “directly and substantially” interfere with free expression or association. *Id.* at 869-70.

for same-sex marriage.”³⁵⁰ Although Latvian civil law has prohibited marriage between two people of the same sex since 1993,³⁵¹ conservative politicians were concerned³⁵² that implementing the European Union’s anti-discrimination employment legislation might provide same-sex individuals with a challenge to the Latvian civil law’s ban on the marriage of same-sex couples.³⁵² The amended the Latvian Constitution now reads: “The State protects and supports marriage – a union between a man and a woman, family, rights of parents and children.”³⁵³

Although South Africa permits same-sex couples to marry, other African countries are weighing measures that would place further restrictions on gay men, lesbians, and their allies. For example, the Nigerian Parliament considered a bill entitled the “Same Sex Marriage (Prohibition) Act,” which imposes a five-year prison sentence on anyone who “goes through the ceremony of marriage with person [sic] of the same sex.”³⁵⁴ The legislation would also permit the government of Nigeria to prosecute an advocate of LGBT rights.³⁵⁵ The bill “stalled in the legislature due to circumstances surrounding Nigeria’s presidential elections in April 2007.”³⁵⁶

³⁵⁰ ILGA Europe, *Latvia Cements Homophobia in the Constitution*, Dec. 12, 2005, available at <http://www.gay.md/eng/story.php?sid=93> (last visited May 1, 2009).

³⁵¹ Article 35.2, Latvian Civil Law.

³⁵² See ILGA Europe, *supra* note 350; see also Laura Sheeter, *Latvia Defies EU over Gay Rights*, BBC NEWS, June 16, 2006, available at <http://news.bbc.co.uk/1/hi/world/europe/5084832.stm> (last visited May 1, 2009).

³⁵³ Article 110, Latvian Constitution (as amended in 2006).

³⁵⁴ A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationship Between Persons of the Same Sex, Celebration of Marriage by Them and for Other Matters Connected Therewith (2006), HB 246, No. C871-C869, available at http://www.asylumlaw.org/docs/sexualminorities/Nigeria2_010106.pdf (last visited May 1, 2009).

³⁵⁵ *Id.* A person could be sentenced to a prison term of five years, if convicted, for being involved “in the registration of gay clubs, societies, and organizations, sustenance, procession or meetings, publicity and public show of same sex amorous relationship directly or indirectly in public and in private.” *Id.*

³⁵⁶ Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT’L L. 353 (2008) (discussing nations currently considering legislation that ultimately decrease protections for LGBT people, including South

At least three other African countries – Zimbabwe, Uganda, and Burundi – have taken steps to criminalize, or more actively prosecute, individuals showing affection to others of the same sex,³⁵⁷ those who come out,³⁵⁸ or homosexuality more generally.³⁵⁹

Korea and Guatemala). In light of the current president’s opposition to LGBT civil rights, it is expected that this bill—threatening to persecute not only same-sex couples, but also any individual who advocates LGBT rights by way of education, speech, or organization—will resurface. *Id.*; see also International Gay and Lesbian Human Rights Commission, *Voices from Nigeria: Gays, Lesbians, and Transgenders Speak Out About the Same-Sex Bill* (Nov. 2006), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/106-1.pdf> (last visited Apr. 30, 2009).

³⁵⁷ Despite signing an international covenant promising to prohibit discrimination and provide equal protection to all citizens, in 2006 Zimbabwe, began criminalizing the acts of kissing, hugging, or holding hands with a person of the same-sex while redefining “sodomy” to mean any physical conduct that could be considered an indecent act by a reasonable person. See Nigeria, Criminal Law (Codification and Reform) Act, Chapter 9:23, Act 23/2004, available at http://www.kubatana.net/docs/legisl/criminal_law_code_050603.pdf (last visited Dec. 15, 2008); International Covenant on Civil and Political Rights, Art. 26, General Assembly Res. No. 2200A (XXI), UN Doc. A/6315 (1996).

³⁵⁸ A 2008 announcement by the Ugandan government declared that it would more proactively prosecute “anyone who comes out.” *Uganda to Tighten Law Against Homosexuality*, 365GAY NEWS, Oct. 6, 2008, available at <http://www.365gay.com/news/uganda-to-tighten-law-against-homosexuality/> (last visited Apr. 30, 2009).

³⁵⁹ In November 2008, the Burundian National Assembly amended its penal code to criminalize homosexuality for the first time. See International Gay and Lesbian Human Rights Commission (IGLHRC) & ARC International, *Submission for Urgent Appeal Concerning Legislation in Burundi* (Nov. 24, 2008), available at <http://www.asylumlaw.org/docs/sexualminorities/BurundiLegislation112408.pdf> (last visited Apr. 30, 2009).

PART TWO

Marriage Developments in New York

The review of domestic and global marriage-related developments leads back to the question of the status of such rights in New York. This Part of the Special Report reviews how the law has developed in our own state since October 2004. It begins with the New York Court of Appeals decision in *Hernandez v. Robles*,³⁶⁰ in which the Court held that although same-sex couples do not have a constitutional right to marry under the state's constitution, the state legislature may enact a statute permitting same-sex couples to marry. Thereafter, this Part discusses the action – and inaction – of the state legislature on various marriage equality proposals.

Members of the executive branch of the state and various local and county governments have enacted orders requiring that otherwise-valid marriages entered into out-of-state by same-sex couples be legally recognized. This Part of the Special Report describes these actions, and the legal decisions sustaining them, including the leading case of *Martinez v. Monroe County*.³⁶¹ Two of the cases addressing these orders, *Lewis v. State Department of Civil Service* and *Godfrey v. Spano* are now before the Court of Appeals,³⁶² which must determine whether out-of-state marriages of same-sex couples ought to be recognized under the legal tenets of Full Faith and Credit and comity. Thus, this Part of the Special Report also reviews these principles and their place in the recognition of marriages between same-sex individuals.

³⁶⁰ *Hernandez v. Robles*, 7 N.Y.3d 338, 339 (N.Y. 2006).

³⁶¹ *Martinez v. Monroe County*, 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dep't 2008).

³⁶² *Lewis v. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 3d Dep't), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009) and *Godfrey v. Spano*, 871 N.Y.S.2d 296 (N.Y. App. Div. 2d Dep't 2008), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009).

Part Two closes with a review of the rights of individuals in same-sex partnerships, whether marriages or civil unions, as interpreted by our state’s courts.

I. *Hernandez v. Robles* (New York Court of Appeals, 2006)

In 2004, 44 same-sex couples brought suit in four separate cases against numerous city marriage license-issuing authorities, the New York State Department of Health, and New York State, seeking a declaratory judgment that the restriction of marriage licenses to opposite-sex couples violates the State Constitution.³⁶³ Plaintiffs, representing a wide cross-section of society,³⁶⁴ were same-sex couples who had each sought to obtain and were subsequently denied marriage licenses by government authorities throughout the state. On both due process and equal protection grounds, plaintiffs challenged the constitutionality of certain provisions of the New York Domestic Relations Law (“DRL”) that effectively precluded legal recognition of civil marriage between same-sex couples. Arguing that these provisions should be subjected to heightened scrutiny, plaintiffs contended that the DRL’s restrictions on the rights of same-sex couples to marry could not survive constitutional review.³⁶⁵

In *Hernandez v. Robles*, the New York Court of Appeals, in a 4-2 decision authored by Judge Robert S. Smith, held that rational basis, not heightened scrutiny, was the appropriate standard of review and rejected plaintiffs’ claims. The court found that the state legislature’s

³⁶³ *Hernandez*, 7 N.Y.3d at 380.

³⁶⁴ In her dissent, Judge Judith S. Kaye describes the class of plaintiffs as including “a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities. They come from upstate and down, from rural, urban and suburban settings. Many have been together in committed relationships for decades, and many are raising children--from toddlers to teenagers. Many are active in their communities, serving on their local school board, for example, or their cooperative apartment building board. In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.” *Id.*

³⁶⁵ *Id.* at 363-64.

refusal to permit same-sex couples to marry was rational and consequently did not violate the equal protection or due process provisions of the State Constitution.³⁶⁶ Any changes to the state’s marriage law, said the court, should be made by the state’s legislature.³⁶⁷

A. *Majority Opinion*³⁶⁸ (Judge Smith)

1. *Rational State Interests*

The *Hernandez* court identified two “legitimate government interests”³⁶⁹ upon which the state could rely in limiting marriage to opposite-sex couples.³⁷⁰ First, the court stated that the legislature “could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born” and provide an inducement – marriage – for these childbearing relationships.³⁷¹ The court reasoned that by differentiating same-sex relationships, the legislature may have decided that same-sex couples, who cannot become parents “by accident or impulse,” required no similar incentives to create or maintain

³⁶⁶ *Id.* at 361. Specifically, the court found that Articles 2 and 3 of the Domestic Relations Law (which govern marriage in New York State by describing void or voidable marriages and the process by which a couple may solemnize their marriage) withstood rational basis analysis. Although the DRL does not explicitly define marriage as a union of opposite-sex partners, the court found that the absence of a prohibition did not imply that same-sex couples could marry under the law. It cited various instances where the DRL describes the parties to marriage as either “husband and wife” or as “the bride” and “the groom” to support its finding of a statutory precedent that limited marriage to opposite-sex couples. *Id.* at 357.

³⁶⁷ *Id.* at 361.

³⁶⁸ Judge Albert M. Rosenblatt recused himself from the discussion; his daughter, a lawyer, had represented same-sex couples attempting to marry in other states. Anemona Hartocollis, *New York Judges Reject Any Right to Gay Marriage*, N.Y. TIMES, July 7, 2006, at B6.

³⁶⁹ *Hernandez*, 7 N.Y.3d at 363.

³⁷⁰ *Id.* at 359. According to the court, other reasons to limit marriage to heterosexuals “have been advanced, but we will discuss only these two, both of which are derived from the undisputed assumption that marriage is important to the welfare of children.” Judge Kaye’s dissent introduces and responds to the four interests introduced by the State as justification for the classification in the Domestic Relations Law: procreation and child welfare, moral disapproval, tradition, and uniformity. *Id.* at 391-95 (Kaye, J. dissenting).

³⁷¹ *Id.* at 359 (majority opinion).

stable homes.³⁷² Second, the court identified as a “commonsense premise” the idea that, other things being equal, the legislature could reasonably believe that children fare better in homes with both a mother and a father than in a home where both parents are the same sex.³⁷³ In short, the court concluded that furthering these two goals could rationally justify the exclusion of same-sex couples from the otherwise fundamental right to marry. It is upon these findings that the court based the remainder of its analysis.

2. *No Prejudicial Motivation*

Plaintiffs argued that the DRL’s implied restriction of marriage to heterosexual couples was predicated on ignorance and prejudice, analogizing it to the ban on interracial marriage that was struck down by the Supreme Court in *Loving v. Virginia*.³⁷⁴ The court acknowledged “there has been serious injustice in the treatment of homosexuals also, a wrong that has been widely recognized only in the relatively recent past, and one our Legislature tried to address when it enacted the Sexual Orientation Non-Discrimination Act.”³⁷⁵ Nevertheless, the Court of Appeals distinguished anti-gay discrimination from the racial prejudice that preceded and motivated the Virginia anti-miscegenation statute.

According to the court, “[i]f we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice ... we would hold it invalid, no matter how long its history.”³⁷⁶

Prior to *Loving*, said the court, racism had a centuries-long history of being regarded “as a

³⁷² *Id.*

³⁷³ *Id.* at 360. The majority decided that a “commonsense premise” was sufficient to overrule an absence of conclusive scientific evidence in support of its point.

³⁷⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving* overruled an anti-miscegenation statute in Virginia, setting a national precedent that individuals could not be banned from marrying a person of a different race.

³⁷⁵ *Hernandez*, 7 N.Y.3d at 361.

³⁷⁶ *Id.* at 360-61.

revolting moral evil” by some individuals, if not by the popular majority.³⁷⁷ By contrast, “the idea that same-sex marriage is even possible is a relatively new one.” Accordingly, the court declined to conclude that a belief in the preservation of marriage as a heterosexual union was “irrational, ignorant, or bigoted.”³⁷⁸ The court concluded there was no prejudicial motivation for the implicit classification against gay men and lesbians in the DRL.³⁷⁹

3. *Due Process*

Plaintiffs claimed that because marriage is a “fundamental right,” any statutory prohibition on same-sex couples’ right to marry violates the substantive due process protections provided by the state constitution. The court affirmed that the right to marry is a fundamental one, but only insofar as it is defined as the right to marry someone of the opposite-sex. The right to marry someone of the same sex was not “deeply rooted,”³⁸⁰ said the court and thus not a fundamental right.

The *Hernandez* court defended this conclusion against arguments drawn from the U.S. Supreme Court’s decision in *Lawrence v. Texas*,³⁸¹ which recognized the fundamental right to same-sex intimacy free from government intrusion or punishment and commenting on the dignity to which gay men and lesbians are entitled in their relationships.³⁸² *Lawrence* overruled

³⁷⁷ *Id.* at 361. According to a 1958 Gallop poll, nine years before the decision in *Loving*, 96% of Americans disapproved of interracial marriages between blacks and whites. *Black/White Relations in the United States - 1997*, Gallop Poll, June 10, 1997 (comparing the 1997 approval rate for interracial marriage, 61%, to that of the 1958 poll, 4%).

³⁷⁸ *Hernandez*, 7 N.Y.3d at 361.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 362.

³⁸¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁸² *Id.* at 566.

Bowers v. Hardwick,³⁸³ stating that *Bowers* characterized too narrowly the right in question as whether there was a fundamental right to homosexual sodomy, not whether there was a right to same-sex intimacy free from state intrusion.³⁸⁴ The *Hernandez* court acknowledged that the fundamental right question turns on how the court defines the right in question, and defined the question before it more narrowly, relying on an earlier U.S. Supreme Court decision, *Washington v. Glucksberg*.³⁸⁵ There, the Supreme Court defined the issue before it more narrowly as a “right to commit suicide” as opposed to the broader “right to die.”³⁸⁶

In the *Hernandez* court’s view, “in *Glucksberg* the relatively narrow definition of the right at issue was based on rational line-drawing,” while “[i]n *Lawrence*, by contrast, the [C]ourt found the distinction between homosexual sodomy and intimate relations generally to be essentially arbitrary.”³⁸⁷ The *Hernandez* court held that defining marriage as heterosexual is rational line-drawing and is not an “essentially arbitrary” definition of the issue. Furthermore, the *Hernandez* court distinguished *Lawrence* as merely protecting intimacy from state intrusion, as opposed to giving “access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples.”³⁸⁸ Pursuant to this reasoning, the *Hernandez* court concluded that excluding same-sex couples from marriage does “not restrict[] the exercise of a fundamental right.”³⁸⁹

³⁸³ *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Hernandez*, 7 N.Y.3d at 360.

³⁸⁴ *Lawrence*, 539 U.S. at 560.

³⁸⁵ *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

³⁸⁶ *Id.* at 722-23.

³⁸⁷ *Hernandez*, 7 N.Y.3d at 363 (without citation to *Lawrence*).

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 363.

Finding that the right of same-sex couples to marry is not fundamental profoundly affected the rest of the court’s due process analysis. Under New York constitutional law, when a due process claim does not pertain to a fundamental right, a statute need only have a rational relationship to a legitimate state interest.³⁹⁰ Referring to its earlier conclusion that legitimate state interests of “protecting the welfare of children” adequately justified limiting marriage to heterosexual couples, the court rejected plaintiffs’ due process claim.³⁹¹

4. Equal Protection

Plaintiffs also asserted that the DRL’s distinct treatments of same-sex and opposite-sex couples based on sex and sexual orientation violated the state constitution’s equal protection provisions. The court found that, under the DRL, men and women are equally entitled to marry a person of the opposite sex and equally prohibited from marrying a person of their own gender.³⁹² Thus, because the statute applies equally to both men and women, it perpetuates no sex-based discrimination.³⁹³

The court then analyzed plaintiffs’ claims that, by distinguishing between heterosexual and homosexual couples, the statute’s classification was a form of sexual orientation discrimination. For the same reasons provided earlier in their discussion, the court rejected plaintiffs’ argument that the legislation affected a fundamental right to marry, which would have implicated strict scrutiny.³⁹⁴ The court also rejected plaintiff’s argument that heightened scrutiny

³⁹⁰ *Id.* (citing *Hope v. Perales*, 83 N.Y.2d 563, 577 (1994)).

³⁹¹ *Hernandez*, 7 N.Y.3d at 363.

³⁹² *Id.* at 364.

³⁹³ *Id.* (“Women and men are treated alike — they are permitted to marry people of the opposite sex, but not people of their own sex.”).

³⁹⁴ *Id.* at 363.

should apply to their equal protection claims because “rational basis scrutiny is generally appropriate ‘where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement.’”³⁹⁵ Thus, because same-sex couples have a “preference for the sort of sexual activity that cannot lead to the birth of children,”³⁹⁶ the court applied a rational basis review.³⁹⁷

Plaintiffs argued that, given the state’s declared interest in protecting children, the state’s definition of marriage was either irrationally under-inclusive, because same-sex couples capable of raising children were excluded from civil marriage, or over-inclusive, because the definition allowed opposite-sex couples to benefit from marriage even if they are unable or choose not to be parents.³⁹⁸ The court disagreed that the statute’s under-inclusiveness lacked a rational basis, referring back to the child welfare reasons it articulated earlier.³⁹⁹

Similarly, the court dismissed any characterization of the DRL as over-inclusive, stating that “[w]hile same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing.”⁴⁰⁰ According to the court, a (hypothetical) legislative belief that the classification made by the DRL would further the state’s child welfare

³⁹⁵ *Id.* at 364 (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)). Although the Court of Appeals suggested that in certain instances it would apply heightened scrutiny to cases dealing with sexual orientation discrimination, it concluded that legislation pertaining to marriage or family was appropriately examined under rational basis review. *Hernandez*, 7 N.Y.3d at 364.

³⁹⁶ *Id.* at 364-65.

³⁹⁷ *Id.* at 364.

³⁹⁸ *Id.* at 365.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 365.

concerns was entirely rational and thus trumped any concerns of under- or over-inclusiveness of the statute.⁴⁰¹ Thus, it rejected plaintiffs’ equal protection claims.⁴⁰²

Although the *Hernandez* court concluded that same-sex couples have no state constitutional right to marry, it did not, however, bar such marriages. Rather, it invited the parties to the controversy to turn to the legislature to decide how to treat same-sex couples seeking to marry.⁴⁰³

B. *The Graffeo Concurrence*

Judge Graffeo declined to construe the Domestic Relations Law as implicitly allowing same-sex couples to marry because it contradicted the generally accepted understanding of the statute’s legislative intent.⁴⁰⁴ She further found no merit to plaintiffs’ substantive argument that the privacy right granted by the state constitution provided individuals with the right to marry a person of his or her choice.⁴⁰⁵ Federal Supreme Court decisions that protected marriage as a fundamental right under the Due Process Clause, she stated, had contemplated only opposite-sex unions;⁴⁰⁶ thus, she concluded, to redefine the marriage right would “tear the resulting new right away from the very roots” that led to its recognition in both the New York Court of Appeals and the United States Supreme Court.⁴⁰⁷ Accepting that the state could, and had on occasion, interpreted due process more broadly than in the U.S. Constitution, Judge Graffeo nonetheless

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.* at 366 (majority opinion).

⁴⁰⁴ *Id.* at 366-67 (Graffeo, J., concurring).

⁴⁰⁵ *Id.* at 368.

⁴⁰⁶ *Id.* at 368-69 (citing *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Conn.*, 381 U.S. 479 (1965); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942)).

⁴⁰⁷ *Hernandez*, 7 N.Y.3d at 369 (Graffeo, J., concurring).

distinguished those cases because each had implicated what she described as “classic liberty concerns beyond the right to privacy” for individuals who had been detained or confined.⁴⁰⁸ She found that the state’s due process precedent as it pertained to privacy outside the liberty context was indistinguishable from that of the U.S. Constitution.⁴⁰⁹ For that reason, she limited the recognition of the fundamental right to marry to that established in the Supreme Court decisions, a right that she found carried an implied procreative purpose.⁴¹⁰

Judge Graffeo rejected plaintiffs’ reliance on both *Loving v. Virginia* and *Lawrence v. Texas* as reflecting a desire to expand the fundamental right to marry by the Supreme Court. She interpreted the due process analysis in *Loving* as reiterating a fundamental right to heterosexual marriage “precisely because of its relationship to human procreation.”⁴¹¹ Likewise, she declared that *Lawrence* had created no new fundamental right. She distinguished the statute the Supreme Court had struck down in Texas, criminalizing private sexual conduct between homosexuals, from the Domestic Relations Law because the DRL is not a penal provision, it does not attempt to regulate private sexual conduct, and it has a long history and tradition.⁴¹² In short, Judge

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 370 (“Most of our Due Process Clause decisions in the right to privacy realm have cited federal authority interchangeably with New York precedent, making no distinction between New York’s constitutional provision and the federal Due Process Clause.”).

⁴¹⁰ *Id.* (“Our Court has not recognized a fundamental right to marry that departs in any respect from the right defined by the U.S. Supreme Court in cases like *Skinner* which acknowledged that marriage is ‘fundamental to the very existence and survival of the [human] race’ because it is the primary institution supporting procreation and child-rearing.”) (citing *Skinner*, 316 U.S. 535, 541 (1942)).

⁴¹¹ *Hernandez*, 7 N.Y.3d at 371. The *Loving* court described marriage as a right “fundamental to our very existence and survival.” *Loving*, 388 U.S. at 12.

⁴¹² *Hernandez*, 7 N.Y.3d at 374.

Graffeo concluded that the Due Process Clause of the New York Constitution did not include a fundamental right to marry outside the traditional male-female construct.⁴¹³

Judge Graffeo next addressed plaintiffs' contention that the sex-based and sexual orientation-based classifications in the Domestic Relations Law should invoke a heightened scrutiny review under the New York Equal Protection Clause.⁴¹⁴ Observing that gender discrimination occurs when men and women are treated unequally and when one gender benefits or is burdened compared to the other,⁴¹⁵ she found the statute did not discriminate on the basis of sex because "neither men nor women are disproportionately disadvantaged or burdened by the fact that New York's Domestic Relations Law allows only opposite-sex couples to marry."⁴¹⁶

Finding no sex-based discrimination, Judge Graffeo turned to plaintiffs' claims that the DRL discriminated on the basis of sexual orientation. Judge Graffeo described the DRL as "facially neutral" because any person, regardless of sexual orientation, could marry an individual of the opposite sex.⁴¹⁷ Although she recognized that the law did create a classification with a disparate impact on homosexuals, she noted that plaintiffs had conceded that, by enacting the marriage laws, the legislature had not intended to disadvantage gays and lesbians.⁴¹⁸ Since "a claim that a facially-neutral statute enacted without an invidious discriminatory intent has a

⁴¹³ *Id.*

⁴¹⁴ *Id.* The Equal Protection Clause of the New York Constitution provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. CONST. art. I, § 11.

⁴¹⁵ *Hernandez*, 7 N.Y.3d at 375.

⁴¹⁶ *Id.* at 376.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 376-77.

disparate impact on a class (even a suspect class, such as one defined by race) is insufficient to establish an equal protection violation,”⁴¹⁹ she concluded that it was unnecessary to address whether the classification should be subject to heightened scrutiny.

Finding a heightened scrutiny analysis to be inapplicable in this case, Judge Graffeo analyzed both the due process and equal protection claims using a rational basis review. She stated that any rational connection between the classification and a single state interest would validate the marriage laws under both the state’s Due Process Clause and its Equal Protection Clause.⁴²⁰ Like the majority, Judge Graffeo found the Legislature’s decision to provide an incentive (through marriage) for opposite-sex couples to create a family, promote a stable child-rearing environment, and nurture their children to be perfectly reasonable.⁴²¹ While same-sex couples might share similar family objectives, she concluded that the processes on which they relied to have children distinguished them from their opposite-sex counterparts.⁴²² Judge Graffeo stated that classifications under rational basis review “need not be perfectly precise or narrowly tailored” to address imperfections in the marriage classification.⁴²³ Only a rational connection was required, and she found that the requirement had been met in this case.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 378.

⁴²¹ *Id.* at 379.

⁴²² *Id.* (“They are simply not similarly situated to opposite-sex couples in [regards to procreation] given the intrinsic differences in the assisted reproduction or adoption processes that most homosexuals couples rely on to have children.”).

⁴²³ *Id.* The imperfections of the statute acknowledged by the judge included: 1) the statute’s overinclusiveness (by permitting opposite-sex couples to marry who cannot or do not procreate), 2) the statute’s underinclusiveness (because opposite-sex couples do conceive children outside the paradigm of marriage), and 3) the increased economic and social benefits to children raised in same-sex households if their parents were permitted to marry. *Id.*

Judge Graffeo, like the majority, concluded her discussion by suggesting that the state legislature ought to consider providing same-sex couples and their families with benefits through marriage or some form of civil status. However, she also noted that such a change was not mandated by the state constitution and was entirely a matter for legislative determination.⁴²⁴

C. The Kaye Dissent

1. Due Process

Writing for the dissent, then-Chief Judge Kaye rejected the majority's holding that same-sex couples did not have a fundamental right to marry and concluded that plaintiffs had been denied their substantive due process rights: "Fundamental rights, once recognized," she noted, "cannot be denied to particular groups on the ground that these groups have historically been denied those rights."⁴²⁵

Judge Kaye found the *Loving* decision particularly relevant, noting that contemporary popular resistance to same-sex marriage paralleled public sentiment against interracial marriage a generation earlier. Prior to *Loving*, the presumed constitutionality of a historical standard often justified bans on interracial marriage;⁴²⁶ in *Loving*, however, the Court rejected the notion that tradition should determine the nation's legal precedent.⁴²⁷ Indeed, since *Loving*, the Court repeatedly has rejected infringements on the fundamental right to marry, including those

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 381 (Kaye, J., dissenting). Judge Kaye stepped down from the court on December 31, 2008, consistent with the state's mandatory rules requiring judges to retire at age 70. John Eligon, *Chief Judge is Retiring, Leaving Trail of Successes for Women on the Bench*, N.Y. TIMES, Dec. 28, 2008, at A.25.

⁴²⁶ See *Hernandez*, 7 N.Y.3d at 382-83 (citing *Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (stating that the "great weight of authority holds [antimiscegenation] statutes constitutional")).

⁴²⁷ *Loving*, 388 U.S. at 12.

requiring court approval for parents owing child support,⁴²⁸ excluding prison inmates,⁴²⁹ and placing an undue burden on the indigent.⁴³⁰ Since the DRL impinged on the fundamental right to marry, she opined that strict scrutiny review was most appropriate.⁴³¹

Applying that standard and recognizing the evolving understanding of “marriage” throughout history, Judge Kaye would have refused to uphold a restriction on the right of same-sex couples to marry based purely on tradition.⁴³² To her, “[t]he long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it.”⁴³³ Thus, she concluded that the precedent favoring the broad protection of an individual’s right to marry should have guided and informed the majority, resulting in recognition of the right of same-sex couples to marry.

2. Equal Protection

a. Heightened Scrutiny

Plaintiffs asserted that the provisions of the DRL limiting marriage to opposite-sex couples should be reviewed under heightened scrutiny. Judge Kaye agreed with them for three

⁴²⁸ *Zablocki*, 434 U.S. at 390-91.

⁴²⁹ *Turner*, 482 U.S. at 99.

⁴³⁰ *Boddie v. Connecticut*, 401 U.S. 371, 383-84 (1971) (concluding the imposition of mandatory court fees to get a divorce was an unconstitutional burden on the rights of indigents to marry).

⁴³¹ *Hernandez*, 7 N.Y.3d at 390 (Kaye, J., dissenting). According to Judge Kaye: “Because . . . the legislative classification here infringes on the exercise of the fundamental right to marry, the classification cannot be upheld unless it is necessary to the achievement of a compelling state interest.” *Id.* at 390.

⁴³² *Id.* at 385.

⁴³³ *Id.* at 386.

reasons, each of which would independently require the state to demonstrate that the statute’s discriminatory effect furthered a compelling governmental interest for it to be upheld.⁴³⁴

First, Judge Kaye concluded that homosexuals met the Supreme Court’s criteria for recognition as a suspect class, that is, “a group whose defining characteristic is ‘so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others.’”⁴³⁵ She determined that “limiting marriage to opposite-sex couples undeniably restricts gays and lesbians from marrying their chosen same-sex partners ... and thus constitutes discrimination based on sexual orientation.”⁴³⁶

Second, although the majority determined that equal application of the statute precluded a sex-based distinction, Judge Kaye disagreed. She noted that a woman’s sex is what prevents her from marrying another woman; were she a man, the state would happily oblige the couple with a marriage license. She observed, “that the statutory scheme applies equally to both sexes does not

⁴³⁴ See *id.* (“On three independent grounds, this discriminatory classification is subject to heightened scrutiny, a test that defendants concede it cannot pass.”). Judge Kaye’s language implicated both strict scrutiny and heightened scrutiny review in this part of her analysis. See *id.* at 387 (describing homosexuals as a “suspect class”); see also *id.* at 390 (stating classifications impinging on fundamental rights must be “necessary to the achievement of a compelling state interest”). But see *id.* at 389 (noting that sex-based classification could only be upheld if “substantially related to the achievement of important governmental objectives”).

⁴³⁵ *Id.* at 387 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). To determine whether a group should be accorded suspect status, the Supreme Court looks to a history of purposeful discrimination, whether the trait is irrelevant to the group’s ability to perform in society, and the group’s relative political powerlessness. *Id.* at 387-89. Historically, homosexuals in New York have experienced discrimination; acknowledging that fact, the Legislature passed the Sexual Orientation Non-Discrimination Act (“SONDA”). *Id.* at 387. Judge Kaye observed that one’s sexual orientation does not affect one’s ability to contribute to society. *Id.* at 388. Finally, although gay men and lesbians have received some protection through the legislative process, no comprehensive protections for their committed relationships exist. Judge Kaye noted that the Supreme Court continues to view racial and sexual classifications with increased scrutiny even after the enactment of comprehensive civil rights legislation. *Id.*

⁴³⁶ *Id.* at 389.

alter the conclusion that the classification here is based on sex,”⁴³⁷ also necessitating heightened scrutiny.⁴³⁸ Finally, for the reasons elaborated under her due process discussion, Judge Kaye found the DRL infringed upon a fundamental right to marry, thereby requiring the classification to be “necessary to the achievement of a compelling state interest.”⁴³⁹

b. Rational Basis Analysis

Although Judge Kaye determined that the Domestic Relations Law ought to be analyzed using heightened scrutiny, she concluded that plaintiffs should have prevailed even under rational basis review. To survive a rational basis analysis, the classification in the statute must rationally further a legitimate state interest.⁴⁴⁰ She objected that the classification in the DRL failed to advance any of the objectives provided by the state. The question, she stated, was not whether the law had a rational basis but “whether there exists a rational basis for excluding same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally furthered by the exclusion.”⁴⁴¹ Otherwise, rational basis review could justify any discriminatory legislation so long as another group benefited by the law.

⁴³⁷ *Id.* at 389-90. Judge Kaye based her argument on the Supreme Court’s rejection of the “equal application” argument raised by the state in *Loving*. 388 U.S. at 8. The Court determined that where “the statutes proscribe generally accepted conduct if engaged in by members of different races,” the statutory distinction is racial, even if applied equally to all individuals regardless of race. *Id.* at 11.

⁴³⁸ *Hernandez*, 7 N.Y.3d at 389 (declaring sex-based classifications must be “substantially related to the achievement of important governmental objectives”).

⁴³⁹ *Id.* at 390.

⁴⁴⁰ *Id.* at 391.

⁴⁴¹ *Id.* (noting that “equal protection requires that it be the legislated distinction that furthers a legitimate state interest, not the discriminatory law itself”).

Judge Kaye rejected the four interests offered by the state to justify promoting solely opposite-sex unions through marriage: (1) procreative and child welfare concerns; (2) legal uniformity among states; (3) moral disapproval; and (4) tradition.⁴⁴² Although she agreed that both encouraging procreation and promoting child welfare are legitimate state interests,⁴⁴³ she found the state never established how *excluding* same-sex couples from marriage rationally furthered those interests.⁴⁴⁴

In particular, Judge Kaye characterized the blatant favoritism of heterosexual parents as “purposeful discrimination” and argued that a governmental interest that diverged so pointedly from New York’s stated public policy, one that declared gay men and lesbians to be as capable of quality parenting as heterosexual individuals, could hardly be considered rational.⁴⁴⁵ Indeed, she found that the statutory refusal to extend civil marriage to same-sex couples actually undercut child welfare and deprived thousands of children of benefits and protections available to their peers with opposite-sex parents.⁴⁴⁶

Judge Kaye also found that the classification made by the DRL could not legitimately further the state’s interest of preserving uniformity of marriage laws among states. She argued

⁴⁴² The majority’s analysis addressed only the state’s interest in child welfare, bifurcating the issue into the creation of stable homes and the promotion of homes with two opposite-sex parents.

⁴⁴³ *Id.* at 391-92.

⁴⁴⁴ *Id.* at 391.

⁴⁴⁵ *Id.* at 393 (citing *In re Jacob*, 86 N.Y.2d 651, 668 (1995)). *In re Jacob* decided that neither governmental disapproval of homosexuality nor encouragement of opposite-sex marriage could justify rejecting potential adoptive parents on the basis of homosexuality; to hold otherwise would clearly violate N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16 (h)(2). *In re Jacob*, 86 N.Y.2d at 668.

⁴⁴⁶ *Hernandez*, 7 N.Y.3d at 392. As of 2005, 20% of same-sex couples in New York State were raising children and approximately 18,335 children in the state lived in households headed by same-sex couples. See *Census Snapshot New York*, THE WILLIAMS INSTITUTE, April 2008, p.2, available at <http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf> (last visited Apr. 30, 2009). In New York City alone, an estimated 8,391 children are raised by the city’s same-sex couples. *Id.*

that not only do New York's marriage laws differ from those of most other states,⁴⁴⁷ but also that the already disparate laws regarding same-sex couples' marriage rights in the states bordering New York made attempts to achieve uniformity impossible.⁴⁴⁸

Finally, Judge Kaye disputed the validity of the state's interest in moral disapproval of same-sex couples and in upholding the tradition of supporting only opposite-sex marriages. In her view, neither moral disapproval nor tradition could ever justify discrimination against a group:

The government cannot legitimately justify discrimination against one group of persons as a mere desire to preference another group.... Simply put, a history or tradition of discrimination — no matter how entrenched — does not make the discrimination constitutional.⁴⁴⁹

According to Judge Kaye, none of the objectives provided by the state could support a finding that the DRL's exclusion of same-sex couples from the right to marry was constitutional, even if analyzed using a rational basis standard. Concluding that the court's constitutionally

⁴⁴⁷ *Hernandez*, 7 N.Y.3d at 395. Marriages in New York are invalid only when a party is too young to consent; an individual is physically incapable of entering into the married state; a party suffers from an incurable mental illness; or where consent was obtained under force, duress, or fraud. DOM. REL. L. art. 9, § 140: Action for judgment declaring nullity of void marriages or annulling voidable marriage. By implication, New York State, unlike most states, permits the marriage of first cousins. *Hernandez*, 7 N.Y.3d at 395.

⁴⁴⁸ *Id.* at 395-96. At the time *Hernandez* was decided, Massachusetts, Connecticut, Ontario and Quebec all permitted same-sex couple to marry; Vermont and New Jersey provided civil unions to same-sex couples. As of April 2009, Pennsylvania is the only border state to New York that provides no legal status for same-sex relationships.

⁴⁴⁹ *Id.* at 394-95 (citing *inter alia Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985); *Romer*, 517 U.S. at 633; *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); and *Lawrence* 539 U.S. at 571).

mandated role was to protect the rights of individuals, she argued that the court, lamentably, had circumvented its duty that day.⁴⁵⁰

II. New York State Legislative Action and Pending Proposals

In concluding that same-sex couples do not have a constitutional right to marry, the Court of Appeals turned to the State Legislature to address what it described as a matter of policy.⁴⁵¹ In fact, numerous marriage-related bills have been introduced in the New York State Legislature. The Proposals fall into three categories: (1) amending the Domestic Relations Law to permit same-sex couples to marry;⁴⁵² (2) amending the Domestic Relations Law to explicitly define marriage as limited to one man and one woman;⁴⁵³ and (3) creating civil unions that would be available either to same-sex couples or to both same-sex and opposite-sex couples (in the latter case, replacing “marriage” as the state’s vehicle for legally uniting a couple⁴⁵⁴) or domestic partnerships that would grant workers’ compensation benefits to “domestic partners.”⁴⁵⁵

⁴⁵⁰ *Id.* at 396 (“[T]his Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation.”).

⁴⁵¹ *Id.* at 361.

⁴⁵² Assemblymember Gottfried’s proposal, A. 8590 (2007), sought to validate a marriage between same-sex parties.

⁴⁵³ Assemblyman Seminerio introduced Assembly Bill A. 03000 in January 2009, which would make a marriage absolutely void if contracted between persons of the same sex. He had introduced a similar bill, A.4978, in 2008, and a companion bill, S.2800, was introduced at the same time in the State Senate by Senator Maltese. In 2006, Assemblymember Hooker introduced a proposal (A. 7723) to define marriage as a legal union between one man and one woman and to prohibit same-sex marriages from being solemnized.

⁴⁵⁴ In 2008, Assemblymember Glick introduced A. 02021 to change references to marriage in the domestic relations law to civil unions for both same-sex and opposite-sex couples.

⁴⁵⁵ Assemblymember Susan John introduced Assembly Bill A. 02128 in 2009 which would provide certain disability benefits to domestic partners and which defines the term domestic partner.

In 2007, Governor Spitzer proposed, and the State Assembly passed, by a vote of 85-61, a bill to permit same-sex couples to marry.⁴⁵⁶ In response to pressure to bring the measure to the Senate floor for a vote, former Senate majority leader Joseph L. Bruno bluntly remarked, “We’re not doing gay marriage by Thursday, that’s for sure, or this year.”⁴⁵⁷

Yet, at a time when a virtual wave of such legislation was sweeping the nation, proposals to adopt DOMA-style legislation in New York have never advanced in New York. Similarly, civil union and domestic partnership bills have not advanced, except for a provision giving workers’ compensation benefits to all persons who lost a partner in the attacks of 9/11.⁴⁵⁸ Efforts to enact legislation providing same-sex couples with the right to marry have fared somewhat better, having passed one house of the legislature and garnered the public support of all current statewide leaders.⁴⁵⁹

After the 2008 elections produced the State Senate’s first Democratic majority in decades, many speculated that the State Senate might vote on whether to extend the right to marry to same-sex couples, something it had opted not to do in the past. Although advocates for

⁴⁵⁶ The legislation, A. 08590, was also introduced by Governor Eliot Spitzer on April 27, 2007 as Governor’s Program Bill No. 22 (2007). The proposal passed in the State Assembly on June 19, 2007, but was not voted upon in the Senate. In April 2009, Governor Paterson re-introduced the measure and called upon the Senate to vote on the legislation. Glenn Blain, *Governor Paterson Urges Gay Nuptials Senate Vote*, N.Y. DAILY NEWS, April 9, 2009, available at http://www.nydailynews.com/news/2009/04/09/2009-04-09_paterson_urges_gay_nuptials_vote.html (last visited Apr. 30, 2009).

⁴⁵⁷ Danny Hakim, *Bruno Says “We’re Not Doing Gay Marriage,”* City Room Blog, N.Y. TIMES, June 19, 2007, available at <http://cityroom.blogs.nytimes.com/2007/06/19/bruno-says-were-not-doing-gay-marriage/>scp=1&sq=bruno%20says%20we’re%20not%20doing%20&st=cse> (last visited May 3, 2009)

⁴⁵⁸ N.Y. WORKER’S COMP. LAW § 4.

⁴⁵⁹ Tom Brune, *In Reversal, Schumer Now Supports Same-Sex Marriage*, NEWSDAY March 24, 2009, now available by subscription only, <http://www.newsday.com/news/nationworld/ny-usschu246081374mar24,0,6353653.story> (“The other statewide officials who back same-sex marriage are Gov. David A. Paterson, Sen. Kirsten Gillibrand, Attorney General Andrew Cuomo and Comptroller Thomas DiNapoli. All are Democrats.”)

marriage equality believe there is sufficient support for marriage equality legislation in the Assembly, it remains unclear whether such support exists in the Senate.⁴⁶⁰

On April 16, 2009, Governor Paterson introduced his legislative proposal for marriage equality. Governor's Program Bill No. 10 (2009), which is identical to Governor Spitzer's Program Bill No. 22,⁴⁶¹ would amend the Domestic Relations Law to provide that "[n]o application for a marriage license shall be denied on the ground that the parties are of the same or different sex."⁴⁶²

⁴⁶⁰ Press Release dated January 7, 2009: [Empire State] Pride Agenda congratulates Malcolm Smith on becoming new Senate Majority Leader, Statement by Empire State Pride Agenda Executive Director Alan Van Capelle, available at <http://www.prideagenda.org/tabid/304/default.aspx?c=367> (last visited Apr. 30, 2009).

News reports of recent polls show New Yorkers increasingly support the right of same-sex couples to marry. According to the Siena College Research Institute poll, 53 percent of voters favor legislation giving same-sex couples marriage rights, compared to 39% who oppose. Michael Gormley, *Poll: Gay Marriage Gains Support But Not NY Gov.*, *Newsday*, April 20, 2009, available at <http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--poll-paterson0420apr20,0,678462.story> (last visited May 2, 2009).

The article discussed the Siena College Research Institute Poll, conducted April 13-15, 2009, available at <http://www.scribd.com/doc/14446210/SNY0409-Crosstabs> (last visited May 2, 2009). The results showed support for marriage among voters in New York City (58-36%), the suburbs of New York City (51-42%), upstate (50-40%), among whites (56-36%), Latinos (57-31%), 18-34 year olds (71-20%), 35-54 year olds (54-37%), Jewish voters (64-32%), and persons answering "other" as to religious affiliation, or no affiliation (69-24%). Marriage rights received less support among African-American voters (44-49%), voters over age 55 (42-52%), and Protestant voters (41-53%). Another study conducted by Quinnipiac University indicated 41% of voters support marriage rights while 33 percent preferred civil unions and 19 percent want no legal recognitions. Gormley, *supra*.

⁴⁶¹ *Paterson Introduces a Same-Sex Marriage Bill*, N.Y. TIMES, Apr. 17, 2009, at A1. See Governor's Program Bill No. 10 (2009), available at http://www.ny.gov/governor/bills/pdf/gpb_10.pdf (last visited Apr. 30, 2009).

State Senator Tom Duane has introduced S.599A, the companion bill to Assembly Bill A.8590, carried forward from 2007 to establish the same-sex couples right to marry.

⁴⁶² The Governor's bill would amend the Domestic Relations Law by adding a new section 10-a that reads:

- 10-a. Sex of parties. 1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of

The legislative intent of the marriage equality bill states explicitly that “[s]ame-sex couples and their children should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage,” which the legislation defines as “a fundamental human right.”⁴⁶³ The proposed legislation also includes a proviso, however, stating “no clergyman, minister or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity under this subdivision.”⁴⁶⁴

The memo accompanying Governor’s Program Bill No. 10 asserts that marriage equality would have an overall positive impact on state and local economies.⁴⁶⁵ The memo cites to a 2007 report by the New York City Comptroller, which “detailed numerous sources of added revenue . . . including tax revenue from additional weddings, higher intake of marital licensing fees and reduction of means-tested benefit payments as a result of aggregated marital income.”⁴⁶⁶

law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law....

⁴⁶³ The bill’s “legislative intent” section reads:

Section 1. Legislative intent. Marriage is a fundamental human right. Same-sex couples and their children should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all new Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex.

⁴⁶⁴ Governor’s Program Bill No. 10, Sec. 4.

⁴⁶⁵ Governor’s Program Bill No. 10, Memorandum at 3, citing “Love Counts: The Economic Benefits of Marriage Equality for New York,” Office of the New York City Comptroller Office of Fiscal & Budget Studies (June 2007), *available at* <http://www.comptroller.nyc.gov/bureaus/bud/07reports/Jun07LoveCountBudgetnotes.pdf> (last visited Apr. 20, 2009).

⁴⁶⁶ *Id.* The New York City Comptroller’s independent analysis was assisted in part by methodologically-controlled studies conducted by the Williams Institute at the University of California-Los Angeles School of Law, which have also been conducted in Washington, New Mexico, New Hampshire, California,

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The City Comptroller's report more specifically estimates that in the first three years after adopting marriage equality legislation, the increase in visitors from other states who come to New York to marry or attend weddings would add an estimated \$142 million, on a net basis, to New York City's economy and \$184 million to New York State's economy. The State would reportedly collect an additional \$8 million in taxes and save more than \$100 million in outlays on health care. Other projected positive effects include lowering employee recruiting costs and expanding the pool of qualified applicants as same-sex couples come to New York, and greater home buying by couples who sense greater economic security, yielding higher tax revenue.⁴⁶⁷ Currently, all same-sex couples' "wedding business" is of necessity shipped out of state to New York's immediate neighbors in Canada, Massachusetts, Connecticut and Vermont, where such weddings are permitted.⁴⁶⁸

Even absent enactment of marriage equality legislation in New York, the state must come to terms with the reality that legally-married same-sex couples are residing in the state. The next section of the Report examines the issues that have arisen as a result.

Connecticut, Colorado, New Jersey, Massachusetts, Vermont, Maryland, and Iowa. The Impact of Extending Marriage to Same-Sex Couples on the California Budget, June 2008, *available at* <http://www.law.ucla.edu/williamsinstitute/publications/EconImpactCAMarriage.pdf> (last visited Apr. 29, 2009). The Williams Institute found in each state that establishing marriage equality would significantly bolster state and local revenues from weddings of residents and out-of-state couples, as well as license fees. *Id.* The Williams Institute states:

[E]xtending the rights and obligations of marriage to same-sex couples would have a positive impact on each state's budget. Similar conclusions have been reached by legislative offices in Connecticut and Vermont and by the Comptroller General of New York. In addition, the Congressional Budget Office has concluded that if all fifty states and the federal government extended the rights and obligations of marriage to same-sex couples, the federal government would benefit by nearly \$1 billion each year. *Id.*

⁴⁶⁷ *Id.* The Comptroller's Report notes that, as of 2005, there were 50,854 same-sex couples living together and residing in New York State, with 23,321 in New York City alone, of out 777,000 nationwide. *Id.*

⁴⁶⁸ *See supra* Part One, Sec. I.G.

III. Recognition in New York of Out-Of-State and Foreign Marriages

A. Background: Principles of Full Faith and Credit and Comity

In the absence of state legislative action, members of the executive branches of state, county and local government have mandated that otherwise-valid marriages entered into by same-sex couples in other jurisdictions – both domestic and foreign – are to be legally recognized in New York. Numerous legal challenges to these policies have been filed, and these challenges require courts to apply the principles of Full Faith and Credit and comity, both of which are informed by principles of equity. This section reviews these basic principles and assesses how they traditionally have been implemented in New York.

The United States Constitution requires all states to give “full faith and credit” to the “public acts, records, and judicial proceedings of every other State.”⁴⁶⁹ The Full Faith and Credit Clause was first applied to assess the validity of marriages performed outside of a particular state’s jurisdiction in the 1933 case of *Loughran v. Loughran*. In that case, the U.S. Supreme Court created the *lex loci* rule of marital recognition,⁴⁷⁰ stating that if a marriage was legal in the jurisdiction where it was celebrated, another state must grant recognition and validity, even if it was contrary to a particular restriction in the other state.⁴⁷¹ The Court did, however, create an

⁴⁶⁹ U.S. CONST., art. IV, § 1. (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

⁴⁷⁰ Restatement (Second) of Conflict of Laws § 283 (1971).

⁴⁷¹ *Loughran v. Loughran*, 292 U.S. 216 (1933). In this case, a widow sought to enforce her rights as beneficiary of trust held by her deceased husband. Defendant-trustees argued that widow’s marriage with decedent violated the law of the District of Columbia because before she had married the decedent in Florida, she had been married to another man who had divorced her for reasons of adultery with the decedent. The Court held that because the marriage was valid under Florida law, the widow was entitled to property in the District of Columbia (“Equity does not demand that its suitors shall have led blameless lives.”) *Id.* at 229.

exception to the rule, permitting a state to deny recognition of those marriages that run counter to its moral or criminal laws.⁴⁷²

New York follows the *lex loci* rule. Over 50 years ago, the Court of Appeals held that even if a couple travels to another state to evade a restriction on marriage contained in the New York statute, New York will still be required to grant full faith and credit to the marriage if it was valid in the state where it was performed. In *In re Estate of May*,⁴⁷³ the couple, an uncle and half-niece who were prohibited by statute from marrying in New York, traveled to Providence, Rhode Island, where the marriage was legal for adherents of the Jewish faith. They then returned to New York where they lived for 33 years.

Upon the wife's death, three of the couple's six children challenged the husband's application for letters of administration, arguing that the marriage was null and void, that he was not the surviving spouse and therefore he was not entitled to the letters. The Court of Appeals ruled that because the marriage was legal in Rhode Island, New York had to recognize it because the Legislature had not expressed a clear intent to regulate the marriage of New York domiciliaries celebrated outside the state (*i.e.*, a "positive law" exception) and the marriage was not an incestuous union found to violate natural law.⁴⁷⁴

⁴⁷² The *Loughran* Court stated: "It is true that, under rules of law generally applicable, these courts may refuse to enforce a mere right of contract if it provides for doing within the District things prohibited by its laws.... It may, in the exercise of the police power, prohibit the enjoyment by persons within its borders of many rights acquired elsewhere and refuse to lend the aid of its courts to enforce them." *Id.* at 227.

⁴⁷³ *In re Estate of May*, 305 N.Y. 486 (N.Y. 1953).

⁴⁷⁴ While the uncle/half-niece relationship in *May's Estate* violated New York's incest statute, Domestic Relations Law §5, it was held not to violate natural law based on religious principles and the marriage, concededly valid where celebrated in Rhode Island, was recognized. The Court stated that it "regard[ed] the law as settled that the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated." 305 N.Y. at 490 internal citations omitted. The Court of Appeals specifically "recognized the general principle... [t]hat the rights dependent upon nuptial contracts, are to be determined by the *lex loci*," 305 N.Y. at 491 (quoting *Decouche v. Savetier*, 3 Johns. Ch. 190, 211 (1817)).

The permissive principle of comity allows New York to recognize judicial and statutory actions of a foreign country.⁴⁷⁵ Although closely related to the obligatory principle of full faith and credit for recognition of the acts of other U.S. states, the rules of comity are somewhat different. The proper test, enunciated by the Court of Appeals in *Greschler v. Greschler*, states that a foreign judgment will be recognized by New York unless it was procured by fraud, would violate a strong public policy of the state, or the original court lacked jurisdiction.⁴⁷⁶

Questions of morality in public policy are assessed based on the prevailing attitudes of the community unless the “transaction ... is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.”⁴⁷⁷ For instance, even though many countries recognize plural marriages, New York declines to grant recognition to any but the first legally married spouse, even if the subsequent relationship would be considered a legal marriage in the country of celebration.⁴⁷⁸

Having reviewed these basic tenets of full faith and credit and comity, the Report now turns to how these principles have been applied in New York.

⁴⁷⁵ *Greschler v. Greschler*, 51 N.Y.2d 368 (N.Y. 1980). *Greschler* considered a complaint seeking a declaration that a Dominican divorce decree and incorporated separation agreement are void.

⁴⁷⁶ *Id.* at 376 (“Absent some showing of fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to some strong public policy of this State a party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding brought in the courts of this State.”) (internal citations omitted).

⁴⁷⁷ *Id.* at 377. For a more detailed discussion of the issue of comity and public policy, see Gennaro Savastano, *Comity of Errors: Foreign Same-Sex Marriages in New York*, 24 *Touro L. Rev.* 199 (2008).

⁴⁷⁸ See, e.g., *In re Application of Sood*, 142 N.Y.S.2d 591 (Spec. Term 1955); *People v. Ezeonu*, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. Bronx County 1992). Cases of recognition include a Canadian marriage of under age minors which would not be permissible in New York. *Donohue v. Donohue*, 63 Misc. 111 (N.Y. Sup. Ct. Erie County 1909).

B. *Martinez v. County of Monroe*

In 2008, the Appellate Division, Fourth Department, had the opportunity to apply the fundamental principles of Full Faith and Credit and comity. In *Martinez v. County of Monroe*, the court held that the marriages of same-sex couples entered into in other jurisdictions are “entitled to recognition in New York State.”⁴⁷⁹ The case arose when the Monroe County Community College denied spousal benefits to plaintiff, a county employee, who had sought such benefits for her same-sex spouse following their marriage in Canada. The employee argued that, by refusing to provide same-sex spouses with the same benefits provided to married spouses, the county had violated both Executive Law § 296 and the state constitution’s Equal Protection Clause.

Relying on plaintiff’s statutory claim, the Fourth Department affirmed the Supreme Court’s decision that New York should legally recognize marriages entered into by same-sex couples out of state.⁴⁸⁰ The court noted that, in the past, the state had recognized all foreign marriages so long as they violated neither “positive law” nor “natural law.”⁴⁸¹ According to the court, no state legislation expressly prohibits recognizing the marriages of same-sex couples, and the natural law exception was inapplicable because it traditionally has been reserved for

⁴⁷⁹ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 744 (N.Y. App. Div. 4th Dep’t 2008) (holding that, absent legislation prohibiting the recognition of same-sex marriages or a natural law exception, the valid Canadian marriage of a same-sex couple should be recognized in New York for the purpose of securing health benefits for plaintiff’s spouse from plaintiff’s county employer).

⁴⁸⁰ *Id.* Executive Law § 296 (1) (a) prohibits sexual orientation-based discrimination “in compensation or in terms, conditions or privileges of employment. Upon finding this statutory violation, the court declined to address plaintiff’s equal protection claim. *Id.* The court also rejected the county’s claim that, since the county had begun to provide spousal health benefits beginning in 2006, plaintiff’s appeal was moot.

⁴⁸¹ *Id.* at 742 (citing *Matter of May*, 305 N.Y. 486 (N.Y. 1953), among other cases).

marriages involving polygamy or incest.⁴⁸² Thus, neither basis for rejecting the validity of the marriage could be satisfied. The court further held that the *Hernandez* decision did not render recognition of such marriages against public policy; rather, it held only that “the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York.”⁴⁸³

The precedential value of *Martinez* has been significant. Two cases, *Golden v. Paterson*⁴⁸⁴ and *Lewis v. State Department of Civil Service*,⁴⁸⁵ relied on the *Martinez* analysis when called upon to review the actions of the Governor and of the State Department of Civil Service, respectively, extending spousal benefits to state employees who have entered same-sex marriages in other jurisdictions. These judicial decisions, while providing optimism for married same-sex couples, do not, however, ensure recognition of their marriages. Indeed, both cases currently are before the Court of Appeals and the recognition of such marriages remains very much in legal limbo.

C. Governor Paterson’s Directive to State Agencies to Recognize Out-of-State Marriages of Same-Sex Couples

Over the last three years, several state, county and local officials and agencies have taken steps to ensure that the legal rights of same-sex couples who have married outside of New York State are fully recognized and respected.⁴⁸⁶ Perhaps the greatest impact has been felt by the

⁴⁸² *Id.* at 743.

⁴⁸³ *Id.* (emphasis in original).

⁴⁸⁴ *Golden v. Paterson*, No. 260148/2008, 2008 WL 5772257, at *2 (N.Y. Sup. Ct. Bronx County Sept. 2, 2008).

⁴⁸⁵ *Lewis v. State Dep’t of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 3d Dep’t), *leave to appeal granted*, - N.E.2d -- (N.Y. Mar. 31, 2009).

⁴⁸⁶ The remainder of Part Two, Sec. III, of the Report discusses orders issued by state and county official and entities. In addition, a number of cities and towns in New York State have publicly stated that they will recognize legal marriages formed in other jurisdictions by same-sex couples. These cities had publicly announced that legal marriages entered into by same-sex couples out of state would be recognized even

directive issued by Governor David Paterson on May 14, 2008, compelling all state agencies to recognize otherwise-valid marriages of same-sex couples legally performed in other states.⁴⁸⁷

This directive came in response to the Fourth Department’s decision in *Martinez v. Monroe County*,⁴⁸⁸ which held that New York’s long-standing policy of recognizing out-of-state marriages required legal recognition of marriages of same-sex couples from other jurisdictions. The Governor’s memorandum, issued through his legal counsel, David Nocenti, directed all state agencies to review and revise their internal policies and regulations to afford “comity and full faith and credit” to marriages of same-sex couples.⁴⁸⁹ Under the directive, all state agencies must

prior to Governor Paterson’s order. Among these cities are Albany, Binghamton, Buffalo, Ithaca, and Rochester; the towns of Brighton and Chili; the Village of Nyack; and New York City. See <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/new-york-marriage-recognition-outside-courtroom.html> (last visited May 1, 2009). Likewise, the Otsego County Board of Representatives voted to overturn an amendment unilaterally implemented by the County Treasurer that excluded same-sex couples from health insurance coverage. Arthur S. Leonard, *Legislative Notes: New York - Oneonta*, LESBIAN/GAY LAW NOTES, September 2008, at 179 (citing Jake Palmateer, *Board Undoes Thayne Ruling*, ONEONTA DAILY STAR, August 22, 2008 available at http://www.thedailystar.com/archivesearch/local_story_235040007.html (last visited May 1, 2009)).

⁴⁸⁷ Directive of Governor Paterson, Memorandum from David Nocenti to All Agency Counsel re: Decision on Same-Sex Marriages (“Paterson Directive”), May 14, 2008, available at <http://www.observer.com/2008/patersons-message-same-sex-marriage> (last visited May 1, 2009). Following the Governor’s order, Bernice K. Leber, President of the New York State Bar Association, supported the Governor’s decision in a press release that stated, “Equal legal rights for same-sex couples have long been a priority for the New York State Bar Association. We applaud Governor Paterson for his progressive and courageous directive. We now urge the Legislature and the Governor to take the appropriate steps to enact long overdue legislation this session that would address all the legal inequities suffered by same-sex couples in New York.” Statement from State Bar President Bernice K. Leber on Governor Paterson’s Directive on Same-Sex Marriage, June 5, 2008, available at <http://www.nysba.org/AM/Template.cfm?Section=Home8&CONTENTID=17558&TEMPLATE=/CM/ContentDisplay.cfm> (last visited May 1, 2009).

⁴⁸⁸ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dep’t 2008). See also *supra* Part Two, Sec. III.B.

⁴⁸⁹ Paterson Directive, *supra* note 487. The directive did not explicitly set forth the ways state agencies could come into compliance, leaving it to the individual agencies to effect their own policy changes. For an example of how one agency dealt with the directive, see Memorandum from State of New York Insurance Department Re: Health Insurance for Same-Sex Spouses in Legal Out-of-State Marriages, OGC Op. No. 08-11-5, available at <http://www.ins.state.ny.us/ogco2008/rg081105.htm> (last visited May 1, 2009)(taking position that “where an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who legally married his or her spouse out-of-state is entitled to health insurance coverage to the same extent as any opposite-sex spouse”).

provide the same rights and benefits under New York law to same-sex couples who have married elsewhere that they currently provide to married opposite-sex couples.⁴⁹⁰

The scope of the order touches upon many state regulations and statutes conferring spousal rights and responsibilities – including such measures as the ability of a state employee’s same-sex spouse to collect the employee’s pension or to continue residing in public housing in the event of that employee’s death.⁴⁹¹ Its bearing on the private sector, however, is less certain.⁴⁹² Although the Governor’s directive clearly reflects and directs the state’s public policy, it does not compel private employers to recognize same-sex couples’ marriages solemnized in other jurisdictions. Thus, these issues will likely be litigated until they reach the Court of Appeals, or unless the legislature acts to ratify marriages between same-sex couples within the state.⁴⁹³

Governor Paterson’s act was immediately challenged in a lawsuit filed by the Alliance Defense Fund, a not-for-profit conservative Christian organization based in Arizona that has

⁴⁹⁰ Paterson Directive, *supra* note 487.

⁴⁹¹ Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, NEW YORK TIMES, May 29, 2008, available at <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html?pagewanted=print> (last viewed May 4, 2009). In total, it is estimated that about 1,300 state statutes and regulations may be implicated by Governor Paterson's directive. *Id.*

⁴⁹² For example, as a direct result of the Governor’s directive, the New York State Insurance Department has advised insurance companies serving the state that same-sex couples validly married outside of New York must be recognized as spouses for insurance purposes. Arthur S. Leonard, *NY State Insurance Department Requires Recognition of Foreign Same Sex Marriages*, LESBIAN/GAY LAW NOTES, December 2008, at 233-234 (citing Circular Letter No. 27 (2008), issued November 1, 2008). The Insurance Department’s authority is limited, however, with respect to employers that seek insurance coverage for their employees. The letter made no distinction between public sector and private sector employers and did not address the possibility of private, self-insured employers circumventing the legal precedent established by *Martinez* through Employee Retirement Security Act (ERISA) preemption. The ERISA loophole is discussed more completely in Part Three of this Report. Other agencies have taken analogous actions, discussed in greater detail in this Section of the Report.

⁴⁹³ For example, if a private employer is not bound by ERISA, it is possible that a married same-sex couple may have legal recourse against that employer based on laws barring discrimination on the basis of sex, sexual orientation or marital status.

advocated against gay-rights.⁴⁹⁴ On September 2, 2008, Justice Billings of the Supreme Court dismissed the complaint in *Golden v. Paterson*, finding that the Governor acted within his proper authority and consistently with state law.⁴⁹⁵ The Alliance Defense Fund filed a notice of appeal.⁴⁹⁶

D. Additional Executive Orders

1. Opinion of the New York State Comptroller (2004) and *Godfrey v. Hevesi*

On October 8, 2004, former New York State Comptroller Alan G. Hevesi issued an opinion confirming that the state's retirement system would recognize out-of-state marriages of same-sex couples to determine eligibility for retirement and pension benefits. The Alliance Defense Fund challenged the constitutionality and general legality of the Comptroller's opinion in *Godfrey v. Hevesi*.⁴⁹⁷ The state supreme court applied the comity principle and held that the state was within its rights to recognize such marriages.⁴⁹⁸

⁴⁹⁴ The ADF filed its lawsuit on June 3, 2008. *Golden v. Paterson*, No. 260148/2008, 2008 WL 5772257, at *2 (N.Y. Sup. Ct. Bronx County, Sept. 2, 2008). According to its website, www.alliancedefensefund.org (last visited May 1, 2009), the organization is "a servant organization that provides resources that will keep the door open for the spread of the Gospel through the legal defense and advocacy of religious freedom, the sanctity of human life, and traditional family values." The ADF website further states that, "God created marriage as the unity of one man and one woman. . . . Sadly, many radical activist groups in the U.S. are attempting to twist the law to change the definition of marriage and the family to include same-sex "marriage," polygamy, polyamory, and other structures. These groups scoff at the idea that there is any fixed or known set of values or beliefs that is generally good for families or culture." Available at <http://www.alliancedefensefund.org/issues/traditionalfamily/Default.aspx> (last visited May 1, 2009).

⁴⁹⁵ *Id.*; see also Nicholas Confessore, *Court Backs Paterson Regarding Gay Unions*, N.Y. TIMES, Sept. 3, 2008, at B5.

⁴⁹⁶ See *ADF Appeals Decision to Uphold NY Governor's Same-Sex 'Marriage' Directive*, Alliance Defense Fund Website, Sept. 9, 2008, available at <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4670> (last visited May 1, 2009).

⁴⁹⁷ *Godfrey v. DiNapoli* [formerly *Hevesi*], 866 N.Y.S.2d 844 (N.Y. Sup. Ct. Albany County 2008).

⁴⁹⁸ *Id.* at 846.

2. *Order of the Westchester County Executive (2006) and Godfrey v. Spano*

In June 2006, Andrew J. Spano, the Westchester County Executive, issued an Executive Order directing county agencies to recognize valid out-of-state marriages of same-sex couples and to provide equal benefits and rights to both same-sex and different-sex couples “to the maximum extent allowed by law.”⁴⁹⁹ In *Godfrey v. Spano*, the Alliance Defense Fund promptly challenged the Order.⁵⁰⁰

In a 2007 decision, Justice Joan B. Lefkowitz of the state’s Supreme Court rejected this challenge, based largely on principles of comity and the evolving nature of New York law on the legal rights of same-sex couples.⁵⁰¹ In a succinct and unanimous decision affirming the Supreme Court’s decision, the Second Department rejected plaintiffs’ challenge to the Executive Order.⁵⁰² Plaintiffs had alleging that the Order legislated in a manner inconsistent with both the New York State Constitution and state law.⁵⁰³ Relying on *Hernandez*, plaintiffs argued that even validly solemnized marriages of same-sex couples may not be recognized in New York.⁵⁰⁴ Noting that relief for plaintiffs would be available only if the Executive Order were illegal, the Appellate Division concluded that because the Order instructed that marriages be recognized only “to the

⁴⁹⁹ *Godfrey v. Spano*, 871 N.Y.S.2d 296, 298 (2d Dep’t 2008), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009) (The Executive Order, Number 3 of 2006, as quoted by the court, orders all agencies under the jurisdiction of Spano’s jurisdiction “to recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belong to these couples, to the maximum extent allowed by law.”).

⁵⁰⁰ *Id.*

⁵⁰¹ *Godfrey v. Spano*, 836 N.Y.S.2d 813, 814, 816-19 (N.Y. Sup. Ct. Westchester County 2007).

⁵⁰² *Godfrey v. Spano*, 871 N.Y.S.2d at 298.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

maximum extent allowed by the law,” the Executive Order could never lie beyond the boundaries of legal conduct.⁵⁰⁵

Plaintiffs also claimed that the Executive Order violated Article IX, § 2(c) of the New York State Constitution and the Municipal Home Rule Law § 10(1)(a)(I).⁵⁰⁶ The Second Department responded that because plaintiffs failed “to demonstrate some personal interest in the dispute beyond that of any taxpayer to make those claims,”⁵⁰⁷ the Executive Order of County Executive Spano was legal and that it did not violate either the State Constitution or the Municipal Home Rule Law.⁵⁰⁸

The Court of Appeals granted leave to appeal the case on March 31, 2009.⁵⁰⁹

3. *Order of the New York State Department of Civil Service (2007) and Lewis v. State Dep’t of Civil Services*

In May 2007, the New York State Department of Civil Services stated that it would recognize valid out-of-state marriages entered into by same-sex couples. As a result, state employees who were parties to such marriages could access spousal health benefits under the New York State Health Insurance Program.

In *Lewis v. State Department of Civil Service*, plaintiff questioned the constitutionality of the Department’s change in public policy, arguing that: (1) because recognition of such

⁵⁰⁵ *Id.*

⁵⁰⁶ Executive Order violated Article IX, § 2(c) of the New York State Constitution and the Municipal Home Rule Law § 10(1)(a)(I) addresses the power of local governments to adopt and amend laws so long as they are consistent with the laws and Constitution of the state.

⁵⁰⁷ *Godfrey v. Spano*, 871 N.Y.S.2d at 298.

⁵⁰⁸ *Id.* at 298-99.

⁵⁰⁹ *Godfrey v. Spano*, -- N.E. -- (N.Y. Mar. 31, 2009).

marriages is illegal, providing benefits constitutes an unlawful disbursement of public funds;⁵¹⁰ (2) same-sex couples who are married are not “spouses” as defined under Civil Service Law, Article 11;⁵¹¹ (3) the Department violated the separation of powers doctrine;⁵¹² (4) the Department violated article VII, § 8(1) of the New York Constitution by using public funds to further the Governor’s personal goal;⁵¹³ and (5) the change in policy did not comply with the formal rule-making procedures detailed in the State Administrative Procedure Act.⁵¹⁴ On appeal to the Third Department, the court rejected all of plaintiff’s claims.⁵¹⁵ The Court of Appeals has announced it will hear plaintiff’s appeal.⁵¹⁶

a. Majority Opinion (Judge Rose)

The Appellate Division found each of plaintiff’s claims to be without merit, affirming the state Supreme Court decision that validated the Department’s policy change.⁵¹⁷ Echoing the Fourth Department’s reasoning in *Martinez*, the court declared that New York’s “marriage recognition rule” acknowledges marriages that are valid where they were performed unless one of two exceptions applied:⁵¹⁸ a state statute explicitly conveys “a legislative intent to void a

⁵¹⁰ *Lewis v. State Dep’t of Civil Serv.*, 872 N.Y.S.2d 578, 581 (N.Y. App. Div. 3d Dep’t), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009).

⁵¹¹ *Lewis*, 872 N.Y.S.2d at 585.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 582-86.

⁵¹⁶ *Lewis v. State Dep’t of Civil Serv.*, -- N.E.2d -- (N.Y. Mar. 31, 2009) (*leave to appeal granted*).

⁵¹⁷ *Lewis*, 872 N.Y.S.2d at 582-86.

⁵¹⁸ *Id.* at 582.

marriage legally entered into in another jurisdiction” or the out-of-state marriage is “abhorrent to New York public policy.”⁵¹⁹

The *Lewis* court found that neither of the exceptions to the marriage recognition rule were applicable in this case. To begin, the court found that “no New York statute expressly precludes recognition of a same-sex marriage solemnized elsewhere,”⁵²⁰ making the positive law exception inapplicable. Although plaintiff argued that *Hernandez* had defined marriage to exclude unions of same-sex couples, the court found that New York had consistently applied the marriage recognition rule even when a marriage would not qualify under New York law.⁵²¹ Further, the Third Department interpreted the Court of Appeals’ silence on whether the DRL bars recognition of such marriages as tacit permission for their recognition and the state’s failure to adopt mini-DOMA legislation as an absence of a state policy adjustment.⁵²²

Analyzing the second exception, the court observed that New York traditionally found marriages abhorrent to its public policy only when they involved incestuous or polygamous relationships.⁵²³ Further, a combination of factors – the state legislature’s decision *not* to deny full faith and credit to the out-of-state marriages of same-sex couples, judicial precedent recognizing marriages same-sex couples, and the Court of Appeals’ decision to narrowly

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 583.

⁵²¹ *Id.* at 584.

⁵²² *Id.*

⁵²³ *Id.* at 583. (“As for the second exception precluding recognition of an incestuous or polygamous marriage, we note that an out-of-state same-sex marriage would not fall within that preclusion unless the same-sex spouses were closely related or were more than two in number, situations not under consideration here.”).

construe the Domestic Relations Law⁵²⁴ – all supported its finding that New York’s public policy did not oppose the recognition of same-sex couples marriages that had been solemnized out-of-state.⁵²⁵ Having declared both exceptions to the marriage recognition rule inapplicable in this case, the court determined that the Department’s policy change providing spousal health benefits to same-sex spouses was valid.

Although the bulk of the court’s analysis addressed plaintiff’s first cause of action, the court briefly examined and rejected plaintiff’s remaining claims as well. The court found that the term “spouses,” as defined by Civil Service Law included same-sex spouses because by recognizing the foreign marriage, each partner would be “‘a party to a marriage’ and, thus, a ‘legal spouse’ who would be entitled to the benefits, rights, and obligations of that status.”⁵²⁶ Thus, the court concluded that the Department’s actions complied with the State Administrative Procedure Act because the policy change reasonably interpreted the definition of the term “spouse” as permitted by the Act.⁵²⁷

The court also found no justification for plaintiff’s claim that the policy change violated the separation of powers doctrine; the Department’s action did not preclude the legislature from later enacting positive legislation to govern the issue.⁵²⁸ The court similarly rejected plaintiff’s

⁵²⁴ *Id.* at 584 (stating that “where the Domestic Relations Law does not expressly declare void a certain type of marriage validly solemnized outside of New York, the statute should not be extended by judicial construction”).

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 585 (citing *Matter of Langan v. State Farm Fire & Cas.*, 48 A.D.3d 76, 78, 849 N.Y.2d 105 (2007)). See N.Y. CIV. SERV. LAW, ART. II.

⁵²⁷ *Id.* at 585-86. The State Administrative Procedure Act states that one exception to the rulemaking procedure concerns “forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory.” A.P.A. § 102 [2] [b] [iv].

⁵²⁸ *Id.*

argument that the use of public funds to implement the Department’s policy was either an unlawful disbursement or unconstitutionally enacted to further a personal goal of the Governor. According to the court, “[i]nasmuch as the Department’s policy furthers a valid governmental purpose to benefit public employees, it cannot fairly be said that it is invalid as promoting a private undertaking.”⁵²⁹

Denying each of plaintiff’s claims, the Third Department affirmed the trial court decision and permitted the Department to recognize out-of-state marriages of same-sex couples and provide spousal health care benefits.

b. The Concurrence (Judge Lahtinen)

In his concurrence, Judge Lahtinen sought to narrow the scope of the court’s decision. He was concerned that the language of the majority opinion could be construed broadly as condoning the interpretation of “spouse” to include the same-sex partners of all married gay men or lesbians regardless of employment status, stating that “[a]ction taken by the state pertaining to its own employees is different from changing longstanding law that affects all of the state’s citizens.”⁵³⁰ Although he said the Department of Civil Services was entitled to make a policy change affecting state employees, he rejected the implication that the authority of that change extended to non-state employees throughout New York and believed that the Legislature was best positioned to address this issue for the state’s population at large.⁵³¹

⁵²⁹ *Id.* at 585. .

⁵³⁰ *Id.* at 586 (Lahtinen, J., concurring) (commenting about the “potentially expansive implications of the majority’s approach”).

⁵³¹ *Id.*

IV. Other New York Judicial Developments Affecting Same-Sex Couples

The state actions discussed above, and the judicial review of those actions, primarily have arisen in the context of a state or county employee's workplace rights, specifically regarding access to benefits. Other courts, however, have been asked to review – directly or indirectly – the rights of same-sex couples in other aspects of their lives, namely dissolution of their unions, parental rights, and the ability to sue as a surviving partner. The following briefly summarizes developments in these areas.

A. *Dissolution of Legal Unions*

Concomitant to the right to marry or to enter into a civil union is the right, one would assume, to terminate that legal relationship. Around the country, however, this right has been quite elusive.⁵³² Fortunately for the affected parties, state courts in New York have been exercising subject-matter jurisdiction to hear and resolve divorce actions for same-sex couples married out of state. For example, in 2008, where the divorce was uncontested and submitted on papers, a lesbian couple who had married in Canada was granted a divorce by the Supreme Court of Kings County.⁵³³ Similarly, a New York County Supreme Court has held that it had subject-

⁵³² See, e.g., Mark Momjian, *The Out-of-State Dissolution of Civil Unions*, Same-Sex Partnership L. Rep. 1 (March 2005), available at http://www.schnader.com/files/Publication/bc8b2c00-d1f2-4c27-9ddf-315b8dc33611/Presentation/PublicationAttachment/bfb85538-830c-4fab-bd1e-20c5876e501b/Out_Of_State_Dissolutions_March2005.pdf (last visited May 3, 2009)

⁵³³ *Henning-Dyson v. Henning-Dyson*, No. 14940/07 (N.Y. Sup. Ct. Kings County Oct. 14, 2008) (uncontested matrimonial judgment granted). The submitted papers made clear that the couple seeking a divorce were both women. The Judgment of Divorce and the Findings of Fact and Conclusions of Law are signed by a Special Referee in Kings County. Email exchange with Michele Kahn (Jan. 21, 2009), counsel to the plaintiff, on file with the Committee.

matter jurisdiction to hear a divorce action in the case of a lesbian couple legally married in Massachusetts.⁵³⁴

Even where the divorce was contested, at least one court has been willing to dissolve an out-of-state marriage of a same-sex couple. In *Beth R. v. Donna M.*, defendant moved to dismiss plaintiff's divorce action, interpreting *Hernandez* to void marriages of same-sex couples under New York law.⁵³⁵ The State Supreme Court distinguished *Hernandez* because its ruling did not address marriage licenses issued outside of New York, holding instead that common-law doctrines and comity governed the recognition of valid out-of-state marriages.⁵³⁶ As no state law precluded recognition, and by proxy dissolution, of the couple's relationship, the court granted subject-matter jurisdiction, rejecting defendant's argument that the marriage was invalid.⁵³⁷

B. Parental Rights Upon Dissolution

Although opposite-sex couples with children must necessarily address custody and parental rights when dissolving their marriages, same-sex couples seeking dissolution must first consider what rights, if any, they have as parents.

In general, New York law provides that the former partner of a biological parent has standing to petition for custody or visitation only if he or she has adopted the child(ren) in

⁵³⁴ See *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. N.Y. County 2008) (determining that the court had subject-matter jurisdiction to hear a divorce action in the case of a lesbian couple legally married in Massachusetts).

⁵³⁵ *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 504 (N.Y. Sup. Ct. N.Y. County 2008).

⁵³⁶ *Id.*

⁵³⁷ *Id.* at 504-505 (denying "defendant's motion to dismiss this divorce action on the grounds that the parties' Canadian marriage is void under New York law"). The court also granted plaintiff's cross-motion to address custodial issues and scheduled further hearings on these issues. *Id.* at 509. The current status of the couple's relationship is unknown.

question, regardless of whether the couple was married.⁵³⁸ Conversely, for purposes of establishing paternity, the husband of a woman who gives birth during a marriage is presumptively deemed to be the father of the child.⁵³⁹ These policies pose unique challenges for same-sex couples, particularly those who are not married. For example, in 2002, the Second Department rejected claims by a non-biological, same-sex (estranged) partner that she was a *de facto* parent.⁵⁴⁰ The court refused to enter an order of visitation, stating that, “[a]ny extension of visitation rights to a same sex domestic partner who claims to be a ‘parent by estoppel,’ ‘de facto parent,’ or ‘psychological parent’ must come from the New York State Legislature or the Court of Appeals.”⁵⁴¹

Other courts have issued analogous orders. For example, in 2004, in *Matter of C.M. v. C.H.*, the defendant had given birth to two children during the couple’s relationship, and although C.M. (also a woman) had legally adopted the first child, the adoption process for the second child had been derailed by the couple’s separation. Relying in part on the New York precedent, the state Supreme Court held that C.M., the non-biological mother, could visit only her legally-adopted first child because she lacked the standing to seek visitation with the second child.⁵⁴²

⁵³⁸ See N.Y. DOM. REL. LAW § 236 Part A(2); 2004 Report at i.

⁵³⁹ *Cossart v. Cossart*, 343 N.Y.S.2d 172, 174 (N.Y. Fam. Ct. Albany County 1972).

⁵⁴⁰ *Janis C. v. Christine T.*, 742 N.Y.S.2d 381, 383 (N.Y. App. Div. 2d Dep’t 2002).

⁵⁴¹ *Id.*

⁵⁴² *Matter of C.M. v. C.H.*, 789 N.Y.S.2d 393, 399, 402 (N.Y. Sup. Ct. N.Y. County 2004) (basing its decision on the Court of Appeal’s “narrow definition of ‘parents’ for purposes of standing in custody cases”) citing *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991)).

A similar conclusion was reached by the Appellate Division, First Department, in *Debra H. v. Janice R.*⁵⁴³ In that case, Debra H. was seeking a hearing on whether she stood *in loco parentis* to the biological child born to Janice R. approximately one month after the parties entered into a Vermont civil union and more than two months after they registered as domestic partners in New York City.⁵⁴⁴ The First Department, overturning a state Supreme Court decision endorsing petitioner’s argument,⁵⁴⁵ held that, consistent with the Court of Appeals’ ruling in *Matter of Alison D. v. Virginia M.*, “a party who is neither the biological nor the adoptive party of a child lacks standing to seek custody or visitation rights.”⁵⁴⁶

Where the couples are married, however, courts have tended to rule differently. A 2008 New York County Supreme Court prevented (by estoppel) the birth mother from denying that her former spouse was a parent.⁵⁴⁷ In *Beth R. v. Donna M.*, the court applied a precedent

⁵⁴³ *Debra H. v. Janice R.*, -- N.Y.S.2d --, 2009 WL 943772 (N.Y.App. Div 1st Dep’t. April 9, 2009).

⁵⁴⁴ *Id.* at 1.

⁵⁴⁵ *See Debra H. v. Janice R.*, 240 N.Y.L.J. 71 (N.Y. Sup. Ct. N.Y. County Oct. 2, 2008), *rev’d*, -- N.Y.S.2d --, 2009 WL 943772 (N.Y. App. Div. 1st Dep’t Apr. 9, 2009) (holding that although the couple’s civil union was not a determinative factor in ordering visitation rights pending a final decision on whether plaintiff had standing, the birth of a child during the union was “extremely persuasive evidence of joint parentage”).

⁵⁴⁶ *Debra H. v. Janice R.*, 2009 WL 943772, at *1 (quoting *Matter of Alison D. v. Virginia M.*, 73 N.Y.2d 651 (1991)).

⁵⁴⁷ *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508 (N.Y. Sup. Ct. N.Y. County 2008). The couple had been married in Canada. *Id.* at 501.

A trio of cases decided in California have started to inform child custody decisions affecting same-sex couples nationwide. In *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), Elisa stopped providing financial support two years after terminating her relationship with her partner. The California Supreme Court found that Elisa, who had agreed to her partner’s insemination and had acted as a co-parent during the relationship, was a presumed parent and could not abandon her children once that relationship ended. *Id.* at 126. The court applied the law equally to both unmarried heterosexual couples and unmarried lesbian couples when it unanimously decided that the non-biological parent of children conceived during the course of a relationship must pay child support following the couple’s separation. *Id.*

That same year, in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), the California Supreme Court decided that K.M., whose eggs had been artificially inseminated in her partner, was the children’s biological parent and second mother. Although K.M. had waived her parental rights, the court distinguished her waiver from those of sperm donors because she had used her eggs to produce children to be raised in a familial

traditionally applied to opposite-sex couples when it ruled that policy concerns for the welfare of the child demanded that married parents be unable to reject their own parental status and its accompanying responsibilities.⁵⁴⁸

In 2009, the New York County Surrogate’s Court thoroughly reviewed existing law and its impact on establishing parental rights within a same-sex couple.⁵⁴⁹ In the *Matter of Adoption of a Child Whose First Name is Sebastian*, petitioners who had been legally married in the Netherlands, sought a ruling declaring both spouses the parents of Sebastian.⁵⁵⁰ In this case, one partner had provided the egg that was fertilized using sperm from an anonymous donor. The fertilized ovum was implanted in the uterus of the other spouse and carried by her.⁵⁵¹

environment composed of both parties to the suit. In a 4-2 decision divided along gender lines, the majority, composed of the men on the bench, found that parental rights belonged to both mothers under a statute governing parentage in the California Family Code. By contrast, the female judges worried about nullifying an otherwise valid written agreement (*i.e.*, K.M.’s waiver of parental rights), favoring instead a test of the parties’ intent.

Finally, in *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005), the court affirmed the parental rights of a woman on procedural grounds. The court declined to review a stipulated judgment of filiation because Kristine H. had benefited from the judgment for the past two years. As a result, the court estopped her from challenging the validity of the stipulated judgment, serving the additional public policy interest of providing the couple’s children with two parents. *In the Matter of the Adoption of a Child Whose Name is Sebastian*, No. 38-08,-- N.Y.S.2d --, 2009 WL 1141728, at *5 n.30 (Glen, S.) (N.Y. Surr. Ct. N.Y. County Apr. 9, 2009) (noting that a court, upon a finding of paternity, issues an “order of filiation” and further noting (citing Black’s Law Dictionary (8th ed. 2004) the traditional use of the term “paternity” but preferring the term “filiation” as a “gender neutral term connoting ‘the fact or condition of being a son or daughter; relationship of a child to a parent.’”).

⁵⁴⁸ *Beth R.*, 853 N.Y.S.2d at 507 (citing *In Matter of Shondel J. v. Mark D.*, 820 N.Y.S.2d 199 (N.Y. 2006)). In *Shondel J.*, the Court of Appeals held that a father figure who had previously acknowledged paternity and had provided some financial support to the child could be estopped from denying paternity. Even though movant was not in a continuous relationship with the mother and a DNA test established that he was not in fact the biological father, the court noted that its decision was motivated by the considerations of the best interest of the child. *Id.* Pointedly, that ruling was gender neutral. *Id.*

⁵⁴⁹ *Sebastian*, 2009 WL 1141728.

⁵⁵⁰ *Id.* at *1. The court stated that petitioners “were legally married in the Netherlands and under general marriage recognition rules, that marriage is recognized in New York.” *Id.* at *6 (citing *Martinez v. County of Monroe*, 850 N.Y.S. 2d 740 (N.Y. App. Div. 4th Dep’t), *app. dismissed*, 859 N.Y.S.2d 617 (2008); *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. N.Y. County 2008)).

⁵⁵¹ *Id.* at *3.

Surrogate Glen observed that “as the child of a married couple, Sebastian already had a recognized and protected child/parent relationship with both [petitioners], arguably making adoption unnecessary and impermissibly duplicative.”⁵⁵² However, because other jurisdictions might not recognize the parental rights of Sebastian’s genetic (yet not birth) mother, the court went on to consider, and ultimately grant, the couple’s petition for an order of adoption.⁵⁵³

These more recent cases indicate that courts may be shifting their approaches to assessing the rights of same-sex partners in the context of custody disputes of married partners, who jointly plan to parent, rather than those who have entered civil unions. Yet, as the Court of Appeals has not endorsed – or rejected – this approach, the custody and visitation rights of these couples remain very much unresolved.⁵⁵⁴

One additional development may significantly affect the parental rights jurisprudence of same-sex couples. In response to a lawsuit arguing that the New York State Department of Health was not complying with Governor Paterson’s directive demanding equal treatment for married same-sex couples,⁵⁵⁵ the Department agreed to allow same-sex couples who are legally

⁵⁵² *Id.* at 6. *Cf. Estate of H. Kenneth Ranfile*, N.Y.L.J., Feb. 3, 2009, at 27, col. 1 (Surr. Ct. N.Y. County) (finding that the surviving partner of a same-sex couple validly married in Canada was a spouse for purposes of determining the distributees entitled to notice).

⁵⁵³ *Id.* at 21. (The court granted the adoption petition, making the ovum donor spouse, “as a matter of law, in addition to her own genetic and loving connection,” Sebastian’s mother.) The court considered the petition, notwithstanding the parties’ theoretical ability to obtain an “acknowledgement of paternity” [sic], out of concern that it might not be honored in other jurisdictions. *See id.* at 18-20.

⁵⁵⁴ Parties still must contend with the Court of Appeals’ decision in *Alison D. v. Virginia M.*, 569 N.Y.S.2d 586 (N.Y. 1991), which restricts custody and visitation solely to parents of the children of the marriage. *But see In the Matter of the Adoption of A Child Whose Name is Sebastian*, -- N.Y.S.2d --, 2009 WL 1141728 (Glen, S.) (N.Y. Surr. Ct. N.Y. County Apr. 9, 2009) (calling into question the “continued validity of that decision” and citing *Deborah H. v. Janice F.*, (Sup. Ct. N.Y. County 2008) (replying in part to dissent in *Alison D.*)).

⁵⁵⁵ Carolyn Trzeciak and Nina Sheldon Trzeciak, married in Canada in 2006, argued that under Governor Paterson’s directive, both should be designated as parents of the child conceived through artificial insemination. Although the husband of a woman who conceived a child by artificial insemination is

married to list both parents' names on their child's birth certificate.⁵⁵⁶ Although the Health Department's action provides a degree of potential legal security to non-birth parents in same-sex relationships, its true effect on the custodial disputes of same-sex couples, particularly beyond the state's borders, is not yet known. As noted by Judge Glen of the New York County Surrogate's Court, a "birth certificate is ... only prima facie evidence of parentage and does not, in and of itself, confer parental rights that must be recognized elsewhere."⁵⁵⁷

C. *Survivors' Claims*

Although the present trend of cases increases access to spousal benefits for same-sex couples married outside New York (at least regarding state employees),⁵⁵⁸ recent litigation suggests that courts are more reluctant to provide similar access to survivor benefits, at least

automatically considered the father under state law, the same may not be true of married same-sex partners. Jennifer Peltz, *Gay Couples Gain Birth-Certificate Rights*, THE WASH. TIMES, Dec. 15, 2008, available at <http://www.washingtontimes.com/news/2008/dec/15/gay-couples-gain-birth-certificate-rights/> (last visited Apr. 30, 2009). See also *Cossart v. Cossart*, 343 N.Y.S.2d 172 (N.Y. Fam. Ct. Albany County 1972).

⁵⁵⁶ New York State Department Memo, Series 631.0, recognizing same-sex marriages performed legally in other jurisdictions (Dec. 8, 2008) cited in *Sebastian* at *4, and in *New York Allows Gay Parents on Birth Certificate*, NBC NEW YORK, Dec 14, 2008, available at http://www.nbcnewyork.com/news/us_world/NATLNew-York-Allows-Gay-Parents-on-Birth-Certificate.html (last visited Apr. 30, 2009). New York City, which has its own birth certificate forms and is not automatically affected by the state Health Department's order, has made a similar change for lesbian mothers, but not for gay male fathers. See, e.g., *City Eases Rule for Lesbian Moms* <http://www.newsday.com/news/local/newyork/ny-nyles26608361mar26,0,930254> (available by subscription only). On March 26, 2009, New York City Council Speaker Christine Quinn issued a press release applauding the New York Board of Health decision to change its rules to allow legally married lesbian couples to list both partners as parents on their child's birth certificate. Press Release, Statement by Speaker Christine C. Quinn Regarding *Lesbian Couples Listed on Their Child's Birth Certificate*, available at http://www.council.nyc.gov/html/releases/lesbian_couples_3_26_09.shtml (last visited Apr. 30, 2009).

⁵⁵⁷ *Sebastian* at *4 (citing Pub. Health L. § 4103).

⁵⁵⁸ See generally *supra* Part Two, Secs. III.C and III.D. Further, in *Funderburke v. State Dep't of Civil Serv.*, 854 N.Y.S.2d 466 (N.Y. Sup. Ct. Nassau County 2006), *reversed and vacated*, 49 A.D.3d 809 (N.Y. App. Div. 2d Dep't 2008), after a trial court found that an employer was justified in refusing to recognize a retired school teacher's Canadian marriage when he sought spousal health and dental benefits for his same-sex spouse, the Department of Civil Service changed its policy, providing plaintiff's spouse with the benefits sought. See also *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844 (Sup. Ct. N.Y. County 2008) (holding that the New York State Comptroller's policy of recognizing foreign same-sex marriages for the purpose of dispensing retirement benefits from public funds was not contrary to New York law).

when the couple has been joined in civil union. A series of cases involving John Langan, the surviving partner of a Vermont civil union, spotlights the complexities and inadequacies inherent in how state law currently addresses gay men and lesbians whose rights are implicated in cases of tort. In 2005, Langan’s partner suffered injuries from a car accident and was taken to St. Vincent’s Hospital. After what had appeared to be a series of successful surgeries, Langan’s partner mysteriously died, prompting Langan to sue the hospital for medical malpractice.⁵⁵⁹

In *Langan v. St. Vincent’s Hospital*, a divided Appellate Division, Second Department, reversed a Supreme Court decision and barred plaintiff from filing a wrongful death action.⁵⁶⁰ The court found that Langan was not a “distributee” under the Estates, Powers and Trusts Law, effectively denying him the right to sue in wrongful death.⁵⁶¹ According to the court, expanding the plain meaning of the statute to equate civil union partners to “spouses” required legislative action, not judicial interpretation.⁵⁶²

Langan brought a related case, this time up to the Third Department, seeking to access his deceased partner’s workers’ compensation benefits. In *Langan v. State Farm Fire & Casualty*, plaintiff challenged a ruling of the Workers’ Compensation Board which refused to recognize him as a surviving spouse. Although Langan conceded that his civil union was not a marriage, he argued that the New York Workers’ Compensation Laws included a partner to a civil union as

⁵⁵⁹ *Id.*

⁵⁶⁰ *Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2d Dep’t 2005).

⁵⁶¹ *Id.* at 479 (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.1).

⁵⁶² *St. Vincent’s*, 802 N.Y.S.2d at 479-80. This decision has since been applied to reject a different attempt to equate same-sex partners with spouses. *See Cruz v. McAnaney*, 816 N.Y.S.2d 486, 489 (N.Y. App. Div. 2d Dep’t 2006) (holding that plaintiff, the surviving partner of a victim of the September 11, 2001 terrorist attacks, is not a “spouse” for the purposes of intestate distribution of the decedent same-sex partner’s award from the federal September 11 Victims Compensation Fund of 2001, but that, as the sole survivor and beneficiary of the decedent however, the court held that the survivor stated valid claims for equitable relief and unjust enrichment).

a “surviving spouse” and that comity considerations required New York to recognize a union equated to marriage in Vermont. He also claimed that depriving a civil union partner of spousal benefits violated the Equal Protection Clause of the U.S. Constitution.⁵⁶³

This court also ruled against Langan, concluding that partners in a civil union are not legal spouses under New York Workers’ Compensation Laws⁵⁶⁴ and that therefore he was not entitled to the decedent’s death benefits for a surviving spouse.⁵⁶⁵ The court acknowledged that although it could “recognize the civil union status of claimant and decedent as a matter of comity, [it was] not thereby bound to confer upon them all of the legal incidents of that status recognized in the foreign jurisdiction that created the relationship.”⁵⁶⁶ Indeed, the court found that a rational relationship existed between the challenged statute and the state legislature’s decision to limit marriage to opposite-sex couples for family and procreative reasons.⁵⁶⁷ Thus, the court rejected Langan’s equal protection claim as well.

In both cases, Langan challenged the New York courts to recognize a civil union partner, acknowledged as equal to a “spouse” under Vermont law, as having the same status in New York. Both courts declined to adopt this interpretation, thereby excluding Langan from receiving benefits that ordinarily would be available to a spouse in a heterosexual marriage.

⁵⁶³ *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105, 107 (N.Y. App. Div. 3d Dep’t 2007).

⁵⁶⁴ The relevant section of the Workers’ Compensation Laws provides: “For the purpose of this section ... the term surviving spouse shall be deemed to mean the legal spouse but shall not include a spouse who has abandoned the deceased.” N.Y. WORKERS’ COMP. LAW § 16(1-a).

⁵⁶⁵ *State Farm*, 849 N.Y.S.2d at 107.

⁵⁶⁶ *Id.* at 107-08.

⁵⁶⁷ *Id.* at 109.

Langan finally was permitted to file a claim (and prevailed) when he sued as the executor of his deceased partner's estate, rather than as an individual plaintiff.⁵⁶⁸

⁵⁶⁸ See *State Farm Mut. Auto. Ins. Co. v. Langan*, 865 N.Y.S.2d 102 (N.Y. App. Div. 2d Dep't 2008).

PART THREE

Civil Union/Domestic Partnership and Marriage: A Comparative Analysis

Recognizing that same-sex couples ought to have legal protections, but hesitating to extend “marriage” to such couples, some state legislatures have created “civil unions” or “domestic partnerships.”⁵⁶⁹ Many hoped these newly-created categories would provide same-sex couples with benefits and protections equivalent to those provided by civil marriage without using “marriage” terminology. This Part of the Special Committee’s Report explores the lessons learned from this attempted compromise.

The Special Committee has discovered that, although these categories were intended to provide equality under merely a different name than “marriage,” they have fallen short of their objective. Instead, they have created a separate legal status with inherent disadvantages due to confusion about the meaning of the separate statutes, unequal and uncertain legal rights, and problems of portability crossing state lines. In short, the result is a public perception and legal reality of inferiority.

We first present in consolidated form some of the experiences with the civil union model primarily as reported by the Vermont and New Jersey civil union commissions. Notwithstanding the many differences between these states, their respective commissions reached the same conclusion: the civil union model creates a separate and unequal mechanism for allocating benefits.⁵⁷⁰ In this Part we also review New York’s treatment of couples joined in civil unions in other states.

⁵⁶⁹ See *supra* Part One, Sec. II, for a discussion of civil unions.

⁵⁷⁰ See *supra* Part One, Secs. II.A and II.B. The Vermont legislature recently responded to its commission’s report, providing same-sex couples with the right to marry.

The remainder of this Part examines the findings of the highest courts in the three states that have subjected civil unions/domestic partnerships to constitutional review, finding that it is not possible both to preserve traditional marriage only for opposite-sex couples and at the same time provide equality to same-sex couples.

I. The Problems with Civil Unions

A. *Civil Unions Are Not Well Understood*

When Vermont became the first state to create the civil union, many thought it might be a way to provide full marriage rights, without using “marriage” terminology. The dominant theme in the testimony presented to the Vermont Commission, however, was that “civil unions are separate, but unequal.”⁵⁷¹ As that Commission found, the very existence of a “separate system of recognition for same-sex couples violates fairness values deeply and widely held in Vermont.”⁵⁷²

New Jersey’s civil union law similarly was designed to confer all of the legal and constitutional rights and duties of civil marriage.⁵⁷³ But, as in Vermont, the New Jersey Commission found that “[a] separate legal structure is never equal.”⁵⁷⁴ The “most common theme” in the testimony the New Jersey Commission received was that “true equality cannot be achieved when there are two separate legal structures for conferring benefits on couples based

⁵⁷¹ *Vt. Report* at 6.

⁵⁷² *Id.*

⁵⁷³ See N.J. STAT. ANN. § 37:1-32 (West 2008), setting forth a non-exclusive listing of the legal benefits, protections and responsibilities of spouses that apply in like manner to civil union couples, which includes home ownership rights for surviving spouses, adoption, and the right to change one’s surname without petitioning the court.

⁵⁷⁴ *N.J. Final Report* at 8.

upon sexual orientation.”⁵⁷⁵ The New Jersey Commission concluded that civil unions create a separate and inherently unequal status:

[T]he issue before [the Commission] is nothing more than the old issue of separate but equal. We know from the tragic story of segregation that there is no such thing as separate but equal. Just as people should not be forced to ride in the back of the bus because of race, people should not be forced to ride in the back of the legal relationship bus because of sexual orientation. Civil unions ... are the back of the legal relationship bus.⁵⁷⁶

While some have tried to downplay “the differences in language between civil union and marriage,” the Vermont Commission found they are “powerful” and capable of producing “stigmatizing results.”⁵⁷⁷ Witnesses described marriage as the “gold standard” – “a term which everyone understands.” In many ways, civil union was considered meaningfully, sometimes painfully, inferior to marriage.⁵⁷⁸

The *New Jersey Report* observed that the word “marriage” conveys a universally understood and “powerful” meaning, and that “marriage is still the coin of the realm.”⁵⁷⁹ A justice of the peace, who had certified several civil unions (in addition to many legal marriages), testified:

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.* The *New Jersey Final Report* gave civil union status the same failing grade as in Vermont, and urged “the Legislature and Governor [to] amend the law to allow same-sex couples to marry.” The Commission recommended that “the law be enacted expeditiously because any delay in marriage equality will harm all the people of New Jersey.” *Id.* at 3.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Vt. Report* at 6-10. Another comparison is drawn by the Human Rights Campaign, an LGBT advocacy group, on its website, using the metaphor of diamonds: “Comparing marriage to civil unions is a bit like comparing diamonds to rhinestones. One is, quite simply, the real deal; the other is not.” Human Rights Campaign, *Questions About Same-Sex Marriage*, available at <http://www.hrc.org/issues/5517.htm> (last visited May 4, 2009).

⁵⁷⁹ *N.J. Final Report* at 9.

[The] pronouncement at the conclusion of a civil union [is] weak in comparison to that of a marriage ceremony. It is clear to me as a justice of the peace who was instructed by the secretary of state that we must not discriminate against gays and lesbians, that I was doing exactly that by being restricted to a ceremony that was void of a valued word.⁵⁸⁰

The civil union status also is not clear to the general public. Witnesses in New Jersey testified, like those in Vermont, that they must repeatedly explain civil union status to employers, doctors, nurses, insurers, teachers, soccer coaches, emergency room personnel and the children of civil union partners.⁵⁸¹ The New Jersey Commission observed that the couples' need to explain their relationship to so many people highlighted their unequal legal status. This difficulty was typified by the story told by a New Jersey resident who had been called for jury duty. When the judge asked every potential juror whether they were single or married, this individual testified,

I felt like I was hit with a ton of bricks, because the judge repeatedly asked every person, "Are you single, are you married?" I'm thinking, how do I answer that, because I am not. I'm not single, I'm not married. I'm in a court of law and here is a judge qualifying candidates for the jury, and what I am is not represented in any way.⁵⁸²

Another New Jersey man testified that when he went to the bank to open a line of credit and was asked about his marital status, the employee explained that the computer system did not

⁵⁸⁰ *Id.* at 9.

⁵⁸¹ *N.J. Final Report* at 10. *See also Vt. Report* at 9-10. The Vermont Commission reported that despite the promise of equality, couples in civil unions instead encountered confusion "when using government, business, employer, and health care forms and documents that do not contemplate or apparently deal with the status of being in a civil union." *Id.* at 9-10.

⁵⁸² *N.J. Interim Report* at 14-15. Part Two of this Report relates this and other experiences with civil unions and domestic partnerships in greater detail.

contemplate civil unions.⁵⁸³ As these circumstances reveal, same-sex couples are “forced to explain their civil union status, what a civil union is, and how a civil union by law secures a legal status and consequences equal to marriage.”⁵⁸⁴

Children whose parents are joined in civil unions also suffer needlessly: the New Jersey Commission noted that children would benefit by societal recognition of their parents’ status as married, and that amending the marriage laws would remedy uncertainty about the recognition of its civil unions in other states.⁵⁸⁵

Even adult children are affected by the incongruity between marriage and civil union. One witness told the story of a Vermont father who refused to attend his son’s civil union ceremony – while he “happily attended the marriage of the man’s gay brother in Massachusetts a short time later.”⁵⁸⁶ The one son’s civil union was simply not perceived to have the exalted status of the other son’s marriage, though both involved same-sex couples.⁵⁸⁷ Another moving story came from a large farm family in which three siblings were gay or lesbian who, unlike the other children “of similar make-up, educational backgrounds, family values, success in careers, and love for our children” could not marry like their siblings.⁵⁸⁸

Within the states providing these unions, couples have reported additional experiences of resistance from medical personnel and employers who have failed to understand the rights

⁵⁸³ *N.J. Final Report* at 14.

⁵⁸⁴ *Vt. Report* at 9. Bearing this special, different label, same-sex couples are also forced into the situation of “‘outing’ oneself as gay or lesbian in situations where this is unnecessary, irrelevant, or a breach of privacy.” *Id.* at 9.

⁵⁸⁵ *N.J. Final Report* at 2.

⁵⁸⁶ *Vt. Report* at 9.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 6.

associated with their legal status, and thus either denied or delayed access and decision-making authority or benefits to civil union partners. These partners also report fears and difficulties associated with crossing state lines. The remainder of this Section relates some of these experiences.

B. Civil Unions Pose Substantial Disadvantages In Medical Settings

Some couples have faced problems due to a lack of individual and institutional accommodation for civil unions. Prior to giving birth, a Connecticut woman was asked by a hospital employee if she was “married, single, divorced, or widowed.” Upon hearing that the mother-to-be was in a civil union, the hospital worker checked the box marked “single,” prompting the woman to protest: “I’m actually more married than single.”⁵⁸⁹

A New Jersey woman testified that when she told the nurse prior to having a medical procedure performed that any decisions made while she was unconscious should be made by her partner, the nurse not only asked if she was her “legal partner,” but also asked her to present documentation to prove her legal status.⁵⁹⁰ Concerns about potential confusion about their civil union status caused an expectant Vermont couple to go to great lengths to ensure that the pregnant partner gave birth in a Vermont hospital, even though similar medical specialists were available much closer in a neighboring state.⁵⁹¹

⁵⁸⁹ Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren’t Enough*, N.Y. TIMES, Mar. 17, 2008.

⁵⁹⁰ *N.J. Final Report* at 14.

⁵⁹¹ *Vt. Report* at 8. After the birth of the child, the non-biological mother legally adopted the child to ensure that she would be recognized as the child’s mother when traveling outside of the state. One of the partners testified:

No parent should have to worry that his or her infant could be considered parentless in a foreign state because that state does not recognize the civil union. Navigating medical emergencies is stressful enough for families without having to worry about these kinds of issues! Civil unions have gone a long way toward

Delays in medical treatment and decision-making have resulted from confusion created by the non-marriage partnership status and have produced undue stress and frustration in what were already very difficult situations.⁵⁹² Consider the experience of Kenneth D. Johnson and James E. Massey.

In 2003, three years into their relationship, the couple were united in a covenant ceremony at a church in Washington, D.C. and later registered as domestic partners in California.⁵⁹³ A year later, they finalized the adoption of their son. In June 2006, Kenneth received a call from one of James' co-workers, who said that James had collapsed and been taken by ambulance to a Washington, D.C. hospital.⁵⁹⁴

Kenneth raced to the hospital and as soon he arrived he told the nurse, "My name is Ken Johnson and I am James Massey's domestic partner." The nurse replied that she could release information only to Mr. Massey's immediate family. Kenneth responded that he and James

had been partners for over six years; that we lived together; that we had registered as domestic partners in the State of California; that we had executed wills and powers of attorney on each other's behalf; and that we had adopted a son together.⁵⁹⁵

The nurse's response was: "*You're just the friend*; I can only release information to immediate family members."⁵⁹⁶

providing rights and benefits, but it has not made it possible to travel the country freely without being terrified that someone might not let you near in an emergency or might even refuse to recognize you as a parent.

Id.

⁵⁹² *N.J. Interim Report* at 14-17; *Vt. Report* at 8, 10.

⁵⁹³ Emergency Room Experience, <http://www.hrc.org/issues/10452.htm> (May 13, 2008).

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* (emphasis added).

Kenneth ultimately let himself into the emergency ward, and found James, with a doctor and a nurse working on him as he lay unconscious bleeding from his nose and mouth. Kenneth informed the doctor that he was James’ partner, and the doctor explained that James had suffered a cerebral hemorrhage, that his condition was critical, and that they were going to move him to the intensive care unit. The doctor let Kenneth ride on the elevator with them to the ICU, but Kenneth was then forced to leave.⁵⁹⁷

As Kenneth explained, “I did not want to leave James’ hospital room because I did not want him to die alone. But I knew that if I wanted to see him again and be involved in making decisions about his health care that I would have to drive to our home in Fairfax County, Virginia, so that I could get our wills, living wills and powers of attorney.”⁵⁹⁸ It took about two and a half hours to drive to get the documents and drive back to the hospital. Kenneth explained that while he was gone, “decisions were made about James’ health care that did not consider his wishes, as reflected in the living will that he had signed.”⁵⁹⁹

Only upon returning to the hospital with their wills, living wills, and powers of attorney, was Kenneth allowed to be involved in making decisions about James’ health care and to spend the night in James’ room. The next day, June 16, 2006, James died.⁶⁰⁰

There can be little doubt that the hospital staff would have known what being “married” means, but Kenneth lost precious hours at the end of the life of his “domestic partner,” the father

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

of his son, because he had to go find records and explain that “domestic partner” does not mean, in the nurse’s words, “just the friend.”

C. Civil Unions Do Not Remedy Disadvantages At Work

Another significant problem facing same-sex couples in civil unions or domestic partnerships is the unwillingness of employers to recognize their unions, especially with regard to providing benefits. A typical example was relayed by a Vermont woman whose employer denied benefits to her civil union partner because the employer saw civil union couples as the equivalent of living with a boyfriend or girlfriend, but not equivalent to marriage.⁶⁰¹

The practice of companies in Massachusetts, where same-sex couples are permitted to marry, however, suggests that the word “marriage” significantly affects how employers perceive same-sex relationships and their willingness to provide spousal benefits.⁶⁰² By affording marriage equality to its same-sex couples, Massachusetts, in effect, forces companies either to acknowledge their discrimination when they deny benefits to married same-sex spouses or to provide these spouses with the same benefits offered to married heterosexual couples. It appears that most companies in Massachusetts have chosen to provide equal benefits to their married employees, both same-sex and opposite-sex, even if ERISA pre-emption might provide a means of denying benefits to the same-sex couples.⁶⁰³

In a case that received significant media attention in New Jersey, the freight delivery company UPS denied benefits to an employee’s partner, despite their couple’s having entered

⁶⁰¹ *Vt. Report* at 10.

⁶⁰² *N.J. Final Report* at 20.

⁶⁰³ *Id.* As a Massachusetts labor leader commented: “ERISA has barely been an issue in Massachusetts In the first weeks of marriage equality, only a few companies chose not to provide retirement benefits under ERISA to same-sex married couples.” *Id.* at 20-21 (quoting Tom Barbera, Service Employees International Union and former Vice President of the Massachusetts AFL-CIO).

into a New Jersey civil union. The company stated that the partner could not be added to the employee's benefit plan, contending that "New Jersey law does not treat civil unions the same as marriages."⁶⁰⁴ Further, the company argued, ERISA preempted state law in the realm of partner health care benefits.⁶⁰⁵ Notwithstanding this assertion, the company acknowledged that if New Jersey were to provide same-sex couples the right to marry, as had been done in Massachusetts, UPS would extend benefits to same-sex spouses – just as it had in Massachusetts.⁶⁰⁶ Following intervention by the state's governor, UPS ultimately agreed to provide spousal benefits to the partners of employees who had entered into civil unions.⁶⁰⁷

Analogous difficulties were faced in California, where prior to 2007, many employers avoided providing COBRA coverage⁶⁰⁸ to their employees' domestic partners because COBRA, a federal program, is governed by ERISA law.⁶⁰⁹ The state recognized the problem and, in an

⁶⁰⁴ See Press Release: UPS Denies Spousal Benefits to Employees in New Jersey Civil Unions (May 31, 2007), available at <http://www.lambdalegal.org/new/pr/ups-denies-nj-spousal-benefits.html> (last visited Apr. 30, 2009), and Letter from UPS Plan Administrator Gabriel Brazier, available at <http://data.lambdalegal.org/pdf/legal/brazier/ups-letter.pdf> (last visited Apr. 30, 2009) (hereinafter "UPS Letter").

⁶⁰⁵ UPS letter, *supra*. (ERISA governs only those benefits regulated by the statute, such as health benefits, but not other benefits, such as continuing education options or gym memberships). See also *N.J. Interim Report* at 6; Anthony Faiola, *Civil Union Laws Don't Ensure Benefits*, WASHINGTON POST, June 30, 2007 ("Most legal experts agree that federal regulations give companies with self-funded insurance plans—a group covering 55 percent of the country's 105 million working-age employees—the power to ignore state laws regarding corporate benefits.").

⁶⁰⁶ UPS Letter, *supra*, at 3.

⁶⁰⁷ Press Release, UPS Extends Health Benefits to N.J. Civil Union Partners (July 30, 2007), available at http://www.pressroom.ups.com/pressreleases/printer/0,1052,4913,00.html?ct=press_releases&at=domain_mainpressroom&tn=pressreleases_archives_archive&id=4913&srch_pos=3&srch_phr=new+jersey (last visited Apr. 30, 2009).

⁶⁰⁸ COBRA is a federal law that extends an individual's right to group health insurance for 18-36 months after terminating employment or reducing hours to part-time at a company with 20 or more covered employees. See California Department of Insurance, "What is COBRA?," available at <http://www.insurance.ca.gov/0100-consumers/0070-health-issues/frequently-asked-questions.cfm> (last visited Apr. 14, 2009).

⁶⁰⁹ Onque.com., *Why Are Domestic Partnerships Ineligible for COBRA Coverage?*, available at <http://onque.com/tips/domesticpartners.html> (last visited Apr. 24, 2009).

effort to ameliorate the situation, enacted a law requiring all businesses with state contracts worth more than \$100,000 to provide COBRA coverage to domestic partners if they normally offer spousal benefits under their group health plans.⁶¹⁰ Although this measure extended benefits to many registered domestic partners, the law does not apply to businesses with more modest state contracts or to companies without such contracts.⁶¹¹

D. Civil Unions Create Disadvantages Crossing State Lines

1. General Portability

Significant issues of portability arise when same-sex couples in civil unions travel to other states. Many individuals testified before the New Jersey and Vermont Commissions that they take certain precautions when crossing state lines, such as carrying a flash drive or other convenient way to have living wills, advanced healthcare directives, and powers of attorneys close at hand in case they are needed. These couples are concerned that they will not be able to adequately explain their relationship or prove their legal status in the event of an emergency.⁶¹²

Interstate custody battles are yet another example of the problems confronting same-sex couples when they cross state lines. When a biological parent moves outside of the state of legal union, the ability of a former partner to exercise second-parent status is tenuous. In one notable case, *Miller-Jenkins v. Miller-Jenkins*,⁶¹³ the birth mother sought sole custody of the child born during the civil union. She filed her original claim in Vermont, but later filed a claim in Virginia, where she had moved. The lower court held that her former partner could claim neither

⁶¹⁰ CAL. PUB. CONT. CODE, CH. 752 § 10295.3.

⁶¹¹ *Id.*

⁶¹² *N.J. Interim Report* at 24.

⁶¹³ *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 28, 661 S.E.2d 822, 827 (Va. 2008).

parentage nor visitation. On appeal, the courts reversed, applying the Parental Kidnapping Prevention Act (“PKPA”) to prevent the state from exercising jurisdiction over a suit originally filed in Vermont.⁶¹⁴ At least one court has applied PKPA to allow former partners to exercise visitation or custody rights.⁶¹⁵ The law, however, remains unsettled on this issue.

2. *Recognition in New York State*

One important window into how New Yorkers would be treated elsewhere if the state were to provide the option to enter into civil unions (or domestic partnerships), is to examine how New York has treated couples who have entered into civil unions elsewhere, including New Yorkers who have traveled to other states to be so joined.

Although New York courts appear willing to recognize same-sex couples’ marriages that were performed in other jurisdictions,⁶¹⁶ this recognition has not generally been extended to other types of relationships, including civil unions and domestic partnerships. Same-sex couples who enter into these quasi-marital relationships have found themselves in a legal limbo: in a legal union created by one state’s law, yet unable to enjoy legal recognition of that union in their own domicile, including New York.

Even if courts are not intentionally trying to differentiate between same-sex couples who are married and those who enter into civil unions, the pattern of their decisions reveals that distinction. For example, the First, Second, and Third Departments have declined to treat civil unions as equivalent to marriage, despite the enabling statutes’ codification of their equivalence.

⁶¹⁴ *Id.*

⁶¹⁵ *See A.K. v. N.B.*, No. 2070086 2008 WL 2154098 (Ala. Civ. App. 2008) (holding that, since the former partner in a California domestic partnership had already begun proceedings to establish a parental relationship in California, the PKPA prevented Alabama from later claiming jurisdiction and granting full and temporary custody to one partner in a child custody battle).

⁶¹⁶ *See supra* Part Two, Sec. III.

Indeed, as described in Part Two of this Report, Mr. Langan’s civil union gave him no traction to bring a wrongful death action,⁶¹⁷ or to pursue survivor’s benefits under New York’s Workers’ Compensation statute.⁶¹⁸ Similarly, neither entering into a civil union nor registering as domestic partners (in New York City) gave Debra H. standing to maintain a legal relationship with the child borne by her partner, Janice R., following their union and registration.⁶¹⁹

By contrast, where the parties have been legally married, courts have presumed the legal validity of the relationship and have treated same-sex marriages similarly to how they have treated opposite-sex marriages. Examples discussed in this Report include *Henning-Dyson v. Henning-Dyson* (granting uncontested divorce),⁶²⁰ *Beth R. v. Donna M.* (granting uncontested divorce),⁶²¹ *In the Matter of the Adoption of a Child Whose First Name is Sebastian* (observing that because the child’s parents are legally married, he “already has a recognized and protected

⁶¹⁷ *Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2d Dep’t 2005).

⁶¹⁸ *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105, 107 (3d Dep’t 2007).

⁶¹⁹ See *Debra H. v. Janice R.*, 2008 N.Y. Misc. LEXIS 6367 (N.Y. Sup. Ct. N.Y. County 2008) (holding that although the couple’s civil union was not a determinative factor in ordering visitation rights pending a final decision on whether plaintiff had standing, the birth of a child during the union was “extremely persuasive evidence of joint parentage”). In *Matter of C.M. v. C.H.*, where the couple had not legally formalized their relationship, a discordant result ensued upon the break-up of their relationship. Although C.M. and C.H. had been partnered and planned for C.H. to give birth to both children of the partnership, C.M. was permitted to seek visitation and custody only of the child she had legally adopted; the failure of the relationship before the second adoption was completed rendered her a legal stranger to the second child. *Matter of C.M. v. C.H.*, 789 N.Y.S.2d 393, 402 (Sup. Ct. N.Y. County 2004) (basing its decision on the Court of Appeal’s “narrow definition of ‘parents’ for purposes of standing in custody cases”).

⁶²⁰ *Henning-Dyson v. Henning-Dyson*, No. 14940/07 (Sup. Ct. Kings County Oct. 14, 2008) (uncontested matrimonial judgment granted).

⁶²¹ *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 504 (Sup. Ct. N.Y. County 2008).

child/parent relationship with both [parents]”),⁶²² and *Estate of H. Kenneth Ranfile* (finding surviving same-sex spouse a distributee entitled to notice).⁶²³

The analysis contained in this section, though, takes us only so far. Until the Legislature or Court of Appeals addresses the legal validity of civil unions and marriages of same-sex couples entered into elsewhere,⁶²⁴ the legal status of these couples remains unsettled.

Just as New Yorkers who have entered into civil unions elsewhere often have not had their relationships legally recognized at home, it is not realistic for New Yorkers to expect that such relationships, should they be created by New York State, would be recognized elsewhere. Given the difficulties of ensuring that civil unions are legally recognized outside the state in which they are entered, it is evident that they cannot be looked to for cross-border stability and consistency. It has become evident that if the state wishes to provide true equality to same-sex partners, the creation of civil unions will not allow the state to achieve this goal.

II. “Separate but Equal” Treatment Of Same-sex Couples Is Not Acceptable

A. Lessons of “Separate But Equal”

This section of the Report explores whether civil unions and domestic partnerships impermissibly relegate same-sex couples to a state-sanctioned second-class status.⁶²⁵ Sponsors of

⁶²² *In the Matter of the Adoption of a Child Whose Name is Sebastian*, File No. 38-08 (Glen, S.) (Apr. 9, 2009).

⁶²³ *Cf. Estate of H. Kenneth Ranfile*, N.Y.L.J., Feb. 3, 2009, at 27, col. 1 (Surr. Ct. N.Y. County).

⁶²⁴ In granting leave to appeal in *Godfrey v. Spano*, 871 N.Y.S.2d 296 (N.Y. App. Div. 2d Dep’t 2008), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009) and *Lewis v. State Dep’t of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 3d Dep’t), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009), the Court of Appeals has signaled that it will rule on whether New York will legally recognize the otherwise-valid marriages entered into by same-sex couples in other jurisdictions.

⁶²⁵ *See generally* discussion in Part One, Sec. II (Civil Unions and Domestic Partnerships in the United States), particularly Secs. II.A and II.B (Vermont and New Jersey). *See also* Bill Hammond, Editorial, Marriage Is More Perfect Union: In Gay Marriage Debate, Separate But Equal Won’t Cut It, NY DAILY NEWS Apr. 21, 2009, available at <http://www.nydailynews.com/opinions/2009/04/21/2009-04->

legislation creating civil unions and domestic partnerships intended both to create a benefit for same-sex couples, often seeking to create substantive equality with marriage rights, and at the same time withhold the name and status of “marriage.”⁶²⁶ As such, civil union/domestic partnership is primarily a political compromise.⁶²⁷

As reported above, civil unions have been criticized by many as a new “separate but equal” institution, recalling the invidious principle underlying a century of racial segregation that haunts the American legal system.⁶²⁸ Opponents of civil union and courts that invoke the lessons of “separate but equal” do not seek to equate exclusion of same-sex couples from marriage with Jim Crow laws or racial segregation. Rather, they extract from “separate but equal” the lesson that a separate status that purports to be equal is actually an inferior, “second-class” status.

The highest courts of Massachusetts, California and Connecticut all engaged in a “separate but equal” analysis of civil unions. Like the Vermont and New Jersey Commissions,

[21_why_civil_unions_arent_enough_in_gay_marriage_debate_separate_but_equal_wont_cut.html](#) (last visited Apr. 21, 2009).

⁶²⁶ See *supra* Part One, Secs. I.A, B and C (Massachusetts, California, Connecticut).

⁶²⁷ See David Blankenhorn & Jonathan Rauch, Editorial, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 21, 2009 (editorial column proposing civil union as a political compromise).

⁶²⁸ See *supra*, Part Two, Sec. I Beginning immediately after Emancipation and continuing through the modern civil rights era, the concept of “separate but equal” was a means of segregating African-Americans from the rest of the population while purporting to provide equality. “Separate but Equal” West’s Encyclopedia of American Law (1998). The policy was approved in the ignominious 1896 decision by the United States Supreme Court in *Plessy v. Ferguson*, upholding Louisiana’s law requiring “equal but separate [train] accommodations for the white, and colored, races.” *Plessy v. Ferguson*, 163 U.S. 537 (1896). “Separate” institutions deemed “equal” under this regime included not only trains, but virtually all aspects of everyday life: public schools, stores, buses, bathrooms, and water fountains to name a familiar few. This state-endorsed policy was essential to “Jim Crow” laws and was one of the foundations of anti-miscegenation statutes. See, e.g., Robert A. Burt, *Overruling Dred Scott: The Case for Same-Sex Marriage*, 17 Widener L.J. 73, 85 (2007). Only in 1954, in *Brown v. Board of Education*, did the Supreme Court reject “separate” as “inherently unequal.” *Brown v. Bd. of Educ.* 347 U.S. 483 (1954) (“rejecting” *Plessy* and noting there had been in the Supreme Court “six cases involving the ‘separate but equal’ doctrine in the field of public education” after *Plessy*, none of which overruled it). Although *Brown* has been part of the American legal canon for over 50 years, our society continues to struggle with *de facto*, if not *de jure*, racially-segregated schools, housing, and other institutions.

they, too, rejected the approach as discriminatory, concluding that excluding an historically disfavored group from an important state-conferred status is unconstitutional, just the same as are other “separate but equal” statutes. These courts separately observed that, even if the purpose of the civil union or domestic partnership laws was to provide substantive equality, they failed, by their very nature and as applied, to create that equality.

Although the three courts – in three very different states – used varying levels of scrutiny to analyze civil union/domestic partnership, they nevertheless concentrated on three principal themes: the great importance of marriage as a legal status; the long history of profound discrimination faced by gay men and lesbians; and the historical failure of “separate but equal” laws.

B. The High Status of Legal Marriage

Common to all of the decisions comparing civil union or domestic partnership with marriage is the recognition that legal marriage is a uniquely important and meaningful state-conferred benefit, with a lofty status that is well-understood in society.

The legal viability of civil unions came before the Massachusetts Supreme Judicial Court when the state’s Senate sought an advisory opinion on the civil union bill it was considering in response to the court’s ruling in *Goodridge v. Dep’t of Health*,⁶²⁹ that same-sex couples were constitutionally entitled to the same legal rights and responsibilities enjoyed by opposite-sex couples. In *Goodridge*, the court had identified numerous tangible benefits that flow from civil marriage,⁶³⁰ such that “the denial of civil marital status ‘works a deep and scarring hardship on a

⁶²⁹ *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (Mass. 2003).

⁶³⁰ *Goodridge*, 798 N.E.2d at 322.

very real segment of the community for no rational reason.”⁶³¹ In *Opinions of the Justices*, the Massachusetts high court applied the principles of *Goodridge* to conclude that there was no rational basis for the different nomenclature of marriage versus civil union; that difference, the Court held, is “more than semantic” and “not innocuous,” but “a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status....”⁶³²

The court rejected the contention that prohibiting same-sex couples from use of the word “marriage” conveys no message:

If ... the proponents of the [civil union] bill believe that no message is conveyed by eschewing the word “marriage” and replacing it with “civil union” for same-sex “spouses,” we doubt that the attempt to circumvent the court’s decision in *Goodridge* would be so purposeful. For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain.⁶³³

Because the difference in nomenclature was purposeful, the court held that it “would have the effect of maintaining and fostering a stigma of exclusion that the Massachusetts Constitution prohibits.”⁶³⁴ This exclusion, concluded the court, denies same-sex couples “a status that is specially recognized in society and has significant social and other advantages.”⁶³⁵

When the California Supreme Court scrutinized the California Domestic Partnership Act, it also recognized the “long and celebrated history of the term ‘marriage’” and the “undeniable

⁶³¹ *Opinions of the Justices to the Senate*, 802 N.E.2d at 567 (2004) (quoting *Goodridge*, 798 N.E.2d 941).

⁶³² *Id.* at 567. (“The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic....”).

⁶³³ *Id.* at 570.

⁶³⁴ *Id.*

⁶³⁵ *Id.*

symbolic importance to this designation.”⁶³⁶ Marriage, observed the court, is “the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”⁶³⁷ For that reason, “the ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual’s happiness and well-being.”⁶³⁸

The California court contrasted the high status and familiar meaning of the marriage nomenclature to domestic partnership. The latter category was not generally well understood by the public, and was likely for a “considerable period of time to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly, for their children.”⁶³⁹ Thus, although the California Domestic Partnership Act attempted to equalize the legal rights and responsibilities of same-sex and opposite-sex couples,⁶⁴⁰ the court found that its principal consequence was to give two names to define what is meant to be the same relationship.⁶⁴¹ The court explained:

affording same-sex couples access only to the separate institution of domestic partnerships, and denying such couples access to the established institution of marriage, properly must be viewed as

⁶³⁶ *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008).

⁶³⁷ *Id.* at 422 (internal quotations and citations omitted). The court also wrote that the term “marriage” is widely understood as describing “a union unreservedly approved and favored by the community.” *Id.* at 445.

⁶³⁸ *Id.* at 424.

⁶³⁹ *Id.* at 446. The court also was concerned that a person who acknowledges that he is in a domestic partnership, by definition, “outs” himself as being homosexual, thereby impinging upon his privacy interests in a way that “may expose gay individuals to detrimental treatment by those who continue to harbor prejudices that have been rejected by California society at large.” *Id.*

⁶⁴⁰ *Id.* at 416 n.23, 445. California’s legislature passed a series of laws to provide benefits to same-sex couples through the status of domestic partnership. The legislature intended the California Domestic Partner Rights and Responsibilities Act of 2003, in particular, “to equalize the status of registered domestic partners and married couples.” *Id.* at 415.

⁶⁴¹ *Id.* at 416 n.24.

impinging upon the right of those couples to have their family accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.”⁶⁴²

Because equal dignity and respect cannot be provided by the different nomenclature,⁶⁴³ the court concluded that the “difference in official names of the relationships violates the [California] Constitution,”⁶⁴⁴ and it struck down the state law limiting “marriage” to a union between a man and a woman.

When the Connecticut Supreme Court examined the Connecticut Civil Union Act in *Kerrigan v. Commissioner*,⁶⁴⁵ it too recognized the “exalted status of marriage”⁶⁴⁶ as “an institution of transcendent historical, cultural and social significance.”⁶⁴⁷ Civil union, said the court, “most surely is not.”⁶⁴⁸

⁶⁴² *Id.* at 445. The court’s poignant conclusion echoed the U.S. Supreme Court’s observation in *Lawrence v. Texas* that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper serve only to oppress.” *Id.* at 451 (citing *Lawrence*, 539 U.S. 558 at 579). Some examples of practices once thought necessary but later understood as oppressive include prohibiting interracial marriage, barring women from many jobs and official duties, and mandating separate facilities for different races. See *In re Marriage Cases*, 183 P.3d at 451.

⁶⁴³ The court stated:

[O]ne of the core elements embodied in the state constitutional right to marry is the right of an individual and a couple to have their own official family relationship accorded respect and dignity equal to that accorded the family relationship of other couples. Even when the state affords substantive legal rights and benefits to couple’s family relationship that are comparable to the rights and benefits afforded to other couples the “assignment of a different name to the couple’s relationship poses a risk that the different name itself will have the effect of denying such couple’s relationship the equal respect and dignity to which the couple is constitutionally entitled. *Id.* at 444.

⁶⁴⁴ *Id.* at 399.

⁶⁴⁵ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407.

⁶⁴⁶ *Id.* at 418.

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.* “The freedom to marry,” the court wrote, is “a right” that “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]” and is “fundamental to our very existence and survival.” *Id.* at 511 (citing *Loving v. Virginia*) (other citations omitted).

The *Kerrigan* court observed that Connecticut, much like Vermont and New Jersey, had attempted to provide marriage-like benefits to same-sex couples when it enacted its civil union law. This good intent, however, was not enough. The court rejected the state’s argument that “the distinction between marriage and civil unions is merely one of nomenclature” because of the historic importance of the term “marriage.”⁶⁴⁹ Further, the court held, even though the separate “classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible ... such treatment nevertheless is every bit as restrictive as naked exclusions.”⁶⁵⁰

C. *The History of Discrimination Against Gay Men and Lesbians*

Both the California and Connecticut high courts took notice of the long history of discrimination faced by gay men and lesbians and observed that this context made them suspicious of any differential treatment of these communities.

The California Supreme Court considered the putative equality of the state’s domestic partnership laws in light of the “historic disparagement of and discrimination against gay persons.”⁶⁵¹ The court wrote that “outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility ... as homosexuals.”⁶⁵² As a result, the court concluded it was proper to subject laws differentiating gay men and lesbians to the same rigorous standard of review as those laws discriminating on the basis of race or national

⁶⁴⁹ *Id.* at 416.

⁶⁵⁰ *Id.* (internal quotations and citation omitted).

⁶⁵¹ *In re Marriage Cases*, 183 P.3d at 445.

⁶⁵² *Id.* at 442.

origin.⁶⁵³ Applying this standard, the court found that the separate status assigned by “the new parallel institution” of domestic partnership could be viewed only as of a “lesser stature than marriage.”⁶⁵⁴

The Connecticut Supreme Court concluded that relegating same-sex couples to civil unions created “an inferior status ... unworthy of the institution of marriage.”⁶⁵⁵ The justices cited to the centuries-old “history of pernicious discrimination faced by gay men and lesbians”⁶⁵⁶ – including “strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.”⁶⁵⁷ The court also relied on a report by the American Psychiatric Association stating that gay men and lesbians, compared to other groups, “are still among the most stigmatized groups in the nation,” suffering from hate crimes, banned from open service in the military, “and humiliated in their school settings.”⁶⁵⁸ For these reasons, the court determined that same-sex couples were “politically unpopular or historically disfavored minorities” entitled to equal protection under the state’s constitution.⁶⁵⁹

Based on these findings, the Connecticut court held that laws disfavoring gay men and lesbians should be subject to “heightened scrutiny,” the same scrutiny used for laws that

⁶⁵³ *Id.* at 446.

⁶⁵⁴ *Id.* at 445.

⁶⁵⁵ *Id.* at 416. The court found that the legislature “exclude[d] same-sex couples from civil marriage” and “declare[d] that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples.” *Id.*

⁶⁵⁶ *Kerrigan*, 957 A.2d 407 (2008). The court also took note of the “long and undisputed history of invidious discrimination that gay persons have suffered.” *Id.* at 412.

⁶⁵⁷ *Id.* at 432 (quoting R. Posner, *Sex and Reason* (Harvard U. Press 1992), at 291, and citing Note, “The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,” 98 Harv. L. Rev. 1285, 1302 (1985)).

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.* at 418.

discriminate on the basis of gender or “legitimacy.”⁶⁶⁰ Under such scrutiny, the differential treatment meted out by the state’s civil union law caused same-sex couples harm that the court could not permit, concluding:

In light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.⁶⁶¹

The Massachusetts Supreme Judicial Court did not base either the *Goodridge* or *Opinions of the Justices* decisions directly upon the traditional discrimination levied against gay and lesbian persons, but it took specific note of that history. The court did not resolve whether plaintiffs constituted a suspect class, finding in both matters that the exclusion of same-sex couples from marriage suffered “[t]he same defects of rationality.”⁶⁶² For example, the *Goodridge* court criticized the “marriage-is-procreation” argument that “transforms that

⁶⁶⁰ *Id.* at 461.

⁶⁶¹ *Id.* The court noted that “there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term ‘marriage’ is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.” *Id.* at 445. Quoting the California Supreme Court, the Connecticut court concluded that “[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.” *Kerrigan*, 957 A.2d at 418 (emphasis in original), quoting *Opinions of the Justices*, 802 N.E.2d at 572 (emphasis in original).

⁶⁶² *Opinions of the Justices*, 802 N.E.2d at 569, n.3. See also *Goodridge*, 798 N.E.2d at 961. The Massachusetts court eschewed the traditional classifications of strict scrutiny, heightened scrutiny, or rational basis review:

The Fourteenth Amendment does not expressly prohibit discrimination against any particular class of persons, racial, religious, sexual, or otherwise, but instead elegantly decries the denial of equal protection of the laws “to any person” within the jurisdiction of the United States. Similarly, our decision in *Goodridge* did not depend on reading a particular suspect class into the Massachusetts Constitution, but on the equally elegant and universal pronouncements of that document.

Opinions of the Justices, 802 N.E.2d at 569, n.3.

difference into the essence of legal marriage”⁶⁶³ and “[i]n so doing [perpetuates] the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”⁶⁶⁴ Then, in *Opinions of the Justices*, the court held that the exclusion of gay and lesbian persons from marriage “excludes [them] from the full range of human experience”⁶⁶⁵ and “maintain[s] and foster[s] a stigma of exclusion.”⁶⁶⁶

D. Separate But Equal Seldom, If Ever, Works

The third clear theme that emerges from the cases that compare civil union/domestic partnership with marriage is that “separate but equal” seldom, if ever, works. In *Opinions of the Justices*, the Massachusetts Supreme Judicial Court was the first to rule upon the “parallel institution” of civil unions, and unreservedly drew the comparison to segregation: “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal.”⁶⁶⁷

The proposed civil union bill, the court wrote, “segregate[s] same-sex unions from opposite sex unions;” because “by its express terms [it] forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status.”⁶⁶⁸ The separate but equal approach failed because, “what is not permissible is to retain the word [marriage] for some and

⁶⁶³ *Goodridge*, 798 N.E.2d at 962.

⁶⁶⁴ *Goodridge*, 798 N.E.2d at 962.

⁶⁶⁵ *Opinions of the Justices*, 802 N.E.2d at 565, 567, quoting *Goodridge*, 798 N.E.2d 941.

⁶⁶⁶ *Opinions of the Justices*, 802 N.E.2d at 570.

⁶⁶⁷ The Massachusetts Court said “nothing presented to us as a justification for the existing distinction was in any way rationally related to the objective of the marriage laws. Now we know that this proposed legislation fails to provide the rational basis for the different nomenclature.” *Id.* at 569, n.3.

⁶⁶⁸ *Id.* (citations omitted).

not for others, with all the distinctions thereby engendered.”⁶⁶⁹ The court emphasized that its decision in *Goodridge* held it is not constitutional

to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.⁶⁷⁰

The *Kerrigan* court also drew the direct connection to impermissible segregation, rejecting the argument that “marriage and civil unions are ‘separate’ but ‘equal’ legal entities.”⁶⁷¹ Specifically, the court wrote, “if ... the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine,” citing *Brown v. Board of Education*.⁶⁷²

The California court also rejected the domestic partnership status as a failed attempt at a separate but equal institution. The court drew specific parallels to the ultimate rejection of laws which, in the past, have:

(1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment.⁶⁷³

⁶⁶⁹ *Id.* at 570 n.4.

⁶⁷⁰ *Id.* at 571 (emphasis in original).

⁶⁷¹ *Kerrigan* (citing *Brown v. Bd. of Educ.*, 347 U.S. 495 (1954)).

⁶⁷² *Id.*

⁶⁷³ *In re Marriage Cases*, 183 P.3d at 451.

The court found that the “separate and differently named family relationship” is not equal to marriage, especially because

retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples ... perpetuat[es] a more general premise - now emphatically rejected by this state - that gay individuals and same-sex couples are in some respects “second-class citizens.”⁶⁷⁴

Thus, offering same-sex couples only “a novel alternative designation,” the Domestic Partnership Act constituted “significantly unequal treatment [of] same-sex couples.”⁶⁷⁵

III. The Separate Name and Status Does Not Yield Equality

The creation of “civil unions” and “domestic partnerships” reflected efforts to establish state recognition of same-sex couples’ love, commitment to, and responsibility for each other. Although some have viewed these mechanisms as too radical, they often represented a way of valuing lesbian and gay unions without treading on the historical, and to some, religious aspects of marriage, precisely because they withhold the term “marriage.”

The Committee raises concerns about the “separate but unequal” nature of civil unions and civil marriage precisely because the New York State Legislature has not yet acted on marriage equality. It is, therefore, important for the Legislature to take note of the fact that in the ten years since Vermont introduced the concept of the civil union, two government-appointed commissions and the highest courts of three states have rejected this model as inherently unequal – most especially because it is *not* the historically valued and socially endorsed institution of civil marriage. The attempt to develop a compromise in the form of civil unions ultimately has

⁶⁷⁴ *Id.* at 401-02.

⁶⁷⁵ *Id.*

been rejected because it has improperly compromised the rights of same-sex couples to form unions equal to those of opposite-sex couples.

It is against this backdrop that the New York State Bar's Special Committee on LGBT People and the Law makes the recommendation contained in the final Part of this Report.

PART FOUR

Conclusion and Recommendation: Equality Is Possible Only If Same-Sex Couples Have the Right to Marry

I. Overview

In 2005, the New York State Bar Association took an appropriate – and some would say courageous – stand. Having reviewed over 350 pages of the Report of the Committee on Legal Issues Affecting Same-sex Couples, (the *2004 Report*), the Association concluded that there was a need for systemic reform of New York State law to ensure that same-sex couples were provided with rights equal to those enjoyed by their opposite-sex counterparts. That reform, said the Association, could come in the form of marriage, civil union, or domestic partnership.⁶⁷⁶

Since 2004, a great deal has changed in the landscape of marriage rights. Thus, when the Association created the Special Committee on LGBT People and Law in the spring of 2008, the Committee decided that one of its first acts would be to provide an update to the *2004 Report*. When we began the process of drafting this Report, we expected to provide the Association with a rather short document.

As is evident through this Report, we have painstakingly analyzed all that has occurred over the last four-and-a-half years. We specifically were curious about how alternatives to marriage (*i.e.*, civil unions and domestic partnerships) had fared. Were lesbian and gay couples who availed themselves of these models of legal union satisfied? Were their rights being recognized? Were they receiving the same acceptance as their opposite-sex, married

⁶⁷⁶ The House of Delegates of the NYSBA defeated a “marriage only” proposal (recommended by a plurality of the Special Committee) a vote of 86-82. It defeated a proposal that the Association ought not to take a stand on the issue by a vote of 58-114. New York State Bar Association, *State Bar News*, May/June 2005, pp. 6-7.

counterparts? Quite frankly, we were surprised to learn that so much had happened in the intervening years, and were equally surprised to learn the extent to which citizens and courts have found civil unions and domestic partnerships to be disadvantageous.

We discovered through the extensive studies conducted by the commissions in both Vermont and New Jersey that citizens of those states – both heterosexual and homosexual – were deeply dissatisfied with these alternative structures. Tangible harms – in medical settings, in the workplace, and elsewhere – were not uncommon. Intangible harms – in suffering indignities and stigma not associated with marriage – were at least as common and as painful.

We further learned that when courts have been asked to review civil unions and domestic partnerships, they uniformly have found them to be unconstitutional. Massachusetts, the first state to recognize that same-sex couples had a state constitutional right to marry, rejected the civil union option following a facial review of the proposed statute. California rejected the domestic partnership model after an in-depth examination of how it was working for same-sex couples in the state. And, although Connecticut had only recently adopted civil unions, its high court concluded that both in theory and in practice, the model failed to survive constitutional review.

We discovered, therefore, that all examinations of these alternatives to marriage, conducted by the executive branch of government found them problematic; all examinations by state high courts found them problematic and unconstitutional. The Special Committee's conclusion, in fact, echoes the findings of the Vermont Commission, the New Jersey Commission, and the highest courts of the states of Massachusetts, California and Connecticut. It also coheres with the reality that same-sex couples from throughout New York State are

traveling to neighboring jurisdictions — Massachusetts, Connecticut, Canada, and soon Vermont to marry — and that married same-sex couples from these states regularly travel to and settle in New York. In other words, New Yorkers can *be* married in New York; they just can't *get* married in New York.⁶⁷⁷

Consistent with the findings of all of these institutions, and the cross-border realities we are facing in this state, we conclude that extending equal marriage rights to same-sex couples is the only legally and pragmatically viable way to vest same-sex couples with the full panoply of rights and responsibilities enjoyed by married opposite-sex couples.⁶⁷⁸ Thus, we recommend that the New York State Bar Association modify its current position to endorse marriage as the only systemic structure that can adequately remedy the exclusion of tens of thousands of this state's citizens from the rights, responsibilities, and dignity that attend the right to marry.

II. *Hernandez* Does Not Bar the New York State Legislature from Granting Same-Sex Couples the Right to Marry

The Court of Appeals held in *Hernandez v. Robles* that same-sex couples do not have a right to marry under the New York Constitution. The court did not, however, ban the state from legislatively creating that right. To the contrary, the court stated that the State Legislature is entitled to deference in deciding how to address same-sex couples' marriage rights, and concluded its decision with an express invitation to all parties to the controversy to take up the issue with the Legislature.⁶⁷⁹

⁶⁷⁷ Professor Arthur Leonard of New York Law School, among others, has used this phrase. Arthur Leonard, "Leonard Link," Mar. 30, 2009, available at <http://newyorklawschool.typepad.com/leonardlink/2009/03/getting-married-to-my-samesex-partner.html> (last viewed Apr. 23, 2009).

⁶⁷⁸ See generally 2004 Report.

⁶⁷⁹ *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006). The court stated:

The Special Committee is concerned that some may see *Hernandez* as a statement of public policy that marriage is a heterosexual-only institution, and thus, implicitly endorses either no rights for same-sex couples, or civil unions as the appropriate way to grant rights to same-sex couples.⁶⁸⁰ This is not, however, what the court concluded. *Hernandez* did not assess the validity, or desirability, of adopting civil unions or domestic partnerships because there was and is no civil union law in New York. It would, in fact, make no cognizable sense for New York to adopt an approach that has been strongly rejected as “separate and unequal” by so many state administrative, legislative and judicial entities.⁶⁸¹ Should New York wish to create equality between same-sex and opposite-sex couples, it has no choice but to reject the second-class model of civil unions and to endorse full marriage equality. Nothing in the *Hernandez* decision precludes this result.

The pending marriage legislation recently introduced by Governor Paterson explicitly states “that same-sex couples and their children should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of marriage.”⁶⁸² Should the State Legislature enact this bill, the legislative intent to treat same-sex and opposite-sex couples

We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result – as many undoubtedly will be – will respect it as people in a democratic state should respect choices democratically made.

Id. at 366. As noted by Chief Judge Kaye in her dissenting opinion in *Hernandez*, “There are enough marriage licenses to go around” to both opposite-sex and same-sex couples, illustrating that opposite-sex couples would not have diminished access to marriage if their same-sex couple friends were granted the same right. *Id.* at 391.

⁶⁸⁰ The Fourth Department rejected this argument in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (4th Dep’t 2008).

⁶⁸¹ *See supra* Part Three.

⁶⁸² Governor’s Program Bill No. 10 (2009), Sec. 1.

equally will be established, and would replace the intention to treat couples differently presumed in the *Hernandez* decision (identifying two procreation-related rationales to justify the exclusion of same-sex couples from marriage).⁶⁸³

III. A Separate Legal Status for Same-Sex Couples Does Not Provide Equality

A number of states have experimented with civil unions/domestic partnerships as a means to sanction same-sex relationships without broadening access to marriage. This approach, which has not gained traction in New York, has been roundly criticized as a “separate and unequal” means of denying access to marriage itself. This Section of the Report reiterates the reasoning behind this finding and explains why these lesser options would not adequately protect this state’s same-sex couples.

A. *Separate Is Not Equal*

The choice New York faces must be viewed in national and historical contexts. Beginning in the early 1990’s, after Hawai’i considered providing same-sex couples with the right to marry, a significant number of states and the U.S. Congress adopted “defense of marriage” legislation. After rulings by the highest courts in Vermont and Massachusetts expanding the rights of same-sex couples, the majority of states adopted constitutional amendments that were intended to deny the rights and privileges of marriage to same-sex couples, and do so in a manner that puts the issue beyond the ordinary power of state or local governments to change. The purpose of the national DOMA and the state mini-DOMA

⁶⁸³ See discussion of *Hernandez* in Part Two, Sec. I. of this Report.

restrictions was unmistakably to restrict the access of same-sex couples to the legal institution of marriage.⁶⁸⁴

Viewed in this historical context, it is understandable that individuals and institutions would seek to broker a compromise of sorts, namely, the creation of the categories of civil unions and domestic partnerships. Yet, as Part Three of this Report makes clear, separate classifications can never truly be equal. Recent and historic experience teaches that when classifications are made, a pejorative classification necessarily results for one group, and it is invariably the group the majority or history disfavors. The combination of the exalted position of the state-conferred status of marriage, and the history of invidious discrimination against lesbian and gay individuals and couples, means that “separate” is an “unequal” choice. Indeed, these “novel alternative designations”⁶⁸⁵ create confusion in the public’s mind and result in unequal treatment of same-sex couples and their children.⁶⁸⁶

These effects are not of minor significance to same-sex couples, or merely incidental to them as citizens. As already reported, same-sex couples are denied over 1100 rights in the state of New York, and thousands of additional federal rights. As important, marriage is the state’s highest recognition and deepest expression for couples to commit to each other and to do so in a

⁶⁸⁴ The DOMA enactments took place after an important set of rulings by the United States Supreme Court. In *Romer v. Evans*, 517 U.S. 620, 634-646 (1996), the Court rejected a Colorado voter initiative that constitutionally barred action by any branch of state or local government to prohibit discrimination against homosexual persons. In this first significant case affecting the rights of gay men and lesbians since the Court upheld Georgia’s sodomy statute in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court specifically rejected animus against a “class of persons” as a legitimate governmental interest. As the Court stated, “‘a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. *Romer*, 517 U.S. at 634-35, citing *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). The Court reiterated its changing attitudes towards the rights of gay men and lesbians in *Lawrence v. Texas* in 2003, when it struck down that state’s sodomy laws and reversed *Bowers* only 16 years after it had been decided. *Lawrence*, 539 U.S. 558.

⁶⁸⁵ *In re Marriage Cases*, 183 P.3d at 451.

⁶⁸⁶ *See supra* Part Three, Sec. I.

public, state-endorsed manner. New York must give equality to same-sex couples, and, simply put, civil unions do not provide equality.

B. Creating Civil Unions in New York Would Not Protect Same-sex Couples Outside of New York

The federal DOMA provides that no state is required to legally recognize the marriage or civil union of a same-sex couple; many states have adopted similar statutes or constitutional amendments. Even among states that have not adopted mini-DOMAs, there is no guarantee that the civil unions of another state will be recognized. As described earlier in this report, even though the New York legislature has not enacted a mini-DOMA, our state's courts have declined to recognize the Vermont civil unions of New York residents as the equivalent of marriage.⁶⁸⁷ Just as our courts have declined to recognize the civil unions created by other states, the creation of civil unions in New York is not likely to sufficiently protect the rights of New York's same-sex couples.

IV. New York State Is Legally Recognizing the Marriages of Same-sex Couples Contracted in Other Jurisdictions

Same-sex couples domiciled in New York are marrying in the other states and countries that permit them to legally wed. Although the *Hernandez* court held that the New York Constitution does not require that same-sex couples be permitted to contract a marriage within New York, it did not hold that such marriages contracted elsewhere should not be recognized within our state.⁶⁸⁸ Indeed, public officials in New York, including the Governor, have issued orders requiring the state to recognize same-sex couples' marriages contracted elsewhere.

⁶⁸⁷ See *supra*, Part Three, Sec. I.D.

⁶⁸⁸ See *supra*, Part Two, Sec. I for a more complete discussion of *Hernandez*.

Lower courts in the state also have recognized such marriages. Most notably, in *Martinez v. County of Monroe*, the Fourth Department relied on New York’s traditional marriage recognition test⁶⁸⁹ when it concluded that otherwise-valid marriages of same-sex couples should be recognized by the state.⁶⁹⁰ The court distinguished *Hernandez* because it did not purport to articulate public policy against same-sex-marriage, holding instead that the policy decision belongs to the Legislature.⁶⁹¹

Several trial courts have issued rulings consistent with *Martinez*. In *Godfrey v. Spano*,⁶⁹² the trial court held that an Executive Order issued by the Westchester County Executive that required recognition of “same-sex marriage as lawfully entered into outside the State of New York” was not illegal and was, in fact, “a policy implementation device in accordance with the current and evolving state of law on recognition of same-sex marriages out of state.”⁶⁹³ In *Beth R. v. Donna M.*, a trial court held valid a Canadian same-sex couple’s marriage in permitting a divorce action to proceed, relying in large part on *Martinez*.⁶⁹⁴ Other trial courts have recognized otherwise-valid marriages between same-sex spouses seeking to adopt, to divorce, or to obtain custody-related rulings.⁶⁹⁵ Indeed, thus far, every state court to consider the question (with one

⁶⁸⁹ *Estate of May*, 305 N.Y. 486 (1953).

⁶⁹⁰ *Id.* at 192.

⁶⁹¹ *Id.*

⁶⁹² *Godfrey v. Spano*, 871 N.Y.S. 2d 276, 298 (N.Y. App. Div. 2d Dep’t 2008), *leave to appeal granted*, -- N.E.2d -- (N.Y. Mar. 31, 2009).

⁶⁹³ *Godfrey v. Spano*, 836 N.Y.S.2d at 818.

⁶⁹⁴ *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. N.Y. County 2008).

⁶⁹⁵ *See, e.g., C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. N.Y. County 2008).

exception vacated on appeal⁶⁹⁶) has recognized the validity of marriages contracted out-of-state by same-sex couples.

As New York administratively and judicially recognizes the marriages of same-sex couples entered into domestically and in other countries, an inherent inequality is resulting: same-sex couples can live as married partners in New York, but they cannot enter into a valid marriage in their home state.

V. Establishing Marriage Equality Both Protects Freedom of Religious Practice and Prevents the Improper Establishment of Religion

New York’s proposed marriage equality legislation protects freedom of religious exercise by providing that “no clergyman, minister or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity....”⁶⁹⁷

Notwithstanding this provision protecting religious freedom, some have raised objections to permitting same-sex couples to marry on religious grounds, arguing both that marriage is a religious institution and that religious leaders should not be forced to conduct marriages they do

⁶⁹⁶ One trial court read *Hernandez* to state a public policy against the recognition of marriages entered into by same-sex couples even if validly contracted elsewhere, but the decision was vacated on appeal, not on the merits of marital recognition, but because the New York State Department of Civil Service had changed its policy to recognize same-sex marriages validly contracted elsewhere rendering the appeal moot. *See Funderburke v. NYS Dep’t of Civil Service*, 13 Misc.3d 284 (N.Y. Sup. Ct. Nassau County 2006), *rev’d and vacated*, 49 A.D.3d 809 (2d Dep’t 2008).

⁶⁹⁷ Governor’s Program Bill No. 10 (2009), Section 4. Free exercise of religion exemptions are also found in the Vermont Marriage Act, Sec. 9, *see supra* Part One, Sec. I.E; and in the Connecticut statute, *see supra* Part One Sec. I.C.5. They also are found in proposed legislation in New Hampshire (H.B. 436, Sec. 4) (“Members of the clergy as described in RSA 457:31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, article 5 of the New Hampshire constitution.”); New Jersey (Assembly Bill A. 818 (2008), Sec. 8) (“No minister of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.”); and Maine (S.P. 384 (2009) Sec. 3) (“A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.”).

not condone. Some people may support the rights of same-sex couples to obtain equivalent access to the rights and responsibilities shared by opposite-sex couples, but object to using the term “marriage” to describe the legal union of a same-sex couple. Those individuals believe in equality, but also believe that “marriage” is a sacred, religious institution that should not be tampered with by the state. They may even assert that the government should make civil unions available to all couples – same-sex and opposite-sex – leaving marriage to our churches, synagogues and mosques. Religious views are also strongly held by religious authorities who conduct commitment ceremonies of same-sex couples, and some even refer to them as marriages⁶⁹⁸ (even though such unions do not constitute civil, legal marriages absent execution of a marriage license).⁶⁹⁹

Legal protection for the freedom of religious practice is an essential American institution, enshrined forever in the First Amendment to the Constitution. In both its “establishment” and “free exercise” clauses, based upon Thomas Jefferson’s Virginia statute for religious freedom,⁷⁰⁰ the Constitution ensures separation of church from state and freedom of religious exercise.⁷⁰¹

⁶⁹⁸ See *Religious vs. Civil Marriage*, available at <http://www.marriageequality.org/index.php?page=religious-vs-civil> (last visited, May 4, 2009.) Reconstructionist Judaism and Reform Judaism bless same-sex unions and permit rabbis ordained by them to call such unions “weddings”; the Unitarian Universalist Association and the Universal Fellowship of Metropolitan Community Churches, among others, similarly bless same-sex relationships as a matter of policy. The United Church of Christ and Quaker groups permit their clergy, congregations or local governing bodies to decide whether to perform same-sex unions; the Presbyterian Church (USA) “allows the blessings of same-gender unions with terminology restrictions.” *Id.* See generally The Marriage Law Project of the Columbus School of Law at The Catholic University of America, *World Religions and Same-Sex Marriage* (July 2002), available at <http://marriagelaw.cua.edu/publications/wrr.pdf> (last visited, Mar. 14, 2009).

⁶⁹⁹ See *Religious vs. Civil Marriage*, *supra* note 698.

⁷⁰⁰ Virginia Act for Establishing Religious Freedom, 1786.

⁷⁰¹ U.S. Const. Amend. I.

Consistent with these principles, although religious institutions may consecrate marriages, marriage is a civil institution in the United States. A marriage is valid only with a state-conferred marriage license;⁷⁰² without a marriage license issued by the state in which the marriage is conducted, the couple will not be considered legally married under local, state, or federal law.

Further, although religious authorities are permitted to wed couples who legally are entitled to marry under a state's marriage law, they are also free to choose not to do so.⁷⁰³ For example, conservative and orthodox rabbis may choose not to marry a Jew and a non-Jew. Catholic clergy may choose not to marry a couple if one person is a member of the church who has been divorced. In both of these circumstances, the couples are permitted to marry under civil law, but their marriages may not be conducted or recognized by their respective religious authorities. Thus, fundamentally, no religion in the United States can be compelled to perform or to recognize any marriage, let alone one that runs counter to the basic principles of its faith.⁷⁰⁴

⁷⁰² See *Religious vs. Civil Marriage*, *supra* note 698. If a couple is married by a clergy person, the cleric "must sign the license before witnesses and the couple." *Id.* See also Interfaith Working Group, Religious Support for Equal Marriage Rights, available at <http://www.iwgonline.org/marriage> (last visited, Mar. 14, 2009) (explaining the support of the rights of same-sex couples to marry by the Interfaith Working Group, an organization whose "mission is to inform the public of the diversity of religious opinion on social issues where it is not widely recognized").

⁷⁰³ See *Religious vs. Civil Marriage*, *supra* note 698 ("Clergy and congregations choose whom they marry. They aren't compelled to accept the state's marriage definition").

⁷⁰⁴ See *id.* ("No court decision or legislative enactment can change the basic tenets of religious faith."). Numerous religions have stated their opposition to performing or recognizing unions of same-sex couples. Such religions include, but are not limited to, the Catholic Church, the United Methodist Church, the Orthodox Churches, the Church of Jesus Christ of Latter-Day Saints and Islam. See generally The Marriage Law Project of the Columbus School of Law at The Catholic University of America, World Religions and Same-Sex Marriage (July 2002), available at <http://marriagelaw.cua.edu/publications/wrr.pdf> (last visited, Mar. 14, 2009). See also Mark Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-sex marriage?*, 24 N. Ill. U.L. Rev. 589, 600 and n.3 (2004) ("Court also distinguish civil marriage from religious marriage. In a country that separates church from state, the grant or denial of a marriage license

The Iowa Supreme Court astutely discerned the religious concern with marriage for same-sex couples, and the constitutional bar to relying upon it or having the state interfere on either side of any religious debate:

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly. Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the “sanctity of marriage” would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained – even fundamental – religious belief.

Yet, such views are not the only religious views of marriage.... [E]qually sincere groups and people ... have strong religious views [in favor of marriage equality].

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them.... State government can have no religious views, either directly or indirectly, expressed through its legislation....

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage – religious or otherwise – by giving respect to our constitutional principles.⁷⁰⁵

for a civil marriage ceremony cannot force any religious group to perform a religious ceremony for the holders of that license.”) (citations omitted).

⁷⁰⁵ *Varnum v. Brien*, 2009 Westlaw 874044 No. 07-1499 (Apr. 3, 2009) at 63-66. *See also Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass 2004) (stating that “the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic institution...”).

In sum, religious persons and organizations cannot be compelled to sanctify any marriage, and this principle is expressly included in proposed legislation in New York permitting same-sex couples to marry.⁷⁰⁶ They are free to choose to sanctify marriages that are recognized under a state's marriage law. Or, they may choose not to do so. Historically and fundamentally, however, marriage as a legal right and responsibility remains regulated by each state's civil law and that law requires, or should require, equality.

VI. Recommendation: The New York State Bar Association Should Only Endorse Legislation That Provides Full Marriage Equality

The marriage rights of same-sex couples have attracted great attention over the last four years in the courts, legislatures, and public discourse in New York, the United States, and the world. The discussion has been wide-ranging, exploring much about the institution of civil marriage, the challenges faced by same-sex couples and their children, and even the economics of marriage. Now, the Court of Appeals has shifted the debate to the State Legislature, and our Governor has submitted a marriage equality bill to this body. The top three elected state officials in New York – Governor David Paterson, Senate Majority Leader Malcolm Smith, and Assembly Speaker Sheldon Silver – are on record supporting civil marriage for same-sex couples, and legislation to amend the marriage laws may well face a vote in 2009, having passed by a vote of 85-61 in the Assembly in 2007.

In 2005, the New York State Bar Association concluded that same-sex couples experience significant inequities under existing state law, and that systemic change – in the form of marriage, civil union or domestic partnership – is necessary to rectify this harm. This policy has been a legislative priority of the NYSBA. The events of the last four years, as well as the on-

⁷⁰⁶ Governor's Program Bill No. 10 (2009), Sec. 4.

going debate in our state concerning marriage rights for same-sex couples, make it timely for NYSBA to refine its position to support marriage alone as the only vehicle to provide full equality to same-sex couples.

Although many thought that civil unions might promise a way to provide equal rights to same-sex couples without having to use the traditional term of “marriage,” experience has shown this to be a false promise. The Massachusetts high court evaluated this construct on its face; courts in Vermont, Connecticut, and California the legislature in Vermont, and special commissions in Vermont and New Jersey, all have assessed this model following implementation. Each of these institutions has given it a failing grade.

The separate nomenclature, it turns out, creates separate and unequal rights and undercuts any attempts to create equal dignity for same-sex and opposite-sex couples. One cannot be left unmoved by the stories of confusion, inconsistency, and unfairness experienced by couples in civil unions. Indeed, as reviewing bodies have concluded, once a state determines that same-sex couples and opposite-sex couples are entitled to equal rights and dignity, it cannot honestly withhold the status of “civil marriage” in favor of a “separate and unequal” institution. These experiments in separate status for equal rights have failed because marriage and civil union are inherently unequal.

As the Iowa Supreme Court poignantly observed, religious freedom is not burdened by allowing same-sex couples to marry or allowing religious organizations to choose whether to marry them. To the contrary, not permitting such marriages may inadvertently involve the state in religious disputes and chose one side (those who disfavor marriage equality) against the other. We are concerned here only with marriage as a civil, legal institution, one that can be neither

imposed upon by religion nor impose on religion. Indeed, every state providing marriage equality permits religious figures to refuse to join same-sex couples in matrimony, as does New York's legislative proposal for marriage equality.

New York has started to deal with the reality that lesbian and gay citizens are returning from nearby (and faraway) states and countries where they solemnize their relationships as marriages. Thus far, New York courts appear to be recognizing these marriages. Although this is a positive step, absent action by the State Legislature or Court of Appeals, the status of these marriages in New York remains unclear. As disconcerting, however, is that lesbian and gay New Yorkers are not permitted to marry at home. Inadvertent as it may be, we have established a form of inequality in our own state.

Where, as a matter of state law and policy, the legal rights, privileges, and duties of marriage are to be enjoyed by all couples, and not reserved exclusively to opposite-sex couples, we conclude that there is no basis for denying same-sex couples the legal name, status, and emoluments of "marriage." Legal marriage has an exalted status, and a deliberate choice of civil unions or domestic partnership has no rational or legitimate basis where equal rights are intended. In light of the history of discrimination suffered by lesbian and gay persons, such other statuses echo the "otherness" long-experienced by these communities, and would reinforce that couples in same-sex relationships are second-class citizens.

Accordingly, the Association should continue to advocate for full equality of legal marriage rights, but abandon its support for civil unions or domestic partnerships, as full equal marriage rights cannot be conveyed by a status different from and inferior to legal marriage. The Domestic Relations Law should be amended to permit same-sex couples to marry.

PROPOSED RESOLUTION FOR THE NEW YORK STATE BAR ASSOCIATION

Enactment of Legislation to Provide Equal Rights for Same-Sex Couples to Marry under New York Law

WHEREAS, the House of Delegates adopted a resolution on January 24, 2003 providing for the appointment of a Special Committee to study legal issues affecting same-sex couples and directing it “to explore legislative or private legal solutions to the problems raised by the Association of the Bar of the City of New York report [entitled “Marriage Rights of Same-Sex Couples in New York’] ... and report back to the House of Delegates with concrete recommendations ...”;

WHEREAS, the Special Committee on Legal Issues Affecting Same-Sex Couples issued its report to the Association in 2004, identifying numerous instances of disparate treatment of same-sex couples under the law and recommending that legislation be enacted to afford same-sex couples the ability to obtain the comprehensive set of rights and responsibilities now afforded opposite-sex couples;

WHEREAS, on April 2, 2005, the House of Delegates endorsed the recommendation of the Special Committee and resolved that “the New York State Legislature should enact legislation that will afford same-sex couples the ability to obtain the comprehensive set of rights and responsibilities now afforded opposite-sex couples ... in the form of a statute creating a domestic partnership registry, a civil union statute, or an amendment to the statutory definition of marriage to include same-sex couples”;

WHEREAS, since the 2005 resolution of the House of Delegates, there have been significant legal developments with respect to the marriage rights of same-sex couples, civil unions and domestic partnerships, including without limitation, the adoption of marriage equality for gay men and lesbians by four states and several foreign jurisdictions, several of which border New York State;

WHEREAS, since the 2005 resolution, the marriages of same-sex couples whose marriages were performed outside of the State have been recognized within the State under, *inter alia*, the decision in *Martinez v. Monroe County*, 850 N.Y.S.2d 740 (4th Dep’t 2008);

WHEREAS, since the 2005 resolution, other states that have instituted domestic partnership or civil union laws have determined that these statuses confer inferior statuses than does marriage, lead to confusion, and do not offer equal legal rights to same-sex couples and their families;

WHEREAS, on June 19, 2007, with a bi-partisan vote of 85 to 61, the New York State Assembly passed Assembly Bill 8590, which provides for an amendment to the Domestic Relations Law to provide equal treatment relating to marriage regardless of whether the parties to the marriage are of the same or opposite sex, but the bill was not voted on by the State Senate; and

WHEREAS, on or about April 2009, the Governor of the State of New York introduced a bill to the Legislature to enact marriage equality for same-sex couples; and

WHEREAS, in April 2009, the Special Committee on LGBT People and the Law issued its Report and Recommendation on Marriage Rights for Same-Sex Couples documenting recent developments in New York, nationally, and internationally on marriage rights for same-sex couples, which reveal numerous reasons why providing same-sex couples with access to marriage is the only viable way to establish marriage equality;

NOW THEREFORE, be it

RESOLVED that the Association hereby endorses and supports the introduction and enactment of legislation that amends the Domestic Relations Law to allow same-sex couples to marry and to recognize their marriages if contracted elsewhere and that exempts clergy from the obligation to perform any marriage to which they object on religious grounds; and the Association does not endorse and will oppose any legislation to enact civil unions, domestic partnerships, or create any status other than marriage to same-sex couples; and it is

FURTHER RESOLVED, that the officers of the New York State Bar Association are hereby authorized to transmit this Resolution to the New York State Legislature and are directed to take such action as is appropriate to support and advance this Resolution.